

**OPINION**

**Date of adoption: 14 March 2014**

**Cases Nos 63/09, 64/09, 65/09, 66/09, 109/09, 113/09, 162/09, 300/09 and 301/09**

**Srboljub MITIĆ, Slavi MITIĆ, Smiljana ÐEKIĆ, Spasena MARKOVIĆ, Todor MARKOVIĆ, Stanomir JOVANOVIĆ, Marija JOVANOVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 14 March 2014,

with the following members taking part:

Marek Nowicki, Presiding Member

Christine Chinkin

Françoise Tulkens

Assisted by

Andrey Antonov, Executive Officer

Having considered the aforementioned complaints, 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 complaints of Mr Srboljub Mitić (cases nos 63/09 and 64/09) and the complaints of Mr Slavi Mitić (cases nos 65/09 and 66/09) were introduced on 15 April 2009 and registered on 30 April 2009. The complaint of Mrs Smiljana Ðekić (case no. 109/09) was introduced on 3 March 2009 and registered on 30 April 2009. The complaint of Mrs Spasena Marković (case no. 113/09) was introduced on 4 April 2009 and registered on 30 April 2009. The complaint of Mr Todor Marković (case no. 162/09) was introduced on 7 April 2009 and registered on 30 April 2009. The complaint of Mr Stanomir Jovanović (case no. 300/09) was introduced and registered on 22 June 2009. The complaint of Mrs Marija Jovanović (case no. 301/09) was introduced and registered on 18 June 2009.
3. On 24 July 2009, the Panel communicated cases nos 63/09, 64/09, 65/09 and 66/09, as individual cases, to the Special Representative of the Secretary-General (SRSG)[[1]](#footnote-1) for UNMIK’s comments on the admissibility of the complaints. The SRSG submitted UNMIK’s response on 5 August 2009.
4. On 24 October 2009, the Panel decided to join cases nos 63/09 and 64/09 with cases nos 65/09 and 66/09 pursuant to Rule 20 of its Rules of Procedure.
5. On 9 December 2009 and on 23 December 2009, the Panel requested further information from the complainants in cases nos 109/09 and 162/09 respectively.
6. 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 Mrs Smiljana Ðekić (case no. 109/09).
7. On 13 January 2010, the Panel requested additional information from the complainant in case no. 113/09.
8. On 23 March 2010, EULEX provided a response to the Panel’s request of 18 December 2009.

1. On 21 April 2010, the Panel requested additional information in relation to cases nos 63/09, 64/09, 65/09 and 66/09.
2. On 12 May 2010, the Panel reiterated its request for additional information from the complainant in case no. 162/09. The complainant’s response was received on 20 May 2010.
3. On 9 September 2010, the Panel decided to join the already joined cases nos 63/09, 64/09, 65/09 and 66/09 with case no. 109/09. On the same date, the Panel decided to join cases nos 113/09 and 162/09.
4. On 6 October 2010, the Panel reiterated its request for additional information to the complainants in relation to cases nos 63/09, 64/09, 65/09, 66/09, 109/09 and 113/09.
5. On 28 October 2010, the Panel received the complainant’s response in relation to case no. 109/09.
6. On 11 November 2010, the Panel received additional information from the complainant in cases nos 63/09 and 64/09.
7. On 8 December 2010, the Panel requested further information from the complainants in relation to case no. 300/09 and case no. 301/09. The Panel received the complainant’s response in relation to case no. 301/09 on 20 January 2011.
8. On 4 March 2011, the Panel communicated case no. 109/09 to the SRSG, and re-communicated cases nos 63/09, 64/09, 65/09 and 66/09 to him, following its decision to join the cases, as well as the receipt of additional information from the complainant in cases nos 63/09 and 64/09. The SRSG submitted his response on 31 May 2011.
9. On 19 April 2011, the Panel forwarded additional information received in relation to case nos 109/09 to the SRSG.
10. On 25 July 2011, the Panel communicated case no. 301/09 to the SRSG for his comments on the admissibility of the complaint. On 30 September 2011, the SRSG submitted UNMIK’s response.
11. On 22 October 2011, the Panel decided to join the already joined cases nos 63/09, 64/09- 65/09, 66/09, 109/09 with the joined cases nos 113/09, 162/09, as well as with cases nos 300/09 and 301/09.
12. On 31 October 2011, the Panel re-communicated cases nos 63/09, 64/09, 65/09, 66/09, 109/09 and 301/09 and communicated cases nos 113/09, 162/09 and 300/09 to the SRSG for comments on admissibility.
13. The SRSG provided UNMIK’s response on 15 December 2011.
14. On 10 May 2012, the Panel declared the complaints admissible.
15. On 15 May 2012, the Panel communicated the decision on admissibility to the SRSG, requesting UNMIK’s observations on the merits of the complaints, as well as copies of the investigative files relevant to the cases.
16. On 10 December 2013, the SRSG provided UNMIK’s response.
17. On 21 February 2014, the Panel requested UNMIK to confirm whether the disclosure of the investigative files concerning the cases could be considered final. On the same day, UNMIK provided its response.
18. On 10 March 2014, the Panel received additional information from the complainant in case no. 300/09.
19. **THE FACTS**
20. **General background[[2]](#footnote-2)**
21. The events at issue took place in the territory of Kosovo shortly after the establishment in June 1999 of the United Nations Interim Administration Mission in Kosovo (UNMIK).
22. 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.
23. 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.
24. 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.
25. 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.
26. 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.
27. 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.
28. 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.
29. 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”.
30. 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 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.
31. On 9 December 2008, UNMIK’s responsibility with regard to police and justice in Kosovo ended with 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.
32. On the same date, UNMIK and EULEX signed a Memorandum of Understanding 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.
33. **Circumstances surrounding the killing of Mr Radislav Jovanović and the disappearances of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović in Mushtisht/Mušutište village, June 1999**
34. The complainants state that their family members, Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković, Mr Radislav Jovanović and Mr Božidar Jovanović, were among the approximately 15-20 Serbs, who remained in Mushtisht/Mušutište village, Suharekë/Suva Reka Municipality, after the arrival of KFOR in June 1999. The complainants state that their relatives disappeared in June 1999 during a KLA attack on the village. To date the whereabouts of all their relatives are unknown.

*Disappearance of Mrs Jovanka Mitić and Mr Stanislav Mitić (cases no. 63/09, 64/09, 65/09, 66/09, 109/09)*

1. The first complainant is the son of Mrs Jovanka Mitić (case no. 63/09) and Mr Stanislav Mitić (case no. 64/09). The second complainant is also a son of Mrs and Mr Mitić (cases no. 65/09 and 66/09). The third complainant is the daughter of Mrs and Mr Mitić (case no. 109/09).
2. The complainants in cases nos 63-66/09 and 109/09 state that they were not present in the village when Mrs Jovanka Mitić and Mr Stanislav Mitić disappeared and that the information about the relevant events has been given to them by their grandmother, T.J., who was about 90 years old at the time of the events.
3. The first complainant states that he saw his parents for the last time on 13 June 1999, as he was leaving with his family to go to Serbia proper, for security reasons. He states that his parents remained behind to protect their house and property, confident that no one would harm old people like them. He also states that some neighbours, who had initially remained in Mushtisht/Mušutište, joined them one day later in a convoy to Serbia proper. Their neighbours said that they had “hardly managed to survive” during the last night spent in Mushtisht/Mušutište and that the few Serbs still there, among them T.J., Mrs and Mr Mitić, Mr Radislav Jovanović and Mr Božidar Jovanović, did not have the means to leave the village.
4. The complainants state that, according to the account of T.J., on 11 June 1999 or later, a group of unknown persons, with weapons and wearing KLA uniforms, arrived in the village. They killed T.J.’s son, Mr Radislav Jovanović (see §§ 46-47 below) in front of her. After the killing of her son, T.J. wanted to head towards the house of her daughter, Mrs Jovanka Mitić, and her son-in-law, Mr Stanislav Mitić to verify that they were still alive, but she never reached their house, as she was taken by unknown persons to a police station nearby and detained there by “Albanians” for three days. Throughout this period, a doctor named “Sali” was visiting her and bringing her food. When she was released and was on her way back to her house, children were throwing stones and spitting at her. She got back to her house and spent six days sleeping in the barn with her animals, while two named Albanian neighbours brought her food. The same neighbours, in an attempt to protect her, informed the KFOR soldiers about her. They brought her to the Prizren seminary. The complainant in case no. 109/09 states that T.J. also witnessed the killing at the hands of the KLA of her neighbour S.Ž. and S.Ž.’s three year old daughter.
5. The complainants state that the disappearance of Mrs and Mr Mitić was reported to the ICRC, the Yugoslav Red Cross, KFOR, UNMIK, the Serbian Ministry of Internal Affairs and the International Prosecutor’s Office in Prishtinë/Priština. The complainant in case no. 162/09 states that she only reported to the ICRC and did not have any contact with UNMIK.
6. The complainant in cases nos 63/09 and 64/09 states that, through the tracing services of the ICRC he contacted the Albanian neighbours mentioned in § 42 above, hoping to receive more information from them; however, they stated that they had gone to Albania and, when they returned, they had found no one of those who had remained in the village. He states that he also “submitted for a DNA test” without specifying when or with which institution. Further, on an unspecified date, he went to an exhibition in Graçanicë/Gračanica of clothes belonging to missing persons, but he could not recognise anything as belonging to his parents.
7. The complainants submit ICRC tracing requests for Mrs and Mr Mitić indicating 13 June 1999 as the date of their disappearance. Their names appear in two lists of missing persons communicated by the ICRC to UNMIK Police on 12 October 2001 and 11 February 2002 respectively, for which ante-mortem data had been collected. Mrs and Mr Mitić’s names are also included in the databases compiled by the UNMIK OMPF and by the ICMP; the entries concerning Mrs and Mr Mitić in the ICMP online database[[3]](#footnote-3) read in relevant fields “Sufficient Reference Samples Collected” and “DNA match not found”.

