

OMBUDSPERSON INSTITUTION in KOSOVO

SPECIAL REPORT NO. 4

Certain Aspects of

**UNMIK Regulation No. 2001/18
on the Establishment of a Detention Review Commission for
Extra-judicial Detentions Based on Executive Orders (25 August 2001)**

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 12 September 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:

BACKGROUND

1. This Special Report is based in part on concerns originally raised in conjunction with 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 (29 June 2001)(hereinafter Special Report No. 3) and reiterated in large part again in three Reports of today's date, finding violations of certain human rights in the cases of Mr. Cele Gashi, Mr. Avdi Behluli, and Mr. Jusuf Veliu.

2. In Special Report No. 3 and pursuant to his powers under Section 4 of UNMIK Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, the Ombudsperson made several recommendations to the Special Representative of the Secretary General of the United Nations (hereinafter SRSG). To date, the Ombudsperson has received no official response to any of these recommendations.

3. On 25 August 2001, the SRSG promulgated UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders (hereinafter UNMIK Regulation 2001/18). Some aspects of this Regulation apparently were intended to address concerns reflected in one of the recommendations the Ombudsperson made in Special Report No. 3.

DISCLAIMER

4. Nothing contained in this Report should be construed as implying that the Ombudsperson has waived his right to investigate any individual complaints alleging violations of human rights or abuses of authority with regard to deprivations of liberty imposed under Executive Orders or effected through other administrative acts.

The Ombudsperson also reserves all rights to exercise his jurisdiction under Section 4.3 of UNMIK Regulation 2000/38 to review for its compatibility with recognised international standards any UNMIK Regulation or comparable instrument relating to issues raised in this Report.

SCOPE OF THE REPORT

5. This Special Report examines the compatibility of UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders (25 August 2001)(hereinafter UNMIK Regulation 2001/18 or the Regulation) with recognised international human rights standards, in particular those established under para. 4 of Article 5 of the European Convention on Human Rights.

RELEVANT INTERNATIONAL INSTRUMENTS

6. **Section 11 of United Nations Security Council Resolution 1244 (1999)(10 June 1999)(hereinafter Resolution 1244) 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....

7. **Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999)(hereinafter UNMIK Regulation No. 1999/1) 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.

8. **Section 1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (12 December 1999)as amended by UNMIK Regulation No. 2000/59 (27 October 2000) (hereinafter UNMIK Regulation 2000/59) reads, in pertinent part:**

1.1 The law applicable in Kosovo shall be:

a. The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and b. The law in force in Kosovo on 22 March 1989....

1.3 In exercising their functions, all persons undertaking public duties or holding office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in [...] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950....

9. **UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders (25 August 2001)(hereinafter Regulation 2001/18) reads, in pertinent part:**

The Special Representative of the Secretary-General ...

Considering the principles set forth in the International Covenant for Civil and Political Rights and the European Convention for Human Rights,

Recognizing that there should be a mechanism for judicial review of detention, including extra-judicial detention,

Hereby promulgates the following:

Section 1: Establishment of a Detention Review Commission

A Detention Review Commission ("Commission") is established for the purpose of reviewing extra-judicial detentions based on executive orders.

Section 2: Composition of Detention Review Commission

2.1 The Commission shall be composed of three international members appointed by the Special Representative of the Secretary-General. At least two such members shall be judges in their respective home country...

Section 4: Proceedings of the Detention Review Commission

4.1 The Commission shall review extra-judicial detentions based on executive orders. A review may be initiated by the Commission on its own motion or upon the petition of a person detained on the basis of such an executive order or of his or her defence counsel.

4.2 In reviewing an extra-judicial detention based on an executive order, the Commission shall convene a hearing so that the detained person or his or her defence counsel and other appropriate persons, including the public prosecutor, investigating judge or relevant law enforcement authorities, may be heard

4.3 The proceedings of the Commission shall be in accordance with the present regulation and such rules of procedure as may be adopted by the Commission...

Section 5: Special measures for sensitive evidence, information and other materials

5.1 The Commission shall order special measures for sensitive evidence, information and other materials if their disclosure to the detained persons or his or her defence counsel would jeopardize the security of investigations or military operations or the life or safety of an injured party, witness, informant or their family members.

5.2 The Commission shall, where possible, summarize sensitive evidence, information or other materials in a manner which would not jeopardize the security of investigations or military operations or the life or safety of an injured party, witness, informant or their family members and provide the detained person or his or her defence counsel with such summary.

