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

DECISION

Date of adoption: 11 May 2012

Case No. 04/07

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

against

UNMIK

The Human Rights Advisory Panel, sitting on 11 May 2012,
with the following members present:

Mr Marek NOWICKI, Presiding Member
Mr Paul LEMMENS
Ms Christine CHINKIN

Assisted by
Mr 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 introduced on 11 October 2007 and registered on the same date. During the proceedings before the Panel, the complainants were represented by Mr Halim Sylejmani, a lawyer from Kosovo, and by Messrs Paul Troop and Jude Bunting, lawyers from London.

2. With respect to the proceedings up to the Panel's decision of 31 March 2010, the Panel refers to the procedural steps listed in that decision (§§ 11-31). In what follows only the most relevant steps are reiterated, as well as an account given of the procedural steps taken since the above mentioned decision.

3. On 6 June 2008, the Panel declared the complaint admissible.

4. On 19 March 2009, a closed hearing took place. It was attended by the following representatives of the parties:
   - On behalf of UNMIK:
     - Mr Ernst Tschoepke, Acting Director of the Office of the Legal Adviser,
     - Mr Carl Campeau, legal officer in the Office of the Legal Adviser.
   - On behalf of the complainants:
     - Mr Paul Troop, barrister, Tooks Chambers, London,
     - Mr Jude Bunting, barrister, Tooks Chambers, London,
     - Mr Halim Sylejmani, advocate, Prishtinë/Priština,
     - Ms Alexandra Channer, assistant to Mr. Sylejmani, Prishtinë/Priština.

   The complainants Kadri Balaj, Shaban Xheladini, Zenel Zeneli and Mustafa Nerjovaj were also present.

5. After having heard the parties, the Panel decided on the same day to adjourn the hearing until 4 June 2009, at which date the hearing would be continued in public. Due to further information received from the Special Representative of the Secretary-General (SRSG), the Panel decided on 12 May 2009 to cancel the hearing.

6. On 31 March 2010, the Panel declared the complaint inadmissible, having regard to Administrative Direction No. 2009/1 of 17 October 2009 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel (see §§ 32-34 below), issued in the course of the proceedings. The Panel found, in particular, that the substantive parts of the complaint fell *prima facie* within the ambit of the UN Third Party Claims Process (see § 35 below) and were therefore deemed inadmissible. It further noted that the substantive and procedural parts of the complaint were so interlinked that it would be artificial to separate them. For that reason, it considered that the entire complaint was deemed inadmissible.

7. In its decision, the Panel applied Rule 49 of its Rules of Procedure, which provides that questions not governed by these Rules shall be settled by the Panel. It decided that once the UN Third Party Claims Process had been concluded, the complainants could request the Panel to reopen the proceedings. The Panel indicated that it would then decide, on the basis of the information available to it, whether or not to accept such a request.

8. On 17 December 2010, the complainants informed the Panel of the completion of the UN Third Party Claims Process with respect to each of them. They requested the Panel to proceed with the complaint as originally presented to the Panel, in particular with the procedural parts of it.

9. On 23 December 2010, the Panel requested further information from the complainants. On the same date, it communicated the request to reopen the proceedings to the SRSG.

10. By e-mail of 22 August 2011, the complainants sent submissions, dated 8 August 2011, in support of their request. They sent the same submissions, together with a number of documents, by letter of 12 September 2011.

11. On 19 September 2011, the Panel communicated the submissions of the complainants to the SRSG, for UNMIK's observations. The Panel indicated that it particularly sought to receive comments in relation to a number of specific questions.

12. On 30 September 2011, the UNMIK Office of Legal Affairs requested clarification with respect to the representation by counsel of the complainants Zenel Zeneli and Mustafa Nerjovaj. On 14 October 2011, the Panel forwarded that request to counsel appearing for the complainants. Counsel for the complainants sent a reply on 14 October 2011. Authorisations signed by the two named complainants, dated 25 October 2011, were sent to the Panel on 10 November 2011.

13. On 21 November 2011, the SRSG provided UNMIK's comments on the complainants' submissions, but only insofar as they had been made on behalf of Kadri Balaj and Shaban Xheladini.

14. On 28 November 2011, the Panel communicated the newly received authorisation letters signed by Zenel Zeneli and Mustafa Nerjovaj to the SRSG and invited him to submit such additional comments as were necessary.

15. On 5 December 2011, the SRSG provided UNMIK's additional comments, relating to the submissions made on behalf of Zenel Zeneli and Mustafa Nerjovaj.

16. On 29 December 2011, the Panel communicated both comments of the SRSG to the complainants and invited them to submit further comments. On 6 February 2012, the complainants submitted their response.

17. On 11 April 2012, the Panel communicated the complainants' response to the SRSG, and invited him to submit further comments and to provide some documents. On 9 May 2012, the SRSG provided UNMIK's response.