*Killing of Mr Radislav Jovanović (case no. 300/09)*

1. The sixth complainant is the son of Mr Radislav Jovanović. In his complaint to the Panel, the complainant stated that his father “was abducted in Mušutište on 13 June 1999” while the latter was with his mother, T.J. In subsequent submissions to the Panel, the complainant also referred to the testimony of T.J., according to which Mr Radislav Jovanović was killed in front of her by KLA members (see § 42 above).
2. The complainant also confirmed that the mortal remains of his father have not been located to date. Indeed, an ICRC tracing request for Mr Radislav Jovanović, indicating 14 June 1999 as the date of his disappearance, remains open. The name of Mr Radislav Jovanović also appears in the database compiled by the ICMP; the entry concerning Mr Radislav Jovanović in the ICMP online database reads in relevant fields “Sufficient Reference Samples Collected” and “DNA match not found”.

*Disappearance of Mr Stanislav Marković (cases nos 113/09 and 162/09)*

1. The fourth complainant is the wife of Mr Stanislav Marković (case no. 113/09). The fifth complainant is the son of Mr Stanislav Marković (case no. 162/09).
2. The complainants state that, on 11 June 1999, the day when most Serbian “villagers” started to leave Mushtisht/Mušutište fearing the “Albanian terrorists”, Mr Stanislav Marković went out of the village to put his cattle out to pasture. Since that day, his whereabouts have remained unknown.
3. The complainant in case no. 162/09 states that “18 villagers” of Mushtisht/Mušutište were abducted by the KLA on the same day as his father. At that time, KFOR soldiers had already entered Suharekë/Suva Reka Municipality. He states that his family received different accounts about his father’s disappearance. According to the account of T.J. (see § 40 above), he was killed on 20 or 21 June 1999: she heard Mr Stanislav Marković’s dogs barking and then a burst of gunfire and then nothing else. According to a different account, he was on his own in Suharekë/Suva Reka when he was abducted. According to a third account, for which the source is not specified, he was kidnapped and taken to the village of “Grkovce” and forced to work as a shepherd there.
4. The complainants state that they reported the disappearance to the ICRC, the Yugoslav Red Cross, UNMIK Police and the International Prosecutor (IP) in Prishtinë/Priština; however they “did not receive any feedback”. The complainant in case no. 162/09 states that, on at least five occasions, he went to Mushtisht/Mušutište village to ask the neighbours about his father, but reportedly they did not know anything.
5. The complainants submit an ICRC tracing request for Mr Stanislav Marković indicating 12 June 1999 as the date of his disappearance. His name appears in two lists of missing persons communicated by the ICRC to UNMIK Police on 12 October 2001 and 11 February 2002 respectively, for which ante-mortem data had been collected. Mr Marković’s name is also included in the databases compiled by the UNMIK OMPF and by the ICMP; the entry concerning Mr Marković in the ICMP online database[[4]](#footnote-4), reads in relevant fields “Sufficient Reference Samples Collected” and “DNA match not found”.

*Disappearance of Mr Božidar Jovanović (case no. 301/09)*

1. The seventh complainant is the wife of Mr Božidar Jovanović.
2. The complainant states that her husband, Mr Božidar Jovanović, was abducted by unknown persons on 11 June 1999. She states that he “stayed at his home in Mušutište, as he trusted the UN Mission to protect the residents of Kosovo and Metohija”.
3. An ICRC tracing request for Mr Božidar Jovanović remains open. His name appears in the OMPF database and in a list of missing persons by the ICRC to UNMIK Police on 11 February 2002, for which ante-mortem data had been collected, as well as in the databases compiled by the UNMIK OMPF and by the ICMP. The entry concerning Mr Jovanović in the ICMP online database[[5]](#footnote-5), reads in relevant fields “Sufficient Reference Samples Collected” and “DNA match not found”.

*Account of the Humanitarian Law Centre on the Mushtisht/Mušutište events*

1. According to the account of the Humanitarian Law Centre, which is based on witness statements, the majority of villagers left Mushtisht/Mušutište immediately after the withdrawal of the Yugoslav Army and the Serbian police from Kosovo, while only 25, mostly elderly persons, remained in the village. Since the village had no phones, the family members of those who remained behind could not contact them. The local priest, F.I., informed the families that he had seen the Serbs from Mushtisht/Mušutište on 15 June 1999 for the last time. A few days later, the village was occupied by the KLA and he was prevented from going there; however, he had been told by people who had subsequently travelled through Mushtisht/Mušutište that the place was inhabited.
2. The Humanitarian Law Centre also refers to the testimony of T.J. (see § 40 above), who was reportedly abducted in Mushtisht/Mušutište by the KLA on 13 June 1999 and released shortly afterwards. T.J. told her grandson that the KLA had “burned her son alive in his house” (case no. 300/09), killed Mrs “Jovana” Mitić, Mr Stanislav Mitić (cases no. 63-66/09, 109/09), Mr Boža Mitić, as well as S.Ž. and her three year old child. In the account of the Humanitarian Law Centre, Mr Božidar Jovanović (case no. 301/09) is indicated as missing since 15 June 1999, but no mention is made of Mr Stanislav Marković (case nos 113/09 and 162/09).
3. **The investigation**
4. In the present case, the Panel received from UNMIK investigative documents previously held by the UNMIK OMPF and UNMIK Police WCIU. The Panel notes that UNMIK has confirmed that all available documents have been provided.
5. Concerning disclosure of information contained in the files, the Panel recalls that UNMIK has made available investigative files for the Panel’s review under a pledge of confidentiality. In this regard, the Panel must clarify that, although its assessment of the present case stems from a thorough examination of the available documentation, only limited information contained therein is disclosed. Hence a synopsis of relevant investigative steps taken by investigative authorities is provided in the paragraphs to follow.
6. The investigative file reveals that investigations into the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović were carried out at different times by different investigative units of the UNMIK Police, as follows.

*On the disappearance of Mrs Jovanka Mitić and Mr Stanislav Mitić*

1. UNMIK Police MPU missing persons cases concerning the disappearance of Mr Stanislav Mitić and Mrs Jovanka Mitić were opened under nos 2002-000208 and 2002-000249 respectively.
2. The investigative file includes MPU Victim Identification Forms for Mr Stanislav Mitić and Mrs Jovanka Mitić. Enclosed are Ante-Mortem Information Forms for each of the missing persons, as previously gathered by the ICRC in Belgrade, which bear no date. In these forms it is stated that the husband and wife went missing together; that their son, the complainant Slavi Mitić, left them in Mushtisht/Mušutište on 23 June 1999; and that, since that day, their whereabouts are unknown. Included in the Ante-Mortem Information Form is the full address, including his telephone number, of the second complainant, Mr Slavi Mitić. The Ante-mortem Information Form for Mrs Jovanka Mitić includes also the full contact details, including an address and telephone number in Serbia proper, for T.J. (see § 40 above), who is this missing person’s mother.
3. Entries in an MPU Case Continuation Report concerning case file no. 2002-000208 indicate that the complete ante-mortem data for Mr Stanislav Mitić, as received from the ICRC, had been entered in the MPU data base between 29 March 2002 and 8 November 2002. An MPU Case Continuation Report concerning case file no. 2002-000249 states that the ante-mortem data for Mrs Jovanka Mitić, as transmitted by the ICRC, had been entered in the MPU database between 4 April and 19 December 2002.
4. The investigative file also contains two, almost identical, Ante-Mortem Investigation reports of the UNMIK Police MPU, one concerning the disappearance of Mr Stanislav Mitić (no. 1154/INV/04, dated 22 December 2004 – 24 December 2004) and the other one on the disappearance of Mrs Jovanka Mitić (no. 0989/INV/04, dated 9 December – 24 December 2004). Both reports state that Mr and Mrs Mitić went missing on 23 June 1999 from Mushtisht/Mušutište; that the case had been reported to the ICRC in Belgrade; and that an MPU file had been opened in 2002. Under the field “Summary of information received to date to start the investigation” the reports read “no sufficient data available in the Victim Identification Form”. Under the field “Further Investigation” the reports state that the investigators had tried to contact the next-of-kin of the victim, but “it was not possible as the persons were not available even over the telephone”. The reports also state “no witness available for this case at this moment” and, in bold format, “this case requires more investigation”. The conclusion of the investigator was that the cases shall remain “pending” with the WCIU. The reports indicate that they had been controlled and approved by the MPU Chief of Investigation.
5. The investigative file also includes a Case Analysis Review Report of the UNMIK WCIU, dated 15 September 2008, concerning the disappearance of Mrs Jovanka Mitić (MPU case no. 2002-000249). In the fields “Priority of the case”, “Status”, “Reason”, the report reads, respectively, “Low”, “Pending”, “Awaiting for further information”. In the field “Comments of the reviewing officer”, the report states “No sufficient data available regarding MP’s identification in the file. The case may be kept pending till further information”. In the field concerning “Blood sample collection for DNA”, it is stated that there was no information as to whether family members had provided blood samples for the purpose of identification.

