The Human Rights Advisory Panel
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DECISION

Date of adoption: 15 September 2011

Case no. 55/08

Gani XHAKA

against

UNMIK

The Human Rights Advisory Panel on 15 September 2011,
with the following members present:

Mr Paul LEMMENS, Presiding Member
Ms Christine CHINKIN

Assisted by
Mr Andrey ANTONOV, Executive Officer

Having noted Mr. Marek NOWICKI's withdrawal from sitting in the case pursuant to Rule 12 of the Rules of Procedure,

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 9 December 2008 and registered on 10 December 2008.

2. On 5 May 2009, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility and the merits of the complaint. On 5 August 2009, UNMIK provided its response.

3. On 13 August 2009, the Panel sent UNMIK's response to the complainant for comments. The complainant replied on 11 November 2009.

II. THE FACTS

4. According to a statement given by the complainant to UNMIK Police on 10 February 2000 (see further, paragraph 10), on 3 February 2000 he and his wife (Mrs Nerimane Xhaka) and daughter were visiting a neighbour and his family at their flat in the northern part of Mitrovicë/Mitrovica. At about 22:00 hours unknown persons knocked on the door of the flat and told them to leave or they would be killed. The complainant and those in the flat refused and the unknown persons began shooting. The persons in the flat then returned fire. The unknown persons threw at least three grenades into the flat. While the first two exploded without injuring anyone, it appears that the third detonated in the room where the women and children were taking cover, causing serious injuries to Mrs Xhaka and the complainant's daughter, amongst others.

5. It seems that there was a lull in the fighting that allowed the complainant and the others in the apartment to attend to the wounded. The unknown perpetrators then began firing again until one of the attackers called a halt to the firing and allegedly identified himself as a police officer from Serbia. He was allegedly holding a Serbian police card in his hands and ordered the complainant and the others to leave the flat or they would be burned alive as in the meantime a fire had started. The complainant asked how they could leave the flat with so many wounded. The reply was that they must leave the wounded to die but that the unknown assailants would guarantee the safe passage of those who were able to leave the flat. The persons in the apartment refused to leave.

6. At this point the shooting resumed. The complainant claims that he had requested assistance from the French KFOR units which were based approximately 50-60 meters from the apartment. However, they did not respond. At approximately 02:40 hours in the morning of 4 February 2000, a number of UNMIK Police officers arrived and brought everyone in the apartment to safety.

7. The incident was part of a broader event that took place in the city of Mitrovicë/Mitrovica at that time, which resulted in the deaths of 13 Kosovo Albanian individuals living in the northern part of Mitrovicë/Mitrovica and the serious wounding of many others.

8. On 4 February 2000, the Regional Investigation Unit (RIU) of UNMIK Police searched and documented the crime scene, collecting evidence and taking witness statements from neighbours.

9. On 5 February 2000, Mrs Xhaka died as a result of the injuries she had suffered.

10. On 10 February 2000, UNMIK Police took a statement from the complainant. In that statement, he claims to have personally recognised one of the attackers.

11. On 14 July 2000 and 8 August 2000, the RIU again interviewed witnesses.

12. On 11 September 2000, the Research Institute of Criminalistics and Criminology in Sofia, Bulgaria, issued a ballistics report relating to the incidents in

Mitrovicë/Mitrovica of 2-3 February 2000. They concluded that different weapons were used in each of the murders.

13. The International Public Prosecutor in Mitrovicë/Mitrovica investigated the case. On 12 March 2002 he issued a "rejection of charge". He noted that the injured parties could only speculate that the individuals named by them were actually involved in the commission of the crime. He reasoned that the unwillingness of one witness to testify, combined with the inconsistent testimony of other witnesses and the lack of sufficient forensic evidence, resulted in a finding that there was no legal basis upon which to institute a preliminary investigation. The complainant was notified of this decision.

14. On 8 April 2002, the complainant and his neighbour submitted a request to the Investigating Judge of the District Court of Mitrovicë/Mitrovica to resume the investigation against a number of named persons. They argued that the decision of the International Public Prosecutor was made in disregard of the evidence gathered.

15. It appears from information provided by the District Court that an International Investigating Judge concluded in August 2002, on the basis of an examination of police reports and the request of the injured parties, that there was not enough evidence to support a sufficiently strong suspicion against the accused persons.

16. The request by the injured parties was then brought before a panel of the District Court composed of three international judges. On 3 August 2002 the panel partially approved and partially rejected the conclusions of the Investigating Judge. The panel ordered that an investigation for the offences of murder and attempted murder be conducted against one of the accused persons, but agreed that no investigation was necessary with respect to the remaining suspects, due to lack of sufficient grounds to order an investigation against them.

