



The Human Rights Advisory Panel

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OPINION

Date of adoption: 14 February 2014

Cases Nos. 51/09 and 53/09

Kenan ČELIĆ and Enver FAZLIJA

against

UNMIK

The Human Rights Advisory Panel, on 14 February 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 complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel,

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

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint of Mr Kenan Čelić (case no. 51/09) was introduced on 7 March 2009 and registered on 17 April 2009. The complaint of Mr Enver Fazlija (case no. 53/09) was introduced on 27 March 2009 and registered on 17 April 2009.

2. On 9 September 2010, the Panel decided to join the cases pursuant to Rule 20 of the Panel's Rules of Procedure.
3. On 12 June 2009, the Panel requested further information from Mr Enver Fazlija. On 18 September 2009 and 3 January 2011, the Panel received further information from Mr Enver Fazlija. On 14 June 2011, the Panel received further information from Mr Kenan Čelić.
4. On 2 November 2009, the complaint of Mr Enver Fazlija was communicated to the Special Representative of the Secretary-General (SRSG)¹, for UNMIK's comments on the admissibility of the complaint. On 4 February 2010, UNMIK submitted its response.
5. On 8 November 2010, the Panel decided to re-communicate the complaint of Mr Enver Fazlija and communicated the complaint of Mr Kenan Čelić for UNMIK's comments on the admissibility of the joined complaints. On 7 March 2011, UNMIK submitted its response.
6. On 26 September 2012, the Panel declared the complaints partially admissible.
7. On 15 October 2012, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaints, as well as copies of the investigative files relevant to the case.
8. On 17 December 2013, the SRSG provided UNMIK's comments on the merits of the complaints, together with the relevant documentation.
9. On 28 January 2014, the Panel requested UNMIK to confirm if the disclosure of files concerning the case could be considered final. On the same day, UNMIK provided its response.

II. THE FACTS

A. General background²

10. 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).
11. 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

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

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

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.

12. 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.
13. 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.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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”.
19. In July 1999, the UN Secretary-General reported to the Security Council that UNMIK already considered the issue of missing persons as a particularly acute human rights concern in Kosovo. In November 1999, a Missing Persons Unit (MPU) was established within UNMIK Police, mandated to investigate with respect to either the possible location of missing persons and/or gravesites. The MPU, jointly with the Central Criminal Investigation Unit (CCIU) of UNMIK Police, and later a dedicated War Crimes Investigation Unit (WCIU), were responsible for the criminal aspects of missing persons cases in Kosovo. In May 2000, a Victim Recovery and Identification Commission (VRIC) chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. As of June 2002, the newly established Office on Missing Persons and Forensics (OMPF) in the UNMIK Department of Justice (DOJ) became the sole authority mandated to determine the whereabouts of missing persons, identify their mortal remains and return them to the family of the missing. Starting from 2001, based on a Memorandum of Understanding (MoU) between UNMIK and the Sarajevo-based International Commission of Missing Persons (ICMP), supplemented by a further agreement in 2003, the identification of mortal remains was carried out by the ICMP through DNA testing.
20. On 9 December 2008, UNMIK’s responsibility with regard to police and justice in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
21. On the same date, UNMIK and EULEX signed a MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities

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

B. Circumstances surrounding the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija

22. Mr Kenan Čelić is the son of Mr Avdija Čelić. Mr Enver Fazlija is the father of Mr Gafur Fazlija and brother-in-law of Mr Avdija Čelić.
23. Mr Enver Fazlija states that on 3 July 1999, he, along with Mr Avdija Čelić, Mr Gafur Fazlija and another relative Mr I.Č worked to assist another person move from his apartment. They had been promised safe transport home. However, this did not transpire. They were on their way home from work when a white Fiat and a blue Lada pulled up in front of them. Some unknown men got out of the car(s), forced Mr Avdija Čelić and Mr Gafur Fazlija inside the car(s) and drove away. While Mr Enver Fazlija and Mr I.Č somehow managed to escape being abducted, Mr Avdija Čelić and Mr Gafur Fazlija were never seen alive again.
24. The complainants state that the abductions were reported to the ICRC, UNMIK and KFOR.

C. The investigation

a) Disclosure of relevant files

25. On 17 December 2013, UNMIK presented to the Panel documents which were held previously by the OMPF, the UNMIK Police MPU, the CCIU and EULEX. On 28 January 2014, UNMIK confirmed to the Panel that all files in UNMIK's possession have been disclosed.
26. 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.

b) Search for the victims, location and handover of their mortal remains

27. According to the documents provided by the SRSG, the bodies of Mr Avdija Čelić and Mr Gafur Fazlija were found on 4 July 1999 at the river Prištevka near Prishtinë/Priština and were subsequently conveyed to Prishtinë/Priština Hospital Morgue by British KFOR officers. The two bodies were not identified at this time and were buried in Prishtinë/Priština cemetery.
28. The file contains documents showing that on 8 July 2000, an autopsy was undertaken by an International Criminal Tribunal for the former Yugoslavia (ICTY) pathologist on the two

unidentified bodies that were later determined to be the mortal remains of Mr Avdija Čelić and Mr Gafur Fazlija. On 18 October 2001, the MPU took ante-mortem information from the complainants.

