
Minding the Gap: Outlining KFOR Accountability in Post- Conflict Kosovo

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Abstract

Notwithstanding the unique conditions of its deployment, KFOR does not act in a legal vacuum. As an entity deployed under UN auspices and by virtue of its exercise of public authority in Kosovo, it is bound by provisions of international human rights and humanitarian law to the extent of its control over individuals there. There are at least three different modalities through which international human rights law may apply to the conduct of KFOR soldiers in Kosovo: the mandate of Resolution 1244; the human rights obligations of the Federal Republic of Yugoslavia; and the human rights obligations of the governments of the national contingents of KFOR. All of the national governments of the various KFOR contingents are bound by the Geneva Conventions, which form the core of modern humanitarian law. As Kosovo may be considered occupied territory, the humanitarian law of occupation is applicable. Further, the failure of KFOR troops to meet international standards for the treatment of individuals may give rise to individual state accountability. Finally, should KFOR or its participating states choose to declare a derogation, they would remain bound by the minimum standards provided by humanitarian law.

1 Introduction

Protecting individuals from gross violations of human rights was the proclaimed purpose and justification of the March 1999 NATO intervention in Kosovo. In the aftermath of the armed conflict, violence has continued to plague the territory and has required a firm response by the Kosovo Force (KFOR), the NATO-led 'security

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The views expressed in this article are solely those of the author.

presence' deployed under Security Council Resolution 1244.¹ As the international community considers strategies for quelling the violence, it is essential to recall the limitations on those strategies, in particular the constraints on KFOR's treatment of individuals under its control, that are imposed by international law.

A quick glance at the core international human rights and humanitarian law instruments might lead one to conclude that KFOR, owing to the unique conditions of its deployment, is not bound by the provisions of those instruments.

Many of the major human rights instruments, and notably those binding on NATO countries, oblige states to ensure to everyone *within their territory or subject to their jurisdiction* the rights contained therein.² Kosovo could not be considered part of the national territory of any state but the Federal Republic of Yugoslavia (FRY),³ and any other state's exercise of jurisdiction in the strict sense (e.g. by applying and enforcing its own domestic laws with respect to the local population) would clearly be illicit.

As for application of the 1949 Geneva Conventions and Additional Protocols thereto,⁴ which embody the bulk of modern humanitarian law (i.e. the laws of war designed to protect individuals and to restrict the methods and means of warfare), it would appear that there has been a general cessation of hostilities following the signing of the Military Technical Agreement in June 1999, thus heralding an end to the ordinary application of the laws of war.

If KFOR were not bound by the norms contained in these instruments, a profound gap in legal accountability for human rights abuses would exist, perhaps as serious as

¹ Security Council Resolution 1244 (1999).

² International Covenant on Civil and Political Rights (ICCPR), Article 2, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976 ('to respect and to ensure to all individuals within its territory and subject to its jurisdiction'); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 1, 213 UNTS 222, entered into force 3 September 1953 ('shall secure to everyone within their jurisdiction'); American Convention on Human Rights (ACHR), Article 1, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978, reprinted in 'Basic Documents Pertaining to Human Rights in the Inter-American System', OEA/Ser.L.V/II.82 Doc.6 Rev.1, at 25 (1992) ('to ensure to all persons subject to their jurisdiction'). While Article 2 of the ICCPR refers to all individuals within a state's territory *and* subject to its jurisdiction, the Human Rights Committee has interpreted these to be independent grounds for application of the Covenant. See, e.g., *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1, at 88 (1984).

³ Resolution 1244, *supra* note 1, preamble ('*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia . . .').

⁴ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, entered into force 21 October 1950; Geneva Convention Relative to the Treatment of Prisoners of War, entered into force 21 October 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, entered into force 21 October 1950 ('Fourth Geneva Convention'); Protocol Additional to the Geneva Conventions of 12

the Meron gap,⁵ in which only non-derogable human rights obligations remain binding.⁶

However, a more thorough examination of the instruments and the meanings of their provisions as established in international jurisprudence reveals that KFOR is in fact bound by both human rights and humanitarian law, or at the very least, provides strong arguments for drawing such a conclusion.

2 The International Presence in Kosovo

In Resolution 1244, the UN Security Council, acting under Chapter VII,⁷ authorized the creation of KFOR and UNMIK (the United Nations Interim Administration Mission in Kosovo), the public authorities that would operate in Kosovo on behalf of the international community with the purposes of securing and administering the territory. KFOR, the ‘international security presence’, was to be established by ‘Member States and relevant international organizations’,⁸ while UNMIK, the ‘international civil presence’, was to be established by the ‘Secretary-General, with the assistance of relevant international organizations’.⁹

KFOR, which is led by and primarily composed of NATO forces, is charged with: [d]etering renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal ... of Federal and Republic ... forces ...; [d]emilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups ...; [e]stablishing a secure environment ...; [e]nsuring public safety and order

August 1949, and Relating to the Protection of Victims of International Armed Conflicts (‘Protocol I’), entered into force 7 December 1979; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (‘Protocol II’), entered into force 7 December 1979.

⁵ The Meron gap refers to the situation that arises when a country is in a state of civil unrest that does not rise to the level of internal armed conflict. In such a situation, a country may be able to derogate from most of its obligations under human rights law, while at the same time avoiding application of the norms of humanitarian law applicable in internal armed conflicts. Even within the Meron gap, however, a state’s non-derogable human rights obligations would continue to apply. For more on non-derogable rights, see *infra* note 99, and the accompanying text. See also Meron, ‘Towards a Humanitarian Declaration on Internal Strife’, 78 *AJIL* (1984) 859–868. For the proposition that there are ‘no substantive legal gaps in the protection of individuals in situations of internal violence’, see ‘Fundamental Standards of Humanity’; Report of the Secretary General submitted pursuant to Commission resolution 2000/69, January 2001, E/CN.4/2001/91.

⁶ Non-derogable human rights obligations, typically protecting individuals from the most serious abuses, would remain binding in Kosovo in any case through the law of state responsibility. Under the traditional law of state responsibility, a state could be held legally responsible on the international plane for injury to aliens that resulted from acts contrary to international law. The doctrine of diplomatic protection permitted the state of nationality of the victim to espouse the victim’s claim. The standard applied to such claims was an international minimum standard, drawn from general principles of law and notions of natural law. Over the past few decades, there has been a degree of convergence between international human rights law and the law of state responsibility, such that acts constituting the most serious human rights violations would also engage state responsibility if committed by state actors abroad.

