



DECISION

Date of adoption: 6 June 2008

Case No. 04/07

Kadri BALAJ (on behalf of Mon BALAJ), Shaban XHELADINI (on behalf of Arben XHELADINI), Zenel ZEMELI and Mustafa NERJOVAJ

against

UNMIK

The Human Rights Advisory Panel sitting on 6 June 2008 with the following members present:
Mr. Marek NOWICKI, Presiding member
Mr. Paul LEMMENS
Ms. Snezhana BOTUSHAROVA-DOICHEVA

Mr. John RYAN, 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. THE FACTS

1. On 10 February 2007, a protest demonstration organised in Pristina by Vetëvendosja became violent. UNMIK formed police units (FPU) from various countries, including Romania, were deployed to protect government buildings and maintain crowd control if necessary.

2. Injuries were sustained by police and protesters during the protest. UNMIK Police discharged rubber bullets towards the crowd, which killed Mon Balaj, son of the first applicant, and Arben Xheladini, son of the second applicant, and wounded others, some quite seriously, including Zenel Zeneli and Mustafa Nerjovaj, third and fourth applicant.

3. Soon after the protest, a task force was assembled to investigate the circumstances of the protest and the violence which occurred. The SRSG appointed a special prosecutor, who submitted two reports, dated 16 April 2007 and 29 June 2007.

The report of 16 April 2007 contains the following findings relating to the complainants in the present case:

A. Mon Balaj – Mon Balaj’s shooting was witnessed by a number of people. It is clear that during the protest he entered into the Illyria Hotel on Mother Theresa Street. At some point he ran from the hotel, jumped off the terrace and was soon thereafter struck in the head behind his right ear with the rubber bullet that pierced his skull. He died as the result of a rubber bullet type RB1 wound to the head. Mon Balaj had entered the Illyria Hotel on Mother Theresa and when MSU [Multinational Specialised Units] entered the hotel he ran from the hotel, leapt from the terrace, collapsed as he was struck by the bullet. An autopsy was performed and the bullet recovered. The bullet was an RB1 type.

B. Arben Xhelladini – Little is known regarding the circumstances of the shooting and death of Arben Xhelladini. He was shot in the front of his forehead. An autopsy was performed and the bullet recovered. The bullet was a RB1 type rubber bullet.

C. Mustafa Nerjovaj – He was shot in the head by an RB1 projectile. This was recovered and examined. His wound was inflicted when he bent down to pick up a tear gas canister in order to throw it back to the police. The bullet was a RB1 type rubber bullet.

D. Zenel Zeneli – He was shot in the chest and the projectile remains within his chest. He is unable to recall details of the infliction of his injuries. From x-rays, it appears that the projectile lodged in his chest is an RB1 projectile.”

The same report contains the following conclusions:

A. The evidence to date leads to the conclusion that deaths of Mon Balaj and Arben Xhelladini were unnecessary and avoidable. There appears to be no justification for shooting to the head of Mon Balaj and to the head of Arben Xhelladini or to the chest of Zenel Zemeli. The goals of the operational plan were to protect the buildings and crowd control. The infliction of the fatal and near fatal injuries took place at considerable distance from the government buildings to be protected. One is also left with the conclusion that the use of rubber bullets at all on that date may have been ill advised and inappropriate under the circumstances. This will be the subject of further inquiry.

B. The evidence developed to date supports the conclusion that the fatal and near deadly rubber bullets shots were fired from one or two of the Romanian FPU gunners. There were 10 Romanian FPU gunners that day. 59 rubber bullet rounds of RB1 variety were discharged by the Romanian gunners. At least eight Romanian gunners fired these 59 RB1 rubber bullet rounds. The evidence does not however provide a basis to further identify who may have fired the deadly or wounding rounds of RB1 ammunition. No witness was able to identify any shooter of the injured persons in question. The state of the evidence gathered thus far does not meet the threshold of reasonable suspicion of criminal activity committed by any *particular* person. Therefore, formal initiation of criminal proceedings pursuant to [Provisional Criminal Procedure Code of Kosovo] Articles 220 and 221 is not warranted under the law at this time.

C. In light of the above, UNMIK, the United Nations, and the Government of Romania may consider initiating appropriate procedures for compensation for the surviving family members of those fatally shot and for those seriously wounded.”

