

**OPINION**

**Date of adoption: 14 December 2014**

**Cases Nos 264/09 and 265/09**

**Bogoljub ŠMIGIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 14 December 2014,

with the following members present:

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, makes the following findings and recommendations:

1. **PROCEEDINGS BEFORE THE PANEL**
2. The two complaints were introduced on 9 April 2009 and registered on 30 April 2009.
3. On 23 December 2009, the Panel requested further information from the complainant. No response was received.
4. On 9 September 2010, the Panel decided to join the cases pursuant to Rule 20 of the Panel’s Rules of Procedure.
5. On 28 March 2012, the Panel communicated the cases to the Special Representative of the Secretary-General (SRSG)[[1]](#footnote-1), for UNMIK’s comments on the admissibility of the complaints.
6. On 2 May 2012, the SRSG provided UNMIK’s response in relation to the admissibility of the complaint, together with the copies of the relevant documents.
7. Following the Panel’s inquiries, on 3 October 2012, UNMIK requested the Archives and Records Management Section of the United Nations’ (UN) Headquarters in New York to locate and return to UNMIK a number of investigative files related to the complaints before the HRAP.
8. On 21 November 2012, the Panel declared the complaints of Mr Šmigić (cases nos 264/09 and 265/09) admissible.
9. On 26 November 2012, the Panel forwarded its decision on admissibility of the complaints of Mr Šmigić 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.
10. On 14 December 2012, UNMIK received the requested investigative files from the UN Headquarters in New York (see §6 above). On 17 December 2012, UNMIK presented those documents, including some investigative files related to the complaints of Mr Šmigić (nos 264/09 and 265/09), to the Panel.
11. On 22 February 2013, the SRSG provided UNMIK’s response to the Panel’s request on UNMIK’s comments to the merits of the complaint from 26 November 2012 together with the copies of the available relevant investigative documents.
12. On 29 September 2014, the Panel requested UNMIK to confirm whether the disclosure of the investigative files concerning the cases could be considered final.
13. On 29 September 2014, the same day, UNMIK provided its response to the Panel’s request for confirmation (see above), confirming that there are no further documents.
14. On 3 December 2014 the Panel requested further information from the complainant.
15. On 9 December 2014 a representative of the complainant contacted the Panel to provide the additional information requested on 3 December 2014.
16. **THE FACTS**
17. **General background[[2]](#footnote-2)**
18. The events at issue took place in the territory of Kosovo during the armed conflict and after the establishment in June 1999 of the United Nations Interim Administration Mission in Kosovo (UNMIK).
19. 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.
20. 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.
21. 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.
22. 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.
23. 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 International Committee of the Red Cross (ICRC) as of October 2012.
24. 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.
25. 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.
26. 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”.
27. 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 chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. On 5 November 2001, UNMIK signed the UNMIK-FRY Common Document reiterating, among other things, its commitment to solving the fate of missing persons from all communities, and recognizing that the exhumation and identification programme is only a part of the activities related to missing persons. 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.
28. On 9 December 2008, UNMIK’s responsibility with regard to police and justice in Kosovo ended with EULEX assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
29. On the same date, UNMIK and EULEX signed a Memorandum of Understanding on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were supposed to be handed over to EULEX.
30. **Circumstances surrounding the abduction and disappearance of the complainant’s close relatives**
31. The complainant is the son of Mr MilosavŠmigić (case no. 264/09) and Mrs Sultana Šmigić (case no. 265/09).
32. The complainant states that his parents, along with 2 other persons, were abducted from the village of Leoqin/Leoćina in the municipality of Skenderaj/Srbica by members of the Kosovo Liberation Army on 9 June 1998. Since that time their whereabouts have remained unknown.
33. The complainant states that the disappearances were reported to the ICRC, the Yugoslav Red Cross and the Serbian Ministry of Internal Affairs.
34. The ICRC tracing requests for Mr MilosavŠmigić and Mrs Sultana Šmigić both remain open.[[3]](#footnote-3) Likewise, their names are included in the database compiled by the UNMIK OMPF[[4]](#footnote-4). Their names also appear in the list of missing persons, which 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. The entries in relation to Mr MilosavŠmigić and Mrs Sultana Šmigić in the online database maintained by the ICMP[[5]](#footnote-5) states, in relation to both of them; “DNA match not found” and “Reported date of disappearance: 06-09-1998” and “Sufficient Reference Samples Collected”
35. **The investigation**

*Disclosure of relevant files*

1. In the present case, the Panel received from UNMIK investigative documents previously held by the UNMIK OMPF and the UNMIK Police WCIU, obtained by UNMIK from EULEX. In addition, on 17 December 2012, the Panel received some documents in relation to the investigation of the abduction and disappearance of Mr MilosavŠmigić and Mrs Sultana Šmigić, which were returned from the UN Headquarters’ archives (see § 9 above). Although the SRSG suggested that more documents in relation to this case may exist, on 29 September 2014, UNMIK confirmed to the Panel that no more files have been obtained.