17. Pursuant to the panel's decision, another Investigating Judge conducted further investigation against the one accused, by interrogating him as well as the injured parties and other witnesses. On 21 February 2003, the Investigating Judge found that the investigation had been completed. She referred to the unwillingness of one witness to testify as well as to the refusal of the accused to appear in court. On the same day she informed the injured parties of this decision and notified them that they had the possibility to lodge a private indictment within eight days if they wished to undertake subsidiary prosecution.

18. On 29 January 2004, the Ombudsperson Institution in Kosovo published a report on the matter finding that UNMIK had failed to conduct an adequate investigation into the death of Mrs Xhaka and the serious wounding of the complainant's daughter, resulting in a violation of the procedural aspect of Article 2 of the European Convention on Human Rights (ECHR). The Ombudsperson subsequently sent requests for updates on the action taken by UNMIK in relation to his earlier recommendations. It does not appear from the file that UNMIK responded to those letters.

19. On 9 December 2008, UNMIK's responsibility with regard to police and justice in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security

Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK Department of Justice and UNMIK Police were handed over to their EULEX counterparts.

20. On 2 February 2011, the local media reported that an investigation into the events of February 2000 in Mitrovicë/Mitrovica is currently in the hands of EULEX prosecutors.

III. THE COMPLAINT

21. The complainant complains about UNMIK's alleged failure to properly investigate the murder of his wife and the serious injury to his daughter.

22. The Panel considers that the complainant may be deemed to invoke a violation of the right to life of his wife and daughter, guaranteed by Article 2 of the ECHR, and a violation of his own right to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

IV. THE LAW

23. Before considering the case on its merits, the Panel must first decide whether to accept the case, considering the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

24. The complainant alleges in substance the failure of the authorities to conduct an adequate criminal investigation into the murder of his wife and the serious injury to his daughter. He states that UNMIK Police, the District Prosecutor's Office in Mitrovicë/Mitrovica, and the International Public Prosecutor all failed to take the necessary measures to solve the case. He specifically makes reference to his own statements and evidence and indicates that there were many eyewitnesses to the events in question.

25. The SRSG responds that the "rejection of charge" of 12 March 2002 indicates that an "extensive and thorough factual investigation" was carried out by UNMIK Police following the incidents in question. The SRSG argues that while UNMIK Police were able to obtain witness statements and conduct ballistics analyses and on-site inspections, there was insufficient information available to issue arrest warrants or even to initiate criminal proceedings against any suspect. The SRSG states that the investigation concluded that there was no ground for suspicion against any particular person as required by Article 157 of the Law on Criminal Proceedings (LCP) of the Federal Republic of Yugoslavia, in force at that time in Kosovo, for the initiation of an investigation against any particular individual. The SRSG concludes that, both before and after the date of the rejection of the charge by the International Public Prosecutor, it cannot be said that there was a lack of effective investigation constituting a human rights violation ongoing to the present day.

26. The Panel notes that at time of the response, the SRSG was not aware that investigations into the incidents in questions continued beyond the rejection of the charge by the International Prosecutor. The Panel later learnt that on 8 April 2002

the complainant submitted a request to the Investigating Judge in the District Court of Mitrovicë/Mitrovica pursuant to Article 60 of the LCP which states the right of injured parties to undertake prosecution in case of rejection of charges. According to Article 159 (7) of the LCP, if the Investigating Judge did not concur with the request for the conduct of an investigation, he had to ask a panel of judges to decide the issue. The Panel notes that, following the decision of the panel of the District Court of 3 August 2002, an investigation against one accused was instituted. On 21 February 2003, after several investigation activities, the Investigating Judge decided to close the investigation. According to Article 176 (3) of the LCP, when the investigating judge finds that an investigation has been completed, and if no private complaint is brought within eight days by the injured parties as private prosecutor, "it shall be taken that they have withdrawn from prosecution, and proceedings shall be dismissed by decision".

27. The Panel notes that there is no indication that the complainant filed a private charge in the sense of Article 176 (3) of the LCP. The Panel therefore considers that the criminal proceedings on the murder and wounding of the complainant's wife and daughter respectively, as far as UNMIK is concerned, were concluded on 1 March 2003, when the decision of the Investigating Judge to conclude the investigation became final.

28. The Panel recalls that, according to Section 2 of UNMIK Regulation No. 2006/12, it has jurisdiction only over "complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights".

29. The Panel considers that the investigation under consideration ended on 1 March 2003. Therefore, the Panel must conclude that the complaint lies outside its jurisdiction *ratione temporis*.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT INADMISSIBLE.

Andrey ANTONOV
Executive Officer

Paul LEMMENS
Presiding Member