



# *The Human Rights Advisory Panel*

Building D, UNMIK HQ Prishtinë/Priština, Kosovo | E-mail: hrap-unmik@un.org | Tel: +381 (0)38 504-604, ext. 5182

## **OPINION**

**Date of adoption: 18 May 2016**

**Case No. 81/10**

**Employees of the Kišnica and Novo Brdo Mines of Trepča Complex**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 18 May 2016,  
with the following members present:

Marek Nowicki, Presiding Member  
Christine Chinkin  
Françoise Tulkens

Assisted by  
Andrey Antonov, Executive Officer

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel,

Having deliberated, decides as follows:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was lodged with the Panel on 18 March 2010 and registered on 21 September 2010. At the moment of its submission, the complaint was considered to have been lodged by 667 employees of Kišnica and Novo Brdo Mines, represented by one of them, Mr Momčilo Nedeljković.
2. On 14 April 2014, the Panel declared the complaint partially admissible. With respect to the complete history of the proceedings, the Panel refers to this admissibility decision (§§ 1-18)<sup>1</sup>.

---

<sup>1</sup> All texts are available at the Panel's webpage: [www.unmikonline.org/hrap/Eng/Pages/default.aspx](http://www.unmikonline.org/hrap/Eng/Pages/default.aspx)

3. On 15 April 2014, the Panel forwarded this decision on admissibility to the SRSG, requesting UNMIK's comments on the merits of the complaint.
4. On 10 June 2014, the SRSG presented UNMIK's response in relation to the merits of the complaint.
5. On 18 November 2015, the Panel requested clarification from the Special Chamber of the Supreme Court of Kosovo on the Privatisation Agency of Kosovo - Related Matters (SCSC).
6. By a letter dated 9 December 2015, which was received by the Panel on 24 December 2015, the SCSC provided additional information to the Panel.
7. On 29 December 2015, the Panel informed the SRSG of the above response of the SCSC and invited him to provide additional comments in this regard.
8. On 9 February 2016, the Panel received additional comments from UNMIK.
9. Between 25 April and 13 May 2016, the Panel's Secretariat obtained a number of additional documents and held meetings with the Trepča administration, Kosovo Ministry of Labor and Social Welfare (MLSW), UNMIK's Office of Legal Adviser (OLA), as well as with the complainant's representative.

## II. THE FACTS

### A. The Trepča mining complex under UNMIK administration

10. The complainants are employees of the socially-owned enterprise "Mines and Flotation Kišnica and Novo Brdo, Priština" (Kišnica Mines). The Kišnica Mines constitute a part of the "Mining and Metallurgic-Chemical Complex of Tin and Zink Trepča" (*Рударско-металуришко-хемијски комбинат олова и цинка Трепча*; hereinafter – Trepča Complex).
11. The Trepča Complex was one of the biggest socially-owned enterprises (SOE) in the former Yugoslavia which, during its zenith in the 1970s and 1980s, employed thousands of workers. As reported, in 2003 the International Organisation for Migration (IOM) registered 9445 workers of the Trepča Complex, of which 3908 were Kosovo-Serbian and 5537 Kosovo-Albanian<sup>2</sup>. In 2006, 9400 workers (6,500 Kosovo Albanian and 3,900 Kosovo Serbian) were still registered<sup>3</sup>.
12. With the placement of Kosovo under UNMIK administration pursuant to UN Security Council Resolution 1244 (1999) of 10 June 1999 and UNMIK Regulation No. 1999/1 *on the Authority of UNMIK in Kosovo*, UNMIK became responsible for the *interim* administration of all socially and publicly-owned enterprises in Kosovo, including the Trepča Complex.

---

<sup>2</sup> See: *Nelles P.* The Trepca Goal. November 2003, p. 12 // Available at [electronic source] - [http://www.esiweb.org/pdf/esi\\_mitrovica\\_trepca\\_id\\_1.pdf](http://www.esiweb.org/pdf/esi_mitrovica_trepca_id_1.pdf) (accessed on 12 May 2016).

<sup>3</sup> See: Privatisation Agency of Kosovo (PAK), Annual Report January - December 2010, p. 17 // Available at PAK website [electronic source] - [http://www.pak-ks.org/repository/docs/raporti\\_anglisht\\_FINAL.pdf](http://www.pak-ks.org/repository/docs/raporti_anglisht_FINAL.pdf) (accessed on 12 May 2016).

13. Upon its arrival in Kosovo, for environmental and public health grounds and pending restructuring of the Trepča Complex, UNMIK with the support of KFOR partially shut down the operation of the Trepča Complex, which *de facto* made part of its workforce redundant. Starting from 13 June 2002, the Trepča Complex, as a SOE, was placed under the administration of the Kosovo Trust Agency (KTA), established by UNMIK Regulation No. 2002/12, with the mandate to administer both socially-owned and publicly-owned enterprises and their related assets as trustee, in the interest of their owners.
14. According to information provided to the Panel by the IOM office in Kosovo, in the period 2001-2002, upon UNMIK's request to assist in the "retraining and retrenchment" of the former and current workforce of the Trepča Complex, the IOM conducted registration and demographic and occupational profiling of the employees of Trepča Complex, including the Kišnica Mines. At the beginning of 2002, as a form of retrenchment, IOM proposed and assisted in establishing an early pension scheme to which the employees who had reached a certain age and who satisfied other criteria could opt to join. The employees who opted for this early pension scheme were removed from the payroll of the Trepča Complex, thus easing the enterprise's financial burden.
15. In 2003 the MLSW of the Provisional Institutions of Self-Government (PISG) of Kosovo (governmental structures under overall UNMIK authority) issued an Administrative Instruction No. 3/2003 *on Early Pension for Trepca Workers under UNMIK Administration*, which entered into force on 1 July 2003. This Instruction set the conditions for enrolment in the early pension scheme (i.e. being 50 to 65 years of age, having worked at least 10 years with the enterprise and having terminated employment with the enterprise), to be financed from the UNMIK-controlled Kosovo Consolidated Budget (KCB). In accordance with the same Instruction, the payment of the early pensions, established in the initial amount of 40 euros per month, was set to start on 1 July 2004. This programme envisaged that the beneficiaries who reached the regular retirement age would be removed from the early pension scheme and would instead start benefiting from the Kosovo pension system.
16. In addition, a system of "stipends" to those who did not qualify for, or did not take, early retirement was developed, apparently by UNMIK in collaboration with the management of Trepča Complex. It was reported in November 2003 by the then UNMIK-appointed "Trepca Manager", but only with regard to the "forced closure of the lead smelter in Zvecan", that the enterprise retained on the payroll "slightly more than 2000 salaried persons (1000 Albanians, 1000 Serbs) and up to 2300 Serbs for stipends"<sup>4</sup>.
17. According to information gathered by the Panel, thanks to this arrangement negotiated by UNMIK with the involvement of the employees' trade unions and the Trepča administration (both in the South and in the North), those inactive employees of all Trepča mines who did not meet the requirements for early or regular pension, or who opted not to take the early pension and were waiting to get back to work once the enterprise restarted operation, were provided with a monthly stipend of 50 euros. This included 30 euros from the Trepča's own resources and 20 euros from the KCB. According to the 2012 Audit Report of the Kosovo Office of the Auditor General, as of 2010, the employees/stipendiaries under the Trepča Complex Administration in the North (mostly

---

<sup>4</sup> See above-referred report *The Trepca Goal* (footnote no. 2), at p. 12.

Kosovo Serbian) stopped receiving the portion of the monthly subsidy coming from the KCB<sup>5</sup>.

18. As confirmed by figures in the public domain, not all inactive (but not retired) employees were in receipt of a monthly stipend. For example, the 2010 Annual Report of the Privatisation Agency of Kosovo (PAK) states that in 2006 only 3,400 registered employees of the Trepča Complex of 9,400 (6,500 Kosovo-Albanian and 3,900 Kosovo-Serbian) were receiving early pensions and 2,300 were receiving stipends<sup>6</sup>.
19. Despite all the efforts, the Panel was not able to get a confirmation from any authority, UNMIK or local, as to whether the above figures included the workers of the Kišnica Mines. The Panel was informed that each Administration, in the North and in the South, keeps a separate list of “their” employees who receive these monthly stipends. The Panel was informed that the list of such people maintained by the Trepča South Administration does not include Kišnica miners. According to the above-mentioned 2012 Trepča Audit Report, by the end of 2012 there were 199 people receiving stipends in the “southern” list<sup>7</sup>. The same Audit Report states with respect to the Trepča Administration in the North that “[t]he list of stipend recipients in 2012 contained approximately 1,883 persons and expenditures for 2012 were in the amount of €675,120.”<sup>8</sup>
20. Moreover, despite numerous enquires with several institutions and interlocutors in Kosovo (Trepča’s management, both in the North and in the South, UNMIK OLA, the Kosovo MLSW), the Panel could not find any piece of published legislation, regulation or government decision outlining the eligibility criteria and the regulation mechanism for receiving these “stipends”.
21. The Panel’s impression that such a document does not exist is corroborated by the 2012 Audit Report on Trepča Complex, which states in the part related to the Administration in the South that it “was not in possession of this decision and there was no regulation defining the criteria and conditions for selection of beneficiaries”<sup>9</sup>. In relation to the Northern Administration it adds that:

“There was no regulation on how to handle and manage stipends, while the files of stipend recipients were not complete. Only a copy of the old employee work booklet was attached to these files, whereas new documents were missing, including identification card, a copy of the bank account as well as the employment contract for the time when these stipend recipients were employed.”<sup>10</sup>

22. On 2 June 2005, the SRSG promulgated the Administrative Direction no. 2005/7 *Implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters*. This Direction stayed all enforcement actions “directed against or in relation to assets or Enterprises that are under the administrative authority and management of the [KTA] and

---

<sup>5</sup> See: Report of the Kosovo Auditor General (KAG) *On the Financial Statements of Trepca Socially Owned Enterprise for the Year ended 31 December 2012*, June 2013, Section 7.2.4, p. 47 // Available at KAG’s website [electronic source] - [http://www.oag-rks.org/repository/docs/RaportiAuditimit\\_Trepca\\_2012\\_ang\\_197200.pdf](http://www.oag-rks.org/repository/docs/RaportiAuditimit_Trepca_2012_ang_197200.pdf) (accessed on 12 May 2016).

<sup>6</sup> See: footnote no. 3 above.

<sup>7</sup> See: above mentioned Audit Report, Section 6.2.5, p. 28.

<sup>8</sup> See: *ibid.*, Section 6.2.5, p. 28.

<sup>9</sup> See: *ibid.*, Section 7.2.4, p. 47.