1. Concerning disclosure of the 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.

*The Investigative File*

1. The OMPF file in relation to Mr MilosavŠmigić and Mrs Sultana Šmigić contains one undated Victim Identification Form, in the Serbian language, for Mr MilosavŠmigić, completed in handwriting apparently by the ICRC. A photograph of him is attached to the form. It provides his brief physical description and lists the three other persons as persons who disappeared with him, including his wife, Mrs Sultana Šmigić. It provides names and contact details of his daughter, as his next of kin. The form is cross-referenced to the MPU case no. 2000-001376. There is a typed form included in the file containing an English translation of the same information with a printed date of 18 December 2004. There is no Victim Identification form for Mrs Sultana Šmigić in the file.
2. There is a document dated “04-03-00”, providing the name, address and contact details of someone named D.S. who is apparently the grandson of Mr Milosav Šmigić. The document provides details related to the kidnapping of Mr Milosav Šmigić, as well as the name of 2 witnesses to the kidnapping. The physical description, occupation and whereabouts of one of the witnesses are also provided. The names, aliases and location of two suspects are also given. A detailed description of a red tractor that was also stolen at the same time was included in the report.
3. There is a 4-page page police report consisting of a cover sheet, incident report, dated 16 August 2000, and officer report, dated 18 August 2000, included in the file. The cover sheet is from “UNMIK Police Kosovo Investigation Team Srbica Station” with file no. 2000-BF-408 and names Mr Milosav Šmigić, Mrs Sultana Šmigić and two other persons as victims. The incident report provides the names and basic information related to the kidnappings of all four persons. The officer’s report provides basic details of the kidnapping of the 4 persons and the name of the person who found their clothes at a fuel station.
4. The file contains a CCIU File Update/Close Form for the file regarding Mr Milosav Šmigić and Mrs Sultana Šmigić as well as the other two persons who were kidnapped with them. The document is dated 31 October 2000 and is related to “Local Case Number 2000-BF-408.” The document states “After reviewing the reports, I find that there are no leads to follow in this investigation. The incident occurred in the summer of 1998 in the village of Leocina. There are no known witnesses to any offense. The victims disappeared and it is suspected that they may have been kidnapped by the TMK[[6]](#footnote-6). They were the last Serbian inhabitants of the village. Several months after their disappearance, clothing was found near a local fuel station. Witnesses believe that the clothing belonged to the missing persons. The witnesses speculate that the victims may be buried somewhere near the gas station, but there are no further evidence to support this or to indicate the exact location of any possible graves. Copies of this report will be forwarded to ICTY regarding the information on the possible mass gravesite. It is unlikely that they will take any further action given the vague nature of the information. Unless further information is developed in this case, it should remain closed to further investigation.”
5. The part of the file, previously held by UNMIK Police WCIU, starts with a one-page UNMIK Police MPU Case Continuation Report (CCR) on the case related to the complainant’s father. The details under the caption “Šmigić, Milosav”, MPU case no. 2000-001376, has three entries, - one of 18 October 2000: “Input – OK”, the other two dated 21 June 2002: DVI Input for Šmigić, Milosav – OK” and “DVI Input for Šmigić, Sultana – OK.”
6. Further, the file contains three WCIU Ante-Mortem Investigation Reports; two are referenced to the MPU case no. 1080/INV/04, with both the names and details surrounding the kidnapping of Mr MilosavŠmigić and Mrs Sultana Šmigić. Both reports indicate a start date of 11 December 2004 and completion date of 30 December 2004. Both are cross-referenced with an MPU case no. 2001-001376; this number is likely incorrect, as the no. 2000-001376 is referenced in all other documentation in the file. Both files contain the names and location of two named prime suspects who were allegedly involved in the crime. Both files also contain the name of a witness to the crime as well as the name of a fuel station where the clothing of both persons were found. There are two differences between the separate reports for Mr MilosavŠmigić and Mrs Sultana Šmigić:
7. The file for Mrs Sultana Šmigić contains the following excerpt from the Human Rights Watch website, which is not included in the file of Mr. Milosav Šmigić;

 “By May 1998, most ethnic Serbs in Leoncina had left their homes after threats from local Albanians. Five members of the Šmigić family, however, four of them over seventy years old, decided not to leave their village. One of them, [KS], told the Humanitarian Law Center that ethnic Albanians in military uniforms entered their yard around 10 a.m. on July 9. She managed to escape but Milosav (75), Sultana (72), Radomir (54), Aleksandra (c75), and Dostana (42) have not been heard from since…”

1. The file of Mr MilosavŠmigić includes additional information obtained from an internet site naming AH “alias N” as commander of the KLA in 1998 for the region where both Mr MilosavŠmigić and Mrs Sultana Šmigić were killed. The site also specifically names AH and one other person as having kidnapped and murdered Dostana Šmigić. The site also states that this same KLA commander was arrested in an unrelated murder in 2003.
2. The WCIU Ante-Mortem Investigation Reports for both Mr MilosavŠmigić and Mrs Sultana Šmigić both state: “WITNESSES INTERVIEWED: No witnesses were possible to get in touch with since according to the information at hand they reside out of Kosovo or the information on their whereabouts is currently unavailable.” The conclusion of both reports is that the respective cases­ should remain open with the WCIU.
3. The third WCU Ante-Mortem Investigation Report, dated 13 June 2005, is missing the front page but has MPU case no. 0530/INV/05 as the heading for each page. It ostensibly appears to be that of Mr Radomir Šmigić, who reportedly disappeared with both Mr MilosavŠmigić and Mrs Sultana Šmigić. The report includes significantly more detail as to what happened to both Mr MilosavŠmigić and Mrs Sultana Šmigić. The report includes text from a website that reportedly contained a statement by the named witness as to what happened after 4 men in camouflage came into her yard;

“As soon as I saw them I ran over to Milosav and Sultana’s…The four of them came after me and asked us, “What are you doing here? This is Albania; there’s nothing here for you.” To which Milosav replied, “It’s been Serbia up until now. And even if it’s Albania, we can find a way to live together in peace.” Then they hit Milosav with their gun butts and kicked me and Sultana…They put us in one room, set fire to the bedding and said they’d be back in an hour…We opened the window and climbed out. Milosav told me and Sultana to flee…Radomir told me, Sultana and [L]to go into the wheat fields and said that he would hide upstairs. Us three women left the house and went into the fields. After a while, Sultana and [L] said they wanted to go back. Sultana went to her husband and [L] went back to her house, to Radomir. But about 30 of them were going into the yard and, when they saw us, then came toward us. They were armed, some in uniform and some in civvies…From her hiding place, [K] saw the Smigic houses in flames.”

1. The report also has an excerpt from the Amnesty International website with the same facts and similar wording. The report states that the investigators tried to contact the brother of Mr Radomir Šmigić “but that the number given in the file was wrong.” The report concluded that the case should remain open inactive within the WCIU.
2. There is a blank, undated, File Diary Date Register in the file with file no. 2000-001376.
3. A one-page printout from the MPU database on the case no. 1130/INV/04, dated 18 April 2005, in relation to the disappearance of both Mr MilosavŠmigić and Mrs Sultana Šmigić, in the form “Invest. Notes”, provides details of the abduction. Under the heading “Result” it states “Pending.” There is also a one-page printout from the MPU database on case no. 0530/INV/05, dated 06 May 2005 in relation to Mr Radomir Šmigić (mentioned in § 40). The field “Request Summary” states “There is a lack of information, MPU file #2005-000007.” The investigators notes state “This case should be kept inactive.”