29. On 19 November 2001, following continued queries from the family on the identity of the buried bodies, and an order from the investigative judge assigned to the case, UNMIK Police exhumed the mortal remains suspected to be those of Mr Avdija Čelić and Mr Gafur Fazlija. As UNMIK did not establish DNA testing as standard practice for identification purposes until 2002, no DNA tests were performed. However, on 20 November 2001, an examination of the mortal remains was carried out by two pathologists from OMPF and the OMPF issued two identification certificates confirming that the mortal remains were those of Mr Avdija Čelić and Mr Gafur Fazlija. In addition, the clothes found on the dead bodies were identified by a family member during an identification display organised by the UNMIK Police MPU in Graçanicë/Gračanica.
30. On 21 November 2001, the mortal remains of Mr Avdija Čelić and Mr Gafur Fazlija were handed over to their family members, who buried them in the cemetery in Preoc/Preoce village, Prishtinë/Priština municipality.
31. On 21 November 2001, the OMPF issued a Death Certificate for Avdija Čelić which lists his cause of death as “possible trauma to the chest” and on 27 November 2001, the OMPF issued a Death Certificate for Gafur Fazlija, which lists his cause of death as “stab wound”.
32. On 26 November 2001, MPU closed the case.

c) Investigation with regard to perpetrator(s)

33. The earliest document in the file provided by UNMIK is a Crime Scene Report from the Royal Military Police of British KFOR, dated 4 July 1999, which states that two unidentified men have been found dead.
34. The file also contains numerous documents from the UNMIK CCIU. The first, labeled as “Supplement/Continuation Form”, is dated 5 October 1999, and is registered as File No. CCIU 99-00066. It states that on 4 October 1999, an UNMIK International Police officer checked with the Prishtinë/Priština Hospital Morgue for bodies No. 1088 and 1089 but the record showed that, as the bodies had neither been identified nor claimed by relatives, they had been buried in Prishtinë/Priština cemetery. The form also mentions that a potential witness, Mr B.B., an Albanian who was purported to be a KLA member, had not yet been located.
35. The file also contains a CCIU document labeled “Witness Statement”, dated 10 November 1999, which is affixed with the file no. 99-00068. This document records the statement given by the above-mentioned witness, Mr B.B. He is quoted as saying “On my way to work at the [KLA], I saw a group of children. I asked them what they were looking at and they told me to call the police because there were two dead persons [lying there].” Mr B.B. did not testify to anything else in the Witness Statement.
36. Another CCIU document in the file, dated 19 November 1999, also labeled “Supplement/Continuation Form” and affixed with the file no. 99-00068, states that the

witness B.B. had failed to identify the deceased persons or to give any information about their deaths. It then states “there is no further information to advance the investigation and I am of the opinion that this file should be treated as inactive until any fresh information comes on hand.” A later CCIU document in the file, dated 3 February 2000, concludes that “there are no more investigations necessary or possible in this case.”

37. The file also contains a copy of an email correspondence dated 13 October 2000 between two staff members of the OSCE Mission in Kosovo. This correspondence details the report of the complainant Mr Enver Fazlija, in which he gave a description of the abduction of Mr Avdija Čelić and Mr Gafur Fazlija to an OSCE staff member. This description specified that three men were in the car that had abducted Mr Avdija Čelić and Mr Gafur Fazlija and four men in the Lada that was convoying with them; this information had not been mentioned in the other documents in the file. The complainant also stated that no one had come to take his statement or the statement of the other witnesses.
38. On 23 November 2001, according to numerous documents in the file, MPU closed the case.
39. The final document in the file is a “Case Analysis Report” from the EULEX War Crimes Investigation Unit dated 28 February 2011. The report states “there is no war crimes case containing the name [Avdija Čelić].”

III. THE COMPLAINTS

40. The complainants complain about UNMIK’s alleged failure to properly investigate the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija. 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).

IV. THE LAW

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

1. The scope of the Panel’s review

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

assesses the procedural positive obligations of an intergovernmental organisation with respect to acts committed by third parties in a territory over which it has temporary legislative, executive and judicial control.

43. The Panel notes that with the adoption of the UNMIK Regulation No. 1999/1 on 25 July 1999 UNMIK undertook an obligation to observe internationally recognised human rights standards in exercising its functions. This undertaking was detailed in UNMIK Regulation No. 1999/24 of 12 December 1999, by which UNMIK assumed obligations under the following human rights instruments: the Universal Declaration of Human Rights, the European Convention on Human Rights and Protocols thereto, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child.
44. 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.
45. 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 § 43). 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.
46. The Panel further notes that Section 2 of UNMIK Regulation No. 2006/12 provides that the Panel shall have jurisdiction over complaints relating to alleged violations of human rights “that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights”. It follows that events that took place before 23 April 2005 generally fall outside the jurisdiction *ratione temporis* of the Panel. However, to the extent that such events gave rise to a continuing situation, the Panel has jurisdiction to examine complaints relating to that situation (see European Court of Human Rights (ECtHR), Grand Chamber [GC], *Varnava and Others v. Turkey*, nos. 16064/90 and others, judgment of 18 September 2009, §§ 147-149; ECtHR, *Cyprus v. Turkey* [GC] no. 25781/94, judgment of 10 May 2001, § 136, ECHR 2001-IV).

