



The Human Rights Advisory Panel

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OPINION

Date of adoption: 21 November 2013

Case No. 88/09

Đ.L.

against

UNMIK

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

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

Assisted by

Mr Andrey Antonov, Executive Officer

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

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

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 7 April 2009 and registered on 30 April 2009.
2. On 9 December 2009, the Panel requested further information from the complainant.

3. On 18 December 2009, the Panel requested from the European Union Rule of Law Mission in Kosovo (EULEX) information with regard to forty three complaints in relation to missing persons filed before the Panel, including the complaint of Mrs Đ.L.
4. On 23 December 2009 and 12 February 2010, the complainant provided additional information to the Panel.
5. On 23 March 2010 EULEX provided a response to the Panel's request of 18 December 2009.
6. On 30 November 2010, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG)¹ for UNMIK's comments on the admissibility of the case.
7. On 2 December 2010, the complainant submitted further information to the Panel.
8. On 25 February 2011, UNMIK provided its response to the Panel's communication of 30 November 2010.
9. On 4 March 2011, the Panel forwarded the additional submissions from the complainant to UNMIK.
10. On 10 March 2011, UNMIK provided its response.
11. On 13 April 2011, the Panel declared the complainant admissible.
12. On 18 April 2011, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaint together with copies of all available files concerning the criminal investigation.
13. On 24 May 2011, the SRSG provided UNMIK's comments, together with the requested files.
14. Following the Panel's inquiries, on 4 October 2012, UNMIK requested the Archives and Records Management Section of the United Nations' (UN) Headquarters in New York to locate and return to UNMIK a number of investigative files related to the complaints before the HRAP.
15. On 14 December 2012, UNMIK received the requested investigative files from the UN Headquarters in New York. On 17 December 2012, UNMIK presented those documents, including the file related to this complaint, to the Panel.
16. On 4 November 2013, the Panel requested UNMIK to confirm whether the disclosure of files concerning the case could be considered final.
17. On the same day, UNMIK provided its response.

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

II. THE FACTS

A. General background²

18. 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.
19. The armed conflict during 1998 and 1999 between the Serbian forces on one side and the Kosovo Liberation Army (KLA) and other Kosovo Albanian armed groups on the other is well documented. Following the failure of international efforts to resolve the conflict, on 23 March 1999, the Secretary General of the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes against the Federal Republic of Yugoslavia (FRY). The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo. On 9 June 1999, the International Security Force (KFOR), the FRY and the Republic of Serbia signed a “Military Technical Agreement” by which they agreed on FRY withdrawal from Kosovo and the presence of an international security force following an appropriate UN Security Council Resolution.
20. 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.
21. 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.

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>).

22. 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.
23. 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.
24. 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.
25. 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.
26. 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”.
27. 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.

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

B. Circumstances surrounding the disappearance of Mr B.R.

30. The complainant is the daughter of Mr B.R. According to the complainant, parents lived in the village of Mushtisht/Mušutište, Suharekë/Suva Reka municipality, until UNMIK and KFOR entered Kosovo in June 1999. Around mid-June 1999, her mother left the village, for security reasons, to Serbia proper, but her father, Mr B.R. stayed in their home. As the complainant states, shortly thereafter Mr B.R., as well as a number of other Serbian residents of that village, was abducted. The whereabouts of Mr B.R. have remained unknown from that time.
31. The complainant states that she reported the disappearance of her father to the ICRC, the Serbian Red Cross, the international prosecutors (IP) in Prishtinë/Priština, the police and some other organisations. Despite that, she has never received any information regarding the fate of her father.
32. The ICRC opened a tracing request for Mr B.R. on 28 November 2002. This request remains open until now³, with 13 June 1999 mentioned as the date of last contact/news of Mr B.R. Likewise, his name is mentioned in the database compiled by the UNMIK OMPF⁴. The entry

³ The ICRC database is available at: <http://familylinks.icrc.org/kosovo/en/pages/search-persons.aspx> http://www.icmp.org/fdmsweb/index.php?w=mp_details_popup&l=en (accessed on 15 November 2013).

⁴ The OMPF database is not open to public. The Panel accessed it with regard to this case on 19 November 2013.

in the online list of missing persons maintained by the ICMP⁵ related to him, reads in relevant parts: “Reported date of disappearance: 1 June 1999”, “Sufficient Reference Samples Collected” and “DNA match not found.”

