The Human Rights Advisory Panel
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DECISION

Date of adoption: 31 March 2010

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 on 31 March 2010,
with the participation of the following members:
Mr. Marek NOWICKI, Presiding Member
Mr. Paul LEMMENS
Ms. Christine CHINKIN

Assisted by
Mr. Nedim OSMANAGIĆ, Acting 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, including through electronic means, in accordance with Rule 13 § 2 of its Rules of Procedure,

Decides as follows:

I. THE FACTS

1. On 10 February 2007, a protest demonstration was organised in Prishtinë/Priština by Vetëvendosje, a movement opposed to the United Nations administration in Kosovo and

campaigning for the independence of Kosovo. UNMIK-formed police units (FPU) from various countries, including Romania, were deployed to protect government buildings and maintain crowd control if necessary.

2. When the protesters approached the government buildings, they threw objects at the police and tried to break through the barricades. The police discharged tear gas canisters and undertook strong action. Injuries were sustained by police and protesters. At a given moment, some policemen discharged rubber bullets, which killed Mon Balaj, son of the first complainant, and Arben Xheladini, son of the second complainant, and wounded others, some quite seriously, including Zenel Zeneli and Mustafa Nerjovaj, third and fourth complainants.

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.

4. The report of 16 April 2007 concluded that the deaths of Mon Balaj and Arben Xheladini were unnecessary and avoidable, and that there appeared to be no justification for shooting to the heads of Mon Balaj and Arben Xhelladini, or to the chest of Zenel Zemeli. It concluded furthermore that the fatal and near deadly rubber bullets shots were fired from one or two Romanian FPU gunners. The evidence did not, however, provide any basis to identify further who had fired the deadly or wounding rounds of ammunition. Therefore, formal initiation of criminal proceedings was not warranted at that time. The special prosecutor recommended UNMIK, the United Nations and the Government of Romania to consider initiating appropriate procedures for compensation for the surviving family members of those fatally shot and for those seriously wounded.

5. The report of 29 June 2007 contained 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 related to the decision to use rubber bullets against the crowd that day. It concluded that there had been various flaws with respect to the legal framework and the planning, operation and decision-making process.

6. The families of the victims filed compensation claims with an UNMIK Claims Review Board. According to information provided by UNMIK, recommendations for compensation were forwarded to the Headquarters Claims Review Board (New York) for onward review on 27 December 2007.

7. According to a note to the media issued by UNMIK on 10 February 2010, the SRSG met with the families of Mon Balaj and Arben Xheladini in the summer of 2009 and apologised to them on behalf of the UN for the events of 10 February 2007. According to the same note, the Third Party Claims Process resulted in the UN formally offering compensation to each of the victims in late 2009. At the moment of adoption of the present decision, it seems that the victims are still considering whether to accept the compensation offered.

II. COMPLAINTS

8. The complainants claim that the killing of Mon Balaj and Arben Xheladini and the serious injury of Zenel Zemeli and Mustafa Nerjovaj constitute violations of the right to life, the prohibition of torture and the right to peaceful assembly. They also claim that there has been no effective investigation into the incident, resulting in a violation of the procedural aspect of the right to life and the prohibition of torture. Finally, they claim that by not being able to bring a claim against UNMIK before a court or before any other body capable of providing redress, their rights to a fair trial and to an effective remedy have been violated.

9. They invoke the following 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

10. 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.

11. 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.

12. By a decision of 6 June 2008 the Panel declared the complaint admissible.

13. On 16 September 2008 the SRSG raised an objection to the admissibility of the complaint, based on the non-exhaustion of available avenues. This objection was communicated to the complainants, who sent their response on 6 October 2008.

14. During its session of October 2008 the Panel decided to schedule a public hearing to be held in January 2009. The Panel also decided to join the admissibility issue raised by the SRSG to the consideration of the merits. It invited the SRSG to address the merits of the complaint.

15. On 15 December 2008 the SRSG commented on the complainants' submissions relating to the objection to the admissibility of the complaint. These comments were communicated to the complainants.

16. Due to the impossibility for the complainants to attend a hearing in January 2009, the date for the public hearing was meanwhile rescheduled for 19 March 2009. The parties were invited to complete their written submissions.

17. On 23 February 2009 the complainants sent submissions in which they further commented on the admissibility of the complaint and on the merits. They also sent a number of documents. These submissions and documents were communicated to the SRSG.