5.3 If the sensitive evidence, information or other materials cannot be provided in a summary form without jeopardizing the security of investigations or military operations or the life or safety of an injured party, witness, informant or their family members, the Commission shall order that such evidence, information or other materials be withheld from the detained person and/or his or her defence counsel and reviewed in an *in camera* hearing. In such a case, the Commission shall appoint a Special Counsel, to represent the interests of the detained person in the *in camera* hearing. The Special Counsel may not communicate with the detained person or his defence counsel on any matter connected with the sensitive evidence, information or other materials, except to seek specific information from the detained person or his defence counsel, in accordance with the rules of procedure.

Section 6: Decision of the Detention Review Commission

6.1 The Commission shall determine that an extra-judicial detention based on an executive order is justified where the Commission considers that there are reasonable grounds to suspect that a person has committed a criminal act, and

- a. His identity cannot be established or if other circumstances exist which suggest the strong possibility of flight; or
- b. There are reasonable grounds to suspect that he will destroy the traces of the criminal act or particular circumstances indicate that he will hinder the investigation by influencing witnesses, accomplices or persons who are concealing the criminal act or traces thereof; or
- c. Particular circumstances justify a fear that the criminal act will be repeated or an attempted criminal act will be completed or a threatened criminal act will be committed.

6.2 If the Commission decides that an extra-judicial detention based on an executive order is not justified, the executive order shall cease to have effect and the detained person shall be immediately released.

6.3 If the Commission decides that an extra-judicial detention based on an executive order is justified, the decision of the Commission shall be treated as a decision of a panel of the Supreme Court to order detention within the meaning of Article 197(2) of the applicable Law on Criminal Procedure. In such a case, the decision of the Commission shall specify the duration of detention, within the limits of Article 197(2).

Section 7: Finality of Decisions of the Detention Review Commission

Decisions of the Commission regarding special measures for sensitive evidence, information and other materials, as set forth in section 4, or regarding an extra-judicial detention based on an executive order, as set forth in section 5, shall not be subject to appeal.

Section 8: Implementation

The Special Representative of the Secretary-General may issue administrative directions for the implementation of the present regulation.

Section 9: Applicable Law

The present regulation shall supersede any provision in the applicable law that is inconsistent with it.

Section 10: Entry into Force

The present regulation shall enter into force on 25 August 2001 and shall remain in force for a period of three months.

10. 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 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.....

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....

BACKGROUND TO THE ANALYSIS

11. In his Special Report No. 3, the Ombudsperson found, *inter alia*, that any deprivation of liberty imposed on an individual under an Executive Order of the Special Representative of the Secretary General of the United Nations (SRSG) cannot be considered to be lawful in the sense of para. 1 of Article 5 of the European Convention on Human Rights and that the absence of judicial control over deprivations of liberty imposed under Executive Orders issued by the SRSG constitutes a violation of paras. 3 and 4 of Article 5 of the European Convention on Human Rights. The Ombudsperson concluded that deprivations of liberty imposed under Executive Orders do not conform with recognised international standards.

12. As noted above (see para. 2), to date the human rights violations identified by the Ombudsperson in Special Report No. 3 have not been remedied. He is issuing this Special Report No. 4 in order to clarify issues raised in the former Report in light of the apparent object and purpose of UNMIK Regulation 2001/18 to address a limited number of the concerns raised in Special Report No. 3.

13. The Ombudsperson recalls that deprivations of liberty imposed under Executive Orders are inherently unlawful in the sense of para. 1 of Article 5 (Special Report No. 3, paras. 9 - 16). The Ombudsperson observes that the premise of UNMIK Regulation 2001/18 is that no legal basis for such deprivations of liberty is required. The Ombudsperson considers that this fundamental flaw in the Regulation - the failure to address the unlawfulness of such deprivations of liberty - renders much of the following discussion moot. However, he also considers that an additional premise of the Regulation - that the institution of only very limited procedural protections is sufficient to bring the law and practice of deprivations of liberty under Executive Orders into conformity with recognised international standards - requires further examination.

Whether the Detention Review Commission provided for under UNMIK Regulation 2001/18 can be considered to be a court in the sense of para. 4 of Article 5 of the European Convention on Human Rights

14. It appears that UNMIK Regulation 2001/18 is intended to guarantee rights protected under para. 4 of Article 5 of the European Convention on Human Rights, which states:

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.