C. The investigation

33. The file in the Panel’s possession consists of the documents obtained by UNMIK from EULEX, presented on 24 May 2011, and the documents obtained from the archives of the UN Headquarters, presented to the Panel on 17 December 2012. Although in May 2011 UNMIK suggested that more documents in relation to this file may exist, on 4 November 2013, it confirmed to the Panel that no more files have been obtained.
34. The only UNMIK document in the file is a printout from the UNMIK Police WCIU database, dated 21 October 2007, related to the case no. 2005-00169. It mentions Mr B.R. as a victim, Mrs Đ.L. as a witness; the type of crime is recorded as “Missing Person – Kidnapping”, the date of offence is 30 June 1999. The field indicating the date when the case was entered into the database indicates 5 September 2005, the same date as in the field “Date Updated”. The case summary in this document repeats mostly the same details of the alleged offence, as mentioned above, although it adds that the case was also reported to KFOR.
35. A case review form signed by an IP at the Kosovo Special Prosecution Office, dated 11 February 2009, qualifies the offence as Kidnapping, as per Article 64 of the Criminal Law of Serbia and Article 159 of the Provisional Criminal Code of Kosovo. It indicates that there were no known suspects at that moment. In the “Remarks” field it reads “No element to allow any identification of the perpetrators.” The “Decision” field, in turn, reads “Investigation: see at ICRC, KFOR, OMPF ... and interview the witness [sic].”
36. On 20 July 2009, the same IP signed a Request to Conduct Investigation addressed to EULEX WCIU, instructing the police to “get info in the OMPF, ICRC... and contacy [sic.] KP Prizren to know if they can provide us some new element about the suspects”. Upon completion of the action, the police were instructed to “present the findings in a compiled report on the allegations (including an overview of the collected evidence).”
37. An EULEX WCIU case review, dated 28 June 2010, mostly repeats the information mentioned in the case review form of 11 February 2009. However, in the “Remarks” field it has a reference to a “previous UNMIK Case Analysis Review” of 27 December 2007, which recommended keeping this investigation pending due to lack of evidence. It adds that “[a] witness able to identify suspects from line up” was mentioned in that UNMIK Police case review document. It also states that there was no new input in the file since the last review by an international prosecutor on 11 February 2009.
38. The “Recommendation” field of the same case review form states that the case has a potential witness; that the “solvability” of this case is very low. However, it is further recommended that this case should be connected with another two cases, which have same “*modus operandi*, circumstances and a close date of occurrence.” All these cases “should be further investigated. An additional review should be drawn after the investigation.”

⁵ The ICMP database is available at: http://www.ic-mp.org/fdmsweb/index.php?w=mp_details_popup&l=en (accessed on 15 November 2013).

39. The file obtained from UN archives in New York contains only a seven-page report prepared by the Serbian police in relation to the disappearance of Mr B.R. In the “event description” field it states that when his wife left to go to Serbia proper on 13 June 1999, Mr B.R. alone stayed at home in Mushtisht/Mušutište village and from that day his fate is not known. The front page of this report has a handwritten number 2004-000085.

D. EULEX clarification

40. As mentioned above (§ 3), on 18 December 2009 the Panel requested EULEX to provide additional information in relation to forty three complaints before the Panel. In their response, dated 23 March 2011, EULEX officers explained that they had searched the available sources, including the list of cases “found in July 2009 in the PTC building Archive room (not officially handed over from UNMIK to EULEX because no more “active” but dismissed, terminated or closed).”

41. In the same response, EULEX added that the search was not exhaustive, as the available sources did not provide information on the following:

- cases, criminal reports or information that UNMIK Police never transferred to UNMIK prosecutors, or otherwise never reached UNMIK prosecutors;
- cases which were handled by UNMIK Police and were then transferred to local police or prosecutors, without reporting to UNMIK or EULEX prosecutors;
- many cases which were handled by UNMIK prosecutors prior to creation of a centralised case registry by UNMIK DOJ, in 2003.

42. However, the search in the EULEX files provided information on only two cases listed in the Panel’s request of 18 December 2009. No files or other information in relation to the other forty one cases, including the complaint of Mrs Đ.L., was found. EULEX were not able to confirm if the cases for which the files were not found “were ever investigated by UNMIK Police and/or Prosecutors.”

III. THE COMPLAINT

43. The complainant complains about UNMIK’s alleged failure to properly investigate the abduction and disappearance of Mr B.R. 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).

44. The complainant also complains about the mental pain and suffering allegedly caused to herself and her family by this situation. In this regard, the Panel deems that the complainant relies on Article 3 of the ECHR.

IV. THE LAW

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

1. The scope of the Panel’s review

45. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
46. 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.
47. 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.
48. 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.
49. 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 § 47). 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.

