

**OPINION**

**Date of adoption: 25 September 2014**

**Case No. 160/09**

**Radmila TOMIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 25 September 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:

1. **PROCEEDINGS BEFORE THE PANEL**
2. The complaint was introduced on 30 March 2009 and registered on 30 April 2009.
3. On 23 December 2009, the Panel requested the complainant to submit additional information. No response was received from the complainant.
4. On 13 January 2010, the Panel reiterated its request for further information to the complainant. The complainant’s response was received on 11 February 2010.
5. On 17 February 2011, the complaint was communicated to the Special Representative of the Secretary-General (SRSG) [[1]](#footnote-1), for UNMIK’s comments on admissibility. On 14 April 2011, the Panel received UNMIK’s response.
6. On 05 April 2012, the Panel declared the complaint admissible.
7. On 11 April 2012, the Panel forwarded its decision to the SRSG requesting UNMIK’s comments on the merits of the complaint.
8. On 30 August 2013, the SRSG provided UNMIK’s comments on the merits of the complaint, together with the relevant documentation.
9. On 14 August 2014, the Panel requested UNMIK to confirm if the disclosure of files concerning the case could be considered final. On 15 August 2014, UNMIK provided its response.
10. **THE FACTS**
11. **General background[[2]](#footnote-2)**
12. The events at issue took place in the territory of Kosovo during the conflict and after the establishment in June 1999 of the United Nations Interim Administration Mission in Kosovo (UNMIK).
13. 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.
14. 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.
15. 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.
16. Meanwhile, members of the non-Albanian community – mainly but not exclusively Serbians, 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 Serbians displaced fall within the region of 200,000 to 210,000. Whereas most Kosovo Serbians 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.
17. 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 Serbians, 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 ICRC as of October 2012.
18. 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.
19. 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.
20. 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”.
21. 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.
22. In May 2000, a Victim Recovery and Identification Commission (VRIC) chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. As of June 2002, the newly established Office on Missing Persons and Forensics (OMPF) in the UNMIK Department of Justice (DOJ) became the sole authority mandated to determine the whereabouts of missing persons, identify their mortal remains and return them to the family of the missing. Starting from 2001, based on a Memorandum of Understanding between UNMIK and the Sarajevo-based International Commission of Missing Persons (ICMP), supplemented by a further agreement in 2003, the identification of mortal remains was carried out by the ICMP through DNA testing.
23. 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.
24. On the same date, UNMIK and EULEX signed an agreement 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 Svetozar Tomić**

1. The complainant is the wife of Mr Svetozar Tomić.
2. The complainant states that on 18 July 1998 Mr Tomić was abducted by unknown perpetrators from Bellacrkvё/Bela Crkva village, while travelling between Gjakovë/Ðakovica and Rahovec/Orahovac.
3. The complainant states that she promptly reported her husband’s abduction to the Yugoslav Red Cross and Doctors without Borders. She also states that she reported her husband’s abduction to the OSCE KVM Mission and to the Humanitarian Law Center HLC. The complainant also states that on an unspecified date Mr Tomić’s disappearance was reported to UNMIK International Public Prosecutors in Prishtinё/Priština.
4. Mr Svetozar Tomić was listed as a missing person in a communication from the ICRC to UNMIK dated 12 October 2001, and in the database maintained by the UNMIK OMPF[[3]](#footnote-3). The entry in relation to Mr Svetozar Tomić in the online database maintained by the ICMP[[4]](#footnote-4) reads in relevant fields: “Sufficient Reference Samples Collected” and “ICMP has provided information on this missing person on **11-10-2004** to authorized institution. To obtain additional information, contact **EULEX Kosovo Headquarters.**”
5. On 01 December 2006, the mortal remains of Mr Tomić were handed over to his family by the UNMIK OMPF. A copy of the death certificate dated 1 December 2006 states that the cause of death was not ascertained.

**C. The investigation**

1. *Disclosure of relevant files*
2. In the present case, the Panel received from UNMIK investigative documents previously held by the UNMIK OMPF, UNMIK Police (MPU and the WCIU) and EULEX.
3. 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.

