

**OPINION**

**Date of adoption: 12 April 2014**

**Case No. 142/09**

**Marko MARKOVIć**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 12 April2014,

with the following members taking part:

Marek Nowicki, Presiding Member

Christine Chinkin

Françoise Tulkens

Assisted by

Andrey Antonov, Executive Officer

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

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

1. **PROCEEDINGS BEFORE THE PANEL**
2. The complaint was introduced on 6 April 2009 and registered on 30 April 2009.
3. On 18 December 2009, the Panel requested from the European Union Rule of Law Mission in Kosovo (EULEX) information with regard to 43 complaints in relation to missing persons filed before the Panel, including the complaint of Mr Marko Marković.
4. On 9 December 2009 and 20 April 2011, the Panel requested further information from the complainant. No response was received.
5. On 23 March 2010, EULEX provided a response to the Panel’s request of 18 December 2009.
6. On 2 February 2012, the complaint was communicated to the Special Representative of the Secretary-General (SRSG)[[1]](#footnote-1), for UNMIK’s comments on its admissibility.
7. On 2 March 2012, the SRSG provided UNMIK’s response.
8. On 11 May 2012, the Panel declared the complaint admissible.
9. On 17 May 2012, the Panel forwarded its decision to the SRSG requesting UNMIK’s comments on the merits of the complaint, as well as copies of the investigative files relevant to the case.
10. On 14 February 2013, the SRSG provided UNMIK’s comments on the merits of the complaint, together with the relevant documentation.
11. On 24 March 2014, the Panel requested UNMIK to confirm whether the disclosure of files concerning the case could be considered final. On the same day, UNMIK provided its response.

1. **THE FACTS**
2. **General background[[2]](#footnote-2)**
3. The events at issue took place in the territory of Kosovo shortly after the conflict and after the establishment in June 1999 of the United Nations Interim Administration Mission in Kosovo (UNMIK).
4. 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.
5. 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.
6. 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.
7. 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.
8. 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.
9. 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.
10. 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.
11. 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”.
12. 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.
13. 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.
14. On the same date, UNMIK and EULEX signed an MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were supposed to be handed over to EULEX.
15. **Circumstances surrounding the disappearance of Mr Branko Marković**
16. The complainant is the father of Mr Branko Marković. He states that on 12 June 1999, Mr Branko Marković was abducted by unnamed persons near the primary school “Zejnell Hajdini” in “Vranjevac” neighborhood of Prishtinë/Priština Municipality. Since that time, Mr Branko Marković’s whereabouts have remained unknown.
17. The complainant states that he reported the disappearance of his son to KFOR, UNMIK, the ICRC and the Yugoslav Red Cross.