50. 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

51. The complainant in substance alleges a violation concerning the lack of an adequate criminal investigation into the abduction and disappearance of Mr B.R. The complainant also states that she was not informed as to whether an investigation was conducted and what the outcome was.
52. In his comments on the merits of the complaint, the SRSG first agrees that “[t]he obligation to carry out an effective investigation is required in deaths resulting by use of force generally and unlawful killings. What form or extent of investigation will achieve the purposes required by Article 2 and 3 of the ECHR would depend on the circumstances.”
53. The SRSG also states that the “families of missing persons have a right to know about that person’s fate”, which, according to the SRSG includes their right “to an accurate identification of all bodies found so far as to make sure whether or not their relative is among the dead, as well as, if so, information on where the body was found and how the person was killed etc.” The SRSG continues that “[t]he family also has a right to bury the body of the dead relative, if and when recovered.” According to the SRSG, “the main activities required for addressing the above aspects” is forensic work, including the “searches of alleged graves, exhumations, autopsies, the comparison of ante and post mortem data, DNA tests, information to families, and the return of bodies and belongings found to the families”.
54. In general, the SRSG does not dispute that starting from 11 June 1999, UNMIK undertook a responsibility to conduct an effective investigation into the disappearance of Mr B.R., 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 § 21 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.
55. In this regard, the SRSG stresses that this responsibility “stems from the procedural obligation [under Article 2 of the ECHR] to conduct an effective official 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.

56. He considers that such an obligation is essentially two-fold, including “(i) an obligation to determine through investigation the fate and/or whereabouts of the missing person; and (ii) 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.”
57. The SRSG accepts that Mr B.R. had disappeared in life-threatening circumstances. Describing the time period when he disappeared, the SRSG states that “[i]n June 1999, the security situation was tense: 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.”
58. 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 [...].”

59. 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.
60. 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.

61. The SRSG also states that locating and identifying missing persons in this context was a very difficult and time-consuming task, and that the process is still ongoing. More bodies have been located in burial sites and more identifications and returns to family members are taking place, often based on information contained in OMPF files. He adds that the process for establishing a system capable of dealing effectively with disappearances and other serious violations of international humanitarian law has been understandably incremental in Kosovo. The process also depended on a number of actors outside of UNMIK’s control, like the ICMP, the ICRC, and local missing persons’ organisations. The SRSG adds that despite all encountered problems, and “[g]iven the amount of missing persons cases resolved, it must be recognised that the work of the OMPF contributed greatly to determining the whereabouts and fate of many of the missing from the Kosovo conflict. However it was simply not possible to locate all those missing within the timeframe with the resources available at the time.”
62. The SRSG further argues that fundamental to conducting effective investigations is a professional, well-trained and well-resourced police force, which did not exist in Kosovo in the aftermath of the conflict. In the “policing vacuum” following the end of the conflict, UNMIK had to build a new Kosovo Police Service from scratch, a long and challenging task which, according to the SRSG, is still in progress. The SRSG also states that UNMIK Police faced numerous challenges in exercising law enforcement functions gradually transferred to it by KFOR in 1999-2000. In this regard, he refers to the UNMIK Police Annual Report of 2000 describing the situation as follows:

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

All of this had to be done, with limited physical and human resources. Being the first executive mission in the history of the UN, the concept, planning and implementation was being developed on the ground. With 20 different contributory nationalities at the beginning, it was a very challenging task for police managers to establish common practices for optimum results in a high-risk environment.”

63. 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 either through interviews with UNMIK Police or by coming forward voluntarily. According to the SRSG, “such constraints inhibited the ability of [...] UNMIK Police to conduct all investigations in a manner [...] that may be demonstrated, or at least expected, in other States with more established institutions not dealing with a post-conflict context.”

64. With regard to the particulars of this complaint under Article 2 of the ECHR, the SRSG first, notes that despite the numerous attempts, UNMIK was able to obtain only a very limited number of documents in relation to the criminal investigation into the disappearance of Mr B.R. Therefore, he based his comments exclusively on the statements made by the complainants to the Panel and “the documents received from UNMIK Office of Missing Persons.” However, the SRSG states that the case file previously held by UNMIK OMPF has not been provided.
65. With regard to the details of the investigation into the disappearance of Mr B.R., the SRSG notes that UNMIK Police MPU opened this case in 2000. The SRSG further notes that the “[i]nvestigative action from UNMIK appears to have remained pending ... due to a lack of information or leads that would enable further meaningful investigation and prioritization against other cases.” UNMIK Police apparently reviewed this investigation in 2007, “keeping the case pending due to lack of evidence”. After its transfer to EULEX, it was again reviewed in 2009 and subsequently sent for investigation to the EULEX WCIU. Another review by the EULEX WCIU, in 2010, indicated that the chances to resolve this case were low, but some further action was recommended. According to the SRSG, “[t]he investigations are on-going to date”.
66. The SRSG also emphasises that the possible six-month delay in reporting the disappearance of Mr B.R., could have resulted “in a lack of fresh leads for investigators to follow and the possibility of witnesses having relocated elsewhere”, thus it had “most probably also hampered the efforts of finding [him].” In the SRSG’s opinion, the fact that the ICRC opened its tracing request in relation to Mr B.R. only on 28 November 2002, supports this argument.
67. The SRSG adds “it is evident the UNMIK Police did open and pursue an investigation into the whereabouts of [Mr B.R.]; however, these investigations did not result in locating him or in determining [his] fate by the time the file was transferred to EULEX”.
68. The SRSG concludes his comments by stating that “UNMIK Police did make investigative efforts in accordance with Article 2 procedural requirements to determine the whereabouts of Mr B.R.” In his view, the requirements of Article 2 of the ECHR were not violated.
69. Considering the fact that there is a possibility that more information exists, the SRSG also reserved UNMIK’s right to make further comments on this matter. However, the Panel has received no further communication in this regard.

