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Abstract

Protection of Individuals in Post-Conflict Kosovo: The Applicability of International Human Rights Law and International Humanitarian Law to a New Generation of Peacekeeping Operations.

Sangeeta Shah

Master of Jurisprudence

2003

On 10 June 1999 the United Nations Security Council adopted Security Council Resolution 1244 thereby authorising the establishment of both international civil and security presences in the Kosovo region of the Federal Republic of Yugoslavia (FRY). This paper seeks to examine the applicability of human rights and international humanitarian law norms to the United Nations Interim Administration in Kosovo (UNMIK) and Kosovo Force (KFOR) operations and their relative protections for individuals in Kosovo. Together, both UNMIK and KFOR serve to govern the Kosovo region to the exclusion of the Yugoslav government, and with such a concentration of power it is essential that individuals are adequately protected. This protection, if it exists, must come from international human rights law and/or international humanitarian law, which are both driven and underpinned by the ideal of the protection of individuals. This thesis investigates the extent to which UNMIK and KFOR operate within the framework of these bodies of law. A comparison of the conceptual and material similarities and differences between international human rights law and international humanitarian law is undertaken, with a view to investigating their relative strengths and weaknesses as a means of furthering the aim of protection of the individual. An examination of the applicability of international human rights law and international humanitarian law, respectively, to the UNMIK and KFOR operations is undertaken, and finally, a brief examination of the remedies available to individuals for violation of these legal norms is undertaken. The paper concludes that the framework in which the UNMIK and KFOR operations is incomplete with regard to protections for individuals and suggests that guidelines need to be established for this new generation of peacekeeping operations.

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2003

Department of Law
University of Durham



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Acknowledgement

I wish to thank my supervisor, Professor Colin Warbrick, whose help, guidance and encouragement have proved invaluable in the writing of this thesis.

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Introduction

On 10 June 1999 the United Nations Security Council adopted Security Council Resolution 1244 thereby authorising the establishment of both international civil and security presences in the Kosovo region of the Federal Republic of Yugoslavia (FRY).¹ This paper seeks to examine the applicability of human rights and international humanitarian norms to the United Nations Interim Administration in Kosovo (UNMIK) and Kosovo Force (KFOR) operations and their relative protections for individuals in Kosovo. First, however, a little should be said about the UNMIK and KFOR operations themselves.

Acting under Chapter VII of the United Nations Charter, the Security Council perceived the situation in Kosovo to be a threat to international peace and security, and duly authorised the creation of UNMIK, by the Secretary-General with the assistance of relevant international organisations. This forms the point of departure for this thesis. The prior eleven week NATO bombing campaign, and its legality, will not be discussed.²

¹ Security Council Resolution 1244 (1999), UN Doc. S/RES/1244 (1999), (Resolution 1244).

The Federal Republic ceased to exist on 4 February 2003, and was replaced by the new state of Serbia and Montenegro. However, for the purposes of this study the state will be referred to by its former name: Federal Republic of Yugoslavia (FRY).

² By way of brief background, the Serbian forces conducted armed attacks against the Albanian population of Kosovo, including members of the Kosovo Liberation Army (KLA), who sought independence for Kosovo. The attacks resulted in human rights abuses and large-scale refugee flows to neighbouring regions. Worried about the increasing humanitarian crisis in Kosovo, international peace negotiations were held in February 1999 resulting in the proposed Interim Agreement for Peace and Self-Government in Kosovo (UN Doc. S/RES/648 (1999)), but the Belgrade authorities refused to sign the agreement. In response, NATO commenced a bombing campaign against the FRY as a 'humanitarian intervention', which in turn led FRY forces to commit revenge attacks against the Albanian civilian population in Kosovo. Eventually a peace plan was brokered, known as the Ahtisaaria-Chernomyrdin plan (Annex 2 to Resolution 1244), which was accepted by the Serbian parliament on 3 June 1999, following which, the NATO airstrikes ceased.

For further details on the situation in Kosovo prior to the entrance of UNMIK and KFOR see: O'Neill, *Kosovo: An Unfinished Peace* (2001); Youngs, *Kosovo: The Diplomatic and Military Options*, House of Commons Research Paper 98/93, 27 October 1998; Youngs, Oakes and Bowers, *Kosovo: NATO and Military Action*, House of Commons Research Paper 99/34, 24 March 1999 and Youngs, Oakes, Bowers and Hillyard, *Kosovo: Operation 'Allied Force'*, House of Commons Research Paper 99/48, 29 April 1999.

For a discussion of the legality of NATO's action see, *inter alia*: Cassese, 'Ex Inuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? What Others Have to Say', (1999) 10 *European Journal of International Law* 23; Duursma, 'Justifying NATO's Use of Force in Kosovo?', (1999) 12 *Leiden Journal of International Law* 287; Gowland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', (2000) 11 *European Journal of International Law* 361; Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', (1999) 3 *Max Planck Yearbook of United Nations Law* 59; Neuhold, 'Collective Security after Operation Allied Force', (2000) 4 *Max Planck Yearbook of International Law* 73; Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law* 1, and the series of 'Editorial Comments on NATO's Kosovo Intervention', (1999) 93 *American Journal of International Law* 824-862.