1. In 2001, the ICRC opened a tracing request for Mr Branko Marković which remains open[[3]](#footnote-3). His name is also in the list of missing persons that was forwarded by the ICRC to UNMIK on 12 October 2001, for whom the ICRC had collected ante-mortem data in Serbia proper, between 1 July and 20 September 2001, as well as in the database compiled by the UNMIK OMPF[[4]](#footnote-4). The entry in relation to Mr Branko Marković in the online database maintained by the ICMP[[5]](#footnote-5) gives 12 June 1999 as the reported date of disappearance and reads in other relevant fields: “Sufficient Reference Samples Collected” and “DNA match not found”.
2. **The investigation**
3. In the present case, the Panel received from UNMIK a substantial number of documents related to the investigative actions conducted by the UNMIK Police WCIU and the UNMIK OMPF. When providing the file to the Panel, on 14 February 2013, the SRSG noted that more information in relation to this case, not contained in the presented documents, may exist. However, on 24 March 2014, UNMIK confirmed to the Panel that no more relevant documents have been obtained.
4. Concerning disclosure of information contained in the files, the Panel recalls that UNMIK has made them available under a pledge of confidentiality. In this regard, the Panel must clarify that although its assessment of the present case stems from a thorough examination of the available documentation, only limited information contained therein is disclosed. Hence a synopsis of relevant investigative steps taken by investigative authorities is provided in the paragraphs to follow.
5. The oldest document (chronologically) in the file is a copy of a letter written by Mr Branko Marković’s sister, Ms S.M., to the OSCE Headquarters in Pristina, dated 21 June 1999. The letter details the facts relating to her brother and five other Serbian men’s disappearances on 12 June 1999. She also provides the name of a witness, R.J, a neighbour who supposedly saw everything from her house which was across the street from the school “Zejnell Haidini”, near where the men were last seen alive. Additionally, she provides a contact number for herself and for two other potential witnesses.
6. The OMPF file contains an undated ICRC Victim Identification Form for Mr Branko Marković, apparently completed by the ICRC between 1 July and 20 September 2001 (see § 25 above). Additionally, the file contains an MPU Ante-Mortem Victim Identification Form dated 18 September 2000, containing the file number 2000-001233. Besides containing Mr Branko Marković’s personal details and ante-mortem description, it provides the name, address and telephone number of his sister, Ms S.M. The file also contains an undated MPU “Case Continuation Report”, containing the file number 2000-001233, which lists the activities of MPU officers during different dates and times. For the date 18 September 2000, it notes that Ms S.M. told their office the account of her missing brother. The account she gave the MPU contained the same information as in the letter to the OSCE, listed above, including the name of a witness, R.J.
7. The WCIU file contains several documents, including an interoffice memorandum and investigation diaries, which provide an overview of the investigative actions that were taken regarding this case. For example, the interoffice memorandum dated 14 April 2008 from the lead investigator in the case to the Head of the WCIU details the beginning of the investigation. “The investigation began on 5 May 2000 when a possible gravesite was located in Vranjevac on a field close to Nerodimska Street in Pristina. On the 6th of May 2000 an exhumation was performed and the remains of three bodies were found and taken to the morgue in Pristina. Further investigation revealed that the three bodies could be the remains of some of the six 6 Serbian males [including the complainant’s son] who were reported missing during the 12th and 13th of June 1999” (see § 28 above). Those mortal remains were found to those of the other Serbian men who disappeared with Mr Branko Marković, but not his.
8. The interoffice memorandum continues, “On 23rd of May 2001 the case-file was closed for lack of evidence and reopened on 15th of February 2002 when the witness [Ms S.M.] gave a statement regarding the kidnapping of her brother Mr Branko Marković on the 12 of June 1999.” In the interview, she stated that her brother had been kidnapped by a big group of armed KLA persons. Additionally, she stated that “in May 2001 she heard from some people that her brother was kidnapped by KLA member G and he was still alive.” She also stated that witness R.J. saw the entire incident.
9. The same interoffice memorandum continues, “Statement taken from witness [R.J.] on 1 May 2003 revealed the fact that on 12th of June at 1800 hrs, [the witness] saw… the kidnapping of [M.D.; another Serbian victim], Mr Branko Marković and the killing of [another three of the Serbian victims] by 10-15 UCK members”. [The witness] indicated that R.K. was another from the group of Serbian men was the person who was wounded at the scene but managed to escape.” A copy of R.J.’s witness statement was also in the file. In the witness statement, R.J. also stated that “I was shown approximately 80 photographs of UCK Members…I could not identify any persons from these photographs.” As for the possible witness R.K., UNMIK Police attempted to locate him, but could not; he was considered a missing person[[6]](#footnote-6).
10. The file contains an MPU Investigation Report, dated 21 October 2004, which states that “On 3rd of August 2004, an MPU investigator attended a meeting at the MPU office in Belgrade with the families of Serbian missing persons…One of the cases was that of Mr Branko Marković. Investigator T.G. met his father Marko Marković [the complainant]. He was able to mention the name of the neighbor who observed the kidnapping of Mr Branko Marković … R.J.”
11. An email dated 23 October 2007 from a WCIU investigator to the Head of the WCIU provides a synopsis of further activity in the investigation. It states “The above case was re-opened by the Regional Investigation Unit for Missing Persons in Mitrovica on 28 July 2006 when one of the father of the six victims appeared to them, Marko Markovic…It was finally forwarded to WCIU on 18 August 2006 and was originally handled by IPO [International Police Officer] … who made efforts to locate the complainant. She succeeded in talking to [Mr Marko Marković] but he did not give any formal statement. Instead, he just gave the names of the alleged suspects and their addresses. IPO … also checked with the exhumation unit and the OMPF for possible files of the missing victim but to no avail. Several phone calls were made by IPO [K.S.] to Mr Markovic asking him to make his formal written statement but [he] always made alibis.”
12. The email continues to explain that in November 2006, a new IPO took over the case, but he also could not get Mr Marko Marković to give a formal statement. The complainant did offer new information about the case; he informed that the suspects in his son’s disappearance, I.K. and his sister V.K. were now living in his former home in Prishtinë/Priština. The email makes clear that the complainant missed two more scheduled meetings with the IPO before finally meeting with him on 16 January 2007 at Graçanicë/Gračanica Police Station.
13. The file contains an Investigation Diary, containing the case number 2000-00157, which is undated but which contains nine different listings showing nine investigative activities taken by the IPO in charge of the case between 11 November 2006 and 16 January 2007. On 30 November 2006, the IPO met with the suspects I.K. and V.K. and they denied knowing Mr Marko Marković or anything about Mr Branko Marković. The listing states “I have also shown [I.K.] a picture of Branko but he said that he has never seen this person ever before.”
14. The email dated 23 October 2007 describes the meeting between the IPO and Mr Marko Markovic on 16 January 2007. It states that, “[Mr Marko Marković] said, ‘[I.K.] and his sister [V.K.] kidnapped my son in 1999 and they forcibly took my house.’ When he was asked by the Investigators to put it down in writing and give his formal statement, he said he did not have enough time as he was going back to Serbia and the bus was waiting for him. According to the Investigators, he did not properly answer questions being asked to him and that he denied answering some of them. He just told them that he would be back in Gracanica by February, and the date should be fixed when the investigators will call him.” The email specifies that between January and July 2007, the investigators called the complainant between six and eight times, and he always gave some reason why he could not make a formal statement.
15. According to the email, on 26 July 2007, Mr Marko Marković finally met with the investigators. They described it as such, “[the complainant] had stated a lot of personal things about what he knew about the case. When he was asked if he saw personally who and when his son was abducted, he answered negative. He further states that… ‘my wife and family sold the house to the family of [I.K. and V.K.]’(whom he had identified as suspects in the alleged abduction of his son)…When asked if he would like to give a written statement, he declined. He then left and said he will be back again.”
16. The above-mentioned interoffice memorandum dated 14 April 2008 continues the story of the investigation. It provides the information that that on 28 October 2007, the WCIU forwarded a request to the Serbian authorities requesting assistance in obtaining Mr Marko Marković’s written statement, but no answer was received. The memorandum ends with this recommendation: “All attempts to find more witnesses were exhausted and so were those to find further leads. Statements taken from [Ms S.M.] and [R.J.] couldn’t be corroborated, reason for which the identity of the KLA members couldn’t be established…Due to what I mentioned above I suggest that this case file should be closed until further evidence would be found.”