18. On 3 March 2009 the Panel sent a number of questions to the parties, inviting them to address these questions during the hearing.

19. On 11 March 2009 the SRSG sent his further comments, including answers to the questions raised by the Panel in its letter of 3 March 2009 and a reply to the submissions made by the complainants on 23 February 2009. The SRSG also sent a number of documents.

20. Shortly before the public hearing was to take place, the Panel was informed by UNMIK that it could not guarantee security prior to and during the hearing. On the basis of this information, the Panel decided on 18 March 2009 that the hearing would not be held in public.[1]

21. The hearing took place on 19 March 2009.[2] 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, attorney, Pristina,
        - Ms. Alexandra Channer, assistant to Mr. Sylejmani, Pristina.

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

22. During the hearing the complainants made submissions relating to the right to a public hearing. They announced that they would not further participate in a closed hearing, and requested an adjournment of the hearing, so that it could be held in public. The Panel, after having noted that the representative of UNMIK did not oppose a public hearing, and that it did not oppose an adjournment of the hearing, decided to adjourn the hearing until 4 June 2009, at which date the hearing would be held in public, at a suitable venue.

23. The Panel was subsequently informed by the SRSG that the representatives of UNMIK would not attend the hearing under the procedure envisaged by the Panel. The SRSG also announced his intention to adopt an administrative direction which would clarify the nature of public hearings before the Panel. In the light of this information, the Panel concluded that a hearing would no longer be meaningful. On 12 May 2009 it decided to cancel the hearing altogether.[3]

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[1] See the Panel's press release of 18 March 2009.
[2] See the Panel's press release of 19 March 2009.
[3] See the Panel's press release of 12 May 2009.

24. On 20 May 2009 the complainants sent submissions relating to the cancellation of the hearing. They also requested the disclosure of the communication between the SRSG and the Panel in the present case. On 26 May 2009 the Panel decided that its decision to cancel the public hearing was final. The request for disclosure of documents was communicated to the SRSG, who sent his comments on 29 May 2009. On 18 June 2009 the Panel determined that there were no additional communications to be transmitted to the complainants.

25. On the same day (18 June 2009) the Panel, in the light of the cancellation of the hearing, invited the complainants to address in writing the questions posed by it on 3 March 2009. It also put some additional questions to both the complainants and the SRSG.

26. The SRSG sent his replies to the additional questions on 1st July 2009. The complainants sent their comments, including replies to the questions posed on 3 March and 18 June 2009 and a reply to the SRSG's comments of 11 March 2009, on 3 July 2009. Each of the replies was communicated to the other party, who were given the opportunity to comment on them.

27. Both the complainants and the SRSG sent further comments on 11 August 2009.

28. On 22 October 2009 the Panel, having noted that on 17 October 2009 Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel had been issued by the SRSG, invited the parties to submit comments in relation to the effect of that administrative direction on the present case.

29. The complainants replied on 12 November 2009 by filing a complaint directed against Administrative Direction No. 2009/1. This complaint was registered by the Panel under no. 320/09. The Panel communicated this new complaint to the SRSG, who sent his comments on the admissibility of that complaint on 14 December 2009.

30. On 18 January 2010 the Panel received the SRSG's reply to its letter of 22 October 2009. This reply was dated 30 October 2009.

31. On 12 February 2010 the Panel declared the complaint in case no. 320/09 inadmissible.

IV. RELEVANT NORMATIVE FRAMEWORK

32. While the present complaint was pending before the Panel, awaiting an opinion on the merits, the SRSG issued on 17 October 2009 Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel. Sections 2.1, 2.2 and 2.3 of that Administrative Direction 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).
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> 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. Whether the complaint is deemed inadmissible

i. Arguments of the parties

37. Invited by the Panel to comment on the effect of Section 2 of Administrative Direction No. 2009/1 on the present case, UNMIK points out that the complainants' case is the subject of "the UN Third Party Claims process under UNMIK Regulation No. 2000/47". It argues that Section 2.2 of Administrative Direction No. 2009/1 is applicable and that the complaint is therefore deemed inadmissible. It expects the Panel to act in accordance with the Administrative Direction and to arrive at a determination that duly implements that legislation.