2. The Parties' submissions

47. The complainants in substance allege a violation concerning the lack of an adequate criminal investigation into the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija, including the failure to perform any DNA analyses on their mortal remains to properly identify them. The complainant Mr Enver Fazlija also states that neither himself nor the relatives of Mr Avdija Čelić and Mr Gafur Fazlija were informed as to whether a criminal investigation was conducted and what the outcome was.
48. In his comments on the merits of the complaint, the SRSG does not dispute that UNMIK had a responsibility to conduct an effective investigation into the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija, in line with its general obligation to secure the effective implementation of the domestic laws which protect the right to life, given to it by UN Security Council Resolution 1244 (1999) (see § 12 above) and further defined by UNMIK Regulation No. 1999/1 *On the Authority of the Interim Administration in Kosovo* and subsequently, UNMIK Regulation 1999/24 *On the Law Applicable in Kosovo*, and Article 2 of the ECHR.
49. In this regard, the SRSG stresses that this responsibility stems from the procedural obligation under Article 2 of the ECHR to conduct an effective investigation where death occurs in suspicious circumstances not imputable to State agents. He argues that, in general, when considering whether UNMIK has satisfied its procedural obligations under Article 2 of the ECHR, the Panel must take into consideration the special circumstances in Kosovo at the time.
50. The SRSG accepts that Mr Avdija Čelić and Mr Gafur Fazlija were abducted in life-threatening circumstances. The SRSG adds that in July 1999, when they were abducted, “the security situation in Kosovo was extremely tense...The abductions occurred at a time when 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 local communities, particularly on the ethnic minorities, including abductions and killings.”
51. The SRSG considers that such an obligation is two-fold, including an obligation to determine through investigation the fate and/or whereabouts of the missing person; and an obligation to conduct an investigation capable of determining whether the death was caused unlawfully and leading to the identification and punishment of those responsible for the disappearance and/or death of the missing person.
52. The SRSG argues that in its case-law on Article 2, the European Court of Human Rights has stated that due consideration shall be given to the difficulties inherent to post-conflict situations and the problems limiting the ability of investigating authorities in investigating such cases. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court in the case *Palić v. Bosnia and Herzegovina* stating at paragraph 70:

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

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

53. In the view of the SRSG, in the aftermath of the Kosovo conflict, UNMIK was faced with a similar situation as the one in Bosnia. Many of those persons who were unaccounted for were abducted, killed and buried in unmarked graves inside or outside of Kosovo, which made very difficult locating and recovering their mortal remains.
54. The SRSG explains that in June 2002, UNMIK created the OMPF with the mandate to determine the fate of the missing; however its work was faced with many challenges at the beginning of the operations, due to the work previously done mostly by actors independent from UNMIK. In particular, the SRSG states that the collection of evidence of war crimes began with the arrival of NATO in 1999 with independent teams from several countries operating under the loose coordination of the ICTY. A lack of standard operating procedures or centralisation led to problems with the evidence gathered in this phase. In 2000, the ICTY launched a large, centralised forensic operation, based at the Rahovec/Orahovac mortuary, with standard operating procedures for all forensic teams except the British one, which operated independently out of Prishtinë/Priština. The SRSG states that, in the effort to demonstrate that crimes were systematic and widespread, the ICTY teams conducted autopsies on as many bodies as possible, carrying out little or no identification work; moreover, unidentified bodies exhumed in 1999 were reburied in locations still unknown to the OMPF. After the ICTY closed their operation in 2000, the UNMIK Police MPU continued small-scale investigations on missing persons “ex-officio, without any broader prosecutorial strategy”. As a consequence, a large amount of unstructured information was collected. The SRSG states that, taking into account the difficulties described above, the process “of dealing effectively with disappearances and other serious violations of international humanitarian law has been an understandably incremental one in the Kosovo context, and this principle has been reflected in the Palić case abovementioned.” The SRSG concludes that the process was reliant upon a number of actors other than just UNMIK, for example the ICMP, the ICRC and local missing persons organisations.
55. 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 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 very challenging task for police managers to establish common practices for optimum results in a high-risk environment.”

