

**OPINION**

**Date of adoption: 12 April 2014**

**Cases Nos. 125/09 and 126/09**

**Nebojša PETKOVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 12 April 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 were introduced on 7 April 2009 and registered on 30 April 2009.
3. On 18 November 2009, the Panel requested further information from the complainant. On 30 November 2009, the Panel received additional information from the complainant.
4. On 19 November 2009, the Panel decided to join the cases, pursuant to Rule 20 of the Panel’s Rules of Procedure.
5. 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 complaints of Mr Nebojša Petković.
6. On 23 March 2010, EULEX provided a response to the Panel’s request of 18 December 2009.
7. On 3 March 2010, the complaints were communicated to the Special Representative of the Secretary-General (SRSG)[[1]](#footnote-1), for UNMIK’s comments on the admissibility of the complaints. On 25 June 2010, UNMIK submitted its response.
8. On 24 August 2010, the Panel sent UNMIK’s response to the complainant for comments. The complainant provided his response on 22 September 2010.
9. On 21 October 2010, the Panel declared the complaints admissible.
10. On 27 October 2010, 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.
11. On 3 November 2010, the SRSG responded to the Panel’s request for comments on the merits of the complaints. On 6 September 2011, the SRSG provided the relevant investigative files.
12. On 24 March 2014, the Panel requested UNMIK to confirm if the disclosure of files concerning the case could be considered final. UNMIK provided its response on the same day.
13. **THE FACTS**
14. **General background[[2]](#footnote-2)**
15. 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).
16. 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.
17. 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.
18. 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.
19. 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.
20. 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.
21. 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.
22. 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.
23. 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”.
24. 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.
25. On 9 December 2008, UNMIK’s responsibility with regard to police and justice in Kosovo ended with the EULEX assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
26. On the same date, UNMIK and EULEX signed an MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were supposed to be handed over to EULEX.
27. **Circumstances surrounding the disappearance of Mr Živko Petković and Mrs Desanka Petković**
28. The complainant is the son of Mr Živko Petković and Mrs Desanka Petković.
29. The complainant states that on 12 June 1999, he and his brother left Gjakovë/Ðakovica for security reasons. Their parents, Mr Živko Petković and Mrs Desanka Petković, stayed behind in their family house in Gjakovë/Ðakovica. The complainant states that the family maintained good relations with all their Kosovo Albanian neighbours and received guarantees from them that their parents would be safe if they remained in Gjakovë/Ðakovica. To that end, their Kosovo-Albanian neighbour, Mr B.D., agreed to move in to the house in order to ensure the safety of Mr Živko Petković and Mrs Desanka Petković.
30. After his departure, the complainant did not hear from his parents. After several unsuccessful attempts, in September 1999 he was able to contact Mr B.D. and obtain some information about his parents. Mr B.D. informed the complainant that he could no longer take care of the complainant’s parents and that they had left for Pejë/Peć in their own vehicle about ten days after the departure of the complainant, on 22 June 1999. When the complainant asked Mr B.D. why he did not take his parents to UNMIK or to KFOR so that they could seek their assistance, Mr B.D. stated that he dared not do it, as he would be held responsible for protecting Serbs. Mr Živko Petković and Mrs Desanka Petković remain missing to date. Mr B.D. lived in the complainant’s family home until 2008, when it was placed under the administration of the Kosovo Property Agency.
31. The complainant states that the disappearance was reported to UNMIK, the ICRC, the Red Cross of Montenegro, the Red Cross of Serbia, the Yugoslav Ministry of Internal Affairs and the Association of Missing and Kidnapped Persons in Kosovo and Metohija.
32. The complainant states that he reported the disappearance to UNMIK immediately upon learning of his parents’ disappearance. In February 2003, the complainant visited an UNMIK Police station to inform them that he had heard from a former neighbour, Mr. L.Z., that his parents had been seen alive in the Gjakovë/Ðakovica region.
33. In 2001, the ICRC opened a tracing request for Mr Živko Petković, and in 2002, the ICRC opened a tracing request for Mrs Desanka Petković; both remain open[[3]](#footnote-3). Their names are also in the list of missing persons that was forwarded by the ICRC to UNMIK on 12 October 2001, for whom the ICRC had collected ante-mortem data in Serbia proper, between 1 July and 20 September 2001, as well as in the database compiled by the UNMIK OMPF[[4]](#footnote-4). The entries in relation to both Mr Živko Petković and Mrs Desanka Petković in the online database maintained by the ICMP[[5]](#footnote-5) gives 12 June 1999 as the reported date of disappearance and reads in other relevant fields: “Sufficient Reference Samples Collected” and “DNA match not found”.