The report of 29 June 2007 contains “a review of the prevailing law and an assessment and critique of practices and procedures employed by the UNMIK Police in planning and carrying out the police functions prior to and during the 10 February protest, particularly as it relates to the decision to use rubber bullets against the crowd that day”. It concludes that there have been various flaws with respect to the legal framework and the planning, operation and decision making process.

4. An UNMIK Claims Review Board, under the UNMIK Director of Mission Support, has reviewed compensation claims filed by the families of the complainants. In the case of Mustafa Nerjovaj, it was recommended to defer the claim pending additional documentation. In the other cases, recommendations for compensation were forwarded on 27 December 2007 to the Headquarters Claims Review Board, for onward review. To date, it seems that no payments have been made to any of the complainants or their families.

II. COMPLAINTS

5. The complainants claim that the facts of the killing and serious injury of the complainants constitute violations of the following rights: right to life, prohibition of torture, right to effective remedy, right to fair trial and right to peaceful assembly.

They invoke the following international human rights instruments:

- the Universal Declaration of Human Rights, in particular Articles 3, 5, 8, 10 and 20;
- the European Convention on Human Rights (ECHR), in particular Articles 2, 3, 6, 11 and 13;
- the International Covenant on Civil and Political Rights (CCPR), in particular Articles 2, 6, 7 and 21;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in particular Articles 2, 10, 12, 13, 14 and 16.

III. PROCEEDINGS BEFORE THE PANEL

6. The complaint was introduced on 11 October 2007 and registered on the same date.

7. The Panel communicated the case to the SRSG on 7 February 2008 giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and merits pursuant to Section 11.3 of UNMIK Regulation No. 2006/12 and Rule 30 of the Panel’s Rules of Procedure. The SRSG did not avail himself of this opportunity.

IV. THE LAW

8. Before considering the case on its merits the Panel has to decide whether to accept the case, taking into consideration the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12 referred to above.

A. Whether all available avenues for review have been pursued

9. Section 3.1 of UNMIK Regulation No. 2006/12 provides that the Advisory Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued.

The complainants submit that, after the two reports of the Special Prosecutor, no criminal investigation has been initiated. Moreover, because of the immunity of UNMIK and its personnel, no other avenues of review are available to them.

10. In this connection, the Panel notes that the question whether the requirement to exhaust remedies has been satisfied in the instant case is closely linked to the complaints concerning the procedural aspect of the right to life and the prohibition of ill-treatment and the existence of an effective remedy. It is of the view that this matter is more appropriately addressed in an overall analysis and taking into account the means of redress available to the complainants, the scope of the obligations arising in this context under the international human rights instruments invoked by the complainants, and also the response given by the authorities to the complainants' use of remedies. Accordingly, the relevant issues should be joined to the merits of the case.

B. Whether the complaint is manifestly ill-founded

1. Right to life

a. The complainants' submissions

11. Relying on the two reports of the Special Prosecutor to the SRSG, the complainants allege that the four victims were killed or seriously wounded by rubber bullets fired by Romanian FPU of UNMIK Police. According to the complainants, the rubber bullets fired by the Romanian police were obsolete, there was no justification or excuse for the shootings, and the rubber bullets were used in a way which was contrary to relevant guidance on the correct methods of firing such projectiles.

Turning to the circumstances surrounding the actual shooting, the complainants allege that there was a significant divergence between Romanian law and internationally accepted standards for the use of firearms and deadly force: the former permitted a significantly greater degree of the use of firearms and deadly force. They further allege that the operational order to deal with the demonstration of 10 February 2007 was ambiguous as to whether the use of rubber bullets were authorised or not. Finally, according to the complainants, there was a breakdown in the chain of command during the protests of 10 February 2007 (in his second report the Special Prosecutor had concluded that the chain was broken because the understanding the Commander of the FPU Coordinators had of his role and responsibility differed from that of his commanders and his subordinates), as well as a breakdown in supervision, in that the supervisors of the Romanian UNMIK Police were unaware that the latter were using rubber bullets during the protest of 10 February 2007.

