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COMKFOR directive 42  
dated 9 October 2001

Request by: Tomasz Banka  
Request for: TDIP Comittee  
Date of request: 1 September 2006

Information sources provided by: Jan Bäverström  
Date of delivery: ...

Amnesty sent this other (newer) [COMKFOR directive 2004 006](#) to me



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Amnesty says " COMKFOR Directive 42 allows COMKFOR to authorize detentions for long periods without judicial authorization or any recourse to judicial review. Amnesty International has repeatedly raised its concerns over the use of COMKFOR Directive 42 with KFOR, NATO and the governments of NATO countries.(59) KFOR spokesperson Lt. Col. James Moran informed Amnesty International on 5 May that 19 people had been so detained for up to "five to seven days" for "interrogation" before being transferred to UNMIK police."

In order to obtain the Document I have contacted:

by e-mail: NATO KFOR spokesman in Pristina, SHAPE headquarter in Mons, NATO legal service in Brussels, Amnesty International Secretariat in London (Sonja Spužić and Jean Jones)

by telephone: NATO KFOR spokesman in Pristina (Mr Haddidi), NATO legal service in Brussels (Baldwin Devidts and his assistant Mr Groenen), Amnesty Balkan group in London, Solana's person in Pristina (Tobrjörn Sohlström), Commission office in Pristina (Wolfgan Koeth), the EPs delegation secretariat (Sabina Mazzi) and EP SEDE secretariat (Luis Balsells).

Of these everyone but Mr Haddidi and Devidts denied having the document. Mr Haddidi asked me to contact the SHAPE headquarter, whereas Mr Devidts has started an internal procedure in order to be able to send the document. This procedure is of course open-ended, and may take weeks to conclude.

### **Serbia and Montenegro (Kosovo) The legacy of past human rights abuses** **AI INDEX: EUR 70/009/2004 1 April 2004**

#### **2. Arbitrary arrest and unlawful detention**

Amnesty International is seriously concerned at incidents of arbitrary arrest and unlawful detention in Kosovo by Kosovo Force (KFOR) personnel from the international military force in Kosovo in blatant contravention of domestic and international laws and standards. The organization is further concerned at allegations of ill-treatment of detainees by KFOR personnel, as well as the denial of their rights while in detention. Amnesty Internationals concerns are amplified by the fact that the UN Mission in Kosovo (UNMIK), which administers Kosovo under UN Security Council Resolution 1244/99, is charged with the protection and promotion of human rights and the rule of law in the province.

The organization raised its concerns about arbitrary arrest and detention by KFOR following a wave of violence in Mitrovica/ë, in February 2000 (see Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Setting the standard? UNMIK and KFOR's response to the violence in Mitrovica*, AI Index: EUR 70/13/00, March 2000). On 6 June 2002 the organization sent an 18-page memorandum to KFOR detailing its concerns and urging a full and impartial investigation into the unlawful arrest and alleged ill-treatment by KFOR personnel of three men arrested in December 2001. In July 2002 three more men were unlawfully arrested by KFOR and held in

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detention for between 43 and 51 days without being brought before a judicial body to authorize their detention.

On 10 October 2003 Amnesty International sent another 18-page memorandum to the North Atlantic Treaty Organization (NATO), individual governments of NATO, and the UN Department of Peace Keeping Operations (DPKO) detailing its concerns at instances in which international peacekeeping forces led by NATO in Kosovo (and in Bosnia-Herzegovina) had failed to adhere to international human rights law and standards when detaining suspects.

The memorandum specifically addressed the lack of legal basis for KFOR detentions and in this context the continued existence of COMKFOR (KFOR commander) Detention Directive 42 (see below).