**C. The investigation**

1. In the present case, the Panel received from UNMIK only very limited documents related to the investigative actions conducted by the UNMIK Police WCIU and the UNMIK OMPF. When providing the file to the Panel on 6 September 2011, the SRSG noted that more information in relation to this case not contained in the presented documents, may exist. However, on 24 March 2014, UNMIK confirmed to the Panel that no more relevant documents have been obtained.
2. Concerning disclosure of information contained in the files, the Panel recalls that UNMIK has made them available under a pledge of confidentiality. In this regard, the Panel must clarify that although its assessment of the present case stems from a thorough examination of the available documentation, only limited information contained therein is disclosed. Hence a synopsis of relevant investigative steps taken by investigative authorities is provided in the paragraphs to follow.
3. The SRSG acknowledges that “according to the UNMIK Police files, it is evident that the complainant did report the disappearance of his parents in October 2000 to the UNMIK Police Station in Zvecan.” Although this document was not provided in the file, it appears from the investigative file that missing person files concerning Mr Živko Petković and Mrs Desanka Petković were opened by the UNMIK MPU at some time in 2000, under case nos. 2000-000549, and 2000-001382, respectively.
4. According to the SRSG’s response, the OMPF files contain only information relating to the case of Mrs Desanka Petković. Apparently, they contain an ante-mortem “Victim Identification Form” dated 2 February 2002[[6]](#footnote-6), that details personal data regarding Mrs Desanka Petković, presumably based on information submitted by the complainant. However the file contains a copy of the letter from the ICRC (see § 29 above) that contains a list of missing persons that was forwarded by the ICRC to UNMIK on 12 October 2001, for whom the ICRC had collected ante-mortem data in Serbia proper; both Mr Živko Petković and Mrs Desanka Petković are listed.