*The Files received from UN archives in New York*

1. As mentioned above (see § 9), on 17 December 2012, the Panel received the documents related to the investigations into the complaints of Mr Bogoljub Šmigić, which were returned to UNMIK from the UN archives in New York. These documents include the files also held by the OMPF and the UNMIK Police MPU. All the documents received from the UN archives in New York were already included in the files that the Panel received from EULEX.
2. **THE COMPLAINTS**
3. The complainant complains about UNMIK’s alleged failure to properly investigate the abduction and disappearance of his parents, Mr MilosavŠmigić and Mrs Sultana Šmigić. 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).
4. The complainant also complains about the mental pain and suffering allegedly caused to him by this situation. In this regard, he relies on Article 3 of the ECHR.
5. **THE LAW**
6. **Alleged violation of the procedural obligation under Article 2 of the ECHR**
	1. **The scope of the Panel’s review**
7. Before turning to the examination of the merits of the complaints, the Panel needs to clarify the scope of its review.
8. In determining whether it considers that there has been a violation of Article 2 (procedural limb) of the ECHR, the Panel is mindful of the existing case-law, notably that of the European Court of Human Rights. However, the Panel is also aware that the complaints before it differ in some significant ways from those brought before that Court. First, the respondent is not a State but an interim international territorial administration mandated to exercise temporary responsibilities in Kosovo. No suspicion attaches to UNMIK with respect to the substantive obligations under Article 2 of the ECHR. Second, as in a limited number of cases before the European Court, those suspected of being responsible for the alleged killings and/or abductions are in all cases before the Panel non-state actors, mostly but not exclusively connected to the conflict. These are factors for the Panel to take into consideration as it assesses for the first time the procedural positive obligations of an intergovernmental organisation with respect to acts committed by third parties in a territory over which it has temporary legislative, executive and judicial control.
9. 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.
10. 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.
11. 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 § 92). 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.
12. 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 party’s’ submissions**
13. The complainant in substance alleges violations concerning the lack of an adequate criminal investigation into the abduction and disappearance of his parents. In essence, the complainant complains that he was not informed as to whether an investigation was conducted and what the outcome was.
14. The SRSG generally notes that in this case UNMIK has been able to obtain copies of relevant files previously held by the OMPF and UNMIK Police WCIU. The SRSG also submits that, UNMIK handed over all investigative files to EULEX and obtained copies of the investigative files in its’ possession.
15. In his comments on the merits of both complaints under Article 2, the SRSG generally states that the complainant’s relatives disappeared in life threatening circumstances, around the same time, prior to the adoption of the UNSC Resolution No. 1244 (1999) establishing UNMIK. He notes that at that time the security situation in Kosovo was tense and there was a high level of violence all over Kosovo due to the on-going armed conflict. Soon after the establishment of UNMIK in June 1999, the security situation remained tense, as “KFOR was still in the process of reaching sufficient strength to maintain public safety and law and order and there were a number of serious criminal incidents targeting Kosovo-Serbs, including abductions and killings.”
16. The SRSG accepts UNMIK’s responsibility to conduct an investigation in the cases of Mr MilosavŠmigić and Mrs Sultana Šmigić under Article 2 of the ECHR, procedural part, starting from 11 June 1999. In the words of the SRSG, “the essential purpose of such investigation [was] 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.”
17. The SRSG notes that the complainants do not allege a violation of the substantive part of Article 2, but rather of its procedural element. The SRSG states that “the procedural element of Article 2 is essentially two-fold: (i) an obligation to determine through investigation the fate and/or whereabouts of the victim; and (ii) an obligation to conduct an investigation capable of determining whether the death was caused unlawfully and leading to the identification and punishment of those responsible for the disappearance and/or death of the victim.”
18. The SRSG further observes that when determining applications under Article 2, procedural part, consideration must be given to not imposing an impossible or disproportionate burden on UNMIK. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court of Human Rights in the case *Palić v. Bosnia and Herzegovina*, stating at paragraph 70:

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

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

1. In the view of the SRSG, UNMIK was faced with a very similar situation in Kosovo, from 1999 to 2008, as the one in Bosnia “from 1995 to 2005”. The SRSG states that thousands of people were displaced or went missing during the Kosovo conflict. Many of the persons who went missing were abducted, killed, and buried in unmarked graves inside or outside Kosovo, which made it very difficult locating and recovering their mortal remains.
2. In June 2002, UNMIK created the OMPF with the mandate to determine the fate of the missing; however its work was faced with many challenges at the beginning of the operations, due to the work previously done mostly by actors independent from UNMIK. In particular, the SRSG states that the collection of evidence of war crimes began with the arrival of NATO in 1999 with independent teams from several countries operating under the loose coordination of the ICTY. A lack of standard operating procedures or centralisation led to problems with the evidence gathered in this phase. In 2000, the ICTY launched a large, centralised forensic operation, based at the Rahovec/Orahovac mortuary, with standard operating procedures for all forensic teams except the British one, which operated independently out of Prishtinë/Priština.
3. The SRSG continues in this regard that: “Even more serious that the shortfall of the forensic standards was the lack of attention paid to the humanitarian agenda of identifying bodies and restituting their remains […]. In a focused effort to demonstrate that crimes were systematic and widespread, ICTY and its gratis teams autopsied as many bodies as possible with little or no identification work. ICTY reports that it exhumed 4019 bodies in 1999 an 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.” 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 culture, with limited support from the still developing Kosovo Police. In addition, 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.
2. The SRSG also stresses that “fundamental to locating missing persons and the perpetrators of disappearances and unlawful killings is information” and that in Kosovo “investigators were often faced with situations where individuals who may hold important information relevant knowledge of knowledge on the whereabouts and fate of missing often did not want to disclose such information either through interviews with UNMIK Police or by coming forward voluntarily.”
3. 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.
4. Further, with regard to all cases, the SRSG provides a brief overview of the actions undertaken by UNMIK authorities and the available investigative documents (see §§ 31 - 43 above).
5. In relation to the investigation into the abduction and disappearance of Mr Milosav Šmigić and Mrs Sultana Šmigić, the SRSG notes that the OMPF has “collected and documented information related to the complainant’s missing parents starting from 2000.”
6. The SRSG then provides a summary of the UNMIK WCIU ante-mortem investigation report for Mr. Radomir Šmigić, dated 13 June 2005, who was one of the persons who was kidnapped in the same village and on the same day as Mr Milosav Šmigić and Mrs Sultana Šmigić, but is not one of the kidnapped persons upon which this complaint is based. (see § 40 above.) The SRSG states that WCIU collected further information on details of the kidnapping from an internet source. The SRSG then refers to a conclusion of an UNMIK WCIU report dated 30 December 2004, which is in fact a portion of the investigation notes of the report related to Mr. Radomir Šmigić. Specifically it states that “WCU tried to contact the brother of the missing person, but the phone number given in the file was found to be wrong.”
7. The SRSG states that “[b]ased on the information provided in the files of the former WCU, it can be seen that UNMIK Police tried to contact the brother of Mr. Milosav Šmigić, in order to get more information regarding the whereabouts of those allegedly responsible for the disappearance of the missing persons. But the phone number given in the file was found to be wrong.”
8. The SRSG closes with “As stated above, based on documents obtained from EULEX it is evident that UNMIK Police did open and pursue an investigation into the whereabouts of Mr Milosav Šmigić and Mrs Sultana Šmigić; however, UNMIK has noted in other missing persons cases that, without witnesses coming forward or physical evidence being discovered, police investigations inevitably stall because of a lack of evidence.”
9. The SRSG concludes that UNMIK authorities acted in accordance with the procedural requirements of Article 2 of the ECHR, in relation to both victims in this case.
10. The SRSG also informed the Panel that he might make further comments on this matter, “[a]s there is the possibility that additional and conclusive information exists”, beyond the documents presented to the Panel. However, no further communication in this regard, other than the confirmation of the full disclosure of the investigative files, has been received to date.
	1. **The Panel’s assessment**
11. 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 ECHR in that UNMIK Police did not conduct an effective investigation into the abduction and disappearance of Mr MilosavŠmigić and Mrs Sultana Šmigić.
12. *Submission of relevant files*
13. At Panel’s request, the SRSG provided copies of the documents related to the investigations subject of the present complaints, which UNMIK was able to recover, including some files which had been retrieved from the archives at the UN Headquarters in New York (see §§ 6 - 9 above). As mentioned above (see § 73), the SRSG also noted that more information, not contained in the presented documents, may exist in relation to this case. However, on 29 September 2014, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 12 above).
14. The Panel notes that Section 15 of UNMIK Regulation No. 2006/12 states that the Panel may request the submission from UNMIK of any documents and that the SRSG shall cooperate with the Panel and provide the necessary assistance including, in particular, in the release of documents and information relevant to the complaints. The Panel in this regard refers to the case-law of the European Court of Human Rights that inferences shall be drawn from the conduct of the respondent party during the proceedings, including from its failure “to submit information in their hands without a satisfactory explanation” (see ECtHR, *Çelikbilek v. Turkey*, no. 27693/95, judgment of 31 May 2005*,* § 56).
15. The Panel also notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigation to their handing over, is crucial to the continuation of such investigations and could thus raise *per se* issues under Article 2 (see Human Rights Advisory Panel [HRAP], *Bulatović*, no. 166/09, opinion of 13 November 2014, § 62). The Panel has no reason to doubt that UNMIK undertook all efforts in order to obtain the relevant investigative documents. However, UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.
16. The Panel itself is not in the position to verify the completeness of the investigative files received. The Panel will therefore assess the merits of the complaints on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of 15 March 2011, § 146).
17. *General principles concerning the obligation to conduct an effective investigation under Article 2*
18. The Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights *Velásquez-Rodríguez* (see Inter-American Court of Human Rights (IACtHR), *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been stated by the HRC as stemming from Article 6 (right to life), Article 7 (prohibition of cruel and inhuman treatment) and Article 9 (right to liberty and security of person), read in conjunction with Article 2(3) (right to an effective remedy) of the ICCPR(see HRC, General Comment No. 6, 30 April 1982, § 4; HRC, General Comment No. 31, 26 May 2004, §§ 8 and 18, CCPR/C/21/Rev.1/Add. 13; see also, among others, HRC, *Mohamed El Awani, v. Libyan Arab Jamahiriya*, communication no. 1295/2004, views of 11 July 2007, CCPR/C/90/D/1295/2004). The obligation to investigate disappearances and killings is also asserted in the UN Declaration on the Protection of all Persons from Enforced Disappearances (A/Res/47/133, 18 December 1992), and further detailed in UN guidelines such as the UN Manual on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions (1991) and the “Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres” (1995). The importance of the obligation is confirmed by the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, which entered into force on 23 December 2010.
19. In order to address the complainant’s allegations, the Panel refers, in particular, to the well-established case-law of the European Court on Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that “[The] obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed (see, *mutatis mutandis*, ECtHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 161, Series A no. 324; and ECtHR, *Kaya v. Turkey*, judgment of 19 February 1998, § 105, 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).
20. 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 § 52 above, at § 136; ECtHR [GC], *Mocanu and Others v. Romania*, nos 10865/09, 45886/07 and 32431/08, judgment of 17 September 2014, § 317).
21. 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; ECtHR [GC], *Mocanu and Others v. Romania*, cited above, § 321).
22. 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, affording a sufficient element of public scrutiny of the investigation and its results, the investigation must also be effective in the sense that is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible (ECtHR [GC]*, Varnava and Others v. Turkey*, cited in § 52 above, at § 191; see also ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, judgment of 15 February 2011, § 63). This is not an obligation of results but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in §82 above, at § 312; and ECtHR *Isayeva v. Russia*, cited above, at § 212).
23. In particular, the investigation’s conclusion must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the investigation’s ability to establish the circumstances of the case and the identity of those responsible (see ECtHR, *Kolevi v. Bulgaria*, cited in § 80 above, at § 201). Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation’s effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of the investigation work (see ECtHR, *Velcea and Mazăre v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105). At the same time, the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation (see ECtHR [GC], *El-Masri v. “the Former Yugoslav Republic of Macedonia”*, no. 39630/09, judgment of 13 December 2012, § 183; ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 81 above, at § 322).
24. 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; ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 81 above, at § 323).
25. Specifically with regard to persons disappeared and later found dead, which is not the situation in this case, the Court has stated that the procedures of exhuming and identifying mortal remains do not exhaust the obligation under Article 2 of the ECHR. The Court holds that “the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for, and it is thus of a continuing nature” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 83 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 102 above, at § 148, *Aslakhanova and Others v. Russia*, nos 2944/06 and others, judgment of 18 December 2012, § 122). However, the Court also stresses that this procedural obligation “does not come to an end even on discovery of the body .... This only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 102 above, at § 145). While the location and the subsequent identification of the mortal remains of the victim may in themselves be significant achievements, the procedural obligation under Article 2 continues to exist (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 83 above, at § 64).
26. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see ECtHR, *Ahmet Özkan and Others*, cited in § 82 above, at §§ 311‑314; ECtHR, *Isayeva v. Russia*, cited in § 82 above, at §§ 211-214 and the cases cited therein; ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011, no. 55721/07, § 167, ECHR 2011; ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 81 above, at § 324).
27. 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,* cited in § 84 above, at § 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).
28. *Applicability of Article 2 to the Kosovo context*
29. The Panel is conscious of the fact that the abduction and disappearance of Mr Milosav Šmigić and Mrs Sultana Šmigić took place about a year prior to the deployment of UNMIK in Kosovo, during the armed conflict, when crime, violence and insecurity were rife.
30. Nevertheless, 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.
31. The Panel considers that the SRSG’s arguments raise two main questions: first, whether the standards of Article 2 continue to apply in situation of conflict or generalised violence and, secondly, whether such standards shall be considered fully applicable to UNMIK.
32. 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).
33. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court on Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see, among other examples, ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 83 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 § 87 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 § 82 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 82 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39 – 51; ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 81 above, at § 319).
34. The Court has acknowledged that “where the death [and disappearances] to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed” (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom,* cited above, at § 164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that “the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 80 above, at §§ 86‑92; ECtHR, *Ergi v Turkey,* cited above, at §§ 82-85; ECtHR [GC], *Tanrıkulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited in § 82 above, at §§ 215‑224; ECtHR, *Musayev and Others v. Russia*, nos 57941/00 and others, judgment of 26 July 2007, §§ 158-165).
35. 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 § 79 above, at § 1; HRC, *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, communication no. 1447/2006, views of 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006). Further, the HRC has stated the applicability of Article 2 (3), 6 and 7 of the ICCPR with specific reference to UNMIK’s obligation to conduct proper investigations on disappearances and abductions in Kosovo (see HRC, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), 14 August 2006, §§ 12-13, CCPR/C/UNK/CO/1).
36. The Panel appreciates the difficulties encountered by UNMIK during the first phase of its deployment. The Panel notes that the appropriate importance attached to the issue of missing persons in Kosovo meant that UNMIK had to take into account both the humanitarian and criminal dimensions of the situation. In particular, the Panel considers that the importance attached to the criminal investigations and the difficulties in Kosovo that limited the abilities of investigating authorities to conduct such investigations, made it crucial that UNMIK establish from the outset an environment conducive to the performance of meaningful investigations. This would involve putting in place a system that would include such elements as the allocation of overall responsibility for the supervision and monitoring of progress in investigations, provision for the regular review of the status of investigations, and a process for the proper handover of cases between different officers or units of UNMIK Police. Such a system should also take account of the protection needs of victims and witnesses (see, *mutatis mutandis*, ECtHR, *R.R. and Others v. Hungary*, no. 19400/11, judgment of 4 December 2012, §§ 28-32), as well as to consider the special vulnerability of displaced persons in post-conflict situations (see ECtHR [GC], *Sargsyan v. Azerbaijan,* no. 40167/06, decision of 14 December 2011, § 145; and ECtHR [GC], *Chiragov and Others v. Armenia*, no. 13216/05, decision of 14 December 2011, § 146). While understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel deems that this process was completed in 2003 when the police and justice system in Kosovo was described as being “well-functioning” and “sustainable” by the UN Secretary-General (see § 23 above).
37. 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 § 83 above, at § 70; *Brecknell v. The United Kingdom,* no. 32457/04, judgment of 27 November 2007, § 62).
38. However, the Panel considers that, in the context of most serious crimes committed against civilian populations, Article 2 requires that the authorities take all investigative efforts in order to establish the facts and bring perpetrators to justice. Such cases shall be given the highest priority.
39. The Panel further notes that its task is not to review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application to the particular circumstances of a situation subject of a complaint before it (see, ECtHR, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, § 53, Series A no. 145-B). The Panel therefore determines that the nature and degree of scrutiny to determine whether the effectiveness of the investigation satisfies the minimum threshold depends on the circumstances of the particular case. For these reasons, the Panel considers that it will establish with regard to each case if all reasonable steps were taken to conduct an effective investigation as prescribed by Article 2, having regard to the realities of the investigative work in Kosovo.
40. The Panel puts on record that it has already analysed the effectiveness under Article 2 of numerous investigations conducted by UNMIK with respect to killings, abductions and disappearances related to the conflict in Kosovo. The Panel has identified common shortcomings in these investigations such as delays in the registration of the cases and lengthy periods of inactivity from the outset and in the period within the Panel’s jurisdiction; failure to take basic investigative steps and follow obvious lines of enquiry; lack of coordination among different units of UNMIK Police; lack of regular and meaningful reviews of cases; lack of prosecutorial oversight; failure to provide family members with minimum necessary information on the status of the investigation  (compare with ECtHR, *Aslakhanova and Others v. Russia*, cited in § 86 above, at § 123). The Panel also records systemic failures such as a deficient system of setting investigative priorities and lack of proper handover. In the great majority of these cases the Panel has found that the investigations were not effective in the meaning of Article 2 and that UNMIK’s failures, which persisted throughout the period of the Panel’s jurisdiction, could not be justified in the light of difficulties encountered by UNMIK at the beginning of its mission.
41. *Compliance with Article 2 in the present case*
42. Turning to the circumstances of the present case, the Panel notes that UNMIK certainly became aware of the abduction and disappearance of Mr Milosav Šmigić and Mrs Sultana Šmigić sometime in the year 2000 (see § 33 and 37 above). On his part, the SRSG does not dispute that UNMIK was obliged to investigate their disappearances.
43. The Panel observes that the investigative documents suggest that both missing relatives of the complainant were abducted by the same group of KLA members around the same time and from the same location. Likewise, it is clear that at least by the end of 2003, UNMIK Police WCIU had joined these cases into one investigation (see § 35 above). Thus, the Panel will assess the investigation into the abduction and disappearance of both of the victims in this case as one process.
44. The purpose of these investigations was to discover the truth about the events leading to the abduction and disappearance of the complainant’s relatives, to establish their fate and to identify the perpetrators. To fulfil these purposes, those conducting the investigations 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.
45. 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 §§ 83 - 87 above).
46. The Panel notes that according to the 2000 Annual Report of UNMIK Police, by the end of 2000 UNMIK Police had “full investigative authority” in Mitrovicë/Mitrovica region, with KFOR retaining some “technical primacy”. According to the statistical data, by 31 August 2000, UNMIK Police had 3,980 officers deployed throughout Kosovo, while by the end of September 2000 this number became 4,145[[7]](#footnote-7). 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.
47. Having noted the SRSG’s assertion that the file submitted to the Panel may be incomplete, and the lack of further explanation in relation to this (see § 73 and 77 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.
48. 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 § 77 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.
49. The Panel notes that there were obvious shortcomings in the conduct of both of these investigations from their inception, having in mind that that the initial stage of the investigation is of the utmost importance. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 52 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 § 83 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 § 25 above).
50. With regard to the first part of the procedural obligation, that is locating the mortal remains of the complainant’s relatives, the Panel notes that their whereabouts remain unknown. The relevant ICMP database entries show that sufficient DNA samples had been collected for both Mr Milosav Šmigić and Mrs Sultana Šmigić. (see § 30 above). The ante-mortem details for the complainant’s missing relatives had been gathered by the ICRC.
51. 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, no such identification has yet occurred.
52. The Panel notes that there was information in the file that there was a suspicion by witnesses that the bodies of Mr Milosav Šmigić and Mrs Sultana Šmigić may be located near the fuel station where their clothes were found. (see §36 above ) However, there was no action taken by the UNMIK police to canvass suspected areas, including areas around the fuel station, record statements of the witnesses who stated this suspicion, to interview the witness who located the clothing or anyone who worked or lived near the fuel station. There is no record of the clothing as evidence for examination.
53. Finally, the Panel notes that there was no Victim Identification Form for Ms. Sultana Šmigić in the file (see above § 33). While it is true that some of the details (i.e. contact of family members and circumstances of disappearance) may be similar, it is also obvious that a Victim Identification form is one of the most basic and fundamental forms needed when searching for a missing person. No explanation is given as to why there is no such form in the file. If there was no such form then it would have been incumbent on UNMIK to contact the next of kin of Mrs Sultana Šmigić to get this information, as contact details were located in Mr Milosav Šmigić’s form. It is clear that not all reasonable steps were taken by UNMIK towards locating and identifying the mortal remains of Mr Milosav Šmigić and Mrs Sultana Šmigić required under Article 2 of the ECHR.
