



DECISION

Date of adoption: 10 May 2012

Case No. 258/09

Snežana SIMONOVIĆ

against

UNMIK

The Human Rights Advisory Panel, sitting on 10 May 2012,
with the following members present:

Mr Marek NOWICKI
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 6 April 2009 and registered on 30 April 2009.
2. On 2 November 2010, the complaint was communicated to the Special Representative of the Secretary-General (SRSG), for UNMIK's comments on admissibility. On 5 April 2011, the Panel received UNMIK's response.

II. THE FACTS

3. The complainant is the daughter of Mr Živorad Krstić.

4. The complainant states that on 25 June 1998, Mr Krstić was abducted by members of the Kosovo Liberation Army in the Caratevë/Crnoljevo village, Shtimë/Štimlje municipality, while travelling in a regular bus from Prizren to Prishtinë/Priština. Since that time, his whereabouts have remained unknown.
5. The complainant indicates that she reported her husband's abduction to the International Committee of the Red Cross (ICRC), the Serbian Ministry of Internal Affairs, and later to KFOR and UNMIK, including the International Prosecutor's Office in Prishtinë/Priština.
6. The ICRC opened a tracing request for Mr Krstić on 26 June 1998 which is still open. Mr Krstić's name also appears in the list of missing persons communicated by the ICRC to UNMIK Police on 12 October 2001, and in the database compiled by the UNMIK Office on Missing Persons and Forensics.
7. According to information provided by the SRSG, a missing person file concerning Mr Krstić was opened by the Missing Person Unit of UNMIK Police in 2002. The SRSG states that some investigative steps were taken by the UNMIK Police in 2005 and 2007 and that since 2008 the investigation has been suspended due to lack of leads.
8. The SRSG also states that the name of Mr Krstić appears in the case *Prosecutor v. Fatmir Limaj et al.* (IT-03-66) before the International Criminal Tribunal for the former Yugoslavia (ICTY). In particular, in the "Second Amended Indictment" filed by the ICTY Office of the Prosecutor on 6 November 2003, it is alleged that "on a date after 24 June 1998 ... KLA forces under the command and control of Fatmir Limaj and Isak Musliu murdered a number of Serb and non-Albanian detainees at the (Llapushnik/Lapušnik) Prison Camp" (§ 30), including Mr Zivorad Krstić, listed in Annex I to the indictment. In its judgment dated 30 November 2005, while acquitting the accused of the offence of murder, the ICTY Trial Chamber found that Mr Krstić had been detained by the KLA at Lapušnik/Llapushnik for an unspecified period of time beginning on 25 June 1998 and was subject to cruel treatment. However, the Trial Chamber was unable to conclude, with sufficient certainty, that Mr Krstić was dead (IT-03-66-T, § 361). These findings were upheld on appeal by the ICTY Appeals Chamber on 27 September 2007 (IT-03-66-A). The SRSG also states that it is not possible to determine from available documents whether a formal request for deferral was made by the ICTY to UNMIK pursuant to Rules 8-10 of the the ICTY Rules of Procedure and Evidence.
9. 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. THE COMPLAINT

10. The complainant complains about UNMIK's alleged failure to properly investigate the disappearance and probable killing of her father. The complainant also complains about the pain and anguish suffered by her because of this situation.

11. The Panel considers that the complainant may be deemed to invoke, respectively, a violation of the right to life of Mr Krstić, guaranteed by Article 2 of the European Convention on Human Rights (hereinafter ECHR), and a violation of her own right to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

IV. THE LAW

12. 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.

Alleged violation of Article 2 of the ECHR

13. 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.
14. The complainant alleges in substance the lack of an adequate criminal investigation into the disappearance and probable killing of Mr Živorad Krstić.
15. The SRSG argues that this part of the complaint is inadmissible as manifestly ill-founded. The SRSG states that “the case appears to be one where the ICTY has exercised primacy over the Kosovo judicial authorities” and that it is reasonable to assume that ICTY “at least *de facto*” had a lead in investigating and prosecuting the matter. In the SRSG’s opinion, the ICTY investigated the circumstances of the disappearance and possible death of Mr Krstić in the context of the *Limaj et al.* case, presumably from 2002 until September 2007, when a final judgment on the case was issued by the Appeals Chamber of the ICTY. The SRSG concludes that the ICTY investigation and resulting prosecution and judgments can be viewed as actions in fulfillment of the requirement of Article 2 of the ECHR with respect to any obligation UNMIK may have had to investigate the disappearance and possible death of Mr Krstić.
16. The Panel recalls, however, that the Statute of the ICTY, Article 9(1), explicitly states that national courts have concurrent jurisdiction with the ICTY for prosecution of serious violations committed in the territory of the former Yugoslavia, including Kosovo, unless a formal request is sent to the relevant national courts to defer their competence in a particular matter (*ibidem*, Article 9(2)). While it is true that the ICTY enjoys primacy jurisdiction should it request a national or domestic authority to defer to it, the concept of primacy jurisdiction explicitly provides for national or domestic courts to exercise concurrent jurisdiction (see Human Rights Advisory Panel (HRAP), *S.C.*, no. 02/09, decision of 9 September 2010, §§ 19-24; HRAP *B.A.*, no. 52/09 decision of 21 October 2010, §§ 16-17).
17. The Panel therefore rejects the SRSG’s assumption that “at least *de facto*” the ICTY enjoyed primacy over UNMIK concerning the investigation into Mr Krstić’s disappearance. In the absence of a formal request for deferral to the competence of the ICTY pursuant to Article 9(2) of the Statute of the ICTY in conjunction with Rules 9-10 of the ICTY Rules of Procedure and Evidence, UNMIK cannot argue that it yielded to the primacy of the ICTY in this investigation. The Panel considers that the discussion of Mr Krstić in the *Limaj et al.* case cannot release UNMIK from its obligations under Article 2 of the ECHR (see, HRAP, *S.C.*, cited above, §§ 23-24; HRAP, *B.A.*, cited above, § 17).

18. Furthermore, the Panel notes that according to the SRSG the investigation into Mr Krstić's case is still open, although suspended.
19. For these reasons, the Panel considers that the complaint under Article 2 of the ECHR raises serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that this part of the complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12, and rejects the objection of the SRSG.
20. No other ground for declaring this part of the complaint inadmissible has been established.

Alleged violation of Article 3 of the ECHR

21. In his comments, the SRSG argues that regarding issues under Article 3 of the ECHR the complaint is overly vague, and for this reason should be declared inadmissible.
22. The Panel considers that, despite the lack of express allegations put forward by the complainant in this respect, the complaint sets forth relevant facts upon which the alleged violation of Article 3 of the ECHR may be based.
23. The Panel also refers to the case law of the European Court of Human Rights with respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR, which prohibits inhuman treatment. The European Court of Human Rights accepts that this may be the case, depending on the existence of "special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation". The Court further holds that "relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries". It also emphasises "that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention" (see, e.g., European Court of Human Rights (ECtHR) (Grand Chamber), *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR (Grand Chamber), *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, *ECHR*, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 139; see also HRAP, *Zdravković*, no. 46/08, decision of 17 April 2009, § 41, and HRAP, *Radisavljević*, no. 156/08, decision of 17 February 2012, § 18).
24. The Panel considers that a complainant may invoke a violation of Article 3 of the ECHR even if there is no explicit reference to specific acts of the authorities involved in the investigation, since also the passivity of the authorities and the absence of information given to the complainant may be indicative of inhuman treatment of the complainant by the authorities.
25. The Panel considers that this part of the complaint raises serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that this part of the 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 this part of the complaint inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member