1. The file contains a document from the UNMIK Police Liaison Office in Belgrade, dated 20 October 2002, entitled “Serbian Missing Persons in Djakovica”. Both Mr Živko Petković and Mrs Desanka Petković are listed among the missing persons.
2. The file also contains two unnamed and undated documents, apparently MPU computer-print-outs, one which contains ante-mortem information about Mr Živko Petković and is cross-referenced under the MPU case no. 2000-001382, and one which contains ante-mortem information about Mrs Desanka Petković, also cross-referenced under the same MPU number. The document with Mr Živko Petković’s ante-mortem information has the no. 0024/inv/03 handwritten at the top of the page.
3. In addition, the file contains a memorandum, dated 8 February 2003, from the UNMIK Police Office in Mitrovicë/Mitrovica and sent to the MPU Pristina, which states that the complainant came into the UNMIK police station in North Mitrovicë/Mitrovica and requested assistance to find out if his parents were still alive, as he had heard from his former neighbour Mr L.Z. that they were alive (see § 28 above). According to the document, the complainant requested that the UNMIK police interview Mr L.Z., as the complainant thought that he had further information about his parents. The memo requests the MPU Pristina, in cooperation with the CCIU “to investigate the circumstances where [Mr Živko Petković and Mrs Desanka Petković] disappeared from their home, and if it shows up that [they] are probably dead, to find their remains.”
4. The file also contains the response memorandum, dated 13 February 2003, from MPU Pristina to the UNMIK Police Office in North Mitrovicë/Mitrovica, responding to the abovementioned request. According to the memorandum, a team from UNMIK Police, Resource and Investigation Pillar, visited the Petković family home in Gjakovë/Ðakovica in order to collect further information relating to the disappearance of Mr Živko Petković and Mrs Desanka Petković. The UNMIK Police found that Mr B.D. was still living in the house. Mr. B.D. confirmed the information provided by the complainant, specifically that Mr Živko Petković and Mrs Desanka Petković had left the house on 22 June 1999. Next the UNMIK Police interviewed Mr L.Z., who stated that he had had lunch with Mr Živko Petković and Mrs Desanka Petković and helped them to get petrol for their car on the day that they had decided to leave. Mr. L.Z. also said that he had heard that, after they had left their home, Mr Živko Petković and Mrs Desanka Petković had spent their first night in the Orthodox Church in Gjakovë/Ðakovica.
5. The aforementioned UNMIK Police memo states that the next day, the UNMIK Police visited the Orthodox Church in Gjakovë/Ðakovica and asked three elderly Serbian women who lived in a small house in the church yard if they remembered Mr Živko Petković and Mrs Desanka Petković. One of the women remembered other persons who had stayed at the church, but not Mr Živko Petković and Mrs Desanka Petković. The memo ends with, “Conclusion: After Zivkol (*sic*) and Desanka Petkovic left their house…, no one have seen or heard from them.”

**D. EULEX clarification**

1. As mentioned above (§ 4), on 18 December 2009 the Panel requested EULEX to provide additional information in relation to 43 complaints before the Panel. In their response (see § 5 above), dated 23 March 2010, EULEX officers explained that they had searched the available sources, including the list of cases “found in July 2009 in the PTC building Archive room (not officially handed over from UNMIK to EULEX because no more “active” but dismissed, terminated or closed).”
2. 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.
3. However, the search in the EULEX files provided information on only two cases listed in the Panel’s request of 18 December 2009. No files or other information in relation to the other 41 cases, including the cases of Mr Živko Petković and Mrs Desanka Petković, 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.”
4. **THE COMPLAINTS**
5. The complainant complains about UNMIK’s alleged failure to properly investigate the disappearance of Mr Živko Petković and Mrs Desanka Petković. In this regard, the Panel deems that the complainant invokes a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
6. The complainant also complains about the mental pain and suffering allegedly caused to him by this situation. In this regard, the Panel deems that the complainant relies on Article 3 of the ECHR.
7. **THE LAW**
8. **Alleged violation of the procedural obligation underArticle 2 of the ECHR**
	1. **The scope of the Panel’s review**
9. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
10. 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.
11. 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.

