

# **OMBUDSPERSON INSTITUTION in KOSOVO**

## **SPECIAL REPORT No. 1**

**on the compatibility with recognized international standards**

**of**

**UNMIK Regulation No. 2000/47  
on the Status, Privileges and Immunities of  
KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000)**

**and on**

**the implementation of the above REGULATION**

**addressed to**

**Mr. Hans Haekkerup  
Special Representative of the Secretary General of the United Nations**

The Ombudsperson for Kosovo, pursuant to Sections 4.3 and 4.9 of UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo and Rule 22, paras. 3 and 4 of the Rules of Procedure of the Ombudsperson Institution, on 26 April, 2001:

has presented the following report to Mr. Hans Haekkerup, Special Representative of the Secretary General of the United Nations, within the meaning of those provisions:

### **Bases for Special Report**

1. This Special Report is based in part on a formal request lodged with the Ombudsperson by the Norwegian Refugee Council (Kosovo Civil Rights Project) on 21 February 2001, asking the Ombudsperson to provide his opinion and recommendations concerning the compatibility of certain provisions of UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) with recognised international human rights standards.

This Report is also based in part on individual applications lodged with the Ombudsperson alleging violations of human rights and/or abuses of authority in the sense of Section 3.1 of UNMIK Regulation 2000/38 and in part on other sources of information.

### **Background**

2. A large number of individuals owning real and/or movable property or having a property interest in socially-owned property in Kosovo have approached non-governmental organisations and the Ombudsperson to complain about the occupation, damage, or both to that property by KFOR and about the impossibility of obtaining compensation for the occupation or damage to their property. These individuals also allege that no administrative or judicial remedies exist either to challenge the actual occupation or damage to the property or to claim compensation for the financial or material

losses suffered. Other individuals or their representatives have complained about personal injuries they have suffered at the hands of individuals working for, or operating under the auspices of, KFOR or UNMIK.

## **DISCLAIMER**

3. Nothing contained in this Special Report should be construed as implying that the Ombudsperson has waived his right to investigate individual complaints alleging violations of human rights or abuses of authority with regard to UNMIK Regulation 2000/47 or to review other provisions of UNMIK Regulation 2000/47 for their compatibility with recognised international standards. The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or any related matters.

## **RELEVANT INSTRUMENTS**

### **4. United Nations Security Council Resolution 1244 (1999)(10 June 1999)(hereinafter S/RES/1244(1999) reads in pertinent part:**

9. [The Security Council] [d]ecides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:

....

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety.....

11. [The Security Council] [d]ecides that the main responsibilities of the international civil presence will include:

....

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo....

### **5. UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999) reads, in pertinent part:**

#### **Section 1: Authority of the interim administration**

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

....

**Section 5: Entry into force and promulgation of regulations issued by UNMIK**

.....

5.2 UNMIK regulations shall be issued in Albanian, Serbian and English. In case of divergence, the English text shall prevail. The regulations shall be published in a manner that ensures their wide dissemination by public announcement and publication.

**6. Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) reads, in pertinent part:**

Section 1: Definitions

For the purpose of this regulation:

"KFOR" means the specially constituted force, composed by the North Atlantic Treaty Organization, including its member States, its subsidiary bodies, its military Headquarters and national elements/units, and non-NATO contributing countries;

"KFOR personnel" means all military and civilian personnel of KFOR ....

"UNMIK" means the international civil presence established pursuant to Security Council resolution 1244 (1999) in the territory of Kosovo, integrating the Interim Civil Administration (United Nations); Humanitarian Affairs (UNHCR); Institution-building (OSCE) and Reconstruction (EU) components; and

"UNMIK personnel" means United Nations officials, experts and other persons assigned to serve in any of the components of UNMIK and holding an ID card, which indicates that the holder is a member of UNMIK, issued by or under the authority of the Special Representative of the Secretary-General.

Section 2: Status of KFOR and its Personnel

2.1 KFOR, its property, funds and assets shall be immune from any legal process.

2.2 All KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council resolution 1244 (1999).

2.3 Locally recruited KFOR personnel shall be immune from legal process in respect of words spoken or written and acts performed by them in carrying out tasks exclusively related to their services to KFOR.

2.4 KFOR personnel other than those covered under section 2.3 above shall be:

- a. immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States;

....

### Section 3: Status of UNMIK and its Personnel

3.1 UNMIK, its property, funds and assets shall be immune from any legal process.

....

3.3 UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of ... all acts performed by them in their official capacity.

....

-

### Section 7: Third Party Liability

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.

## **7. Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (hereinafter European Convention on Human Rights or the Convention)**

Para. 1 of Article 6 of the European Convention on Human Rights reads, in pertinent part:

In the determination of his civil rights ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 8 of the European Convention on Human Rights reads, in pertinent part:

1. Everyone has the right to respect for his ... home....
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 15 of the European Convention on Human Rights reads, in pertinent part:

1. In time of war or other public emergency threatening the life of the nation any [Party] may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

....

3. Any [Party] availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 1 of the Additional Protocol to the European Convention on Human Rights reads, in pertinent part:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ....

**8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva Convention IV) reads, in pertinent part, as follows:**

147. "...wilful killing, torture or inhuman treatment, .... wilfully causing great suffering or serious injury to body or health,... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully ...."

**ANALYSIS**

9. The Ombudsperson considers that any review of the compatibility of a specific legal enactment with recognised international standards must in the first instance be founded on the general principles of interpretation governing human rights law.