56. The SRSG states that UNMIK international police officers had to adjust to conducting investigations in a foreign territory and country, with limited support from the still developing Kosovo Police. He further states that these investigators were often faced with situations where individuals holding relevant knowledge on the whereabouts and fate of missing persons did not want to disclose this information. According to the SRSG, “such constraints inhibited the ability of [...] UNMIK Police to conduct all investigations in a manner [...] that may be demonstrated, or at least expected, in other States with more established institutions and without the surge in cases of this nature associated with a post-conflict situation.”
57. With regard to this particular case, in relation to the obligation to locate and identify the missing persons, the SRSG states that “Mr Avdija Čelić and Mr Gafur Fazlija were located and buried soon after the abduction and killing...UNMIK MPU exhumed the bodies of the deceased on 19 November 2001 and the family representatives gave positive identification of the bodies as belonging to Mr Avdija Čelić and Mr Gafur Fazlija. Following the positive identification, death certificates were issued to the family representatives and the bodies were transported to Preoce for re-burial.” Therefore, in SRSG’s view, UNMIK fully discharged itself of this obligation through the speedy identification of the bodies and the speedy return of Avdija Čelić and Gafur Fazlija’s mortal remains to the family.
58. With respect to the investigation aimed at identifying and bringing to justice those responsible for the abduction and killing of Avdija Čelić and Gafur Fazlija, the SRSG submits that “the lack of information in the instant case posed a real hurdle to the conduct of any investigation by UNMIK. In the period under review by the HRAP, no further witnesses of the alleged abduction and killing came forward at any point in time and no physical evidence could be discovered by the investigators. UNMIK has noted in other missing persons’ cases that, without witnesses coming forward or physical evidence being discovered, police investigations inevitably stall because of lack of evidence.”
59. The SRSG argues that “it is evident that UNMIK Police did open and pursue an investigation with a view towards finding the perpetrators and there were no investigation leads that could be relied on to pursue this investigation and arrest the perpetrators. The records received by UNMIK indicate that no leads were uncovered in relation to this case, and the person who found and reported the dead bodies near river Privetska [*sic.*] was interviewed by UNMIK Police on 10 November 1999 and no leads could be drawn from that interview. No further witnesses of the alleged abduction came forward at any point in time and no physical evidence could be discovered by the investigators to pursue the investigation further.”
60. The SRSG concludes that “it is evident that UNMIK Police did conduct investigative efforts in accordance with the procedural requirements of Article 2 of ECHR, aiming at bringing the perpetrators to justice.” For these reasons, according to the SRSG, there has not been a violation of Article 2 of the ECHR.
61. The SRSG also informed the Panel that in a view of a possibility that more information in relation to this case exists, he might make further comments on this matter. However, no

further communication in this regard, other than confirmation of the full disclosure of the investigative files, has been received to date.

3. The Panel's assessment

62. The Panel considers that the complainants invoke a violation of the procedural obligation stemming from the right to life, guaranteed by Article 2 of the European Convention on Human Rights (ECHR) in that UNMIK did not conduct an effective investigation into the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija.

a) *Submission of relevant files*

63. At the Panel's request, on 17 December 2013, the SRSG provided copies of the documents related to this investigation, which UNMIK was able to recover. The SRSG also noted that there is a possibility more information, not contained in the presented documents, exists, but provided no further details. On 28 January 2014, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 9 above).

64. The Panel notes that Section 15 of UNMIK Regulation No. 2006/12 states that the Panel may request the submission from UNMIK of any documents and that the SRSG shall cooperate with the Panel and provide the necessary assistance including, in particular, in the release of documents and information relevant to the complaint. The Panel in this regard refers to the case-law of the European Court of Human Rights that inferences shall be drawn from the conduct of the respondent party during the proceedings, including from its failure "to submit information in their hands without a satisfactory explanation" (see ECtHR, *Çelikkilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).

65. Furthermore, the Panel notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigations to their handing over, is crucial to the continuation of such investigations and failure to do so could thus raise *per se* issues under Article 2.

66. The Panel has no reason to doubt that UNMIK undertook all efforts in order to obtain the relevant investigative files. However, the Panel notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.

67. The Panel itself is not in the position to verify the completeness of the investigative files received. The Panel will therefore assess the merits of the complaint on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of 15 March 2011, § 146).

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

68. The Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights (IACtHR) *Velásquez-Rodríguez* (see IACtHR, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been

stated by the United Nations Human Rights Committee (HRC) as stemming from Article 6 (right to life), Article 7 (prohibition of cruel and inhuman treatment) and Article 9 (right to liberty and security of person), read in conjunction with Articles 2 (3) (right to an effective remedy) of the ICCPR (see United Nations Human Rights Committee (HRC), General Comment No. 6, 30 April 1982, § 4; HRC, General Comment No. 31, 26 May 2004, §§ 8 and 18, CCPR/C/21/Rev.1/Add. 13; see also, among others, HRC, *Mohamed El Awani, v. Libyan Arab Jamahiriya*, communication no. 1295/2004, views of 11 July 2007, CCPR/C/90/D/1295/2004). The obligation to investigate disappearances and killings is also asserted in the UN Declaration on the Protection of all Persons from Enforced Disappearances (UN Document 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.