⁷ Resolution 1244, *supra* note 1, final preambular paragraph.

⁸ *Ibid.*, at para. 7.

⁹ *Ibid.*, at para. 10.

until the international civil presence can take responsibility for this task; [s]upporting, as appropriate, and coordinating closely with the work of the international civil presence . . .'.¹⁰

UNMIK, which is composed of four 'pillars' led by the UN, the UNHCR, the OSCE and the EU, is mandated to 'provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia'.¹¹ It is specifically responsible for, *inter alia*: '[p]romoting the establishment . . . of substantial autonomy and self-government in Kosovo . . .; [p]erforming basic civilian administrative functions . . .; [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government . . .; [m]aintaining civil law and order; [p]rotecting and promoting human rights'.¹²

Together, these two entities are effectively authorized and mandated to exercise all public authority in Kosovo.

3 Human Rights Law

There are several different modalities through which international human rights law is in force in Kosovo. First, human rights law is incorporated into the mandate of the actors deployed under UN auspices in Resolution 1244. Secondly, the human rights obligations of the Federal Republic of Yugoslavia remain in force throughout the territory and may be said to be binding by reasoning from established principles of the law of state succession. Thirdly, the human rights obligations of the governments of the various national contingents of KFOR apply to the conduct of their troops abroad.

A *The UN Mandate*

While Resolution 1244 expressly mandates UNMIK to protect and promote human rights, this task is not listed among the responsibilities of KFOR, which has a separate mandate and is outside of UNMIK's command.¹³ Nor is any limitation on the means KFOR may use in carrying out its responsibilities expressly stated in the Resolution.

Further, it is unclear whether UNMIK regulations requiring public authorities in Kosovo to comply with international human rights law are applicable to KFOR. UNMIK's chief administrator, the Special Representative of the Secretary-General (SRSG), has signed several regulations requiring the application of international

¹⁰ *Ibid.*, at para. 9.

¹¹ *Ibid.*, at para. 10. See also Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo ('Report of the Secretary-General'), at para. 35, S/1999/779, 12 July 1999 ('The Security Council, in its Resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK.').

¹² Resolution 1244, *supra* note 1, at para. 11.

¹³ While UNMIK and KFOR are each mandated to 'coordinate closely' with the other (Resolution 1244, *supra* note 1, at paras 6 and 9(f)), responsibility for their establishment is given to separate entities and they are placed under separate chains of command.

human rights standards in Kosovo.¹⁴ UNMIK Regulation 1999/24 stipulates that '[i]n exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards'.¹⁵ It then provides an impressive list of major international human rights instruments from which these standards are to be drawn.¹⁶

Despite the considerable range of human rights protection afforded by UNMIK regulations, they may be inapplicable to KFOR. While the SRSG exercises 'all legislative and executive power' in Kosovo, he may only regulate 'within the areas of his responsibilities laid down by the Security Council in its resolution 1244'.¹⁷ He may thus be wholly precluded from regulating the activities of KFOR, which is given a separate area of responsibility under Resolution 1244.¹⁸

There are, however, at least two arguments for holding that KFOR has been mandated by the UN to act in conformity with human rights law. The first is that as a security presence deployed 'under United Nations auspices',¹⁹ KFOR is bound to comply with the purposes of the United Nations, among which is the promotion of human rights.²⁰ Secondly, as noted above, Resolution 1244 lists among KFOR's responsibilities supporting, as appropriate, the work of the international civil presence. Further, Resolution 1244 requires 'that both presences operate towards the same goals and in a mutually supportive manner'.²¹ As UNMIK is responsible for protecting and promoting human rights, KFOR's obligation to support UNMIK

¹⁴ See, e.g., UNMIK Regulations 1999/1, 1999/23 and 1999/24. See also *Belul Beqaj and Dita v. Temporary Media Commissioner*, Office of the Media Appeals Board, Kosovo, FRY, www.osce.org/kosovo/media/ditavtmc (September 2000).

¹⁵ UNMIK Regulation 1999/24, section 1.3.

¹⁶ This list includes: the Universal Declaration on Human Rights of 10 December 1948; the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979 (CEDAW); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 17 December 1984 (CAT); and the International Convention on the Rights of the Child of 20 December 1989 (CRC).

¹⁷ Report of the Secretary-General, *supra* note 11, at para. 39.

¹⁸ Given the plain meaning of UNMIK's mandate to protect and promote human rights, it could equally well be argued that regulating KFOR to the extent necessary to protect human rights is 'within the areas of [the SRSG's] responsibilities laid down by the Security Council in its Resolution 1244'. However, UNMIK Regulation 2000/47 provides that 'all KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General *insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council Resolution 1244*'. UNMIK Regulation 2000/47, section 2.2 (emphasis added). While the Regulation purports to apply to the conduct of KFOR troops, it emphasizes that the security mandate overrides the applicable law. The same regulation also deprives the courts of Kosovo of jurisdiction over KFOR or KFOR soldiers. See *infra* note 95.

¹⁹ Resolution 1244, *supra* note 1, at para. 5.

²⁰ Charter of the United Nations, Article 1(3) (1945); see also Article 55(c).

²¹ Resolution 1244, *supra* note 1, at para. 6.

requires that it, at the very least, refrain from undermining this objective. This can only be achieved through compliance with international human rights standards.²²

B Succession

The Socialist Federal Republic of Yugoslavia (SFRY), the predecessor to the FRY,²³ was a party to all of the major universal²⁴ human rights instruments.²⁵ As the law of state succession provides for automatic succession with respect to human rights obligations,²⁶ the obligations of the SFRY continue in force in the FRY.²⁷

While these human rights obligations technically apply only to the FRY Government, the principle of automatic succession for human rights obligations may imply obligations on the part of any public authorities acting in the place of the FRY Government. If the rationale underlying the principle is that obligations pass with control over territory and that beneficiaries of rights are entitled to maintain them,²⁸

²² This proposition is also supported by a 4 July 1999 statement by then Acting SRSG, Sergio Vieira de Mello. While recalling that KFOR was responsible for ensuring public safety and order until such time as UNMIK was capable of doing so, he emphasized that KFOR would be bound by international human rights standards in the performance of these duties. 'Statement on the Right of KFOR to Apprehend and Detain', Office of the Acting SRSG, UNMIK, 4 July 1999.

