

OMBUDSPERSON INSTITUTION in KOSOVO

SPECIAL REPORT No. 5

On Certain Aspects

of

UNMIK Regulation No. 2001/17

on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 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 29 October, 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 7 September 2001, asking the Ombudsperson to provide his opinion and recommendations concerning the compatibility of certain provisions of UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001)(hereinafter UNMIK Regulation 2001/17) with recognized international human rights standards. This Report is also based in part on other sources of information.

BACKGROUND TO THE REPORT

2. UNMIK Regulation 2001/17 establishes a regime under which UNMIK officials may refuse to permit the registration of contracts for the sale of residential property located in certain geographical areas in Kosovo. The apparent underlying purpose of the Regulation is to control the sale of private property where the property is located in areas with a predominantly ethnic minority population.

On 19 October 2001, the Special Representative of the Secretary General (hereinafter SRSG) issued Administrative Direction 2001/16 Implementing UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo. This Direction, which designates the specific geographical areas where contracts for the sale of residential property are to be registered with the Municipal Administrator prior to court verification, has no direct bearing on the findings in this Report.

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 2001/17 or to review other provisions of UNMIK Regulation

2001/17 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. Para. 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; and ... (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo....

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

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....

6. UNMIK Regulation No. 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property (13 October 1999) (hereinafter UNMIK Regulation 1999/10) reads, in pertinent part:

For the purpose of repealing certain legislation that is discriminatory in nature and that is contrary to international human rights standards....

Section 1: Repeal of Certain Legislation

The following laws ... are repealed in Kosovo:

The Law on Changes and Supplements on the Limitations of Real Estate Transactions (Official Gazette of Republic of Serbia, 22/91 of 18 April 1991)...

7. UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001)(hereinafter UNMIK Regulation 2001/17 or the Regulation) reads, in pertinent part:

The Special Representative of the Secretary General

For the purpose of ensuring a safe and secure environment, sustainable living conditions for all communities in Kosovo, and the right to return of all refugees and displaced persons to their homes in Kosovo,

For the purpose of monitoring the sale of residential property in specific geographical areas of Kosovo,

Hereby promulgates the following:

Section 1: Designation of Specific Geographical Areas

1.1 The Special Representative of the Secretary-General (hereinafter "the SRSG") may, after consultations with the Municipal Administrator, designate specific geographical areas within Kosovo where all contracts for the sale of residential property located in the designated area shall be registered with the Municipal Administrator prior to court verification.

1.2 In designating the specific geographical areas, the SRSG shall take into consideration the recommendation of the Municipal Administrator which shall be based on the following criteria:

- (a) security concerns arising from the sale of minority-owned property;
- (b) evidence of an existing pattern of systematic sales of minority-owned property at prices which are unrealistic; and
- (c) sale of residential property in areas where property rights of minority communities are of special concern.

Section 2: Registration of Contracts for the Sale of Residential Property

2.1 Contracts for the sale of residential property located in areas designated pursuant to section 1.1 shall be registered with the relevant Municipal Administrator....

2.3 The Municipal Administrator shall review the property-related documentation and may demand an explanation regarding the sale of the property and its intended future use. The Municipal Administrator is authorized to request the purchaser to establish the source of the funds for the purchase of the property in question....

Section 3: Refusal of Registration

3.1 Following examination of the documentation and explanations provided pursuant to section 2.3, the Municipal Administrator may ... refuse to register the contract for the sale of the residential property if he/she has reasonable grounds to believe that:

- (a) the transaction is directly or indirectly carried out or fostered by an organization or structure with the aim to systematically buy minority-owned properties in order to change the ethnic balance within the designated area;
- (b) the transaction was carried out under duress;
- (c) the sale price of the property in question is unrealistic;
- (d) that the source of the funds for the purchase of the property is questionable and the bona fide nature of the transaction is not established; or
- (e) the transaction is objectively deemed, on the basis of reports of law enforcement authorities, to affect the security situation in a designated area in a way that would be of serious detriment to other minority owners of residential property in that area.

Section 11: Implementation

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

Section 12: Applicable Law

The present regulation shall, for the time it is in effect, supersede any provision in the applicable law, which is inconsistent with it.

8. 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:

Article 8 reads, in pertinent part:

1. Everyone has the right to respect for his private and family life [and] 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 14 reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... national or social origin, association with a national minority, property ... or other status.