<sup>10</sup> See: *ibid.*, Section 6.2.5, p. 28.

designated as part of Trepča under UNMIK Administration, based on awards, judgments or other decisions issued by any other court, quasi-judicial or administrative body, for a period of three months. The [SRSG] may extend this stay of enforcement period by a subsequent legislative instrument”. Section 3.2(iii) of this Direction lists the Kišnica Mines among the assets of the Trepča Complex.

23. On 21 November 2005, UNMIK Regulation no. 2005/48 *on the Reorganization and Liquidation of Enterprises and Their Assets under the Administrative Authority of the Kosovo Trust Agency*, made provisions for the reorganisation or liquidation of insolvent SOEs, such as the Trepča Complex, through “moratorium proceedings”. With the aim of protecting the concerned enterprises from creditors’ claims during their restructuring or liquidation, the Regulation envisaged that, upon a warranted request of the KTA, the SCSC could issue a “moratorium decision” (Moratorium Decision) suspending “all actions, proceedings or acts of any kind aimed at enforcing or satisfying any claim against the Enterprise concerned or its assets”, which could only continue with the permission of the SCSC. The Regulation also envisaged a number of steps to be taken towards the reorganisation of an enterprise, such as an appointment of one or more independent Administrator(s) no later than three months after issuance of a Moratorium Decision (Section 8) and the elaboration of restructuring plans to be discussed and voted upon by creditors and subsequently endorsed by the Special Chamber (Section 27).
24. On 15 December 2005, the KTA submitted an application to the SCSC, by which it requested the issuance of a Moratorium Decision with regard to the Trepča complex and all its assets.
25. On 9 March 2006, the SCSC issued the Moratorium Decision no. SCR-05-001, sought by the KTA. Its text states, *inter alia*, that “As of the date of this Moratorium Decision all actions, proceedings or acts of any kind aimed at enforcing or satisfying any claim against Trepča under KTA Administration as defined above, or its assets shall be suspended and shall only continue with the permission of this Court in accordance with section 5.2 of UNMIK Regulation No. 2005/48.”
26. The last paragraph of the Moratorium reads:
 

“The court expects KTA to proceed expeditiously to obtain proposals for Administrators and Service Providers and to prepare an inventory as required by UNMIK Regulation 2005/48. If there is undue delay, any aggrieved party may apply to this court for a lifting of this Moratorium [emphasis added].”
27. On 28 and 29 March 2006, information about the Moratorium Decision was published in a Kosovo-based daily newspaper *Koha Ditore*. The publication did not include the full text of the Moratorium, only reflecting the substance of the Decision. It further provided all creditors and other interested parties with detailed instructions as to how to file their claims with the KTA. This publication did not reflect the referred to above clause relating to the possibility for aggrieved parties to apply to the SCSC for lifting of the Moratorium.
28. Following the Kosovo unilateral declaration of independence, on 17 February 2008 and the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK was no longer able to perform effectively the vast majority of its tasks as an interim administration, and the SRSG was unable to enforce the executive authority that is still formally vested upon him under Security Council Resolution 1244 (1999) (see, e.g., Report of the Secretary-

General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, §§ 7 and 17; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 15 July 2008, S/2008/458, §§ 3-4 and 29; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 24 November 2008, S/2008/692, § 21).

29. As of May 2008, the administration of Trepča Complex and all its assets was overtaken by the then newly-established PAK, acting under the local Kosovo authorities. After 15 June 2008, the KTA, as an UNMIK organ, ceased its operations. On 24 August 2008, former local KTA officials, appointed by the Kosovo authorities to official positions in the PAK, took over the KTA compound. Following the takeover of the compound, it was expected that the PAK would attempt to restart the privatization process (see UN SG Report no. S/2008/692, cited in § 28 above).
30. Nevertheless, the originals of documents related to the direct involvement of UNMIK with the management of KTA, and the KTA trust funds which were held in KTA accounts, have been secured by UNMIK and remain under its control. Furthermore, according to the SRSG, the KTA had been and continues to be the overall authority for the Trepča Complex (see the decision on admissibility of this complaint, dated 14 April 2014, § 20).
31. On 9 December 2008, UNMIK's responsibility with regard to the judiciary in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the UN Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
32. On 19 May 2011, the Moratorium Decision suspending creditors' claims against the Trepča Complex was re-issued by the Special Chamber. It appears to be currently still in force. From 8 November 2011, the PAK again started collecting creditors' claims against the Trepča Complex, which includes Kišnica Mines. However, as was also confirmed by the Reorganisation Unit, until the Moratorium Decision is lifted or somehow modified, no consideration of those claims on their substance will be undertaken by the PAK.
33. On 9 December 2015, at the Panel's request, the SCSC Presiding Judge for the Reorganisation of the SOEs confirmed that (original text preserved):

“The reorganisation plan was not prepared so far and creditors' council was not established or held any meeting.

The Special Chamber several times had extended the deadline for submission of the reorganisation plan based on the requests of the PAK and the last decision for extension of this deadline until 01.11.2016 was taken by the Special Chamber on 23 February 2015.

Until now the PAK did not submit the reorganization plan justifying by the fact that the Agency does not have the appointed Board of Directors and they are waiting a decision to be taken by the Assembly of Kosovo related to appointment of the Board. And also the Government of Kosovo took an initiative to pass a special law for 'Trepča' based on which the status of this Enterprise would be defined.”

## **B. The complainants' claims/proceedings stemming from their employment with Trepča**

34. The complainants' representative, Mr Momčilo Nedeljković, states that on 17 June 1999, the British KFOR forcefully removed all the non-Albanian employees from Kišnica Mines premises and allowed the Albanian employees to take over the mines. Since that time, the complainants have been prevented from returning to their workplaces, while the Albanian workers have reportedly been allowed to return to work. This is despite the fact that most of the workers have retained their status of employees of the Kišnica Mines. At the time of lodging the complaint, the complainants' representative provided to the Panel a list of 667 workers, who were on the Kišnica Mines payroll as of 28 February 1999, claiming that most of those workers were removed from their workplaces in the described manner on 17 June 1999.
35. According to the complainants' representative, over the years he has addressed a number of organisations, including KFOR, the IOM office in Kosovo, the Ombudsperson Institution in Kosovo and UNMIK, requesting that the workers be allowed to return to their workplaces and that their other related rights be restored, but without any positive results.
36. The complainants' representative further states that from that time employees have received neither a regular salary, nor other benefits from their employer.
37. After the early pension scheme for the workers of Trepča was set up by UNMIK in 2003 and started operating (see §§ 15-38), it was administered by the relevant bodies in the field of social welfare of the Kosovo PISG. The Panel was informed by the complainants' representative that since the inception of this pension programme, more than 200 workers of the Kišnica Mines have started benefiting from it.
38. Following Kosovo's unilateral declaration of independence on 17 February 2008 (see § 28 above), a letterhead of the Republic of Kosovo was affixed on the early pension enrolment forms which the management of Trepča Complex in Zvečan refused to validate. As the forms without such a validation stamp are not accepted by the Kosovo pension authorities, no more applications from workers fulfilling the criteria for receiving the early pension have been accepted by the authorities after that date. Those workers who have been included in the scheme prior to February 2008 still regularly receive their pension payments.
39. In the context of the process of reorganisation of the Trepča Complex through moratorium proceedings (see § 23 above), the KTA was responsible for collecting creditors' claims against the enterprise, including those concerning the unpaid wages to former and current employees. Mr Momčilo Nedeljković states that in 2006 he filed a claim with the KTA, asking for payment of unpaid salary earned at Kišnica Mines (200 euros per month), for the period from his removal from the workplace, starting from June 1999. He presented a copy of his claim, which bears a stamp of the UNMIK EU Pillar office in Belgrade, which was responsible for collecting such claims and forwarding them to the KTA; the stamp is dated 4 April 2006. A cover letter from the UNMIK EU Pillar office in Belgrade shows that his claim was forwarded to the KTA's Claims Unit in Prishtinë/Priština, on 30 January 2007. He, as the representative of other complainants, further states that in 2006 and 2007 similar claims were filed by most of the other Kišnica Mines' employees, who

were forcefully removed from work in June 1999. However, according to him, none of their claims have been processed by the KTA.

40. On 22 November 2013, the Trepča Reorganisation Unit of the PAK (Reorganisation Unit) confirmed to the Panel that they are in possession of the complete KTA database with the registry of all claims received by the KTA Claims Unit. At the Panel's request, the Reorganisation Unit conducted a search of ten randomly-selected names from the above-mentioned list of workers of non-Albanian ethnicity not allowed to work but still on the enterprise payroll (see § 34 above). It was confirmed that those workers had in fact filed claims in 2006 before the KTA; copies of their claims were collected by the Panel.
41. The Reorganisation Unit likewise confirmed to the Panel that none of those claims had in fact been acted upon by the KTA, because the process of their consideration was, and still is, blocked by the moratorium of the Special Chamber.
42. The complainants' representative states that none of the complainants or any of the workers in Kišnica and Novo Brdo mines has received the monthly stipends given to inactive workers of Trepča who did not qualify for early or regular retirement. However, they did not file any complaint with the Management or with UNMIK concerning this situation. The complainants' representative also states that, as of 2014, those Kišnica miners in receipt of the early pension stopped receiving it.

### III. THE COMPLAINTS

43. Insofar it has been declared admissible, the complainants complain that the Moratorium declared by the Special Chamber effectively prevented them from pursuing their claims filed before the KTA in 2006. In this respect, the Panel considers that they allege violations of Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR) Articles 6 (right of access to a court) and 13 (right to an effective remedy) of the ECHR.
44. The complainants further complain about UNMIK's failure to resolve the situation of their removal from their workplaces and not receiving their wages since June 1999. Therefore, in the Panel's view, they invoke a violation of Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions) to the ECHR, as well as Article 6 (right to work) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
45. A group of complainants (the workers who did not become eligible for enrolment into the early pension scheme before 15 June 2008) also complain that UNMIK failed to provide them with any alternative means of supporting themselves and their families financially. The Panel considers that these complainants allege a violation of Articles 9 (right to a social security) and 11 (right to an adequate standard of living) of the ICESCR.
46. Finally, the complainants complain about the discrimination in this situation surrounding the *de-facto* loss of work, non-payment of wages and other benefits, whereby more favourable conditions have been established for the Kosovo Albanian employees of the same enterprise. Thus, they in essence allege a violation of Article 2 (general prohibition of discrimination), in conjunction with Articles 9 and 11 of the ICESCR.

## IV. THE LAW

### A. Applicable law

#### 1. UNMIK Regulation no. 2002/13 (13 June 2002) on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (subsequently amended by UNMIK Regulations nos 2008/4, 2008/19 and 2008/29)

Section 1

#### ESTABLISHMENT OF A SPECIAL CHAMBER

1.1 A Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereafter “Special Chamber”) is hereby established.

Section 4

#### JURISDICTION

4.1 The trial panels of the Special Chamber shall have primary jurisdiction for claims or counterclaims in relation to the following:

...

