

OMBUDSPERSON INSTITUTION in KOSOVO

SPECIAL REPORT No. 3

on

**The Conformity of Deprivations of Liberty under 'Executive Orders'
with Recognised International Standards**

addressed to

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

The Ombudsperson for Kosovo, pursuant to Sections 1.1 and 4.1 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 29 June 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 THE SPECIAL REPORT

1. This Special Report is based in part on applications lodged with the Ombudsperson by individuals who have been detained under Executive Orders issued by the Special Representative of the Secretary General of the United Nations (hereinafter also referred to as the SRSG) and in part on other sources of information. (Throughout this Special Report, the term Executive Order is intended to encompass other types of instructions, decisions, decrees or any similar actions taken by the SRSG.)

BACKGROUND

2. A number of individuals currently or previously detained in Kosovo under Executive Orders issued by the current or previous Special Representative of the Secretary General of the United Nations have approached non-governmental organisations, the Organisation for Security and Co-operation in Europe and the Ombudsperson to complain about the lawfulness of their deprivations of liberty (hereinafter also referred to as detention). These individuals have complained, *inter alia*, about the alleged lack of a legal basis for their detention, the failure of any governmental authority to inform them fully of the grounds for their detention, the lack of procedural mechanisms through which they can effectively challenge their continued detention, the lack of compensation for unlawful detention, and other similar issues.

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 deprivation of liberty issues. The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or any related matters.

SCOPE OF THE REPORT

4. The primary focus of this Special Report is whether or not the practice of depriving persons of their liberty on the basis of orders issued by the Special Representative of the Secretary General conforms with the relevant international human rights standards established under Article 5 of the European Convention on Human Rights.

RELEVANT INSTRUMENTS

5. Section 11 of United Nations Security Council Resolution 1244 (1999)(10 June 1999)(hereinafter S/RES/1244(1999) reads in pertinent part, 'The Security Council... [d]ecides that the main responsibilities of the international civil presence will include... (j) protecting and promoting human rights....'

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

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.

7. Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (hereinafter European Convention on Human Rights or the Convention) reads in pertinent part as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court ;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law ;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational

supervision or his lawful detention for the purpose of bringing him before the competent legal authority ;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants ;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ANALYSIS

Overview of principles governing deprivations of liberty under Article 5 of the European Convention on Human Rights

8. At the outset, the Ombudsperson recalls that any determination of whether a deprivation of liberty imposed on the authority of the executive is lawful in the sense of Article 5 of the European Convention on Human Rights depends on the fulfilment of several conditions. For instance, a deprivation of liberty may only be imposed for one of the purposes listed in para. 1 of Article 5 and may only be on grounds that are clearly established by a domestic legal provision. In addition, any deprivation of liberty may only be imposed in accordance with a procedure prescribed by law. The Ombudsperson further recalls that the notion of 'lawfulness' under the Convention as a whole is to protect the individual against arbitrary actions of the government.

[L]awfulness of detention under domestic law is not always the decisive element... [D]etention [must be] compatible with the purpose of Article 5(1) of the Convention, which is to prevent persons

from being deprived of their liberty in an arbitrary fashion.
(*Baranowski v Poland* judgment of 28 March 2000).

In connection with Article 5, the European Court of Human Rights has long held that, 'In a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as 'lawful' (see, e.g. *N.C. v Italy* judgment of 11 January 2001, citing to *Winterwerp v the Netherlands* judgment of 24 October 1979).

Whether a deprivation of liberty imposed by an Executive Order of the SRSG can be considered to be for any of the purposes listed in para. 1 of Article 5

9. The European Convention on Human Rights permits the state to detain an individual only for certain purposes delineated in para. 1 of Article 5 (see para. 7 *supra*). The Ombudsperson recalls the established case law of the European Court of Human Rights, which confirms that the list of grounds for detention under Article 5 of the Convention is exhaustive. Any expansion of the list included in para. 1 of Article 5 by either a legislature or an executive authority constitutes a violation of that provision. Concepts such as 'preventive detention' or general claims of concern for 'national security', 'public order' or similar terms that appear in other contexts in the Convention are not legitimate grounds for deprivations of liberty under para. 1 of Article 5 of the European Convention on Human Rights (see e.g. *Jecius v Lithuania* judgment of 31 July 2000).

10. According to information available to the Ombudsperson, Executive Orders of the SRSG are based on such grounds as the alleged threat that the individual detained poses to the 'delivery of a safe and secure environment', to 'public safety and order' or similar justifications. The Ombudsperson observes that, by definition, the notion of a deprivation of liberty being grounded on a 'threat' gives a preventive cast to that deprivation of liberty. When coupled with claims of that the threat posed is to 'public safety' or similar ill-defined grounds, it is clear that the deprivation of liberty falls foul of the requirements of para. 1 of Article 5.