1. *Investigation aimed at determining the whereabouts of Mr Svetozar Tomić*
2. According to an OMPF autopsy report, dated 30 January 2004, mortal remains of unidentified individuals were exhumed by a British Forensic team in the Dragodan Cemetery in Prishtinë/Priština on 24 May 2000. A copy of a report by the forensic team, entitled “Sitelog for Dragodan Cemetery” was also attached to the autopsy report, which indicates that the remains of several individuals were located in a shallow grave at the site. According to the OMPF documents included in the file, the mortal remains of an unknown person, numbered JA32/004BP, later identified as Mr Svetozar Tomić, were found in a blue body bag. Moreover, the report states that those mortal remains were probably associated with other mortal remains found at the same site which had possible blast or bullet injuries. The report also indicates that the mortal remains had been subject to a previous post-mortem examination, including the collection of DNA samples. The medical doctor stated in the report “It is my determination that the cause of death in the case number JA32/004BP was DNA sample 47 – gunshot to the chest (the rest – the cause of death – is unascertained)”.
3. The file contains an Ante Mortem Investigation Report of the WCU Missing Person Section, dated 16 December 2004. The report states that an MPU file on Mr Svetozar Tomić was opened on 09 June 2002. The report concludes that “After investigations, it’s impossible at this time to find an impartial witness around the place event. No information leading to a possible MP’s location. This case should remain open pending within the WCU.”
4. The file contains an UNMIK OMPF/DOJ Confirmation of Identity Certificate, dated 12 October 2005. This states that UNMIK had compared the ante-mortem and post-mortem information, which corroborated the DNA-analysis results provided by the ICMP a year earlier in a report which is included with the file and dated 11 March 2004. That ICMP report identified the mortal remains as those of Mr Tomić.
5. The file also contains a Death Certificate, issued by the UNMIK DOJ, dated 12 October 2005, in the name of Tomić Svetozar with the ICTY case number JA32/004-21BP MPU 2002-000527. A Body and Clothing Check Form, dated 11 October 2005, authorising the release of the mortal remains, is included in the OMPF file. An undated OMPF document entitled “Family Visit” indicates that the UNMIK OMPF handed over the mortal remains of Mr Tomić for reburial on 01 December 2006 at the administrative crossing between Serbia proper and Kosovo known as “Gate 3”.
6. According to an UNMIK MPU document included in the file, dated 03 December 2006, the investigation into the disappearance of Mr Tomić was closed in December 2006, after the mortal remains of Mr Tomić had been identified and handed over to the family for reburial.
7. *Criminal investigation by the UNMIK WCIU*
8. The investigative file contains an English translation of an undated criminal report by the complainant’s son addressed to the International Prosecutor at the District Public Prosecutor’s Office (DPPO) in Prishtinë/Priština, concerning the abduction of Mr Svetozar Tomić. Besides a detailed description of Mr Svetozar Tomić’s abduction, in that report the complainant states that the family did not have any information as to his fate or whereabouts. The translation notes indicate that the translation was “created on 3/10/2005”, the original Serbian version of the document, which would likely have had a date stamp indicating when the complaint was filed, was not provided by UNMIK.
9. In December 2004, the UNMIK Police WCIU conducted an ante-mortem investigation, no. 1062/INV/04, cross-referencing MPU case no. 2002-000527. A WCIU Ante-Mortem Investigation Report dated 16 December 2004 states in the field “Further investigation” that the investigator had contacted the complainant by telephone. In the field “Statement of witness” the report states “Tomić Svetozar disappeared in the village of Bela Crkva, Orahovac municipality while driving a car FORD ESCORT, black in colour whit {sic}window on top, TG (Titograd) plates. He was never seen after that”.
10. The file contains two numbered 1-page documents both signed by F. L., who ostensibly worked for an OSCE team in Kosovo conducting investigations on behalf of the ICTY. The first document entitled “List of persons kidnapped by Albanian terrorists on 17 July, 1998 in Orahovac” includes the name and year of birth of Mr Tomić. The second document, under the title “Person who has been kidnapped in the village of Bela Crkva on 17 July, 1998”, provides details of the name of an “eye-witness of this kidnapping” including the village where he lived. The document also provides the name and location of the possible perpetrator of Mr Tomić’s kidnapping, and states that Mr Tomić was “taken in the village of Drenovac, and after 10 days he has been seen in Malisevo.” The document further states that “All kidnapped persons have been transported by bus whose owner is V.T. from Orahovac and by truck of S.B. from the village of Vranjak. Personal documents of kidnapped persons have been found in the building of ‘Jaha Petrol’, ownership of D.J. On the barricades in Orhaovac have been found been found bus, truck, dredging machine and two tractors of the company S.H., ownership of S.S.” In total, the document provides the names of one potential witness and six possible perpetrators, with the towns and villages where most of these persons were located.
11. The SRSG provided to the Panel the EULEX WCIU files regarding the disappearance of Mr Tomić as part of its disclosure. As such it can be reasoned that the file remained open and transferred to EULEX by UNMIK during the transition period of 2008-2009.
12. **THE COMPLAINT**
13. The complainant complains about UNMIK’s alleged failure to properly investigate the abduction and killing of Mr Svetozar Tomić. 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).
14. **THE LAW**
15. **Alleged violation of the procedural obligation underArticle 2 of the ECHR** 
    1. **The scope of the Panel’s review**
16. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
17. 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.
18. 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.
19. 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.

