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HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 – 28 July 2006

DECISION

Communication No. 1374/2005

Submitted by:	Azem Kurbogaj and Ghevdet Kurbogaj (represented by counsel, Mr. Sadije Mjekiqi)
Alleged victim:	The authors
State Party:	Spain
Date of communication:	23 November 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 April 2005 (not issued in document form)
Date of adoption of Decision:	14 July 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Jurisdiction of State Party over acts committed by the Spanish Police Unit of UNMIK;

Procedural issues: Non-exhaustion of domestic remedies;

Substantive issues: Ill-treatment of authors and members of their family;

Articles of the Covenant: 2, paragraph 3 (a); 7; 17;

Articles of the Optional Protocol: 5(2)(b).

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-seventh session

concerning

Communication No. 1374/2005[*]

Submitted by:	Azem Kurbogaj and Ghevdet Kurbogaj (represented by counsel, Mr. Sadije Mjekiqi)
Alleged victim:	The authors
State party:	Spain
Date of communication:	23 November 2004 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Azem (first author) and Ghevdet (second author) Kurbogaj, both of Kosovar Albanian origin, born on 22 April 1949 and on 4 May 1975, respectively. They claim to be victims of violations by Spain of articles 2, paragraph 3 (a); 7 and 17 of the Covenant. They are represented by counsel, Mr. Sadije Mjekiqi. The Covenant and the Optional Protocol entered into force for Spain on 27 July 1977 and on 25 January 1985, respectively.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 On 1 February 2003, at approximately 4:00 a.m., officers belonging to a special Spanish Police Unit of the United Nations Interim Administration Mission in Kosovo (UNMIK) forced their way into the authors' two adjacent houses located at Peja/Pec (Kosovo), breaking the doors and searching the premises without giving any reason. During the four-hour search, members of both families were forced to lie on the ground face down, with their hands tied behind their backs.

2.2 The first author was kicked and beaten on his shoulder. Despite the low temperature and the fact that several windows of his house had been broken by the police, he was forced to lie down on the cold floor, dressed only in shorts and a tee shirt. As a result, he caught bronchitis and developed asthma for the first time in his life, for which he was subsequently hospitalized for ten days.

2.3 Similarly, during the search of the second author's house, his pregnant wife, V.K., was forced to lie face down on the ground, with her hands tied behind her back, for three hours, one week prior to childbirth. A one year old child also caught bronchitis because of the manner and duration of the searches. Another family member, N.K., was pushed by the police while chopping firewood with an axe, causing cuts on her hand that required stitches.

2.4 The police confiscated savings of the families totaling 187,000 € from the second author's home, a pistol type TT-1, two hunting rifles, three cellular phones and 40 € belonging to the first author's wife, A.K. One rifle and two cellular phones were later returned to the authors. The damage caused to the furniture, doors and windows of the properties was in the order of 4,700€. While the first author signed a record of the search of his house, no such record was established in the second house, from where the said monies were confiscated.

2.5 Following the searches four members of the family, including the second author, were arrested and taken to the regional police headquarters in Pec. The second author was informed that he was a suspected terrorist. In particular, he was suspected of having attacked the UNMIK police station in Pec with a grenade in January 2003. He was released after approximately 36 hours in police custody. The other three individuals remained in detention for about four hours.

2.6 The authors' lawyer reported the matter to the UNMIK Police Commissioner, who replied that he could not accept the complaints. No reply was received from the Public Prosecutor in Pec District Court, to whom an application for the return of the seized items and compensation was addressed. The Ombudsperson in Kosovo wrote to the UNMIK Police Commissioner and, subsequently, to the Special Representative of the Secretary General, requesting access to the relevant file and documents, in accordance with the obligation to provide these under section 4.7 of Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo. However, the Ombudsperson received no reply from them.

2.7 The authors provided to the Committee copy of a letter from the District Public Prosecutor to the Head of the Criminal Division at the Department of Justice informing him about the damage caused during the search. The letter indicates that the first author was claiming compensation.

The complaint

3.1 The authors claim violations of their rights under article 2, paragraph 3 (a), of the Covenant, as no effective remedy was available to them in Kosovo. The opening of an investigation by the prosecutor would have no reasonable prospects of success, in light of the immunity afforded to UNMIK under paragraph 3.3 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel. Such paragraph provides that "UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity".

3.2 The authors submit that their case falls within the jurisdiction of Spain by virtue of the control exercised over them by members of the Spanish Police Unit of UNMIK. In this respect, they invoke the Committee's Views in *Saldias de López v. Uruguay*, according to which States parties are responsible for the violations of the Covenant committed by their agents on foreign territory.[1] The authors also invoke the Committee's General Comment No. 31 (2004), and state that Spain must respect and ensure the rights laid down in the Covenant to anyone within its power or effective control, even if not situated within its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace-enforcement operation.