**Basic Principles of Interpretation: International Human Rights Law**

10. The Ombudsperson observes that the international human rights canon comprises some rights regarding which a government may impose restrictions and some that are not so amenable. With regard to the former category, the established case law of the European Convention on Human Rights provides clear guidelines for evaluating whether a given governmental interference with a right falls within the parameters permitted under the Convention. In particular, any restriction that a government imposes on the enjoyment of a right must be 'in accordance with law' and 'necessary in a democratic society' for the achievement of a legitimate specified aim.

**Overview of 'lawfulness' in international human rights law**

11. The Ombudsperson recalls the standards to be applied when determining whether a particular legal enactment can be considered to be 'in accordance with law' in the sense of the European Convention on Human Rights. At the outset, the Ombudsperson notes that 'law' in the sense of the Convention encompasses all types of law, administrative, statutory and constitutional, written and unwritten (*Sunday Times v. the United Kingdom* judgment of 26 April 1979, Series A No. 30).

12. The Ombudsperson also recalls that established case-law of the European Convention on Human Rights dictates that, in order for a law to be compatible with the rule of law and thus to meet the legality requirements of the Convention, that law must attain a certain quality. In particular, the law must be sufficiently accessible and precise to avoid all risk of arbitrariness on the part of governmental authorities (*Amuur v. France* judgment of 25 June 1996, *Reports of Judgments and Decisions 1996-III*, para. 50).

13. The Ombudsperson observes that the application of the above criteria in evaluating whether a given governmental action is 'in accordance with law' in the sense of the European Convention on Human Rights requires interpretation by a judicial body or judicial bodies at the domestic level.

14. Finally, the Ombudsperson recalls that under the established case law of the European Convention on Human Rights, with respect to most rights that permit limitations, where a law fails to meet the threshold requirements for lawfulness any further examination of that law is rendered moot: the violation of the right at issue is caused by the unlawfulness itself.

#### **Overview of state discretion to restrict rights in international human rights law**

15. The Ombudsperson observes that the European Convention on Human Rights permits states to exercise a certain discretion to restrict the enjoyment of certain specified rights. Amongst these rights are the right to property, protected by Article 1 of Protocol No. 1, and the right to respect for the home, protected by Article 8. Any exercise of state discretion to limit these or similar rights must be both lawful in the sense described above and necessary in a democratic society for the achievement of one of the legitimate aims listed in the relevant Article of the Convention. The Ombudsperson notes, however, that the exercise of state discretion to restrict rights in this context should not be confused with the exercise of state powers to regulate the implementation of certain other rights, for example those guaranteed under Article 6.

16. The Ombudsperson also recalls that the list of legitimate aims in each of the Articles permitting restrictions on rights is exhaustive; a government may not invoke aims other than those listed to justify restricting the enjoyment of rights.

17. Finally, the Ombudsperson recalls that any evaluation of the necessity of a particular governmental restriction on the enjoyment or exercise of a right calls for a review of the proportionality of that restriction for the purpose of achieving one or more of the legitimate aims specified in the relevant Article. In other words, a government does not enjoy total authority to circumscribe the enjoyment of fundamental rights, but must exercise its discretion in a narrowly tailored way, subject to oversight and control in each individual case.

### **Restrictions on rights during times of public emergency: Derogations**

18. The preceding discussion describes the criteria governing acceptable restrictions on particular rights imposed by governments in normal circumstances and in the context of democratic practice during peace time. The Ombudsperson notes, however, that a government may impose additional restrictions on some rights in situations constituting public emergencies. The scope of such exceptional restrictions is governed by Article 15 of the European Convention on Human Rights, which reads, in pertinent part:

1. In time of war or other public emergency threatening the life of the nation any [Party] may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

....

3. Any [Party] availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

19. The Ombudsperson observes that even in time of war or other public emergency threatening the life of the nation, a government still must meet certain requirements in order for a derogation to be valid. A notice of derogation, which is normally transmitted to the Secretary General of the international organisation who acts as the depository for the treaty being derogated from, must identify the provisions of the instrument being derogated from, the scope of the derogation and the reasons for the specific measure being taken. Derogations are intended to be of a temporary character and should be lifted at the earliest opportunity.

20. The Ombudsperson also observes that even in an active state of war, governments are bound by international human rights law and are permitted to derogate from their obligations thereunder only to the extent strictly required by the exigencies of the situation and only by exercising such measures as are not inconsistent with other obligations under international law. In this regard, the Ombudsperson recalls that certain principles codified in the Geneva Conventions may also be of relevance when considering whether a particular governmental action is compatible with international standards.

### **The compatibility of the statutory grant of immunity afforded by UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) with recognised international human rights standards**

21. The Ombudsperson observes that the object and purpose of Regulation 2000/47 is to guarantee, by operation of law, broad immunity for the international civilian and security presences and for their international and local personnel. The Ombudsperson further observes that this grant of immunity creates an insurmountable procedural bar to any legal process in any territory at any time to KFOR and UNMIK as institutions, as well as to their property, funds and assets (Sections 2.1 and 3.1 of the Regulation, respectively) to locally recruited KFOR personnel in respect of words spoken and acts performed by them in carrying out tasks exclusively related to their services to KFOR (Section 2.3 of the Regulation) and to international and locally recruited UNMIK personnel in respect of all acts performed by them in their official capacity (Section 3.3 of the Regulation).

22. The Ombudsperson observes that, consequently, an examination of the underlying grounds for grants of immunity in international law and the exercise of governmental powers to this end is of primary importance in considering the compatibility of UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) with the relevant international standards.