12. The complainants further complain about a number of failings in the investigation both by the police task force and by the Special Prosecutor. They primarily criticised the fact that the investigations did not allow the investigators to identify which of the Romanian officers of UNMIK Police had fired the shots. They furthermore alleged that all the police reports were identically worded and formatted, in typed English text, despite questions as to whether the Romanian UNMIK Police officers spoke English; that the investigators included Romanian UNMIK personnel, despite it being clear that the suspects included Romanian UNMIK Police officers; that the English transcripts or translations of the interviews of the Romanian UNMIK

Police officers contained information that was not contained in the original handwritten Romanian notes of the interviews; that serious discrepancies existed in the evidence of at least one of the Romanian UNMIK Police officers; that none of the Romanian UNMIK Police officers were questioned in accordance with the Provisional Criminal Procedure Code of Kosovo, rendering any evidence against them inadmissible; and that not all relevant witnesses to the events of 10 February 2007 were questioned.

b. The Panel's preliminary assessment

13. The right to life is guaranteed by, among other provisions, Article 2 of the ECHR and Article 6 of the CCPR. These articles enshrine some of the basic values of democratic societies.

From a substantive point of view, the said Articles set out the circumstances in which a deprivation of life may be justified. As stated explicitly in Article 6 § 1 of the CCPR, it is the arbitrary deprivation of life that is prohibited. The text of Article 2 § 2 of the ECHR itself shows that the use of lethal force by police officers may be justified in certain circumstances. However, any use of force must be "no more than absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) of the latter paragraph, that is to say it must be strictly proportionate in the circumstances. In view of the fundamental nature of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed (see ECtHR, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 94, ECHR 2005-VII).

Accordingly, and with reference to Article 2 § 2 (c) of the ECHR, the legitimate aim of quelling a riot or insurrection can only justify putting human life at risk in circumstances of absolute necessity.

Following the case law of the European Court of Human Rights in cases concerning the use of force by State agents, the Panel must take into consideration not only the actions of the agents of UNMIK who actually administered the force but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination (see ECtHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 46, § 150; ECtHR, *Makaratzis v. Greece* [GC], no. 50385/99, §§ 56-59, ECHR 2004-XI; ECtHR, *Nachova and Others*, cited above, § 93).

14. The Articles 2 of the ECHR and 6 of the CCPR also entail a procedural obligation for UNMIK.

With respect to Article 2 of the ECHR, this obligation has been described as follows by the European Court of Human Rights in the *Nachova* case (cited above, §§ 110-113; the principles have recently been reaffirmed in ECtHR, *Ramsahai v. Netherlands* [GC], no. 52391/99, § 321, 15 May 2007):

"110. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 86, ECHR 1999-IV). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Anguelova v. Bulgaria*, no. 38361/97, § 137, ECHR 2002-IV).

111. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to request particular lines of inquiry or investigative procedures (see, *mutatis mutandis*, *Ilhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

112. For an investigation into alleged unlawful killing by State agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice (see *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82; *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III; and *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84).

113. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible (see *Oğur*, cited above, § 88). The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye-witness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the "no more than absolutely necessary" standard required by Article 2 § 2 of the Convention. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness (see *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001, and *Anguelova*, cited above, §§ 139 and 144)."

15. In the light of the foregoing principles, the Panel considers that the complaint relating to the right to life, considered both from the substantive and the procedural point of view, raises issues of law and of fact, the determination of which should depend on an examination of the merits of the complaints. The Panel notes that the complaint is not manifestly ill-founded within the meaning of Section 3.3 of the said Regulation. It further notes that it is not inadmissible on any other grounds.

2. Prohibition of torture and inhuman or degrading treatment

a. The complainants' submissions

16. The complainants submit that the circumstances of the case exposed them to torture or inhuman or degrading treatment within the meaning of Article 3 of the ECHR, Article 7 of the CCPR and 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

b. The Panel's preliminary assessment

17. Like the treaty provisions relating to the right to life, the above mentioned provisions enshrine some of the most fundamental values of democratic society.

From a substantive point of view, the said provisions prohibit in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (ECtHR, *Saadi v. Italy* [GC], no. 37201/06, § 127, 28 February 2008). To fall within the scope of that prohibition, ill-treatment must attain a minimum level of severity (ECtHR, *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

The said provisions can be violated by the use of force by the police. Admittedly, they do not prohibit the use of force in certain well-defined circumstances, such as to quell a riot or an insurrection. However, such force may be used only if indispensable and must not be

excessive (compare ECtHR, *Eser Ceylan v. Turkey*, no. 14166/02, § 28, 13 December 2007).