(g) All claims and applications related to the reorganization or restructuring of Enterprises pursuant to Regulation No. 2005/48, as amended from time to time:

...

(l) Such other matters as may be assigned by law.

...

Section 14

#### ENTRY INTO FORCE

*As amended by UNMIK Regulations no. 2008/4 of 5 February 2008:*

Section 4

#### JURISDICTION (

4.1 The trial panels of the Special Chamber shall have primary jurisdiction for claims or counterclaims in relation to the following:

...

(g) All claims and applications related to the reorganization or restructuring of Enterprises pursuant to Regulation No. 2005/48, as amended from time to time:

...

(l) Such other matters as may be assigned by law.

Section 14

#### ENTRY INTO FORCE

The present Regulation shall enter into force on 31 March 2008, by which time the procedural rules promulgated under section 7 shall have been duly adjusted.

*As amended by UNMIK Regulations no. 2008/19 of 31 March 2008:*

The present Regulation shall enter into force on 31 May 2008...

*As amended by UNMIK Regulations no. 2008/29 of 31 May 2008:*

The present Regulation shall enter into force on 30 June 2008...

**2. UNMIK Administrative Direction no. 2005/7 (2 June 2005) *Implementing UNMIK Regulation no. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters***

Section 1  
Scope of Application

This Administrative Direction sets forth a stay of all enforcement actions against all assets and Enterprises currently under the administrative authority and management of the Kosovo Trust Agency (KTA) and designated to be part of “Trepca under UNMIK Administration”.

...

Section 3  
Stay of Enforcement

3.1 All enforcement actions directed against or in relation to assets or Enterprises that are under the administrative authority and management of the Kosovo Trust Agency and designated as part of Trepca under UNMIK Administration, which are based on judgments or other decisions issued by the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters or based on awards, judgments or other decisions issued by any other court, quasi judicial or administrative body shall be stayed for a period of three months from the date of this Administrative Direction. The Special Representative of the Secretary-General may extend this stay of enforcement period by a subsequent legislative instrument.

3.2 Assets and Enterprises designated as part of Trepca under UNMIK Administration include but are not limited to the following:

...

(iii) Socially-owned Enterprise Mines and Flotation, Kisnica and Novo Brdo, Pristina (DP Rudnici i flotacija Kisnica i Novo Brdo, Pristina);

**3. UNMIK Administrative Direction no. 2005/21 (21 November 2005) *Implementing UNMIK Regulation no. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters***

Section 1  
Further Extension

The period of Stay of Enforcement Actions under UNMIK Administrative Direction No. 2005/7 is hereby extended for a further period one month from 1 December until 31 December 2005.

**4. UNMIK Regulation no. 2005/48 (21 November 2005) *On the Reorganisation and Liquidation of Enterprises and their Assets under the Administrative Authority of the Kosovo Trust Agency***

Section 5  
Moratorium

5.1 As of the date of the Moratorium Decision all actions, proceedings or acts of any kind aimed at enforcing or satisfying any claim against the Enterprise concerned or its assets shall be suspended and shall only continue with the permission of the Court.

...

5.2 Within ten (10) Business Days from the date of the Moratorium Decision, the Agency shall publish a notification in accordance with the Advertisement Provisions on two consecutive workdays and the following weekend.

- (a) The notification shall include the following information:
- (i) the date and a description of the Moratorium Decision;
  - (ii) a reference to the present Regulation and the rights of creditors thereunder; and
  - (iii) that an Administrator will be appointed in within the time limit specified in section 8.1;
  - (iv) details of the claims filing process; and
  - (v) a notice of the opportunity to vote on a Reorganization Plan for the Enterprise.

...

5.3 As of the date of the Moratorium Decision until the date of the appointment of an Administrator, the Enterprise shall continue to be managed under the administrative authority of the Agency, which shall cause the Enterprise to promptly prepare an inventory of all its property, assets and known liabilities.

(a) The inventory of all property, assets and known liabilities shall continue to be updated by the Enterprise until the date of the appointment of an Administrator...

(b) The inventory of all property, assets and liabilities shall not include “pension assets” or “vested rights” as defined in UNMIK Regulation No. 2001/35 “On Pensions in Kosovo.”

5.4 As of the date of the Moratorium Decision until the Appointment Date and subject to the provisions of subsection 5.5 below, the Enterprise shall require prior permission in writing from the Agency for the validity of any of the following transactions:

...

(g) The payment of salaries to employees, provided that the Agency shall approve such payments only to the extent that funds used for such payments are available from the revenues of the Enterprise or made available partly or in full to the Enterprise by the PISG, the Kosovo Consolidated Budget or a donor.

...

Section 12  
Effects of Appointment and Immediate Actions by the Administrator

...

12.2 Immediately after the Appointment Date and in preparation for the publication of the Appointment Notice and the holding of the Initial Creditors Meeting the Administrator shall take the following actions:

...

(b) Hold consultations with representatives of such employees of the Enterprise which are claiming to be creditors of the Enterprise ...

Section 31  
Registration and Evaluation of Claims

...

31.1 Immediately following the Claims Bar Date, the Administrator shall evaluate the validity, extent and priority of claims and any related perfected pledge or registered mortgage presented against the Enterprise.

...

31.4 If the Administrator rejects, in whole or in part, or reduces the amount of a claim submitted, he shall notify as soon as practical the affected creditor in writing, giving an explanation for the rejection or reduction of the claim.

(a) The affected creditor is entitled to apply to the Court within twenty (20) Business Days of the dispatch of such notice by the Administrator for determination of his claim and failing such application the creditor shall be precluded from objecting further to the Administrator's decision...

(b) The Court shall schedule a hearing to occur no later than ten (10) Business Days after the submission of the application by the affected creditor and shall make a determination on the claim no later than five (5) Business Days after the hearing.

### Section 32 Invalid and Improper Claims

32.1 The Administrator may reject any claim or liability arising out of a transaction if:

...

32.2 The creditor of such claim may challenge any decision of the Administrator under this section in the Court in accordance with the provision of section 31.4.

### Section 35 Final Claims List

35.1 No later than three (3) months after the evaluation of all claims including the determination of objections against the Administrator's decision by the affected creditor relating to the rejection or reduction of claims in accordance with section 31, the Administrator shall compile and submit to the Court a final list of claims, indicating their amount and status in accordance with the priority categories set forth in section 36 of the present Regulation.

### ...

### Section 36 Priorities of Claims

...

(c) Claims for such wages of employees, which have remained unpaid until the date of Moratorium Decision, limited to three months gross salary per person...

## **5. Moratorium Decision in the case SCR-05-001 dated 9 March 2006, regarding the Application of KTA For the reorganization of Trepca Under KTA Administration**

1. The application of [KTA] for the reorganization of "Trepca Under KTA Administration" is accepted as follows:

The Enterprise to be reorganized is TREPCA UNDER KTA ADMINISTRATION, defined as:

Trepca Core Enterprise consisting of:

...  
 (b) DP Rudnici I flotacija Kisnica I Novo Brdo, Pristina (SOE Mines and Flotation, Kisnica and Novo Brdo, Pristina);

- ...
2. As of the date of this Moratorium Decision all actions, proceedings or acts of any kind aimed at enforcing or satisfying any claim against Trepca Under KTA Administration as defined above, or its assets shall be suspended and shall only continue with the permission of this Court in accordance with section 5.2 of UNMIK Regulation 2005/48.
  3. Within ten Business Days from the date of this Moratorium Decision, KPA shall publish a notification hereof in accordance with section 5.2 of UNMIK Regulation 2005/48.
  - ...
  4. No later than two and one-half (2 ½) months from the date of this Moratorium Decision, KTA shall submit to the court all submitted bids and an evaluation report for the Court including proposals for the most suitable bidders to be appointed by the Court as Administrators and Service Providers pursuant to sections 7 & 8 of UNMIK Regulation 2005/48.

Procedural and Factual background:

...  
 The court expects KTA to proceed expeditiously to obtain proposals for Administrators and Service Providers and to prepare an inventory as required by UNMIK Regulation 2005/48. If there is undue delay, any aggrieved party may apply to this court for a lifting of this Moratorium...

## **B. The Scope of the Panel's Review**

47. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
48. 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 ECHR and Protocols thereto, the International Covenant on Civil and Political Rights (ICCPR), the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child.
49. 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.

50. 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 § 48).
51. With regard to its competence *ratione temporis*, the Panel recalls that it has jurisdiction over complaints alleging violations of human rights arising from facts that occurred prior to 23 April 2005 only where those facts give rise to a continuing violation of human rights (Section 2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel). In the case at issue, the complainants were forcefully removed from their workplaces on 17 June 1999; they reportedly stopped receiving regular salaries from that time. While the event by itself does not fall within the Panel's temporal jurisdiction, its effects extend until the present day, thereby constituting a continuing situation to this date.
52. The period under review with regard to UNMIK's actions in its capacity as Interim Administration of Kosovo ended on 15 June 2008 (see § 28 above), after which UNMIK was no longer able to perform effectively the vast majority of its tasks. However, the period under review in connection with the allegations relating to the functioning of the judiciary ended on 9 December 2008, when UNMIK's responsibility with regard to the judiciary in Kosovo ceased (see § 31 above).

### **C. The parties' submissions**

#### *1. The complainants' submissions*

53. The complainants complain that, notwithstanding their forceful removal from the workplace, they retained the status of employees with the enterprise. However, no wages have been paid to them since June 1999. They state that they have claimed their rights by addressing several authorities and institutions in Kosovo, from UNMIK authorities, to the Ombudsperson Institution in Kosovo (see § 35 above), but to no avail.
54. The complainants further state that, within the process of restructuring of the Trepča Complex through moratorium proceedings, in 2006 they filed claims with the KTA for the payment of unpaid wages. However their claims have been stayed ever since due to the Moratorium Decision issued by the Special Chamber, based on UNMIK Regulation No. 2005/48, which is still in force. On the other hand, no concrete steps towards the reorganisation of the enterprise have been taken so far. The complainants in essence complain that, due to this situation, their right of access to court, and consequently, their right to the peaceful enjoyment of possessions, and their right to work have been violated.
55. [Those] complainants, employees who did not meet the criteria for enrolment in the early pension scheme at the date of 15 June 2008, also complain that they were left without any social protection to ensure an adequate standard of living for themselves and their families.

56. Furthermore, the complainants complain that the Kosovo Albanian employees of the Kišnica Mines were treated more favourably than non-Albanians.

## 2. *The SRSG's submissions*

57. In his comments on the merits dated 10 June 2014, the SRSG stresses the undisputed fact that the workers had been in fact removed from the Kišnica Mines by KFOR, which is “an authority over which UNMIK has no supervision, control or authority ... [so that] UNMIK can not be held liable for actions attributed to that authority.” The SRSG further notes that the complaints related to non-payments of wages and discrimination arise from this alleged forceful removal.