In the memorandum,(16) Amnesty International noted that KFOR troops are not subject to control by civilian bodies *in situ*, even though in Kosovo KFOR is the sole official armed force - i.e. it is the army - and the UN Interim Mission in Kosovo (UNMIK) is the (temporary) government. Indeed the civilian executive authority, UNMIK, does not appear to have either legal jurisdiction or mandate to conduct investigations into KFOR activities. UN Security Council Resolution 1244/99 of 10 June 1999 under which Kosovo is - until resolution of its final status - placed under UN control is ambiguous as to the question of the power relationship between the international civilian presence (UNMIK) and the international security presence (KFOR), and calls on the two to "coordinate closely". Instead, civilian democratic control over KFOR is exerted by the



respective governments of troop-contributing countries who have responsibility for, *and only for*, their respective national contingents. This means that civilian democratic control over KFOR and SFOR troops is divided up between a number of national governments who only have control over their own troops. An additional factor is that these troops are operating outside of their respective national territories, and thus distanced from their democratic overseers. This removal from the area of operation (i.e. Kosovo), combined with the multiplication and fragmentation of civilian democratic control over KFOR, has, in Amnesty International's experience, led to a lack of accountability for human rights violations. An additional factor is the absence of a centralized body initiating prompt, thorough and impartial investigations into all allegations of human rights violations by KFOR troops, and ensuring that appropriate remedial measures are taken. The lack of accountability is further compounded by the fact that institutions such as the Ombudspersons' Office in Kosovo - specifically set up to defend the rights of citizens - does not have any remit over actions by KFOR members.

NATO is not itself a party to international human rights treaties: state officials must ensure their participating forces' compliance with international law. NATO does not have a mechanism either to enforce compliance of a common set of standards, or to ensure a common interpretation of such standards. These remain the responsibility of each state member, and results in inconsistencies in the application of rules. Amnesty International is calling on NATO to publicly commit itself to abide by the highest standards of international human rights law, and to ensure a common interpretation of such standards.

The structural weakness, combined with the general immunity from prosecution (unless explicitly waived), which is enjoyed by all members of the international community<sup>(17)</sup>, has contributed to the lack of accountability for human rights violations committed by KFOR troops. Under UNMIK Regulation 2000/47 the UN Secretary-General has "the right and the duty to waive immunity [from prosecution] of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of UNMIK".<sup>(18)</sup> This is not the case for KFOR personnel. Section 6.2 of the same regulation states: "Requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration." Thus, not even the UN Secretary-General has a mandate to waive immunity for KFOR personnel even though they are operating under the aegis of the UN in what is effectively a UN state.

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Furthermore, Section 2.4 of the regulation regarding the 'Status of KFOR and its Personnel' states:

"KFOR personnel other than [locally recruited KFOR personnel]... shall be immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive [emphasis added] jurisdiction of their respective sending States; and immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States."

This seeks to prevent courts of any state (other than the relevant contributing state) from exercising jurisdiction, and thereby preventing courts in Kosovo, foreign courts (other than those of the relevant contributing state), and courts exercising universal jurisdiction, such as the International Criminal Tribunal for the former Yugoslavia (the Tribunal) and the International Criminal Court (ICC), from exercising jurisdiction. However, Amnesty International believes that in cases of genocide, crimes against humanity and war crimes, courts exercising universal jurisdiction such as the Tribunal and the ICC do have primacy.<sup>(19)</sup> However, the ICC or the Tribunal are not likely to exercise jurisdiction over crimes and other human rights violations allegedly committed by KFOR troops. Thus, in a case in which, for example, there is sufficient admissible evidence to prosecute but the national courts of the relevant contributing state are not able to take the case up, there will be no court able to exercise jurisdiction.

To Amnesty International's knowledge the only case where an alleged human rights violation either by KFOR or SFOR troops in the course of their duty has been brought before a national judiciary of a respective sending state has been in the United Kingdom (UK). On 7 April 2004 the UK High Court ruled in civil proceedings that the UK government should pay compensation to Mohamet and Skender Bici for damages caused when in 1999 UK KFOR troops opened fire on the car in which they were travelling in an incident in which two other passengers in the car, Fahri Bici and Avni Dudi, were killed. An investigation by the UK Royal Military Police into the incident had cleared the three soldiers responsible for opening fire.