²³ While the United Nations does not consider the FRY to be *the* successor state to the SFRY for the purpose of taking up the seat of the SFRY in the General Assembly, the FRY is one of the successor states to the SFRY for the purpose of succession to treaty obligations. See *infra* note 26.

²⁴ In this article, the term 'universal', when used in reference to instruments or institutions, serves to distinguish treaty regimes open to all states from the regional systems.

²⁵ The SFRY had ratified the ICCPR, the ICESCR, CEDAW, CERD, CAT and the CRC. It was not, however, a party to the ECHR.

²⁶ *British Yearbook of International Law* (1994) 627 (European Union asserting the position that successors to the former Yugoslavia 'must abide by their obligations deriving from this International Covenant [on Civil and Political Rights]'). See also the Vienna Convention on Succession of States in Respect of Treaties, Article 34(a), 17 ILM (1978) 1488 ('any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed'). While few states are parties to the Vienna Convention, its provisions have been regarded as declaratory of customary international law. *Case Concerning the Gabčíkovo-Nagymaros Project*, No. 92 (25 September 1997); *Digest of United States Practice in International Law* (1980) 1041 n. 43 (State Department Legal Adviser expressing the opinion that the rules of the Convention were 'generally regarded as declarative of existing customary law by the US'); *M v. Federal Department of Justice and Police*, 75 ILR 107, at 110 (Switzerland Federal Tribunal, 1979) ('It can be accepted that this draft codification reflects a considerable level of agreement on the rules of international law governing the matter and that the Federal Tribunal can consider it as an authority.'). Finally, the FRY's continued compliance with the reporting obligations contained in the various human rights treaties to which the SFRY was a party indicates its acceptance of the obligations contained therein.

²⁷ Note also that, as the legal system of the FRY is monist with respect to the integration of international norms, obligations arising from treaties to which the FRY is a party are a 'constituent part of the internal legal order'. The Constitution of the Federal Republic of Yugoslavia, Article 16 (1998).

²⁸ As stated by the Human Rights Committee, 'once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant'. General Comment No. 26, 'Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights', 8 December 1997.

then it would not be unreasonable to conclude that UNMIK and KFOR are bound by the obligations that ensure protection of those rights.

C Human Rights Obligations of Individual States

The various KFOR contingents may also be bound by the human rights obligations of their sending states. This third approach is particularly significant because, unlike the first two, it can provide for individual state accountability.

The vast majority of states, including almost all NATO countries, are parties to the International Covenant on Civil and Political Rights (ICCPR). In addition, all of the European member states of NATO are parties to the European Convention on Human Rights (ECHR).

As noted above, these instruments limit the scope of their application to persons subject to the jurisdiction of the state party. However, the term 'jurisdiction' as used in this context has been construed broadly by international human rights institutions.

The Human Rights Committee, whose interpretation of states' obligations under the ICCPR is authoritative,²⁹ has consistently held that the Covenant can have extraterritorial application,³⁰ and has thus clearly demonstrated its understanding that a state's jurisdiction extends beyond its territorial boundaries. Further, it has found that the expressed scope of Article 2(1) 'does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it'.³¹

In *Delia Saldias de Lopez v. Uruguay*, the Committee held that Uruguay violated its obligations under the Covenant when its security forces abducted and tortured a Uruguayan citizen then living in Argentina. Following the command of Article 5(1) that '[n]othing in the present Covenant may be interpreted as implying . . . any right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms recognized herein', the Committee reasoned that 'it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party

²⁹ UN Doc. CCPR/C/SR 371, at para. 1; Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy, and Process* (2nd ed., 1996) 94.

³⁰ See, e.g., Human Rights Committee, Comments on United States of America, at para. 19, UN Doc. CCPR/C/79/Add 50 (1995) ('The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject matter jurisdiction of a state party even when outside that state's territory.');

Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Iran (Islamic Republic of), at para. 63, 30 July 1993, CCPR/C/SR.1253 ('The existence and the scale of application of the death penalty — compounded, as in the matter of Salman Rushdie, by extraterritorial persecution — constituted a flagrant violation of the State party's commitment under the Covenant to protect the right to life. Notwithstanding Mr Mehrpour's claim to the contrary, those were certainly issues that rightfully fell within the Committee's sphere of competence.').

³¹ *Delia Saldias de Lopez v. Uruguay*, at para. 12.3, Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1, at 88 (1984).

to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.³²

While one could argue that the ambit of the Committee's holding in *Delia Saldias de Lopez* is strictly limited to extraterritorial violations committed *against a state's own national*, that factor providing a solid basis for finding that the victim was subject to the perpetrating state's jurisdiction, the language of its holding is broad enough³³ to cover cases involving extraterritorial mistreatment of non-nationals. The latter proposition has been carried forward by the regional human rights institutions.³⁴

In *Loizidou v. Turkey (Preliminary Objections)*,³⁵ the European Court of Human Rights faced the issue of whether certain acts committed against individuals by Turkish armed forces deployed in northern Cyprus were capable of falling within Turkish 'jurisdiction' within the meaning of Article 1 of the European Convention. In finding that such acts were capable of falling within the scope of Article 1, the Court tied the application of human rights obligations to the fact of control over the individual alleging a violation. The Court held: 'Bearing in mind the object and purpose of the Convention, the responsibility of a contracting party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory.'³⁶ It reasoned that '[t]he obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control'.³⁷ It also stated that it was irrelevant whether such control is 'exercised directly, through [a state party's] armed forces, or through a subordinate local administration'.³⁸

In that particular case, the alleged wrongful conduct was the continuous denial by Turkish forces of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property. In the merits phase of the case, the Court found that this interference with the applicant's rights 'is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 and is thus imputable to Turkey'.³⁹

The Inter-American Commission on Human Rights has similarly found states bound by human rights obligations in their extraterritorial treatment of non-

³² *Ibid.*

³³ Recognizing the breadth of the holding, one Committee member filed a separate statement attempting to limit its scope, even citing the case of occupied territory as a situation in which the obligations of the ICCPR should not apply. *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1, at 88 (1984) (individual opinion appended to the Committee's views at the request of Mr Christian Tomuschat). No other Committee members joined in this opinion.