Whether a deprivation of liberty imposed by an Executive Order of the SRSG can be considered to be for any ground established by a domestic legal provision

11. The Ombudsperson recalls that the European Court of Human Rights places a high value on legal certainty, particularly where deprivations of liberty are concerned (*Kawka v Poland* judgment of 9 January 2001). With respect to legal certainty, the Ombudsperson also recalls that the established case law of the Court holds that the primary line of inquiry for determining whether a given deprivation of liberty is lawful is the existence in domestic law of accessible and clear provisions indicating the substantive grounds on which that deprivation of liberty can be imposed. In other words, the individual being deprived of his or her liberty must have been able to ascertain what activities or conduct are prohibited by law, in order to regulate his or her conduct accordingly.

12. The Ombudsperson further recalls that even should the domestic legal bases for a deprivation of liberty be accessible and clear, the notion of legal certainty also comprises a procedural element which must be fulfilled in order to comply with the requirements of Article 5(1) of the Convention:

[T]he practice of keeping a person in detention ... because of a lack of clear rules governing the detainee's situation, whereby a person may be deprived of his liberty for an unlimited period without *judicial* authorisation, is incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads

throughout the Convention and the rule of law. (*Jecius v Lithuania* judgment of 31 July 2000)(emphasis added).

13. The Ombudsperson observes that no law currently in force in Kosovo provides for deprivations of liberty grounded solely on the discretion of the SRSG. Such deprivations of liberty therefore have no legal basis. The Ombudsperson further observes that even should a law be promulgated granting power to the executive to order the detention of an individual, removing or unduly limiting the role of the judiciary to exercise their proper role in this regard, or otherwise entrenching arbitrariness, any such law would be incompatible with the principles underlying Article 5 of the European Convention on Human Rights.

Whether a deprivation of liberty imposed by an Executive Order of the SRSG can be considered to be imposed in accordance with a procedure prescribed by law

14. As discussed above (see para. 8), in order for a deprivation of liberty to be lawful in the sense of Article 5 of the European Convention on Human Rights, the grounds supporting the deprivation of liberty must both be founded in one of the sub-paragraphs of Article 5(1) of the Convention and be clearly set forth in the domestic law. An additional element of lawfulness, however, that any deprivation of liberty be 'in accordance with a procedure prescribed by law', is equally important.

15. The Ombudsperson observes that no domestic law applicable in Kosovo prescribes any procedure according to which the SRSG can issue an Executive Order to deprive someone of his or her liberty.

Conclusion

16. In light of the above considerations, the Ombudsperson concludes that any deprivation of liberty imposed by an Executive Order of the Special Representative of the Secretary General of the United Nations cannot be considered to be lawful in the sense of para. 1 of Article 5 of the European Convention on Human Rights.

The necessity of judicial control over deprivations of liberty under Article 5 of the European Convention on Human Rights

17. The underlying premise of Article 5 of the Convention is that the judiciary exercises oversight and control over deprivations of liberty. Not only at the time of initial detention, but during the entire course of detention, Article 5 dictates that the courts must exercise vigilance with regard to any individual who has been deprived of his or her liberty. Not only must an individual deprived of liberty have recourse to the courts to challenge the legality and/or the continuing necessity of the deprivation, but the courts themselves have an obligation to take a proactive role regularly and at appropriate intervals to review every deprivation of liberty on the same grounds, the legality and continuing necessity of the deprivation.

18. At the outset, the Ombudsperson recalls that respect for the rule of law requires the separation of powers, a principle that is also reflected in para. 1 of Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999), which reads, '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.' (emphasis added). Neither this provision, nor any other legal provision applicable in Kosovo vests judicial authority in the SRSG.

19. The Ombudsperson further recalls that certain procedural protections are set forth in para. 3 of Article 5 of the European Convention on Human Rights, which reads:

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

20. The Ombudsperson recalls that in order for judicial control over detention decisions to meet the requirements of para. 3 of Article 5 of the Convention, the judicial officer exercising that control must be competent to review promptly and automatically the merits of the detention issue, hearing from both the detainee and the government prior to taking any decision on the matter. Amongst the competences of that judicial officer must also be the power to order the release of the detainee (see e.g. **Aquilina v Malta** judgment of 29 April 1999 and **Sabeur Ben Ali v Malta** judgment of 29 June 2000). In this regard, the Ombudsperson also recalls that if the detention decisions of the judicial officer can be overturned by another authority, the requirements of para. 3 of Article 5 are not met (**Assenov v Bulgaria** judgment of 28 October 1998).

21. The Ombudsperson observes that the Special Representative of the Secretary General cannot be considered to be a judge or other judicial officer in the sense of para. 3 of Article 5 of the European Convention on Human Rights. The Ombudsperson also observes that any act of the Special Representative of the Secretary General or any other executive authority to override or otherwise negate a detention decision taken by a competent judicial officer constitutes a *prima facie* violation of this provision.