Article 18 reads:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

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

Article 2 of Protocol No. 4 to the European Convention on Human Rights reads, in pertinent part:

1. Everyone lawfully within the territory of a State shall, within that territory, have the ... freedom to choose his residence....

3. No restrictions shall be placed on the exercise of [this] right other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime ... or for the protection of the rights and freedoms of others.

4. The right set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

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 (see paras. 10 – 20 of 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, dated 26 April 2001 (hereinafter Special Report No. 1)). The following analysis is grounded in large part on these principles.

In this regard, the Ombudsperson reiterates in particular that no state of emergency in the sense of Article 15 of the Convention currently exists in Kosovo.

The compatibility of UNMIK Regulation 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo with the 'lawfulness' requirement of the European Convention on Human Rights

10. The Ombudsperson has been called upon to examine whether UNMIK Regulation 2001/17 can be considered to be 'in accordance with law' in the sense of the European Convention on Human Rights. The Ombudsperson recalls the standards governing such review, as summarised in Special Report No. 1 at paras. 11 – 14, include the following elements: accessibility, foreseeability, protection of the individual against arbitrary governmental conduct, and availability of domestic judicial interpretation of the legal enactment at issue. The Ombudsperson also recalls that 'law' in the sense of the Convention encompasses all types of law, including sub-legal acts such as administrative instructions. 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).

11. The Ombudsperson observes that several of the standard-setting provisions of UNMIK Regulation 2001/17 list extremely vague criteria that governmental authorities may invoke to restrict, *inter alia*, the rights to property, respect for the home, and respect for private life. The terms 'unrealistic prices', 'special concern', 'explanation of the sale' are but a few examples of these criteria, whose scope and content are not elaborated, and whose meaning and applicability must therefore remain elusive to the individuals whose rights are affected. The criteria therefore cannot be considered to meet the standards of accessibility and foreseeability dictated by the Convention. Nor does the Regulation provide sufficient protection of the individual against arbitrary decisions by the governmental authorities charged with its implementation.

12. With regard to another aspect of the 'lawfulness' of UNMIK Regulation 2001/17, the Ombudsperson observes that the Regulation occupies a unique place in the legal order in Kosovo. Section 12 of the Regulation states:

The present regulation shall, for the time it is in effect, supersede any provision in the applicable law, (sic) which is inconsistent with it.

From this provision it appears that UNMIK Regulation 2001/17 is intended to have a limited but indeterminate life span. During this indeterminate life span, Section 12 dictates that the Regulation take precedence over all other applicable law with which it is inconsistent. As will be elaborated on below, the effect of this provision is to override domestic contract law, civil procedure law, administrative procedure law, and any UNMIK Regulation touching upon the fundamental rights with which the Regulation is itself incompatible, including the Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK Regulation 2001/9) and UNMIK Regulation 2000/59 on the Law Applicable in Kosovo. In this regard, the Ombudsperson reiterates the concerns and findings of Special Report No. 2 on Certain Aspects of UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (27 October 2000) of 30 May 2001 which remain relevant to the instant discussion.

Conclusion

13. The Ombudsperson is therefore of the opinion that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo is not 'in accordance with law' in the sense of the European Convention on Human Rights.

Governmental restrictions on rights: general principles

14. In light of the finding of the Ombudsperson that UNMIK Regulation 2001/17 cannot be considered to be 'in accordance with law' in the sense of the European Convention on Human Rights, it is not absolutely essential for the Ombudsperson to address other aspects of the conformity of the Regulation with recognised international standards. However, the Ombudsperson considers that such a review may serve to clarify the nature and scope of those standards in connection with the parameters of permissible restrictions on rights guaranteed under Article 8 of the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 to the Convention.

Nature of a 'democratic society' in the sense of the Convention

15. The Ombudsperson notes that each of the aforementioned Articles of the Convention permits a government to restrict the exercise of a protected right when the restriction imposed can be considered to be 'necessary in a democratic society' for one or more of the aims set forth in the relevant Article. In this context, the Ombudsperson recalls that the European Court of Human Rights has described the notion of a 'democratic society' in the sense of the Convention to encompass the precepts of pluralism, broad-mindedness and tolerance (see, e.g. *Handyside v. United Kingdom* judgement of 7 December 1976). Where the effect of governmental actions restricting the exercise of rights is to militate against these democratic values, those actions will not be permissible under the terms of the Convention.