*On the killing of Mr Radislav Jovanović*

1. The investigative file contains a “Supplement/Continuation Form” of the UNMIK Police, dated 6 December 2001, concerning the murder of Mr Radislav Jovanović. The report states that, on 5 December 2001, an UNMIK Police investigator visited in Prizren the orthodox priest A.[N.], who stated that he was in contact with one person, T.J., who could be the witness in a murder case. According to the priest, T.J. had witnessed the murder of her son, Mr Radislav Jovanović, in the village of Mushtisht/Mušutište in June 1999. She had been brought after the event to the “orthodox church” in Prizren by KFOR soldiers and had subsequently moved to Serbia proper. The priest was still in contact with this witness, who could be easily reached for further information about the case. He had also provided the UNMIK Police with a list of Serbs still missing from the villages of Mushtisht/Mušutište, Dvoran/Dvorane and Popovlan/Popovljane. The list, attached to the report, contains the names and surnames of 22 missing persons, 16 of them from Mushtisht/Mušutište, including Mr Radislav Jovanović, Mr Stanislav Mitić, Mrs Jovanka Mitić, Mr Stanislav Marković and Mr Božidar Jovanović. The report further states that the investigator had checked the name of Mr Radislav Jovanović in the CCIU database and was not able to find any records corresponding to that name.
2. The file also contains a CCIU interoffice memorandum, dated 6 December 2001, which in the field “subject” reads “Possible new file”; in the text of the memorandum it is requested that CCIU officers should verify whether they had a case concerning the killing of Mr Radislav Jovanović registered. In case it was not registered, a decision on “how to handle this case” was requested to be made.
3. With an Initial Report, dated 8 December 2001 and included in the investigative file, the case of Mr Radislav Jovanović is recorded as a murder by the UNMIK Police. The report mentions a witness (T.J., indicated here as D.J.), whose statement had not yet been taken.
4. On 11 December 2001, a CCIU investigator requested the US KFOR Intelligence Unit to check in their database whether they had information on the case of Mr Radislav Jovanović. On 13 December 2001, the same investigator requested the MPU to check again their database for information with respect to Mr Radislav Jovanović and the list of other missing persons from Mushtisht/Mušutište, Dvoran/Dvorane and Popovlan/Popovljane village (see § 66 above).
5. According to a Supplement Continuation Form, dated 11 January 2002, on 10 January 2002, the CCIU investigator visited the orthodox priest A.N. in Prizren in order to gather more information from him about the alleged killing of Mr Jovanović. The report reflects the information provided by the priest that T.J. was brought by KFOR soldiers to the orthodox church in Prizren. She told him that her son had been killed in her presence by “kids” from Mushtisht/Mušutište, whose names were not provided. The priest did not know whether the body of Mr Jovanović had been buried by KFOR, or where. The priest also stated that T.J., who was at that time 93 years old, was living in Serbia proper with her relatives.
6. According to a memorandum of the WCIU, dated 30 September 2003, on 25 September 2003, the investigators contacted the priest A.N. (the same as mentioned in § 66 above) in Prizren and retrieved from him information about how to contact T.J. On the same day, they reached T.J. by phone and asked if she would be available to be interviewed by the UNMIK Police at her address in Serbia proper. On 1 October 2003, T.J.’s nephew contacted UNMIK Police and informed them that an interview could take place at his home, where T.J. was living, provided that there was an authorisation from the Serbian police.
7. On 2 October 2003, investigators checked the list of missing persons given to them by the priest A.N. against the MPU database. From a list attached to the memo, it appears that, of the 23 persons on the list, 10 had been already registered as missing, including Mr Radislav Jovanović, Mr Stanislav Mitić, Mrs Jovanka Mitić, Mr Stanislav Marković and Mr Božidar Jovanović.
8. The file includes the statement of the priest A.N., which was taken on 10 October 2003. In his statement, A.N. stated that he had been a priest in Mushtisht/Mušutište for five years before he left on 16 June 1999, fearing for his life and the life of his family members. According to him, after the arrival of the NATO troops, all Serbian houses in the village were destroyed and many people went missing, as he had already reported to the UNMIK Police in December 2001. At the beginning of July 1999, about 15 days after leaving Mushtisht/Mušutište, he had met T.J. in the orthodox seminary building in Prizren, where she had been brought by KFOR. She told him that she saw her son being killed. She stayed in Prizren for four or five months and then she went to live with her relatives in Serbia proper. The priest showed to the investigators the ruins of T.J’s house in Mushtisht/Mušutište, so that they could take pictures of it.
9. Following a request from the UNMIK CCIU, dated 30 September 2003, the Serbian Ministry of Internal Affairs arranged for UNMIK Police to take a statement from T.J. in her nephew’s house in Serbia proper. In her statement, dated 6 November 2003, T.J., declared that, after the arrival of KFOR, most villagers of Mushtisht/Mušutište left the village, but she and her son Radislav Jovanović stayed. On Sunday, 15 or 16 of June 1999, four KLA members armed with rifles and knifes arrived at their house. After a short conversation and argument, one of them shot Mr Radislav Jovanović. A neighbour, S.Ž, came out as she heard the shooting. T.J. saw the four men dragging her son’s body into her house, searched it probably for valuable items, then they spread gasoline over the body and set it on fire. She spent the night at the neighbour’s house; when she went back to her house the next day she found it burned. She was in her courtyard that afternoon when she heard shots coming from the house of S.Ž.; after 30 minutes she saw that house burning as well. Later, on the same day, two “Albanians” brought her to the “former police station” which was “full of Albanian KLA fighters”; she was kept there for three days and three nights. She stated that an Albanian doctor from the village, whom she identified as “R’s son”, visited her and brought her something to eat and drink and medications. T.J. asked him to check the house of her son-in-law to see whether Mrs Jovanka Mitić and Mr Stanislav Mitić were still alive. Since the doctor never came back, she thought that they had also been killed. After she was released, she went back to what remained of her house and spent a week in an old house in her courtyard. Afterwards, an Albanian neighbour, Ms X., said she would call KFOR as she could not guarantee her safety any longer. Then German KFOR soldiers arrived and brought her to the Prizren seminary, where she stayed until January 2000 and where she met the priest A.N. As she had moved to Serbia proper, she provided a statement of these events to the Serbian Ministry of Internal Affairs. T.J. stated that she did not know any of the KLA fighters and the only person she knew was the above mentioned doctor. She described the person who killed her son, but she was not confident she would be able to recognise him on a photograph. She added that, as far as she knew, she was the only survivor from the 23 Serbs who were in Mushtisht/Mušutište when her son was killed; she did not name any other witnesses. She did not know whether the perpetrators had later removed and buried her son’s body or whether it was still under the ruins of the house, so she requested the investigators to ascertain if that was the case. As the investigators asked her if she knew F.B. (name and surname provided), whose name had been painted on the ruins of her house, as shown in the pictures, T.J. answered that he was from a neighbourhood close to Mushtisht/Mušutište. Referring to a document of the Serbian Ministry of Internal Affairs, the investigators asked T.J. to confirm whether it was true that her son had been stabbed before being shot dead, which she denied. Questioned by the investigators about her neighbour S.Ž. and her daughter, T.J. answered that, since she had heard shots coming from her house and had then seen the house burning, she thinks they had been killed inside the house. She also identified the ruins of her house in a set of six photographs of the house, which had been shown to the UNMIK investigators by the priest A.N. (see § 73).
10. It transpires from an UNMIK Police Investigative Diary concerning the case that, on 25 November 2003, and again on 28 November 2003, UNMIK investigators contacted the priest A.N. enquiring about the Albanian doctor of Mushtisht/Mušutište village; however, he was not able to provide the doctor’s name.
11. In a CCIU Investigation Report of 25 November 2003, the investigator responsible for the case stated that the two available witnesses (priest A.N. and T.J.) in the case had both been interviewed. Neither of them was able to “name or identify” any of the perpetrators. As for the Albanian doctor mentioned by T.J. (“R.’s son”), she was not able to give his full name either. The investigator therefore recommended the closing of the case “until new information may appear” and to communicate to the MPU the full list of missing persons given to them by the priest, so that they could be registered. Following this recommendation, in a letter dated 20 January 2004, the IP of the District Public Prosecutor’s Office in Prizren requested the CCIU to dismiss the case. In the Prosecutor’s view, based on the information available there was “no evidence to initiate a judicial investigation” and no further action could be taken on the matter, unless the witness was able to provide more information about the perpetrators.
12. By an Interoffice memorandum dated 14 March 2004, the CCIU transmitted to the MPU the list of missing persons from Mushtisht/Mušutište, Dvoran/Dvorane and Popovlan/Popovljane village for their action. Concerning the case of Mr Radislav Jovanović, the CCIU stated that as the case was being closed, they were requesting the MPU to verify at T.J.’s house whether his mortal remains were still there.
13. Notwithstanding the decision of the IP not to pursue the case further, it appears that the investigation was re-opened a few months later, following a request from the Head of the DOJ. Included in the investigative file is an interoffice memorandum of 3 August 2004 from the Head of the DOJ Criminal Division to the CCIU Head of War Crimes Unit and the CCIU Commander. In the memorandum, bearing the subject “Allegations of war crimes – Victim: Radovan JOVANOVIC”, it is stated that the file concerning the killing of Mr Jovanović, as well as the abduction by the KLA of Mr Stanislav Mitić and Mrs Jovanka Mitić, was being forwarded. The document further stated that “given the allegations in this case, the investigation should be undertaken by UNMIK Police and not the local KPS officer. Accordingly we would ask that this case is submitted to the analysis cell for an initial review, evaluation and recommendation for further action”. Attached to the memo is a letter, dated 2 February 2004, from the Coordination Centre for Kosovo and Methoija of the Government of Serbia (CCKM) to the “District Office of the Prosecutor in Prizren”, detailing the allegations of T.J. with respect to the killing of Mr Jovanović, the abduction of Mr Stanislav Mitić and Mrs Jovanka Mitić, as well as the killing of S.Ž and her three year old daughter, requesting an interview to be taken and audio recorded from T.J.
14. The file contains the copy of an e-mail dated 10 September 2004 from a DOJ staff member, probably addressed to the CCIU. In the e-mail it is stated that in August 2004 “we requested WC Unit to have an initial review of the letter from the CCKM regarding the murder of Radislav Jovanović … according to my records, there is a CCIU file # 2001-00114 regarding this case. This e-mail intends to follow up if there has been any new development. An interview with the elderly witness appears to be the only chance to move further in this case”.
15. The case of Mr Radislav Jovanović was also registered by the UNMIK Police WCIU under no. 2004-000096. The investigative file contains an Ante-Mortem Investigation Report, dated 7 April 2005, concerning the cases of Mr Radislav Jovanović (no. 2004-000096), S.Ž. (no. 2005-000002), and S.Ž.’s daughter (no. 2005-000003). The report states that, on 9 January 2003, one S.J., reported to the authorities that in June 1999, Mr Radislav Jovanović, as well as his neighbours S.Ž and her daughter, were kidnapped from their houses in Mushtisht/Mušutište by a group of armed KLA members. Under the field “Further Investigation”, the report states that, on 5 April 2005, UNMIK Police had contacted S.J. by telephone. He informed that his report was based on the account of T.J. (here referred to as D.T.), who had seen the perpetrators. According to the report, the latter was 95 years old at that time and, due to hearing problems, she could not be interviewed over the telephone. For this reason, the investigator recommended that a group of investigators should visit the witness in Serbia proper to get a more accurate account of the events. Under the field “Witnesses Interviewed” the report states “None were interviewed”. The investigator also recommended that the case should remain “open pending” with the WCU. The report bears the signature of approval of the WCU Chief of Investigation.
16. A WCIU Case Analysis Report , dated 24 November 2007, cross-referenced to the MPU case no. 2001-00114, reads in the field “summary of the crime” that on 16 June 1999, a group of armed Albanians wearing KLA insignias arrived at the house where T.J. was living, in Mushtisht/Mušutište village. They started arguing with Mr Radislav Jovanović, the son of T.J. and shot him dead; this was witnessed by T.J. Thereafter, they poured gasoline over Mr Radislav Jovanović’s body, dragged him into one of the rooms and set the house on fire. T.J. was then brought to a former police station occupied by the KLA and illegally detained there for three days. She never saw her son again. In the field “number of total victims” it is stated “3”; under “number of victim statement” it reads “1”; in the field “number of known witnesses” and “number of witness statements” it indicates “2”. In the field “brief description of evidence” it reads “No evidence. All statements have been properly recorded”. At the end of the report, the investigator states that the closure of the case due to lack of evidence was recommended. According to the investigator, there was only one possibility to identify the perpetrators, which was through the testimony of T.J. However the mother of the victim “was not able either to identify nobody in a photo-lineup and neither to give us any other relevant information regarding the assailants in her statement”. The investigator further noted that the witness was at that time “well on in years (95)” and living in Serbia proper. For this reason, it was recommended to temporarily close the case “until such a time new evidence should be gathered”.
17. The file further contains a printout of the UNMIK WCIU, generated on 15 December 2007, related to case no. 2001-00114, which indicates that the case had been recorded on 16 December 2001 and updated on 14 March 2004. The report states that “after the witnesses were interviewed, and shown photo line-ups, they were still not able to conclusively identify any of the perpetrators”. Thereafter, in consultation with the IP, it was decided that there was insufficient evidence to initiate a “judicial investigation” and that the file should be placed in the “inactive list”. In the list of victims the report indicates, in addition to Mr Radislav Jovanović, also Mr Stanislav Mitić and Mrs Jovanka Mitić. Under “Witnesses”, the report indicates, in addition to T.J., also A.N. (the priest).

