



**OMBUDSPERSON INSTITUTION in KOSOVO  
INSTITUCIONI I OMBUDSPERSONIT në KOSOVË  
INSTITUCIJA OMBUDSPERSONA na KOSOVU**

## **SPECIAL REPORT No. 7**

### **ON THE COMPATIBILITY WITH RECOGNISED INTERNATIONAL STANDARDS**

**of**

**Certain Provisions of the Yugoslav Law on the Enforcement of Criminal Sentences  
(1977)**

**addressed to**

**Mr. Harri Holkeri  
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 5 May 2004:

has presented the following report to Mr. Harri Holkeri, 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 on general inquiries received by the Ombudsperson about the interpretation and application of certain provisions of the Yugoslav Law on the Enforcement of Criminal Sentences (hereinafter “the Law on the Enforcement of Criminal Sentences”), applicable in Kosovo pursuant to UNMIK Regulations 1999/24 and 2000/59 on the Law Applicable in Kosovo.
2. 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 on other sources of information.

## **SCOPE OF THE REPORT**

3. This Special Report examines the compatibility of certain provisions of the Law on the Enforcement of Criminal Sentences concerning the right to respect for correspondence of sentenced individuals with recognised international human rights standards, in particular those contained in Article 8 of the European Convention on Human Rights.

## **DISCLAIMER**

4. 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 the Law on the Enforcement of Criminal Sentences or to review any related or subsequent legal enactments for their compatibility with recognised international standards. The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or any related matters.

## **RELEVANT INSTRUMENTS**

5. United Nations Security Council Resolution 1244 (1999) (10 June 1999) reads, in pertinent part:

[...]

Article 11

The Security Council decides that the main responsibilities of the international civil presence will include [...] (j) protecting and promoting human rights [...].

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

1.1. All legislative and executive authority with respect to Kosovo [...] is vested in UNMIK and is exercised by the Special Representative of the Secretary General [...].

3. The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with [...] the present or any other regulation issued by UNMIK.

4. In the performance of the duties entrusted to the interim administration under United Nations Security Council resolution 1244 (1999), UNMIK will, as necessary, issue legislative acts in the form of the regulations. Such regulations will remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement, as provided for in United Nations Security Council resolution 1244 (1999). [...]

7. UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (12 December 1999), as amended by UNMIK Regulation 2000/59 (27 October 2000) 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 public office in Kosovo shall observe internationally recognised human rights standards, as reflected in particular in [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 [...]

8. The Law on the Enforcement of Criminal Sentences (SFRY Official Gazette No. 26, 30 June 1977) states, in pertinent part:

*(unofficial translation)*

[...]

Article 107

(1) The sentenced individual will have the right to correspond with close family members;

(2) For the purpose of this law, close family members will be the spouse, children, parents, brothers and sisters, foster children and foster parents of the sentenced individual;

(3) In circumstances where he considers it to be justified, the director of the institution may allow the sentenced individual to correspond with other persons;

(4) The sentenced individual may receive and send letters subject to the control of the management of the institution. [...]

#### Article 111

(1) For good behaviour and [a sentenced individual's] commitment to [his] work, the director of the institution or a person authorized by him may grant the following privileges to a sentenced individual:

The right to exchange letters with persons other than his family members [...]

(3) The conditions of permitting privileges, as well as the way in which use is made of the privileges, are determined by the institution's respective internal regulations. [...]

9. The European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (hereinafter "the European Convention on Human Rights" or "the Convention") states, in pertinent part:

[...]

#### Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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. [...]