The Ombudsperson recalls that para. 4 of Article 5 of the Convention calls for both institutional and procedural guarantees for the achievement of the underlying purposes of Article 5 as a whole (See Special Report No. 3, paras. 17 - 21).

15. With respect to the institutional aspects of the guarantees provided for by para. 4 of Article 5, the Ombudsperson recalls the case-law of the European Court of Human Rights setting forth the characteristics of a 'court' conforming with the requirements of the Convention. The Ombudsperson further recalls that the constant case-law of the Court stresses the importance of independence, particularly from the executive, as one of the fundamental underlying principles of a 'court' (see, e.g. *Belilos v. Switzerland* judgement of 29 April 1988). This notion of independence also conforms with the democratic principles of the separation of powers and, in particular, respect for the rule of law. The Ombudsperson also recalls that respect for the rule of law demands that the executive not be above the law. As he has noted previously, the vesting of executive and legislative authority in one person, as has been done by UNMIK Regulation 1999/1 is inherently incompatible with the rule of law and hence with recognised international standards (see Special Report No. 1, para. 24). The Ombudsperson finally recalls that a 'court' in Convention terms must have the jurisdiction to determine all aspects of the case before it, that is issues of both fact and law, and to issue binding decisions that may not be altered by a non-judicial authority (*Van de Hurk v. Netherlands* judgement of 19 April 1994).

16. The Ombudsperson observes that Section 2.1 of UNMIK Regulation 2001/18 states:

The [Detention Review] Commission shall be composed of three international members appointed by the Special Representative of the Secretary-General.

Section 1 of the Regulation states:

A Detention Review Commission ('Commission') is established for the purpose of reviewing extra-judicial detentions based on executive orders.

17. The Ombudsperson observes that the above provisions of UNMIK Regulation 2001/18 make it clear that the SRSG, acting in his capacity as the legislature of Kosovo has promulgated a law guaranteeing the SRSG, acting in his capacity as the executive of Kosovo, control over a judicial process of fundamental importance. The Ombudsperson also observes that the Detention Review Commission called for under UNMIK Regulation 2001/18 will only have the jurisdiction to review an act that in essence is contrary to law, both for reasons described elsewhere, and due to the fact that each such act has been performed in contravention of the exercise of jurisdiction of a properly constituted and competent court. The Regulation thus substitutes a 'Commission' under substantial control of the executive whose act is being contested for a 'court' whose independence, impartiality and full jurisdiction has never been questioned. As noted elsewhere, the only ground posited for overriding the decisions of the competent court is that the executive disagreed with the court's decision (cf. Special Report No. 3 and Reports of 12 September 2001 in the cases of Cele Gashi, Avdi Behluli and Jusuf Veliu). These factors, taken separately or together, serve to thwart the independence of the judiciary with regard to the exercise of jurisdiction over deprivations of liberty, in

contravention not only of the applicable provisions of the European Convention on Human Rights, but democratic principles underlying the Convention as a whole.

Conclusion

18. The Ombudsperson concludes, therefore, that the body envisioned under UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders, cannot be considered to be a court in the sense of para. 4 of Article 5 of the European Convention on Human Rights.

Whether the procedures called for under UNMIK Regulation 2001/18 comply with the requirements of para. 4 of Article 5 of the European Convention on Human Rights

19. In addition to the requirement of para. 4 of Article 5 of the European Convention on Human Rights that an individual who has been deprived of his or her liberty is entitled to have the lawfulness of that deprivation of liberty determined by a court, the Ombudsperson recalls that the proceedings themselves must be of a judicial character. In major respects, these procedural requirements are manifestations of the principle of equality of arms that underlies all judicial proceedings governed by the Convention.

20. The Ombudsperson recalls that the implementation of the principle of equality of arms does not lie exclusively in the hands of the parties, but that the courts themselves have an affirmative obligation to implement the principle (see e.g. *Botten v Norway* judgement of 19 February 1996). The Ombudsperson further recalls the case-law of the European Court of Human Rights establishing the rule that a detainee and/or his or her legal counsel must be provided with sufficient information relevant to a determination about a deprivation of liberty to be able to contest a decision to detain (*Lietzow v. Germany* judgement of 13 February 2001). The Ombudsperson also recalls that the European Court of Human Rights has rejected Governmental arguments that an alleged risk of collusion between defence counsel and an accused can justify limiting their access to one another or to monitoring their communications, a principle that applies to other Governmental actions negatively affecting the conduct of the defence or ancillary matters such as detention decisions (*S v. Switzerland* judgement of 28 November 1991).