23. With regard to UNMIK's grant of immunity to itself and to KFOR, the Ombudsperson recalls that the main purpose of granting immunity to international organisations is to protect them against the unilateral interference by the individual government of the state in which they are located, a legitimate objective to ensure the effective operation of such organisations (see, e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, *Reports of Judgments and Decisions, 1999-I*, para. 63). The rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration (United Nations Mission in Kosovo – UNMIK) in fact acts as a surrogate state. It follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself. The Ombudsperson further recalls that no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for the impunity of the state.

24. With regard to UNMIK's exercise of its executive and legislative powers for the purpose of granting itself and its security counterpart immunity, the Ombudsperson recalls that the fundamental precept of the rule of law is that the executive and legislative authorities are bound by the law and are not above it. He further recalls that, therefore, the actions and operations of these two branches of government must be subject to the oversight of the judiciary, as the arbiter of legality in a democratic society. Finally, he recalls that these precepts govern the relationship between the state and the individual, who is the subject and not the object of the law. UNMIK Regulation 2000/47 contravenes all of these principles.

25. With regard to the more technical aspects of whether UNMIK Regulation 2000/47 can be considered to be 'in accordance with law' (cf. paras. 11-13, *supra*), the Ombudsperson first observes that Section 5.2 of UNMIK Regulation 1999/01 on the Authority of the Interim Administration in Kosovo (25 July 1999) calls for the publication and wide dissemination of all UNMIK Regulations in Albanian, Serbian and English, thus recognising an affirmative obligation to ensure the accessibility of applicable laws in Kosovo. The Ombudsperson further observes that although UNMIK Regulation 2000/47 was promulgated on 18 August 2000, as of the date of this report it has only been published and disseminated in English. As virtually all of those individuals directly affected by the Regulation understand Albanian and/or Serbian only, UNMIK Regulation 2000/47 cannot be considered to be accessible to them in the sense of the European Convention on Human Rights.

26. With regard to the precision and foreseeability of the Regulation, the Ombudsperson observes that the Regulation consists of a complex set of provisions prescribing *inter alia*, different levels and types of immunities for different categories of personnel as well as for KFOR and UNMIK in their institutional capacities. Waivers of immunity over some personnel are at the total discretion of persons outside the control of any oversight body: other personnel enjoy total lifetime immunity not subject to any waiver at all. Jurisdiction over any claims an individual may lodge against any of the immunized entities is ascribed to different judicial, quasi-judicial or administrative bodies, some inside and some outside the country. It follows that UNMIK Regulation 2000/47 cannot be considered to meet the criteria of precision and foreseeability comprising the second aspect of lawfulness under the European Convention on Human Rights.

27. With regard to the question as to whether UNMIK Regulation 2000/47 attains standards compatible with the rule of law, the Ombudsperson recalls that the law must protect the individual against arbitrary exercises of governmental authority *inter alia* through the articulation of clear standards for the exercise of governmental authority and the provision of adequate control by independent legislative and/or judicial authorities over the exercise of powers by the executive. None of these forms of protection obtain in the instant Regulation.



### *Conclusion*

28. The Ombudsperson is, therefore, of the opinion that UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) is incompatible with recognised international human rights standards.

### **The right to peaceful enjoyment of possessions (the right to property) under Article 1 of Protocol No. 1 of the European Convention on Human Rights**

29. The majority of complaints the Ombudsperson has received against KFOR relate to KFOR's taking and continuing occupation of the private property of individual residents of Kosovo, coupled with the lack of compensation and/or procedural mechanisms for obtaining compensation for the taking and occupation. The Ombudsperson has received similar complaints, although fewer in number, against UNMIK.

### **The nature of the right to peaceful enjoyment of possessions (right to property)**

30. The right to peaceful enjoyment of possessions is guaranteed by Article 1 of Protocol No. 1 of the European Convention on Human Rights, which reads, in pertinent part as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ....

31. At the outset, the Ombudsperson recalls that in recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 of Protocol No. 1 of the European Convention on Human Rights in substance guarantees the right to property (*Marckx v. Belgium* judgment of 13 June 1979, Series A No. 31, p. 27, para. 63). The right to property in the sense of the aforementioned Article comprises also the right to be free from governmental actions constituting undue restrictions on controls on the use of property (*Sporrong and Lonnroth* judgment of 23 September 1982, Series A No. 52).

32. The Ombudsperson also recalls that the first and most important requirement of Article 1 of Protocol No. 1 is that any governmental interference with the right to property should be in accordance with law. Where no accessible and precise domestic legal provisions on governmental interferences with property exist, such governmental conduct violates the right to property. Where a law is applied inconsistently, thus resulting in unforeseeable or arbitrary outcomes, individuals are deprived of effective protection of their rights, circumstances which do not conform to the requirements of lawfulness (*Belvedere Alberghiera S.r.l. v Italy* judgment of 30 May 2000, para. 58; see also paras. 11-13, *supra*.)

33. The Ombudsperson further recalls that any interference by a public authority with the right to property must be for justifiable reasons in the public interest. In order for an interference to be justifiable in this connection, it must strike a fair balance between the general interests of the community, and the requirements of the protection of the individual's fundamental rights (*Stran Greek Refineries and Stratis Andreadis v. Greece* judgment of 9 December 1994, Series A No. 301-B, p. 87, para. 69). Whereas a government may exercise a certain margin of appreciation when depriving an

individual of his or her possessions (property) under Article 1 of the Additional Protocol to the European Convention on Human Rights, such restrictions must be 'in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The Ombudsperson recalls that the case-law of the Convention has accepted that initiatives of democratically elected governments to effect economic, social or other reforms, in part through deprivations of or limitations on private property, fall within the purview of 'the public interest' clause of Article 1 of the Additional Protocol (James and others v. the United Kingdom judgment of 21 February 1986, Series A. No. 98, p. 30, para. 40). In this regard, the Ombudsperson observes that no government in Kosovo has instituted a social, economic or other programme calling for deprivations of or limitations on private property.