However, the presiding judge ruled that the soldiers had deliberately and unjustifiably caused the injuries. The judge reportedly reached the "clear conclusion" on the evidence, including that of witnesses and "extremely powerful" forensic findings, that the soldiers were not being threatened with being shot when they opened fire, and there were no reasonable grounds for them to believe that they were. He reportedly stated that: "The British army can justifiably be proud of the operation it carried out in Kosovo. But soldiers are human; from time to time the mistakes are inevitable. In this case the fall from the army's usual high standards led to tragic consequences for the victims and their families... The Queen's uniform is not a licence to commit wrongdoing ... The army should be held accountable for such shortcomings." (See UK daily *The Guardian*, 8 April 2004.) Amnesty International believes that the court ruling indicates a failure by the UK military authorities to adequately investigate the incident in question, and illustrates the defects in the NATO system of investigating allegations of human rights abuses committed by its troops.

## 2.1 The lack of legal basis for KFOR detentions

Amnesty International believes that there is no legal basis for the continuation of such KFOR detentions. The organization has also repeatedly expressed its view that the detention of people by KFOR without review by any judicial body violates national and international laws and standards. Amnesty International understands from previous correspondence with both KFOR and the Special Representative of the (UN) Secretary General (SRSG) that KFOR considers that their authority to arrest derives from UNSC resolution 1244/99, which at Para. 9(d) charges the international security presence in Kosovo with responsibility for "ensuring public safety and order until the international civilian presence can take responsibility for this task". Amnesty International believes that, given the progress made by UNMIK in establishing the rule of law in Kosovo over the past three years - and in particular, the existence of a fully-functioning international (UN

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CIVPOL) and domestic (KPS) police service - this justification is no longer applicable. In this period, Kosovo has seen the development of a comprehensive body of applicable law and UNMIK Regulations with regard to arrest and detention and the establishment of a functioning judicial system, and Memoranda of Understanding have been signed between KFOR and CIVPOL, within each of the KFOR Multi-National Brigade (MNB) Boundaries. Under these Memoranda, investigative primacy, including the power of arrest and detention, has been transferred from KFOR to CIVPOL in each of the KFOR Multi-National Brigade areas.

In addition, Amnesty International considers that any detentions carried out on the basis of UNSC resolution 1244/99 which fail to guarantee detainees' rights set out under applicable law and in international standards are unlawful.

### 2.1.1 COMKFOR Detention Directive 42

Furthermore, Amnesty International is concerned that COMKFOR Detention Directive 42 (9 October 2001) allows COMKFOR and section level KFOR commanders of MNBs to authorize detentions which are outside of the rule of law and violate international human rights which, under UN SC 1244/99, KFOR is charged to protect and promote. Specifically COMKFOR Directive 42 allows COMKFOR to authorize detentions for long periods without judicial authorization or any recourse to judicial review. Section 2 (e) of this directive states: "I [COMKFOR] will continue to use the authority to detain but only in cases where it is absolutely necessary. It must be noted that this authority to detain is a *military* decision, not a *judicial* one." [Emphasis added]

The directive in Section 5 (b) also allows MNB commanders to detain people for up to 72 hours on their own authority even without recourse to COMKFOR approval which is needed for detention after this initial 72-hour period.

This raises a number of concerns, especially as the Organization for Security and Cooperation In Europe (OSCE) reported in 2002, on the basis of information received from KFOR, that an average of 10 persons per month were held under the authority of MNB Commanders' authority.(20) In May 2003 the OSCE reported that although there had been a "general decrease in the number of persons held by KFOR held in US KFOR's Bondsteel camp [where KFOR detainees are held]", KFOR detentions continued. The OSCE re-iterated its concerns that such detentions were illegal.(21)

Detention by COMKFOR can initially be for up to 30 days but can be extended by COMKFOR. As highlighted above, under point 2 (e), COMKFOR's authority to detain is military not judicial. In fact Directive 42 gives COMKFOR powers to, if he so wishes, arbitrarily detain people without any recourse. There is no mention of judicial oversight or the possibility of detainees challenging the legality of their detention. On the contrary, point 5 (c) (8) states: "Once COMKFOR has detained a person, no one may release that person during the ordered detention period without the written



approval of COMKFOR." COMKFOR is assisted by a Detention Review Panel whose members are designated by COMKFOR and which is chaired by KFOR LEGAD [the KFOR legal advisory body]. This panel reviews all detention requests and makes recommendations to COMKFOR (point 5 (c) (3)). KFOR LEGAD also carries out its own recommendations independent of the panel recommendation (point 5 (c) (4)). But these are recommendations. Authority rests with COMKFOR who operates outside judicial scrutiny. Point 7 (k) in the section dealing with 'Rules for detention and treatment of detainees' states: "Detainees may submit petitions regarding their detention." However, these petitions can only be submitted to COMKFOR - the very person who authorized detention - not to an independent judicial body.