1. **EULEX clarification**
2. As mentioned above (§ 2), on 18 December 2009 the Panel requested EULEX to provide additional information in relation to 43 complaints before the Panel. In their response (see § 4 above), dated 23 March 2010, 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).”
3. 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.
4. 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 41 cases, including the case of Mr Branko Marković, 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.”
5. **THE COMPLAINT**
6. The complainant complains about UNMIK’s alleged failure to properly investigate the disappearance of his son. 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).
7. The complainant also complains about the mental pain and suffering allegedly caused to him by this situation. In this regard, the Panel deems that the complainant relies on Article 3 of the ECHR.
8. **THE LAW**
9. **Alleged violation of the procedural obligation under Article 2 of the ECHR**
	1. **The scope of the Panel’s review**

1. In determining whether it considers that there has been a violation of Article 2 (procedural limb) 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.

1. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
2. 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](http://untreaty.un.org/English/TreatyEvent2001/pdf/07e.pdf), the Convention on the Rights of the Child.
3. 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 complainant complains about acts that occurred after that date, they fall outside the jurisdiction *ratione personae* of the Panel.
4. 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.
5. 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).
	1. **The Parties’ submissions**
6. The complainant in substance alleges violations concerning the lack of an adequate criminal investigation into the disappearance of his son. The complainant in substance also alleges that he was not informed as to whether an investigation was conducted at all, and what the outcome was.
7. In his comments on the merits of the complaint under Article 2, the SRSG accepts that Mr Branko Marković disappeared in life threatening circumstances. He notes that in June 1999, when he had disappeared, “the security situation in Kosovo remained 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.”
8. The SRSG accepts UNMIK’s responsibility to conduct an investigation in the case of Mr Branko Marković under Article 2 of the ECHR, procedural part. In the words of the SRSG, “the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life, as defined by UNMIK Regulation No. 1999/1 On the Authority of the Interim Administration in Kosovo of 25 July 1999 and subsequently, by UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo of 12 December 1999, as amended.”
9. The SRSG considers that such an obligation is 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.”
10. The SRSG further observes that when considering applications of this nature under Article 2, consideration must be given to not imposing an impossible or disproportionate burden on UNMIK. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court of Human Rights 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.”

1. In the view of the SRSG, “UNMIK was faced with a very similar situation in Kosovo from 1999 to 2008, as that in Bosnia and Herzegovina from 1995 to 2005...” Many of those persons who were unaccounted for were abducted, killed and buried in unmarked graves inside or outside Kosovo, which made locating and recovering their mortal remains very difficult.
2. 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.”
3. The SRSG states that locating and identifying the missing in the context described above is a very difficult and time-consuming task. He further states that the number of missing persons recovered and identified by OMPF is a “testament to the vigour of its work between 2002-2008” and that “[m]ore 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”. The SRSG continues that therefore “it is apparent that the process for establishing a system capable of dealing effectively with disappearances and other serious violations of international humanitarian law has been an understandably incremental one” in Kosovo, as reflected in the *Palić* case referred to above. The SRSG further notes that this process was reliant on a number of actors rather than just UNMIK, for example the ICMP, ICRC and local missing persons organisations.
4. The SRSG further argues that fundamental to conducting effective investigations “is a professional, well trained and well resourced police force” and that “[s]uch a force did not exist in Kosovo in 1999 and had to be established from scratch and progressively developed.” In the policing vacuum following the end of the conflict, UNMIK had to build a new Kosovo Police Service, 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 in 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.”