34. The Ombudsperson also considers that even if the current situation in Kosovo may be considered to constitute a 'public emergency' in the sense of Article 15 of the European Convention on Human Rights, any governmental restrictions on the right to property in this context must nevertheless meet the requirements of Article 15, i.e. be 'strictly required by the exigencies of the situation' and be consistent with the government's 'other obligations under international law'. The Ombudsperson finally observes that KFOR has a security mandate in the post-war/public emergency context and KFOR contingents therefore may arguably exercise their powers within certain parameters, even with regard to the temporary taking of private property. However, even assuming that the 'emergency' taking of private property was necessary at the outset of their mission, nothing indicates that the taking of such property and its occupation indefinitely without compensation to the owner is either justifiable 'in the public interest' (cf. Article 1 of Protocol No. 1) or 'strictly required by the exigencies of the situation' (cf. Article 15).

#### **The right to compensation in the context of the right to property**

35. The Ombudsperson next observes that the right to compensation for a governmental deprivation of property is an independent property right guaranteed under Article 1 of the Additional Protocol to the Convention. The Ombudsperson also observes that the right to compensation is a derivative right, arising as a direct consequence of a governmental deprivation of property. The Ombudsperson further observes that the right to compensation is an established principle of international law and thus forms one of the preconditions for a governmental taking of property to be lawful. These two circumstances dictate that the right to compensation is not amenable to the restrictions provided for with regard to the original taking of a given property. It follows that, even if a governmental taking of property is justified for public emergency or public interest reasons, those circumstances do not negate the right of the individual to receive compensation for that taking of property. In Kosovo, no public emergency threatening the life of the nation exists that requires the government to deprive someone of his or her property, to occupy it in perpetuity, and to provide no compensation for the deprivation, occupation or other hindrances on the right to peaceful enjoyment of possessions.

36. The Ombudsperson recalls that the general principles of international law calling on governments to compensate individuals for governmental deprivations of property developed in the context of rules of state responsibility regarding the treatment of aliens. In all circumstances, such takings must be for a public purpose. However, even when a public purpose is being served by depriving an alien of his or her property, the government must pay 'prompt, adequate and effective compensation' to the individual property owner. The Ombudsperson recalls that the reasoning underlying the distinction between the rights of citizens and the rights of aliens in this context was canvassed by the European Court of Human Rights in the cases of James and others v. the United Kingdom (judgment of 21 February 1986, Series A No. 98) and Lithgow and others v. the United Kingdom (judgment of 8 July 1986, Series A No. 102). In these cases, the Court noted that non-nationals are in a more vulnerable position than are nationals regarding governmental takings of property, due to two factors. First, non-nationals do not have a right to participate in democratic electoral processes through which the authors of domestic legislation governing the property deprivations derive their power. And second, non-nationals have no voice during consultative processes leading up to the promulgation and implementation of such legislation.

37. The Ombudsperson considers that the situation of individuals in Kosovo whose property has been appropriated by KFOR and/or UNMIK are in a situation analogous to that of non-nationals in the traditional international legal context. Individuals in or from Kosovo have not had an adequate opportunity to participate in any political process with regard to the designation of lawmakers empowered to pass legislation governing the taking of private property. It follows that even in the event that KFOR and UNMIK deprivations of property can be considered to be for a public purpose, there are strong policy grounds supporting their payment of prompt, adequate and effective compensation to those whose property they have taken.

**Procedural aspects of the right to property: Third party liability under Section 7 of UNMIK Regulation 2000/47**

38. Section 7 of UNMIK Regulation 2000/47 which addresses third party liability of KFOR, UNMIK or their respective personnel for, *inter alia*, reads in pertinent part as follows:

Third party claims for property loss or damage ... 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.

39. The Ombudsperson recalls that Article 1 of Protocol No. 1 of the European Convention on Human Rights can be considered to provide certain procedural protections that are necessary to ensure the effective protection of the right to property. The Ombudsperson also recalls that the European Court of Human Rights has found the inability of an individual to participate in fair proceedings that are determinative of his or her property rights to be a significant factor in concluding that an interference imposed an 'individual and excessive burden' on an individual so that that interference failed to strike the necessary fair balance between the relevant competing interests (*Hentrich v. France* judgment of 22 September 1994, Series A No. 296, pp. 20-21, paras. 43-48).

40. Regarding the procedures envisioned under Section 7 of UNMIK Regulation 2000/47, the Ombudsperson first observes that an individual wishing to lodge a claim against KFOR or UNMIK must meet two threshold requirements in order to have the claim reviewed by the future Claims Commissions. First, he or she must establish that the matter at issue arose from or was directly attributed to KFOR, UNMIK or their respective personnel. Second, he or she must show that the matter at issue did not arise from 'operational necessity' of either international presence. The Ombudsperson observes that, whereas an individual may reasonably be expected to establish an arguable claim regarding the former criterion, with regard to the latter criterion both the individual and the respondent party or parties must necessarily have their views heard. However, neither Section 7 nor any other Section of Regulation 2000/47 envisions procedural mechanisms for the conduct of any effective inquiry into the 'operational necessity' of the contested act, whether as a threshold requirement for gaining access to the future Claims Commissions or in the context of procedures before the future Claims Commissions. As this preliminary inquiry is therefore directly decisive of the outcome of any ensuing civil proceeding, the full panoply of procedural protections afforded by Article 6 of the European Convention on Human Rights must be guaranteed (*Ringeisen v. Austria* judgment of 16 July 1971, Series A No. 13).