Amnesty International also notes the concerns expressed by the UN Special Representative of the Commission on Human Rights, Jose Cutileiro, that arrests and detentions by KFOR, under COMKFOR Detention Directive 42, "may be incompatible with basic human rights principles"; the  
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Special Representative has also questioned the need for KFOR detention practices on the basis that the grounds on which KFOR may arrest under Directive 42 are "adequately covered by existing legislation".(22)

Similar concerns were expressed by the OSCE which recommended that "KFOR cease detentions forthwith and officially renounce its authority in this area".(23) as well as by the Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles.(24)

Despite these authoritative pronouncements by international human rights experts, on 26

November 2003 then-NATO Secretary General, Lord Robertson, replied to Amnesty

International's memorandum of October 2003. In his reply he stated that he was:

*"content that we are maintaining an acceptable balance between a Force Commander's necessary powers to detain and the essential rights of those detained."*

*On the specific issue of the legality of detention operations carried out by KFOR, I have nothing to add further to my previous correspondence... The relevant procedures remain in place for the exercise of KFOR's powers with regard to detention, including through Directive 42, which places the correct emphasis upon the need for correct treatment, whilst ensuring that detentions are lawful and fully respectful of international law."*

Amnesty International believes that persons detained solely under Directive 42 are victims of arbitrary detention in clear contravention of Article 5 of the ECHR and Article 9 of the ICCPR in that they have not been deprived of their liberty in accordance with procedures prescribed by applicable law, including their right to judicial scrutiny of their detention, and their right to *habeas corpus*. The non-derogable nature of the right to *habeas corpus*, even in times of emergency, has been affirmed by the (UN) Human Rights Committee.(25) Judgments by the European Court of Human Rights make it clear that there must be judicial supervision of detention and respect for the rights of detainees even during emergency situations and armed conflicts.(26)

## [International officials flout international law](#)

1 Sep 2002

Furthermore, Amnesty International is concerned that COMKFOR Detention Directive 42 allows COMKFOR and section level KFOR commanders of Multi-National Battalions (MNBs) to authorize detentions which are outside of the rule of law and violate international human rights which, under UN SC 1244/99, KFOR is charged to protect and promote. Specifically it allows COMKFOR to authorize detentions for long periods without judicial authorization or any recourse to judicial review. On the contrary, section 2 (e) of this directive states: "I [COMKFOR] will continue to use the authority to detain but only in cases where it is absolutely necessary. It must be noted that this authority to detain is a *military* decision, not a *judicial* one." [Emphasis added]

The directive lays special emphasis on the exceptional circumstances for such detentions. Article 3 (d) states: "COMKFOR authority to detain will only be used as a last resort when civil authorities are unable to take action addressing the threat to KFOR or the safe and secure environment in Kosovo." While section 4 (a) dealing with standards states: "Persons may be detained under the authority of COMKFOR only if they constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter." Furthermore the directive in section 5 (a) (2) (3) and (7) underline the importance of engaging the civil police at every opportunity. Section 5 (a) (2)



states: "Once the situation is stabilised and safe, and after any questioning required by the circumstances, the on-scene commander will *immediately* [emphasis added] relinquish authority over the restrained person and the crime scene to civilian police authorities." Section 5 (3) states: "If a civilian police authority is not present, the on-scene commander will make every effort to summon civilian police authority to the scene. Every effort should be made to transfer the restrained person to civil authorities at the location where the person was restrained. However, the restrained person may be moved for reasons of the safety of the restrained person or the restraining unit." Despite these instructions, the directive then goes on to detail the procedures for KFOR detention. Section 5 (b) allows MNB commanders to detain people for up to 72 hours on their own authority even without recourse to COMKFOR approval which is needed for detention after this initial 72-hour period.