1. 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.
2. 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 § 46). 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.
3. 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**
4. The complainant in substance alleges a violation concerning the lack of an adequate criminal investigation into the disappearance of Mr Živko Petković and Mrs Desanka Petković. The complainant in substance also alleges that he was not informed as to whether an investigation was conducted at all, and what the outcome was.
5. In his comments on the admissibility of the complaint[[7]](#footnote-7), the SRSG does not dispute that UNMIK had a responsibility to conduct an effective investigation into the disappearance of Mr Živko Petković and Mrs Desanka Petković**,** in accordance with ECHR case law. The SRSG notes that, “[w]hat form and extent of investigation will achieve the purpose required under Article 2 ECHR depends on the circumstances in the specific case.” He also agrees that, “[i]t is uncontested that the families of missing persons have a right to know about and be informed about a person’s fate. This encompasses their right to an accurate identification of all bodies found so as to make sure whether or not their relative is among the dead, as well as, if so, information on where the body was found and how the person was killed, etc. The main activities for addressing the above aspects of these fundamental rights are forensic work. Such work includes searches of alleged graves, exhumations, autopsies, the comparison of *ante* and *post mortem* data, DNA tests, information from and to families of missing persons and the return of bodies and belongings found to the families.”
6. The SRSG notes that, “[b]ased on the documents obtained from the UNMIK OMPF and from UNMIK Police in relation to the disappearance of Živko Petković and Desanka Petković, it is evident that forensic investigations and examinations were conducted by the Missing Persons Unit of UNMIK Police by collecting *ante mortem* data of Mrs. Desanka Petković. Furthermore, UNMIK Police investigations took place by visiting the place of disappearance and talking to the neighbours who were likely to possess some information relating to the incidents. The e-mail communications between the UNMIK Police Offices and Belgrade and Pristina also document that various attempts were made to compile lists of *ante mortem* data received from the ICRC to match and compare them with data from human remains found in Kosovo in various locations.”
7. The SRSG also notes that, “[a]s no remains of missing persons were found, all forensic work was limited to the collection of *ante mortem* data, presumably from information given by the complainant in relation to his parents and comparisons of such data with human remains found. It appears such efforts remained without conclusive result. Given the fact that the circumstances surrounding the alleged abduction and disappearance of Živko and Desanka Petković remain very vague and that neither interviews with the former neighbours, the women at the Serbian Orthodox Church in Gjakovica and the complainant provided further information to this extent- it remains unclear where and when exactly the trace of the missing persons was lost and where they were abducted-, it is evident that UNMIK Police was not in a position to initiate further investigations in the matter. No information could be obtained about any possible perpetrators or witnesses of an alleged abduction. In addition, it should be emphasised that neither the vehicle in which Živko and Desanka Petković left Gjakovica nor any other item belonging to them was ever found. Consequently…UNMIK Police simply was not in a position to further investigate the matter.”
8. The SRSG concludes that the complaint is “without basis as far as it relates to the allegation of a failure of UNMIK to conduct an effective investigation into the matter. UNMIK Police did all the investigation it could do into the matter taking into account the minimal information available and provided by the complainant.”
9. 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.
10. The SRSG did not provide additional comments at the merits state.
	1. **The Panel’s assessment**
11. 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 disappearance of Mr Živko Petković and Mrs Desanka Petković.
12. *Submission of relevant files*