*On the disappearance of Mr Stanislav Marković*

1. It appears that a missing person case on Mr Stanislav Marković was opened by the UNMIK Police MPU in 2002 under case file no. 2002-000166.
2. Included in the investigative file is an undated MPU Victim Identification Form for Mr Stanislav Marković, case no. 2002-000166, and an Ante-Mortem Information form filled in by the ICRC in Belgrade, which also bears no date. It is stated in the Ante-Mortem Information Form that Mr Marković had disappeared on 13 June 1999, along with three other persons, Mr Marko Marković, Marko Nikolić and Cveta Nikolić, as they had remained in their houses in the Mushtisht/Mušutište village. Entries in an MPU Case Continuation Report indicate that the ante-mortem information concerning Mr Stanislav Marković was inputted into the MPU database between 13 March and 10 December 2002.

1. The investigative file contains an Ante-Mortem Investigation Report of the UNMIK Police WCU referring to the case of Mr Marković, MPU case no. 2002-000166, which is dated 31 January 2005. In the field “data of witness” the report indicates the name, surname and town of residence in Serbia proper of V.M., the missing person’s sister. In the fields “further investigation” and “witness interviewed” the report states, respectively, “witness lives in Serbia proper, no telephone number” and “none”. Under “Statement of the witness”, the report reads “The report states that Mr Marković disappeared on 13 June 1999, along with three other persons, namely Mr Marko Marković, Marko Nikolić and Cveta Nikolić and that missing persons had remained in their houses in the village”. The conclusion of the investigator is that “after investigations, it’s impossible at this time to find an impartial witness around the place event. No information leading to a possible MP’s location. This case should remain pending within the WCU. The report bears the signature for approval of the WCIU Chief of Investigation.
2. Enclosed in the investigative file is also the copy of the undated criminal complaint filed against unknown perpetrators by the complainant Mr Todor Marković with the IP of the District Public Prosecutor’s Office in Prizren. In the complaint, it is stated that Mr Stanislav Marković was abducted by KLA members on 11 June 1999 from his house in Mushtisht/Mušutište and that from that time his whereabouts had remained unknown. The disappearance had been reported to the KFOR, who probably had official records of it, the ICRC and all “international state institutions in Kosovo”. However, the complainant had received no information about the fate of his father. No evidence in the file indicates that there was a follow-up to this criminal complaint.