This raises a number of concerns, especially as OSCE reported, as per information received by OSCE from KFOR, that an average of 10 persons per month were held under the authority of MNB Commanders' authority.(33) As the OSCE states:

"[T]he existence of this authority indicates that KFOR, rather than trying to gradually restrain its detention practice with the aim of abandoning it altogether, is actually developing it. KFOR's authority to detain people outside of judicial process has always been presented as an extraordinary solution and as a last resort, and consequently, it has been perceived as being an authority resting solely with COMKFOR. The fact that COMKFOR was the sole level of command having the authority to order such detention did provide certain guarantees that such measures were undertaken only after due consideration in extreme cases. Extending this authority to the regional commandants, even if only for 72 hours detentions, and allowing this authority to be unchecked and unreported to COMKFOR, raises concerns about KFOR's attempt to acquire even more law enforcement functions. The KFOR LEGAD [legal department] has admitted that this practice is viewed as corresponding to the 72 hour police custody. Several concerns arise from this policy. Under the domestic law, and under international human rights law, brief detentions ordered by law enforcement agencies are governed by strict guarantees regarding the rights of detainees. There are limited circumstances under which a person can be held by law enforcement agencies: they include, for example, detention for the purpose of establishing a person's identity, and detention to prevent the risk of flight or the risk of destroying relevant evidence. Furthermore, persons held in police custody have a well-defined set of rights, both under the domestic law in Kosovo and under international human rights law. OSCE has concerns that these rights, especially the rights to defence counsel and the right to remain silent, are not effectively observed during these 72 hours KFOR detentions. These detainees are interrogated by KFOR without any of the above-mentioned guarantees. Another concern is that some individuals are detained under the 72 hour provisions only for the purpose of intelligence gathering."(34)

This last point highlights an apparent contradiction within Directive 42. Point 5 (b) (2) states "MNB Commanders are authorised to detain for up to 72 hours to gather intelligence or evidence on the detainees to determine whether the MNB Commander should release or recommend COMKFOR detention." Apart from the complete lack of reference to the supposed requirement to hand detainees over to civilian police authorities, this strongly implies MNB Commanders can detain people merely for the purposes of intelligence gathering, a practice explicitly forbidden by point 4 (b) which states: "The fact that a person may have information of intelligence value by itself is not a basis for detention."

Detention by COMKFOR can initially be for up to 30 days but can be extended by COMKFOR. As highlighted above, under point 2 (e), COMKFOR's authority to detain is military not judicial. In fact Directive 42 gives COMKFOR powers to, if he so wish, arbitrarily detain people without any recourse. There is no mention of judicial oversight or possibility of detainees challenging the legality of their detention. On the contrary point 5 (c) (8) states: "Once COMKFOR has detained a person, no one may release that person during the ordered detention period without the written approval of COMKFOR." COMKFOR is assisted by a Detention Review Panel whose members are designated by COMKFOR and which is chaired by KFOR LEGAD. This panel reviews all detention requests and makes recommendations to COMKFOR (point 5 (c) (3)). KFOR LEGAD also carries out its own recommendations independent of the panel recommendation (point 5 (c) (4)). But these are recommendations. Authority rests with COMKFOR who operates above legal scrutiny. Point 7 (k) in the section dealing with 'Rules for detention and treatment of detainees' states: "Detainees may submit petitions regarding their detention." However, these petitions can only be submitted to KFOR, not to a judicial body.