II. THE FACTS

18. The complaint originally filed by the complainants relates to the actions of UNMIK formed police units from various countries at the occasion of a protest demonstration organised in Prishtinë/Priština by Vetëvendosje on 10 February 2007. As a result of these actions, Mon Balaj, son of the first complainant, and Arben Xheladini, son of the second complainant, were killed, and other demonstrators were wounded, some seriously, including Zenel Zeneli and Mustafa Nerjovaj, the third and fourth complainants.

19. For a brief overview of the facts relating to these events and the subsequent investigation, the Panel refers to its decisions of 6 June 2008 (§§ 1-3) and 31 March 2010 (§§ 1-5). In what follows an account is given of the facts relating to the claims submitted in the framework of the UN Third Party Claims Process (see § 35 below).

20. In the weeks after the events of 10 February 2007, UNMIK invited the complainants to file claims for compensation. All four complainants filed such claims between April and August 2007. They were examined by an UNMIK Local Claims Review Board. According to information provided by UNMIK, recommendations for compensation were forwarded to the Headquarters Claims Review Board (New York) for review on 27 December 2007.

21. After a preliminary review of the compensation claims, the United Nations Controller requested in 2009 that the amount of compensation to be paid be negotiated by UNMIK with the complainants. Once a settlement amount was agreed upon, the claims had to be resubmitted to the UNMIK Local Claims Review Board.

22. The SRSG met some of the complainants on 24 July 2009. According to the complainants, he then apologised for the acts that had led to the tragic events. He allegedly repeated his apologies during a meeting with the other complainants, on 23 September 2009.

23. The SRSG set up a negotiation team, to reach an agreement with the complainants. On 14 August 2009, the negotiation team proposed substantial amounts of compensation to the complainants Balaj, Xheladini and Zeneli. Various meetings took place and letters were exchanged, in which the respective amounts of compensation were discussed. The complainants also insisted on the fact that even if they accepted the compensation, they wished to continue the proceedings that were then pending before the Panel. On 25 September 2009, the negotiation team indicated to the complainants Balaj and Xheladini that by accepting the pending offer they would release UNMIK from any liability. On 2 October 2009, the complainants Balaj and Xheladini responded that they did not only seek compensation, but also other forms of redress, in particular the opening of a criminal investigation. Therefore they considered that acceptance of compensation could not preclude the Panel from continuing with its examination of the case and recommending further measures.

24. On 17 October 2009, UNMIK Administrative Direction No. 2009/1 was issued (see §§ 32-34 below).

25. During a meeting on 30 December 2009, the complainants stated that they did not wish to enter into an agreement with UNMIK on the issue of compensation. On 4 January 2010, the negotiation team wrote to the complainants Balaj, Xheladini and Zeneli, offering again a justification for the amounts proposed, reiterating the offers made and indicating that, if the complainants would not accept the offer, UNMIK would still go forward with the compensation procedure. There has not been an agreement between the complainants and UNMIK.

26. The Panel declared the complaint inadmissible on 31 March 2010, leaving open the possibility for the complainants to request the reopening of the proceedings after completion of the UN Third Party Claims Process (see §§ 6-7 above).

27. On 27 and 28 May 2010, UNMIK announced to Arlinda Xheladini, widow of Arben Xheladini, and to Kadri Balaj that the compensation offers, confirmed by the UNMIK Local Claims Review Board, had been approved by the Assistant Secretary-General (and Controller) of the United Nations in New York. UNMIK was ready to pay the amounts offered, subject to the signing of a "release form" by the complainants. The release forms contained the following statement: "I understand that this offer is in full and final settlement of all claims of every nature and kind whatsoever resulting from the above loss" (referring to the death of the victim). On 9 June 2010, Kadri Balaj and Arlinda Xheladini each signed a release form. On 4 August 2010, compensation was paid to them.

28. On 21 June 2010, UNMIK announced the approval of the offer to Zenel Zeneli, and indicated its readiness to pay the amount offered, subject to the signing of a release form containing the following statement: "I understand that this payment is in full and final settlement of all claims of every nature and kind whatsoever resulting from the above injuries." Zenel Zeneli signed a release form on 22 June 2010. On 23 June 2010, compensation was paid to him.

29. On 1 November 2010, the negotiation team proposed a substantial compensation to Mustafa Nerjovaj. It indicated that the compensation would be "in full and final settlement of all claims arising out of the injuries suffered on 10 February 2007".

30. On 26 April 2011, UNMIK announced approval of the offer to Mustafa Nerjovaj, subject to the signing of a release form. Mustafa Nerjovaj signed a release form on 28 April 2011. On 29 April 2011, compensation was paid to him.