58. The SRSG further argues that the complainants failed to substantiate “a lawful right to the payment of wages or other income related to employment for the period subject of their present complaint”, as they neither confirmed their “continued employment status with the enterprise after 17 June 1999, not have they presented any information which indicates that judicial redress has ever been sought with respect to their “forceful” removal, and/or the determination of their continued status as employees, so as to establish the illegitimacy of their absence from the workplace after 17 June 1999 and the unlawful termination of payment of wages after that date.”

59. In the SRSG’s view, in such circumstances, the Panel “may not substitute itself for a court of law so as to make inferences, undertake deliberations and form conclusions on substantive legal issues related to the determination, termination and period of employment of individuals, including the employer/employee status of the present complainants.”

60. With respect to the complainants’ claim that UNMIK did not establish an alternative support scheme for those who were not eligible for enrolment in the early pension scheme, the SRSG considers that the complainants invoke a violation of Article 1 of Protocol No. 1 to the ECHR under this part of the complaint. According to the SRSG, the complainants “do not allege the ultimate loss of pension rights per se, but rather, the failure to be provided with an interim support mechanism until such time as they would have become eligible” for an early pension. Therefore, the SRSG considers that “where workers qualified, based on legal established criteria, for the earlier receipt of pension remuneration to which they were lawfully entitled, such payments cannot be classified as a “support scheme”, as is presently contended by the Complainants.” Thus, the SRSG questions “whether those Complainants, who did not meet the legal criteria for early pension remuneration, may now claim to have existing proprietary right to a “support scheme” so as to invoke the protection of Article 1 Protocol No. 1 to the ECHR.”

61. In this respect, the SRSG refers to the jurisprudence of the ECtHR (case *Van Der Musselle v. Belgium*) which clarifies that Article 1 of Protocol No. 1 does not guarantee the right to acquire ownership of a possession, but that an applicant claiming infringement of his/her rights under Article 1 of Protocol No. 1 is required to show *prima facie* evidence of the existence and validity of his claim to that possession. The SRSG further refers to another ECtHR case, *Andrejeva v. Latvia*, where the European Court clarifies that:

“ ... Article 1 of Protocol No. 1 places no restriction on the Contracting State’s freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the

payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a pecuniary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements”.

62. The SRSG therefore concludes that “there is no legal basis in the law for the mandatory establishment of a social welfare scheme”. Furthermore, “only those Complainants who had satisfied the legal conditions under the early pension scheme for Trepča workers could claim to possess an existing and identifiable entitlement to early pension payment so as to raise a legitimate expectation of enjoying the rights associated with that entitlement.” Consequently, according to the SRSG, “the complainants who did not meet the legal criteria for early pension remuneration have failed to establish the existence of a proprietary right to a “support scheme”, falling within the ambit of Article 1 Protocol No. 1 of the ECHR.
63. The SRSG reiterates the point that the complainants failed to substantiate that their “alleged removal from the workforce and thereby the contravention of their right to work is attributable to UNMIK or that legislation establishing qualifying criteria for the payment of early pension was implemented in an unfair and arbitrary manner”.
64. Commenting on the right to access justice, the SRSG recalls that on 14 December 2005, the “KTA ... made an application to the Special Chamber for commencement of the reorganization of Trepča [which is] an important SOE in a geographical area in Kosovo with high political sensitivity. An application for the imposition of a moratorium which would have the effect of suspending all actions to enforce or satisfy claims against Trepča ... was deemed necessary to protect and preserve the SOE and its assets while establishing a restructuring regime for Trepča that enables an orderly addressing of all Trepča debts, equal treatment of all Trepča creditors and the reorganization of the Enterprises.”
65. The SRSG continues that “in order to act in the interest of all shareholders, workers, creditors and claimants to protect and preserve the assets of Trepča and its related SOEs, no interest, right or demand of a particular group could be placed ahead of others and granted special attention or privileges by the KTA. The aim of the reorganization process was to provide an equal platform for the assessment of and protection of the rights of interested parties while maintaining a transparent and fair process for the restructuring of the SOE.”
66. The SRSG also submits that, although “*UNMIK Regulation 2005/48* provides KTA with the possibility to apply to the Special Chamber for the imposition of a moratorium in certain circumstances, the actual reasoned decision made by the Special Chamber cannot be considered an act attributable to UNMIK or the KTA.” Referring to the position expressed by the Panel in the case *LINDA, Limited Liability Company* (no. 45/08), the SRSG states that “it is not the Panel’s function to act as a court of appeal in matters where a competent tribunal has conducted careful examination and has given reasons for its decision which are not arbitrary or unfair.”
67. Furthermore, the SRSG points out that (emphasis preserved) “in its ruling on the Moratorium Decision (SCR-05-001), the Special Chamber specifically provides for the judicial review of its decision by ruling that ‘[I]f there is undue delay, any aggrieved person may apply to this Court for a lifting of the moratorium’.” He continued in this respect that “the Complainants have presented no evidence to demonstrate that any

application challenging the Moratorium Decision has ever been filed by the Complainants with the Special Chamber, or that the Special Chamber has been ineffective in the adjudicating of such matters within its competence.” Thus, the SRSG concludes that “where no such grievance application has been filed with the Special Chamber, the Complainants may not allege that UNMIK had been effectively put on notice of any such grievance.”

68. The SRSG also submits that “the Complainants cannot claim that the judicial action taken by the Special Chamber was disproportionate to the aim sought to be realized or that they have borne an excessive burden in relation to the other Trepča claimants.” In the SRSG’s opinion, the fact that the Moratorium was re-issued on 19 May 2011 and is currently in force, “significantly reinforces the submission that public interest concerns regarding the reorganization of Trepča continues to remain valid to date.”
69. The SRSG presents no comments on the substance of pending KTA claims, which, in his view, should be adjudicated within the jurisdiction of a competent court “without administrative interference”.
70. Finally, the SRSG draws the Panel’s attention to “the issuance by UNMIK of various Regulations which created a legal framework for the administration of the SOEs as well as the institution by KTA of the reorganizational procedure in the case of Trepča and its related SOEs”. In the SRSG’s view, those actions prove that “the allegations raised by the Complainants that the claims of the creditors of Trepča workers of its related SOEs, were not acted upon by the KTA, cannot be maintained.”
71. In his comments received by the Panel on 9 February 2016, with respect to the Moratorium Decision issued by the SCSC (see §§ 7 and 33 above), the SRSG adds that UNMIK Regulation No. 2005/48 does not contain a provision to a right of appeal of a Moratorium decision “as such”. Nonetheless, according to the SRSG, other elements of the same Regulation show that “various forms of redress, other than appeals” may be available to aggrieved persons, including “preliminary injunctions”. The SRSG states that, although UNMIK Regulation No. 2005/48 does not specify a procedure to obtain such redress, it “clearly indicates that the SCSC has competence to hear and decide upon claims against an Enterprise, such as that raised by the Complainants, while a Moratorium decision is in place”. The SRSG further states that, because there was no right for judicial review codified in statute, the Moratorium decision itself states in its last operative paragraph that “if there is undue delay, any aggrieved person, may apply” to the SCSC for a lifting of the moratorium.
72. The SRSG also states that UNMIK Administrative Direction No. 2006/17, as amended and replaced by UNMIK Administrative Direction No. 2008/6 of 11 June 2008, introduced the notion of judicial review of the Special Chamber’s judgments and decisions. However, the SRSG acknowledges that UNMIK “is not aware that either AD was ever made applicable retroactively, meaning that the Complainants would have been time-barred from pursuing a review or appeal” pursuant to these Administrative Directions.
73. With respect to the reorganisation proceedings of the Trepča Complex, as pending before the SCSC, the SRSG states that UNMIK Regulation No. 2005/48 establishes that the employees of the SOE should be consulted in the process of reorganisation, “as well as means for creditors to challenge actions of an Administrator or seek clarifications by way

of access to the SCSC”. However, the SRSG acknowledges that “none of these would be applicable at this time given that no Administrator has been appointed”.

74. The SRSG also acknowledges that “political realities on the ground have regrettably interfered with the efficient administration and reorganisation of the Trepča SOE” and that, up to date, no Administrator has been appointed to oversee the reorganisation process, in violation of UNMIK Regulation No. 2005/48. However, these political realities and the delays in addressing the claims raised by the complainants “cannot be attributed to UNMIK, especially in light of the fact that at any time, Complainants could have exercised the rights described above before the SCSC”.
75. In response to the complainants’ claim that they have been discriminated against, the SRSG, first recalls that at the admissibility stage the Panel was satisfied that the complainants sufficiently established a *prima facie* case of discrimination. Also at that time the Panel considered that, according to the Kosovo Anti-Discrimination Law (promulgated by the UNMIK Regulation no. 2004/32 of 20 August 2004, *On the Promulgation of the Anti-Discrimination Law Adopted by the Assembly of Kosovo*), the burden to prove that this part of the complaint is not substantiated should be on the SRSG.
76. However, the SRSG, again, states that “While the complainants make several general and unsubstantiated allegations in their statement of complaints there is no dispute that the genesis of the complaint concerning discrimination against non-Albanian workers stems directly from the alleged forceful removal of non-Albanians from the Kišnica Mines” and that this action is not attributable to UNMIK.
77. The SRSG further stresses that the complainants “do not allege that the legislative framework on discrimination established in Kosovo was inadequate, insufficient or incompatible with acceptable human rights standards, with respect to the protection of their freedom from discrimination, so as to attribute the alleged discrimination ... to a failure on the part of UNMIK.”
78. The SRSG also highlights that the discrimination claims under Article 14 must be pleaded in relation to some other substantive rights in the ECHR. As, according to the SRSG, “the Complainants have not established an Article 14 claim within the ambit of another protected right under the ECHR and ... the discriminatory act is not attributable to UNMIK, the Complaint falls outside the scope of the HRAP’s jurisdiction *ratione personae*.”
79. Finally, recalling the Panel’s earlier finding that the complainants’ removal from their workplaces was an instantaneous act, which does not give rise to any possible continuous situation, the SRSG considers that this part of the complaint does not involve a continuing violation of human rights. Therefore, according to the SRSG, “the alleging acts of discrimination on the part of UNMIK cannot succeed.”

## **D. Alleged violation of Articles 6 and 13 of the ECHR, and Article 1 of Protocol No. 1 to the ECHR**

### ***I. Access to court***

#### ***a. General principles***

80. The Panel recalls that the guarantees laid down in Article 6 § 1 of the ECHR secure to everyone, *inter alia*, the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal; in this way it embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see ECtHR, *Golder v. United Kingdom*, judgment of 21 February 1975, *Publications of the Court*, Series A, no. 18, pp. 13-18, §§ 28-36).