Amnesty International also notes the concerns expressed by the UN Special Representative of the Commission on Human Rights, Jose Cutileiro, that arrests and detentions by KFOR under COMKFOR detention directive 42 (9 October 2001), "may be incompatible with basic human rights principles"; the Special Representative has also questioned the need for KFOR detention practices on the basis that the grounds on which KFOR may arrest under directive 42 are "adequately covered by existing legislation".(35)



## Kosovo : The Human Rights Situation And The Fate Of Persons Displaced From Their Homes

report By Mr Alvaro Gil-Robles, For the attention of the Parliamentary Assembly and the Committee of Ministers  
CommDH(2002)11, Strasbourg, 16 October 2002

### Arrest and extra-judicial detention by KFOR

88. In Kosovo, an individual can be arrested by either KFOR or UNMIK Police/KPS. The situation would appear to be such that KFOR needs to have this possibility, not only with respect to individuals who threaten its own security, but also those who pose a threat to the security and safety of others. One major argument would be that there is still an extraordinary number of weapons, including war weapons, in Kosovo. Thus, resorting to arrests in Kosovo is still often so risky that it needs the help of the military. Indeed, the tasks entrusted to KFOR under UNSCR 1244, seem to have as a logical corollary the power to arrest individuals, at least while in action.

89. The Commander of KFOR (COMKFOR) has, however, interpreted UNSCR 1244 as granting him the power to arrest and detain individuals without any involvement of the judiciary, and no external control<sup>55</sup>. COMKFOR orders detention in cases where, in his opinion, public safety is threatened. He does not present evidence to a court showing that detention is necessary; detainees do not receive written documentation that establishes the precise legal grounds of their detention<sup>56</sup>.

90. COMKFOR's interpretation relies on Paragraphs 7 and 9 of UNSCR 1244, under which UN member States and relevant international organisation are authorized "to establish the international security presence in Kosovo [...] with all necessary means to fulfill its responsibilities under paragraph 9", as well as Paragraph 9 (c) according to which the responsibilities of the security presence include "establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered" (emphases added).

91. This legal basis, the policy, the process and the conditions of detention by KFOR were kindly explained to us by the Legal Advisor of COMKFOR<sup>57</sup>. The policy, as laid down in Section 4 of COMKFOR Directive 42 dated 9 October 2001, is to detain persons "only if they 54 Paragraph 12 iii.a of Opinion No. 239 (2002), on the "Federal Republic of Yugoslavia's application for membership of the Council of Europe", 24 September 2002.

55 Regular cooperation with the Ombudsperson, on the basis of an agreement that could be concluded by the latter according to Section 3.4 of the Ombudsperson's mandate (UNMIK Regulation 2000/38), has apparently been refused by COMKFOR. Certain organisations are from time to time invited to inspect the detention conditions, in line with Section 7 p of COMKFOR Directive 42, updated on 9 October 2001.

56 COMKFOR Directive 42 underlines that "[i]t must be noted that this authority to detain is a military decision, not a judicial one" (Section 2 e.). The Directive also states: "No one shall be subjected to arbitrary detention" (Section 7). Amnesty International has, however, qualified KFOR detentions as "arbitrary", indicating that out of an estimated 1500 persons who went through KFOR detention in 2001, the majority were released without charge; only 10 men were convicted of weapons possession (Concerns in Europe, July-December 2001, page 83). The ground for their detention, as notified to detainees, is: "Resolution 1244". Upon release, detainees receive a certificate that indicates the time span of their detention, which enables them to explain their absence, for example, towards their employer.

57 Powerpoint presentation made to my team on 3 August 2002.

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constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter"(emphasis added<sup>58</sup>).

92. "Organized ethnic violence, organized violence [at the border with Macedonia], organized crime and corruption, inability of current Kosovo legal system to face these situations: threat to a safe and secure environment in Kosovo" were given to us as the reasons for present detention orders<sup>59</sup>.

93. It has been underlined to us that the general policy was to release at the earliest possible opportunity, to afford respectful treatment and compliance with all relevant international human rights standards and to grant transparency without compromising operational security. These principles are laid down in Directive 42.

94. As to the practicalities, extra-judicial detention by KFOR is basically a decision to keep in detention persons arrested, instead of setting them free or handing them over to UNMIK.



After an initial restraint of a maximum of 18 hours by decision of the KFOR on-site commander, Multi-National Brigade (MNB) Commanders may continue to detain (in an MNB detention facility<sup>60</sup>) the individual for no more than 72 additional hours (in exceptional cases they can apply for another 72 hours “in order to gather intelligence of evidence on the detainee”). Further detention can only be ordered by COMKFOR himself, for detention periods of up to 30 day, renewable, with no time limits for the total length of detention<sup>61</sup>.