69. In order to address the complainant’s allegations, the Panel refers to the well-established case-law of the European Court of Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that “[The] obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed (see, *mutatis mutandis*, ECtHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 161, Series A no. 324; and ECtHR, *Kaya v. Turkey*, judgment of 19 February 1998, § 86, Reports 1998-I; see also ECtHR, *Jasinskis v. Latvia*, no. 45744/08, judgment of 21 December 2010, § 71). The duty to conduct such an investigation arises in all cases of killing and other suspicious death, whether the perpetrators were private persons or State agents or are unknown (see ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, judgment of 5 November 2009, § 191).
70. 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 § 46 above, at § 136).
71. 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).
72. Setting out the standards of an effective investigation, the Court has stated that “besides being independent, accessible to the victim’s family, carried out with reasonable promptness and expedition and affording a sufficient element of public scrutiny of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible” (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in

§ 46 above, at § 191; see also ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, judgment of 15 February 2011, § 63). This is not an obligation of results but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited above, at § 312, and ECtHR, *Isayeva v. Russia*, cited above, at § 212).

73. In particular, the investigation's conclusion must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the ability to establish the circumstances of the case and the identity of those responsible (see ECtHR, *Kolevi v. Bulgaria*, cited in § 69, at § 201). Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of the investigative work (see ECtHR, *Velcea and Mazăre v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105).
74. Specifically with regard to persons disappeared and later found dead, 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 § 72 above, § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 46 above, § 148, *Aslakhanova and Others v. Russia*, nos. 2944/06 and others, judgment of 18 December 2012, § 122). However, the Court also stresses that this procedural obligation "does not come to an end even on discovery of the body This only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain" (ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited above, § 145). While the location and the subsequent identification of the mortal remains of the victim may in themselves be significant achievements, the procedural obligation under Article 2 continues to exist (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, § 64).
75. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others v. Turkey*, cited in § 71 above, at §§ 311-314; *Isayeva v. Russia*, cited in § 71 above, §§ 211-214 and the cases cited therein)." ECtHR [GC], *Al-Skeini and Others v. United Kingdom*, no. 55721/07, judgment of 7 July 2011, § 167, ECHR 2011).
76. The Court has also underlined the great importance of an effective investigation in establishing the truth of what transpired, not only for the families of victims, but also for other victims of similar crimes, as well as the general public, who have the right to know

what occurred (ECtHR [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630/09, judgment of 13 December 2012, § 191). The United Nations also recognises the importance of the right to truth. In the words of the United Nations Secretary-General, “the right to truth implies knowing the full and complete truth about the violations and the events that transpired, their specific circumstances and who participated in them. In the case of missing persons ... it also implies the right to know the fate and whereabouts of the victim” (see Report of the UN Secretary-General, Missing Persons, UN Document A/67/267, 8 August 2012, § 5; see also UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009; see also the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Framework Principles for securing the accountability of public officials for gross and systematic human rights violations committed in the context of State counter-terrorist initiatives; UN Document A/HRC/22/52, 1 March 2013).

c) Applicability of Article 2 to the Kosovo context

77. The Panel is conscious that Mr Avdija Čelić and Mr Gafur Fazlija were abducted and killed shortly after the deployment of UNMIK in Kosovo in the aftermath of the armed conflict, when crime, violence and insecurity were rife.
78. 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.
79. The Panel considers that this raises two main questions: first, whether the standards of Article 2 continue to apply in situation of conflict or generalised violence and, second, whether such standards shall be considered fully applicable to UNMIK.
80. 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).
81. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court of Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see,

among other examples, ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 72 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 § 75 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 § 71 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 71 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).

82. The Court has acknowledged that “where the death [and disappearances] to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and [...] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed” (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited above, at §164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that “the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 69 above, at §§ 86-92; ECtHR, *Ergi v. Turkey*, cited above, at §§ 82-85; ECtHR [GC], *Tanrikulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).
83. 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 § 68 above, at § 1; HRC, *Abubakar Amirov and Aizan Amirova v. Russian Federation*, communication no. 1447/2006, views of 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006). Further, the HRC has stated the applicability of Article 2 (3), 6 and 7 of the ICCPR with specific reference to UNMIK’s obligation to conduct proper investigations on disappearances and abductions in Kosovo (see HRC, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), 14 August 2006, §§ 12-13, CCPR/C/UNK/CO/1).
84. The Panel appreciates the difficulties encountered by UNMIK during the first phase of its deployment. The Panel notes that the appropriate importance attached to the issue of missing persons in Kosovo meant that UNMIK had to take into account both the humanitarian and criminal dimensions of the situation. In particular, the Panel considers that the importance attached to the criminal investigations and the difficulties in Kosovo that limited the abilities of investigating authorities to conduct such investigations, as described by the SRSG, made it crucial that UNMIK establish from the outset an environment conducive to the performance of meaningful investigations. This would involve putting in place a system that would include such elements as the allocation of overall responsibility for the supervision and monitoring of progress in investigations, provision for the regular review of the status of investigations, and a process for the proper handover of cases between different officers or units of UNMIK Police. Such a system should also take account of the protection needs of

victims and witnesses (see, *mutatis mutandis*, ECtHR, *R.R. and Others v. Hungary*, no. 19400/11, judgment of 4 December 2012, §§ 28-32), as well as to consider the special vulnerability of displaced persons in post-conflict situations (see ECtHR [GC], *Sargsyan v. Azerbaijan*, no. 40167/06, decision of 14 December 2011, § 145; and ECtHR [GC], *Chiragov and Others v. Armenia*, no. 13216/05, decision of 14 December 2011, § 146). While understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel deems that this process was completed in 2003 when the police and justice system in Kosovo was described as being “well-functioning” and “sustainable” by the UN Secretary-General (see § 18 above).