III. THE REQUEST FOR REOPENING OF THE PANEL PROCEEDINGS

31. The complainants request the reopening of the Panel proceedings, so that the Panel can resume its examination of the merits of their complaint.

IV. RELEVANT NORMATIVE FRAMEWORK

32. Sections 2.1, 2.2 and 2.3 of Administrative Direction No. 2009/1 of 17 October 2009 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel read as follows:

> "2.1. At any stage of the proceedings of a human rights complaint before it, the Advisory Panel shall examine all issues of admissibility of the complaint before examining the merits.
>
> 2.2. Any complaint that is or may become in the future the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and

> Immunities of KFOR and UNMIK and their personnel in Kosovo of 18 August 2000, as amended, shall be deemed inadmissible for reasons that the UN Third Party Claims Process and the procedure under section 7 of Regulation No. 2000/47 are available avenues pursuant to Section 3.1 of (Regulation No. 2006/12).
>
> 2.3 Comments on the merits of an alleged human rights violation shall only be submitted after the Advisory Panel has completed its deliberation on and determined the admissibility of such complaint. If issues of admissibility of a complaint are addressed at any time after the Advisory Panel has made a determination on admissibility of a complaint and commenced its considerations of the merits, the Advisory Panel shall suspend its deliberations on the merits until such time as the admissibility of the complaint is fully re-assessed and determined anew."

33. Section 5 of Administrative Direction No. 2009/1 provides that no complaint to the Panel shall be admissible "if received by the Secretariat of the Advisory Panel later than 31 March 2010".

34. Section 6 provides that Administrative Direction No. 2009/1 shall enter into force on 17 October 2009, that is the date of its issuance, and that it "shall be applicable (to) all complaints submitted to the Advisory Panel including such that are currently pending before the Advisory Panel".

35. The UN Third Party Claims Process referred to in Section 2.2 forms the object of General Assembly resolution 52/247 of 17 July 1998 on "Third-party liability: temporal and financial limitations" (A/RES/52/247). The relevant provisions of that resolution read as follows:

> "5. *Decides* that the temporal and financial limitations set out in paragraphs 8 to 11 below shall apply to third-party claims against the Organization for personal injury, illness or death, and for property loss or damage (including non-consensual use of premises) resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties, as described in paragraph 13 of the report of the Secretary-General (A/51/903);
> 6. *Endorses* the view of the Secretary-General that liability is not engaged in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from 'operational necessity', as described in paragraph 14 of the first report of the Secretary-General on third-party liability (A/51/389);
> 7. *Also endorses* the views of the Secretary-General, reflected in paragraph 14 of his report (A/51/903), with regard to third-party claims resulting from gross negligence or wilful misconduct of the personnel provided by troop-contributing States for peacekeeping operations, and requests him to report on their implementation in the relevant performance reports;
> 8. *Decides* that, where the liability of the Organization is engaged in relation to third-party claims against the Organization resulting from

peacekeeping operations, the Organization will not pay compensation in regard to such claims submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation, provided that in exceptional circumstances, such as described in paragraph 20 of the report of the Secretary-General (A/51/903), the Secretary-General may accept for consideration a claim made at a later date;

9. *Decides also*, in respect of third-party claims against the Organization for personal injury, illness or death resulting from peacekeeping operations, that:

(*a*) Compensable types of injury or loss shall be limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses;

(*b*) No compensation shall be payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages;

(*c*) No compensation shall be payable by the United Nations for homemaker services and other such damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the injury or loss itself;

(*d*) The amount of compensation payable for injury, illness or death of any individual, including for the types of loss and expenses described in subparagraph (*a*) above, shall not exceed a maximum of 50,000 United States dollars, provided, however, that within such limitation the actual amount is to be determined by reference to local compensation standards;

(*e*) In exceptional circumstances, the Secretary-General may recommend to the General Assembly, for its approval, that the limitation of 50,000 dollars provided for in subparagraph (*d*) above be exceeded in a particular case if the Secretary-General, after carrying out the required investigation, finds that there are compelling reasons for exceeding the limitation;

10. *Decides further* in respect of third-party claims against the Organization for property loss or damage resulting from peacekeeping operations that:

(*a*) Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team; or (ii) not exceed a maximum ceiling amount payable per square metre or per hectare as established by the United Nations pre-mission technical survey team on the basis of available relevant information; the Secretary-General will decide on the appropriate method for calculating compensation payable for non-consensual use of premises at the conclusion of the pre-mission technical survey;

(*b*) Compensation for loss or damage to premises shall either: (i) be calculated on the basis of the equivalent of a number of months of the rental value, or a fixed percentage of the rental amount payable for the period of United Nations occupancy; or (ii) be set at a fixed percentage of the cost of repair; the Secretary-General will decide on the appropriate method for calculating compensation payable for loss or damage to premises at the conclusion of the pre-mission technical survey;