*On the disappearance of Mr Božidar Jovanović*

1. Among the documents concerning the disappearance of Mr Božidar Jovanović is an undated ICRC Ante-Mortem Investigation Form which states that he disappeared from Mushtisht/Mušutište on “13 or 14 June 1999”, and also indicates that the victim’s wife and son were living in a collective centre for displaced persons.
2. Enclosed in the file is also a one page agenda of a meeting of the Joint Working Group on Identification and Exhumation, dated 11 December 2001. The name of Mr Božidar Jovanović appears among the agenda items and a hand written note by his name states “in progress”.
3. The last document in the investigative file is an MPU Case Continuation Report for the case of Mr Božidar Jovanović, registered under case file no. 2003-000119. An entry dated 2 May 2003 indicates that, on that day, the ante-mortem information had been put into the MPU database.
4. The file also contains an interoffice memorandum from the Head of the UNMIK Belgrade Office to the Head of the MPU, with a letter from the victim’s sister addressed to the SRSG. In the letter, dated 30 July 2007, Mr Božidar Jovanović’s sister stated, among other things, that she did not have any news about her brother who had remained in Mushtisht/Mušutište. She had informed the Humanitarian Law Centre, the ICRC and the Yugoslav Red Cross about his disappearance. In an MPU Case Continuation Report on Mr Božidar Jovanović it is stated that, after a first check, it appeared that there was no trace of him in the MPU database. The Report further indicates a to-do-list for the MPU in Belgrade (check the “Serb DB in Pristina” for further info; enquire for further information at the Humanitarian Law Centre; verify whether ICRC had gathered ante-mortem information and, if not, ask them to do so; subsequently forward the whole file to Prishtinë/Priština and “keep the head of office informed (written) about the steps taken in this file”) and in Prishtinë/Priština (open a file in the MPU database; inputting ante-ante mortem information in the database and conduct regular follow-ups).
5. The file also contains copy of the second page of a response letter signed by the Director of the UNMIK DOJ, to the victim’s sister. With respect to the disappearance of Mr Božidar Jovanović, the letter states “I also understand that you have not registered the matter with the UNMIK Missing Persons Unit. I invite you to do so by visiting the Unit’s office in Gracanica (Kosovo) on Fridays between 10.00 and 14.00 (the office is located behind the municipality of Gracanica), either in person or alternatively through another close relative or family member. If it is not possible … then please contact the UNMIK Liaison Office in Belgrade which may be able to assist further”.
6. **EULEX clarification**
7. As mentioned above (§ 5), 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 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).”
8. 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.
9. 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 Smiljana Đekić (case no. 109/09), 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.”
10. **THE COMPLAINTS**
11. The complainants complain about UNMIK’s alleged failure to properly investigate the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović. In this regard the Panel deems that the complainants invoke a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
12. The complainants also complain about the mental pain and suffering allegedly caused to them by this situation. In this regard, they rely on Article 3 of the ECHR.
13. **THE LAW**
14. **Alleged violation of the procedural obligation under Article 2 of the ECHR**
	1. **The scope of the Panel’s review**
15. 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 for the first time 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.
16. Before turning to the examination of the merits of the complaints, the Panel needs to clarify the scope of its review.
17. 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.
18. 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.
19. 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 § 99). 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.
20. 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**
21. The complainants in substance allege violations concerning the lack of an adequate criminal investigation into the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović. The complainants also state that they were not informed as to whether an investigation was conducted and what the outcome was.
22. The SRSG notes in his submission, dated 10 December 2013, that in this case UNMIK has been able to obtain copies of relevant files previously held by the OMPF and UNMIK Police War Crime Investigation Unit. However, the SRSG states that UNMIK reserves its right to present additional comments on the matter “at any further stage, should additional pertinent files be made available to it”.
23. In his comments on the merits of the complaint under Article 2, the SRSG does not differentiate between the case of Mr Radislav Jovanović and those of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković, Mr Radislav Jovanović and Mr Božidar Jovanović and states that they all disappeared in life threatening circumstances, around the same days on which the UNSC Resolution No. 1244 (1999) establishing UNMIK was adopted. He notes that at that time the security situation in Kosovo was tense: “KFOR was still in the process of reaching sufficient strength to maintain public safety and law and order and there were a number of serious criminal incidents targeting Kosovo-Serbs, including abductions and killings”.
24. The SRSG accepts UNMIK’s responsibility to conduct an investigation in the cases of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković, Mr Radislav Jovanović and Mr Božidar Jovanović under Article 2 of the ECHR, procedural part, starting from 11 June 1999. 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”.
25. The SRSG notes that the complainants do not allege a violation of the substantive part of Article 2, but rather of its procedural element. The SRSG states that “the procedural element of Article 2 is essentially two-fold: (i) an obligation to determine through investigation the fate and/or whereabouts of the victim; 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 victim.”
26. The SRSG further observes that when determining applications under Article 2, procedural part, 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. Furthermore, after a long and brutal war, Bosnia and Herzegovina underwent fundamental overhaul of its internal structure and political system: Entities and Cantons were set up pursuant to the Dayton Peace Agreement, power-sharing arrangements were introduced in order to ensure effective equality between the “constituent peoples” in the post-conflict society (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos 27996/06 and 34836/06, ECHR 2009‑...), new institutions had to be created and the existing ones had to be restructured. Some reluctance on the part of the former warring parties to work with those new institutions could be expected in the post-war period, as evidenced in the present case. While it is difficult to pinpoint when exactly this process ended, the Court considers that the domestic legal system should have become capable of dealing effectively with disappearances and other serious violations of international humanitarian law by 2005, following comprehensive vetting of the appointment of police and judiciary and the establishment of the War Crimes Sections within the Court of Bosnia and Herzegovina.

All this considered and since there has been no substantial period of inactivity post-2005 on the part of the domestic authorities in the present case, the Court concludes that, in the circumstances obtaining at the material time, the domestic criminal investigation can be considered to have been conducted with reasonable promptness and expedition”.

1. In the view of the SRSG, UNMIK was faced with a very similar situation in Kosovo “from 1999 to 2008” as the one in Bosnia “from 1995 to 2005”. The SRSG states that thousands of people were displaced or went missing during the Kosovo conflict. Many of the persons who went missing were abducted, killed, and buried in unmarked graves inside or outside Kosovo, which made it very difficult locating and recovering their mortal remains.
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 “testament to the vigour of its work between 2002-2008” and that “more bodies continued to be located in burial sites and more identifications and returns to family members are taking place, often based on information contained in UNMIK-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 International Commission on Missing Persons, the International Committee of the Red Cross 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 such a force did not exist in Kosovo in the aftermath of the conflict. In the policing vacuum following the end of the conflict, UNMIK had to build a new Kosovo Police Service from scratch, a long and challenging task, which, according to the SRSG, is still in progress. The SRSG also states that UNMIK Police faced numerous challenges in exercising law enforcement functions gradually transferred to it by KFOR in 1999-2000. In this regard, he refers to the UNMIK Police Annual Report of 2000 describing the situation as follows:

“UNMIK Police had to deal with 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 Police WCIU included both international UNMIK Police and local Kosovo Police Service officers and focused on the criminal investigation of cases of missing persons. Their responsibility included locating illicit graves, identifying the perpetrators and collecting evidence relating to the crime. 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.
2. He further states that, after the conflict, all local institutions in Kosovo, including law-enforcement institutions and those responsible for locating the missing, were non-functional and had to be established from scratch. In addition, 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.
3. With regard to the case of Mr Radislav Jovanović, the SRSG states that a Police file on his alleged killing was opened in December 2001. At this time, UNMIK Police visited for the first time the priest and witness A.N. and sent communications to the US Intelligence Unit at KFOR, the UNMIK MPU and the German KFOR to ask for database checks with respect to Mr Radislav Jovanović. The Police again visited A.N. in January 2002.
4. In September 2003, upon review of the file by the DOJ, the case was reassigned to a CCIU WCU investigator. The SRSG states that, at this moment, no information on the case of Mr Radislav Jovanović could be found in the CCIU database. In October 2003, the CCIU WCU investigator contacted A.N. again, took from him a witness statement and the contact details of the other witness, T.J., and was brought by him to the crime scene in order to take pictures of the victim’s property and create a “photo line-up”. In November 2003, a witness statement from T.J., was taken by the investigator in Belgrade, Serbia proper. According to the SRSG, however, T.J. “did not provide UNMIK Police with information useful for investigative purposes”. In particular, she provided only “a very generic physical description of the man who killed her son” and “she was not sure whether she could recognise him in a picture”. She was unable to provide any other name of possible witnesses or suspects in the village, apart from the name of the medical doctor from the village who assisted her while in detention. She was unable to indicate whether her son’s mortal remains had remained among the ruins of the house or had been taken away by the perpetrators and she was unable to say whether a villager named “F.B”, whose name and surname had been written on the ruins of her property, could be related to the killing of her son. For this reason, in January 2004, the UNMIK IP in Prizren, to whom the file had been transmitted, deemed that there was insufficient evidence to initiate a judicial investigation on the matter. In March 2004, the CCIU WCU requested the MPU to register Mr Radislav Jovanović as missing.
5. The SRSG also states that, later on, in August 2004, the Head of the DOJ Criminal Division, following a report from the Serbian Government, requested an investigation be undertaken by UNMIK Police “and not by local Kosovo Police officers” and that the case be submitted to the analysis cell for an initial review, evaluation and recommendation for further action.
6. The case was further reviewed by UNMIK Police in 2007, when a WCU international investigator noted that there was no evidence that all statements had been recorded and recommended the closure of the case. The SRSG makes reference to the UNMIK Police Case Report stating that “after the witnesses were interviewed, and shown photo line-ups, they were still not able to conclusively identify any of the perpetrators”.
7. As for the disappearance of Mr and Mrs Mitić, the SRSG states that tracing requests for each of them were issued by the ICRC in November 1999 and that missing person files were opened by the UNMIK MPU in March-April 2002. The investigators tried to contact family members by phone, to no avail. The case was reviewed in September 2008; however due to lack of information on the whereabouts of the missing persons, it was kept pending “till further information”.
8. Concerning the disappearance of Mr Božidar Jovanović, the SRSG states that an ICRC tracing request was opened in February 2001 and that an MPU missing person file was opened “only on 2 May 2003”.
9. On the disappearance of Mr Stanislav Marković, a tracing request was issued by the ICRC in June 2000 and an MPU missing person file opened in March 2002. In January 2005, as there was no information on the whereabouts of the missing person, the case was considered open and inactive.
10. In light of the above, the SRSG states that according to the investigative files provided, “UNMIK complied with its obligation to promptly open and pursue a police investigation wherever relevant information was available. UNMIK Police interviewed the only two witnesses, even though they were not able to provide conclusive information to determine the fate and whereabouts of Mr Stanislav Mitić, Mrs Jovanka Mitić and Mr Radislav Jovanović and identify their perpetrators”. As for Mr Božidar Jovanović and Mr Stanislav Marković, the investigative file, according to the SRSG “reveals an overall dearth of information”. All investigations were pursued until 2007-2008 following up “all relevant investigative leads when possible”.
11. The SRSG also recalls the argument made in other missing persons cases that “without witnesses coming forward with credible investigative leads or without physical evidence being discovered, police investigations inevitably stall because of lack of evidence”. The SRSG states that “in the period under review by the HRAP, no further witnesses of the alleged disappearances came forward and no physical evidence could be discovered by the investigators”.
12. The SRSG therefore argues that UNMIK Police acted in accordance with the procedural requirements of Article 2 of the ECHR.
13. The SRSG further states that “as there is the possibility that additional and conclusive information exists, beyond the documents mentioned above, UNMIK reserves its right to make further comments on the matter”. 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**
14. The Panel considers that the complainants invoke a violation of the procedural obligation stemming from the right to life, guaranteed by Article 2 of the ECHR in that UNMIK Police did not conduct an effective investigation into the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović.
15. *Submission of relevant files*
16. The SRSG observes that all available files regarding the investigation have been presented to the Panel. However, in his comments of 10 December 2013, the SRSG suggests that the investigative files might be incomplete (see § 104 above). Nevertheless, on 21 February 2014, UNMIK confirmed to the Panel that disclosure may be considered complete (see § 24 above).
17. As mentioned above the Panel had also requested EULEX to provide additional information in relation to this case (§§ 5 and 7), but EULEX was unable to do so (see §§ 92-94 above).
18. 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 complaints. 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, *Çelikbilekv. Turkey*, no. 27693/95, judgment of 31 May 2005*,* § 56).
19. The Panel also notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigation to their handing over, is crucial to the continuation of such investigations and could thus raise *per se* issues under Article 2. The Panel likewise notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.
20. 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 complaints on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of 15 March 2011, § 146).
21. *General principles concerning the obligation to conduct an effective investigation under Article 2*
22. 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.
23. In order to address the complainants’ 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).
24. 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 § 102 above, at § 136).
25. 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).
26. 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 § 102 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 in § 135 above, at § 312; and *Isayeva v. Russia*, cited in § 135 above, at § 212).
27. 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 § 133 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 Mazărev. Romania*, no. 64301/01, judgment of 1 December 2009, § 105).
28. Specifically with regard to persons disappeared and later found dead, which is not the situation in this case, the Court has stated that the procedures of exhuming and identifying mortal remains do not exhaust the obligation under Article 2 of the ECHR. The Court holds that “the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for, and it is thus of a continuing nature” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 136 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 102 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, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 102 above, at § 145). While the location and the subsequent identification of the mortal remains of the victim may in themselves be significant achievements, the procedural obligation under Article 2 continues to exist (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, at § 64).
29. 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 § 135 above, at §§ 311‑314; ECtHR, *Isayeva v. Russia*, cited in § 135 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).
30. 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).
31. *Applicability of Article 2 to the Kosovo context*
32. The Panel is conscious of the fact that the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović took place shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.
33. 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.
34. The Panel considers that the SRSG’s arguments raise two main questions: first, whether the standards of Article 2 continue to apply in situation of conflict or generalised violence and, secondly, whether such standards shall be considered fully applicable to UNMIK.
35. 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).
36. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court on Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see, among other examples, ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 136 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 § 139 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 § 135 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 135 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
37. The Court has acknowledged that “where the death [and disappearances] to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed” (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom,* cited above, at § 164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that “the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 133 above, at §§ 86‑92; ECtHR, *Ergi v Turkey,* cited above, at §§ 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 in § 135 above, at §§ 215‑224; ECtHR, *Musayev and Others v. Russia*, nos 57941/00 and others, judgment of 26 July 2007, §§ 158-165).
38. 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 § 132 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).
39. 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, 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 § 34 above).
40. 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 § 136 above, § 70; *Brecknell v. The United Kingdom,* no. 32457/04, judgment of 27 November 2007, § 62).
41. However, the Panel considers that, in the context of most serious crimes committed against civilian populations, Article 2 requires that the authorities take all investigative efforts in order to establish the facts and bring perpetrators to justice. Such cases shall be given the highest priority.
42. 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 therefore determines 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.
43. *Compliance with Article 2 in the present case*
44. Turning to the circumstances of the present cases, the Panel notes that there were flaws and delays in the conduct of the investigation from its inception, having in mind that the initial stage of the investigation is of the utmost importance. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 102), 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 (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 136 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 §§ 36-37 above).
45. 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 § 37 above); and third, that the investigative files could be traced and retrieved, should a need arise at any later stage.
46. 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.
47. The Panel notes especially an important facts related to this particular case: the response from EULEX to the Panel’s request for information (see §§ 92-94 above), in which 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, this fact is particularly indicative of a possible general failure to comply with the obligation to ensure the proper handover of the investigative material.
48. Concerning the disappearance of Mr Stanislav Mitić and Mrs Jovanka Mitić (cases no. 63-66/09 and 109/09), the Panel notes that UNMIK became aware of the matter at the latest in October 2001, when UNMIK Police received their ante-mortem information from the ICRC. However, UNMIK MPU opened a case file on the matter only at some time in 2002.
49. The Panel further notes that the only activity undertaken by the UNMIK Police at this stage was to record in the MPU database the ante-mortem information previously gathered by the ICRC. According to the investigative file, not a single attempt, until November 2003, was made to contact T.J., the mother of Mrs Jovanka Mitić and the only eye-witness to the Mushtisht/Mušutište events, whose full contact details had also been provided by the ICRC in 2001. The Panel also notes that such a delay in interviewing such an elderly witness could have resulted in the loss of her valuable testimony. Further, only in December 2004, did the investigators make one, unsuccessful attempt to contact the victims’ family members in order to gather further information.
50. With respect to the killing of Mr Radislav Jovanović, the Panel notes that the killing was first reported to the UNMIK CCIU in December 2001. At this time, the priest who reported the incident also provided the UNMIK Police with the full list of persons who had gone missing in Mushtisht/Mušutište since June 1999 and made himself available to establish a contact with the main eye-witness to the case, T.J. UNMIK Police took its first action on this report only about two years later, when witness statements were taken from the priest and T.J., in September and November 2003 respectively. Around this same time, UNMIK investigators visited for the first time the alleged crime scene and took pictures of the victim’s house (these pictures will be mistakenly referred to by the investigators subsequently assigned to the case as “photo line-up” of the perpetrators, see § 82). However, there is no indication that the investigators properly inspected the crime scene or tried to identify and interview individuals residing in Mushtisht/Mušutište and neighbouring areas (for example the “Ramice quarter” indicated as the place of one of the perpetrators), who were present in the village at the time of the alleged abduction (such as the Albanian neighbours who called the KFOR in order to protect T.J. in June 1999), and who thus may have witnessed something (“canvassing” the area) or persons (such as the Albanian neighbours who reportedly asked the KFOR to protect T.J) who might provide further information on the limited leads available (including the name and surname painted in red on the victim’s house, or the identity of the village doctor who had visited T.J. while in KLA detention). In this respect, the investigative file shows that the only avenue used by UNMIK Police to trace this potential key witness was to ask twice the priest A.N. if he knew the person.
51. The Panel also notes with concern that, although the CCIU had received information since 2001 of about 20 persons who had gone missing from the same area and during the same time as the killing of Mr Radislav Jovanović occurred, no effort was made by the investigators to place all those events in context and to determine a strategy to conduct a joint and systematic investigation into all those crimes. Notwithstanding these gaps, the case was dismissed by an IP in January 2004. Only then, three years after the initial report of the killing, did UNMIK Police request the MPU to include Mr Radislav Jovanović in their list of missing persons and to cross check in their databases the names in the list of missing persons from Mushtisht/Mušutište and neighbouring villages.
52. The Panel also notes that, despite the assessment of the prosecutor, the investigation into the case was revived by UNMIK WCIU under a different case no. (see § 80 above) at the request of the Government of Serbia, in August 2004. At this time the investigators acknowledged that the only way to move the case forward was by interviewing the witness T.J. and a recommendation was made to undertake an audio-interview in consideration of her age and health situation. There is no indication in the file that this was done.
53. Concerning the disappearance of Mr Stanislav Marković, the Panel notes that UNMIK became aware of the matter at the latest in October 2001 but that a missing person file was opened by the MPU only in March 2002. As acknowledged by the SRSG, no action whatsoever was taken with respect to this case, apart from the registration of the ante-mortem data gathered by the ICRC.
54. As for the disappearance of Mr Božidar Jovanović, the Panel notes that, according to the investigative file, UNMIK should have been aware of the matter from December 2001, as his name was included in the list of missing persons from Mushtisht/Mušutište provided to the Police by the priest A.N. Further, his name was also included in the list of missing persons communicated by the ICRC to UNMIK in February 2002. However, it appears from the investigative file that his case was recorded by the MPU only in May 2003. It appears also that, following the registration, the MPU could not trace this case file in the database, for reasons that are not explained (see § 170 below).
55. The Panel also notes that, from 2001, the investigators had become aware that the victims had all disappeared in the same days during a KLA attack on the village and probably at the hands of the same perpetrators. Nonetheless the investigative file shows that no systematic and coordinated investigation into those events was initiated in an attempt to establish connections between the different cases.
56. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that after that critical date the failure to conduct the necessary investigative actions persisted, thus, in accordance with the continuing obligation to investigate (see § 138 above), bringing the assessment of the whole investigation within the period of the Panel’s jurisdiction.
57. The Panel considers that, as the mortal remains of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Radislav Jovanović, Mr Stanislav Marković and Mr Božidar Jovanović had not been located and those responsible for the crime had not been identified, UNMIK was obliged to use the means at its disposal to regularly review the progress of the investigation to ensure that nothing had been overlooked and any new evidence had been considered, as well as to inform his relatives regarding any possible new leads of enquiry.