16. The Ombudsperson observes that the prohibition of the sale of residential property located in an ethnic minority community by a member of an ethnic minority to a member of an ethnic majority contravenes any of the principles underlying the notion of a 'democratic society' in Europe. Indeed, antipathy to the perpetuation of ethnic ghettos has been one of the foundations of international human rights at least since World War II, including the development of the legal and political normative canon prohibiting discrimination, up to and including the anti-apartheid movement. The Ombudsperson further observes that, even assuming that restrictions on the sale and purchase of residential property on an ethnic basis can ever be an appropriate mechanism for the achievement of a public policy goal, should that public policy goal relate in any way to enhancing democratic values the restrictions should apply to minority properties located in majority areas, in order to encourage integration. Finally, the Ombudsperson observes that whatever grounds a government may allege as the justification for segregation, the essence of segregation is that it is achieved through the diminution of the individual into an object of that policy.

Proportionality of restrictions on rights to legitimate governmental aims

17. The Ombudsperson recalls that any interference by a public authority with a protected right must be for justifiable reasons and to achieve a legitimate aim specified in the relevant Article of the Convention. 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. The Ombudsperson recalls that the European Court of Human Rights has held that when striking this balance the principle of proportionality must apply (*Stran Greek Refineries and Stratis Andreadis v. Greece* judgment of 9 December 1994, Series A No. 301-B, p. 87, para. 69). Two aspects of the principle are of particular relevance to an examination of UNMIK Regulation 2001/17, the 'disproportionate burden' test and the 'least restrictive means' test.

18. With respect to the first of these tests, the Ombudsperson notes that for a governmental restriction on the exercise or enjoyment of a right to meet the requirements of the European Convention on Human Rights, that restriction may not place a disproportionate burden on the individual affected (*Sporrong and Lonnroth v. Sweden* judgement of 23 September 1982).

19. The Ombudsperson observes that UNMIK Regulation 2001/17 institutes a system permitting UNMIK to deprive individuals of their private property by prohibiting its alienation and negatively to affect other guaranteed rights, all without providing either for compensation or for any other remedy. The individuals thus affected are forced to bear the entire burden of the implementation of a governmental policy by being the uncompensated agents for its fulfilment. The weight of this burden cannot be considered to be proportionate to any legitimate aim.

Least restrictive means to limit enjoyment of rights:

20. The Ombudsperson recalls the constant case-law of the Convention holding that when limiting the exercise of rights, a government must impose the least restrictive means to achieve a legitimate end. In the *Hatton and others v. United Kingdom* judgement of 2 October 2001, the Court stated:

... [I]n striking the required balance, States must have regard to the whole range of material considerations.... It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best solution which will, in reality, strike the right balance should precede the relevant project.

21. Even assuming *arguendo*, that the maintenance of communities populated exclusively by members of ethnic minorities can be considered to be a legitimate governmental aim, the Ombudsperson observes that UNMIK has alternative means at its disposal to achieve such objectives. For example, a government may exercise its right of eminent domain to expropriate property in the public interest, in this instance an alleged governmental interest in providing accommodation in certain geographic locations to members of ethnic minorities. A government may also institute legislation under which it may exercise a right of prior purchase of property or a right of pre-emption to purchase a property even after a sale has been concluded. A government wishing to encourage individuals to reside in certain areas may also create inducements to live in those areas through the introduction of tax advantages or other incentives. With respect to 'creating sustainable living conditions', a government may even require professionals, for example medical or legal professionals, to work for at least some period of time in certain communities needing particular services. With respect to the 'intended future use' of real property, public land use or zoning plans are the normal means for making such determinations.

22. The Ombudsperson also observes that UNMIK Regulation 2001/17 posits several grounds for restrictions on rights that fall within the purview of other domestic legal regimes with developed doctrine and procedures for addressing the matters at issue. For example, civil law governing contracts is the proper channel through which such claims as duress, artificially low prices, or other similar claims should be adjudicated. And criminal law is the normal context in which a government addresses any concerns it might have about the source of an individual's wealth.

23. The Ombudsperson notes that there appears to have been no consideration given to alternative means to achieving the aims set forth in UNMIK Regulation 2001/17 by the drafters of the Regulation.

Conclusion

24. The Ombudsperson is of the opinion, therefore, that the restrictions on guaranteed rights permitted by UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) cannot be considered to be 'necessary in a democratic society' for legitimate governmental aims.