41. Going beyond consideration even of the standards set forth under Article 15 of the Convention, the Ombudsperson also observes that even in the event that Kosovo were to be considered in a state of armed conflict, as opposed to a state of emergency or a state of peace, the 1949 Geneva Conventions reinforce the views expressed in the preceding discussion. Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva Convention IV), for example, includes in its definition of 'grave breaches' of the Geneva Convention the following:

....wilful killing, torture or inhuman treatment, .... wilfully causing great suffering or serious injury to body or health,... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully ....

42. The Ombudsperson considers that the additional requirement, even during wartime, of 'military' necessity for the appropriation of property, implies a much stricter standard than does the 'operational' necessity provided for in Section 7 of UNMIK Regulation 2000/47. The Ombudsperson therefore considers that by permitting UNMIK and KFOR to invoke 'operational necessity' to preclude any review of allegations that their actions caused harm that could fall within the category of grave breaches of Geneva Convention IV, Section 7 of UNMIK Regulation 2000//47 fails to meet any reasonable standard of proportionality.

43. Even assuming, *arguendo*, that the invocation of 'operational necessity' falls within the scope of permissible restrictions on the right to property or otherwise constitutes a 'public interest' in the sense of Article 1 of Protocol No. 1, the phrase does not in itself have sufficient legal clarity to meet the requirements of lawfulness called for in the second clause of the Article. As noted elsewhere (see para. 13, *supra*) the problem of a lack of legal clarity is exacerbated by the absence of civil courts capable of interpreting this provision. Furthermore, in light of both considerations of lawfulness and the general principles of international law, even in the event that 'operational necessity' can be raised as a ground for an actual taking of property, it cannot be invoked to refuse to pay compensation for the taking, as the failure to pay compensation is incompatible with obligations set forth under both Article 1 of the Additional Protocol and Article 15 of the Convention itself.

#### *Conclusion*

44. The Ombudsperson is, therefore, of the opinion that UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) is incompatible with the right to peaceful enjoyment of possessions guaranteed by Article 1 of the Additional Protocol to the European Convention on Human Rights.

#### **The right to respect for the home under Article 8 of the European Convention on Human Rights**

45. The Ombudsperson has received complaints against KFOR and/or UNMIK regarding the taking and continuing occupation of apartments or houses in which individual residents of Kosovo had lived, some with their families, prior to the conflict. These complaints raise issues related to the applicants' lack of access to their homes and some also to their lack of financial means to obtain housing, the latter complaint stemming in large part from the failure of KFOR or UNMIK to pay rent for the use of residential property. The absence of accessible procedural mechanisms for the review of these complaints also raises problems.

46. The Ombudsperson notes that the above complaints reflect a pattern of conduct that may raise an arguable claim of a violation of the right to respect for the home as provided by Article 8 of the European Convention on Human Rights. The Ombudsperson recalls that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities with the right to, *inter alia*, respect for the home (*Gillow v. the United Kingdom* judgment of 24 November 1986, Series A No. 109).

47. In this regard, the Ombudsperson first recalls that, under Article 8 of the Convention, a residential property, once lawfully acquired by an individual and occupied for a reasonable length of time, does not cease to be that individual's 'home' merely because, due to unforeseen circumstances, he or she is no longer authorised to use it (Dec. No. 7456/76 of 8 February 1978, D.R. 13 p. 40 at p.44).

48. The Ombudsperson has set out above (paras. 30-44) the general principles that apply to determinations as to whether there has been a violation of the right to property in the sense of Article 1 of the Additional Protocol to the Convention. Although there are some differences between the application of these general principles to the right to property and to the right to respect for the home guaranteed under Article 8, there is a broad similarity in terms of the balance to be struck between the interests of the community and the rights of the individual. (see, e.g. *Sporrong and Lönroth v. Sweden* judgment of 23 September 1982, Series A No. 52, p. 26, para. 69).

49. The Ombudsperson considers that even if the accommodation of KFOR or UNMIK personnel could be considered to be permissible under Article 8 for the grounds specified, e.g. national security, public safety, and so forth, the continuing occupation of the homes of local persons without compensating them or otherwise providing them with the means to obtain alternative accommodation cannot be considered to be proportionate to any of those aims. In this regard, the Ombudsperson observes that S/RES/1244 (1999) assigns joint responsibility to KFOR (para. 9 (c)) and UNMIK (para. 11 (k)) for the return of refugees and displaced persons to their homes in Kosovo. The Ombudsperson considers that the taking over and continuing occupation of the homes of residents of Kosovo arguably militates against this policy objective.

#### *Conclusion*

50. The Ombudsperson is, therefore, of the opinion that UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) is incompatible with the right to respect for the home guaranteed by Article 8 of the European Convention on Human Rights to the extent that real property at issue constitutes the home of the individual affected.

#### **The compatibility of UNMIK Regulation 2000/47 with recognised international human rights standards governing fair proceedings in civil matters**

51. The Ombudsperson considers that UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) raises a wide range of issues related to the lack of judicial mechanisms and procedures through which individuals can lodge claims against KFOR and/or UNMIK and/or their respective personnel regarding alleged violations of civil or human rights. These issues are primarily governed by para. 1 of Article 6 of the European Convention on Human Rights, which reads in part as follows:

In the determination of his civil rights ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

#### **Applicability of Article 6 of the European Convention on Human Rights**

52. The Ombudsperson recalls that the right to a court in the civil context extends to any disputes over civil rights or obligations for which there appear to exist at least arguable grounds in domestic law (See, *inter alia*, the *James and Others v. the United Kingdom* of 21 February, 1986, Series A no. 98, pp. 46-47, para. 81; and the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 16, para. 36).