21. The procedures envisioned by UNMIK Regulation 2001/18 may be described as follows:

a) Prior to the availability of review by the Detention Review Commission, the following events will have transpired:

An individual will have been arrested and detained for a short period of time allowed under the relevant provisions of the Code of Criminal Procedure (24 to 72 hours);

Also in accordance with the relevant provisions of the Code of Criminal Procedure, the individual will have been brought before the competent court, which court will have reviewed any request by the responsible executive to detain the individual in light of the facts and law, and will have decided on the release of the individual;

The SRSG will have issued an Executive Order authorising the continued detention of the individual, thereby nullifying the decision of the competent court.

b) Review by the Detention Review Commission will be triggered by a request from a detainee or his counsel or will be undertaken on an *ex officio* basis by the Commission and will be conducted within the following frame:

The Commission will convene a hearing in which a wide range of persons, some of whose submissions should already have been heard by the competent court, are heard again, together with additional persons;

The SRSG will be permitted to introduce information withheld from the competent court of first instance, the detainee and the detainee's defence counsel, or provided to the latter two parties at the discretion and under the control of the executive only in connection with review by the Commission;

The Commission will affirm the Executive Order to detain the individual concerned on largely the same grounds reviewed by the competent court of first instance, and determined to be unfounded by that court of first instance.

22. The Ombudsperson observes that the scope of review of extra-judicial detention based on an Executive Order under Section 6.1 of UNMIK Regulation 2001/18 overlaps to a high degree the scope of review already ascribed to the regular courts exercising judicial control over deprivations of liberty falling within the purview of paras. 3 and 4 of Article 5. The Ombudsperson notes in this regard that there does not appear to exist any justification for excluding or overriding decisions taken by the regular courts, as provided for under UNMIK Regulation 2001/18. In particular, the Ombudsperson stresses that it is a normal function of a domestic court to review all facts and evidence related to a particular matter over which the court exercises jurisdiction. It is also normal for a court to review even sensitive or confidential information in this context and to respect professional ethical norms with regard to maintaining confidentiality of information falling within the purview of its review processes. There does not appear to be any evidence that the competent courts, and, in particular, the international panels of judges comprising the competent courts making initial decisions regarding detention, have conducted themselves in an improper manner with regard to decisions to detain or release anyone in Kosovo. Nor do there appear to be any legitimate grounds to presume that they will conduct themselves unprofessionally or inappropriately with regard to the review of sensitive information relevant to a decision to detain an individual on any of the grounds provided for under para. 1 of Article 5 of the European Convention on Human Rights.

23. The Ombudsperson observes that Section 5 of UNMIK Regulation 2001/18 is based on the same negative presumption about the detainee and defence counsel as is made about the courts throughout the Regulation. In this regard, the Ombudsperson further observes that the establishment of practices such as the summarising or withholding of relevant information from the individual whose fundamental right to liberty is at issue contravenes the established case-law of the European Court of Human Rights (see para. 20, *supra*). The Ombudsperson also observes that the appointment of a 'Special Counsel' whose role is 'to represent the interests of the detained person', but who is forbidden to communicate 'sensitive evidence, information or other materials, except to seek specific information from the detained person or his defence counsel' cannot be considered to guarantee the equality of arms that forms the bedrock of any proceeding related to deprivations of liberty.

Conclusion

24. The Ombudsperson concludes, therefore, that the procedures envisioned under UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders, do not meet the requirements of para. 4 of Article 5 of the European Convention on Human Rights.

REITERATION OF CONCLUSIONS

25. The Ombudsperson reiterates the conclusions he reached in Special Report No. 3:

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.

26. With respect to UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders (25 August 2001), the Ombudsperson concludes that the Detention Review Commission envisioned under UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders, cannot be considered to be a court in the sense of para. 4 of Article 5 of the European Convention on Human Rights;

that the procedures envisioned under UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders, do not meet the requirements of para. 4 of Article 5 of the European Convention on Human Rights.

RECOMMENDATIONS

27. The Ombudsperson reiterates his substantive recommendations and the deadlines suggested with regard to the implementation of those recommendations from Special Report No. 3, 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 undertake to comply with decisions on detention taken by the judicial panels convened in accordance with these recommendations;

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.

28. With respect to UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders (25 August 2001), the Ombudsperson considers that it does not constitute an adequate response to the above recommendations.

Marek Antoni Nowicki
Ombudsperson