



The Human Rights Advisory Panel

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DECISION

Date of adoption: 9 September 2010

Case No. 02/09

S. C.

against

UNMIK

The Human Rights Advisory Panel on 9 September 2010,
with the following members present:

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

Assisted by
Mr Rajesh TALWAR, 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 15 January 2009 and registered on the same date.
2. On 20 April 2009, the Panel requested further information from the complainant. The complainant responded on 18 May 2009.
3. On 9 June 2009, the Panel communicated the case to the SRSG for UNMIK's comments on the admissibility of the case.

4. On 25 August 2009, UNMIK provided its response.
5. On 2 September 2009, the Panel sent UNMIK's response to the complainant for comments. The complainant replied to the Panel on 15 September 2009.

II. THE FACTS

6. The complainant, Ms S.C., was the wife of Mr Ah.C. and the mother of Mr An.C.
7. According to the complainant, Messrs Ah.C. and An.C. were at their place of business in Prizren, along with another family member on 18 July 1999. Three uniformed Kosovo Liberation Army (KLA) members arrived and informed them that the KLA commander had ordered some work to be done. At around 1130 hours, Messrs Ah.C. and An.C. took their tools and followed the KLA jeep in their own car in the direction of Gjakovë/Dakovica. The other family member remained at the shop and the KLA members informed him that Messrs Ah.C. and An.C. would return within half an hour.
8. When Messrs Ah.C. and An.C. did not return by the time the business was to be closed for the night, the remaining family member returned home and informed the complainant of what had happened. When Messrs Ah.C. and An.C. did not return the next morning, the complainant and the other family member went to the KLA headquarters and to UNMIK to look for them to no avail.
9. Following this, the complainant reported the disappearances to UNMIK, KFOR and the Red Cross. The complainant states that the police and the KLA took statements about the case, but she is unaware of the status of any formal investigation.
10. The mortal remains of Messrs Ah.C. and An.C. were located in Prizren on 10 August 2000. The autopsies concluded that the cause of death for both Mr Ah.C. and Mr An.C. was multiple gunshot wounds. By 17 February 2003, the mortal remains were identified as those of Messrs Ah.C. and An.C. They were handed over to the complainant on 6 March 2003.
11. The complainant allegedly relocated outside of Kosovo in 2003 or 2004 due to threats against her and her family.
12. From information provided by the SRSG, the forensic investigation in this case was conducted by investigators from the International Criminal Tribunal for the former Yugoslavia (ICTY). The SRSG states that, aside from a small amount of forensic data shared by the ICTY with UNMIK Police's Missing Persons Unit, no other information was shared with UNMIK Police. The Panel notes that there is no indication of any other interaction between UNMIK and the ICTY.
13. 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.

III. COMPLAINTS

14. The complainant complains about UNMIK's alleged failure to properly investigate the kidnapping and murder of her husband and son. She also complains that this situation caused her mental pain and suffering.
15. The Panel considers that the complainant may be deemed to invoke, respectively, a violation of the right to life of her husband and son, guaranteed by Article 2 of the European Convention on Human Rights (ECHR), and a violation of her right to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

IV. THE LAW

16. 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.
17. Section 3.3 of UNMIK Regulation No. 2006/12 provides that the Panel may only deal with a matter after it determines that it is not manifestly ill-founded.
18. The complainant alleges violations in substance concerning the lack of an adequate criminal investigation into the kidnapping and murder of her husband and son, and the way she as a next-of-kin has been treated by the authorities. The Panel notes that Messrs Ah.C. and An.C. were last seen alive on 18 July 1999, which is more than ten years ago.
19. The SRSG argues that the case is *prima facie* inadmissible. He states that the ICTY had the mandate to investigate all crimes that gave rise to war crimes allegations in the context of the Kosovo conflict at that time. Based on that, and since the ICTY only shared the autopsy report and other forensic data with the UNMIK Police's Missing Persons Unit, he is of the view that there was no ground upon which UNMIK Police could open an investigation.
20. The Panel notes that the Statute of the ICTY explicitly states that national jurisdictions have concurrent jurisdiction with the ICTY for serious crimes committed in Kosovo unless a formal request is sent to the relevant national courts to defer their competence in a particular matter. Article 9 of the Statute of the ICTY, adopted on 25 May 1993 through United Nations Security Council resolution 827, states:
 - (1) The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
 - (2) The International Tribunal shall have primacy jurisdiction over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.
21. Rules 9 and 10 of the ICTY Rules of Procedure and Evidence (ICTY Rules), adopted pursuant to Article 15 of the Statute of the Tribunal, which came into force on 14 March 1994, state:

Rule 9: Prosecutor's Request for Deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

- (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
- (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
- (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

Rule 10: Formal Request for Deferral

(A) If it appears to the Trial Chamber seized of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.

(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent trial shall be held before another Trial Chamber.

22. Furthermore, the Panel notes that the ICTY's Office of the Prosecutor (OTP) explicitly stated that such a situation also applied in Kosovo after the establishment of UNMIK:

Continuing liaison with ICTY is important because the Security Council provided for concurrent jurisdiction in the International Tribunal and in national courts to prosecute persons for crimes within the scope of the ICTY Statute. Therefore, the judicial authorities in Kosovo have the competence to judge those accused of crimes of the sort that come within the jurisdiction of the International Tribunal. In appropriate cases, which must be determined on a case by case basis, it is open to the International Tribunal to request national courts to defer to its competence, in accordance with the Statute of the Tribunal and its Rules of Procedure and Evidence (the Rules). (Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the investigation and Prosecution of crimes committed in Kosovo, Pr/P.I.S./437-E of 29 September 1999, § 7).

23. The Panel notes that the investigation of a criminal matter is a "stage of the procedure" within the meaning of Article 9 of the Statute of the ICTY as well as Rules 9 and 10 of the ICTY Rules. However, the comments provided by UNMIK provide no indication that the ICTY formally requested UNMIK to defer to the competence of the ICTY in relation to this investigation under Article 9(2) of the Statute of the ICTY and Rules 9 and 10 of the ICTY Rules.

24. The Panel therefore rejects UNMIK's argument that there were no grounds upon which UNMIK could open an investigation into the disappearances and murders of Messrs Ah.C.

and An.C. Even if it is clearly shown that the ICTY did not share much information with UNMIK authorities outside of some limited forensic information, such a situation alone did not release UNMIK from its obligations under Article 2 of the ECHR.

25. The Panel furthermore considers that the complaints under Articles 2 and 3 of the ECHR raise serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that this complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

26. No other ground for declaring the complaint inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

Rajesh TALWAR
Executive Officer

Marek NOWICKI
Presiding Member