18. From a procedural point of view, the said provisions imply that where an individual raises an arguable claim that he has been seriously ill-treated by the police, there should be an effective official investigation. As with an investigation relating to an interference with the right to life, such investigation should be capable of leading to the identification and punishment of those responsible (ECtHR, *Matko v. Slovenia*, no. 43393/98, § 84, 2 November 2006).

19. The complaint relating to the prohibition of torture and inhuman or degrading treatment is thus related to the one related to the right to life. Like for the latter complaint, the Panel considers that the former complaint, limited however to the issue of inhuman treatment, but considered both from the substantive and the procedural point of view, raises issues of law and of fact the determination of which should depend on an examination of the merits of the complaints. The Panel notes that the complaint is not manifestly ill-founded within the meaning of Section 3.3 of the said Regulation. It further notes that it is not inadmissible on any other grounds.

3. *Right to a fair hearing and right to an effective remedy*

a. The complainants' submissions

20. The complainants allege that following the second report of the Special Prosecutor, there are no effective remedies available to them as these reports did not lead to the filing of an initiation of a criminal investigation. They also complain that it appears that no appropriate mode of settlement of disputes has been implemented as required by Section 29 of the Convention on the Privileges and Immunities of the United Nations in circumstances where there is a dispute involving an official of the United Nations who enjoys immunity by reason of his official position.

This complaint can be related to Articles 6 and 13 of the ECHR and 2 § 3 and 14 of the CCPR, invoked by the complainants.

b. The Panel's preliminary assessment

21. The Panel first notes that Article 6 § 1 of the ECHR, insofar as relevant, guarantees that in the determination of one's civil rights and obligations, everyone is entitled to a fair hearing within a reasonable time. Likewise, Article 14 § 1 of the CCPR guarantees that in the determination of one's rights in a suit at law, everyone is entitled to a fair hearing.

22. The Panel further notes that Articles 13 of the ECHR and 2 § 3 of the CCPR require that where an arguable breach of one or more of the rights is in issue, there should be available to the victim a mechanism for establishing any liability of State officials or bodies for that breach. The public authorities are afforded some discretion as to the manner in which they comply with their obligations under this provision. As a general rule, if a single remedy does not by itself entirely satisfy the requirements of the said provisions, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, ECtHR, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; see also ECtHR, *Čonka v. Belgium*, no. 51564/99, § 75, ECHR 2002-I).

The scope of the obligation under Article 13 of the ECHR and Article 2 § 3 of the CCPR varies depending on the nature of the applicant's complaint. It results from the case law of the European Court of Human Rights that in certain situations a particular remedy is to be provided. Thus, in cases of suspicious death or ill-treatment, given the fundamental importance of the rights protected by Articles 2 and 3 of the ECHR, Article 13 of the ECHR

requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see ECtHR, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, § 114 et seq.; ECtHR, *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV; ECtHR, *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005).

23. Having regard to the circumstances of the case, the Panel considers that this part of the complaint raises issues of law and of fact the determination of which should depend on an examination of its merits. The Panel notes that the complaint is not manifestly ill-founded within the meaning of Section 3.3 of the said Regulation. It further notes that it is not inadmissible on any other grounds.

4. Right to peaceful assembly

a. The complainants' submissions

24. The complainants do not make any specific submissions in this regard.

b. The Panel's preliminary assessment

25. The Panel observes that the right to freedom of assembly is a fundamental right in a democratic society and is one of the foundations of such a society (ECtHR, *Galstyan v. Armenia*, no. 26986/03, § 114, 15 November 2007). This right, of which the protection of personal opinion is one of the objectives, is subject to a number of exceptions which must be narrowly interpreted, and the necessity for any restrictions must be convincingly established. (ECtHR, *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, 11 October 2001).

26. In the light of the foregoing principles, the Panel considers that this part of the complaint raises issues of law and of fact the determination of which should depend on an examination of its merits. The Panel notes that the complaint is not manifestly ill-founded within the meaning of Section 3.3 of the said Regulation. It further notes that it is not inadmissible on any other grounds.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

John J RYAN
Executive Officer

Marek NOWICKI
Presiding member