38. The complainants replied by filing a fresh complaint in which they invoked a violation of Article 6 § 1 of the ECHR by Administrative Direction No. 2009/1. They argued, in particular, that the Administrative Direction purports to have the effect of reopening the issue of admissibility, determining the live issue of admissibility and preventing the Panel from considering the merits of the complaint, preventing adversarial proceedings, and undermining the independence and impartiality of the Panel. That complaint was registered under no. 320/09.

ii. Findings of the Panel

A. Whether the complaint is deemed inadmissible

39. Before continuing with the consideration of the merits of the complaint, the Panel must first consider UNMIK's new objection to admissibility, pursuant to Section 2.3 of UNMIK Administrative Direction No. 2009/1.

The question of the legality of Administrative Direction No. 2009/1

40. As the Panel held in its decision of 12 February 2010 on the complainants' complaint registered under no. 320/09, it is within the discretion of the SRSG to determine the regulatory scheme of the complaint system before the Panel, and the Panel has no jurisdiction to examine the compatibility of the legal basis of its own functioning with human rights standards.

41. The Panel reiterates that, even if it may be seriously questioned whether the SRSG has the competence to alter some of the basic principles contained in UNMIK Regulation No. 2006/12 by an "implementing" administrative direction, for the purpose of the Panel's jurisdiction it makes no difference whether the modifications are made by regulation or administrative direction. The fact remains that the provisions of UNMIK Administrative Direction No. 2009/1 form part of the basis of the Panel's functioning.

42. Regretfully, the Panel must conclude that it has no jurisdiction to deal with the arguments raised by the complainants concerning the illegality of Administrative Direction No. 2009/1.

43. The Panel is therefore required to examine the substance of the objection raised by UNMIK.

The objection raised by UNMIK

44. Section 2.2 of Administrative Direction No. 2009/1 provides that any complaint "that is or may become in the future" the subject of the UN Third Party Claims Process, made applicable to UNMIK by Section 7 of Regulation No. 2000/47, "shall be deemed inadmissible", for reasons that this process is considered an available avenue in the sense of Section 3.1 of Regulation No. 2006/12.

45. Under Section 3.1 of Regulation No. 2006/12 normal recourse should be had by a complainant to avenues which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the avenues in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility

and effectiveness (compare, with respect to the requirement of exhaustion of domestic remedies under Article 35 § 1 of the ECHR, European Court of Human Rights (ECtHR) (Grand Chamber), *Demopoulos and Others v. Turkey*, nos. 46113/99 and other, decision of 1 March 2010, § 70, quoting from ECtHR, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, p. 1210, § 66). It would normally be for the Panel to satisfy itself that the UN Third Party Claims Process, like any other avenue that may be advanced by UNMIK, "was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the (complainants') complaints and offered reasonable prospects of success" (compare ECtHR, *Akdivar and Others v. Turkey*, judgment quoted above, p. 1211, § 68).

46. Section 2.2 of Administrative Direction No. 2009/1 removes this jurisdiction from the Panel. That provision has the effect of obliging the Panel to consider the UN Third Party Claims Process as an accessible and sufficient avenue.

47. This does not imply, however, that the mere fact of UNMIK raising an objection based on Section 2.2 of Administrative Direction No. 2009/1 inevitably and without more leads to the conclusion that the complaint is deemed inadmissible. The Panel considers that, when such an objection is raised, it must ascertain whether the object of the complaint before the Panel is of such a nature that it can reasonably give rise to a claim that can be dealt with in the UN Third Party Claims Process. It will declare a complaint inadmissible only when it is satisfied that the claim is one that falls *prima facie* within the ambit of the UN Third Party Claims Process. By contrast, it is precluded from examining whether the outcome of the process is capable of providing sufficient redress in respect of the complaint before the Panel, nor whether the process offers reasonable prospects of success to the complainants.

48. The procedure set forth in General Assembly resolution 52/247 and in Section 7 of UNMIK Regulation No. 2000/47 allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.

49. Turning to the objection raised by UNMIK in the present case, the Panel recalls that the complaint as submitted concerns the killing and serious wounding of four individuals who participated in a demonstration, the effectiveness of the criminal investigation following the demonstration and the violence, and the impossibility for the complainants to bring a claim against UNMIK before a court or before any other body capable of providing redress.

50. The substantive complaints declared admissible by the Panel in its 6 June 2008 decision on admissibility are mostly linked to the use of force by UNMIK Police, which resulted in personal injury or death. The Panel considers that these parts of the complaint fall *prima*

facie within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.