81. The Panel notes, however, that this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the competent authorities. In this respect, the authorities enjoy a certain margin of appreciation. However, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 of the ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see: ECtHR, *Stubbings and Others v. United Kingdom*, judgment of 22 October 1996, *Reports of Judgments and Decisions*, 1996-IV, p. 1502, § 50; ECtHR [GC], *Marković and Others v. Italy*, no. 1398/03, judgment of 14 Dec 2006, § 99).

*b. Application of those principles to the present case*

82. At the outset, the Panel considers that the following facts were not disputed by the parties:

- the complainants were forcefully removed from their workplaces in 1999 and they have not actually worked at any facility of the Trepča Complex since that time;
- the complainants do not receive regular salaries since the time of their *de facto* removal from workplaces;
- nevertheless, the complainants remained employed by the Trepča Complex at least by the time they filed their claims for unpaid salaries with the KTA;
- the complainants did not file any claims with regard to their situations with any regular court in Kosovo;
- in December 2005, the KTA initiated a reorganisation procedure for the Trepča Complex and moved before the SCSC to have the process authorised, as required by the UNMIK Regulation 2005/48;
- after following the proper procedure, the SCSC granted permission to initiate reorganisation of the Trepča Complex and subsequently issued the Moratorium, which *de facto* prohibited any authority to process any kind of material claims against the enterprise;
- following the announcement of the Moratorium in the newspapers, the complainants, along with other persons having any financial interest in the Trepča Complex, submitted their claims to the KTA, in which they claimed for unpaid salaries (200 euro/month) and asked for shares from the process of privatisation of the enterprise;
- according to the applicable law, while the Moratorium is in force, the KTA should have undertaken certain actions in order to reorganise the Trepča Complex, including collection and analysis of all the creditors’ claims;
- the Moratorium was never lifted by the SCSC during the period while UNMIK was in charge of administration of justice in Kosovo; it is still in force, having last been re-issued in February 2015.

83. The Panel recalls that since the adoption of UNMIK Regulation 2002/13, which came into force on 13 June 2002, all “[c]laims, including creditor or ownership claims, brought

against an Enterprise or Corporation currently or formerly under the administrative authority of the [KTA], where such claims arose during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the [KTA]” were to be filed with the SCSC (see e.g. HRAP, *DEPOSIT INSURANCE AGENCY*, no. 59/10, decision of 26 October 2011 and *Jugobanka A.D. Under Receivership I and II*, nos 56/10 and 57/10, decisions of 6 June 2013).

84. However, since the adoption, in June 2005, of UNMIK Administrative Direction no. 2005/7 (see § 22 above), all “enforcement of actions directed against or in relation to assets ... of Trepča under UNMIK Administration”, were suspended, initially for three months. In practice, from that time no civil litigation against the Trepča Complex, even if a claimant against the enterprise would succeed in securing a favourable judgment, could be completed. The Moratorium Decision issued by the SCSC in March 2006 extended this suspension, until completion of the reorganisation of the Trepča Complex by the KTA.
85. However, the same Moratorium Decision also indicated to all creditors (interested parties) that there was another mechanism to have their material claims examined and maybe satisfied, which was the invitation to file their material claims against the Trepča Complex with the KTA.
86. The Panel recalls that the complainants did not address their grievances through the existing judicial system, before lodging their claims with the KTA, in 2006. Nevertheless, this period of time is outside the Panel’s temporal jurisdiction explained above (see §§ 51 - 52). Instead, the Panel will concentrate on the period of time after they filed their claims with the KTA, following an invitation in the Moratorium Decision to do so, which is within its temporal jurisdiction.
87. The Panel agrees that the issuance of such a Moratorium, stopping all existing proceedings against the Trepča Complex and preventing new cases from being adjudicated, is not *per se* an illegitimate measure, as it is designed to safeguard the interests of all creditors of an enterprise which is being reorganised. Indeed, because of the Moratorium, the SCSC suspended its own ongoing proceedings filed by a Trepča creditor (see Human Rights Advisory Panel (HRAP), *Jugobanka A.D. Under Receivership I*, cited in § 90 above, at § 15). It follows that the Moratorium itself did not prevent the KTA from examining the complainants’ claims filed before it. On the contrary, it is specifically designed to create such “ideal conditions” enabling the KTA to conduct the best possible assessment of the enterprise’s economic situation and propose the best solution, considering fully the interests of all parties. In this situation, the KTA procedure, so “guarded” by the Moratorium, remained the only mechanism for any creditor of the Trepča Complex, including the complainants, to have their material claims against the enterprise addressed.
88. Nevertheless, according to Regulation 2005/48 (Sections 31 – 35), all claims were to be dealt with by the Administrator appointed by the KTA only after the reorganisation plan was approved by the Special Chamber. It is only then that the Administrator could evaluate and decide whether a particular claim should be included in the final claims list or rejected.
89. The Panel acknowledges that this Moratorium was accompanied by a time-bound plan of concrete actions to be undertaken in relation to the enterprise which was put into

reorganisation. In particular, the SCSC requested the KTA to present to it evidence of these actions being implemented. On that issue, the Moratorium itself stated that “[t]he court expects KTA to proceed expeditiously to obtain proposals for Administrators and Service Providers and to prepare an inventory” and established a 2.5-month deadline for the KTA to do so.

90. However, as was confirmed to the Panel by the SCSC, no actions prescribed by UNMIK Regulation 2005/48 have in fact been undertaken by the KTA. Responding to its request for information, on 9 December 2015 the SCSC informed the Panel that (original text preserved):

*“The reorganisation plan was not prepared so far and creditors’ council was not established or held any meeting. ... Until now the PAK did not submit the reorganization plan justifying by the fact that the Agency does not have the appointed Board of Directors...”*

91. As the KTA failed to complete the reorganisation proceedings, the claims of the complainants were not evaluated, and, subsequently, remained without any decision on their merits. Thus, the complainants have never received a decision on their claims for material interests in the Trepča Complex (payment of salaries in arrears). At the same time, because of the Moratorium Decision, the SCSC could not itself assess these claims.
92. The Panel has no doubts that the property of the Trepča Complex is extremely valuable. However, the Complex also accumulated significant debts requiring the authorities in Kosovo to take an extremely cautious approach to its reorganisation. On the other hand, the interests of creditors, as well as members of the significant workforce of the Trepča Complex, should have also been given due consideration. There can be little doubt that the reorganisation of this enterprise is a very complex and multi-dimensional process, which requires time. Further, the reorganisation of the Trepča Complex is apparently dependent on political agreement between the authorities in Belgrade and Pristina, over which UNMIK seemed to have had little or no control, but could only attempt to facilitate
93. The Panel also recalls that the imposed restrictions should be “justifiable and [should strike] a fair balance between the interests of the State and those of the individual” (ECtHR, *Sokur v. Ukraine*, no. 29439/02, judgment of 26 April 2005, § 32, see also HRAP, *Milogorić and Others*, nos 38/08 et al, opinion of 24 March 2010, § 40). In other words, a balance should be shown to exist between the common interests (of enterprise/state/society) and the interests of individual creditors. For example, in a situation where a significant number of claims for large sums of money are lodged against a State, it may call for some further regulation by the State. In this respect the States enjoy a certain margin of appreciation, but the measures adopted must be compatible with Article 6 § 1 of the ECHR (see ECtHR, *Kutić v. Croatia*, no. 48778/99, judgment of 1 March 2002, *ECHR*, 2002-II, § 31).
94. In the present case, however, it appears that any possibility to have a civil lawsuit against Trepča Complex adjudicated by a court has so far been stayed for over ten years, almost three of which fall within the Panel’s jurisdiction *ratione temporis*. This was a consequence of a continuous failure by the KTA to take the relevant steps for reorganisation of the Trepča Complex and subsequently to decide on the complainants’ claims, as well as of the Moratorium on civil proceedings against the Trepča Complex. In these circumstances, the Panel cannot accept that the degree of access afforded under the applicable legislation was sufficient to secure the complainants’ “right to a court”.

95. Accordingly, the Panel finds that this situation amounts to a violation of Article 6 § 1 of the ECHR.

## 2. *Right to an effective remedy*

### a. *General principles*

96. The Panel recalls that the principles related to Article 13 of the European Convention guarantee that a remedy in relation to an alleged violation of the rights, which is sufficient to repair the violation and, if applicable, provide redress, should be available at the relevant time to the aggrieved individual in theory and in practice (see: ECtHR, *Klass and Others v Germany*, no. 5029/71, judgment of 6 September 1978, §§ 64 and 67; ECtHR [GC], *Kudła v Poland*, no. 30210/96, judgment of 26 October 2000, 157; ECtHR, *Melnik v. Ukraine*, no. 72286/01, judgment of 28 March 2006, § 114).

97. Furthermore, according to the Court, the “authority” referred to in that provision does not necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, the *Silver and Others v. the United Kingdom* judgment of 25 March 1983, Series A no. 61, p. 42, § 113; *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports 1996-V, pp. 1869-70, § 145).

98. Further, according to the Court, the “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. At the same time, the remedy required by Article 13 must be “effective” in practice as well as in law, in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred, and must offer reasonable prospects of success (see ECtHR [GC], *Kudła v Poland*, no. 30210/96, judgment of 26 October 2000, §§ 157-158; ECtHR, *Wasserman v. Russia (no. 2)*, no. 21071/05, judgment of 10 April 2008, § 45; ECtHR, *Vlad and Others v. Romania*, nos 40756/06, 41508/07 and 50806/07, judgment of 26 November 2013, § 111).

99. The European Court has also found in many cases that there is no need to examine allegations under Article 13 separately, when a violation of Article 6 has been found, as “Article 6 § 1 was deemed to constitute a *lex specialis* in relation to Article 13”. However, the Court has also found that the situation is different in cases where the complaint is of an absence of a remedy against an alleged violation of Article 6 itself, in particular of the length of proceedings (see ECtHR [GC], *Kudła v Poland*, cited in § 96 above, at § 156; ECtHR, *Vlad and Others v. Romania*, cited in § 97 above, at § 111).

100. As explained by the European Court, the question of whether a complainant in a case “did benefit from trial within a reasonable time in the determination of civil rights and obligations ... is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground. ... [There is a] need to examine the applicant’s complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 § 1 for failure to try him within a reasonable time (ECtHR [GC], *Kudła*, cited above, §§ 147-149). Furthermore, “the requirements of Article 13 are to be seen as reinforcing those of Article

6 § 1, rather than being absorbed by the general obligation imposed by that Article (*ibid.*, § 153).

101. The Panel considers that a similar approach with regard to a complaint under Article 13 of the ECHR, in relation to a violation of right of access to court under Article 6 § 1 of the ECHR, should be applied.