³⁴ Given the pervasive phenomenon of cross-fertilization among international fora, particularly among human rights fora, it is not uncommon to cite jurisprudence from regional fora as precedent for universal regimes. Regional practice is also particularly useful since the regional institutions, the combined membership of which comprises a large proportion of UN member states, tend to be more active, and thus have broader bases of experience within their spheres of competence.

³⁵ *Loizidou v. Turkey (Preliminary Objections)*, ECHR (1995) Series A. No. 310, 23 February 1995.

³⁶ *Ibid.*, at para. 62.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Loizidou v. Turkey (Merits)*, 40/1993/435/514, 18 December 1996, at para. 57.

nationals.⁴⁰ Indeed, the reasoning of the *Loizidou* Court was taken a step further in a recent report of the Commission. In *Coard et al. v. United States*,⁴¹ the Commission examined allegations that the military action led by the armed forces of the United States in Grenada in October 1983 violated a series of norms of international human rights and humanitarian law. Specifically, the petitioners alleged that they had been, *inter alia*, detained by United States forces in the first days of the military operation, held incommunicado for many days, and mistreated, all in violation of the United States' obligations under the American Declaration of the Rights and Duties of Man.⁴²

Before addressing the question of whether the actions of the US forces violated rights contained in the American Declaration, the Commission had to determine whether the petitioners were subject to US jurisdiction.⁴³ Citing Theodor Meron's scholarship for the proposition that a state's human rights obligations obtain where its agents exercise power and authority over persons outside national territory,⁴⁴ the Commission found that the phrase 'subject to its jurisdiction' 'may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state — usually through the acts of the latter's agents abroad'.⁴⁵ The Commission further stated that '[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control'.⁴⁶

Finding that the United States forces were bound by norms of both human rights

⁴⁰ See, e.g., *Haitian Centre for Human Rights v. United States*, Case 10.675, Report No. 51/96, Inter-AmCHR, OEA/Ser.L/V/II.95 Doc. 7 Rev. at 550 (1997) (finding that the United States, in intercepting Haitian refugees in boats on the high seas and returning them to Haiti, had violated its obligations under the American Declaration of the Rights and Duties of Man); Report 31/93, Case 10.573, United States, published in Annual Report of the IACHR 1993, OEA/Ser.L/V/II.85, Doc. 9 Rev., 11 February 1994, at 312 (admitting case concerning actions of United States forces in Panama).

⁴¹ *Coard et al. v. United States*, Case 10.951, Report No. 109/99, 29 September 1999.

⁴² American Declaration of the Rights and Duties of Man ('American Declaration'), OAS Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 Doc.6 Rev.1, at 17 (1992). It is well established that the American Declaration 'constitutes a source of international obligation'. *Coard*, *supra* note 41, at para. 36 (citing Inter-American Court of Human Rights, Advisory Opinion OC-10/89, 14 July 1989, 'Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights', Series A, No. 10, at paras 43–46).

⁴³ While the Declaration does not contain language expressly narrowing the scope of its application to individuals 'subject to the jurisdiction' of the state party, the Commission read in this requirement. *Coard*, *supra* note 41, at para. 37 ('Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.').

⁴⁴ Meron, 'Extraterritoriality of Human Rights Treaties', 89 *AJIL* (1995) 78, at 81.

⁴⁵ *Coard*, *supra* note 41, at para. 37.

⁴⁶ *Ibid.*

and humanitarian law⁴⁷ during the course of their activities in Grenada, the Commission declared that the deprivation of the petitioners' liberty effectuated by those forces did not comply with the terms of Articles I, XVII and XXV of the American Declaration.

A recent admissibility decision of the European Court of Human Rights illustrates the extent to which this point of law has developed. In response to a claim by Iraqi citizens of violations alleged to have been perpetrated by Turkish armed forces on Iraqi soil in the course of Turkish military operations there, the European Court declared the application admissible without even mentioning the extraterritorial nature of the incident.⁴⁸

Synthesizing the holdings of the cases above, the following rule may be drawn. A state's human rights obligations may apply with respect to its treatment of non-nationals abroad, where such individuals find themselves under its control, whether directly, through that state's armed forces, or through a subordinate local administration. Further, the legality of the state's presence abroad or whether that state is acting alone or with the acquiescence of the state in whose territory the violation occurs is irrelevant.

KFOR would appear to fall within this rule. KFOR is an organ of state control in Kosovo in at least two senses. First, it exercises public authority in Kosovo. Secondly, it consists of sections of the armed forces of participating states.⁴⁹ The fact that its presence is lawful, having been authorized by the Security Council acting under Chapter VII, is irrelevant.⁵⁰

⁴⁷ While the Commission found that the United States was simultaneously bound by both human rights and humanitarian law, it essentially deferred to humanitarian law as *lex specialis* in order to 'help . . . define whether the detention of the petitioners was "arbitrary" or not under the terms of Articles I and XXV of the American Declaration' (*Coard, supra* note 41, at para. 42) given the climate in which the alleged violation occurred. While the Commission also pointed out that, where human rights and humanitarian law 'provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual', its *renvoi* to humanitarian law to ascertain the standard of 'arbitrariness' may have undermined that mandate. Normally, where a state is unable to afford the full protection of certain rights, it is required to enter a derogation. That would be preferable in this case as well, rather than risking the dilution of human rights standards and the integrity of human rights law as a separate and independently applicable body of public international law.

⁴⁸ *Issa, Omer, Ibrahim, Murty Khan, Muran and Omer v. Turkey*, Decision as to the Admissibility of Application No. 31821/96, 30 May 2000.

⁴⁹ For the nexus between the sending state and its forces under KFOR command, see *infra* section 5.

⁵⁰ While it may be theoretically possible for the Security Council to override a state's human rights obligations (at least those that have not achieved the status of *jus cogens*) by issuing a resolution under Chapter VII, which would be binding on all member states and would be superior to conflicting international obligations (UN Charter, Articles 25 and 103), it would have to do so expressly. This flows from the general principle of interpretation that obligations should be construed, where possible, so as to avoid conflicting obligations. This would be especially true with respect to the abrogation of human rights obligations, given the great importance placed on them by the international community. For the proposition that the Security Council could not override *jus cogens* norms, see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v.*

The primary ground for distinction⁵¹ would appear to be the degree of control exercised by the relevant forces. In its *Loizidou* judgment, the European Court referred to the fact that the Turkish army exercised 'effective overall control over that part of the island'.⁵² While KFOR and UNMIK together exercise overall control in Kosovo, KFOR alone has limited responsibilities.