54. The Panel will now 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.
55. The SRSG provided a summary of the UNMIK WCIU Ante-Mortem Investigation Report for Mr Radomir Šmigić, dated 13 June 2005, who was one of the persons who was kidnapped in the same village and on the same day as Mr Milosav Šmigić and Mrs Sultana Šmigić. It is important to note immediately that he is not one of the kidnapped persons upon which this complaint is based (see § 40 above). The only action mentioned by the SRSG in relation to this report is that the WCIU collected further information on details of the kidnapping from an internet source. The SRSG does not explain why this WCU ante-mortem investigation report was referred to rather than the two reports that were in the file for Mr MilosavŠmigić and Mrs Sultana Šmigić respectively.
56. The SRSG then refers to the conclusion of an UNMIK WCU report dated 30 December 2004, which is in fact a portion of the investigation notes of the report related to Mr. Radomir Šmigić. Specifically it states that “WCU tried to contact the brother of the missing person, but the phone number given in the file was found to be wrong.” This wording is found only in the UNMIK WCU report for Mr Radomir Šmigić and was dated 13 June 2005. There is nothing in any of the files indicating that Mr. Milosav Šmigić has a brother. The complaint only refers to him having a wife, a son and a daughter. The files of both Mr Milosav Šmigić and Sultana Šmigić both clearly state that no attempt was made to contact any of the witnesses. If the SRSG is referring to the information referred to in §69 then that would be the brother of Mr. Radomir Šmigić upon which there is no claim before the Panel. Again, it must be pointed out that this is not the UNMIK WCU report for either Mr MilosavŠmigić or Mrs Sultana Šmigić, both of which were completed on 30 December 2004 and are part of the file. Moreover, it is worth noting that the SRSG does not refer to either of these investigative reports in his response in relation to the investigation of the kidnapping of Mr. Milosav Šmigić and Mrs Sultana Šmigić. It appears that the SRSG mixed-up facts from the different reports for different missing persons files.
57. The files clearly show that there are named witnesses but there is no evidence of any attempt to contact them. There is no information in the file of UNMIK coordinating with any organisations in Kosovo or Serbia proper in locating the witnesses who were displaced from Kosovo. UNMIK failed to utilize the resources created under the UNMIK-FRY common document to coordinate the location of any witnesses that were displaced from Kosovo (see § 24 above).
58. The file provided by UNMIK also gives the names and locations of suspects who were involved in the kidnappings but there is nothing in the file indicating that they were interviewed or that any attempts were made to locate them. There is no information in the file that UNMIK police went to the villages where they were reportedly said to be living to locate them.
59. There is a reference in the file to a former KLA commander of the respective zone where the kidnapping occurred who was named as a suspect in an unrelated murder and who was arrested and charged by UNMIK, yet there is nothing in the file related to interviewing him in relation to the kidnapping of Mr Milosav Šmigić and Mrs Sultana Šmigić. He was held in detention by UNMIK, so it would be reasonable to assume that the investigating officers would have been able to locate him for such an interview.
60. In this respect, the Panel notes that, as established above, UNMIK became aware of the kidnapping of Mr Milosav Šmigić and Mrs Sultana Šmigić in the year 2000, when the respective investigative files were opened by UNMIK Police. However, no immediate action by UNMIK Police whatsoever, except for registering the cases, is reflected in the investigative file.
61. Furthermore, before any substantive investigative action was undertaken, their files had been categorised as “pending” or “inactive” (see §43 above), despite having several obvious open avenues for investigation as explained above and although the likelihood of a grave crime against a large group of Kosovo Serbians was committed was very high, and the names of the suspects were made available to the police**.** Thus, in the Panel’s view, the investigation into the abduction and disappearance of the complainant’s parents obviously did not fulfill the requirements of promptness and expeditiousness.
62. Assessing this investigation against the need to take reasonable investigative steps and to follow obvious lines of enquiry to obtain evidence, the Panel takes into account that 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).
63. However, UNMIK Police never contacted or properly recorded statements of family members who were named with contact details made available in the various documents in this case. This is especially important in the view of the fact that they may have possessed information in relation to the possible suspects and witnesses, including eye-witnesses. Likewise, there is no registered action with regard to the identified suspects and additional witnesses.
64. It is particularly important in the light of the fact that the complainant’s family members contact details, in Serbia proper were available to UNMIK Police from the very beginning. In this respect, the Panel recalls the general need to take into account the special vulnerability of displaced persons in post-conflict situations (see § 96 above). Thus, in the Panel’s view, it was for UNMIK to reach out to them, and not for them to come back to Kosovo, from where they had left for security reasons, to try to find out what had happened to their relatives or to the investigation.
65. The Panel likewise recalls the SRSG’s above arguments that information is the most crucial element in locating missing persons and the perpetrators of disappearances and unlawful killings and that in many situations in Kosovo the witnesses did not provide the necessary information (see § 65).
66. In this regard, the Panel notes, first, that information is crucial to any investigation, regardless of a crime being investigated. Second, almost any investigation at its initial stage lacks at least some 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. In this case, however, 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).
67. The Panel also reiterates in this regard its position expressed in many other cases in relation to the adequacy of the investigation into the abductions, disappearances, killings and suspicious deaths in relation to the categorisation of cases into “active” and “inactive”. In those cases the Panel underlined 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).
68. The Panel is conscious of the fact that not all crimes can be solved and not all investigations lead to identification and successful prosecution of the perpetrator[s]. The Panel has already referred above to the position of the European Court with regard to the nature of the procedural obligation under Article 2, which is “not an obligation of results but of means.” The Court clearly states that no violation of Article 2 exists if the authorities take all reasonable steps they can to secure the evidence concerning an incident and the investigation’s conclusion is based on thorough, objective and impartial analysis of all relevant elements (see § 83 - 84 above), even when no perpetrators are convicted (see e.g. ECtHR case *Palić*, cited in § 83 above, at § 65 or ECtHR [GC], *Giuliani and Gaggio v. Italy*, no 23458/02, judgment of 24 March 2011, §§ 301 and 326). In this respect, the Panel also recalls the position of the European Court that “the authorities always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation” (see § 84 above).
69. However, in this case, before any even minimum substantive action was undertaken and any information collected, the investigations were de-facto suspended, pending new information to appear, and subsequently stayed without any action for the years to come.
70. 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, the assessment of the whole investigation is brought within the period of the Panel’s jurisdiction.
71. As the fate of the complainant’s family members had not been established, 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 any new evidence had been considered, as well as to inform their relatives regarding the progress of this investigation. As mentioned above, the investigative file in the joint case related to the victims was reviewed by the UNMIK Police WCIU only once, in late December 2004.
72. The Panel would also like to express its position with regard to the SRSG’s assertion that UNMIK Police fulfilled its obligations to open and pursue this investigation into the abduction and disappearance of the complainant’s relatives (see §§ 71 and 72 above). In view of all above-described deficiencies and failures in the investigation, the Panel is concerned by this conclusion. As explained above, the file does not reflect any substantive action by UNMIK authorities; thus it is not clear which and how those obligations had been complied with.
73. The apparent limited reaction from UNMIK Police, either immediately or at later stages,may have suggested to perpetrators that the authorities were either not able, or not willing to conduct investigations into disappearances of people. 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. Certainly, in the Panel’s view, such inaction did not help UNMIK to defuse the “[t]empers and tensions … running high amongst all ethnic groups, exacerbated by reports of missing and dead persons”, mentioned by the SRSG (see § 63 above).
74. 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 locating and identifying the mortal remains of Mr Milosav Šmigić and Mrs Sultana Šmigić, 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 § 83 above), as required by Article 2 of the ECHR.
75. For its part, the Panel, in light of the shortcomings and deficiencies in the investigation described above, considers that this case, as well as other cases of killings, abductions and disappearances previously examined, well exemplify a pattern of perfunctory and unproductive investigations conducted by the UNMIK Police into killings and disappearances in Kosovo (see § 100 above; compare with HRC, *Abubakar Amirov and Aïzan Amirova v. Russi*a*n Federation*, cited in § 95 above, at § 11.4, and ECtHR, *Aslakhanova and Others v. Russia*, cited in § 86 above, at § 123; compare with HRAP, *Bulatović*, no. 166/09, opinion of 13 November 2014, §§ 85 and 101).
76. In relation to the procedural requirement of public scrutiny, the Panel recalls that Article 2 also entails that the victim’s next-of-kin be involved in the investigation to the extent necessary to safeguard his or her legitimate interests. In this case, the complainant and his relatives were apparently never contacted in relation to his missing parents. Thus, the Panel considers that the investigation was not open to any public scrutiny, as required by Article 2 of the ECHR.
77. Therefore, considering all stated above, the Panel concludes that UNMIK failed to carry out an effective investigation into the abduction and disappearance of Mr Milosav Šmigić and Mrs Sultana Šmigić. There has accordingly been a violation of Article 2, procedural limb, of the ECHR.