*b. Application of those principles to the present case*

102. The Panel recalls that the text of the Moratorium Decision suggests the possibility of a request to the SCSC to lift the moratorium: “[i]f there is undue delay, any aggrieved party may apply to this court for a lifting of this Moratorium.” However, the Moratorium Decision was announced in a newspaper in an abridged form, which did not include that line, while the full text of the Moratorium Decision was never distributed to all interested parties, including the complainants. Thus, the Panel concludes that the parties were not informed about such a possibility, as provided for in the text of the Memorandum Decision, at the time it was issued.

103. At the same time, the Panel notes that only by the UNMIK Regulation no. 2008/4 of 5 February 2008 (Section 4.1(g)), the UNMIK Regulation no. 2002/13 *On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters* was amended to include into the SCSC’s jurisdiction, *inter alia*, the right to review “[a]ll claims and applications related to the reorganization or restructuring of Enterprises pursuant to Regulation No. 2005/48.” The Panel also notes that the original date of entry into force of this provision was delayed twice by two subsequent Regulations, nos 2008/19 and 2008/29, which made it eventually 30 June 2008 (see Section A.1. of this Opinion). Thus, it seems that only from that time did the Special Chamber receive authority to hear complaints related, as it is in this matter, to the KTA’s failure to act in accordance with the UNMIK Regulation 2005/48.

104. As to the period from 1 July until 9 December 2008 (end of UNMIK’s authority over the judiciary in Kosovo), the Panel recalls that the KTA had already withdrawn from its administrative functions by then, and that those were taken over by the PAK. At the same time, UNMIK was preparing to hand over its complete judicial powers to EULEX. The Panel accepts that in principle the above-mentioned amendment to UNMIK Regulation 2002/13 created a possibility to complain against the KTA, if it acts inappropriately in exercise of its functions under UNMIK Regulation 2005/48. However, the latter Regulation applies only to the KTA, while the PAK is not even mentioned. Although the possibility of bringing a complaint against the PAK to the SCSC could have been explained in the Regulation 2008/4 (and the subsequent 2008/19), this was not the case.

105. Thus, in the Panel’s view, the UNMIK legislation at that time provided a basis for a complaint against the KTA only after it was known that it no longer in fact exercised its function. On the other hand, no possibility to complain against the PAK was created, until the end of the Panel’s temporal jurisdiction.

106. Indeed, the Panel notes that the *Law on the Privatisation Agency of Kosovo* (no. 03/L-067), which explained that the PAK is the KTA’s successor (Article 5), was adopted by the Kosovo authorities in May 2008. However, only in August 2011 the new *Law on the Special Chamber of the Supreme Court of Kosovo on PAK-Related Matters* (no. 04/L-033) adopted by Kosovo authorities eventually explained that the SCSC (created under the authority of local institutions) did have jurisdiction to hear claims against the KTA

and PAK in relation to the “proceeding arising under or within the scope of UNMIK Regulation No. 2005/48 or any successor legislation thereto, or a claim, matter, issue or proceeding arising in or related to a case under or within the scope of such regulation or legislation” (Articles nos 1.10. and 69).

107. In addition, the Panel recalls in this context the complaints filed before it by two Serbian legal persons, the Serbian Deposit Insurance Agency and the “Jugobanka” bank represented by their teams of lawyers. They also complained to the Panel about the failure of the KTA and the SCSC with regard to their claims filed in accordance with UNMIK Regulation 2005/48 (see HRAP decisions in cases *DEPOSIT INSURANCE AGENCY* and *Jugobanka A.D. Under Receivership I* and *II* cited in § 83 above). In their submissions, none of them referred to the possibility of bringing a claim against the KTA, acting with respect to the reorganisation procedure under UNMIK Regulation 2005/48 to the SCSC. In the Panel’s view, as the legal teams of these two corporate complainants were not apparently aware of such a remedy, it cannot be reasonably expected that the complainants in this case would be even aware of such a possibility.
108. The Panel also recalls the SRSG’s statement that the KTA had been and continues to be the overall authority for the Trepča Complex (see § 30 above). In the Panel’s view, this adds to the confusion as to the applicable legislation, the authority to manage Trepča and subsequently the relevant body to complain against. This all supports the Panel’s view that there was no clear and effective remedy against the situation of lack of access to court, in which the complainants, as well as many other creditors of the Trepča Complex, found themselves in.
109. Thus, the Panel considers that, since the Moratorium completely denied the complainants the possibility to have their claims resolved by any court (including the SCSC itself) or by a mechanism outside the KTA procedure, no effective remedy against such a measure blocking their access to a court existed until the end of the Panel’s temporal jurisdiction.
110. Therefore, the Panel finds that there was a violation of Article 13, in conjunction with Article 6 § 1 of the ECHR.

#### **E. Alleged violation of Article 1 of Protocol No. 1 to the ECHR**

111. The Panel considered that in this part of the complaint the complainants alleged in substance that, because of their inability to have their material claims before the KTA resolved, they were unable to receive retroactively payment their salaries that remained unpaid from the time they were forced to leave their workplaces. The complainants further complain about UNMIK’s failure to resolve the situation of their removal from their workplaces and not receiving their wages since June 1999.
112. In the view of considerations and findings above, the Panel sees no need to examine separately this part of the complaint.

#### **F. Alleged violation of the right to social security and the right to an adequate standard of living**

113. Those among the complainants who did not meet the requirements for the early pension scheme claim that, since they were removed from their workplaces in June 1999, they have not received any regular redundancy or unemployment payment, except for

occasional *ex gratia* payments from the Trepča administration, to support themselves and their families. In this regard, the Panel found that this part of the complaint should be examined under Articles 9 (right to social security) and 11 (right to an adequate standard of living) of the ICESCR for the alleged failure by UNMIK to establish an alternative support scheme for this category of inactive employees.

*a. General principles*

114. Both the right to an adequate standard of living and the right to social security are included in the Universal Declaration of Human Rights (UDHR) which states that “everyone, as a member of society, has the right to social security” (Article 22, UDHR) and that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (Article 25.1, UDHR).

115. The right to social security and the right to an adequate standard of living are also guaranteed in the ICESCR, which reads in relevant parts:

Article 9

“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance”.

Article 11.1

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation...”

116. The Panel notes that the right to social security has been strongly affirmed in international law, being embodied in several international human rights treaties, including the International Convention against All Forms of Racial Discrimination (Article 5 (e) (iv)), the Convention on the Elimination of All Forms of Discrimination Against Women (Article 11 and 14) and the Convention on the Rights of the Child (Article 26) and ILO treaties.

117. In its General Comment No. 19 on the Right to Social Security (Article 9), the ICESCR Committee has spelled out the key features of this right and the scope of state parties’ obligations under the Covenant. The right to social security requires the establishment of a system, whether composed of a single scheme or a variety of schemes, available and in place to ensure that benefits are provided for the relevant social risks and contingencies, especially those resulting from circumstances outside peoples’ control. Such a system should be established “under domestic law, and public authorities must take responsibility for the effective administration or supervision of the system” (at § 40). Nine principal branches of social security are envisaged by Article 9 to replace or substitute lost work-related income due to “sickness, disability, maternity, employment injury, unemployment, old age or death of a family member, unaffordable access to health care or insufficient family support (at § 11) ...”.

118. The Committee has further stated that the right to social security, like any human right, imposes on state authorities the obligation to respect, to protect and to fulfil. The obligation to respect requires that States parties for example refrain from engaging in any practice or activity that “denies or limits equal access to adequate social security”. The obligation to protect requires that State parties prevent third parties (individuals, groups, corporations and other entities, as well as agents acting under their authority) from interfering in any way with the enjoyment of the right to social security. This obligation includes, “adopting the necessary and effective legislative and other measures, for example, to restrain third parties from denying equal access to social security schemes operated by them or by others” (at § 45). Finally, the obligation to fulfil requires the adoption of all necessary measures towards the full realization of the right to social security, among them according “sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national social security strategy and plan of action to realize this right”.
119. With respect to the social protection against unemployment, the Committee has held that, “in addition to promoting full, productive and freely chosen employment, States parties must endeavor to provide benefits to cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment”. In particular in the case of loss of employment, “benefits should be paid for an adequate period of time and at the expiry of the period, the social security system should ensure adequate protection of the unemployed worker, for example through social assistance”. Further, “benefits should be provided to cover periods of loss of earnings by persons who are requested not to report for work during a public health or other emergency” (at § 16). In the consideration of states parties’ reports under the Covenant, the Committee expressed the view that the lack of unemployment benefits “runs counter to the State party’s obligations”<sup>11</sup> under the ICESCR. However it is not specified in the ICESCR or by the Committee either the minimum amounts of such benefits, or the minimum length of their duration.
120. The ICESCR Committee has stated that “social security is of central importance for guaranteeing a life in dignity”, highlighting the relationship between this right and the realisation of other economic and social rights human rights, primarily the right to an adequate standard of living and the right to health. In this regard, in respect to the principle of human dignity contained in the preamble of the Covenant, it is well-established that, whether in cash or in kind, and besides being available, accessible and affordable, pension benefits must be adequate “in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care”. Further, the adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realise their Covenant rights.
121. It is accepted that, pursuant to Article 2 of the ICESCR, which concerns the scope of states’ obligations under the Covenant, the full realisation of the right to social security and the right to an adequate standard of living can only be reached “progressively”, to the maximum of states’ available resources. However, it is understood that these provisions of the ICESCR also impose obligations which are of immediate effect. These include: the obligation to guarantee that the exercise of these rights shall be free from discrimination

---

<sup>11</sup> See: Committee on Economic, Social and Cultural Rights, Concluding Observations: Syria, UN Doc. E/C.12/1/Add.63, 24 September 2001, at § 22.

and ensuring at least the enjoyment of “minimum essential levels” of each of the rights concerned.

122. This last obligation, with regard to the right to social security, requires ensuring access to a social security scheme that provides “a minimum level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuff and the most basic forms of education”.

123. The Committee has underlined that the minimum core obligations stated above, do apply “also in times of severe resource constraints”, where authorities have obligations to protect “the vulnerable members of society” (ICESCR Committee, General Comment No. 3 *on the Nature of States parties’ Obligations*, at § 12)<sup>12</sup>. Moreover, special attention should be given to ensure that a social security system can respond in times of emergency, such as during and after a natural disaster, armed conflict and crop failure. In order for authorities to avoid responsibility for failing to meet at least its minimum core obligations, they must demonstrate that all efforts have been made to use all resources that are at their disposal to satisfy, as a matter of priority, these core minimum obligations.

*b. Application of the general principles to the present case*

124. At the outset, the Panel notes that this part of the complaint is limited to those complainants who did not meet the envisaged criteria to be enrolled in the early pension scheme established by UNMIK in support of the work force of Trepča who had become redundant. The complainants claim that no alternative support scheme was made available to them to protect them from the sudden and unexpected situation of unemployment and that they were left without the means to support themselves and their families.