1. The SRSG states that UNMIK international police officers working on cases of missing persons had to adjust to conducting investigations in a foreign territory and country, with limited support from the still developing Kosovo Police. He further states that these investigators were often faced with situations where individuals holding relevant knowledge on the whereabouts and fate of missing persons did not want to disclose this information. According to the SRSG, all these constraints inhibited the ability of the UNMIK Police to conduct investigations according to the standards that may be expected from States with more established institutions and which are not faced with the high number of cases of this nature associated with a post-conflict situation.
2. With regard to the part of the investigations aimed at establishing the fate of Mr Branko Marković or locating his mortal remains, the SRSG asserts that UNMIK OMPF became aware of his disappearance on 18 September 2000 (see § 29 above). The SRSG acknowledges that UNMIK OMPF and MPU contacted the family members of Mr Branko Marković and alleged witnesses in order to get more information about his disappearance and any possible indications that could lead to his whereabouts. The SRSG notes that “[u]nfortunately, despite the thorough attempt by the UNMIK Police reflected in the OMPF file, there was no information that could shed light on Mr Branko Marković’s whereabouts. It should be noted also that, based on the available documents, there is no conclusive information as to the fate of Mr Branko Marković.”
3. The SRSG notes that “[o]n 6 May 2000, an exhumation was performed and the remains of three bodies were found and moved to Pristina. Further investigation revealed that none of them were remains of Mr Branko Marković” (see § 30 above). He also notes that on 23 May 2001, the case file was closed due to lack of evidence and reopened on 15 February 2002, when Ms S.M., Mr Branko Marković’s sister, gave more information regarding the kidnapping of her brother (see § 31 above). The information she provided included the name of the eyewitness R. J. who was in Serbia and finally was interviewed on 1 May 2003. The SRSG notes that “the witness was shown approximately 80 pictures of the KLA members, but she could not recognize any person in the pictures” (see § 32 above).
4. The SRSG also pointed out that, “Mr Marko Marković subsequently stated that his son was kidnapped by [I.K. and V.K]. UNMIK Police located these individuals and interviewed them on 30 November 2006. The suspects denied any connections with the disappearance of Mr Branko Marković. By further follow up with the complainant, who was ‘uncooperative with the investigators’, UNMIK Police interviewed the complainant on 16 January 2007; however, his statements were not consistent.” The SRSG notes how Mr Marko Marković stated that his house was being occupied by the suspects I.K. and V.K. and later he said that his wife had sold the house to them (see §§ 37-38 above), and also that Mr Marko Marković stated that he was an eyewitness to his son’s kidnapping and also that he wasn’t an eyewitness. In the SRSG’s opinion, “the inconsistencies in the witness’ statements and his unwillingness to provide clear evidence impeded the investigation.”
5. In relation to the authorities’ actions towards identifying the perpetrators and bringing them to justice, the SRSG asserts that, “lack of and conflicting information in the instant case presented a real hurdle to the conduct of the investigation by UNMIK.” The SRSG notes that both Ms S.M. and R.J. were interviewed.
6. The SRSG concludes that, based on the available documents, “it is evident that UNMIK Police did open and pursue an investigation into the whereabouts of Mr Branko Marković; however … without witnesses coming forward or physical evidence being discovered, police investigations inevitably stall because of a lack of evidence.”
7. In the SRSG’s opinion, in this case “UNMIK police did conduct investigative efforts in accordance with the procedural requirements of Article 2 [of the] ECHR, aiming at bring the perpetrators to justice.” Thus, according to the SRSG, there has been no violation of Article 2 of the ECHR.
8. The SRSG also informed the Panel that he might make further comments on this matter, “[a]s there is a possibility that additional and conclusive information exists”, beyond the documents presented to the Panel. However, no further communication in this regard, other than confirmation of the full disclosure of the investigative files, has been received to date.
	1. **The Panel’s assessment**
9. 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 Police did not conduct an effective investigation into Mr Branko Marković’s disappearance.
10. *Submission of relevant files*
11. At Panel’s request, on 14 February 2013, the SRSG provided copies of the limited documents related to this investigation, which UNMIK was able to recover. As mentioned above (see § 67), the SRSG also noted that more information, not contained in the presented documents, may exist in relation to this case. On 24 March 2014, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 10 above).
12. As mentioned above (§§ 2 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).
13. 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, *Çelikbilek v. Turkey*, no. 27693/95, judgment of 31 May 2005*,* § 56).
14. The Panel also notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigations to their handing over, is crucial to the continuation of such investigations and failure to do so could thus raise *per se* issues under Article 2.
15. The Panel has no reason to doubt that UNMIK undertook all efforts in order to obtain the relevant investigative documents. However, UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.
16. 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 of15 March 2011, § 146).
17. *General principles concerning the obligation to conduct an effective investigation under Article 2*