First, KFOR's mandate is limited to acting as a security force, including some police functions. It is not charged with civilian administration. Secondly, it is composed of troops from several different countries, each sharing a portion of the overall security responsibility. Thirdly, the responsibilities of the various KFOR contingents vary depending upon the region of Kosovo in which they are deployed. For example, in some regions KFOR actively polices, running the prisons and conducting investigations; in others it acts only as back-up to the UNMIK Police. Thus, an individual state's troops in Kosovo stand in a different position from that occupied by Turkish forces in northern Cyprus.

The *Coard* decision, on the other hand, did not require overall control of a particular territory. It only required control *vis-à-vis* the individual alleging a violation of his or her rights. The European Court's decision in *Issa*, where the application was held admissible in the case of an extraterritorial military operation falling short of effective overall control of a territory, appears to employ a similar approach.⁵³

Several factors support this progressive development of the law and provide a sound basis for arguing that the reach of a state's human rights obligations is commensurate with its degree of control over individuals in foreign territory.

First, the International Court of Justice has held that, with respect to treaty

Yugoslavia (Serbia and Montenegro) (Separate Opinion of Judge Lauterpacht), ICJ Reports (1993), at 325 ('The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*.').

⁵¹ The fact that the FRY is not a party to the European Convention could not serve as a basis for distinguishing the case of KFOR in Kosovo from the cases above. First, as mentioned above, the FRY is a party to the ICCPR. Secondly, even if the *Loizidou* holding is to be limited to interpretation of the ECHR, neither the fact that the applicant was a national of a state party to the ECHR nor the fact that the violation occurred on the territory of a state party was relied on, or even mentioned, by the Court in its determination of Turkey's responsibility. Finally, the European Court found the application in *Issa* admissible even though Iraq, which is not a party to the ECHR, is both the country of citizenship of the complainants and the state in which the violations are alleged to have occurred.

⁵² *Loizidou v. Turkey* (Merits), 40/1993/435/514, 18 December 1996, at para. 56.

⁵³ It should also be noted that, in an earlier decision in the *Loizidou* case, the European Commission on Human Rights had used broader language than the Court subsequently used. In ascertaining whether the applicant was subject to Turkey's jurisdiction, the Commission had held 'that nationals of a State, including registered ships and aircraft, are partly within its jurisdiction wherever they may be, and that authorized agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.' *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, Decision as to the Admissibility of Application Nos 00015299/89, 00015300/89 and 00015318/89, Hudoc reference number: REF00002448, 3 April 1991 (emphasis added).

interpretation, a contextual approach, rather than a literal approach, should be employed.⁵⁴ That being said, it is important to recall that the purpose of human rights law is to protect individual human beings.⁵⁵ Further, in promulgating the ICCPR, the state parties ‘recogniz[ed] that these rights derive from the inherent dignity of the human person’ and recalled their Charter obligation to promote the universal protection of human rights,⁵⁶ thus clearly implying an obligation to acknowledge the rights of all human beings. Secondly, human rights instruments in particular are subject to a method of dynamic interpretation, one which can respond to developments in international affairs, as well as to the changing realities of peoples’ everyday lives.⁵⁷ Related to these is the effectiveness principle, which requires that the provisions of human rights treaties ‘be interpreted and applied so as to make [their] safeguards practical and effective’.⁵⁸

In light of these legal principles, the very fact that the various KFOR contingents exercise different powers and discharge different responsibilities supports the notion that their level of obligation should be tied to their fields of operation. At the same time, as the European Court held in *Loizidou* that the legality of the state’s presence was irrelevant and that the state’s obligation flowed from the fact of its control, it is reasonable to conclude that the state’s level of obligation should be tied to the degree of actual control, even where it exceeds the degree of lawful control. This is also supported by the well-established rule that a state’s responsibility is engaged even where a state actor is acting *ultra vires*, or beyond the scope of his official capacity.⁵⁹ Thus, for example, if a KFOR contingent were to undertake activities outside of its

⁵⁴ *The Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 271*, ICJ Reports (1970), at 31, at para. 53. See also Vienna Convention on the Law of Treaties, Article 31(1), 24 April 1970, 8 ILM 679.

⁵⁵ *Loizidou v. Turkey* (Preliminary Objections), ECHR (1995) Series A, No. 310, 23 February 1995, at para. 72.

⁵⁶ ICCPR, third and fifth preambular paragraphs.

⁵⁷ For the proposition that the European Convention is a living instrument which must be interpreted in the light of present-day conditions, see, *inter alia*, *Tyrer v. United Kingdom*, ECHR (1978) Series A, No. 26, 25 April 1978, at 15–16, at para. 31.

⁵⁸ *Loizidou v. Turkey* (Preliminary Objections), ECHR (1995) Series A, No. 310, 23 February 1995, at para. 72. See also *Velásquez-Rodríguez*, Judgment of 29 July 1988, Inter-AmCHR (1988) Series C, No. 4, at para. 167; Human Rights Committee, General Comment No. 16; ICESCR Committee, General Comment No. 5, at para. 11 (1994); *Artico v. Italy*, ECHR (1980) Series A, No. 37, at 16 (‘The [European] Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.’); *A v. UK*, Application No. 15599/94, Report of 18 September 1997, at para. 48 (European Commission stating that ‘[i]n order that a State may be held responsible it must in the view of the Commission be shown that the domestic legal system . . . fails to provide practical and effective protection of the rights guaranteed’).

⁵⁹ *Velásquez-Rodríguez*, *supra* note 58, at paras 169–170 (‘Whenever a State organ, official or public entity violates one of [the rights recognized in the Convention], this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.’).

legally prescribed mandate, the state's human rights obligations would apply nonetheless.

4 Humanitarian Law

All of the national governments of the various KFOR contingents are bound by the Geneva Conventions,⁶⁰ which contain the core of modern humanitarian law. The question then is whether humanitarian law is applicable to the present situation in Kosovo. As shown below, several lines of argument support the proposition that the provisions of humanitarian law apply to the conduct of KFOR operations.