(*c*) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the premises;

11. *Decides* that:

(*a*) Compensation for loss or damage to personal property of third parties arising from the activities of the operation or in connection with the performance of official duties by its members shall cover the reasonable costs of repair or replacement;

(*b*) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the personal property;

12. *Requests* the Secretary-General to take the necessary measures to implement the present resolution in respect of the status-of-forces agreements in accordance with paragraph 40 of his report (A/51/903);

13. *Also requests* the Secretary-General to ensure that the terms of reference of the local review boards include the temporal and financial limitations on the liability of the Organization, as set out in paragraphs 8 to 11 above, and that those boards rely on those temporal and financial limitations as a basis for their jurisdiction and recommendations for compensation for third-party claims against the Organization resulting from its peacekeeping operations."

36. Section 7 of UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, referred to in Section 2.2 of Administrative Direction No. 2009/1, states:

> "Third Party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel and which do not arise from "operational necessity" of either presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for."

V. THE LAW

A. Representation of the complainants Zenel Zeneli and Mustafa Nerjovaj

1. Submission of the parties

37. In his comments of 21 November 2011, the SRSG notes that the submissions relating to the request for reopening of the proceedings, dated 8 August 2011, had been made by Messrs Troop and Bunting on behalf of all four complainants, but forwarded to the Panel by letter of 12 September 2011, signed by Mr Sylejmani in his capacity of representative of the Balaj and Xheladini families. According to the SRSG, it was evident from previous correspondence with the Panel and from UNMIK's correspondence with the representatives of the complainants that Mr Sylejmani was the representative of the Balaj and Xheladini families only, not of Zenel Zeneli and Mustafa Nerjovaj. He asserts that there is no evidence that these last complainants had authorised the submissions to be filed on their behalf.

38. In his comments of 5 December 2011, the SRSG takes note of the letters signed by Zenel Zeneli and Mustafa Nerjovaj on 25 October 2011, by which they authorise Mr Sylejmani to represent their interests in the proceedings before the Panel. The SRSG argues that such authorisations cannot be understood to have retrospective effect. Accordingly, the request to reopen the proceedings should be deemed to have been filed by the complainants Zeneli and Nerjovaj on 23 November 2011, when the Panel received a letter from Mr Sylejmani, dated 10 November 2011, forwarding the above mentioned authorisations.

39. In their comments of 6 February 2012, the complainants express their surprise that UNMIK seeks to suggest that their legal representatives have not, at all material times, actually been acting on behalf of each of them. They categorically state that all four of them have instructed Mr Sylejmani and Messrs Troop and Bunting to act on their behalf in the proceedings before the Panel. They give a number of examples of previously sent submissions and letters from which it results that the representatives clearly acted on behalf of all four complainants.

2. The Panel's assessment

40. The Panel notes that in the proceedings up to the request for their reopening, all four complainants have always been represented by Messrs Sylejmani, Troop and Bunting. UNMIK never previously made any objection with respect to the power of the representatives to act on behalf of the complainants Zeneli and Nerjovaj. The Panel has always considered the representatives to act on behalf of all four complainants.

41. It is true that formal authorisation letters were signed only on 25 October 2011 and received by the Panel on 23 November 2011. However, in these letters it is explicitly mentioned by the complainants Zeneli and Nerjovaj that they approved all actions undertaken thus far by the lawyers of Took Chambers and Mr Sylejmani on their behalf. The Panel considers that these letters are sufficient to validate their representatives' powers of attorney and their ability to represent the

complainants in the proceedings before the Panel (European Court of Human Rights (ECtHR), *Melnik v. Ukraine*, no. 72286/01, judgment of 28 March 2006, § 57).

42. The Panel therefore concludes that the complainants Zeneli and Nerjovaj were validly represented by Messrs Troop and Bunting and by Mr Sylejmani when they joined the other complainants in their request for reopening of the proceedings, filed with the Panel on 17 December 2010.

B. Whether the UN Third Party Claims Process has been completed

43. According to Section 2.2 of Administrative Direction No. 2009/1, any complaint "that is or may become in the future" the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 shall be deemed inadmissible.

44. This provision does not preclude the examination of a complaint that has been the subject of the UN Third Party Claims Process, once that process has come to an end.

45. It is not disputed that the UN Third Party Claims Process has come to an end in the case of each of the complainants.

46. It remains to be seen whether there is a legal obstacle to reopening the proceedings commenced by the complainants in 2007. In this respect, the Panel will examine the objections raised by the SRSG in his comments of 21 November 2011 and 5 December 2011, as well as any objection that it considers it has to raise at its own initiative.