1. The Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights *Velásquez-Rodríguez* (see Inter-American Court of Human Rights (IACtHR), *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been stated by the 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 Article 2(3) (right to an effective remedy) of the ICCPR (see 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.
2. In order to address the complainant’s allegations, the Panel refers, in particular, to the well-established case-law of the European Court on Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that “[The] obligation to protect the right to life under Article 2 of the Convention, 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, § 105, *Reports of Judgments and Decisions* 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).
3. 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).
4. 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).
5. Setting out the standards of an effective investigation, the Court has stated that “beside being independent, accessible to the victim’s family, carried out with reasonable promptness and expedition, affording a sufficient element of public scrutiny of the investigation and its results, the investigation must also be effective in the sense that is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible (see ECtHR [GC]*, Varnava and Others v. Turkey*, cited in § 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, § 312; and *Isayeva v. Russia*, cited above, § 212).
6. 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 investigation’s ability to establish the circumstances of the case and the identity of those responsible (see ECtHR, *Kolevi v. Bulgaria*, cited in § 76 above, 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 investigation work (see ECtHR, *Velcea and Mazăre v*. *Romania*, no. 64301/01, judgment of 1 December 2009, § 105).
7. Even with regard to persons disappeared and later found dead, which is not the situation in the present case, the Court has stated that the procedures of exhuming and identifying mortal remains do not exhaust the obligation under Article 2 of the ECHR. The Court holds that “the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for, and it is thus of a continuing nature” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 79 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, § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited above, § 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, § 64).
8. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see ECtHR, *Ahmet Özkan and Others*, cited in § 78 above, at §§ 311‑314; ECtHR, *Isayeva v. Russia*, cited in § 78 above, at §§ 211-214 and the cases cited therein; ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011, no. 55721/07, § 167, ECHR 2011).
9. The Court has also underlined the great importance of an effective investigation in establishing the truth of what transpired, not only for the families of victims, but also for other victims of similar crimes, as well as the general public, who have the right to know what occurred (ECtHR [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630/09, judgment of 13 December 2012, § 191). The United Nations also recognises the importance of the right to truth. In the words of the United Nations Secretary-General, “the right to truth implies knowing the full and complete truth about the violations and the events that transpired, their specific circumstances and who participated in them. In the case of missing persons … it also implies the right to know the fate and whereabouts of the victim” (see Report of the UN Secretary-General, Missing Persons, UN Document A/67/267, 8 August 2012, § 5; see also UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009; see also the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Framework Principles for securing the accountability of public officials for gross and systematic human rights violations committed in the context of State counter-terrorist initiatives; UN Document A/HRC/22/52, 1 March 2013).
10. *Applicability of Article 2 to the Kosovo context*
11. The Panel is conscious that Mr Branko Marković disappeared shortly after the deployment of UNMIK in Kosovo, after the armed conflict, when crime, violence and insecurity were rife.
12. On his part, the SRSG does not contest that, from its deployment in Kosovo in June 1999, 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.
13. 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.
14. 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).
15. 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 § 79 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011). The Court has further held that that the procedural obligation under Article 2 continues to apply in “difficult security conditions, including in a context of armed conflict” (see ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited in § 82 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 § 78 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 78 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
16. 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, § 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 § 76 above, at §§ 86 ‑ 92; ECtHR, *Ergi v Turkey,* cited above, §§ 82 - 85; ECtHR [GC], *Tanrıkulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited above, §§ 215 ‑ 224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158 - 165).
17. 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 § 75 above, at § 1; HRC, *Abubakar Amirov and Aïzan Amirova v. Russi*a*n 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).
18. 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 § 18 above).
19. 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.
20. Lastly, in response to the SRSG’s objection that Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, either in the context of policing activities or that of priorities and resources, the Panel takes into account that the European Court has established that what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and contexts (see ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 79 above, at § 70; *Brecknell v. The United Kingdom,* no. 32457/04, judgment of 27 November 2007, § 62).
21. *Compliance with Article 2 in the present case*
22. Turning to the particulars of this case, the Panel first notes that there is some question as to when UNMIK was apprised of Mr Branko Marković’s disappearance. For example, the complainant states that he reported the disappearance of Mr Branko Marković to KFOR, UNMIK, the ICRC and the Yugoslav Red Cross (see § 24 above), but he has not provided information as to when that reporting occurred. The file contains a copy of a letter written by Mr Branko Marković’s sister, Ms S.M. to the OSCE Headquarters in Pristina, dated 21 June 1999, which informs about her brother’s disappearance (see § 28 above); however, it is not clear precisely when that document was received by the OSCE or when it was transmitted to UNMIK Police. The Panel notes that the WCIU documents in the file place the beginning of the investigation at 5 May 2000 (see § 30 above). For his part, the SRSG acknowledges that UNMIK was made aware of Mr Branko Marković’s disappearance on 18 September 2000 and the UNMIK OMPF and MPU had registered a case in this regard (see § 60 above).
23. The purpose of this investigation was to discover the truth about the events leading to the disappearance of the complainant’s son, to establish his fate and to identify the perpetrators. To fulfil these purposes, those conducting the investigation were required to seek, collect and preserve evidentiary material; to identify possible witnesses and to obtain their statements; to identify the perpetrator(s) and bring them before a competent court established by law.