### ANALYSIS

10. The Ombudsperson considers that Article 107 of the Law on the Enforcement of Criminal Sentences raises certain issues under Article 8, which reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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.
11. At the outset, the Ombudsperson notes that the Law on the Enforcement of Criminal Sentences is still the only legal instrument dealing with the rights of sentenced individuals. So far, no UNMIK Regulation has been issued in this field amending or changing its provisions. As Article 107 is not in conflict with any UNMIK Regulations, it thus still applies according Section 3 of UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo (see para. 6 *supra*).
  12. Under Article 107 of the Law on the Enforcement of Criminal Sentences, a sentenced individual may only correspond with close family members. Any correspondence with other persons is subject to the permission of the respective prison director, who may grant such permission where he considers it to be justified. At the same time, all such correspondence is subject to the control of the prison management.
  13. The Ombudsperson considers that this constitutes an “interference by a public authority” with every sentenced individual’s right to respect for his correspondence as guaranteed by paragraph 1 of Article 8. Such an interference will contravene Article 8 unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is “necessary in a democratic society” in order to achieve them (see the following judgments: *Silver and Others v. the United Kingdom*, 25 March 1983, *Campbell v. the United Kingdom*, 25 March 1992, *Calogero Diana v. Italy*, 15 November 1996, and *Petra v. Romania*, 23 September 1998).
  14. The Ombudsperson recalls the standards to be applied when determining whether a particular legal enactment can be considered to be “in accordance with law” within the meaning 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). At the same time, the expression “in accordance with the law” not only necessitates compliance with domestic law, but also relates to the quality of that law (see *Halford v. United Kingdom*, judgment of 25 June 1997 and *Radaj v. Poland* judgment of 28 February 2003). In particular, such a law must be sufficiently accessible and precise to avoid all risk of arbitrariness on the part of governmental authorities (*Rotaru v. Romania*, judgment of 4 May 2000).

15. When examining whether Article 107 of the Law on the Enforcement of Criminal Sentences may be considered to be “in accordance with the law”, the Ombudsperson notes initially that legal provisions limiting the rights of sentenced individuals to correspondence should clearly indicate the scope and manner of the exercise of discretion conferred on the public authorities (see the *Silver and Others* judgment previously cited). This is necessary in order to provide the affected individuals with the minimum level of protection guaranteed by the principles of the rule of law in a democratic society (see *Domenichini v. Italy*, judgment of 15 November 1996 and *Niedbala v. Poland*, judgment of 4 July 2000).
16. In the present case, the Ombudsperson notes that Article 107 of the Law on the Enforcement of Criminal Sentences allows for an automatic censorship of all letters that a sentenced individual receives and sends. This same Article only permits a sentenced individual to correspond with close family members. According to Article 111, this right may only be extended following a sentenced individual’s good behaviour and commitment to his work.
17. The right of sentenced individuals to correspond with the outside world is thus severely limited. With regard to the censorship of incoming and outgoing mail, there is also no distinction between different categories of persons with whom a sentenced individual may correspond. Moreover, neither Article 107 nor other Articles in the same law contain any principles governing the exercise of this censorship. In particular, there is no specification on the manner and time-frame within which it should be effected. Since the censorship is automatic, the prison authorities are not obliged to give reasoned decisions explaining why it has been effected.
18. At the same time, the permission for a sentenced individual to correspond with persons who are not family members lies entirely within the prison director’s discretion. He or she does not have to give any reasons for the choice to allow a sentenced individual to correspond with certain persons and not with others. Nor does Article 107 differentiate in which circumstances a limitation of persons is necessary, nor does it reveal the extent of such a limitation. Instead, the assessment of the situation is left entirely up to the prison director. In the same vein, it is only the prison director who may determine whether the sentenced individual demonstrated good behaviour and commitment to his work, which are the requirements for receiving certain privileges with regard to correspondence with the outside world (Article 111).
19. The Ombudsperson reiterates that while a law which confers discretion must indicate the scope of that discretion, it is impossible to attain absolute certainty in the framing of the law, and the likely outcome of any search for certainty would be excessive rigidity (see, among many other authorities, the *Silver and Others* judgment previously cited). In the present situation, however, Article 107 does not indicate with reasonable clarity the scope and manner of the censorship of the correspondence of sentenced individuals. With regard to the permission to

correspond with persons not belonging to the family of the respective sentenced individual, Articles 107 and 111 leave the prison authorities, in particular the prison director, too much latitude (see the above-mentioned *Domenichini* judgment and the *Niedbala* judgment).

## CONCLUSION

20. It follows from the above that the interference of the public authorities with the right of each sentenced individual to respect for his correspondence is not “in accordance with law” and thus in violation of each sentenced individual’s right to respect for his correspondence under Article 8 of the European Convention on Human Rights.

## RECOMMENDATIONS

21. The Ombudsperson recommends that, no later than **26 May 2004**, the Special Representative of the Secretary-General, should:
- disseminate this Report to all judges, prosecutors and prison administrators in Kosovo;
  - ensure that the Law on the Enforcement of Criminal Sentences be amended in accordance with the findings in this Report;
  - on the date of its entry into force, ensure the dissemination in Kosovo, through all appropriate channels, of the amended Law on the Enforcement of Criminal Sentences in all languages widely used in Kosovo, in accordance with Section 5.2 of UNMIK Regulation 1999/01;
  - 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