1. 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 § 41). 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.
2. 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**
3. The complainant in substance alleges a violation concerning the lack of an adequate criminal investigation into the abduction and killing of Mr Svetozar Tomić.
4. In his comments on the merits of the complaint, the SRSG acknowledges that the abduction of Mr Svetozar Tomić in June 1998 occurred in life threatening circumstances. He notes that at that time the security situation in Kosovo was tense: “KFOR was still in the process of reaching sufficient strength to maintain public safety and law and order and there were a number of serious criminal incidents targeting Kosovo-Serbians, including abductions and killings”.
5. The SRSG therefore accepts UNMIK’s responsibility to conduct an investigation in the case of Mr Svetozar Tomić under Article 2 of the ECHR, procedural part, stemming “from the procedural obligation to conduct an effective investigation where death occurs in suspicious circumstances not imputable to state agents”. In the words of the SRSG, “the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life, as defined by UNMIK Regulation No. 1999/1 On the Authority of the Interim Administration in Kosovo of 25 July 1999 and subsequently, by UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo of 12 December 1999, as amended”.
6. 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.
7. Nonetheless, according to the SRSG, when examining the complaint under Article 2, due consideration shall be given to “the difficulties inherent in post-conflict situations, and the concomitant problems that limit the ability of investigating authorities when conducting investigations of such nature”. The SRSG further observes that obligations under Article 2, must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court of Human Rights in the case *Palić v. Bosnia and Herzegovina*, stating at paragraph 70:

“The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources. Furthermore, after a long and brutal war, Bosnia and Herzegovina underwent fundamental overhaul of its internal structure and political system: Entities and Cantons were set up pursuant to the Dayton Peace Agreement, power-sharing arrangements were introduced in order to ensure effective equality between the “constituent peoples” in the post-conflict society (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009 ...), new institutions had to be created and the existing ones had to be restructured. Some reluctance on the part of the former warring parties to work with those new institutions could be expected in the post-war period, as evidenced in the present case. While it is difficult to pinpoint when exactly this process ended, the Court considers that the domestic legal system should have become capable of dealing effectively with disappearances and other serious violations of international humanitarian law by 2005, following comprehensive vetting of the appointment of police and judiciary and the establishment of the War Crimes Sections within the Court of Bosnia and Herzegovina.

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

1. In the view of the SRSG, the situation that UNMIK faced in Kosovo “from 1999 to 2008 was in most respects similar to that experienced in Bosnia and Herzegovina from 1995 to 2005”.
2. The SRSG states that during the Kosovo conflict thousands of people went missing, at least 800,000 people were displaced and thousands were killed. Many of those that went missing were abducted and killed, buried in unmarked graves and “in certain instances were killed outside of Kosovo, or had their mortal remains moved and buried outside of Kosovo, further adding to the difficulty in locating and recovering the remains”.
3. 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.
4. The SRSG states that locating and identifying the missing in the context described above is a very difficult and time-consuming task. He further states that the number of missing persons recovered and identified by OMPF is “testament to the vigour of its work between 2002-2008” and that “more bodies continued to be located in burial sites and more identifications and returns to family members are taking place, often based on information contained in UNMIK-OMPF files”. The SRSG continues that “therefore, it is apparent that the process for establishing a system capable of dealing effectively with disappearances and other serious violations of international humanitarian law has been an understandably incremental one” in Kosovo as reflected in the *Palić* case referred to above. The SRSG further notes that this process was “reliant on a number of actors rather than just UNMIK, for example the International Commission on Missing Persons, the International Committee of the Red Cross and local missing persons organisations.”
5. The SRSG further argues that fundamental to conducting effective investigations is a professional, well trained and well-resourced police force and that such a force did not exist in Kosovo in the aftermath of the conflict. In the policing vacuum following the end of the conflict, UNMIK had to build a new Kosovo Police Service from scratch, a long and challenging task, which, according to the SRSG, is still in progress. The SRSG also states that UNMIK Police faced numerous challenges in exercising law enforcement functions gradually transferred to it by KFOR in 1999-2000. In this regard, he refers to the UNMIK Police Annual Report of 2000 describing the situation as follows:

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

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

1. The SRSG states that UNMIK Police WCIU included both international UNMIK Police and local Kosovo Police Service officers and focused on the criminal investigation of cases of missing persons. Their responsibility included locating illicit graves, identifying the perpetrators and collecting evidence relating to the crime. UNMIK international police officers working on cases of missing persons had to adjust to conducting investigations in a foreign territory and cultures, with limited support from the still developing Kosovo Police.
2. He further states that, after the conflict, all local institutions in Kosovo, including law-enforcement institutions and those responsible for locating the missing, were non-functional and had to be established from scratch. In addition, investigators were often faced with situations where individuals holding relevant knowledge on the whereabouts and fate of missing persons did not want to disclose this information. According to the SRSG, all these constraints inhibited the ability of the UNMIK Police to conduct investigations according to the standards that may be expected from States with more established institutions and which are not faced with the high number of cases of this nature associated with a post-conflict situation.
3. The SRSG therefore argues that the constraints describe above inhibited the ability of UNMIK to conduct all investigations in a manner that “may be demonstrated, or at least expected, on other States with more established institutions and without the surge in cases of this nature associated with a post-conflict situation”.
4. With respect to the case of Mr Svetozar Tomić, the SRSG states that the investigative files available show that UNMIK complied with its obligation to determine his fate and whereabouts by opening and pursuing an investigation on the basis of “very scant” information provided, “not by the Complainant herself…but probably from the ICRC or the Belgrade authorities.”
5. Summarising the steps taken by UNMIK investigators, the SRSG states that the UNMIK MPU opened a missing person file on Mr Svetozar Tomić on 09 June 2002. As documented in the WCIU Ante-Mortem Investigation Report dated 16 December 2004, UNMIK contacted the complainant in order to collect additional information. The SRSG states that “Even though there was no information at that time that could shed light to the possible whereabouts of Mr Tomić, the available files provide evidence that UNMIK police and forensic efforts in early 2000…lead to the discovery of what at a later stage would turn out to be Mr Tomić’s mortal remains” at the end of what he defines as a “complex investigation”.
6. The SRSG further states that “In the final phase of the investigation, i.e. when the remains were formally identified by the MPU, the death of Mr Tomić was duly certified by UNMIK.” The SRSG states that “the lapse of years” between the initial stage of the UNMIK investigation and the actual identification of the mortal remains of Mr Svetozar Tomić, which occurred in December 2006, must be assessed against the broader context of UNMIK’s criminal investigations in post-conflict Kosovo. In the SRSG’s view, despite the lack of information on the whereabouts of Mr Svetozar Tomić, UNMIK Police and forensic efforts led to the discovery of his mortal remains. The SRSG reports that the “identification of Mr Tomić’s mortal remains was possible only after ante mortem samples were collected from his close family members, i.e. his wife, daughter and two sons.”
7. Concerning the investigation aimed at identifying and bringing to justice those responsible for the abduction and killing of Mr Svetozar Tomić, the SRSG states that the investigation files made available to UNMIK are not conclusive and reveal an overall dearth of information. The SRSG stated that the “Complainant failed to provide UNMIK’s Police with leads as to the identity of the perpetrators. The SRSG argues that during the period within the Panel’s jurisdiction no further witnesses had come forward and no physical evidence could be discovered. The SRSG states that the investigation initiated in 2002 was still followed up by UNMIK Police in 2004 with the appointment of a new investigator for the case and review of the case. The SRSG states that the new contacts pursued with the complainant as a witness did not yield any further useful investigative leads, given the persistent unavailability of relevant information.
8. In view of the above, the SRSG states that UNMIK took all reasonable steps to investigate the case in accordance with the procedural requirements of Article 2 of the ECHR. The SRSG further states that, however, “as there is the possibility that additional and conclusive information exists, beyond the documents mentioned above, UNMIK reserves its right to make further comments on the instant matter”.
   1. **The Panel’s assessment**
9. The Panel considers that the complainant invokes a violation of the procedural obligation stemming from the right to life, guaranteed by Article 2 of the European Convention on Human Rights (ECHR) in that UNMIK did not conduct an effective investigation into the abduction and killing of Mr Svetozar Tomić.
10. *Submission of relevant files*
11. At the Panel’s request, on 5 August 2013, the SRSG provided copies of the documents related to this investigation, which UNMIK was able to recover. The SRSG also suggested (see § 62 above) that there is a possibility more information, not contained in the presented documents, exists, but provided no further details. On 15 August 2014, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 8 above).
12. 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).