Before advancing to those arguments, however, mention should be made of the UN Secretary-General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law'.

A *UN Observance of Rules of International Humanitarian Law*

In August 1999, the UN Secretary-General promulgated a code of 'principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'.⁶¹ It essentially sets forth, in summary fashion, the main provisions of the Geneva Conventions and holds that they are applicable 'to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement'.⁶² It further provides that: 'They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.'⁶³

While not technically binding on KFOR, which is not, strictly speaking, a United Nations force (i.e. blue berets), nor capable of directly giving rise to state accountability, the promulgation of this code is important for two reasons. First, as KFOR is a 'security presence' deployed 'under United Nations auspices', it should in principle be held to the same standards as UN forces. Secondly, it lends support to the proposition that humanitarian law is applicable in peacekeeping operations.

B *Obligations of States Contributing Forces to KFOR*

Whatever the level of hostilities in Kosovo prior to March 1999, it is clear that from the inception of the NATO air campaign an international armed conflict existed,

⁶⁰ Almost all countries in the world are parties to the Geneva Conventions. Further, the substantive provisions of the Geneva Conventions are widely regarded as having achieved the status of customary international law, and are thus binding on all states. See, e.g., *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, ICJ Reports (1986) 14.

⁶¹ 'Observance by United Nations Forces of International Humanitarian Law', ST/SGB/1999/13, 6 August 1999.

⁶² *Ibid.*, at section 1.1.

⁶³ *Ibid.*

triggering the application of humanitarian law.⁶⁴ The issue examined herein is whether humanitarian law continued to apply following the withdrawal from Kosovo of Yugoslav security forces in June 1999.

In the course of any analysis of the applicability of the Geneva Conventions, it is important to bear in mind that one of the main strengths of the Conventions is that they apply once a given set of factual circumstances arises, regardless of the label applied by the parties⁶⁵ or of the legality of the initial resort to armed force.⁶⁶

Even assuming that the FRY's agreement to the principles annexed to Resolution 1244⁶⁷ and its signing of the Military-Technical Agreement⁶⁸ (MTA) brought an end to armed combat between the parties,⁶⁹ this does not necessarily mean that international humanitarian law has ceased to apply.

According to Article 6 of the Fourth Geneva Convention, its provisions apply from 'the outset of any conflict or occupation' until there has been a 'general close of military operations'.⁷⁰ In the case of occupied territory, its provisions continue to apply beyond the general close of military operations.⁷¹

Before determining whether there has been a general close of military operations, it is necessary to consider whether Kosovo can be deemed an occupied territory.

⁶⁴ According to the ICRC (International Committee of the Red Cross) Commentary to the Fourth Geneva Convention: 'Any difference arising between two States and leading to the intervention of members of the armed forces' is an international armed conflict, regardless of 'how long the conflict lasts, or how much slaughter takes place.' Jean Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) (1994 reprinted edition) 20. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72 (RP D6413-D6491), at para. 70. The NATO bombing campaign clearly meets these standards.

⁶⁵ See, e.g., Fourth Geneva Convention, *supra* note 4, Article 2 (the Convention applies even if a state of war is not recognized by one of the parties). See also ICRC Commentary, *supra* note 64, at 21 ('The Convention only provides for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war. Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.').

⁶⁶ It is a fundamental principle of the laws of war that *jus in bello* is independent of *jus ad bellum*.

⁶⁷ Annex 2, S/RES/1244 (1999).

⁶⁸ The Military-Technical Agreement, concluded on 9 June 1999 by NATO military authorities and the Federal Republic of Yugoslavia, dealt with the procedures and modalities for the withdrawal from Kosovo of Yugoslav security forces for the purpose of 'establish[ing] a durable cessation of hostilities'. Military-Technical Agreement, at para. 4(a), S/1999/682, 9 June 1999.

⁶⁹ Given the continuing violence in Kosovo among members of the local population and between KFOR and members of the local population, it may be possible to argue that active hostilities continue.

⁷⁰ Fourth Geneva Convention, *supra* note 4, Article 6. According to the ICTY, the law of armed conflict 'extends beyond the cessation of hostilities until a general conclusion of peace is reached'. *Tadic* Jurisdiction Decision, *supra* note 64, at para. 70. Considering present conditions within Kosovo and the rest of the FRY, it may be difficult to argue that a general conclusion of peace has been reached.

⁷¹ *Ibid.*

(i) The Law of Occupation

As noted above, the provisions of the Geneva Conventions apply from the outset of any conflict or occupation. The definition of occupation as the term is used in the Geneva Conventions is broad. Unlike the definition used in the Regulations annexed to the Fourth Hague Convention of 1907, which requires that the ‘territory actually [be] placed under the authority of the hostile army’ before it can be considered occupied, the Geneva Conventions apply ‘even [to] a patrol which penetrates into enemy territory without any intention of staying there’ with respect to ‘its dealings with the civilians it meets’.⁷² Further, paragraph 2 of Article 2 provides that the Convention applies to all cases of partial or total occupation, ‘even if the said occupation meets with no armed resistance’.⁷³

The period after which application of the Convention ceases depends upon the nature of the occupation. The Convention contemplates two types of occupation. The first is the case in which occupation is ‘carried out under the terms of the instrument which brings hostilities to a close: an armistice, capitulation, etc.’.⁷⁴ As the ICRC Commentary explains: ‘[I]n such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared.’⁷⁵ Thus, the application of the Convention to this type of occupation follows from the first paragraph of Article 2.⁷⁶ The second type of occupation is covered by the second paragraph of Article 2, which ‘refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances’.⁷⁷

While application of the Convention to the first type of occupation terminates one year after the general close of military operations,⁷⁸ the Convention continues to apply fully to the second type for the duration of the occupation.⁷⁹

⁷² ICRC Commentary, *supra* note 64, at 60.

⁷³ Fourth Geneva Convention, *supra* note 4, Article 2.

⁷⁴ ICRC Commentary, *supra* note 64, at 63.

⁷⁵ *Ibid.*, at 21.

⁷⁶ The first paragraph of Article 2 states: ‘the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.’ Fourth Geneva Convention, *supra* note 4, Article 2. See ICRC Commentary, *supra* note 64, at 21 (‘The application of the Convention to territories which are occupied at a later date, in virtue of an armistice or a capitulation, does not follow from [paragraph 2], but from paragraph 1. An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1.’).