1. At Panel’s request, on 6 September 2011, the SRSG provided copies of the limited documents related to this investigation, which UNMIK was able to recover. As mentioned above (see § 55), the SRSG also noted that more information, not contained in the presented documents, may exist in relation to this case. On 24 March 2014, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 11 above).
2. As mentioned above (§§ 4 and 39), the Panel had also requested EULEX to provide additional information in relation to this case, but EULEX was unable to do so (see § 41 above).
3. The Panel notes that Section 15 of UNMIK Regulation No. 2006/12 states that the Panel may request the submission from UNMIK of any documents and that the SRSG shall cooperate with the Panel and provide the necessary assistance including, in particular, in the release of documents and information relevant to the complaint. The Panel in this regard refers to the case-law of the European Court of Human Rights that inferences shall be drawn from the conduct of the respondent party during the proceedings, including from its failure “to submit information in their hands without a satisfactory explanation” (see ECtHR, *Çelikbilek v. Turkey*, no. 27693/95, judgment of 31 May 2005*,* § 56).
4. The Panel also notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigations to their handing over, is crucial to the continuation of such investigations and failure to do so could thus raise *per se* issues under Article 2.
5. The Panel has no reason to doubt that UNMIK undertook all efforts in order to obtain the relevant investigative documents. However, UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.
6. The Panel itself is not in the position to verify the completeness of the investigative files received. The Panel will therefore assess the merits of the complaint on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of15 March 2011, § 146).
7. *General principles concerning the obligation to conduct an effective investigation under Article 2*
8. 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.
9. 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).
10. 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 § 49 above, at § 136).
11. 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).
12. 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 § 49 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).
13. 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 § 65, 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).
14. 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 § 68 above, § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 49 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).
15. 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 § 67 above, at §§ 311‑314; *Isayeva v. Russia*, cited in § 67 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).
16. 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).
17. *Compliance with Article 2 in the present case*
18. Turning to the particulars of this case, the Panel notes the undisputed fact that Mr Živko Petković and Mrs Desanka Petković’s disappearance was reported promptly to UNMIK, the ICRC, the Red Cross of Montenegro, the Red Cross of Serbia and the Yugoslav Ministry of Internal Affairs. The SRSG acknowledges that according to the investigative file, UNMIK became aware of their disappearance in October 2000 (see § 32 above).
19. The purpose of this investigation was to discover the truth about the circumstances of Mr Živko Petković and Mrs Desanka Petković’s disappearance, 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.
20. 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 §§ 68 - 69 above).
21. 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 § 49 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 § 68 above, at § 70). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 22 above).
22. The Panel notes in this regard that according to the 2000 Annual Report of UNMIK Police, the complete executive policing powers in the Pejë/Peć region, including criminal investigations, were under the full control of UNMIK Police by June 2000. 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.
23. 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 § 55 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 § 62 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.
24. With regard to the first part of the procedural obligation, that is establishing the fate of Mr Živko Petković and Mrs Desanka Petković, the Panel notes that their whereabouts remain unknown. The Panel notes that ante-mortem information concerning the complainant’s missing parents had been gathered by the ICRC, between 1 July and 20 September 2001 and that the ICMP database confirms that the DNA samples had been collected, but it is not clear when, from or by whom (see § 29 above).
25. In this respect, the Panel notes that the collection of the DNA samples is of itself an essential action that secures the necessary material for any future comparative examination and possible identification of located mortal remains. However, as in this case no such identification has yet occurred, the Panel will turn to the investigation carried out by UNMIK Police with the aim of identification of perpetrators and bringing them to justice, that is the second element of the procedural obligation under Article 2 of the ECHR.
26. 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 (compare with the Panel’s position in the case *X*., nos. 326/09 and others, opinion of 6 June 2013, § 81).
27. In this respect the Panel recalls that UNMIK became aware of the disappearance of Mr Živko Petković and Mrs Desanka Petković by October 2000 and the investigation into the matter was opened by UNMIK MPU around that time (see § 32 above). However, no immediate action by UNMIK Police whatsoever is reflected in the investigative file. Thus, in the Panel’s view, this investigation obviously failed to fulfill the requirements of promptness and expeditiousness.
28. Likewise, this investigation had failed in the requirement to take reasonable investigative steps and to follow the obvious lines of enquiry to obtain evidence. A properly maintained investigative file should have included records of all investigative actions and particularly of the interviews with the complainant, suspects and all potential witnesses to the disappearance. In all cases, such interviews should take place as soon as possible and should be recorded and retained in the case file[[8]](#footnote-8).