53. The Ombudsperson further recalls that the established case law of the European Convention on Human Rights holds that the right to property constitutes a civil right in the sense of Article 6 of the European Convention on Human Rights, as does the right to respect for the home and the right to claim damages resulting from prohibited ill-treatment by governmental authorities or arising in

connection with a wrongful death. The Ombudsperson concludes, therefore, that Article 6 of the Convention is applicable, *inter alia*, to these rights, the determination of which is directly affected by the terms and operation of UNMIK Regulation 2000/47.

54. The Ombudsperson, therefore, considers it necessary to examine whether the various Sections of UNMIK Regulation 2000/47 addressing or alluding to judicial proceedings meet the requirements of Article 6 of the Convention.

### **The right to a court**

55. On finding that Article 6 of the Convention applies, the Ombudsperson notes that the primary issue requiring examination with respect to UNMIK Regulation 2000/47 is whether or not an individual wishing to raise a civil claim has access to a tribunal for the full adjudication of that claim. In this respect, the Ombudsperson recalls that:

'Article 6.1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only' (see the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 18, para. 36, and the *Osman v. the United Kingdom* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3166, para. 136).

56. The Ombudsperson further recalls that the right of access to court by its nature is not an absolute right, but may be subject to certain limitations. Such limitations are

.... permitted by implication since the right of access by its very nature calls for regulation ... which may vary in time and in place according to the needs and resources of the community and of individuals' (see, *inter alia*, the *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, para. 65 and ancillary references).

57. The Ombudsperson also recalls, however, that any limitations applied may not 'restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired'. And, as with regard to other rights guaranteed under the Convention, any limitation on the right to a court will not be compatible with Article 6 if it does not pursue a legitimate aim or if there is not a reasonable degree of proportionality between the means employed and the aim sought to be achieved'. (see, *inter alia*, the *Fayed* judgment cited above, *loc. cit.*)

58. The balance to be struck in considering whether a given limitation on access to court complies with the requirements of para. 1 of Article 6 of the European Convention on Human Rights is 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' (see, *inter alia*, the *Sporrong and Lonroth v. Sweden* judgment of 23 September 1982, Series A no. 52, p. 26, para. 69).

59. The Ombudsperson finally recalls that the right of access to court may be violated where the costs attached to pursuing court proceedings prevent an individual from pursuing a civil claim relating to the protection of his or her human rights. Among the necessary guarantees in this regard is the State provision of civil legal aid to indigent litigants with substantial arguable claims (*Airey v. Ireland* judgment of 9 October 1979, Series A No. 32).

60. Prior to applying the above principles to UNMIK Regulation 2000/47, the Ombudsperson first observes, with respect to the discretionary exercise of regulatory power with regard to limiting access to the domestic courts, that in normal circumstances such regulation is instituted by the State. And the State normally regulates in this, as in other areas, in conjunction with applicable legislation promulgated through normal democratic parliamentary processes. In the current circumstances prevailing in Kosovo, regulatory and other functions are performed by the interim civilian administration (UNMIK). In this capacity, UNMIK enjoys a certain margin of appreciation in regulating access to court in Kosovo. At the same time, the Ombudsperson reiterates his concerns expressed elsewhere in this Report about the melding of executive and legislative powers in Kosovo (see para. 24, *supra*, and para. 75 *infra*) and notes that the exercise of these combined powers to prevent the courts from exercising jurisdiction over certain civil claims against certain actors in Kosovo has strong negative repercussions for respect for the rule of law in the province.

61. The Ombudsperson considers that he must apply the aforementioned principles to three separate situations envisioned by UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000). First, he must apply them in the context of the broad immunity afforded to KFOR, UNMIK and their respective international and national personnel. Second, he must apply them in the context of the assignment of exclusive jurisdiction over international KFOR personnel to the national courts of their respective sending states. And third, he must apply them in the context of third party liability addressed in Section 7 of the Regulation.

62. With regard to the relationship of the broad grant of immunity of UNMIK Regulation 2000/47 and the right to a court, the Ombudsperson recalls the case law of the European Convention on Human Rights holding that an actionable civil claim may depend not only on the definition of the claim under domestic law,

'but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court... [I]t would not be consistent with the rule of law in a democratic society or with the basic principle underlying [para. 1 of Article 6] – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control ... remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons' (see the Fayed judgment cited above, *loc. cit.*).

63. In this light and in connection with the general discussion of immunity (see paras. 21-28, *supra*), the Ombudsperson considers that UNMIK's conferral of immunity from any civil liability on all KFOR and UNMIK personnel constitutes a procedural bar preventing individuals from bringing potential civil claims before a court. This grant of immunity is therefore incompatible with Article 6 of the European Convention on Human Rights.

64. With regard to the assignment of exclusive jurisdiction over administrative, civil and criminal acts of international KFOR personnel to the national courts of their respective sending states (Section 2.4 of UNMIK Regulation 2000/47), the Ombudsperson recalls that governmental authorities have an affirmative obligation to ensure that the rights guaranteed under the European Convention on Human Rights are practical and effective, not theoretical or illusory (see, e.g. the *Artico v. Italy* judgment of 13 May 1980, Series A No. 37).

65. The Ombudsperson also recalls that Article 6 of the Convention guarantees certain procedural rights designed to ensure, *inter alia*, access to court and the equality of arms between the parties during ensuing proceedings. In this context, the Ombudsperson observes that the practical and effective protection of the rights of individuals to fair administrative, civil or criminal proceedings virtually demands that proceedings be conducted in the jurisdiction in which the facts arise. The Ombudsperson also observes that the transparency of proceedings, as an important element of the administration of justice, is defeated by the conduct of proceedings outside the reach of one of the

affected parties. The Ombudsperson also observes that in most domestic legal systems a change of venue is the exception, not the rule, and that such a change is normally effected on a case by case basis, on objectively justifiable grounds, and only after considering the views and interests of both parties to the proceeding at issue.