3. The Panel’s assessment

70. 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 disappearance of Mr B.R.

a) Submission of relevant files

71. At Panel’s request, the SRSG provided copies of the documents related to this investigation, which UNMIK was able to recover. The SRSG also noted that “there is the possibility that more information exists, which is not contained in the [presented] documents” and “[t]he

information that UNMIK relies upon may ... be incomplete”, and advised that “it may be useful for the HRAP to request the required information directly from EULEX.” On 4 November 2013, UNMIK confirmed to the Panel that disclosure may be considered complete (see §§ 16, 17 and 33 above).

72. As mentioned above (§§ 3 and 40), the Panel had also requested EULEX to provide additional information in relation to this case, but EULEX was unable to do so (see § 42 above).
 73. The Panel notes that Section 15 of UNMIK Regulation No. 2006/12 states that the Panel may request the submission from UNMIK of any documents and that the SRSG shall cooperate with the Panel and provide the necessary assistance including, in particular, in the release of documents and information relevant to the complaint. The Panel in this regard refers to the case-law of the European Court of Human Rights that inferences shall be drawn from the conduct of the respondent party during the proceedings, including from its failure “to submit information in their hands without a satisfactory explanation” (see ECtHR, *Çelikkilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).
 74. Furthermore, the Panel notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigations to their handing over, is crucial to the continuation of such investigations and failure to do so could thus raise *per se* issues under Article 2.
 75. 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*
76. First, the Panel considers that the almost complete lack of any investigative files raises issues of the burden of proof. In this regard, the Panel refers to the approach of the European Court on Human Rights as well as of the United Nations Human Rights Committee (HRC) on the matter. The general rule is that it is for the party who asserts a proposition of fact to prove it, but that this is not a rigid rule.
 77. Following this general rule, at the admissibility stage an applicant must present facts, which are supportive of the allegations of the State’s responsibility, that is, to establish a *prima facie* case against the authorities (see, *mutatis mutandis*, ECtHR, *Artico v. Italy*, no. 6694/74, judgment of 13 May 1980, §§ 29-30, Series A no. 37; ECtHR, *Toğcu v. Turkey*, no. 27601/95, judgment of 31 May 2005, § 95). However, the European Court further holds that “... where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities ... The burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation” (see ECtHR [GC], *Varnava and Others v. Turkey*, cited above in § 50, at §§ 183-184).
 78. The European Court also states that “... it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the

applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise” (see ECtHR, *Akkum and Others v. Turkey*, no. 21894/93, judgment of 24 June 2005, § 211, ECHR 2005-II (extracts)). The Court adds that “... [i]f they [the authorities] then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn” (see ECtHR, *Varnava and Others v Turkey*, cited above, at § 184; see also, HRC, *Benaniza v Algeria*, views of 26 July 2010, § 9.4, CCPR/C/99/D/1588/2007; HRC, *Bashasha v. Libyan Arab Jamahiriya*, views of 20 October 2010, § 7.2, CCPR/C/100/D/1776/2008).

79. The Panel understands that the international jurisprudence has developed in a context where the Government in question may be involved in the substantive allegations, which is not the case with UNMIK. The Panel nevertheless considers that since the documentation was under the exclusive control of UNMIK authorities, at least until the handover to EULEX, the principle that “strong inferences” may be drawn from lack of documentation is applicable
80. Second, the Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights (IACtHR) *Velásquez-Rodríguez* (see IACtHR, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been stated by the United Nations Human Rights Committee (HRC) as stemming from Article 6 (right to life), Article 7 (prohibition of cruel and inhuman treatment) and Article 9 (right to liberty and security of person), read in conjunction with Articles 2 (3) (right to an effective remedy) of the ICCPR (see United Nations Human Rights Committee (HRC), General Comment No. 6, 30 April 1982, § 4; HRC, General Comment No. 31, 26 May 2004, §§ 8 and 18, CCPR/C/21/Rev.1/Add. 13; see also, among others, HRC, *Mohamed El Awani, v. Libyan Arab Jamahiriya*, communication no. 1295/2004, views of 11 July 2007, CCPR/C/90/D/1295/2004). The obligation to investigate disappearances and killings is also asserted in the UN Declaration on the Protection of all Persons from Enforced Disappearances (A/Res/47/133, 18 December 1992), and further detailed in UN guidelines such as the UN Manual on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions (1991) and the “Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres” (1995). The importance of the obligation is confirmed by the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, which entered into force on 23 December 2010.
81. In order to address the complainant’s allegations, the Panel refers to the well-established case-law of the European Court of Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that “[The] obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed (see, *mutatis mutandis*, ECtHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 161, Series A no. 324; and ECtHR, *Kaya v. Turkey*, judgment of 19 February 1998, § 86, Reports 1998-I; see also ECtHR, *Jasinskis v. Latvia*, no. 45744/08, judgment of 21 December 2010, § 71). The duty to conduct such an investigation arises in all cases of killing and other suspicious death, whether the perpetrators were private persons or State agents or are unknown (see ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, judgment of 5 November 2009, § 191).