22. In addition to the specific procedural protections afforded to individuals who have been deprived of their liberty in circumstances set forth under Article 5(1)(c), general procedural protections that must be guaranteed to all individuals deprived of their liberty are set forth under para. 4 of Article 5:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

23. The Ombudsperson recalls the holding of the European Court of Human Rights, that rights guaranteed under para. 4 of Article 5 are violated where no judicial appeal can be raised in law against an unlawful detention decision. In the **Trzaska v Poland** judgment (11 July 2000) the Court held:

[B]y virtue of Article 5(4), an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5(1), of his or her deprivation of liberty (see the **Brogan and Others v. the United Kingdom** judgment of 29 November 1988, Series A no. 154-B, p. 34, para. 65).... [T]he procedure under Article 5(4) ... must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In the case of a person whose detention falls within the ambit of Article 5 (1)(c), a hearing is required (see the **Kampanis v. Greece** judgment of 13 July 1995, para. 47; **Nikolova v. Bulgaria** judgment of 25 March 1999, para. 58) (para. 100).

24. The Ombudsperson observes that the SRSG has issued a number of Executive Orders extending detention periods without providing the detainee or his or her legal counsel with information about the grounds for the continued detention, and without affording any possibility for the detainee to enjoy the

benefit of proceedings of a judicial character to challenge the lawfulness of that detention, as required under para. 4 of Article 5.

Conclusion

25. The Ombudsperson, therefore, concludes that the absence of judicial control over deprivations of liberty imposed under Executive Orders issued by the Special Representative of the Secretary General of the United Nations constitutes a violation of paras. 3 and 4 of Article 5 of the European Convention on Human Rights.

The right to compensation of an individual who has been unlawfully deprived of liberty: para. 5 of Article 5 of the European Convention on Human Rights

26. The Ombudsperson recalls that Para. 5 of Article 5 of the European Convention on Human Rights provides that:

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

As noted elsewhere, the permissible grounds for arrest or detention set forth under para. 1 of Article 5 of the Convention constitute an exhaustive list that cannot be supplemented through legislative or executive enactments or broadly interpreted by governmental authorities (see paras. 10 -12, supra). It follows that anyone who has been arrested or detained for reasons other than those set forth under para. 1 of Article 5 must be able to obtain compensation for that arrest or detention. The Ombudsperson further recalls that para. 5 of Article 5 of the Convention also provides for an enforceable right of compensation for any individual whose arrest or detention has been effected or continued in contravention of the procedural protections guaranteed under Article 5.

27. The Ombudsperson observes that deprivations of liberty imposed under Executive Orders issued by the SRSG do not conform to the requirements of paras. 1, 3 and 4 of Article 5 of the European Convention on Human Rights. The Ombudsperson further observes that individuals whose rights have been violated in connection with this practice have no enforceable right to compensation.

Conclusion

28. The Ombudsperson concludes, therefore, that the lack of an enforceable right to compensation constitutes a violation of para. 5 of Article 5 of the European Convention on Human Rights.

REITERATION OF CONCLUSIONS

29. The Ombudsperson concludes:

- that any deprivation of liberty imposed by Executive Order of the Special Representative of the Secretary General of the United Nations cannot be considered to be lawful in the sense of para. 1 of Article 5 of the European Convention on Human Rights;
- that the absence of judicial control over deprivations of liberty imposed under Executive Orders issued by the Special Representative of the Secretary General of the United Nations constitutes a violation of paras. 3 and 4 of Article 5 of the European Convention on Human Rights;

- that the lack of an enforceable right to compensation constitutes a violation of para. 5 of Article 5 of the European Convention on Human Rights.

The Ombudsperson, therefore, concludes that deprivations of liberty imposed under 'Executive Orders' do not conform with recognised international standards.

RECOMMENDATIONS

32. The Ombudsperson recommends that the Special Representative of the Secretary General of the United Nations:

- should immediately cease the practice of issuing Executive Orders or any other form of executive instruction, decree or decision imposing on any individual in Kosovo a deprivation of liberty;
- should, no later than 20 July 2001, convene one or more panels composed of international judges to review, on an urgent basis, the lawfulness of detentions of individuals currently deprived of their liberty under Executive Orders or any other form of executive instruction, decree or other decision, such review to conform with the requirements of Article 5 of the European Convention on Human Rights;
- should, no later than 20 July 2001, inform the Ombudsperson of the actions taken in response to the preceding two Recommendations, in accordance with Section 4.9 of UNMIK Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo;
- should undertake to comply with decisions on detention taken by the judicial panels convened in accordance with these recommendations;
- should, on an ongoing basis, inform the Ombudsperson of the decisions taken by the judicial panels and of actions the SRSG has taken to comply with those decisions;
- should, no later than 31 August 2001, promulgate a Regulation setting forth the legal bases for compensation claims for unlawful deprivations of liberty and proper judicial proceedings in this respect;
- should, on the date of its entry into force, disseminate, through all appropriate channels the new UNMIK Regulation in all languages widely used in Kosovo, in accordance with Section 5.2 of UNMIK Regulation 1999/01. In particular, the Regulation should be distributed to all persons who have been deprived of their liberty under Executive Orders issued by the SRSG and to all judges, judicial officers or others exercising judicial authority in Kosovo;
- should, no later than 31 August 2001, inform the Ombudsperson of the actions taken in response to the preceding two 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