C. Whether there is a legal obstacle to the reopening of the Panel proceedings

1. Possibility to request the reopening of the Panel proceedings after the cut-off date of 31 March 2010

a) Submission of the parties

47. The SRSG argues that no new complaint can be filed with the Panel after 31 March 2010, the cut-off date for submission of complaints established by Section 5 of Administrative Direction No. 2009/1. According to the SRSG, there is no basis for allowing the reopening of proceedings after that date.

48. Insofar as the Panel considered in its decision of 31 March 2010 that it would be possible for the complainants to request the reopening of the proceedings after the cut-off date of 31 March 2010, the SRSG notes that the Panel based that decision on Rule 49 of the Panel's Rules of Procedure. Rule 49 provides that questions not governed by the Rules of Procedure shall be settled by the Panel. The SRSG argues that mere rules of procedure cannot create a new procedure that is not foreseen by UNMIK Regulation No. 2006/12, which establishes the Panel. Section 18 of that Regulation provides that the Panel shall adopt rules of procedure. However, the SRSG argues that this provision can only be understood as

empowering the Panel to adopt rules governing the procedure as established in the Regulation and subsidiary Administrative Directions. It does not allow for the creation of a new procedure that is inconsistent with the spirit and the intent of the Regulation or Administrative Directions issued thereunder. By allowing a request for reconsideration to be submitted after the cut-off date set by Administrative Direction No. 2009/1, the Panel took a position that is inconsistent with the Administrative Direction.

49. The complainants invite the Panel to follow its decision of 31 March 2010. They argue that there is no obstacle of inadmissibility or ineligibility preventing full examination of a case following the completion of the UN Third Party Claims Process.

b) The Panel's assessment

50. Section 5 of Administrative Direction No. 2009/1 provides that no complaint to the Panel shall be admissible "if received by the Secretariat of the Advisory Panel later than 31 March 2010".

51. This provision applies to new complaints. In the present case, the complainants are requesting the reopening of proceedings instituted in 2007.

52. As the Panel held in its decision of 31 March 2010, declaring the complaint inadmissible on the basis of Section 2.2 of Administrative Direction No. 2009/1, "the effect of a declaration of inadmissibility on account of non-exhaustion of an available remedy is in principle of a dilatory nature only, not of a peremptory nature. This means that a complainant may resubmit his or her complaint once all required processes have been concluded" (§ 55). The Panel further took into account the existence of the cut-off date for new complaints, and considered that a strict application of Section 5 of Administrative Direction No. 2009/1 in the case of the complainants would have unacceptable effects:

> "... if the complainants are required to re-file a complaint after the conclusion of the UN Third Party Claims Process, they would invariably run afoul of the 31 March 2010 deadline for the submission of new complaints. The requirement of going through the UN Third Party Claims Process would in that case in effect extinguish the complaint without the possibility of the complainants resubmitting it to the Panel, despite the fact that, as the Panel found on 6 June 2008, the complaint was admissible under the regulatory framework applicable when it was filed. Such a result would offend basic notions of justice" (§ 57).

53. The Panel confirms that point of view. It concludes that, since the UN Third Party Claims Process has come to an end, the complainants can request the Panel to reopen the proceedings instituted in 2007, without the cut-off deadline of 31 March 2010 being an obstacle to a continued examination of their complaint.

54. The objection of the SRSG is therefore rejected.

2. Six-month time limit or other temporal requirement

a) Submission of the parties

55. The SRSG argues that Section 3 of UNMIK Regulation No. 2006/12 provides that the Panel may only deal with a matter "within a period of six months from the date on which the final decision was taken". This means that a matter must be pursued within six months of the final decision in the available avenue of recourse.

56. In the instant case, according to the SRSG, the "final decision" is the date of communication of the United Nations Controller's agreement to pay the proposed compensation figure agreed by the parties. In the case of Mon Balaj, the Controller's decision was communicated to the family and their legal representative on 28 May 2010, and in the case of Arben Xheladini, the decision was communicated on 27 May 2010. The complainants did not submit their formal request, supported by the submissions dated 8 August 2011, until 12 September 2011. The request to reopen the case was therefore sent more than six months after the communication of the Controller's final decision, and is therefore not admissible. In the case of Zenel Zeneli, the Controller's decision was communicated on 21 June 2010, and in the case of Mustafa Nerjovaj on 26 April 2011. The effective date of the submission of these complainants' request to reopen the proceedings is 23 November 2011, the date of receipt of their letters of 25 October 2011 authorising Mr Sylejmani to act on their behalf. In their case too, the request to reopen the case was therefore sent more than six months after the communication of the Controller's final decision, and is therefore not admissible.