125. Contrary to the SRSG submissions as summarised in §§ 60-62 above, according to which the complainants claim a violation by UNMIK of an “acquired property right” protected by Article 1 of Protocol No. 1 to the ECHR, the Panel, as stated at the admissibility stage, considers that this part of the complaint concerns UNMIK’s obligations under Articles 9 (right to social security, in particular against unemployment) and 11 (right to an adequate standard of living) of the ICESCR. Therefore it falls to be examined under these provisions.

126. The Panel notes that there can be no doubt about UNMIK’s responsibility to guarantee the complainants’ rights as provided for by Articles 9 and 11 of the ICESCR. The Panel notes that, since June 1999, UNMIK assumed the overall legislative and executive authority in Kosovo, which included the responsibility to establish the institutional and regulatory framework for the reorganisation and/or liquidation of public enterprises, an exercise which started in 2002. The Panel also notes that, while undertaking this complex exercise, UNMIK had the responsibility to establish the necessary social security safeguards for the protection of the human rights, including economic and social rights, of Kosovo residents, which was at the core of UNMIK’s mandate pursuant to UN Security Council Resolution 1244 (1999).

---

<sup>12</sup> ICESCR Committee, General Comment No. 3 on the Nature of States parties obligations, 14 December 1990, UN Doc. E/1991/23, at § 12.

127. The Panel notes that, regardless of the specific circumstances of and responsibility for their removal from the work at the Kišnica mines in June 1999 (see HRAP, *Employees of the Kišnica and Novo Brdo Mines of Trepča Complex*, no. 81/10, decision of 14 April 2014, §§ 43-48), which are outside of its jurisdiction *ratione temporis*, the complainants were thereafter, as a matter of fact, left without employment and salaries. The Panel notes that, as of 2002 at the latest, this situation persisted with UNMIK's knowledge and acquiescence. Since that time the Kišnica mines as part of the Trepča Complex were put under the administration of the KTA, an UNMIK body.
128. The Panel further notes that UNMIK was aware of the vulnerable situation of those employees of Trepča who had become redundant, as shown also by the measures adopted by it directly or with its facilitation, in order to provide them with some form of social security support.
129. The Panel likewise notes that, on the basis of a programme of registration, training and retrenchment of Trepča employees carried out by IOM in 2001-2002, as of 2003 UNMIK established an on-going early pension scheme for those inactive employees aged 50-65 meeting the additional requirements envisaged in UNMIK Administrative Instruction No. 3/2003, as later modified by UNMIK Administrative Instruction No. 02/2006 of March 2006. As the employees who opted for the scheme reached the established age, they would become former employees of the enterprise and receive 40 euros per month as early pension. The scheme was envisaged as a temporary measure until the employees concerned reached the age for regular retirement, in accordance with UNMIK Regulation No. 2001/35 of 22 December 2001 *on Pensions in Kosovo*, which set up a new pension system in Kosovo, operational since 2002.
130. The complainants not meeting the requirements for receiving an early pension, or who opted not to be enrolled in the scheme, complain that they did not receive any regular form of financial support (i.e. redundancy or unemployment benefit) which made it hard for them and their families to maintain an adequate standard of living. They complained that UNMIK had not established any alternative support scheme for the employees in their situation. At the admissibility stage, the Panel declared this part of the complaint admissible, based on the complainants' submissions, non-contested by the SRSG.
131. However, in light of the additional information subsequently gathered by the Panel, it transpires that an additional support scheme consisting of monthly "stipends" for those inactive employees of the Trepča Complex below the age for early or regular retirement was indeed put into place by Trepča under UNMIK/KTA administration in cooperation with the PISG, since 2004. The Panel relies on the information received by stakeholders, as well as on the documents in the public domain, which state that a larger number of Trepča Complex employees not eligible for pension have been in receipt of a monthly redundancy benefit of 50 euros, funded partially from the budget of Trepča under UNMIK administration and partially from the KCB.
132. The Panel notes that this was the situation at the start of the Panel's temporal jurisdiction on 23 April 2005. The Panel notes that at this date, the early pension scheme was on-going, with additional former employees being progressively enrolled as they reached the age of 50, whereas the monthly "stipends" or redundancy benefits were to be paid to a large number of inactive employees below the age for early retirement. The Panel also notes that both arrangements continued to be in place throughout the time UNMIK

exercised full executive powers in Kosovo (June 2008), and in the justice area (December 2008), dates which also mark the end of the Panel's temporal jurisdiction.

133. With regard to the complainants' claim, not rebutted by the SRSG, that they have not been paid the regular redundancy benefits mentioned above, the Panel has carried out enquiries from which it transpires that indeed not all inactive employees below the age for early retirement have been in receipt of the so called "stipends". For example, the Panel notes that the 2010 PAK Annual Report states that, in 2006, out of 9400 individuals registered as (former) employees of Trepča, a total of 5,700 were in receipt of social security benefits (3400 early pensions and 2,300 "stipends")<sup>13</sup>. Similarly, according to the Kosovo Government Audit Report of 2012, Trepča "stipendiaries" in the same year were 199 in the South and 1883 in the North of Kosovo<sup>14</sup>.
134. However, and notwithstanding multiple enquiries including with UNMIK and with the Kosovo MLSW the Panel could not retrieve, any document (law, administrative instruction, government decision or similar) setting out the eligibility criteria, amount and duration of these benefits, which would justify the exclusion of the complainants from their distribution. It appears to the Panel that, once established, the implementation of the stipends system appears was left to the branches of the Trepča Administrations (North and South) and, to some extent, to the workers' trade unions.
135. While acknowledging UNMIK's efforts, directly and through its organ the KTA, to provide a social security net for the employees of the enterprise who had become redundant, the Panel notes that the practical administration of monthly redundancy benefits, which was not backed by a clear legal or regulatory framework, was such as to create room for abuse of the system by third parties and consequent unfair exclusion of potential beneficiaries, like the complainants. The Panel notes that concern about lack of regulation on stipend management was also raised by the Kosovo Office of the Auditor General, who stated that the lack of legal basis for this scheme had given rise to irregularities (see § 21 above). In this regard, the Panel refers to the views expressed by the ICESCR Committee that a core aspect of the authorities' obligations to protect the effective enjoyment of the right to social security is to adopt those necessary legislative and other measures to prevent third parties from denying equal access to social security schemes.
136. However, the Panel observes that in the instant case, notwithstanding the identified need by UNMIK to set up a system of redundancy benefits for the inactive employees of Trepča pending the enterprise's reorganisation, no legislative or other regulatory measures were adopted by UNMIK to set up a system that provided objective eligibility criteria and modalities of distribution of the above-mentioned benefits, as well as the provision of remedies in case of faulty implementation of the system. The Panel also notes that, in the context of the "minimum core obligations" which state authorities are required to fulfil in the immediate term under the Covenant, UNMIK has not put forward any submission that it used all its available resources to towards satisfying the objective of regulating by law the distribution of redundancy benefits to Trepča's employees. On the contrary, UNMIK has not provided any explanation to justify such a failure to put in place any such system.

<sup>13</sup> PAK Annual Report, January – December 2010, p. 17 // Available at [electronic source] [http://www.pak-ks.org/repository/docs/raporti\\_anglisht\\_FINAL.pdf](http://www.pak-ks.org/repository/docs/raporti_anglisht_FINAL.pdf) (accessed on 14 May 2016).

<sup>14</sup> Report *On the Financial Statements of Trepca Socially Owned Enterprise for the Year ended 31 December 2012*, cited in footnote 5 above, at p. 27 and 47.

137. The Panel also notes the complainants' submissions that they addressed several institutions in Kosovo, including the Trepča Administration and UNMIK organs, in order to complain about this situation (see § 35 above), but to no avail.

138. In this respect, the Panel considers that UNMIK, as interim administrator of Trepča, as well as interim administrator of Kosovo failed to fulfil its obligations under Article 9 of the ICESCR. In particular, the Panel considers that UNMIK's failure to establish a clear legal framework for the establishment, monitoring and the implementation of the stipends system reflected in the unfair exclusion of the complainants from the above mentioned scheme and in the violation of their right to social security. As the complainants were left without any means to support themselves and their families, the Panel also considers that their right to an adequate standard of living was violated.

139. Subsequently the Panel finds a violation of Articles 9 and 11 of the ICESCR.

### **G. Alleged violation of Article 2, in conjunction with Articles 9 and 11, of the ICESCR**

140. Insofar as the complainants complain that, upon their removal from work, more favourable welfare conditions were established for those (inactive) employees of the Kišnica mines of Albanian ethnicity, the Panel considers that this part of the complaint falls to be examined under Article 2, taken in conjunction with Articles 9 (right to social security) and 11 (right to an adequate standard of living) of the ICESCR.

141. The Panel recalls that non-discrimination and equality are fundamental components of international human rights law and that the prohibition of discrimination is recognised by the United Nations Charter and enshrined in all international human rights instruments, starting with the Universal Declaration of Human Rights (Articles 2 and 7). With respect to economic and social rights, Article 2.2 of the ICESCR states the obligation of state parties to guarantee that the rights enunciated in the Covenant "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

142. The prohibition of discrimination under Article 2.2 covers both the direct and indirect forms of differential treatment. Direct discrimination occurs "when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground", unless the justification for differentiation is "reasonable and objective". Indirect discrimination refers to "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of the Covenant rights as distinguished by prohibited grounds of discrimination"<sup>15</sup>.

143. As stated by the Committee on Economic Social and Cultural Rights, in contrast to the obligations imposed on states by Article 2.1 of the ICESCR, which are mostly subject to progressive realisation, Article 2.2 imposes the concrete and immediate obligation to guarantee that the Covenant rights are exercised without discrimination<sup>16</sup>. The Committee

---

<sup>15</sup> ICESCR Committee, General Comment No. 20 *Non-discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2, of the Covenant), 2 July 2009, UN Doc. E/C.12/GC/20, at §§ 10 and 13. See also ECtHR [GC], *D.H. and Others v. Czech Republic*, no. 57325/00, judgment of 13 November 2007, § 175 and the cases cited therein.

<sup>16</sup> ICESCR Committee, General Comment No. 3 cited in footnote 12 above, at § 10; and General Comment No. 20 cited in footnote 15 above, at § 7.

has also stated that a “failure to remove differential treatment on the basis of lack of available resources is not an objective and reasonable justification, unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority”<sup>17</sup>.

