OMBUDSPERSON INSTITUTION in KOSOVO

SPECIAL REPORT No. 9

ON THE COMPATIBILITY WITH RECOGNISED INTERNATIONAL STANDARDS

of

certain aspects of the detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity

addressed to

Mr. Charles Brayshaw
Acting 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 **29 June 2004**,

has issued the following report:

BASES FOR THE SPECIAL REPORT

1. This Special Report is based on general inquiries conducted by the Ombudsperson into the lawfulness of certain aspects of the detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity.

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 the detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity with recognised international human rights standards, in particular those contained in Article 5 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the European Convention on Human Rights" or "the Convention"), before and after the entry into force of the Provisional Criminal Code of Kosovo (hereinafter "the PCCK") on 6 April 2004.

BACKGROUND

4. Since the conflict in Kosovo in 1999, the UNMIK administration has been responsible for all aspects of civil administration. For the last few years until 6 April 2004, courts have been ordering the detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity in the Prishtinë/Priština University Mental Health Clinic (hereinafter "the Mental Health Clinic"), if the courts had established that these persons posed a danger for their environment and that their treatment in such institutions was necessary for the sake of removing this danger. The legal bases for such orders were the Yugoslav Criminal Code of 1977 (hereinafter "the Criminal Code" and the Yugoslav Law on the Enforcement of Criminal Sentences, also of 1977 (hereinafter "the Law on the Enforcement of Sentences"). Since the entry into force of the PCCK on 6 April 2004, the old Yugoslav laws are no longer applicable. At the same time, the PCCK itself does not contain an adequate legal basis for ordering the placement of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity in mental health institutions. According to Article 76 of the PCCK, the procedures for ordering mandatory psychiatric treatment shall be provided for separately by law. Such a law has, however, not yet been promulgated.

5. According to information received from the Director of the UNMIK Department of Justice in June 2004, local judges have thereupon continued to base their detention orders on the above-mentioned Yugoslav laws, even after the entry into force of the PCCK had rendered them inapplicable. These judges face a serious dilemma, as an application of the new law would force them to set free mentally incompetent

criminal offenders or to order the placement of criminal offenders with diminished mental capacity in ordinary prisons, both of which could have unforeseeable consequences. By letter of 12 May 2004, the Director of the Lipjan/Lipljan Detention Centre informed representatives of the Ombudsperson Institution that, as there were far more such court orders than places available in the Mental Health Clinic, a considerable number of criminal offenders were first detained in ordinary prisons, where their names were added to lists maintained by the directorate of the each detention centre. The detention centres were in regular contact with the Mental Health Clinic and if a vacancy should arise, the individual at the top of the prison's list were transferred to the Mental Health Clinic. According to information received towards the end of June 2004, the time spent by these individuals in ordinary prisons in the meantime varied, but in some cases amounted to near to ten months at a stretch. The competent Department of Justice is aware of this problem, but considers that the Ministry of Health is responsible for establishing adequate facilities to accommodate mentally incompetent criminal offenders or criminal offenders with diminished mental capacity. So far, the Ministry of Health appears to have no plan to establish such facilities in order to reduce the amount of time that these persons need to stay in ordinary prisons without adequate psychiatric or psychological care.

DISCLAIMER

6. 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 above law and practice or to review any thereto related or subsequent 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

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

Article 11

The Security Council decides that the main responsibilities of the international civil presence will include [...] (b) Performing basic civilian administrative functions where and as long as required [...] (j) Protecting and promoting human rights [...].

8. UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (12 December 1999) as amended by UNMIK Regulation 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 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 […]

9. The Yugoslav Criminal Code (*SFRY Official Gazette No. 36, 15 July 1977*) states, in pertinent part:

[unofficial translation]

[…]

Types of security measures

Article 61

The following security measures may be imposed on persons who have committed criminal acts:
1) mandatory psychiatric treatment and custody in a medical institution
2) mandatory psychiatric treatment outside prison
[…]

Imposing security measures

Article 62

(1) The court may impose one or more security measures on a person who has committed a criminal act when grounds exist for their application pursuant to the present code.