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 § 50 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 “besides being independent, accessible to the victim’s family, carried out with reasonable promptness and expedition and affording a sufficient element of public scrutiny of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible” (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in in § 50 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 disappeared and later found dead, which is not the situation in this particular 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 § 50 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 § 50 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).
88. The Court has also underlined the great importance of an effective investigation in establishing the truth of what transpired, not only for the families of victims, but also for other victims of similar crimes, as well as the general public, who have the right to know what occurred (ECtHR [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630/09, judgment of 13 December 2012, § 191). The United Nations also recognises the importance of the right to truth. In the words of the United Nations Secretary-General, “the right to truth implies knowing the full and complete truth about the violations and the events that transpired, their specific circumstances and who participated in them. In the case of missing persons ... it also implies the right to know the fate and whereabouts of the victim.” (see Report of the UN Secretary-General, Missing Persons, A/67/267, 8 August 2012, § 5; see also HRC, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009)

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

89. The Panel is conscious that the disappearance of Mr B.R. occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.
90. 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.
91. 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.
92. 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).

93. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court of Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see, among other examples, ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 84 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011). The Court has further held that the procedural obligation under Article 2 continues to apply in "difficult security conditions, including in a context of armed conflict" (see ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited in § 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).
94. The Court has acknowledged that "where the death [and disappearances] to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and [...] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed" (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited above, at §164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that "the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 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, *Hashiyev 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).
95. 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 § 80 above, at § 1; HRC, *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, communication no. 1447/2006, views of 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006). Further, the HRC has stated the applicability of Article 2 (3), 6 and 7 of the ICCPR with specific reference to UNMIK's obligation to conduct proper investigations on disappearances

and abductions in Kosovo (see HRC, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), 14 August 2006, §§ 12-13, CCPR/C/UNK/CO/1).

96. 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 § 26 above).
97. 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.
98. In response to the SRSG’s objection that Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, either in the context of policing activities or that of priorities and resources, the Panel takes into account that the European Court has established that what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and contexts (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 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*
99. Turning to the particulars of this case, the circumstances of the present case, the Panel first addresses the issue of the burden of proof. At the admissibility stage, the Panel was satisfied that the complainant’s allegations were not groundless, thus it accepted the existence of a

prima facie case: that B.R. disappeared in life threatening circumstances and that UNMIK was aware of the matter.

100. Accordingly, applying the principles discussed above (see §§ 76 - 79 above), the Panel considers that the burden of proof has shifted to the respondent, so that it is for UNMIK to present the Panel with evidence of an adequate investigation as a defence against the allegations put forward by the complainant and accepted by the Panel as admissible. The Panel concludes that UNMIK has not discharged its obligation in this regard, as it has neither presented any complete investigative file, nor has it in a “satisfactory and convincing” way explained its failure to do so. Accordingly, the Panel will draw inferences from this situation.
101. The purpose of this investigation was to discover the truth about the events leading to the disappearance of Mr B.R. 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.
102. The Panel recalls that in order to be effective, the investigation 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).
103. The Panel notes that there were obvious shortcomings in the conduct of this investigation from its commencement. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 50 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 (*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 § 28 above).
104. The Panel also recalls in this regard that according to the 2000 Annual Report of UNMIK Police, the complete executive policing powers in Prizren region, including criminal investigations, were under the full control of UNMIK Police from 27 October 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 § 28 above); and *third*, that the investigative files could be traced and retrieved, should a need arise at any later stage.