58. In this respect, the Panel notes that no meaningful actions were carried out to further review or investigate the cases during this period. Concerning the disappearance of Mrs Jovanka Mitić and Mr Stanislav Mitić, it transpires from the investigative file that their case was reviewed in September 2008. The reviewing investigator noticed that by that time, almost six years after a missing person file had been opened, no DNA samples had been taken from the victims’ family members for the purpose of identification. He also stated that there was not sufficient information on the identification of the missing persons; however no recommendation was made or action taken in order to fill these information gaps.
59. Concerning the case of Mr Radislav Jovanović, the Panel notes that, in 2004, the MPU had been instructed to verify if there was any trace of his mortal remains at the scene of the crime, under the burnt ruins of his house (see § 74). However, there is no evidence in the file that this was done by the MPU. Further, there is no indication in the file that a further interview of T.J., the only eye-witness, was conducted and audio-recorded as had been deemed necessary when the case had been re-opened by the WCIU in August 2004 (see §§ 79-80). The Panel notes that, when the case was further reviewed in 2007, it was dismissed based on the assumption that all leads had been properly followed and that T.J. had not been able to identify her son’s killer in a supposed “photo line-up” organised by the UNMIK Police. The Panel notes with concern the inadequacy of this review, as the reviewing investigators confused the set of photographs taken by the UNMIK Police in 2001 at the scene of crime in Mushtisht/Mušutište (and recognised as such by T.J.), with a photo line-up of possible perpetrators of the crime, which indeed never apparently took place (see §§ 74 and 82 above).
60. In response to the SRSG’s argument that the witness T.J. did not provide the Police with conclusive information concerning perpetrators, the identity of other witnesses (the village doctor), the location of her son’s mortal remains, and the possible connection to the case of the person whose name had been written on the walls of her house, the Panel notes that, it is normally the responsibility of the investigative authorities to follow up the leads and to corroborate the albeit limited information provided by witnesses and considers that UNMIK did not take all reasonable steps in this regard.
61. Concerning the disappearance of Mr Stanislav Marković and of Mr Božidar Jovanović, the Panel notes that, in the period under the jurisdiction of the Panel, no action whatsoever was taken with a view to gathering further information on these cases and that no attempt was made to trace the complainants or any other potential witness, or to better understand the circumstances of their disappearance.
62. With particular respect to Mr Božidar Jovanović, the Panel has already noted that, notwithstanding the fact that this case had been recorded by UNMIK MPU in 2003, the MPU investigators tasked to trace the file at the request of the SRSG in 2007, could not find any record concerning the missing person. Based on the results of this search, the Director of the DOJ advised the victim’s sister, at that time living in Serbia proper, to register the disappearance of her brother at the MPU Office in Graçanicë/Gračanica. Around the same time, a list of actions was prepared by the MPU to gather more information on the case; however, there is no indication in the file that any of those actions was ever undertaken.
63. The Panel further notes the SRSG’s argument that these cases were characterised by a “dearth of information”. The SRSG also states that no further witnesses came forward and no new evidence could be discovered in the period under review. In this respect, the Panel holds that finding the necessary information to fill the gaps of an investigation is the main goal of any investigative activity. Therefore, a lack of information should not be used as an argument to defend inaction by the investigative authorities. As has been shown, instead of actively searching for information and leads, UNMIK Police simply waited for further information to appear by itself.
64. The Panel has already noted that no effort was made by the investigative authorities to investigate in a systematic and coordinated manner the disappearance of about 20 persons from Mushtisht/Mušutište village in June 1999 during a concerted KLA action which appears to the Panel to be an operation of ethnic cleansing. The Panel also notes that this failure continued during the period under review as, by this time, no system seems to have been put in place by the UNMIK Police to establish effective coordination among its different units and to avoid overlapping. In this respect, the Panel also notes that no effort was made by UNMIK Police to follow an obvious line of enquiry leading to the KLA group controlling Mushtisht/Mušutište and nearby villages, which in the statements of the witnesses had been responsible for crimes against the civilian inhabitants of the area.
65. The apparent lack of any adequate 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.
66. 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.
67. The Panel considers that, having regard to all the circumstances of the particular case, not 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 not adequate and did not comply with the requirements of promptness, expedition and effectiveness (see § 136 above), as required by Article 2.
68. 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.
69. In this regard, the Panel has already noted that the investigative file shows that, aside from one single attempt made by the UNMIK Police to contact the first complainant by phone, there has been no other contact between UNMIK and the complainants with respect to the investigation. The Panel therefore considers that the investigation was not accessible to the complainants as required by Article 2.
70. In light of the deficiencies and shortcomings described above, and having considered the gravity and dimension of the crimes committed as well as the harm suffered by the victims and their families in cases like the present one, the Panel concludes that UNMIK failed to carry out an effective investigation into the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović. There has been accordingly a violation of Article 2, procedural limb, of the ECHR.
71. **Alleged violation of Article 3 of the ECHR**
72. The Panel considers that the complainants invoke, in substance, a violation of the right to be free from inhumane or degrading treatment, guaranteed by Article 3 of the ECHR.
73. **The scope of the Panel’s review**
74. 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 §§ 97- 102 above).
75. The Panel recalls that the European Court of Human Rights has found on many occasions that a situation of enforced disappearance gives rise to a violation of Article 3 in respect of close relatives of the victim. It emphasises that, concerning Article 3, “the essence of such a violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention” (see, e.g., ECtHR [GC], *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR [GC], *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, *ECHR*, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, cited in § 146 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 136 above, at § 74; ECtHR, *Alpatu Israilova v. Russia*, no. 15438/05, judgment of 14 March 2013, § 69; see also HRAP, *Zdravković*, no. 46/08, decision of 17 April 2009, § 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).
76. 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).
77. **The parties’ submissions**
78. Concerning the killing of Mr Radislav Jovanović, the complainant in case no. 300/09 in substance complains that, as a result of UNMIK’s failure to properly investigate the case and take all necessary steps in order to locate his father’s mortal remains and return them to the family, he endured mental suffering in violation of Article 3.
79. The complainants also in essence allege that the lack of information and certainty surrounding the disappearance of their family members, particularly because of UNMIK’s failure to properly investigate their case, caused mental suffering to them and their family.
80. With respect to Article 3, the SRSG does not dispute the mental anguish and suffering of the complainants; however he argues that this is not attributable to UNMIK as it is rather “a result of the inherent suffering caused by the disappearance of a close family member and the unfortunate fact that to date, despite efforts, the authorities have been unable to determine the whereabouts of the missing persons”.
81. While acknowledging that, with respect to the conduct of authorities in response to enquiries by the family, a violation can be found depending on the reactions and attitudes of authorities when the situation is brought to their attention, the SRSG states that there is no documentation on record to indicate that the complainants, in the period under review by the HRAP, made enquiries to UNMIK MPU and WCU.
82. The SRSG states that it is clear from the investigative file that UNMIK “remained seized” of the matters and “actively undertook investigations”. There are no allegations by the complainants of any bad faith on the part of UNMIK personnel involved in the matter or of any attitude by UNMIK that would have evidenced “disregard for the seriousness of the matter or the emotions of the complainants”. Therefore, the SRSG argues that there is no documentation or claim that UNMIK acted inappropriately or with an attitude amounting to a violation of Article 3 of the ECHR.
83. The SRSG therefore argues that there has been no violation of Article 3.
84. **The Panel’s assessment**
85. *General principles concerning the obligation under Article 3*
86. 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.
87. 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 § 132 above, at § 150).
88. 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.
89. 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. Urugay*, 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 v. Dominican Republic*, 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, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), § 5.7).
90. 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, Judgement of 29 May 2009, at § 159; ECtHR, *Er and Others v. Turkey*, cited in § 181 above, at § 94).
91. 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 complainants 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, *Er 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).
92. The Court has exceptionally found a violation of Article 3 also in those cases, including instantaneous killings, where there was not a distinct long-lasting period during which relatives sustained uncertainty, anguish and distress characteristic to the phenomenon of disappearances but where the corpses of the victims were “dismembered and decapitated and where the applicants had been unable to bury the dead bodies of their loved ones in a proper manner, which, according to the Court, “in itself must have caused them profound and continuous anguish and distress”. The Court thus considered that “in the specific circumstances of such cases the moral suffering endured by the applicants had reached 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” (see, ECtHR, *M. and Others v. Italy and Bulgaria*, no. 40020/03, judgment of 31 July 2012, § 75; ECtHR, *Khadzhialiyev and Others v. Russia*, no. 3013/04, judgment of 6 November 2008 § 121; and ECtHR, *Akpınar and Altun v. Turkey*, no. 56760/00, § 86, 27 February 2007).
93. 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 led to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated” (HRC, *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, cited in § 147 above, at § 11.7).
94. The Panel also takes into account that according to the European Court, the analysis of the authorities’ reaction should not be confined to any specific manifestation of the authorities’ attitudes, isolated incidents or procedural acts; on the contrary, in the Court’s view, an assessment of the way in which the authorities reacted to the applicants’ enquiries should be global and continuous (see ECtHR, *Açiș v.Turkey*, no. 7050/05, judgment of 1 February 2011, § 45).
95. 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 § 193 above, at § 109; ECtHR, *Gelayevy v. Russia*, no. 20216/07, judgment of 15 July 2010, § 147; ECtHR, *Bazorkina v. Russia*, cited in § 146 above, at § 140).
96. 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.
97. 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).
98. *Applicability of Article 3 to the Kosovo context*
99. 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 §§ 141-151 above).
100. 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 § 34 above).
101. 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.
102. 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.
103. *Compliance with Article 3 in the present case*
104. Against this background, the Panel discerns a number of factors in the present cases which, taken together, raise the question of violation of Article 3 of the ECHR.
105. The Panel notes the proximity of the family ties between the complainants and the victims in these cases. The complainants are the sons and daughters or spouses to the victims.
106. The Panel further notes that it appears that the complainants were never directly contacted by UNMIK authorities during the investigation, including for the purpose of gathering further information on the abduction or providing an update on the investigation.
107. At the outset, with respect to the killing of Mr Radislav Jovanović (case no. 300/09), the Panel recalls the case-law of the European Court of Human Rights and its own case-law that the application of Article 3 generally does not extend to the relatives of a person who has been killed in the case of an instantaneous death (see ECtHR, *Bitiyeva and X v. Russia*, nos 57953/00 and 37392/03, judgment of 21 June 2007, § 152; ECtHR, *Udayeva and Yusupova* *v. Russia*, no. 36542/05, judgment of 21 December 2010, § 82; see also HRAP, *Filipović*, case no. 92/09, decision of 11 August 2011, at §§ 21-22). The Panel notes that the instant case differs in that, notwithstanding the eye-witness testimony of T.J. that Mr Radislav Jovanović was killed, his mortal remains were never located and, for this reason, he is still reported as missing by the ICRC and the ICMP.
108. The Panel has already noted UNMIK’s failure to conduct an effective investigation into this case under Article 2 of the ECHR. In particular, the Panel has noted that, after recording Mr Radislav Jovanović as missing, the UNMIK MPU never followed up on T.J.’s and the investigators’ request (see § 74) to verify if Mr Radislav Jovanović’s mortal remains were still in the house where he had been killed and reportedly burnt. In the context of Article 3, the Panel considers that, because of UNMIK’s omission, the complainant and his family were left in a situation of uncertainty concerning the whereabouts of Mr Radislav Jovanović’s mortal remains and were deprived for a number of years of the possibility of giving him a decent burial. The Panel thus considers in the specific circumstances of this case, having also in mind the advanced age of the victim’s mother, that the suffering endured by the complainant and his family has reached 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, amounting to a violation of Article 3 (see ECtHR, *Khadzhialiyev and Others v. Russia*, cited in § 195 above, § 121).
109. The Panel also notes UNMIK’s reaction to the information that T.J., the grandmother of the complainants in cases no. 63-66-09 and 109/09, had been an eye-witness to some of the events. Although this information had reached UNMIK Police since December 2001, the witness was heard only in November 2003. With respect to case no. 300/09, the Panel notes that the complainant, Mr Todor Marković, filed a criminal complaint with the IP concerning the disappearance of his father and that the file shows no evidence that this was acted upon. The Panel also notes UNMIK response to the letter written by the sister of Mr Božidar Jovanović (case no. 301/09) to the SRSG in 2007. In this letter, the DOJ mistakenly informed the complainant that the case had never been recorded by the MPU and invited her, an internally displaced person living in Serbia proper, to go to the MPU Office in Graçanicë/Gračanica to do so. The Panel reiterates that from the standpoint of Article 3 it may examine UNMIK’s reactions and attitudes to the complainants in its entirety.
110. Drawing inferences from UNMIK’s failure to provide another plausible explanation for the absence of sustained and regular contact with the complainants, the Panel considers that this situation, which continued into the period of the Panel’s temporal jurisdiction, caused grave uncertainty to the complainants and their families about their family members’ fate and the status of the investigation. With respect to the SRSG’s argument that there should be no violation of Article 3 given that there is no documentation that the complainants made enquiries with the UNMIK Police in the period within the Panel’s jurisdiction, it seems to the Panel not fully appropriate, in the circumstances of the case as described above, to implicitly attribute the failure of any contact to the victims’ families.
111. In view of the above, the Panel concludes that the complainants have 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 the case and as a result of their inability to find out what happened to Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović and to locate the mortal remains of Mr Radislav Jovanović. In this respect, it is obvious that, in any situation, the pain of a family who has to live in uncertainty about the fate of a close member of the family must be unbearable.
112. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the complainants’ distress and mental suffering in violation of Article 3 of the ECHR.
113. **CONCLUDING COMMENTS AND RECOMMENDATIONS**
114. In light of the Panel’s findings in this case, the Panel is of the opinion that some form of reparation is necessary.
115. The Panel notes that enforced disappearances constitute serious violations of human rights which shall be investigated and prosecuted under any circumstances. The Panel also notes that UNMIK as the territorial administration of Kosovo from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute those responsible for the killing of Mr Radislav Jovanović and the disappearance of Mrs Jovanka Mitić, Mr Stanislav Mitić, Mr Stanislav Marković and Mr Božidar Jovanović, and that its failure to do so constitutes a further serious violation of the rights of the victims and his next-of-kin, in particular the right to have the truth of the matter determined.
116. 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.
117. 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 § 36), 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.
118. 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 cases the Panel considers appropriate that UNMIK:**