(2) Mandatory psychiatric treatment and custody in a health institution, and mandatory psychiatric treatment outside prison shall be imposed independently on a mentally incompetent perpetrator of a crime. […]

Mandatory psychiatric treatment and custody in a medical institution

Article 63

(1) The court shall impose mandatory psychiatric treatment and custody in a medical institution on an offender who has committed a criminal act while in the state of mental incompetence or substantially diminished responsibility, if it

establishes that the offender poses a danger to the environment and that his treatment and custody in such an institution is necessary for the sake of removing the danger.

(2) The court shall revoke the measure referred to in paragraph 1 of this article upon a determination that further detention in the institution is not necessary. […]

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

[unofficial translation]

[...]

Article 229

(1) A security measure of mandatory psychiatric treatment and confinement in a mental institution shall be executed in a psychiatric correctional facility or other mental institution ordered by the court that ordered the security measure in the first instance.

(2) The choice of mental institution shall be dictated by the danger of a convicted person to his surroundings.

(3) If a security measure of mandatory psychiatric treatment and confinement in a mental institution is ordered together with a prison sentence, a convicted person shall first be sent to the mental institution.

[...]

11. The PCCK, promulgated by UNMIK Regulation 2003/25 (6 July 2003), states, in pertinent part:

[…]

Special Provisions on Measures of Mandatory Psychiatric Treatment

Article 76

The procedures of ordering measure of mandatory psychiatric treatment of a perpetrator who is mentally incompetent or who has diminished mental capacity shall be provided for separately by law. […]

12. The European Convention on Human Rights (4 November 1950) states, in pertinent part:

[...]

Article 5

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 following his conviction by a competent court.
[…]

(e) the lawful detention […] of persons of unsound mind […]

ANALYSIS

13. The Ombudsperson considers that the detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity raises certain issues under Article 5 para. 1, which, in pertinent part, reads:

"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 following his conviction by a competent court;

[…]

(e) the lawful detention […] of persons of unsound mind […]."

14. The Ombudsperson goes on to stress the difference between mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity. In the case of the former, criminal courts have considered that these criminal offenders are not responsible for their actions based on their mental incompetence at the time when the criminal act was committed. Based on this, but also on the fact that such individuals are considered to pose a danger for their environment, courts have ordered that these persons be placed in a mental health institution. As these individuals have not been convicted by a court due to their mental incompetence, these cases fall to be examined under Article 5 para. 1 (e) of the Convention.

15. Criminal offenders with diminished mental capacity, on the other hand, are considered to have been criminally responsible when committing a criminal act by the respective courts and have thus been sentenced to imprisonment in ordinary prisons. However, due to the danger they may pose to their environment at the time of conviction, courts have first ordered their placement in a mental health institution for mandatory psychiatric treatment. As the detention of these persons follows a

conviction for a criminal offence, but is also based on the fact that their mental capacity is diminished, these cases fall to be examined under Article 5 para. 1 (a) and (e) of the Convention.

The detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity under the law applicable before 6 April 2004

16. It must be established whether the initial detention orders regarding the placement of both groups of persons in mental health institutions were "in accordance with a procedure prescribed by law" and "lawful" within the meaning of Article 5 para. 1 of the Convention.

17. The Ombudsperson notes that according to Articles 61 – 63 of the Yugoslav Criminal Code, courts could impose mandatory psychiatric treatment in cases where they considered criminal offenders to be mentally incompetent or of diminished mental capacity, if it established that these persons posed a danger to the environment and that their treatment and custody was necessary for the sake of removing this danger. The Law on the Enforcement of Criminal Sentences then dealt with the execution of such sentences and security measures.

18. Next, it must be examined whether the pre-placement of these persons in ordinary prisons while awaiting their admission to the Mental Health Clinic was covered by the above legal provisions.

19. In this context, the Ombudsperson notes that Article 229 of the Law on the Execution of Sentences, while providing for the placement of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity in mental health institutions, did not expressly envisage their pre-placement in ordinary prisons.

20. In cases where a convicted person was sentenced to both prison and mandatory psychiatric treatment, Article 229 was even more explicit and required that such individuals should first be sent to a mental health institution, thereby leaving no room for pre-placement in an ordinary prison.

21. However, for the purposes of Article 5 of the Convention, the lawfulness under domestic law of the placement of both mentally incompetent persons and of criminal offenders with diminished mental capacity in ordinary prisons is not in itself decisive. It must also be established whether the pre-placement detention was in conformity with the purpose of Article 5 para. 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Brand v. The Netherlands* and *Morsink v. The Netherlands*, both judgments of 11 May 2004, as well as *Witold Litwa v. Poland*, judgment of 4 April 2000).