105. 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.
106. The Panel notes especially two important facts related to this particular case: the response from EULEX to the Panel's request for information (see §§ 40 - 42 above) and the return of some case-related material, from the archives at the UN Headquarters (see §§ 14, 15 and 39). In the first, EULEX informed the Panel that in July 2009 a number of cases not officially handed over from UNMIK to EULEX for various reasons were "found" in the former UNMIK DOJ building. Similarly, the documents returned from the UN Headquarters' archive were likewise apparently not handed over to EULEX. In the Panel's view, they are particularly indicative of a possible general failure to comply with the obligation to ensure the proper handover of the investigative material.
107. With regard to the first part of the procedural obligation, that is establishing the fate of Mr B.R., the Panel notes that his whereabouts remain unknown. The ICMP database entry confirms that the DNA samples had been collected, but it is not clear when, from or by whom (see § 32 above).
108. 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 identification of perpetrators and bringing them to justice, that is the second element of the procedural obligation under Article 2 of the ECHR.
109. The Panel welcomes a number of the SRSG's statements in relation to the process of finding and identification of the mortal remains of the missing persons, and the relatives' right in this respect (see § 53 above). However, the Panel does not fully agree with the assertion that the main part of work in this respect depends on forensic action, as it is presented by the SRSG. In this particular case, as almost no investigation was done, there appears to be little room for forensics work.
110. As regards the requirements of promptness and expedition, the Panel is mindful that in any investigation, and particularly in an investigation of a disappearance in life-threatening circumstances, the initial stage is of utmost importance, and it shall serve the two main purposes: identify the direction of the investigation and ensure 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).
111. In this respect the Panel recalls the complainant's statement that her father's disappearance was reported to the ICRC, the Serbian Red Cross, the international prosecutors in Prishtinë/Priština, the police and some other organisations (see § 31 above). The Panel also takes into view the existence of an open ICRC's tracing request for Mr B.R., as well as

relevant entries in the ICMP and OMPF databases (see § 32 above). The Panel also recalls that the UNMIK Police WCIU database entry in relation to the case no. 2005-00169, which among other information says that Mr B.R.'s disappearance was also reported to KFOR.

112. The Panel likewise takes into consideration that no document in the file as made available to the Panel confirms when UNMIK became aware of the disappearance of Mr B.R. However, as the SRSG confirmed to the Panel that UNMIK Police registered the case under in relation to the disappearance of Mr B.R. in 2000, the Panel takes the view that at least by the end of 2000, UNMIK was aware of the matter.
113. The Panel recalls in this respect the SRSG's remark (see § 66 above), that the possible six-month delay in reporting the disappearance of Mr B.R. had "most probably also hampered the efforts of finding [him]." In the SRSG's opinion, the fact that the ICRC had opened its tracing request in relation to Mr B.R. only on 28 November 2002, supports this argument. The Panel notes in this context that the date of his disappearance is not clearly known; the only relevant undisputed fact is that Mr B.R. was last seen by his wife, when she left the village around mid-June 1999 (see §§ 30 and 39 above). The Panel will return to this argument later.
114. Although there was information about an eye-witness, who was reportedly even able to identify the perpetrators from a line-up, neither a statement of that witness, nor the results of the photo identification, is in the file. Likewise, the complainant and her mother were never interviewed.
115. Moreover, no other immediate action, except registering the case, is reflected in the police file. The investigators did not even visit his house, in order to gain a better understanding of the circumstances of the disappearance; there is no registered attempt to locate the suspects and interview them, or to "canvass" the village in a search for other possible witnesses. There is no trace of a general request for information for database checks with regard to this missing person, which would usually be sent by the MPU to other UNMIK Police units. Likewise, there is no sign of any action with regard to the information related to a possible KLA involvement in the disappearance. Regardless of these obvious shortcomings, which should have been rectified, the file reflects no action whatsoever on this case by UNMIK Police. Thus, in the Panel's view, this investigation did not fulfill the requirements of promptness and expeditiousness.
116. Such a lack of any immediate reaction from UNMIK Police, may have suggested to perpetrators that the authorities were either not able, or not willing to investigate such criminal acts. Such an attitude of the authorities towards the gravest crimes in any society, and especially in post-conflict circumstances, inevitably creates a culture of impunity among the criminals and can only lead to a worsening of the situation. The problems which UNMIK had encountered at the beginning of its mission, which were discussed above, do not justify such inaction, either at the outset or subsequently.
117. Coming back to the SRSG's argument that the delayed reporting of the disappearance of Mr B.R. may have negatively affected the criminal investigation, the Panel considers that, in the light of the above findings, there is no indication that such a delay undermined this investigation. In the same way, the Panel considers that the lack of certainty about the actual

date of disappearance would also not have affected the investigation (see e.g. the Panel's approach in *P.S.*, no. 48/09, opinion of 31 October 2013, § 88).