1. **Alleged violation of Article 3 of the ECHR**
2. The Panel considers that the complainant invokes, in substance, a violation of his right to be free from inhumane or degrading treatment arising out of the abduction and disappearance of his relatives, as guaranteed by Article 3 of the ECHR.
3. **The scope of the Panel’s review**
4. 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 §§ 47 - 52 above).
5. The Panel recalls that the European Court of Human Rights has found on many occasions that a situation of enforced disappearance gives rise to a violation of Article 3 in respect of close relatives of the victim. It emphasises that, concerning Article 3, “the essence of such a violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention” (see, e.g., ECtHR [GC], *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR [GC], *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, *ECHR*, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, cited in § 94 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina,* cited in § 83 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).
6. 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).
7. **The Parties’ submissions**
8. The complainant alleges that the lack of information and certainty surrounding the abduction and disappearance of Mr Milosav Šmigić and Mrs Sultana Šmigić, particularly because of UNMIK’s failure to properly investigate their disappearance, caused mental suffering to him and his family.
9. Commenting on the complaint in this part, the SRSG rejects the allegations. He argues that it appears that the complainant did not witness the disappearance, neither was he in close proximity to the location at the time the disappearance occurred. In particular, the complainant had made no assertions of any bad faith on the part of UNMIK personnel involved with the matter, while there is no evidence of any disregard for the seriousness of the matter or the emotions of the complainant and his family in relation with the disappearance of his parents.
10. In addition, the SRSG states that “it is evident from the Investigation Report that UNMIK did try to contact Mr. Brank {sic} Šmigić the brother of Mr. Milosav Šmigić, to get more information about the missing persons.”
11. The SRSG recalls in this respect the position of the European Court, that suffering of the family member must have a character “distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation” (see § 150 below). According to the SRSG, the understandable and apparent mental anguish and suffering of the complainant, based on the disappearance of his parents, cannot be attributed to UNMIK, but rather a result of the inherent suffering caused by the disappearance of a close family member.
12. Therefore, according to the SRSG, there is no violation of Article 3 of the ECHR and thus these allegations should be rejected by the Panel.
13. **The Panel’s assessment**
14. *General principles concerning the obligation under Article 3*
15. 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.
16. 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 § 79 above, at § 150).
17. 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.
18. 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. Uruguay*, 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).
19. 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 § 139 above, at § 94).
20. 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).
21. 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” (HRC, *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, cited in § 95 above, at § 11.7).
22. 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).
23. 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 § 150 above, at § 109; ECtHR, *Gelayevy v. Russia*, cited in § 140 above, at § 147; ECtHR, *Bazorkina v. Russia*, cited in § 94 above, at § 140).
24. 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.
25. 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).
26. *Applicability of Article 3 to the Kosovo context*
27. With regard to the applicability of the above standards to the Kosovo context, the Panel first refers to its view on the same issue with regard to Article 2, developed above (see §§ 89 - 100 above).
28. The Panel reiterates that a normally functioning law enforcement system should take into account the protection needs of victims and witnesses, as well as to consider the special vulnerability of displaced persons in post-conflict situations. The Panel has already considered the fact that by 2003 the police and justice system in Kosovo was described by the UN Secretary-General as being “well-functioning” and “sustainable” (see § 23 above).
29. The Panel again notes that it will not review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application to the complaint before it, considering the particular circumstances of the case.
30. 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 complainant’s quest for information with regard to the fate of his parents 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.
31. *Compliance with Article 3 in the present case*
32. 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.
33. The Panel notes the proximity of the family ties between the complainant and both Mr Milosav Šmigić and Mrs Sultana Šmigić, as they are the complainant’s parents.
34. 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 investigation from the outset. 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.
35. At the time of his latest submission to the Panel in April 2009, the complainant states that, approximately 11 years since the abduction and disappearance of Mr Milosav Šmigić and Mrs Sultana Šmigić, he had received no information on his parents’ whereabouts or on the status of the investigation. The Panel recalls that there was no recorded contact with the complainant or of any of the identified family members.
36. 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 the fate of Mr Milosav Šmigić and Mrs Sultana Šmigić and the status of the investigation.
37. With regard to the SRSG’s assertion that “it is evident from the Investigation Report that UNMIK did try to contact the brother of Mr. Milosav Šmigić, to get more information about the missing persons.” As stated in §70 above, the person that UNMIK attempted to contact was not the brother of Mr Milosav Šmigić and that it is likely that the SRSG has the facts mixed from the WCIU investigation file for Mr Radomir Šmigić, which was also included in this file. There is nothing in the file of any attempt to contact any of the named relatives of Mr Milosav Šmigić or Mrs Sultana Šmigić.
38. 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 his parents. 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.
39. 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.
40. **CONCLUDING COMMENTS AND RECOMMENDATIONS**
41. In light of the Panel’s findings in this case, the Panel is of the opinion that some form of reparation is necessary.
42. 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 the abduction and disappearance of Mr Milosav Šmigić or Mrs Sultana Šmigić, and that 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.
43. 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.
44. 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 § 25 above), 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 unilateral 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.
45. 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*, cited in § 146 above, at § 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 means available to it *vis-à-vis* competent authorities in Kosovo, to obtain assurances that the investigations concerning the cases 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 disappearance of Mr Milosav Šmigić or Mrs Sultana Šmigić will be established and that the possible perpetrators will be brought to justice. The complainants and/or other next-of-kin shall be informed of such proceedings and relevant documents shall be disclosed to them, as necessary;