57. The complainants argue that the "final decision" is not the date of communication of a "final offer" to the complainants, which in the cases of Mon Balaj and Arben Xheladini took place on 28 and 27 May 2010, respectively. That offer required the agreement of the complainants in order to become finalised. The complainants recall that Kadri Balaj and Arlinda Xheladini signed a release form on 9 June 2010; that a final offer was sent to Zenel Zeneli on 21 June 2010 and that he signed a release form on 22 June 2010; that an offer was sent to Mustafa Nerjovaj on 1 November 2010 and a final offer on 26 April 2011. The complainants argue that the date upon which the UN Third Party Claims Process was completed is the date upon which the United Nations paid each complainant financial compensation.

58. The complainants further argue that the request for reopening of the proceedings was made on 17 December 2010. The request was thus filed within six months of the date when the UN Third Party Claims Process was completed. Indeed, before 18 June 2010 (six months before 17 December 2010) the United Nations had not received the release forms from all four complainants and had not paid compensation to any of the complainants.

b) The Panel's assessment

59. The Panel observes in the first place that the six-month time limit provided for in Section 3 of UNMIK Regulation No. 2006/12 relates to the filing of a complaint. The Regulation does not set a time-limit for filing a request for reopening of

proceedings. This does not mean that complainants may indefinitely postpone the filing of such a request. To the contrary, the Panel considers that they are required to take the necessary steps within a reasonable time.

60. What constitutes a "reasonable time", is to be determined in each case, taking into account the particular circumstances of the case.

61. The starting point for the calculation of the reasonable time should be the date on which the UN Third Party Claims Process came to an end, as it is that date that marks the end of the remedy that precluded the Panel from its continued examination of the complaint. The Panel considers that the UN Third Party Claims Process came to an end for each of the complainants with the return of a release form signed by them. The actual payment of the compensation should be considered a mere execution of the decision taken by the United Nations, and does not constitute a good starting point.

62. The Panel notes that Kadri Balaj and Arlinda Xheladini signed a release form on 9 June 2010, Zenel Zeneli on 22 June 2010, and Mustafa Nerjovaj on 28 April 2011.

63. The request for reopening of the proceedings was sent to the Panel, on behalf of all four complainants, on 17 December 2010.

64. The Panel considers that it was not unreasonable for the complainants to wait until the UN Third Party Claims Process had terminated for all four of them. Apparently, at a certain point they decided that they would no longer wait until the process came to an end for the fourth complainant. The Panel considers that, taking into account the circumstances, they remained within a reasonable time when they filed their request on 17 December 2010, within six months of the end of the process for the third complainant and slightly over six months since the end of the process for the first two complainants.

65. The objection of the SRSG is therefore rejected.

3. The complainants' continued victim status

a) Submission of the parties

66. The SRSG does not raise any objection based on the victim status of the complainants. The Panel considers that it has to consider this issue of its own motion.

67. The complainants argue that they continue to have victim status. Referring to the case law of the European Court of Human Rights, they argue in particular that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his victim status, unless the competent authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of his fundamental rights.

68. According to the complainants, the formal apology and acceptance of responsibility by the SRSG and the payment of compensation are an insufficient

acknowledgement of and redress for the fundamental human rights violations alleged by the complainants, so as to deprive them of their status as victims. They consider that their rights would be made illusory and purely theoretical if UNMIK were able to prevent an examination of their complaint solely by the payment of compensation. This is particularly the case because, on the one hand, the UNMIK Local Claims Review Board (read: negotiation team) has expressly and repeatedly stated that the compensation is for economic loss only, and on the other hand, the UN Third Party Claims Process did not consider a number of significant issues at the heart of the complainants' case, such as the adequacy of the investigation and the lack of criminal prosecution. In accepting compensation, the complainants have not voluntarily prevented a full investigation into their complaints from taking place. The UNMIK Local Claims Review Board exists solely to administer compensation; it has no ability to investigate complaints or to apportion liability. The complainants add that they have been consistently careful to make it clear that they considered any receipt of financial compensation as an issue separate from the proceedings before the Panel.

b) The Panel's assessment

69. The Panel agrees with the complainants that a decision or measure favourable to a complainant is not in principle sufficient to deprive him of his status as a "victim" unless the competent authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the human rights instruments referred to in Section 1.2 of UNMIK Regulation No. 2006/12 (see, for recent authorities in the case law of the European Court of Human Rights with respect to the "victim" requirement in Article 34 of the ECHR, ECtHR (Grand Chamber), *Sakhnovskiy v. Russia*, no. 21272/03, judgment of 2 November 2010, § 67; ECtHR (Grand Chamber), *Markin v. Russia*, no. 30078/06, judgment of 22 March 2012, § 82).

70. In the present case, the SRSG allegedly apologised for the actions attributable to UNMIK, during meetings with the families of the victims. Although this is a significant step, the Panel notes that these apologies have not been put in writing.