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

86. Lastly, in response to the SRSG’s objection that Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, either in the context of policing activities or that of priorities and resources, the Panel takes into account that the European Court has established that what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and contexts (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 72 above, at § 70; *Brecknell v. The United Kingdom*, no. 32457/04, judgment of 27 November 2007, § 62).

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

87. Turning to the particulars of this case, the Panel notes undisputed fact that Mr Avdija Čelić and Mr Gafur Fazlija’s abduction and killing was reported promptly to KFOR, UNMIK authorities and the ICRC. The investigative file reflects that UNMIK became aware of their abduction and killing no later than 4 October 1999 (see § 34 above).

88. The purpose of this investigation was to discover the truth about the circumstances of Mr Avdija Čelić and Mr Gafur Fazlija’s abduction and killing, to establish their fate and to identify the perpetrators. To fulfil these purposes, those conducting the investigation were required to seek, collect and preserve evidentiary material; to identify possible witnesses and to obtain their statements; to identify the perpetrator(s) and bring them before a competent court established by law.

89. The Panel recalls that in order to be effective, the investigative actions must be conducted promptly and expeditiously, with the authorities taking all reasonable steps and following obvious lines of enquiry to secure the evidence concerning the incident, including, *inter alia* eye-witness testimony, forensic evidence etc. The investigation must also ensure a sufficient element of public scrutiny and be reasonably accessible to the victim’s family. The investigation’s conclusion must be based on thorough, objective and impartial analysis of all

relevant elements. In addition, the investigation should be periodically reviewed, in order to ensure that all available information is considered. As the obligation to investigate is not an obligation of results but of means, in assessing the investigation's effectiveness, the circumstances of the particular case and the practical realities of the investigative work must be taken into consideration (see §§ 72 - 73 above).

90. The Panel notes that there were obvious shortcomings in the conduct of the investigation from its commencement. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 46 above), the Panel recalls that it is competent *ratione temporis* to evaluate the compliance of the investigation with Article 2 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 72 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 § 20 above).
91. The Panel notes in this regard that according to the 2000 Annual Report of UNMIK Police, the complete executive policing powers in the Prishtinë/Priština region, including criminal investigations, were under the full control of UNMIK Police from 19 September 1999. Therefore, it was UNMIK's responsibility to ensure, *first*, that the investigation is conducted expeditiously and efficiently; *second*, that all relevant investigative material is properly handed over to the authority taking over responsibility for the investigation (EULEX); and *third*, that the investigative files could be traced and retrieved, should a need for that arise at any later stage.
92. Having noted the SRSG's assertion that the file submitted to the Panel may be incomplete, and his failure to provide further explanation in relation to this (see § 60 above), the Panel assumes that UNMIK cannot guarantee whether the file presented to the Panel is complete or not. In case it is not complete, it would indicate that one of the following situations may have occurred: no proper investigation was carried out; the file was not accurately and fully handed over to EULEX; or UNMIK failed to retrieve the complete file from the current custodian. The Panel has already noted above that it has no reason to doubt UNMIK's good faith in seeking to provide the complete investigative file for its review (see § 66 above). However, the Panel considers that whichever of these potential explanations is applicable, it would indicate a failure directly attributable to UNMIK, either when it was exercising its executive functions, or in its current capacity.
93. With regard to the first part of the procedural obligation, that is establishing the fate of Mr Avdija Čelić and Mr Gafur Fazlija, the Panel concludes from the file that their bodies were first located and collected by KFOR on 4 July 1999. The two bodies were not identified at this time and were buried in Prishtinë/Priština cemetery. They were autopsied by an ICTY pathologist on 8 July 2000. The MPU took ante-mortem information from the complainants on 18 October 2001. Following queries from the family as to the identity of the buried bodies, and an order from the investigative judge assigned to the case, on 19 November 2001 UNMIK Police exhumed the mortal remains suspected to be those of Mr Avdija Čelić and Mr Gafur Fazlija. On 20 November 2001, OMPF issued two identification certificates confirming that the mortal remains belonged to Avdija Čelić and Gafur Fazlija (see §§ 27-29 above). The Panel notes that as DNA testing was not established as standard practice for identification purposes until 2002, identification was therefore performed by traditional

means. The complainants clarified that they do not wish to allow the mortal remains of their relatives to be exhumed for DNA testing.