1. The Panel notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigations until their completion, including the proper record of all hand overs which might have taken place, is crucial to the continuation of such investigations and failure to do so could thus raise *per se* issues under Article 2.
2. 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.
3. 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).
4. *General principles concerning the obligation to conduct an effective investigation under Article 2*
5. The Panel notes that the positive obligation to investigate has 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.
6. 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).
7. 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 § 44 above, at § 136).
8. 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).
9. 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 § 44 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).
10. 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 § 70 above, at § 201). Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation’s effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of the investigative work (see ECtHR, *Velcea and Mazăre* *v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105).
11. A requirement of promptness and reasonable expedition is implicit in this context. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see ECtHR, *Paul and Audrey Edwards* *v. the United Kingdom*, no. 46477/99, judgment of 14 March 2002, § 72, ECHR 2002‑II).
12. 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 § 73 above, § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 44 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).
13. 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 § 73 above, at §§ 311‑314; *Isayeva v. Russia*, cited in § 73 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).

The Court has also underlined the great importance of an effective investigation in establishing the truth of what transpired thereby satisfying the right to truth 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; ECtHR, *Al Nashiri v. Poland*, no. 28761/11, judgment of 24 July 2014, §§ 495-496). United Nations bodies also recognise 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 HRC,  *Schedko and Bondarenko v. Belarus*, Communication no. 886/1999, views of 3 April 2003, § 10.2, CCPR/C/77/D/886/1999; HRC, *Mariam, Philippe, Auguste and Thomas Sankara v. Burkina Faso*, Communication no. 1159/2003, views of 8 March 2006, § 10.2, CCPR/C/86/D/1159/2003; UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009; Preamble and Article 24 (2) of the Convention for the Protection of All People from Enforced Disappearance, cited in § 106 above; see also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr 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, § 23-26).