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

25. The Ombudsperson has been called upon to examine whether UNMIK Regulation 2001/17 can be considered to be in conformity with the requirements of Article 1 of Protocol No. 1 to the European Convention on Human Rights, which states, in so far as relevant:

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

26. The Ombudsperson recalls the case-law of the European Court of Human Rights with respect to the right to peaceful enjoyment of possessions, as canvassed, *inter alia*, in paras. 31-33, 35, 36 and 39 of Special Report No. 1. The Ombudsperson further recalls the principles governing restrictions on rights, including the right to property, and his findings in this regard, set out at paras. 10 – 24, *supra*.

27. The Ombudsperson observes that UNMIK Regulation 2001/17 establishes principles for individuals to be effectively deprived of their property but makes no provision for compensation. The Ombudsperson has previously pointed out that less restrictive means could be introduced to achieve whatever governmental objectives may be considered to be legitimate under the Regulation (see e.g. para. 21, *supra*). However, these less restrictive means would require the expenditure of public funds. In the context of respect for the human rights being contravened by UNMIK Regulation 2001/17, the Ombudsperson observes that the basic premise of the Regulation seems to be to ensure that UNMIK will neither have any financial outlay nor accrue any financial obligations under the Regulation – individuals owning property in Kosovo will bear the entire financial burden of its implementation. The resulting constraints on the rights of individuals to order their lives in their own best interests can hardly be seen to conform with recognised international human rights standards.

28. Finally, the Ombudsperson is concerned about the troubling expansion of governmental arguments that ‘security’ interests require the International Civil Administration to deprive individuals of their property without compensation in yet another context in Kosovo. In Special Report No. 1, the Ombudsperson found that takings of property without compensation constituted violations of the same rights addressed in the current Report even when those takings were allegedly for military purposes in the context of United Nations Security Council Resolution 1244. Where international law requires that individuals receive compensation for governmental deprivations of property even in an arguable ‘emergency’ context, the Ombudsperson cannot see that compensation should not be required where a governmental taking of property is for civil, and even social engineering, purposes. The Ombudsperson notes, in this context, that UNMIK Regulation 2001/17 posits no arguable need of either the international civil or military presences in Kosovo actually to use the properties at issue in the Regulation.

Conclusion

29. The Ombudsperson is, therefore, of the opinion that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) 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 private and family life and for the home under Article 8 of the European Convention on Human Rights

30. UNMIK Regulation 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) provides for the imposition by governmental authorities of limitations on the rights of individuals to sell their residential property. The rights thus affected fall within the purview of Article 8 of the European Convention on Human Rights, which states, in so far as relevant:

1. Everyone has the right to respect for his private and family life [and] 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.

31. At the outset, the Ombudsperson recalls the case-law of the European Court of Human Rights delineating the notion of the ‘right to respect’ under Article 8. The Court has held that the right to respect encompasses first and foremost the right of the individual to live his or her daily life and to

develop relationships with other persons without the state's monitoring, controlling or otherwise interfering with his or her activities (*Airey v Ireland* judgement of 9 October 1979). This obligation of the State to leave the individual alone reflects the principle that the individual is the subject of the law and not the object of governmental policy. It also reflects the principle that it is within the discretion and control of the individual to exercise his or her rights and not for the state to dictate the means by which he or she should do so.

32. 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). In this regard, the Ombudsperson further 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). However, the Ombudsperson notes that the threshold determination of what constitutes a 'home' is vested in the individual, who is entitled by both law and common sense to change the location of his or her home without undue interference by the State.

33. The Ombudsperson has set out above (paras. 25 - 29) the general principles that apply to a determination 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).

34. In this context, the Ombudsperson also observes that for the past several years Kosovo has seen high levels of violence and displacement, seriously disrupting individual lives as well as the social order. The Ombudsperson further observes that an individual who may have lost members of his or her family to violence may be in a particularly vulnerable psychological position. In such circumstances, for a governmental authority to invoke any of the grounds listed in UNMIK Regulation 2001/17 to refuse to allow such an individual to sell his or her home in order to have sufficient resources to be able to relocate away from the site of personal tragedy may be considered to constitute at least a violation of the right to private and family life if not inhuman or degrading treatment. In any event, no such governmental action can be considered to be proportionate to any legitimate aim.

Conclusion

35. The Ombudsperson is, therefore, of the opinion that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) is incompatible with the right to respect for private and family life and for the home guaranteed by Article 8 of the European Convention on Human Rights.