24. The Panel recalls that in order to be effective, the investigative actions must be conducted promptly and expeditiously, with the authorities taking all reasonable steps and following obvious lines of enquiry to secure the evidence concerning the incident, including, *inter alia* eye-witness testimony, forensic evidence etc. The investigation must also ensure a sufficient element of public scrutiny and be reasonably accessible to the victim’s family. The investigation’s conclusion must be based on thorough, objective and impartial analysis of all relevant elements. In addition, the investigation should be periodically reviewed, in order to ensure that all available information is considered. As the obligation to investigate is not an obligation of results but of means, in assessing the investigation’s effectiveness, the circumstances of the particular case and the practical realities of the investigative work must be taken into consideration (see §§ 79 - 80 above).
25. The Panel notes that depending on when UNMIK became aware of Mr Branko Marković’s disappearance, there may have been shortcomings in the conduct of the investigation from its commencement. However, in light of the considerations developed above concerning the Panel’s limited temporal jurisdiction (see § 50 above), it Panel recalls that it is competent *ratione temporis* to evaluate the compliance of the investigation with Article 2 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (see ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 79 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 § 21 above).
26. In the Panel’s view, 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 the investigation (EULEX); and *third*, that the investigative files could be traced and retrieved, should a need for that arise at any later stage.
27. Having noted the SRSG’s assertion that the file submitted to the Panel may be incomplete, and the lack of further explanation in relation to this (see § 67 and 73 above), the Panel assumes that UNMIK cannot guarantee whether the file presented to the Panel is complete or not. In case it is not complete, it would indicate 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 (see § 73 above). However, the Panel considers that whichever of these potential explanations is applicable, it would indicate a failure directly attributable to UNMIK, either when it was exercising its executive functions, or in its current capacity.
28. The Panel notes the especially important fact related to this particular case, which is the response from EULEX to the Panel’s request for information (see §§ 40 - 42 above). In that response, 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. In the Panel’s view, it is particularly indicative of a possible general failure to comply with the obligation to ensure the proper handover of the investigative material.
29. With regard to the first part of the procedural obligation, that is establishing the fate of Mr Branko Marković, the Panel notes that his whereabouts remain unknown. The Panel also notes that ante-mortem information concerning the complainant’s missing son had been gathered by the ICRC, between 1 July and 20 September 2001 and that the ICMP database confirms that the DNA samples had been collected, but it is not clear when, from or by whom (see § 25 above). The Panel also notes that the investigation into his disappearance appears to have been initiated within a reasonable time. On 5 May 2000 the investigation began when a possible gravesite was located in in a field in “Vranjevac neighborhood”, Prishtinë/Priština Municipality. On 6 May 2000, an exhumation was performed and the remains of three bodies were found and taken to the morgue in Pristina. Further investigation revealed that mortal remains could have included the remains of Mr Branko Marković and/or at least 5 other Serbian males who were reported missing during 12 June and 13 June 1999. After conducting autopsies, the authorities concluded that the mortal remains were those of the other Serbian men who disappeared with Mr Branko Marković, but not his (see § 30 above). Concurrently with the WCIU investigation, on 18 September 2000, the MPU opened a missing persons file for Mr Branko Marković and ante-mortem information was taken from his sister Ms S.M. for identification purposes. Additionally, Ms S.M. gave the MPU information regarding what she had heard had happened to her missing brother, which included naming a witness, R.J. who had supposedly witnessed it all from her house.
30. 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.
31. It appears that the information gathered by the MPU on 18 September 2000 regarding Ms S.M. was not received by the WCIU, as the WCIU closed Mr Branko Marković’s case on 23 May 2001 due to lack of evidence, only to reopen it on 15 February 2002 when Ms S.M. gave a statement regarding her brother’s kidnapping with the same information that she had already given to the MPU on 18 September 2000. Specifically, besides providing general information regarding her brother’s disappearance, in her interview Ms S.M. also gave the name and contact information of another witness R.J. who she intimated had seen the entire incident from her house (see § 31 above). R.J. was located in Serbia, and on 1 May 2003 her statement was recorded by the WCIU IPO. R.J. provided the UNMIK Police with relevant information regarding the incident, including the name of another potential witness R.K. who had apparently been wounded at the scene but had survived (see § 32 above). Based on the information in her statement, R.J. was shown approximately 80 photographs of UCK members to try to locate potential suspects, but she was unable to identify any persons in the photographs. As for the potential witness R.K., UNMIK Police attempted to locate him, but could not (check ICRC list): he was never located and is considered a missing person.
32. The next investigative activity recorded in the file took place on 3 August 2004, when the WCIU IPO met with the complainant at the UNMIK Police Liaison Office in Belgrade and took some information from him. Apparently, the case was closed again at some point until 28 July 2006.
33. The Panel notes that by 23 April 2005, marking the start of the Panel’s jurisdiction, the Panel considers that most reasonable investigative steps had been taken. While there were a couple of omissions or oversights until that point in the investigation, they were not significant enough to cause the investigation in its entirety to fall foul of the minimum standard of an effective investigation. The first oversight was the delay in the WCIU obtaining Ms S.M.’s testimony. On 18 September 2000 Ms S.M. gave the MPU information regarding what she had heard had happened to her missing brother which included naming a witness, R.J. However, it took the WCIU until 15 February 2002 to take her statement, which led the investigators to the key witness R.J. In fact, the WCIU had closed the case on 23 May 2001, even though an MPU file had been opened that included information from Branko Marković’s sister. There is no evidence in the file that the WCIU was aware of the MPU information at that time, but as these two UNMIK police units liaised regularly regarding missing persons cases, it seems sensible that before closing the case, WCIU would have checked with the MPU to see if there were any obvious leads. Nevertheless, although the WCIU may have delayed its investigation more than one year by seemingly not having any proper communication with the MPU concerning Ms S.M.’s testimony, eventually the investigation was undertaken sufficiently promptly and adequately. The traceable witnesses were interviewed, such as Ms S.M. and R.J., and the available evidence collected. The other oversight is that it does not appear from the file that the area where Mr Branko Marković disappeared from has ever been canvassed for potential witnesses, nor the crime scene fully investigated. There is no evidence provided in the file why this investigative activity, normally performed at the beginning of an investigation such as this one, was not undertaken. The file does contain information showing that on 5 May 2000, a field in the same neighbourhood, “Vranjevac”, that Mr Branko Marković disappeared from, was searched and the mortal remains of three persons were located there. However, the file contains no information of any other investigative activity that took place around this site. The Panel finds that this appears to be a glaring oversight in the investigation. 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 investigation work (see ECtHR, *Velcea and Mazăre*, cited in § 80 above, at§ 105). The Panel deems that these deficiencies do not, on their own, given the circumstances of this case, make this investigation less than adequate effective.