22. The Ombudsperson notes that in the past, the European Court of Human Rights has held that there must be some relationship between the ground of permitted

deprivation of liberty relied on and the place and conditions of detention and that, in principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of Article 5 para. 1 if effected in a hospital, clinic or other appropriate institution (see *Hutchison Reid v. UK*, judgment of 20 February 2003, with further references).

23. At the same time, it would be unrealistic and too rigid an approach to expect the competent authorities to ensure that a place is immediately available in the selected mental health institution, in particular bearing in mind the fact that the restructuring process in Kosovo following the 1999 conflict has still not been completed. In this context, a certain friction between available and needed capacity in a mental health institution is inevitable and must be regarded as acceptable (see the *Brand v. The Netherlands* and *Morsink v. The Netherlands* judgments cited above).

24. Consequently, a reasonable balance must be struck between the competing interests involved. On this point, the Ombudsperson, recalling the importance of Article 5 in the Convention system, notes that in striking this balance, particular weight should be given to the right to liberty of the persons concerned. A significant delay in admission to a mental health institution and thus the beginning of adequate psychiatric and psychological treatment for both groups of persons will obviously affect the prospect of this treatment's success (see also the *Brand v. The Netherlands* and *Morsink v. The Netherlands* judgments cited above). Depending on how long the pre-placement detention in ordinary prisons lasts, this detention bears the risk of aggravating the detained individuals' mental condition. The entire purpose of ordering their placement in a mental health institution may thus be lost.

25. Bearing in mind that the competent UNMIK and PISG authorities have been aware of the general structural lack of capacity in the mental health institutions in Kosovo for a considerable amount of time and that there is thus no indication that these authorities were faced with an exceptional and unforeseen situation, the Ombudsperson is of the opinion that the instant substantial delays in the admission of the above persons to mental health institutions (see para. 5 *supra*) cannot be regarded as acceptable (see the *Brand v. The Netherlands* and the *Morsink v. The Netherlands* judgments cited above). At the same time, authorities should not be allowed to rely on practical problems as a sufficient legal excuse for failing to comply with the requirements of the Convention, as this brings with it a considerable risk of arbitrariness. To hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the persons concerned and would thus impair the very essence of this right protected by Article 5 para. 1 of the Convention.

Conclusion

26. It follows that under previously applicable law, the prolonged detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental

capacity in ordinary prisons while awaiting their admission to mental health institutions was in violation of Article 5 para. 1 of the Convention.

The detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity under the now applicable PCCK

27. Following the entry into force of the PCCK, the Ombudsperson notes that both the Yugoslav Criminal Code and the relevant provisions of the Law on the Execution of Sentences are now no longer applicable to such matters.

28. When examining whether the detention of mentally incompetent criminal offenders and of criminal offenders with diminished mental capacity may still be considered to be "lawful" under Article 5 para. 1 of the Convention, the Ombudsperson recalls that Article 76 refers to a separate law for "the procedures of ordering measures of mandatory psychiatric treatment of a perpetrator who is mentally incompetent or who has diminished mental capacity". However, such a law has so far not been adopted or promulgated yet.

Conclusion

29. This creates a situation in which the applicable law does not provide an adequate legal basis for placing mentally incompetent criminal offenders or criminal offenders with diminished mental capacity in an appropriate mental health institution. The placement of such categories of criminal offenders in such an institution or in any other place including an ordinary prison is thus not "lawful" and thus constitutes a violation of these persons' right to liberty under Article 5 para. 1 of the Convention.

RECOMMENDATIONS

30. The Ombudsperson recommends that the Special Representative of the Secretary-General, should:

- ensure that an appropriate law concerning the detention of mentally incompetent persons and of criminal offenders with diminished mental capacity be adopted and promulgated **immediately**;

- no later than **18 August 2004:**

    - ensure that UNMIK, together with the Ministry of Health, do its utmost to find a solution that will enable the above categories of persons to receive the necessary and required psychiatric treatment in appropriate mental health institutions;
    - disseminate this Report to all courts in Kosovo;

- no later than **31 August 2004**, 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