29. The Panel notes in this context that the investigative file reflects only a single contact by UNMIK Police with the complainant, on 8 February 2003, when the complainant came to the UNMIK Police Station in the northern part of Mitrovicë/Mitrovica of his own accord, in order to provide UNMIK Police with additional information (see § 36 above). First, in the Panel’s view, such a contact with the complainant, more than three and-a-half years after the disappearance of Mr Živko Petković and Mrs Desanka Petković and more than two years and two months after the case had been opened, was obviously belated and took place only because the complainant reached out to the Police, not as an investigative activity of the UNMIK Police. Additionally, the file does not contain the complainant’s formal statement, and it does not appear from the file that the Police undertook any effort to take his full testimony concerning his parents’ disappearance.
30. Second, the Panel notes that, while this discussion with the complainant apparently led to a team from the UNMIK Police, Resource and Investigation Pillar visiting the Petković family home in Gjakovë/Ðakovica in order to collect further information relating to the disappearance of Mr Živko Petković and Mrs Desanka Petković (see § 37 above), this investigative action was also belated and should have been undertaken much closer in time to the opening of the investigation in October 2000. Furthermore, although the file contains the response memo, dated 13 February 2003, which states that the UNMIK Police interviewed Mr B.D. who was still living in the Petković family house, and that he confirmed that Mr Živko Petković and Mrs Desanka Petković had left their house on 22 June 1999, Mr B.D.’s formal statement is not in the file. The Panel notes that while it would have been appropriate to treat Mr B.D. as a person of interest regarding the investigation of Mr Živko Petković and Mrs Desanka Petković’s disappearance, as he seemingly had benefited significantly from the situation, there is no record in the file that Mr B.D. was asked any questions concerning how he had come to take possession of the Petković family house.
31. Similarly, although the file contains the information that the UNMIK Police also interviewed Mr L.Z., who informed the Police that he was the last person to see Mr Živko Petković and Mrs Desanka Petković prior to their disappearance (see § 37 above), Mr. L.Z’s formal statement is not in the file, only the information that he had had lunch with Mr Živko Petković and Mrs Desanka Petković on 22 June 1999, and that he had heard that they had spent the first night away from home in the Orthodox Church in Gjakovë/Ðakovica. There is no record in the file that the UNMIK Police questioned Mr. L.Z. concerning whether he had told the complainant that his parents had been seen alive in the Gjakovë/Ðakovica region, as the complainant had told the UNMIK Police (see § 28). Therefore, in the Panel’s view, either the record keeping of the investigatory documents was very poor and the formal statements of these witness interviews were lost, or the interviews were deficient and key questions were not asked.
32. The same analysis holds true for the UNMIK Police visit to the Orthodox Church in Gjakovë/Ðakovica, which the file states occurred the day after the visit to the Petković family house (see § 38 above). According to the file, UNMIK Police asked three Serbian women who lived in a small house in the church yard if they remembered Mr Živko Petković and Mrs Desanka Petković. The file provides a summary of this event, stating that one of the women remembered other persons who had stayed at the church, but did not remember Mr Živko Petković and Mrs Desanka Petković. There is no transcript in the file of these interviews, and from this account it is not clear if more investigative activity was undertaken at that time that is not recorded in the file, or if this was the extent of the UNMIK Police investigation. Therefore, in the Panel’s view, while it seems that UNMIK Police followed this one lead- Mr. L.Z.’s testimony- to a logical conclusion, there is no evidence in the file that UNMIK Police did a thorough investigation in this regard.
33. With respect to the SRSG’s argument that UNMIK Police did all the investigation it could do into the matter, taking into account the minimal information available or provided by the complainant (see § 53 above), the Panel notes that as shown above, the file reflects only a cursory and belated investigation.
34. In the SRSG’s view, it is because of the lack of information at the initial stage that the UNMIK Police was not in a position to further investigate the matter. The Panel recalls in this regard its position in relation to deciding that there was not enough evidence available to investigate further, 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 and disappearance, especially as it had occurred in obviously life-threatening circumstances, and all obtainable evidence had been collected.
35. 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, UNMIK 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).
36. 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, bringing the assessment of the whole investigation within the period of the Panel’s jurisdiction.
37. 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.
38. The Panel notes that from the investigative file there is no evidence provided to show 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.
39. 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.
40. 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 § 68 above), as required by Article 2 of the ECHR.
41. 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.
42. As was shown above, the investigative file does not show any attempts made by UNMIK Police to contact the next-of-kin of Mr Živko Petković and Mrs Desanka Petković. The only contact with the complainant was made on the impetus of the complainant, when he contacted the UNMIK Police in the northern part of Mitrovicë/Mitrovica (see § 36 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 complainant 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.
43. In light of the deficiencies and shortcomings described above, the Panel concludes that UNMIK failed to carry out an effective investigation into the disappearance of Mr Živko Petković and Mrs Desanka Petković. There has accordingly been a violation of Article 2, procedural limb, of the ECHR.
44. **Alleged violation of Article 3 of the ECHR**
45. The Panel considers that the complainant invokes, in substance, a violation of the right to be free from inhumane or degrading treatment, guaranteed by Article 3 of the ECHR.
46. **The scope of the Panel’s review**
47. 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 §§ 44 - 49 above).
48. 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*, no. 69481/01, judgment of 27 July 2006, § 137; ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 68 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).
49. 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).
50. **The Parties’ submissions**