**-** Publicly acknowledges, including though media, within a reasonable time, responsibility with respect to UNMIK’s failure to adequately investigate the abduction and disappearance of Mr Milosav Šmigić or Mrs Sultana Šmigić, 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 the distress and mental suffering incurred 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 THE COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE ABDUCTION AND DISAPPEARANCE of Mr Milosav Šmigić or Mrs Sultana Šmigić, IS CONTINUED IN COMPLIANCE WITH ARTICLE 2 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;**
5. **ACKNOWLEDGES RESPONSIBILITY, INCLUDING THROUGH MEDIA, FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE ABDUCTION AND DISAPPEARANCE of Mr Milosav Šmigić or Mrs Sultana Šmigić, 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 TO 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

**CCR -** Case Continuation Report

**DOJ -** Department of Justice

**DPPO** **-** District Public Prosecutor’s Office

**ECHR** **-** European Convention on Human Rights

**ECtHR -** European Court of Human Rights

**EU** **-** European Union

**EULEX** **-** European Union Rule of Law Mission in Kosovo

**FRY -** Federal Republic of Yugoslavia

**HRAP -** Human Rights Advisory Panel

**HRC** **-** United Nation Human Rights Committee

**IACtHR**– Inter-American Court of Human Rights

**ICMP** **-** International Commission of Missing Persons

**ICRC** **-** International Committee of the Red Cross

**ICTY -** International Criminal Tribunal for former Yugoslavia

**IPO** - International Police Officer

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

**KLA** **-** Kosovo Liberation Army

**MPU -** Missing Persons Unit

**NATO** **-** North Atlantic Treaty Organization

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

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

**OTP** **-** ICTY Office of the Prosecutor

**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

**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; Humanitarian Law Centre, *“Abductions and Disappearances of non-Albanians in Kosovo”* (2001); Humanitarian Law Centre, “Kosovo Memory Book” (htpp://www.kosovomemorybook.org); UNMIK Office on Missing Persons and Forensics, Activity Report 2002-2004; European Court of Human Rights, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, nos 71412/01 and78166/01, decision of 2 May 2007; International Commission on Missing Persons, *“The Situation in Kosovo: a Stock Taking”* (2010); data issued by the United Nations High Commissioner for Refugees, (available at [www.unhchr.org](http://www.unhchr.org)) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>). [↑](#footnote-ref-2)
3. The ICRC database is an electronic source available at:

<http://familylinks.icrc.org/kosovo/en/pages/search-persons.aspx> (accessed on 5 December 2014). [↑](#footnote-ref-3)
4. The OMPF database is not open to public. The Panel accessed it with regard to this case on 1 December 2014. [↑](#footnote-ref-4)
5. The ICMP database is an electronic source available at:

<http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en> (accessed on 5 December 2014). [↑](#footnote-ref-5)
6. “TMK”stands for the Kosovo Protection Corps, which is “Trupat e Mbrojtjes së Kosovës” in Albanian. [↑](#footnote-ref-6)
7. See.: Monthly Summaries of Military and CIVPOL personnel deployed in current United Nations Operations as of 31/08/00 and 30/09/00 // Available on UN official website [electronic source] - http://www.un.org/en/peacekeeping/resources/statistics/contributors\_archive.shtml (accessed on 12 December 2014). [↑](#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)