95. Between June 2001 and June 2002 KFOR has held, on any given day, up to some 140 detainees in the American KFOR facility at Bondsteel, figures having dropped to 20 or less since December 2001. On the day on which my team visited Bondsteel, there were 13 KFOR detainees there.

96. When asked what the average as well as the maximum periods of detention (for KFOR detainees) at Bondsteel were, we were told that no statistics existed on these data. This rather surprising fact stands in contrast with practices in the civilian prisons run by UNMIK.

97. It must be recalled that, pursuant to international human rights standards, deprivation of the right to liberty may only occur for a limited series of reasons and in accordance with a procedure provided for by law. Moreover, persons arrested and detainees have a number of specific fundamental rights (see, for instance Article 5 of the ECHR). Persons detained must be informed in detail of the reasons of their detention (Article 5 par. 2 ECHR) ; they must be able to appeal to a judge challenging the legality of their detention, have their case dealt with speedily by a court and be released if their detention is not lawful (habeas corpus, Article 5 par. 4) ; they must also be compensated if illegally detained (Article 5, par. 5). In addition, persons who may be detained on reasonable suspicion that they have committed an offence (pre-trial detainees) must be brought promptly before a judge and shall be entitled to trial within a reasonable time or to be released pending trial.

58 This sentence clearly shows that in the spirit of KFOR it is not the civilian, executive branch of the international presence who controls KFOR, but, to the contrary, it is KFOR who controls the executive.

59 Powerpoint presentation made to my team on 3 August 2002.

60 I am not aware of any visits by human rights observers to MNB detention facilities.

61 For the precise process, see the chapters « Process of Detention » and « Extending Existing COMKFOR Detentions” in COMKFOR Directive 42.

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98. It is quite obvious that the system of extra-judicial detentions by KFOR as described above does not comply with the above mentioned guarantees: The legal basis for the KFOR power to detain individuals, namely the very general wording in Paragraphs 7 and 9 of UNSCR 1244, manifestly lacks the required precision, whereas norms restricting fundamental freedoms must be specific and precise. Furthermore, it is unclear whether persons arrested in accordance with Directive 42 are reasonably suspected of having committed an offence or whether they are detained for other reasons. In any case, there appears to be no judicial authority whatsoever to control the legality of their arrest and detention and to order their release in the event of the detention’s being unlawful. To sum up, UNSCR 1244, as interpreted by KFOR, allows for a prolonged or even potentially indefinite detention of individuals who are thought to constitute a threat to the "safe and secure environment", without any judicial control as to the legality of their arrest, without any remedy against unlawful detention and with no obligation to bring them to trial if suspected of having committed a criminal offence.

99. It is true that in case of war or other emergency fundamental guarantees can be restricted. Indeed, detentions without judicial control might be envisaged in a war-like emergency situation, where there is no judiciary available.

100. However, after more than three years of international administration, such a situation happily no longer exists in Kosovo. KFOR itself indicates that the security situation is under control, except in very few places of the territory<sup>62</sup>. UNMIK underlines that important progress has been made under its rule over Kosovo over the past three years, as concerns police and the administration of justice.

101. COMKFOR accepts that progress has been made, but insists that his special powers to arrest and detain remain necessary<sup>63</sup>. Whilst KFOR may, indeed, still need to be able to arrest and, perhaps even detain, individuals in order to fulfil its mandate, such powers must be specifically provided for in a normative instrument setting out at least the precise conditions for the exercise of these powers, the maximum time-limit of the detention, the independent authority that will hear appeals or other judicial remedies available to the persons arrested to



challenge the legality of their deprivation of liberty.

102. It might also be added that the continuing practice of extra-judicial arrests and detentions undermines the long-term aim of developing of an effective independent judiciary in Kosovo.

62 For example, the commander of the US KFOR forces told us on 3 August 2002 that not one single shot had been fired by his soldiers or against his soldiers over the last 6 months. Also, we were told that the Klokot bombing incident of 31 July 2002, was “the single most violent incident we had here [in the American Sector] for the last two years”. Two American KFOR soldiers were injured (cf. OMIK Weekly Report No. 31: 24-30 July 2002, p. 3).