144. With respect to the scope of state parties’ obligations, the Panel notes that under Article 2.2. they are required to take concrete, deliberate and targeted measures, including legislative measures, to eliminate discrimination, as well as to regularly assess whether the measures chosen are effective in practice<sup>18</sup>. State parties should ensure that strategies, policies and plans of action are in place and implemented to address discrimination by both public and private actors in the area of economic and social rights. In particular “economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of Covenant rights without discrimination”<sup>19</sup>.
145. Anti-discrimination measures should include provisions for mechanisms and institutions (i.e. courts, tribunals, administrative authorities, national human rights institutions) for dealing with alleged violations of Article 2.2., including acts or omissions by private actors, which should be accessible to everyone<sup>20</sup>. On the issue of burden of proof in cases where discrimination has been alleged, the Committee has stated that, “where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or the other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively”<sup>21</sup>.
146. Turning to the complainants’ case, the Panel notes that they in essence complain that, upon their removal from work, they did not receive the same financial benefits granted to the Albanian employees of the Trepča Complex, including the Kišnica mines, who were in their same factual situation. Thus, they complain that they were discriminated against in the enjoyment of their rights to social security and to an adequate standard of living on the ground of their ethnicity, in violation of Article 2.2 of the ICESCR.
147. Based on the complainants’ submissions as put forward at the admissibility stage, which were not rebutted by the SRSG, the Panel decided that the complainants had established a *prima facie* case of discrimination which warranted its further consideration on the merits.
148. Based on the additional information subsequently gathered from UNMIK, Trepča management, the complainants’ representative and the Kosovo MLSW, the Panel makes the following assessment.
149. As far as the complainants complain that they could not be enrolled in the early pension scheme established by UNMIK as of 2003, the Panel recalls that this scheme was established by laws adopted by the Kosovo Assembly and promulgated by the UNMIK SRSG, which set out the requirements for the assignment of early pensions to former employees of the Trepča Complex. Having assessed these requirements, the Panel considers that they were grounded on clear and objective criteria which did not

---

<sup>17</sup> *Ibid.*, at § 13.

<sup>18</sup> ICESCR Committee, General Comment No. 20, cited in footnote 15 above, at § 36.

<sup>19</sup> *Ibid.*, at § 38.

<sup>20</sup> See ICESCR Committee, General Comment No. 20 cited in footnote 15 above, at § 40.

<sup>21</sup> *Ibid.*

discriminate against the Serbian employees *vis-à-vis* the Albanian employees of Trepča. The Panel also notes that neither the above-mentioned laws established - at least in the period within UNMIK's jurisdiction - apparent neutral rules for the enjoyment of early pensions which in their practical application were such as to disproportionately affect the employees of Serbian ethnicity, such as the complainants. The Panel further notes, with respect to the implementation of the early pension scheme, that none of the complainants presented *prima facie* evidence that they met the requirements for receipt of an early pension and were nonetheless prevented from being granted it in accordance with the law. For this reason, the Panel considers their complaints under Article 2.2 of the ICESCR unfounded.

150. With regard to those complainants who did not meet the age requirement for early pension and who complain that they did not receive the unemployment benefits received by their Albanian colleagues, the Panel recalls that it appears from the information available to it that, starting from 2004 and for the whole period under UNMIK's administration, a system of monthly stipends for inactive employees of Trepča was established, with funding from both the Trepča's budget ( in the amount of 30 euros per month) and the KCB (in the amount of 20 euros per month).

151. The complainants state that they did not receive these monthly stipends and that they have only received very occasional payments of unspecified amounts of money by the Trepča administration located in the North. The Panel notes that this statement is not contested by the SRSG.

152. The Panel also notes that, based on the documentation gathered, it is clear that not all inactive employees of Trepča are in receipt of the monthly stipends mentioned above. Nonetheless, the criteria on which a number of employees are excluded from the unemployment benefits are not clear, since, regrettably, no piece of legislation or regulation or instruction, neither by the Trepča Administration, nor by UNMIK or local authorities, could be found which establishes the criteria for eligibility or the procedure for the distribution of those monthly stipends. The Panel notes that, when questioned on this aspect, the SRSG/UNMIK confirmed that no legislation exists in this respect.

153. The Panel considers that it was UNMIK's responsibility, as the administrator of Trepča and as surrogate state authority in Kosovo, to make sure that the system of unemployment benefits envisaged for inactive workers of Trepča Complex was set up and implemented in accordance with clear, objective criteria preferably enshrined in laws, instructions or regulations, to avoid any form of discriminatory exclusion or other forms of abuse.

154. On the other hand, the Panel has not been presented with sufficient *prima facie evidence* to deem that the system of payments was implemented in a discriminatory fashion against the complainants on the basis of their ethnicity, since it seems to the Panel that the lack of legislation and set criteria for the allocation and distribution of monthly unemployment benefits might have equally affected inactive employees of Trepča Complex of Albanian ethnicity. Further, the Panel notes that, notwithstanding the existence of an anti-discrimination legal framework as also put forward by the SRSG, the complainants have not presented any submission or evidence that they filed a complaint with the Trepča management, UNMIK or local authorities that they were being unfairly excluded from the enjoyment of unemployment benefits. For these reasons, the Panel finds the complaint of alleged discrimination unsubstantiated also with respect to this group of complainants.

155. In light of the above, the Panel concludes that there was no violation of Article 2.2, taken in conjunction with Article 9 and 11 of the ICESCR.

## V. RECOMMENDATIONS

156. In light of the Panel's findings in this case, the Panel is of the opinion that reparation is necessary.

157. 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. The Panel is mindful of the fact that from June 2008 most of UNMIK's responsibilities under UN SC Resolution 1244 as the Interim Administration of Kosovo were taken over by local authorities (see § 28 above) and that the KTA stopped its operation (see § 29 above). Subsequent to that, its responsibility with regard to the judiciary in Kosovo ended on 9 December 2008 (see § 31 above). Thus, UNMIK is no longer in a position to directly speed up the proceedings pending at the PAK (the successor of the KTA) and before the Special Chamber.

158. Nevertheless, 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.

159. First, the Panel considers that UNMIK should publicly acknowledge, within a reasonable time, responsibility with respect to the violations described above and make a public apology to the complainants in this regard.

160. Second, recalling the SRSG's assertion that the KTA had been and continues to be the overall authority for Trepča Complex (see § 30 above), the Panel considers that UNMIK should exercise its authority over Trepča Complex and undertake appropriate measures to ensure that the complainants eligible to receive stipends start duly benefiting from that support scheme.

161. For the same reason, the Panel considers that UNMIK should ensure that proper legal instruments regulating the payment of stipends to the workers of the Trepča Complex are developed and made public without delay.

162. Further, in line with the case law of the European Court of Human Rights on situations of reduced State jurisdiction, the Panel is of the opinion that UNMIK must endeavour, with all means available to it *vis-à-vis* the competent authorities in Kosovo, to obtain assurances that the claims filed by the complainants before KTA (and currently pending before the PAK) are duly processed (see HRAP, *Milogorić and Others* § 49, cited in § 10 above; compare ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, ECHR, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171).

163. Finally, the Panel considers that UNMIK should take appropriate steps towards adequate compensation to the complainants for damages they incurred as a result of the above violations.

**FOR THESE REASONS,**

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN RESPECT OF THE INABILITY OF THE COMPLAINANTS TO HAVE THEIR CLAIMS DETERMINED;**
- 2. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN RESPECT TO THE ABSENCE OF AN EFFECTIVE REMEDY FOR THE COMPLAINANTS AGAINST THE SITUATION PREVENTING THEM FROM HAVING THEIR CLAIMS DETERMINED BY A COURT;**
- 3. FINDS THAT THERE IS NO NEED TO EXAMINE THE COMPLAINT UNDER ARTICLE 1 OF THE PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 4. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLES 9 AND 11 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS WITH RESPECT TO LACK OF MINIMUM CORE SOCIAL SECURITY ASSISTANCE TO THE COMPLAINANTS WHO WERE NOT IN RECEIPT OF EARLY PENSIONS;**
- 5. FINDS THAT THERE HAS BEEN NO VIOLATION OF THE COMPLAINANTS' RIGHTS GUARANTEED BY ARTICLE 2, IN CONJUNCTION WITH ARTICLES 9 AND 11, OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS.**
- 6. RECOMMENDS THAT UNMIK:**
  - a. ACKNOWLEDGES ITS FAILURE TO MEET ITS OBLIGATIONS UNDER ARTICLES 6 § 1 AND 13 OF THE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ARTICLES 9 AND 11 OF THE ICESCR, AND MAKES AN APOLOGY TO THE COMPLAINANTS;**
  - b. URGES THE COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ASSURE THAT THE ELIGIBLE COMPLAINANT'S CLAIMS BEFORE PAK WILL BE DECIDED WITHOUT ANY FURTHER DELAY;**
  - c. ENSURES THAT THE COMPLAINANTS WHO ARE ELIGIBLE TO RECEIVE THE STIPENDS ARE DULY INCLUDED IN THE LIST OF BENEFICIARIES OF SUCH ASSISTANCE;**
  - d. ENSURES THAT THE ADEQUATE LEGAL FRAMEWORK REGULATING PAYMENT OF STIPENDS TO TREPČA WORKERS IS DEVELOPED AND PUBLISHED;**

- e. **TAKES APPROPRIATE STEPS TOWARDS ADEQUATE COMPENSATION OF THE DAMAGES INCURRED BY THE COMPLAINANTS;**
- f. **TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND INFORM THE COMPLAINANTS AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey Antonov  
Executive Officer

Marek Nowicki  
Presiding Member

**ABBREVIATIONS AND ACRONYMS**

- EULEX** - European Union Rule of Law Mission in Kosovo  
**ICCPR** - International Covenant on Civil and Political Rights  
**ECHR** - European Convention on Human Rights  
**ECtHR** - European Court of Human Rights  
**GC** - Grand Chamber of the European Court of Human Rights  
**HRAP** - Human Rights Advisory Panel  
**HRC** - United Nations Human Rights Committee  
**IOM** - International Organisation for Migration  
**KAG** - Kosovo Auditor General  
**KCB** - Kosovo Konsolidated Budget  
**KFOR** - International Security Force (commonly known as Kosovo Force)  
**KTA** - Kosovo Trust Agency  
**MLSW** - Kosovo Ministry of Labor and Social Welfare  
**OLA** - Office of Legal Advisor  
**PAK** - Privatisation Agency of Kosovo  
**PISG** - Provisional Institutions of Self-Government of Kosovo  
**SCSC** - Special Chamber of the Supreme Court of Kosovo on KTA Related Matters  
(succeeded in 2011 by the Special Chamber of the Supreme Court of Kosovo on PAK Related Matters)  
**SOE** - Socially-Owned Enterprise  
**SRSG** - Special Representative of the Secretary-General  
**Trepča Complex** - Mining and Metallurgic-Chemical Complex of Tin and Zink Trepča  
(in Serbian: *Рударско-металуршко-хемијски комбинат олова и цинка Трепча*)  
**UN** - United Nations  
**UNMIK** - United Nations Interim Administration Mission in Kosovo