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

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

* + - In line with the UN General Assembly Resolution on “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (A/Res/60/147, 21 March 2006), takes appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and non-governmental organisations, for the realisation of a full and comprehensive reparation programme, including restitution compensation, rehabilitation, satisfaction and guarantees of non-repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict;
		- Takes appropriate steps before competent bodies of the United Nations, including the UN Secretary-General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the United Nations, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring;

**FOR THESE REASONS,**

The Panel, unanimously,

1. **FINDS THAT THERE HAS BEEN A VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
2. **FINDS THAT THERE HAS BEEN A VIOLATION OF THE SUBSTANTIVE OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
3. **RECOMMENDS THAT UNMIK:**
4. **URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE KILLING OF MR RADISLAV JOVANOVIĆ AND THE DISAPPEARANCE OF MRS JOVANKA MITIĆ, MR STANISLAV MITIĆ, MR STANISLAV MARKOVIĆ AND MR BOŽIDAR JOVANOVIĆ IS CONTINUED IN COMPLIANCE WITH ARTICLE 2 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;**
5. **PUBLICLY ACKNOWLEDGES RESPONSIBILITY FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE KILLING OF MR RADISLAV JOVANOVIĆ AND THE DISAPPEARANCE OF MRS JOVANKA MITIĆ, MR STANISLAV MITIĆ MR STANISLAV MARKOVIĆ AND MR BOŽIDAR JOVANOVIĆ, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANTS;**
6. **TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION OF THE COMPLAINANTS FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 AND ARTICLE 3 OF THE ECHR.**
7. **TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**
8. **TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
9. **TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANTS AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

 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

**IP** - International Prosecutor

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

**KLA** - Kosovo Liberation Army

**MPU** - Missing Persons Unit

**NATO** - North Atlantic Treaty Organization

**OMPF** - Office on Missing Persons and Forensics

**OSCE** - Organization for Security and Cooperation in Europe

**RIU** - Regional Investigation Unit

**SRSG** - Special Representative of the Secretary-General

**UN** - United Nations

**UNHCR** - United Nations High Commissioner for Refugees

**UNMIK** - United Nations Interim Administration Mission in Kosovo

**VRIC** - Victim Recovery and Identification Commission

**WCIU** - War Crimes Investigation Unit

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 ICMP database is available at: <http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en> (accessed on 12 March 2014). [↑](#footnote-ref-3)
4. The ICMP database is available at: <http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en> (accessed on 22 March 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 12 March 2014). [↑](#footnote-ref-5)