66. Finally, the Ombudsperson observes that a resident of Kosovo wishing to pursue a civil claim before a foreign court against an international KFOR staff member will almost inevitably be precluded from doing so due to the inordinate costs involved (including *inter alia*, travel and translation costs, costs of retaining legal counsel and ancillary interpretation services, payment of court fees, and so forth). In this regard, the Ombudsperson notes that many European countries limit the provision of civil legal aid to indigent residents, or in some cases even to indigent citizens, of the country. The provision of civil legal aid to indigent alien non-residents is not currently the European norm.)

67. In light of the above, the Ombudsperson considers that the wholesale removal of a large group of governmental agents, in this case international KFOR personnel, from the jurisdiction of the courts of the territory within which they are operating under colour of law constitutes a violation of the right of access to court guaranteed under Article 6 of the European Convention on Human Rights. The seriousness of the violation is exacerbated by the insurmountable difficulties confronting individuals from Kosovo who can only pursue a claim against an international KFOR staff member in the latter's sending State.

68. With regard to the third party liability addressed in Section 7 of UNMIK Regulation 2000/47, the Ombudsperson notes that individuals wishing to lodge third party claims for 'property loss or damage and for personal injury, illness or death arising from or directly attributable to KFOR, UNMIK or their respective personnel' may only do so with regard to those claims that 'do not arise from "operational necessity" of either international presence'. Without addressing the nature of the Claims Commissions envisioned for the settlement of these claims (see para. 40, *supra*, and paras. 70-78, *infra*), the Ombudsperson observes that not only are no objective criteria for the determination of 'operational necessity' provided, but the regulation itself establishes a unilateral declaration by KFOR or UNMIK that the act at issue did not arise from 'operational necessity' as a condition precedent for the claim to be addressed at all.

69. The Ombudsperson, therefore, considers that the grant by Section 7 of UNMIK Regulation 2000/47 of unilateral power to UNMIK and to KFOR, permitting them to preclude review of civil claims lodged by residents of Kosovo constitutes a violation of the right of access to court guaranteed under Article 6 of the European Convention on Human Rights.



### **The Right to an Independent and Impartial Tribunal Established by Law**

70. The Ombudsperson has been called upon to consider whether the Claims Commissions envisioned under Section 7 of UNMIK Regulation 2000/47 conform with the internationally recognised standards governing the independence and impartiality of tribunals. At the outset, the Ombudsperson observes that in order for a body to be considered a 'tribunal' in the sense of Article 6 of the European Convention on Human Rights it must have the competence to base its determination both on fact and law (See, e.g. *Umlauft v. Austria* judgment of 23 October 1995, Series A No. 328-B, pp. 39-40).

71. The Ombudsperson recalls the standards governing the determination of whether a tribunal can be considered to be 'established by law' in the sense of para. 1 of Article 6 of the European Convention on Human Rights. First, in order for a tribunal to be 'established by law', it must be established through a statutory enactment and not through a subordinate act such as an administrative instruction or directive. Second, a tribunal may not be established on an *ad hoc* basis for the adjudication of a specific category of complaints.

72. The Ombudsperson recalls that the right to an independent and impartial tribunal can only be guaranteed if certain objective and subjective criteria are fulfilled. The Ombudsperson recalls that in order to establish whether a tribunal can be considered to be 'independent' for the purposes of para. 1 of Article 6 of the European Convention on Human Rights, consideration must be given, *inter alia*, to the following factors: the manner of appointment of its members and their terms of office, the existence of safeguards against outside pressures and the question whether the tribunal presents an appearance of independence (see, e.g. *Findlay and others v. the United Kingdom* judgment of 25 February 1997, *Reports of Judgments and Decisions 1997-I*, p. 281, para. 73). With regard to the condition of 'impartiality', a determination must be made, first, of the personal conviction of a particular judge in a given case and, second, whether the judge offers sufficient guarantees to exclude any legitimate doubts as to the effect of those personal convictions on the proceedings (See, *mutatis mutandis*, *Gautrin and others v. France* judgment of 20 May 1998, *Reports of Judgments and Decisions, 1998-III*, pp. 1030-1031, para. 58).

73. In applying the above criteria to the participation of military judges in civil judicial proceedings, that is, to proceedings unrelated in any way to military justice issues, the case law of the European Convention on Human Rights has held that the standpoint of the individual affected is an important factor, but what is decisive is whether his or her doubts can be held to be objectively justified (see, e.g. *Findlay v. United Kingdom*, cited above). The case law has also held, in this regard, that an individual whose case is heard by a court, one of whose members is a military judge, could legitimately fear that the court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case (*Incal v. Turkey* judgment of 9 June 1998, *Reports of Judgments and Decisions, 1998-IV*, p. 1573, para. 72).

74. The Ombudsperson notes that, given that the Claims Commissions called for under Section 7 of UNMIK Regulation 2000/47 have yet to be established, it is only possible to apply some of the objective criteria governing independence and impartiality.

75. The Ombudsperson first observes that the essence of the claims to be reviewed by the Claims Commissions stem from actions of KFOR and UNMIK that allegedly have negatively affected the fundamental rights of individual residents of Kosovo. The Ombudsperson next observes that UNMIK bears the responsibility for the establishment and operation of the judicial system generally (Cf. Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999)) and shares the responsibility with KFOR for the establishment of the Claims Commissions. Thus, the entities whose potential liability forms the subject matter of the claims to be reviewed are also charged with the establishment and operation of the organs of that review. The Ombudsperson, therefore, considers that the relationship between the authority charged with the establishment and administration of the 'tribunal' at issue and potential defendants in the cases falling within that tribunal's jurisdiction is too close to be compatible with the institutional requirements of independence and impartiality called for under Article 6 of the European Convention on Human Rights.