71. In any event, the Panel notes that the compensation paid to the complainants was not based on any acknowledgement of a violation of the victims' human rights. Rather, it constituted an *ex gratia* payment. Moreover, as was repeatedly explained to the complainants by the UNMIK negotiation team, the compensation is limited to economic loss, including in particular loss of earnings. No compensation has been paid for pain and suffering, moral anguish, punitive or moral damages or other types of loss which are not directly related to the injury (see the United Nations General Assembly resolution 52/247 of 17 July 1998 on "Third-party liability: temporal and financial limitations", cited in § 35 above, at § 9).

72. Specifically with respect to the complaint relating to the lack of an effective investigation into the events of 10 February 2007, the Panel is of the opinion that the procedural duty under Articles 2 and 3 of the ECHR cannot be considered satisfied by the payment of sums of money, as compensation for the pecuniary damage suffered by the victims and their families (see ECtHR (Grand Chamber), *Al-Skeini v. United Kingdom*, no. 55721/07, judgment of 7 July 2011, § 175).

73. It follows that the complainants can still claim to be victims within the meaning of Section 1.2 of UNMIK Regulation No. 2006/12.

4. Waiver

a) Submission of the parties

74. The SRSG argues that each complainant signed a release form on receipt of compensation from UNMIK. The form carried the following wording: "I understand that this offer is in full and final settlement of all claims of every nature and kind whatsoever resulting from the above (death or injuries)." The SRSG considers that this constitutes a waiver of all claims of every kind.

75. Referring to the case law of the European Court of Human Rights, the complainants argue that certain rights are not capable of being waived and that a waiver, in order to be valid, must fulfil certain conditions. In light of the principles derived from that case law, they submit that they have not waived their rights by signing a release form. First, the rights engaged by the complainants' case, including Articles 2 and 3 of the European Convention on Human Rights, are not capable of being waived in any circumstances. Secondly, none of the requirements that must be shown for a purported waiver of rights are satisfied in the complainants' case: the complainants have at no time conducted themselves in a way which demonstrates their unequivocal acquiescence to the waiver of their rights, but to the contrary repeatedly indicated to UNMIK their intention to exercise their rights upon completion of the UN Third Party Claims Process; waiving the complainants' fundamental rights in the present circumstances would offend the vital public interest in ensuring that complaints about violations of fundamental rights are heard by the Panel, accountability is upheld and confidence is maintained among the population; there have been insufficient guarantees surrounding the alleged waiver, commensurate to the fundamental nature of the rights in question; it cannot be shown that the complainants reasonably foresaw that the consequence of signing the release forms would be to waive their rights, having regard to the fact that the complainants were informed by the UNMIK Local Claims Review Board that the compensation process would not affect the Panel's proceedings and to the fact that the release forms do not explicitly state that they result in a waiver of the complainants' rights. Thirdly, the complainants did not sign the release forms in the absence of constraint, as they were told that unless they signed the forms they would not be compensated. Fourthly, having regard to the terms of the release forms and the intention and understanding of the complainants, it cannot be submitted that they waived their rights: there is no explicit reference in any of the release forms to the complaint before the Panel; the reference to a "full and final settlement of all claims" should be read as a sensible and convenient tool for settling claims for financial settlement, and should not therefore have the effect of depriving any party of a substantive right, in this case the right to seek consideration of the merits of a human rights complaint before the Panel.

b) The Panel's assessment

76. The question in this case is whether the complainants, by signing the release forms, waived their right to the examination of their complaint by the Panel and, more generally, the fundamental rights invoked in their complaint.

77. The Panel does not consider it necessary to examine whether these rights are capable of being waived. It is sufficient in the present case to examine whether there has been an effective waiver.

78. In this respect the Panel considers that for a waiver of a right to be effective, it must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see ECtHR (Grand Chamber), *Sejdovic v. Italy*, no. 56581/00, judgment of 1 March 2006, § 86, *ECHR*, 2006-II; ECtHR, *Pishchalnikov v. Russia*, no. 7025/04, judgment of 24 September 2009, § 77).

79. In the present case, the SRSG argues that the waiver results from the signing by the complainants of a release form containing the following wording: "I understand that this offer is in full and final settlement of all claims of every nature and kind whatsoever resulting from the above (death or injuries)."

80. The Panel notes that this formula refers to "claims" of every nature and kind, resulting from the death or the injuries of the victim. Such a wording seems to indicate that it covers only claims for compensation. In any event, there is no explicit reference to the complaint filed with the Panel.