94. On 21 November 2001, the mortal remains of Avdija Čelić and Gafur Fazlija were handed over to their family members, who buried them in the cemetery in Preoc/Preoce village, Prishtinë/Priština municipality. On 21 November 2001, OMPF issued a Death Certificate for Mr Avdija Čelić which lists his cause of death as “possible trauma to the chest” and on 27 November 2001, OMPF issued a Death Certificate for Mr Gafur Fazlija, which lists his cause of death as “stab wound”. On 26 November 2001, MPU closed the case.
95. The Panel notes that the SRSG states that UNMIK fulfilled the requirements with regard to the first part of the procedural obligation, that is establishing the fate of Mr Avdija Čelić and Gafur Fazlija, as they were located and buried soon after the abduction and killing. The SRSG notes that “The bodies were also exhumed, examined and re-buried following an order of the investigating judge in 2001. Consequently, there was no obligation for UNMIK OMPF to open an investigation to determine the fate and/or whereabouts of the deceased.”
96. Although this must be considered in itself an achievement, the Panel recalls that the procedural obligation under Article 2 did not come to an end with the discovery and identification of the bodies, especially as they showed signs of a violent death. Now the Panel will turn to the investigation carried out by UNMIK Police with the aim of identifying the perpetrator(s) and bringing them to justice, that is, the second element of the procedural obligation under Article 2 of the ECHR.
97. As regards the requirements of promptness and expedition, the Panel is mindful that in any investigation, and particularly in an investigation of a disappearance in life-threatening circumstances, the initial stage is of the utmost importance, and it serves two main purposes: to identify the direction of the investigation and ensure preservation and collection of evidence for future possible court proceedings (see the Panel’s position on a similar matter expressed in the case X., nos. 326/09 and others, opinion of 6 June 2013, § 81).
98. In this respect the Panel recalls the complainants’ statements that they immediately reported Mr Avdija Čelić and Mr Gafur Fazlija’s abduction and killing to the ICRC, UNMIK and KFOR (see § 24 above). As established above, UNMIK became aware of the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija by 4 October 1999 at the latest, as the investigation into the matter had been opened by UNMIK Police by then (see § 34 above). However, no immediate action was taken by UNMIK Police, except for probably making an initial assessment of the information, registering the case and taking the witness statement of the person who had discovered the bodies, Mr B.B. (see § 3535 above). Thus, in the Panel’s view, this investigation obviously failed to fulfill the requirements of promptness and expeditiousness.
99. The Panel notes that by 4 October 1999 UNMIK Police possessed all the necessary information (see § 34 above). In any event, the only substantive action undertaken by UNMIK Police in this case was taking the witness statement from Mr B.B. There is no evidence in the file that UNMIK Police interviewed the complainant Mr Enver Fazlija or Mr I.Č., both of whom were present at the abduction of Mr Avdija Čelić and Mr Gafur Fazlija. Specifically, Mr Enver Fazlija’s description of the abductors and their cars does not appear in the investigative files presented to the Panel, which would have been an obvious line of

enquiry for UNMIK Police (see § 37 above). Thus, in the Panel's view, there was a failure to fulfil the requirements of conducting an adequate investigation.

100. The Panel notes in this context that the investigative file does not reflect a single attempt by UNMIK Police to contact the victims' next-of-kin or other relevant persons such as the children who showed the bodies to Mr B.B. (see § 35, above), or to canvass the neighbourhood near the scene of the crime, or attempt to trace the cars used in the abduction. In this respect, the Panel considers that this apparent lack of contact with potential witnesses was a failure in UNMIK Police's investigation.
101. With respect to the SRSG's argument that UNMIK opened and pursued an investigation to determine whether there was an unlawful abduction of Mr Avdija Čelić and Mr Gafur Fazlija and to identify and bring to justice those responsible (see § 60 above), the Panel notes that as shown above, the file does not reflect any substantive action in pursuit of those goals.
102. The Panel likewise recalls the SRSG's argument that "the lack of information in the instant case posed a real hurdle to the conduct of any investigation by UNMIK. In the period under review by the HRAP, no further witnesses of the alleged abduction and killing came forward at any point in time and no physical evidence could be discovered by the investigators" (see § 58 above). In this regard, the Panel must note that almost any investigation at its initial stage lacks a significant amount of information. Finding the necessary information to fill those gaps is the main goal of any investigative activity. Therefore, a lack of information should not be used as an argument to defend inaction by the investigative authorities. The file, as made available to the Panel, does not show any such activity. Thus, it appears that, instead of actively searching for information and leads, UNMIK Police simply waited for further information to appear by itself. In this situation it may have led to the loss of potential evidence (see e.g. HRAP, *P.S.*, no. 48/09, opinion of 31 October 2013, § 107).
103. In the Panel's view, it is because of the lack of information at the initial stage that this case was closed, without any action by the MPU (see § 32 above). The Panel recalls in this regard its position in relation to the categorisation of cases into "active" and "inactive", that any "categorisation of an investigation should take place only after the minimum possible investigative actions have been undertaken and obtainable information has been collected and analysed" (see e.g. HRAP, *B.A.*, no. 52/09, opinion of 14 February 2013, § 82). In this case, such prioritisation should not have been made at the earliest stages, before the complainant and the witnesses had been interviewed about the circumstances of the abduction, especially as it had occurred in obviously life-threatening circumstances, and all obtainable evidence had been collected.
104. The Panel notes in this context that if not worked upon, developed, corroborated by other evidence and put in a proper form, any information by itself, however good it might be in relation to a crime under investigation, does not solve it. In order to be accepted in court, information must become evidence, which can only happen through investigative actions undertaken in compliance with the applicable rules of criminal procedure. In this case, the Police appear to have never undertaken any action in this direction (see e.g. HRAP, *Todorovski*, case no. 81/09, opinion of 31 October 2013, § 116).