The right to choose one's place of residence: Article 2 of Protocol No. 4 to the European Convention on Human Rights

36. UNMIK Regulation 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) provides for the imposition by governmental authorities of limitations on the rights of individuals to sell their residential property. Given that in the majority of instances, 'residential property' will constitute one's primary residence, the rights thus affected by the Regulation fall within the purview of Article 2 of Protocol No. 4 to the European Convention on Human Rights, which states, in so far as relevant:

1. Everyone lawfully within the territory of a State shall, within that territory, have the ... freedom to choose his residence....

3. No restrictions shall be placed on the exercise of [this] right other than such as are in accordance with law and are necessary in a democratic society in the interests of national

security or public safety, for the maintenance of *ordre public*, for the prevention of crime ... or for the protection of the rights and freedoms of others.

4. The right set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

37. The Ombudsperson observes that his previous findings with regard to Article 1 of Protocol No. 1 to the Convention and Article 8 of the Convention itself apply also to the above Article. In this respect, the Ombudsperson further observes that the imposition of conditions on members of ethnic minorities currently domiciled on the territory that prevent them from choosing their place of residence, alienating their property, and relocating their homes cannot be considered proportional.

Conclusion

38. The Ombudsperson is therefore of the opinion that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) is incompatible with the right to choose one's place of residence guaranteed by Article 2 of Protocol No. 4 of the European Convention on Human Rights.

The prohibition against discrimination: Article 14 of the European Convention on Human Rights

39. The Ombudsperson is called upon to examine whether UNMIK Regulation 2001/17 conforms to the prohibition against discrimination guaranteed under Article 14 of the European Convention on Human Rights, which states in so far as relevant:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination, on any ground such as ... national or social origin, association with a national minority... or other status.

40. The Ombudsperson observes that, to the best of his knowledge, no State adhering to the European Convention on Human Rights has ever instituted any governmental program aimed at the creation or maintenance of a particular ethnic composition in a specific geographical area through preventing individuals of one ethnicity from selling their property to individuals of another ethnic group. The Ombudsperson observes, however, that in 1991, the Serbian Parliament promulgated a Law on Changes and Supplements to the Law on Special Conditions Applicable to Real Estate Transactions (*SRS Official Gazette* 22/91 (18 April 1991)) requiring the approval by the Serbian Ministry of Finance of any contract through which an ethnic Serb wished to sell real property located in Kosovo. UNMIK Regulation 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property (13 October 1999) (hereinafter UNMIK Regulation 1999/10) repealed the 1991 Law, on the grounds that it 'is discriminatory in nature and that is contrary to international human rights standards...'

41. The Ombudsperson observes that UNMIK Regulation 2001/17 requires the approval of UNMIK authorities of any contract through which an individual owning property in a specified geographical area in Kosovo – inhabited primarily or exclusively by members of ethnic minorities. The Ombudsperson concurs with the 1999 abolition of the 1991 Law and observes that virtually identical concerns arise in connection with UNMIK Regulation 2001/17.

Conclusion

42. The Ombudsperson is of the opinion, therefore, that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) is incompatible with the prohibition against discrimination guaranteed by Article 14 of the European Convention on Human Rights.

Restrictions on the enjoyment of rights for purposes other than those prescribed: Article 18 of the European Convention on Human Rights

43. The Ombudsperson is called upon to examine whether the restrictions imposed by UNMIK Regulation 2001/17 on the rights to respect for private and family life and the home and the right to peaceful enjoyment of possessions conform with Article 18 of the European Convention on Human Rights, which states:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

44. The Ombudsperson notes that UNMIK Regulation 2001/17 sets forth a number of policy grounds that governmental authorities may allege to provide a justification for imposing restrictions on rights guaranteed under the Convention. The Ombudsperson has found that the Regulation does not meet the requirements of legality and proportionality with respect to these rights (see paras. 10 - 24, *supra*).

45. In this regard, the Ombudsperson observes that S/RES/1244 (1999) assigns part of the responsibility for the return of refugees and displaced persons to their homes in Kosovo to UNMIK (para. 11 (k)). However, the Ombudsperson does not consider that the embargo on alienation of an individual's or family's major asset will help to achieve this policy objective. Nor does such an embargo conform to the right of the individual to enjoy the right to establish and maintain a home

46. The Ombudsperson observes that the policy objectives on which UNMIK Regulation 2001/17 is founded include:

... ensuring a safe and secure environment, sustainable living conditions for all communities in Kosovo, and the right to return of all refugees and displaced persons to their homes in Kosovo [and] monitoring the sale of residential property in specific geographical areas of Kosovo....