81. The Panel considers furthermore, in view of the nature of the complaints made by the complainants, that it is highly unlikely that they would have accepted an offer for compensation that would result in impunity for the perpetrators of the alleged killing and wounding of the victims (compare ECtHR, *Pailot v. France* and *Richard v. France*, judgments of 22 April 1998, *Reports of judgments and decisions*, 1998-II, respectively § 52 and § 49). This is all the more so since the complainants repeatedly indicated to UNMIK their intention to proceed with their complaint before the Panel notwithstanding any award of compensation (see, among others, the letters on behalf of Kadri Balaj and Shaban Xheladini of 27 August 2009 and 2 October 2009). Moreover, at a meeting on 30 December 2009 they indicated that they were not prepared to enter into an agreement with UNMIK on the amount to be paid, and UNMIK subsequently decided to continue with the compensation process on the basis that no agreement could be reached (see the letters of 4 January 2010 to the complainants Balaj, Xheladini and Zeneli).

82. The Panel concludes that, even if the signing of the release forms implies a waiver on the part of the complainants, it cannot be considered to imply an unambiguous waiver of their right to obtain an opinion from the Panel on the merits of their complaint.

83. The objection of the SRSG is therefore rejected.

5. Conclusion

84. Having found that there is no obstacle to the reopening of the proceedings, the Panel grants the complainants' request.

D. Scope of the reopened proceedings

a) Submission of the parties

85. The SRSG argues that, should the Panel be determined to reopen the proceedings, it should take into account the scope of its mandate. According to Section 1.2 of UNMIK Regulation No. 2006/12, it can only examine complaints relating to alleged human rights violations by UNMIK. Its mandate does not extend to the examination of acts, omissions or decisions by any other organ of the United Nations, including the General Assembly.

86. The SRSG further argues that an important consideration for the Panel should be the specific intention of the complainants and the matters that they have asked the Panel to consider. In the instant case it transpires that the complainants' request for reconsideration is limited to the issues concerning a criminal investigation capable of determining whether the deaths and injuries that occurred on 10 February 2007 were caused unlawfully and leading to the identification and punishment of those responsible for unlawful acts, *i.e.* matters within the ambit of Articles 2 and 3 of the European Convention on Human Rights. The SRSG refers in this respect to certain letters sent by the complainants to UNMIK in 2009 and to their representative's letter to the Panel of 17 December 2010.

87. The complainants argue that the SRSG incorrectly asserts that they only seek to renew their complaints under Articles 2 and 3 of the ECHR. They maintain each aspect of their complaint, which concerns the right to life, the right to freedom from torture (or inhuman or degrading treatment), the right to a fair trial, the right to freedom of assembly and the right to an effective remedy.

88. The complainants further state that, while the payment of a financial compensation may be relevant to any recommendation that the Panel chooses to make in respect of a "just satisfaction", a recommendation in respect of a lawful, public investigation into their complaints remains of the utmost personal importance to them.

b) The Panel's assessment

89. The Panel acknowledges in the first place that its mandate is limited to the examination of complaints directed against UNMIK, about acts and omissions that are attributable to UNMIK. The scope of its review is not altered by the fact that the examination of the merits of a complaint follows a request to reopen the proceedings.

90. The Panel furthermore considers that it is for the complainants to determine the scope of their request for reopening of the proceedings: they can request the Panel to continue with the examination either of their whole complaint or of only part of it.

91. In the present case, the complainants wrote in their request of 17 December 2010 as follows:

> "Each complainant wishes the Panel to proceed with the complaint as originally presented to the Panel. In particular, the complainants would wish the Panel to focus on the procedural complaints raised which concern matters such as complaints about violations of the procedural aspects of the right to life and the prohibition of inhuman or degrading treatment, as well as violations of the right to a fair trial and the right to an effective remedy. These are not matters that were examined by the Third Party Claims Process."

92. The Panel notes that in the first sentence there is a reference to the complaint as initially presented to the Panel, *i.e.* to the whole complaint. In the next two sentences there is an invitation to the Panel to "focus" on specific parts of the complaint, to which the complainants attach a special importance. The Panel does not consider that the complainants intended to limit their request for a reopening of the proceedings to these parts.

93. This interpretation is confirmed by a reading of the complainants' submissions of 8 August 2011, in which they stated that "the facts and issues raised by the complainants' claim require further attention, particularly given that fundamental aspects of their claim have not received any attention or consideration during the UN Third Party Claims Process" (§ 99), and invited the Panel "to re-open and fully examine (their) claim" (§ 101).

94. The Panel will therefore proceed with the examination of the merits of the whole complaint as initially presented to it.

95. It is not necessary to indicate at this point to what extent the financial compensation paid to the complainants may have an effect on the redress to be afforded to the complainants in case of a finding of a violation of the victims' fundamental rights. This is a matter to be resolved, should the need arise, at the merits stage.

FOR THESE REASONS,

The Panel, unanimously,

DECIDES TO REOPEN THE PROCEEDINGS AND TO PROCEED WITH THE EXAMINATION OF THE MERITS OF THE COMPLAINT.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member