105. 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 § 74 above), bringing the assessment of the whole investigation within the period of the Panel's jurisdiction.
106. In addition, the Panel considers that as those responsible for the crime had not been identified, UNMIK Police was obliged to use the means at their disposal to regularly review the progress of the investigation to ensure that nothing had been overlooked and that any new evidence had been considered, as well as to inform their relatives regarding the progress of this investigation.
107. The Panel understands from the file that there is no evidence provided showing that the investigation was ever reviewed by UNMIK Police. Therefore, the Panel must conclude that there was no adequate and thorough review of this case.
108. The apparent lack of any immediate reaction from UNMIK Police, and of any adequate action at later stages, may have suggested to the 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.
109. The Panel is also aware that the duty to investigate is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, such an investigation must be undertaken in a serious manner and not be a mere formality. The Panel considers that, having regard to all the circumstances of the particular case, not all reasonable steps were taken by UNMIK towards 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 § 72 above), as required by Article 2 of the ECHR.
110. As concerns the requirement of public scrutiny, the Panel recalls that Article 2 also requires the victims' next-of-kin to be involved in the investigation to the extent necessary to safeguard his or her legitimate interests.
111. As was shown above, the investigative file does not show any attempts made by UNMIK Police to contact the next-of-kin of Mr Avdija Čelić and Mr Gafur Fazlija. The only contact with the complainants was made by the MPU when it collected ante-mortem information on 18 October 2001 (see § 28 above). In this regard, the Panel has already noted that the investigative file shows that there has been no contact whatsoever between UNMIK and the complainants with respect to the investigation. The Panel therefore considers that the investigation was not open to any public scrutiny, as required by Article 2 of the ECHR.
112. In light of the deficiencies and shortcomings described above, the Panel concludes that UNMIK failed to carry out an effective investigation into the abduction and killing of Mr

Avdija Čelić and Mr Gafur Fazlija. There has accordingly been a violation of Article 2, procedural limb, of the ECHR.

V. CONCLUDING COMMENTS AND RECOMMENDATIONS

113. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
114. The Panel notes that enforced disappearances and arbitrary executions constitute serious violations of human rights which, shall be investigated and prosecuted under any circumstances. The Panel also notes that UNMIK as the territorial administration of Kosovo from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute those responsible for killings, abductions or disappearances in life threatening circumstances. Its failure to do so constitutes a further serious violation of the rights of the victims and their next-of-kin, in particular the right to have the truth of the matter determined.
115. 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.
116. 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 § 20), 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.
117. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible.

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

- In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR [GC], *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 109), must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the

requirements of an effective investigation as envisaged by Article 2, that the circumstances surrounding the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija will be established and that perpetrators will be brought to justice. The complainants and/or other next-of-kin shall be informed of such proceedings and relevant documents shall be disclosed to them, as necessary;

- Publicly acknowledges, within a reasonable time, responsibility with respect to UNMIK's failure to adequately investigate the abduction and killing of Mr Avdija Čelić and Mr Gafur Fazlija and makes a public apology to the complainants and their families 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.

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. RECOMMENDS THAT UNMIK:

- a. URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE ABDUCTION AND KILLING OF MR AVDIJA**

ČELIĆ AND MR GAFUR FAZLIJA IS CONTINUED IN COMPLIANCE WITH ARTICLE 2 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;

- b. PUBLICLY ACKNOWLEDGES RESPONSIBILITY FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE ABDUCTION AND KILLING OF MR AVDIJA ČELIĆ AND MR GAFUR FAZLIJA AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANTS;**
- c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 TO THE COMPLAINANTS AND THEIR FAMILY;**
- d. TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**
- e. TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
- f. TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANTS AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey Antonov
Executive Officer

Marek Nowicki
Presiding Member

ABBREVIATIONS AND ACRONYMS

CCIU - Central Criminal Investigation Unit
CCPR – International Covenant on Civil and Political Rights
DOJ - Department of Justice
DPPO - District Public Prosecutor’s Office
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
EU – European Union
EULEX - European Union Rule of Law Mission in Kosovo
FRY - Federal Republic of Yugoslavia
FYROM - Former Yugoslav Republic of Macedonia
HRAP - Human Rights Advisory Panel
HRC - United Nation Human Rights Committee
HQ - Headquarters
IACtHR – Inter-American Court of Human Rights
ICMP - International Commission of Missing Persons
ICRC - International Committee of the Red Cross
ICTY - International Criminal Tribunal for former Yugoslavia
KFOR - International Security Force (commonly known as Kosovo Force)
KLA - Kosovo Liberation Army
MoU - Memorandum of Understanding
MPU - Missing Persons Unit
NATO - North Atlantic Treaty Organization
OMPF - Office on Missing Persons and Forensics
OSCE - Organization for Security and Cooperation in Europe
RIU - Regional Investigation Unit
SIU – Special Investigations Unit of the UNMIK Security
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