47. At the outset, the Ombudsperson observes that 'monitoring the sale of residential property in specific geographical areas of Kosovo' is not a legitimate governmental aim under any international human rights provision. At the same time, the registration of property deeds, transfers of titles, and similar activities is a normal function of government. The creation of public land registers, cadasters and similar official records renders transparent all relevant information about property transactions.

48. The Ombudsperson next observes that the policy objective, 'the right to return of all refugees and displaced persons to their homes in Kosovo', cannot be seen to relate to restrictions on alienation of property located in minority areas. With respect to 'refugees', the Ombudsperson observes that the vast majority of refugees from Kosovo are ethnic Albanians forced to flee Yugoslavia or the Federal Republic of Yugoslavia since 1989. Restricting their ability to purchase residential property in Kosovo can hardly be seen to contribute to their return. At the same time, with respect to other categories of refugees or to internally displaced persons, the Ombudsperson observes that compelling such persons to return to their properties in Kosovo by encumbering what for many constitutes their major financial asset cannot be considered as protecting their 'right' to return. In this context, it is important to note that the nature of a human right is that it vests in the individual, who may choose to exercise or claim the right or not. In other words, a government may not force an individual into the exercise of a right, for governmental, political or other purposes.

49. The Ombudsperson further recalls that it is the responsibility of the government to guarantee the right to security of the individual, and the responsibility of neither the individual himself or herself nor of certain selected portions of the population. In this regard, the Ombudsperson observes that UNMIK Regulation 2001/17 not only places the burden of guaranteeing security on some individuals from some communities, but grounds this approach on the failure of governmental authorities – UNMIK and KFOR – to fulfil the functions assigned to them under UN Security Council Resolution 1244 to guarantee the security of the population. Instead, Regulation 2001/17 apparently is based on the presumption that the security of the community should be guaranteed primarily through a 'safety in numbers' policy.

50. In this context, the Ombudsperson observes that individuals wishing to sell their residential property and to locate elsewhere may often wish to do so in order better to ensure the protection of their human rights and those of their families, where the government has failed its responsibilities in this regard. In an environment in which the government cannot guarantee a reasonable level of security to individuals living in given communities, the right to education for children from the communities, the right to access to public employment and public services generally, and other basic rights, by effectively preventing members of the community from seeking to live in an environment in which such rights are better protected, the government exacerbates the existing human rights violations.

51. The Ombudsperson finally observes that the introduction of such subjective criteria as misgivings about either the sources of funds to be used for the purchase of property or the motives of the purchaser of a given property as grounds for governmental authorities to refuse to permit a property sale raise two separate concerns. The application of these criteria is not only subject to abuse through arbitrary or subjective interpretation by the responsible authorities, but their effect is also to penalise the individual attempting to sell a property for the 'bad motives' or the expenditure of 'ill-gotten gains' of the buyer.

Conclusion

52. The Ombudsperson is of the opinion, therefore, that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) is incompatible with Article 18 of the European Convention on Human Rights.

RECAPITULATION OF CONCLUSIONS

53. The Ombudsperson is of the opinion that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001)

- is not 'in accordance with law' in the sense of the European Convention on Human Rights;
- cannot be considered to be 'necessary in a democratic society' for legitimate governmental aims in the sense of the European Convention on Human Rights;
- 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;
- is incompatible with the right to respect for private and family life and for the home guaranteed by Article 8 of the European Convention on Human Rights;
- is incompatible with the right to choose one's place of residence guaranteed by Article 2 of Protocol No. 4 of the European Convention on Human Rights.
- is incompatible with the prohibition against discrimination guaranteed by Article 14 of the European Convention on Human Rights;
- is incompatible with the prohibition against imposing restrictions on rights for purposes other than those prescribed guaranteed by Article 18 of the European Convention on Human Rights.

The Ombudsperson therefore concludes that UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001) is incompatible with recognised international standards.

RECOMMENDATIONS

54. The Ombudsperson recommends that, no later than 15 November 2001, the Special Representative of the Secretary General:

- should abolish UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (22 August 2001);
- should abolish Administrative Direction 2001/16 Implementing UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo (19 October 2001);
- should issue a new Administrative Direction declaring null and void any decision to refuse to register a contract for the sale of real property anywhere in Kosovo, where that decision was taken pursuant to UNMIK Regulation No. 2001/17 and/or Administrative Direction 2001/16;
- 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