34. With regard to the period from 23 April 2005, which is under the Panel’s jurisdiction, more investigative activity was undertaken. Specifically, on 28 July 2006, the case was reopened when the complainant met with MPU officers in Mitrovicë/Mitrovica. Later in 2006, he talked with the WCIU IPO in charge of the case and he gave the names and addresses of alleged suspects, although apparently he did not wish to give a formal statement at that time; according to the file, “Several phone calls were made by IPO to Mr Markovic asking him to make his formal written statement but [he] always made alibis” (see § 34 above). A new IPO took over the case in November 2006, and although the complainant offered some new information about the case, he continued to be reluctant to give a formal statement. Notwithstanding, on 30 November 2006, the IPO met with the suspects named by the complainant, I.K. and his sister V.K. who at that time were living in the Marković’s former family home. The suspects denied knowing Mr Marko Marković or anything about Mr Branko Marković. A document in the investigative file from the IPO states, “I have also shown [I.K.] a picture of Branko but he said that he has never seen this person ever before” (see § 35 above). The file shows additional investigative activities were undertaken by the IPO, but none bore significant fruit.
35. Next, the investigative file shows that on 16 January 2007, the IPO met with the complainant. An email in the file describes the meeting. It states that, “[Mr Marko Marković] said, ‘[I.K.] and his sister [V.K.] kidnapped my son in 1999 and they forcibly took my house.’ When he was asked by the Investigators to put it down in writing and give his formal statement, he said he did not have enough time as he was going back to Serbia and the bus was waiting for him. According to the Investigators, he did not properly answer questions being asked to him and that he denied answering some of them. He just told them that he would be back in Gracanica by February, and the date should be fixed when the investigators will call him.” The email specifies that between January 2007 and July 2007, the investigators called the complainant between 6 and 8 times, and he always gave some reason why he could not make a formal statement (see § 37 above). The email informs that on 26 July 2007, the complainant met again with the IPO. According to the email, the complainant gave some contradictory information about the alleged suspects I.K and V.K., and again declined to give a formal written statement (see § 38 above).
36. The next investigative activity shown in the file was on 28 October 2007 when the WCIU forwarded a request to the Serbian authorities requesting assistance in obtaining Mr Marko Marković’s written statement; apparently no answer was received. An interoffice memorandum dated 14 April 2008 ends with the recommendation to close the case until further evidence could be found, as all attempts to find more witnesses were exhausted and so were those to find further leads (see § 39 above). It is not known whether the file was closed at that time, but there is no evidence of any further activity.
37. The Panel finds that the investigative activity undertaken in this case appears to satisfy the minimum requirements of an effective investigation. While the Panel notes that this was far from an ideal investigation, the investigative file shows significant effort undertaken by the IPOs to try to locate Mr Branko Marković and bring the perpetrators to justice. Specifically, the investigative record shows that the IPOs made numerous attempts to obtain information from the complainant, but his own unwillingness to provide a formal statement confounded the investigation’s progress. The SRSG argues that “the inconsistencies in the witness’s statements and his unwillingness to provide clear evidence impeded the investigation.” The Panel understands the complainant’s difficult situation, but nevertheless must accept that this impeded the investigation.
38. In addition, the Panel considers that, as the mortal remains of Mr Branko Marković had not been located and those responsible for the crime had not been identified, UNMIK Police were obliged to use the means at their 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 victim’s relatives regarding the progress of this investigation. The Panel notes that there are many indications that the case was reviewed regularly; between October 2004 and April 2008, the file contains evidence of more than 20 investigative steps that were attempted, many of which involved attempting to liaise with the complainant in order to convince him to provide a formal statement to facilitate further investigative activities. Therefore, in the Panel’s opinion, there was an adequate and thorough review of this case.
39. The Panel considers that, having regard to all the circumstances of the particular case, with the exceptions noted above (see § 105), all reasonable steps were taken by UNMIK towards locating the missing person, identifying the perpetrators and to bring them to justice. In this sense the Panel considers that the investigation was adequate and complied with the requirements of promptness, expedition and effectiveness (see § 96 above), as required by Article 2.
40. As concerns the requirement of public scrutiny, the Panel recalls that Article 2 also requires the victim’s next-of-kin to be involved in the investigation to the extent necessary to safeguard his or her legitimate interests. The Panel also recalls that the European Court of Human Rights has held that “this aspect of the procedural obligation does not require applicants to have access to police files, or copies of all documents during an ongoing enquiry, or for them to be consulted or informed at every step” (see ECtHR, *McKerr v. the United Kingdom*, no. 28883/95, judgment of 4 May 2011, § 121; ECtHR, *Green v. the United Kingdom*, no. 28079/04, decision of 19 May 2005; ECtHR*, Hackett v. the United Kingdom*, no. 34698/04, decision of 10 May 2005; ECtHR*, Brecknell v. the United Kingdom*, judgment of 27 November 2007, § 77).
41. As was shown above, the investigative file records that many contacts were made with the complainant. From 3 August 2004 until at least 28 October 2007, UNMIK Police made regular attempts to contact the complainant, in order to get information from him about the case as well as to obtain his formal statement (see §§ 104, 106 above). The Panel therefore considers that the investigation was open to public scrutiny, as required by Article 2 of the ECHR.
42. The Panel regrets that the investigation has not to date been able to identify the persons responsible for Mr Branko Marković’s disappearance and bring them to justice. Nevertheless, the Panel concludes that in the present case there has been no violation of Article 2, procedural limb, of the ECHR (see HRAP, *Zdravković*, no. 46/08, opinion of 25 February 2014, § 126).
43. **Alleged violation of Article 3 of the ECHR**
44. 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.
45. Given the particular circumstances of the case, having found no violation of the procedural element of Article 2 of the ECHR, the Panel considers that there is no need to examine separately whether there has been a violation of Article 3 of the ECHR.