76. The Ombudsperson also notes that the Claims Commissions or any other bodies established by law to review claims against KFOR, UNMIK or their respective personnel should not include amongst those exercising jurisdiction in this regard anyone affiliated with KFOR, the respective military contingents or the UNMIK civilian administration. The Ombudsperson further notes, however, that even in the event that Claims Commissions are ultimately established, the scope of the immunity granted by UNMIK Regulation 2000/47 leaves no room for the Claims Commissions to act in any meaningful way as no UNMIK or KFOR assets can be touched and no international or local personnel can be held liable.

77. The Ombudsperson finally notes that it is incumbent on the domestic authorities of the respective sending states to ensure that the above minimum standards for independence and impartiality are also met by any tribunal reviewing claims against KFOR personnel in those countries.

#### *Conclusion*

78. The Ombudsperson is, therefore, of the opinion that the legal framework governing the future establishment of the Claims Commissions envisioned in Section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) does not comply with the objective criteria called for by Article 6 of the European Convention on Human Rights for determining the independence and impartiality of a tribunal.

#### **Access to court and the lack of implementation of Section 7 of UNMIK Regulation 2000/47**

79. In light of views expressed by KFOR that any claim against KFOR or its personnel with respect to alleged abuses of authority or violations of human rights are to be handled by the Claims Commissions envisioned under Section 7 of UNMIK Regulation 2000/47, and in light of the Ombudsperson's conclusions above (paras. 28, 44, 50, and 78, *supra*), the Ombudsperson must consider whether the failure, since 18 August 2000, of KFOR and UNMIK to establish the Claims Commissions envisioned in Section 7 of UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo constitutes an additional violation of the right of access to court.

80. The Ombudsperson recalls the well-established principle of European human rights law, that justice delayed is justice denied. He further recalls that delays in the administration of justice may jeopardise its effectiveness and credibility and pose a threat to the rule of law (*Bottazzi v. Italy* judgment of 28 July 1999, para. 22). He further observes that, by its own terms, Section 7 of UNMIK Regulation 2000/47 recognises the principle that individuals wishing to lodge civil claims against KFOR, UNMIK and/or their respective personnel should have a forum in which such claims can be heard. At the same time, however, from 18 August 2000 to 26 April 2001, neither UNMIK nor KFOR have acted to establish the Claims Commissions called for by the Regulation.

#### *Conclusion*

81. The Ombudsperson is, therefore, of the opinion that the failure of UNMIK and/or KFOR to establish the Claims Commissions envisioned in Section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) constitutes a violation of the right of access to court.

#### **RECAPITULATION OF CONCLUSIONS**

82. The Ombudsperson is of the opinion that UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000)

- is incompatible with recognised international standards with respect to the scope of the grant of immunity to UNMIK and KFOR in their institutional capacities;
- is not 'in accordance with law' in the sense of the European Convention on Human Rights;
- is incompatible with Article 6 of the European Convention on Human Rights;
- is incompatible with Article 15 of the European Convention on Human Rights;
- is incompatible with Article 1 of Protocol No. 1 of the European Convention on Human Right;.
- is incompatible with Article 8 of the European Convention on Human Rights, where the real property at issue is also the home of an individual.

The Ombudsperson therefore concludes that UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) is incompatible with recognised international standards.

83. Independent of his conclusions on the incompatibility of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) with recognised international standards, the Ombudsperson also concludes that the failure of UNMIK to regulate further the structure and procedures of the Claims Commissions called for under Section 7 of said Regulation and the consequent failure of UNMIK and KFOR to establish such Claims Commissions constitutes a violation of the right to a court guaranteed under Article 6 of the European Convention on Human Rights.

#### **RECOMMENDATIONS:**

84. The Ombudsperson notes that he has no jurisdiction over KFOR. The following recommendations are therefore directed exclusively to UNMIK.

The Ombudsperson recommends that, no later than 29 June 2001, the Special Representative of the Secretary General:

- should amend UNMIK Regulation 2000/47 to limit the immunity of UNMIK and KFOR in their institutional capacities. In particular, Sections 2.1 and 3.1 rendering the property, funds and assets of these institutions immune from legal process should be abolished.
- should promulgate a Regulation establishing the Claims Commissions envisioned in Section 7 of UNMIK Regulation 2000/47, such Regulation to have powers and competences consistent with the standards governing the right of individuals to have access to an independent and impartial tribunal established by law for the purpose of having a determination of their civil rights as guaranteed under Article 6 of the European Convention on Human Rights.
- should, on the date of its entry into force, disseminate in Kosovo and abroad, through all appropriate channels, the amended UNMIK Regulation and the new UNMIK Regulation in all languages widely used in Kosovo, in accordance with Section 5.2 of UNMIK Regulation 1999/01.
- should take appropriate steps to ensure that KFOR establishes and implements a consistent policy that KFOR and/or its national contingents accept responsibility for compensating individuals whose property in Kosovo has been occupied or damaged by KFOR, in accordance with general principles of international law and the case-law established under Article 1 of Protocol No. 1 of the European Convention on Human Rights.

- should inform the Ombudsperson of the actions taken in response to these Recommendations, in accordance with Section 4.9 of UNMIK Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo.

**Marek Antoni Nowicki**  
Ombudsperson