118. The Panel notes in this context that if not worked upon, developed, corroborated by other evidence and put in a proper form, any 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 (see e.g. HRAP, *Todorovski*, case no. 81/09, opinion of 31 October 2013, § 116).
119. With respect to this particular investigation, the Panel observes that the file as presented to the Panel shows no action by UNMIK Police, except for the opening of this investigation in 2000 and its assessment in 2007. On the other hand, it appears to the Panel that in 2007, UNMIK Police did possess additional information (see § 37 above), which presented obvious leads needed for the investigation. However, the file does not show that any of those leads were followed.
120. The Panel notes that an EULEX WCIU report, date 28 June 2010, refers to an UNMIK Police Case Analysis Review of 11 February 2009 (see § 37 above), although the latter document was not presented to the Panel. An EULEX officer wrote that there was a witness who was able to, or actually did, identify suspects from line up, but that UNMIK Police recommended keeping this investigation pending "due to lack of evidence".
121. For example, as mentioned above, the police appear to have never inspected the house of the victim. The Panel understands that it would not be realistic to expect that some "breakthrough" physical evidence could be found at such a site inspection, years after the alleged crime. However, such investigative action is widely accepted as one of the basic and "must-do" steps, which could provide the investigators with a better understanding of the circumstances of an incident. Further, such a visit to the house of the complainant's father, even years after he had disappeared, would have provided the police with information, for example, as to the current status of his property, thus at least leading to a potential motif behind his disappearance (e.g. property gain).
122. 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.
123. The Panel also recalls the SRSG's argument that "[i]nvestigative action from UNMIK appears to have remained pending ... due to a lack of information or leads that would enable further meaningful investigation and prioritization against other cases" (see § 65 above). In this regard, 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. The file, as made available to the Panel, does not show any such activity. Thus, it appears that UNMIK Police

simply waited for further information to appear by itself. In this situation, in Panel's view, it is such a passivity by UNMIK Police and not the possible delay in reporting the disappearance of Mr B.R. the incident that may have led to the loss of potential evidence (see the Panel's approach in the case *P.S.*, cited in § 117 above, at § 107).

124. In this context, the Panel also would like to recall its position in relation to the categorisation of cases by UNMIK Police into "active" and "inactive". In this respect, in the case *B.A.* the Panel stated that "[the] 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 HRAP, *B.A.*, no. 52/09, opinion of 14 February 2013, § 82). In relation to this particular case, such prioritisation should not have been made before the minimum actions aimed at obtaining more information on the disappearance of Mr B.R. had been completed (see §§ 114 and 115 above), as it had occurred in obviously life-threatening circumstances, in the immediate aftermath of the conflict.
125. Assessing this investigation against the need to take reasonable investigative steps and to follow the obvious lines of enquiry to obtain 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 disappearance. In all cases, such interviews should take place as soon as possible and should be recorded and retained in the case file⁶. The failure to identify, locate and formally interview the persons who were mentioned as being involved in the disappearance again undermines the effectiveness of the investigation.
126. 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 the reasonable investigative steps and pursuing obvious lines of enquiry, serious deficiencies existed with respect to the effectiveness of this investigation.
127. As those responsible for the crime had not been located, UNMIK was obliged to use the means at its disposal to regularly review the progress of the investigation to ensure that nothing had been overlooked and any new evidence had been considered, as well as to inform the relatives of Mr B.R. regarding the progress in the investigation. The investigation record shows that UNMIK Police undertook such a review only once, in December 2007 (see § 37 above). A WCIU investigator acknowledges that there was information related to the suspects and a witness. However, regardless of the fact that there were leads to work on, the file was kept pending, with no further registered investigative action. In the Panel's view, first, one case review during about eight-year long investigation is insufficient, and there was no follow up on the results of the only review which had been undertaken. Thus, there was no adequate review of the investigation by the UNMIK authorities.
128. 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.*

⁶ 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.

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).

129. The Panel notes from the investigative file that there was no contact between the UNMIK authorities and Mrs Đ.L. This should particularly be assessed in light of the fact that, at least from the end of 2000, UNMIK Police was informed about the disappearance of the complainant's father in obviously life-threatening circumstances and that the investigation was lacking information. However, nothing was done in order to rectify these information gaps in the years to come. The Panel therefore considers that the investigation was not open to any public scrutiny, 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 disappearance of Mr B.R. 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 §§ 46 - 50 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; ECtHR [GC], *Cyprus v. Turkey*, cited in § 50 above, at § 156; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, cited in § 94 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 84 above, at § 74; ECtHR, *Alpatu Israilova v. Russia*, no. 15438/05, judgment of 14 March 2013, § 69; see also HRAP, *Jočić*, 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 disappearance of Mr B.R., particularly because of UNMIK's failure to properly investigate his disappearance, caused mental suffering to herself and her family.
136. Commenting on this part of the complaint, the SRSG, first agrees that the complainant, as a close relative of the disappeared and missing person, where the disappearance is not attributable to the agents of the authorities, may be considered a victim of a violation contrary to Article 3 of the ECHR. However, he clarifies that this only applies to this situation insofar as it is related to the authorities' reactions and attitudes to the situation when it has been brought to their attention. The SRSG, citing the European Court, case *Varnava and Others v. Turkey*, adds that:
- “The finding of such a violation ... can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for whereabouts and fate of a missing person.”
137. However, the SRSG rejects the allegations, as there are no allegations of any bad faith on the part of UNMIK personnel involved with the matter, or of any attitude by UNMIK that would evidence any disregard for the seriousness of the matter or the emotions of the complainant emanating from the continuing missing status of her father.
138. The SRSG asserts that the understandable and apparent mental anguish and suffering of the complainant based on the disappearance of his mother cannot be attributed to UNMIK, but it is rather a result of inherent suffering caused by the disappearance and the unfortunate fact that to date, despite efforts, the authorities have been unable to determine her whereabouts. 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.
139. 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*

140. 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.
141. 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 § 76 above, at § 150)

142. 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.
143. 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).
144. 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 § 93 above, at § 94).
145. 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).