1. *Applicability of Article 2 to the Kosovo context*
2. The Panel is conscious that Mr Svetozar Tomić was abducted in 1998 before the deployment of UNMIK in Kosovo, when crime, violence and insecurity were rife.
3. 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.
4. 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.
5. 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).
6. 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 § 73 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 § 77 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 § 72 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 72 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
7. The Court has acknowledged that “where the death 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 § 70 above, at §§ 86‑92; ECtHR, *Ergi v Turkey,* cited above, at §§ 82-85; ECtHR [GC], *Tanrıkulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited above, at §§ 215‑224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).
8. 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 Aïzan Amirova v. Russi*a*n Federation*, communication no. 1447/2006, views of 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006). Further, the HRC has stated the applicability of Article 2 (3), 6 and 7 of the ICCPR with specific reference to UNMIK’s obligation to conduct proper investigations on disappearances and abductions in Kosovo (see HRC, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), 14 August 2006, §§ 12-13, CCPR/C/UNK/CO/1).
9. 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 § 17 above).
10. 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.
11. 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 § 73 above, at § 70; *Brecknell v. The United Kingdom,* no. 32457/04, judgment of 27 November 2007, § 62).
12. *Compliance with Article 2 in the present case*
13. Turning to the particulars of this case, 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 § 44 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 § 71 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 § 19 above).
14. 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 § 62 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. 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.
15. The Panel notes that the investigative file reflects that UNMIK became aware of Mr Svetozar Tomić’s abduction at the latest by 12 October 2001, when his ante-mortem data was communicated by the ICRC to UNMIK (see § 25 above).
16. The Panel notes that the UNMIK OMPF discovered the mortal remains later identified as those of Mr Svetozar Tomić on 24 May 2000. Moreover, these remains had been earlier discovered, analysed for DNA evidence and reburied, ostensibly by the ICTY. It is unclear whether or not the ICTY communicated this information to UNMIK. An autopsy on the mortal remains, which was conducted by UNMIK in December 2003, established that the death had been caused by “gunshot to the chest”. As shown in the investigative file, the UNMIK MPU opened a missing person file on the matter on 9 June 2002.
17. In March 2004, the mortal remains mentioned above were identified as those of Mr Svetozar Tomić based on DNA testing by the ICMP. UNMIK identified the remains mentioned above over a year later in September 2005 by comparison of ante-mortem and post-mortem information and DNA analysis (see § 31 above). In the Panel’s view, as this particular “DNA sample 47” was confirmed as a bone belonging to Mr Tomić’s body, then the cause of death in the death certificate should have been specified as a gunshot wound. The Panel notes that no explanation has been provided from the SRSG to clarify why the family was not informed of this early identification and why arrangements were not made at this time to confirm the identification through DNA test, as per standard practice in these cases.
18. The Panel notes that, apart from opening the case and recording of the ante-mortem data transmitted from the ICRC, no meaningful action was taken by UNMIK following the identification of the remains of Mr Svetozar Tomić in locating the perpetrators. There is no evidence in the file that UNMIK investigators took basic steps such as identifying and interviewing individuals residing at or located in the area of the alleged crime (“canvassing” the area), and persons who knew the victim, who might have had knowledge of possible motives.
19. The Panel also notes with concern the inadequacy of the one-day ante-mortem investigation conducted by the UNMIK MPU on 16 December 2004, probably after the complainant filed a criminal complaint with the DPPO in Prishtinë/Priština. The Panel notes that this investigation consisted of a telephone call made to the complainant to take her statement. There is no record of any other action taken. Had the investigators conducted a proper analysis of the case, they would have realised that the mortal remains of Mr Svetozar Tomić had been already located and identified by the ICMP in March 2004.
20. The Panel notes that there are signs of a possible prior investigation into the disappearance conducted by the ICTY[[5]](#footnote-5) with the assistance of the OSCE-Kosovo Verification Mission and the HLC (see § 24 & §36 above). This included the exhumation of the body, DNA testing, re-burial of the body and obtaining of information which included the names and locations of a potential witness and no less than six alleged perpetrators. There is nothing in the materials provided indicating any cooperation or coordination between UNMIK and the ICTY, OSCE or the HLC in this case. There is nothing in the file indicating that the named witness or any of the alleged perpetrators were interviewed by UNMIK or any of the above-mentioned bodies.
21. 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, including those at the initial stage, persisted. Accordingly, inadequacies existing up until that date were not addressed. Thus, in accordance with the continuing obligation to investigate (see § 44 above), the assessment of the whole investigation is brought within the period of the Panel’s jurisdiction.
22. The Panel notes that the mortal remains of Mr Svetozar Tomić were again identified through DNA analysis on 12 October 2005, about five years and half after they were first discovered by the OMPF (see § 29 above) and about 1 year and a half after the first identification by ICMP, based on the DNA evidence, had taken place (see § 31 above). The Panel also notes that, apart from the general statement that “the lapse of years” between the discovery and the identification of the mortal remains must be assessed “against the broader context of criminal investigations in post-conflict Kosovo”, no plausible explanation was provided by the SRSG to clarify the reasons of the delay in this particular case.
23. Although the identification of Mr Svetozar Tomić and the handover of his mortal remains to the family 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 his mortal remains, especially as they showed signs of a violent death. As those responsible for the abduction and killing had not been located, UNMIK was obligated to use the means at its disposal to regularly review the progress of the investigation to ensure that nothing had been overlooked and any new evidence had been considered, as wellas to inform the relatives ofMr Svetozar Tomić regarding the progress of the investigation.
24. The investigative file shows that a review of the case took place on 03 December 2006 and that the only step taken by the UNMIK WCIU in this occasion was to record the information that the mortal remains of Mr Svetozar Tomić had been identified and handed over to his family. The Panel notes that this was a moment of renewed contact with the family. Nonetheless, no further investigative action was carried out to identify the perpetrators before the case was handed over to EULEX.
25. 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 that UNMIK had encountered at the beginning of its mission, which were discussed above, do not justify such inaction, either at the outset or subsequently.
26. The SRSG argues that due to the unavailability of information or evidence it was not possible for the UNMIK Police to undertake “further meaningful investigation and prioritization against other criminal investigations”. In this respect, the Panel notes 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). Concerning the SRSG’s statement that UNMIK opened and pursued an investigation on the basis of “very scant” information provided, “not by the Complainant herself…but probably from the ICRC or the Belgrade authorities”, the Panel notes that, had the UNMIK Police located and interviewed the named witness and alleged perpetrators that were provided to them, an entirely different outcome may have occurred.
27. The Panel further 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 potential witnesses and alleged perpetrators had been located and interviewed about the circumstances of the abduction, and all obtainable evidence had been collected.
28. 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 bringing 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 § 74 above), as required by Article 2 of the ECHR.
29. 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.
30. The complainant states that she received no feedback from UNMIK on the investigation concerning her husband. The Panel notes that the only documented contacts between the complainant and UNMIK were a telephone call asking her for more information and the handover of Mr Svetozar Tomić’s mortal remains from the OMPF to his family in 2006. As the Panel has already noted no information was given to them concerning the progress of the investigation, including the fact that an identification of Mr Svetozar Tomić’s mortal remains had occurred in March 2004 (see § 31 above). The Panel therefore considers that the investigation was not accessible to the complainant’s family as required by Article 2.
31. 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 Svetozar Tomić. There has accordingly been a violation of Article 2, procedural limb, of the ECHR.