51. The complainant alleges that the lack of information and certainty surrounding the disappearance of Mr Živko Petković and Mrs Desanka Petković, and particularly the lack of proper investigation by UNMIK, caused mental suffering to himself and his family.
52. The SRSG makes no comment concerning whether there has been a violation of Article 3 of the ECHR.
53. **The Panel’s assessment**
54. *General principles concerning the obligation under Article 3*
55. 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.
56. 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 § 64 above, at § 150)
57. 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.
58. 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).
59. With respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR, the Panel refers to the case law of the European Court of Human Rights and to its own case law. The European Court accepts that this may be the case, depending on the existence of “special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation”. The Court further holds that “relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries” (see ECtHR, *Basayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 159; ECtHR, *Er and Others v. Turkey*, cited in § 101 above, at § 94).
60. 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, § 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).
61. 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 case *Amirov v. Russian Federation* the Committee observed that “[w]ithout wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary. In the present case, the Committee notes the horrific conditions in which the author came to find his wife's mutilated remains (…), followed by the dilatory, sporadic measures undertaken to investigate the circumstances that have lead to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated” ( see HRC, *Abubakar Amirov and Aïzan Amirova v. Russi*a*n Federation*, communication no. 1447/2006, views of 22 April 2009, § 11.7, CCPR/C/95/D/1447/2006).
62. 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 of the respondent State reacted to the applicants’ enquiries should be global and continuous (see ECtHR, *Açiș v.Turkey*, no. 7050/05, judgment of 1 February 2011, § 45).
63. 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 § 109 above, at § 109; ECtHR, *Gelayevy v. Russia*, cited in § 102 above, at § 147; ECtHR, *Bazorkina v. Russia*, cited in § 101 above, at § 140).
64. 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.
65. 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).
66. *Applicability of Article 3 to the Kosovo context*
67. The Panel notes that a normally functioning law enforcement system should take into account the protection needs of victims and witnesses, as well as to consider the special vulnerability of displaced persons in post-conflict situations. The Panel has already considered the fact that by 2003 the police and justice system in Kosovo was described by the UN Secretary-General as being “well-functioning” and “sustainable” (see § 20 above).
68. The Panel also 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.
69. 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.
70. *Compliance with Article 3 in the present case*
71. Against this background, the Panel discerns a number of factors in the present case which, taken together, raise the question of violation of Article 3 of the ECHR.
72. The Panel notes the proximity of the family ties between the complainant and Mr Živko Petković and Mrs Desanka Petković, as they are the complainant’s parents.
73. The Panel recalls the failure established above in relation to the procedural obligation under Article 2, despite the fact that UNMIK Police had the minimum necessary information to pursue the investigation from the outset. The Panel further notes that the complainant was never contacted by UNMIK authorities, including for the purpose of gathering further information on the disappearances, providing an update in the investigation and involving him in the search for Mr Živko Petković and Mrs Desanka Petković. As mentioned above (see § 84 ), the only contact between the complainant and the UNMIK Police stemmed from the complainant’s impetus in contacting the UNMIK Police (see § 28 above). In this respect, the Panel reiterates that from the standpoint of Article 3 it may examine UNMIK’s reactions and attitudes to the complainant in their entirety.
74. As was shown above with regard to Article 2, no adequate investigation, even a bare minimum, was conducted in this case. There is no evidence that the complainant was ever formally interviewed by either UNMIK Police; the ante-mortem data present in the investigative file was collected by the ICRC. Instead of actively investigating, the police was waiting for information to appear by itself.
75. Drawing inferences from UNMIK’s failure to provide a plausible explanation for the absence of any contact with the complainant, the Panel considers that this situation, which continued into the period of the Panel’s temporal jurisdiction, caused grave uncertainty to the complainant and his family about Mr Živko Petković and Mrs Desanka Petković s fate and the status of the investigation.
76. In view of the above, the Panel concludes that the complainant has 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 his inability to find out what happened to Mr Živko Petković and Mrs Desanka Petković. In this respect, it is obvious that, in any situation, the pain of a son who has to live in uncertainty about the fate of his parents must be unbearable.
77. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the complainant’s distress and mental suffering in violation of Article 3 of the ECHR.
78. **CONCLUDING COMMENTS AND RECOMMENDATIONS**
79. In light of the Panel’s findings in this case, the Panel is of the opinion that some form of reparation is necessary.
80. 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 disappearance of Mr Živko Petković and Mrs Desanka Petković, and that its failure to do so constitutes a further serious violation of the rights of the victim and his next-of-kin, in particular the right to have the truth of the matter determined.
81. It would normally be for UNMIK to take the appropriate measures in order to put an end to the violation noted and to redress as far as possible the effects thereof. However, as the Panel noted above (see § 22), UNMIK’s responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law. UNMIK therefore is no longer in a position to take measures that will have a direct impact on the investigations that are still pending before EULEX or local authorities. Likewise, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo, this fact limiting its ability to provide full and effective reparation of the violation committed, as required by established principles of international human rights law.
82. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible.