⁷⁷ ICRC Commentary, *supra* note 64, at 21.

⁷⁸ Note, however, that certain provisions of the Convention continue to apply after one year has expired in so far as the occupying power continues to exercise governmental functions. Fourth Geneva Convention, *supra* note 4, Article 6. For those states that have ratified Protocol I to the Geneva Conventions, the provisions of that Protocol and the Conventions continue to apply fully for the duration of the occupation. Protocol 1, *supra* note 4, Article 3(b).

⁷⁹ ICRC Commentary, *supra* note 64, at 63.

(ii) *Kosovo as Occupied Territory*

The primary criteria for determining whether the presence of foreign troops in a given territory constitutes an occupation would logically be whether the sovereign has been displaced from the exercise of public authority over the territory, and whether that sovereign has consented to the displacement.

As noted above, KFOR and UNMIK exercise public authority in Kosovo to the virtual exclusion of Belgrade authorities from the territory. Recalling the fact that a patrol penetrating into enemy territory without any intention of staying there is sufficient to trigger the law of occupation, this criterion would be clearly satisfied.

As for the second criterion, while the FRY did consent to the KFOR presence in signing the MTA, whether that consent was anything more than formal consent is doubtful. In light of the emphasis of the Geneva Conventions on factual circumstances, as opposed to labels, formal consent would probably be insufficient to overcome the presumption of occupation that arises from the circumstances leading up to the signing of the MTA.

Further, formal consent may itself be lacking in this case. Although the FRY did express its consent in signing an international agreement, that consent may be vitiated if the agreement is found to be invalid. While duress does not usually constitute grounds for holding a treaty invalid, Article 52 of the Vienna Convention on the Law of Treaties provides that: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'⁸⁰ This essentially means that the validity of the MTA turns on the legality of the initial NATO intervention, which is a question that has not been definitively settled.⁸¹

The fact that KFOR's presence has been authorized by the Security Council adds little to this analysis. While the presence of KFOR has been rendered legal by virtue of Resolution 1244 and must be accepted by the FRY,⁸² this does not directly⁸³ affect application of the Geneva Conventions, which consciously avoid inquiries into the legality of resort to the use of force. However, the fact that KFOR is given a limited

⁸⁰ Vienna Convention on the Law of Treaties, *supra* note 54, Article 52; see also Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Article 52.

⁸¹ It may be interesting to note here the possible intersection of *jus ad bellum* and *jus in bello*. Application of the law of occupation (*jus in bello*) turns on whether the situation constitutes an occupation, which turns on the existence of FRY consent, which can be inferred from an agreement, the validity of which turns on the legality of the NATO intervention (*jus ad bellum*).

⁸² Obligations arising from the exercise of the Security Council's Chapter VII powers are binding on all member states (UN Charter, Article 25), are superior to all other international obligations (*ibid.*, Article 103), and override the non-intervention principle (*ibid.*, Article 2(7)). While the FRY is not a member state of the United Nations, it insists that it is the successor state to the SFRY. Thus, it could be argued that the FRY lacks standing to object to being bound by obligations arising from Security Council resolutions.

⁸³ The Security Council could theoretically abrogate certain non-fundamental norms of humanitarian law, as with human rights law (see *supra* note 50). Thus, it could be argued that KFOR is not bound by humanitarian law to the extent it receives directly conflicting commands from the Security Council. It should be noted here that the statement in paragraph 7 of Resolution 1244 authorizing member states to establish the international security presence 'with all necessary means to fulfil its responsibilities', read in

mandate under the Resolution, and is thus not itself exercising the full range of public authority in Kosovo, may mean that its obligations apply only to the extent that it exercises control over the areas governed by the relevant provisions of the Geneva Conventions.⁸⁴ Thus, where it polices, detains civilians, investigates crimes and runs prisons, it would have to comply with the relevant norms applicable to occupied territories.

It remains to be determined which type of occupation is being carried out in Kosovo. If KFOR is seen as a mere continuation of the NATO force that launched the bombing campaign in March 1999, then it would clearly be engaged in an occupation of the first type (i.e. an occupation by hostile forces during or subsequent to hostilities). If KFOR is viewed as a new, independent entity deployed in Kosovo following the passage of Resolution 1244, then it may constitute an occupation of the second type (i.e. an occupation meeting with no armed resistance). Given the fact that KFOR is largely composed of NATO forces, and that part of its mandate was to ensure the withdrawal of Yugoslav forces, it would seem to constitute an occupation of the first type; as such, the Geneva Conventions would continue to apply for one year following the close of military operations.⁸⁵

Whether there has been a close of military operations is also subject to debate. According to the ICRC Commentary, 'in most cases the general close of military operations will be the final end of all fighting between all those concerned'.⁸⁶ While NATO and FRY forces may no longer be in open conflict, hostilities continue to surface in Kosovo and Serbia proper. As some violent acts have been committed against KFOR in an organized fashion, it may be difficult to dismiss these as purely isolated instances of internal violence.

In any event, the law of occupation would have fully applied at least until June 2000.⁸⁷ After that, KFOR would still be bound by certain provisions of the Fourth Convention to the extent that it continued to exercise public authority in the fields to which those provisions apply.

5 Piercing the Intergovernmental Veil: State Accountability for Violations

As the vast majority of participating states are parties to the instruments cited above, it is clear that KFOR can be collectively held to the standards contained therein.

conjunction with the decision in paragraph 5 to deploy the civil and security presences 'with appropriate equipment and personnel', clearly refers to the provision of adequate resources to the security presence and not to any sort of blanket permission to use whatever method of repression KFOR decides is necessary in carrying out its mandate.

⁸⁴ This is supported by the example in the ICRC Commentary of the cross-border patrol that is bound by the provisions on occupied territories of the Fourth Convention to the extent that it has dealings with civilians in the foreign territory. See *supra* note 72, and the accompanying text.

⁸⁵ Again, this limitation would not apply to state parties to Protocol I, which provides that the Geneva law continues to apply for the duration of the occupation. See *supra* note 78.

⁸⁶ ICRC Commentary, *supra* note 64, at 62.

⁸⁷ See *supra* note 85.

However, assigning individual state accountability for violations of those standards is a more complex matter.