3.3 The authors claim that, even though remedies might be available to them in Spain, these remedies are theoretical and illusory, but not available and effective, as required by the Covenant. It would be impractical for logistical reasons to require counsel to leave Kosovo and to pursue a remedy before the courts of Spain. He would be required to apply for a Spanish visa, but no Spanish Liaison Office exists in Kosovo which he could approach, neither does one exist in Skopje, the nearest foreign capital city. In Sarajevo, there is a Spanish liaison office where a visa could be sought, but in order to enter Bosnia with a UNMIK passport a Bosnian visa must be held, which can only be applied for in Skopje.

3.4 The authors recall that the European Court of Human Rights has held in numerous cases that the applicant must be able to initiate proceedings directly, without reliance on public officials, in order for the remedies to be adequate and effective. Obtaining the necessary visas and other travel documents would require discretionary action on the part of the respondent State. Therefore, the remedies which the State party might claim to be available to the authors in theory are rendered ineffective and inadequate in practice due to the dependency on such discretionary powers of the State party.

3.5 The authors claim that they were not provided with any information whatsoever either by the Spanish Police Unit, the UNMIK Police Commissioner or the Kosovo Ombudsperson, about potential remedies in Spain, and detailed information about such remedies was difficult to obtain. Article 23 of the Organic Law of Judicial Power (*Ley Orgánica del Poder Judicial*) provides that the Central Criminal Court (*Audiencia Nacional*) in Madrid has jurisdiction, at least in theory, over acts perpetrated by Spanish civil servants in the exercise of their functions abroad. Furthermore, the cost of taking proceedings in Spain is likely to be high, due to the need for the

[1] Communication No. 52/1979, *Saldias de López v. Uruguay*, Views adopted on 29 July 1981.

presence of both an attorney and a barrister before the Court and also, in the case of the authors, a translator/interpreter, as well as the travel costs.

3.6 The authors indicate that the weak situation of human rights protection in Kosovo and the absence of review mechanisms were the subject of a report by the Council of Europe Parliamentary Assembly entitled "*Protection of human rights in Kosovo*", dated 6 January 2005. According to this report, UNMIK is not subject to the jurisdiction of any court, but only to the non binding jurisdiction of the Kosovo Ombudsperson; this constitutes a serious lacuna in the human rights protection system in Kosovo. The report recommends the establishment of a Human Rights Court for Kosovo.

3.7 The authors claim to be victims of a violation of article 7 of the Covenant, as their and their families' treatment by the police during the unlawful searches was inhuman. In particular, the fact that the first author was assaulted and that all members of the families were forced to lie on the floor for hours in freezing temperatures, including the second author's pregnant wife, amounts to a violation of article 7. The searches were conducted in an inhuman manner, several persons were assaulted, the health of others harmed and substantial damage to property was caused.

3.8 The authors allege a violation of their right, under article 17, not to be subjected to arbitrary or unlawful interference with their privacy, family and home. They refer, in this respect, to Section 3.5 of UNMIK Regulation 2000/47, which provides that: "UNMIK personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General, in the fulfillment of the mandate given to UNMIK by Security Council resolution 1244 (1999). They shall refrain from any action or activity incompatible therewith." Furthermore, the searches were not conducted in accordance with the then applicable "Yugoslav Law on Criminal Procedure"[2], according to which a search warrant

[2] The authors quote in this respect article 207 of the Law, which reads: "(1) A search shall be ordered by court in a written and substantiated warrant. (2) The search warrant shall be presented before commencement of the search to the person whose place […] is to be searched. (3) A search may also be conducted without prior presentation of a warrant […], if armed resistance is assumed or if it is necessary to perform the search immediately and by surprise, or if the search is to be conducted in a public place." They also quote art. 208 of the same Law, according to which: "(3) Two adult citizens shall be present as witnesses when a dwelling or person is searched. Before commencement of the search, the witnesses shall be cautioned to note how the search is conducted and instructed that they have a right to make their objections before signing the record of the search, if they feel that the content of the record is not accurate. […] (7) A record shall be drawn up concerning each search of a dwelling or person, and it shall be signed by the person whose premises or person have been searched and by the persons whose presence is required. During a search, only those items and papers related to the purpose of the search in the particular case shall be temporarily confiscated. The things and papers confiscated shall be entered and precisely indicated in the record, and the same information shall also be entered on the receipt which shall immediately be given to the person whose things or papers have been confiscated."

must be presented before the beginning of the search, and a receipt for confiscated property must be issued. The search and seizure were conducted without any, or any proper, authorization or safeguards.

State party's observations on admissibility

4.1 By submission of 30 September 2005, the State party challenges the admissibility of the communication, alleging that the authors were neither within its territory nor subject to its jurisdiction. The facts are alleged to have occurred as part of UNMIK activities. Accordingly, the entity ultimately responsible is UNMIK, which is not a party to the Covenant. A State party to the Covenant cannot be held responsible by resorting to the argument that UNMIK regulations are ineffective, especially when no domestic remedy of such State was sought.