**FOR THESE REASONS,**

The Panel, unanimously,

1. **FINDS THAT THERE HAS BEEN NO VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
2. **FINDS THAT THERE IS NO NEED TO EXAMINE WHETHER THERE HAS BEEN A VIOLATION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.**

 Andrey Antonov Marek Nowicki

 Executive Officer Presiding Member

*Annex*

**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

**IPO** – International Police Officer

**KFOR** - International Security Force (commonly known as Kosovo Force)

**KLA** - Kosovo Liberation Army

**MoU -** Memorandum of Understanding

**MPU** - Missing Persons Unit

**MUP -** Serbian Ministry of Internal Affairs (Serbian: *Министарство унутрашних послова*)

**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

1. A list of abbreviations and acronyms contained in the text can be found in the attached Annex. [↑](#footnote-ref-1)
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” (htpp://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 and78166/01, 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.unhchr.org](http://www.unhchr.org)) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>). [↑](#footnote-ref-2)
3. The ICRC database is available at: <http://familylinks.icrc.org/kosovo/en/pages/search-persons.aspx> (accessed on 10 April 2014). Although the exact date that the ICRC tracing request was opened is not known, the request for Mr Branko Marković is numbered BLG-800653-01. [↑](#footnote-ref-3)
4. The OMPF database is not open to public. The Panel accessed it with regard to this case on 10 April 2014. [↑](#footnote-ref-4)
5. The ICMP database is available at: <http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en> (accessed on 10 April 2014). [↑](#footnote-ref-5)
6. The name of this witness is found in the same OMPF database (see footnote no. 4 above). The Panel accessed it with regard to this case on 14 April 2014. [↑](#footnote-ref-6)