While alleged violations would have to be assessed on a case-by-case basis, there are a number of factors generally weighing in favour of or against a finding of individual state accountability. The strongest factor weighing against a finding of individual state accountability is that formally each national contingent is an integral part of KFOR and does not purport to be acting in Kosovo on behalf of its sending state. However, notwithstanding this formal affiliation with KFOR,⁸⁸ the home governments of the KFOR contingents retain a substantial degree of residual control over their forces. For example, each national contingent follows its own rules of engagement. While KFOR has some common rules of engagement, the interpretations of each contingent vary widely. In addition, orders given by KFOR command are subject to the now famous ‘red card’ procedure,⁸⁹ providing a strong back-link to the home government of the contingent. Each contingent’s tie to its home government is made explicit in UNMIK Regulation 2000/47, which provides that KFOR personnel are ‘subject to the exclusive jurisdiction of their respective sending States’ and are ‘immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States’,⁹⁰ and that ‘[r]equests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration’.⁹¹ Thus, while the KFOR leadership⁹² nominally assumes responsibility for directing the activities of the forces, the national governments of the contingents ultimately retain significant control over their soldiers, bolstering a finding of individual state accountability for the acts of the troops each state has contributed to KFOR.

Further, even if it could be demonstrated that the individual home governments lacked effective control over the troops that they contributed to KFOR, accountability would still arise based upon their freely entering into a multinational operation if human rights violations resulted from that operation.⁹³

⁸⁸ Recall that KFOR was not created by the UN. Although deployed under UN auspices, its creation was left to ‘Member States and relevant international organizations’. Resolution 1244, *supra* note 1, at para. 7.

⁸⁹ The ‘red card’ procedure was best exemplified by Michael Jackson’s refusal to eject the Russian troops from Slattina airport in June 1999.

⁹⁰ UNMIK Regulation 2000/47, section 2.4.

⁹¹ *Ibid.*, at section 6.2.

⁹² Another possible argument for a finding of individual state accountability could be drawn from corporate law. If one state (or perhaps a small group of states) so clearly dominated the command of KFOR that KFOR could be said to be acting on behalf of that state, then, by ‘piercing the corporate veil’, that state could be held responsible for the acts of KFOR.

⁹³ *Matthews v. United Kingdom* (Judgment), at paras 33–34, Application No. 24833/94, 18 February 1999 (‘The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty. . . In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom’s responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 . . .’); see also *Waite and Kennedy v. Germany* (Judgment), Application No. 26083/94, 18 February 1999, at para. 67 (‘The Court is of the opinion that where States establish

Another factor weighing in favour of individual state accountability is the effectiveness principle mentioned above.⁹⁴ States should not be able to escape accountability for the conduct of their forces by acting through an intergovernmental organization.⁹⁵ The practical and effective protection of individual rights requires that there be accountability for violations of those rights. If national governments are not held responsible for the conduct of their troops, no legal subject can be held accountable under international human rights law⁹⁶ for violations committed by those troops. The resulting lacuna in accountability would be anathema to the effective protection of individuals that is the very purpose of human rights and humanitarian law.

6 Derogation

All of the major human rights instruments provide for the possibility of derogation in times of public emergency. In such cases, state parties may take measures derogating from their obligations under the respective treaties 'to the extent strictly required by the exigencies of the situation'.⁹⁷ In such cases, states must declare their derogation. For example, the ICCPR requires a derogating state party to 'immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated'.⁹⁸ A small number of rights are non-derogable, meaning that they are never subject to derogation.⁹⁹

international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.').

⁹⁴ See *supra* section 3.

⁹⁵ Another significant feature of UNMIK Regulation 2000/47 is that it deprives the Kosovo courts of any type of jurisdiction, civil or criminal, over KFOR itself or over KFOR soldiers. Although remedies may be theoretically available in the courts of the sending state, those courts are physically and financially inaccessible for most residents of Kosovo. Further, the Human Rights Ombudsperson for Kosovo, established by UNMIK Regulation 2000/38, is not authorized to receive complaints of abuses committed by KFOR. Thus, in the absence of individual state accountability, if internal KFOR complaints procedures fail to provide adequate redress, a situation of effective impunity would result and victims would be left without access to a remedy.

⁹⁶ Unlike human rights law, the violation of certain norms of humanitarian law may give rise to individual criminal responsibility under international law. See Statute of the ICTY, 25 May 1993.

⁹⁷ ICCPR, *supra* note 2, Article 4(1). See also ECHR, *supra* note 2, Article 15(1); and ACHR, *supra* note 2, Article 27(1).

⁹⁸ ICCPR, *supra* note 2, Article 4(3). See also ECHR, *supra* note 2, Article 15(3); and ACHR, *supra* note 2, Article 27(3).

⁹⁹ See, e.g., ICCPR, *supra* note 2, Article 4(2); ECHR, *supra* note 2, Article 15(2); and ACHR, *supra* note 2, Article 27(2). These non-derogable rights typically include the right to life, freedom from torture and slavery, and freedom from retroactive application of criminal laws. See *supra* note 5 and the accompanying text.

No declarations of derogation have been lodged for armed forces deployed in Kosovo. Nor can deployment as a 'security presence' imply an intrinsic derogation since human rights obligations fully apply to a state's armed forces.¹⁰⁰

Humanitarian law is never subject to collective derogation.¹⁰¹

7 Conclusion

Despite the unique situation in which KFOR finds itself, it does not occupy a legal vacuum. As an entity deployed under UN auspices and by virtue of its exercise of public authority in Kosovo, it is bound by provisions of international human rights and humanitarian law to the extent of its control over individuals there.

In addition, the failure of KFOR troops to meet international standards for the treatment of individuals may give rise to individual state accountability, particularly in light of the substantial degree of control retained by the sending states as well as the intolerable situation that would otherwise result.

Finally, should KFOR or its participating states choose to declare a derogation, it is important to remember that they would remain bound by the minimum standards provided by humanitarian law.

¹⁰⁰ See *Loizidou v. Turkey* (Preliminary Objections), ECHR (1995) Series A, No. 310, 23 February 1995.

¹⁰¹ Although Article 5 of the Fourth Geneva Convention provides for a limited degree of derogation with respect to rights of communication of a 'person under definite suspicion of activity hostile to the security of the Occupying Power', there is no provision permitting derogation with respect to the general population.