4.2 There are no similarities between the present case and the *Saldia de López v. Uruguay* case invoked by the authors. In the latter, the State agents responsible were not part of a UN Mission, but simply carrying out illegal activities outside the territory of the State's jurisdiction. In the present case, Spain cannot be held responsible for violations of articles 7 and 17 of the Covenant, in view of the location where the alleged acts took place, the nature of the police force alleged to have carried them out and the applicable law, i.e. UNMIK regulations or Yugoslav laws.

4.3 The State party rejects the authors' claim regarding a violation of article 2, paragraph 3 (a), by Spain. It is paradoxical to state, on one hand, that Spain has not provided an effective remedy and, on the other, that domestic remedies in Kosovo are ineffective. Given the nature of remedies in Kosovo which the authors considered it appropriate to exhaust (i.e. complaint before the UNMIK Police Commissioner and the local Prosecutor), it is clear that Spain cannot be expected to establish "effective remedies" in Kosovo. Furthermore, there is no evidence whatsoever of the alleged facts before the Spanish authorities, since they were never even brought to their attention.

4.4 The State party adds that free legal assistance benefits exist in Spain and that persons without resources can be assisted by a lawyer provided by the State. However, the authors did not even try to avail themselves of this possibility. Furthermore, an administrative claim regarding State liability can be formulated in writing and sent by mail, but not even this avenue was attempted by the authors.

4.5 Criminal proceedings are conducted ex-officio in Spain. If Spanish courts were competent to deal with the case, a simple complaint containing the basic facts would have been sufficient to initiate an investigation. However, this possibility was not explored either. The State party concludes, accordingly, that no domestic remedies have been exhausted.

4.6 The authors should have availed themselves of the possibilities provided for in paragraph 6.1 of UNMIK Regulations 2000/47, which define the right and duty of the Secretary General to waive the immunity of its personnel "in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK". This remedy is an effective one and has been resorted to on several occasions. Furthermore, Section 7 of the same Regulations stipulates that "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 international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for". There is no indication in the authors' submission that they ever filed a claim with this commission. Nor is any information about the result of the complaint allegedly filed with the Ombudsperson. In this respect, the State party recalls paragraph. 3.1 of Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, according to which "the Ombudsperson shall have jurisdiction to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution. The Ombudsperson shall give particular priority to allegations of especially severe or systematic violations and those founded on discrimination." The State party concludes that effective avenues of redress existed in Kosovo, none of which appear to have been pursued or completed.

4.7 The State party points out inconsistencies which raise doubts about the veracity of the author's allegations. For instance, it seemed odd that the members of the families were forced to lie down while at the same time one of them was allowed to use an axe. The police implication in the acts causing the injury with the axe remains unclear. Finally, a link between the police activity and the delivery of the pregnant woman a few days later seems to be suggested, but it remains speculative. There are also some mistakes in the authors' submission. For instance, it ignores the fact that a new Code of Criminal Procedure was adopted in Kosovo in July 2003, as result of which the rules regarding police searches referred to by the authors are no longer in force.

4.8 The State party concludes that the Committee has no competence in respect of activities of UNMIK and its personnel under the Optional Protocol, and that the authors have not exhausted domestic remedies available in the State party and in Kosovo.

Author's comments

5. By letter dated 14 January 2006 the authors insist on the veracity of the facts alleged. They say that the case was reported to the UNMIK Police Commissioner and a number of authorities in Pec, including the International Public Prosecutor, the District Public Prosecutor, the District Court, the Mayor and the International Administrator, as well as the Kosovo Government and the Ombudsperson in Prishtina. The authors requested all of them to take action, including by prosecuting those responsible and have the money and other stolen belongings returned. However, nothing has been done and there is no other remedy they can resort to in Kosovo. They reject the State party's argument about its lack of responsibility and reaffirm that Spain is responsible for the actions of its Police.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, in accordance with article 5, paragraph (a), of the Optional Protocol, that the same matter is not being examined under another international procedure of international investigation or settlement.

6.3 The authors claim that the State party is responsible for the violation of their rights as a result of illegal acts committed by the Spanish Police Unit present in Kosovo. They invoke, in this respect, the Committee's General Comment No. 31, pursuant to which a State party must respect and ensure the rights laid down in the Covenant also to anyone within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation. Without pronouncing itself on the question of jurisdiction in the particular circumstances of the case, the Committee notes that the authors did not address themselves at any point to any penal or administrative authorities in Spain. The Committee does not ignore the authors' arguments regarding the practical difficulties they could encounter in initiating proceedings in Spain, but notes the State party's observation that a written complaint would have been enough to, at least, initiate an investigation. The Committee recalls that mere doubts about the effectiveness of judicial remedies or the prospect of substantial costs of pursuing such remedies do not absolve a complainant from his/her obligation to attempt to exhaust them.[3] In the light of the foregoing, the Committee concludes that the authors failed to exhaust domestic remedies.

7. The Committee, therefore, decides:

(a) That the communication is inadmissible under article 5, paragraph 2(b) of the Optional Protocol;

(b) That this decision shall be communicated to the authors and the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[3] See, for instance, communication No. 397/1990, *P.S. v. Denmark*, Decision of 22 July 1992, para. 5.4.