146. 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).
147. 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).
148. 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 § 144 above, at § 109; ECtHR, *Gelayevy v. Russia*, no. 20216/07, cited in § 134 above, at § 147; ECtHR, *Bazorkina v. Russia*, cited in § 94 above, at § 140).
149. 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.

150. 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

151. 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 §§ 89 - 97).

152. 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 § 26 above).

153. 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.

154. 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

155. 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.

156. The Panel notes the proximity of the family ties between the complainant and Mr B.R., as the complainant is his daughter. Accordingly, the Panel has no doubt that she indeed has suffered serious emotional distress since her father's disappearance in the life-threatening situation, which is known to have existed for the Kosovo Serbs in July 1999, during the first months after the end of the armed conflict. As Mrs Đ.L. stated to the Panel, her mother unfortunately passed away in 2000, due to sadness and pain. The complainant states to the Panel that: "because of all nervousness and concerns for my father [...] I got very sick [...]"

157. The Panel cannot overlook the period of almost complete inaction of the authorities, from 1999 until the end of 2008, established above. In this respect, the Panel reiterates that from

the standpoint of Article 3 it may examine UNMIK's reactions and attitudes to the complainant in their entirety.

158. As was shown above with regard to Article 2, almost no investigation, even a bare minimum, was conducted in this case. The complainant was never formally interviewed by either UNMIK Police or prosecutors. The file does not indicate that the ante-mortem data and the DNA samples were collected by UNMIK Police. Instead of actively investigating, the police was simply waiting for new information to appear. In this respect, the Panel considers that the SRSG's argument that UNMIK Police undertook the necessary actions in order to determine the whereabouts of Mr B.R, in accordance with Article 2 of the ECHR (see § 68 above), used in relation to Article 3, does not reflect the reality of this investigation.
159. The SRSG also raised an objection that there is no document on record that the complainant or any other close relatives made inquiries with UNMIK Police in relation to this investigation. In the Panel's view, it was up to the authorities to keep the complainant informed, thus somewhat easing the grave uncertainty about the fate of his mother and the status of the investigation.
160. In view of the above, the Panel concludes that the complainant suffered severe distress and anguish for a prolonged and continuing period of time on account of the way the authorities of UNMIK have dealt with her complaint and as a result of her inability to find out what happened to her father. In this respect, it is obvious that, in any situation, the pain of a daughter who has to live in uncertainty about the fate of her disappeared father must be unbearable.
161. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the complainant's distress and mental suffering in violation of Article 3 of the ECHR.

V. CONCLUDING COMMENTS AND RECOMMENDATIONS

162. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
163. The Panel notes that enforced disappearances and arbitrary executions constitute serious violations of human rights which, shall be investigated and prosecuted under any circumstances. The Panel also notes that UNMIK as the territorial administration of Kosovo from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute those responsible for killings, abductions or disappearances in life threatening circumstances. Its failure to do so constitutes a further serious violation of the rights of the victim and his next-of-kin, in particular the right to have the truth of the matter determined.
164. 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.

165. 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 § 28), 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.
166. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible.

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

- In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR [GC], *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 109), must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the requirements of an effective investigation as envisaged by Article 2, that the circumstances surrounding disappearance of Mr B.R. will be established and that perpetrators will be brought to justice. The complainant and/or other next-of-kin shall be informed of such proceedings and relevant documents shall be disclosed to them, as necessary;
- Publicly acknowledges, within a reasonable time, responsibility with respect to UNMIK's failure to adequately investigate the disappearance of Mr B.R., as well as the distress and mental suffering subsequently incurred, and makes a public apology to the complainant and her family in this regard;
- Takes appropriate steps towards payment of adequate compensation to the complainant for the moral damage suffered due to UNMIK's failure to conduct an effective investigation, as well as for distress and mental suffering incurred by the complainant as a consequence of UNMIK's behavior.

The Panel also considers 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 DISAPPEARANCE OF THE COMPLAINANT'S FATHER 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 DISAPPEARANCE OF MR B.R., AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT AND HER FAMILY;**
- c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 AND ARTICLE 3 OF THE ECHR;**
- d. TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**

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

Andrey Antonov
Executive Officer

Marek NOWICKI
Presiding Member

ABBREVIATIONS AND ACRONYMS

CCIU - Central Criminal Investigation Unit
CCPR – International Covenant on Civil and Political Rights
DOJ - Department of Justice
DPPO - District Public Prosecutor’s Office
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
EU - European Union
EULEX - European Union Rule of Law Mission in Kosovo
FRY - Federal Republic of Yugoslavia
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
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