51. The procedural complaints declared admissible by the Panel, such as the complaints about violations of the procedural aspects of the right to life and the prohibition of inhuman or degrading treatment, as well as about violations of the right to a fair trial and the right to an effective remedy, concern acts, omissions or situations that clearly did not result in personal injury, illness or death, nor in property loss or damage. As such, these parts of the complaint are therefore not covered by the UN Third Party Claims Process.

52. The Panel considers, however, that the substantive and procedural complaints pending before the Panel are so interlinked that it would be artificial to separate them, resulting in most of the substantive complaints being dealt with in the UN Third Party Claims Process and some of these complaints as well as the procedural complaints at the same being dealt with by the Panel.

53. The Panel therefore considers that the entire complaint is deemed inadmissible.

B. Effects of the determination that the complaint is deemed inadmissible

54. The Panel considers it useful to explain the effects of its decision holding that the complaint is deemed inadmissible.

55. Requirements of exhaustion of available avenues are by their very nature only temporary restrictions on admissibility. 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. This view is accepted in the present case by UNMIK. In a note from the Director of the Office of Legal Affairs of 30 October 2009, attached to the letter of the SRSG of the same date, it is said that cases deemed inadmissible by virtue of Section 2.2 of Administrative Direction No. 2009/1, "may be resubmitted by the complainants to the (Panel) after completion of the processing of their related claims under the (…) UN Third Party Claims process".

56. If the complainants want to make use of this possibility, they would normally be required to file a fresh complaint with the Panel once the UN Third Party Claims Process has been concluded. According to the said note of the Director of the Office of Legal Affairs, the complainants would be able to do so "until 31 March 2010, the cut-off date for submission of complaints before the (Panel)", imposed by Section 5 of UNMIK Administrative Direction No. 2009/1.

57. However, 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. In the specific context of the cut-off date set by Administrative Direction No. 2009/1, the Panel considers that a specific arrangement is called for, which will preserve

the possibility for the complainants to have their complaint further examined by the Panel upon completion of the UN Third Party Claims Process, should they then wish to proceed with the case before the Panel.

58. The Panel notes, with respect to proceedings before various international tribunals, that in certain special circumstances applicants may seek to obtain the reopening of proceedings that have been closed, where new circumstances arise and where the reopening of those proceedings is in the interests of justice.

59. It is for instance the common practice of the European Court of Human Rights to strike cases out of the list, pursuant to Article 37 § 1 (c) of the ECHR, where for some objective reason it is no longer justified to continue the examination of the application. In such cases the Court may, according to Article 37 § 2 of the ECHR, decide to restore the application to its list of cases if it considers that the circumstances justify such a course (for applications, see ECtHR, *Aleksentseva and 28 Others v. Russia*, nos. 75025/01 and other, decision of 23 March 2006; ECtHR, *Jashi v. Georgia*, no. 10799/06, decision of 9 December 2008).

60. Likewise, in the *Nuclear Tests Case*, the International Court of Justice (ICJ) decided in 1974, having regard to a unilateral statement made by the respondent State, that the claim of the applicant State no longer had any object and that the Court was therefore not called upon to give a decision thereon. In the same judgment it allowed the applicant State to request an examination of the situation "if the basis of (its) judgment were to be affected" (ICJ, *New Zealand v. France*, judgment of 20 December 1974, *I.C.J. Reports*, 1974, p. 457, § 63). Some 20 years later, the applicant State attempted to have the proceedings reopened. The ICJ explained that, by inserting the above-quoted words in its 1974 judgment, it could not have intended to limit the applicant's access to legal procedures such as the filing of a new application, a request for interpretation or a request for revision, since such procedures would have been open to it in any event. It rather "did not exclude a special procedure" (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, order of 22 September 1995, *I.C.J. Reports*, 1995, p. 288, §§ 52-53).

61. Having regard to these practices, the Panel considers that a similar "special procedure" should be available in the present case too. In accordance with Rule 49 of the Panel's Rules of Procedure, which provides that questions not governed by these Rules shall be settled by the Panel, it decides that once the UN Third Party Claims Process has been concluded, the complainants can request the Panel to reopen the present proceedings. The Panel will then decide, on the basis of the information then available to it, whether or not to accept such a request.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT INADMISSIBLE.

Nedim OSMANAGIĆ
Acting Executive Officer

Marek NOWICKI
Presiding Member