63 This continues to be COMKFOR’s view of the current situation. Indeed, Directive 42 reads, in its chapter entitled “Background” : “When UNSCR 1244 was passed [...] in June 1999, civil authority in Kosovo did not exist. There was no legitimate criminal justice system, no law enforcement authority, and no judicial or penitentiary systems. COMKFOR’s authority to detain was essential to him to accomplish his military mission of establishing and maintaining as safe and secure environment; [Now] a civilian criminal justice system has begun to take shape in Kosovo. The stronger this system becomes, the less important COMKFOR’s authority to detain under UNSCR 1244 will be [...]. Today, the civilian criminal justice system is capable of dealing with some cases that two years ago would have resulted in COMKFOR detentions. This system is not mature enough yet, however, to deal with every individual that constitutes a threat to KFOR or the safe and secure environment of Kosovo. I will continue to use the authority to detain but only in cases where it is absolutely necessary” (Section 2, b to e).

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103. Finally, it should be noted that the treatment afforded to detainees held in KFOR facilities should correspond to the highest human rights standards. The KFOR detention facilities I visited in Bondsteel appeared, in this respect, quite satisfactory, although the impressive security machinery could well, in cases of prolonged detention, have considerable impact on the psychological well being of the detainees. I would stress in this respect that the possibility should be given to authorised human rights observers (such as OSCE personnel and some NGOs) to monitor the conditions of detention, as foreseen in COMKFOR Directive 42, Article 7.

j. Conditions of detention in UNMIK facilities

104. My team and I have visited two out of the seven detention facilities run by UNMIK in Kosovo. Our visits, which were hosted in an open, cooperative, manner, did not amount to fullfledged inspections<sup>64</sup>. This is why I will limit myself to making only a few remarks on salient impressions, without claiming to be exhaustive. I wish to add that it seems that, in spite of problems that still remain to be resolved, UNMIK has brought tremendous progress to the Kosovo prison system, as compared with the situation it found when it came.

105. At the Pristina Detention Centre, the main problems we saw were: Total lack of sports facilities (indeed, there are only two walking areas, which are far too small for prisoners serving long sentences), the lack of significant recreation and rehabilitation activities, as well as the fact that there was no separation of remand prisoners from sentenced prisoners. The cells we saw had almost no daylight coming in and seemed to be poorly ventilated. Also, the Centre does not have an open-type part, which, in the light of regional habits, represents an especially severe form of detention.

106. During our own visit to Dubrava, by far the biggest prison in Kosovo, we were impressed by the resoluteness with which shortcomings that still existed at the end of last year, have since been addressed. To give just two examples: where one physician was available only 3 hours per day for some 500 inmates, there is now a small basic hospital with the necessary medical staff and offering basic dental treatment. Secondly, a vocational training programme is being set up with Swiss help, in order to use land that surrounds the prison for teaching farming to inmates with the help of an agricultural engineer ... and to save money to be reinvested elsewhere by supplying foodstuffs for the prison.

107. To sum up, the reports of qualified observers show that detention conditions have enormously improved in the (UNMIK-run) prisons in Kosovo. It seems desirable that conditions of detention continue to be improved and fully monitored at all times by the Ombudsman’s office and the OSCE. There might, where appropriate, be room for greater cooperation with relevant international or national NGO’s and consideration might be given to incorporating the expertise of the European Committee for the Prevention of Torture (CPT) in the improvement of prison conditions. Certainly, special attention should be given to measures emphasising the presumption of innocence of persons in pre-trial detention, as well as to the detention conditions of juveniles and women. Also, one would like to see adequate recreational



activities as well as professional training offered to detainees. Solutions might be found in order to detain ethnic Serbs in locations not too far from their families.

64 For a wider and more systematic overview, see the report of visits conducted in November 2001 to four facilities (not including the Pristina Detention Center which we visited): Finnish Human Rights Project, Report, NGO Prison Monitoring Mission, November 19-24, 2001, Kosovo.