**V. CONCLUDING COMMENTS AND RECOMMENDATIONS**

1. In light of the Panel’s findings in this case, the Panel is of the opinion that some form of reparation is necessary.
2. 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.
3. 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.
4. 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. 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.
5. 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 means available to it *vis-à-vis* the competent authorities in Kosovo, 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 Svetozar Tomić 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 abduction and killing of Mr Svetozar Tomić and make a public apology to the complainant and her family in this regard;
* Takes appropriate steps towards payment of adequate compensation to the complainant for the moral damage suffered due to UNMIK’s failure to conduct an effective investigation.

**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:**
3. **URGES THE COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE ABDUCTION AND KILLING OF MR SVETOZAR TOMIĆ IS CONTINUED IN COMPLIANCE WITH ARTICLE 2 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;**
4. **PUBLICLY ACKNOWLEDGES RESPONSIBILITY FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE ABDUCTION AND KILLING OF MR SVETOZAR TOMIĆ AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT;**
5. **TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 TO THE COMPLAINANT;**
6. **TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**
7. **TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
8. **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

**KVM** – OSCE Kosovo Verification Mission

**MPU** - Missing Persons Unit

**MUP** - Ministry of Internal Affairs of the Republic of Serbia

**NATO** - North Atlantic Treaty Organization

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

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

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

**UN** - United Nations

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

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

**VRIC** - Victim Recovery and Identification Commission

**WCIU** - War Crimes Investigation Unit

1. A list of abbreviations and acronyms contained in the text can be found in the attached Annex. [↑](#footnote-ref-1)
2. The references drawn upon by the Panel in setting out this general background include: OSCE, “As Seen, as Told”, Vol. 1 (October 1998 – June 1999) and Vol. II (14 June – 31 October 1999); quarterly reports of the UN Secretary-General on the United Nations Interim Administration in Kosovo; UNMIK Police Annual Reports (2000, 2001); Humanitarian Law Centre, “Abductions and Disappearances of non-Albanians in Kosovo” (2001); Humanitarian Law Centre, “Kosovo Memory Book” (htpp://www.kosovomemorybook.org); UNMIK Office on Missing Persons and Forensics, Activity Report 2002-2004; European Court of Human Rights, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, nos. 71412/01 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 OMPF database is not open to public. The Panel accessed it with regard to this case on 09 September 2014. [↑](#footnote-ref-3)
4. The ICMP database is available at: <http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en> (accessed on 09 September 2014). [↑](#footnote-ref-4)
5. The SRSG reported to HRAP that “ICTY reports that it exhumed 4019 bodies in 1999 and 2000, less than half of which were identified; furthermore, some of the unidentified bodies exhumed in 1999 by gratis teams were reburied in locations still unknown to OMPF.” [↑](#footnote-ref-5)