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

* + - In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR [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 disappearance of Mr Živko Petković and Mrs Desanka Petković will be established and that perpetrators will be brought to justice. The complainant and/or other next-of-kin shall be informed of such proceedings and relevant documents shall be disclosed to them, as necessary;
		- Publicly acknowledges, within a reasonable time, responsibility with respect to UNMIK’s failure to adequately investigate the disappearance of Mr Živko Petković and Mrs Desanka Petković, as well as the distress and mental suffering subsequently incurred, and makes a public apology to the complainant and his family in this regard;
		- Takes appropriate steps towards payment of adequate compensation to the complainant for the moral damage suffered due to UNMIK’s failure to conduct an effective investigation as well as for distress and mental suffering incurred by the complainant as a consequence of UNMIK’s 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 DISAPPEARANCE OF MR ŽIVKO PETKOVIĆ AND MRS DESANKA PETKOVIĆ 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 DISAPPEARANCE OF THE COMPLAINANT’S PARENTS, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT AND HIS FAMILY;**
6. **TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION OF THE COMPLAINANT 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 COMPLAINANT 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

**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

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 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.unhchr.org](http://www.unhchr.org)) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>). [↑](#footnote-ref-2)
3. The ICRC database is available at: <http://familylinks.icrc.org/kosovo/en/pages/search-persons.aspx> (accessed on 10 April 2014). Although the exact date that the ICRC tracing request were opened is not known, the request for Mr Živko Petković is numbered BLG-803026-01, and the request for Mrs Desanka Petković is numbered BLG-803026-02. [↑](#footnote-ref-3)
4. The OMPF database is not open to public. The Panel accessed it with regard to this case on 10 April 2014. [↑](#footnote-ref-4)
5. The ICMP database is available at: <http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en> (accessed on 10 March 2014). [↑](#footnote-ref-5)
6. This document was not provided in the investigative files [↑](#footnote-ref-6)
7. In this case, the SRSG did not provide comments on the merits, only at the admissibility stage. Those comments were not really addressed in the admissibility decision, so they are reflected here. Therefore, these comments differ significantly from the usual “template” response. [↑](#footnote-ref-7)
8. See: United Nations Manual On The Effective Prevention And Investigation Of Extra-Legal, Arbitrary And Summary Executions, adopted on 24 May 1989 by the Economic and Social Council, Resolution 1989/65. [↑](#footnote-ref-8)