Under Resolution 1244, UNMIK's mandate is to:

...provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide an interim administration while establishing and overseeing the development of provisional democratic self-governing institutions....³

United Nations member states and 'relevant international organisations' were also authorised to create an international security presence in Kosovo, which became known as the Kosovo Force (KFOR). The Security Council granted KFOR the mandate to "establish a safe environment for all people in Kosovo".⁴

The interim administration is charged with various responsibilities including: promoting the establishment of substantial autonomy and self-government in Kosovo, performing basic civilian administration functions where required, organising and overseeing the development of provisional institutions for democratic and autonomous self-government, supporting reconstruction of infrastructure and other economic reconstruction, maintaining civil law and order, assuring the safe return of refugees to Kosovo, and protecting and promoting human rights.⁵ The Secretary-General was given the task of creating an institution which could successfully fulfil this complex and varied range of duties and he created UNMIK, a hybrid body composed of UN collaboration with various international agencies.⁶ UNMIK is composed of four pillars each headed by a different agency. The UN is responsible for civil administration in Kosovo including: policing; overseeing and conducting civil affairs functions (including the civil service, budgetary affairs and supporting the provision of basic public services) and organisation and oversight of the judicial system. Humanitarian affairs were overseen by the Office for the United Nations High Commissioner for Refugees, with responsibility for the safe return of refugees to Kosovo and coordination of emergency relief.⁷

³ Paragraph 10, Resolution 1244.

⁴ Paragraph 4, Annex 2, Resolution 1244. Also paragraph 9(c), Resolution 1244.

⁵ Paragraph 11, Resolution 1244.

⁶ See Report of Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), 12 June 1999, UN Doc. S/1999/672, especially paragraphs 2-14.

⁷ The mandate of the United Nations High Commissioner for Human Rights was fulfilled by the end of June 2000 and this pillar was then dissolved. See paragraph 66, Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 6 June 2000, UN Doc. S/2000/538 and paragraph 51, Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 15 December 2000, UN Doc. S/2000/1196.

The Organisation for Security and Cooperation in Europe has been assigned responsibility for institution building in Kosovo. This includes capacity-building in the areas of justice, police and public administration; democratisation and governance; human rights monitoring and capacity-building and the conduct and monitoring of elections. Finally, the European Union is given the task of economic reconstruction of the region. A Special Representative of the Secretary General heads the UNMIK mission, and he has “overall authority to manage the mission and to coordinate the activities of all UN agencies operating as part of UNMIK”, to ensure that the UNMIK mandate is carried out effectively “in an integrated manner with a clear chain of command”.⁸

The UNMIK operation has been described by the Secretary-General as an ‘unprecedented’ peacekeeping operation⁹ deviating from the norm of prior peace operations.¹⁰ It is instructive to identify three different types or ‘generations’ of peacekeeping operations that existed prior to the creation of UNMIK: (i) classical or traditional peacekeeping operations, (ii) multidimensional peacekeeping operations and (iii), quasi-enforcement peacekeeping operations.¹¹ UNMIK falls into none of these categories, rather exemplifying a new fourth generation of peacekeeping operations, which will be discussed after the first three have been explained a little further.

Traditional peacekeeping operations have been defined as:

...the deployment of United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well.¹²

⁸ Report of Secretary-General, *supra* note 6, at paras. 2 and 3.

⁹ Paragraph 120, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, UN Doc. S/1999/779. See also Strohmeyer, ‘Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor’, (2001) 95 *American Journal of International Law* 46, at 46; and Matheson, ‘United Nations Governance of Postconflict Societies’, (2001) 95 *American Journal of International Law* 76, at 83.

¹⁰ A few months after the adoption of Resolution 1244, the Security Council authorised the deployment of a similar mission to East Timor. Security Council Resolution 1272 (1999), UN Doc. S/RES/1272 (1999) authorised the establishment of an interim administration in East Timor, during its transition to independence.

¹¹ See White, *Keeping the Peace. The United Nations and the Maintenance of International Peace and Security* (2nd edn, 1997), at 211-212.

¹² Paragraph 20, An Agenda for Peace. Preventative Diplomacy, Peacemaking and Peace-keeping, UN Doc. A/47/277 (1992).

The most oft-cited example of a traditional or classical peacekeeping operation is that of the United Nations Emergency Force authorised by the General Assembly in response to the Suez crisis.¹³ The force was mandated to secure the cessation of hostilities and the withdrawal of British, French, and Israeli forces from the Egyptian territory, and then serve as a buffer forces between the Egyptian and Israeli armies. The elements of traditional peacekeeping, which ordinarily involved a situation between states were: i) the consent of all states was necessary – the host state(s), to deployment, the contributing states to provide the forces; ii) the force was impartial between the (usually) states and iii) the forces had the right to use force only in self-defence (though it was possible that a specific resolution could provide a wider mandate to use force).

In recent years, due to the increase in the number of intra-state conflicts, the second generation multidimensional peacekeeping forces have been created as a result of comprehensive peace agreements which include provisions requesting UN supervision of the implementation of the agreement. These operations include both a military component and a large civilian component engaged in functions such as election monitoring, demobilisation and reintegration of former combatants, human rights monitoring, and, occasionally, assisting in rebuilding institutions and national capacities.¹⁴

The third generation is that of quasi-enforcement peacekeeping operations. These operations abandon the limitation of using force only in self-defence, and instead are authorised to use force where necessary to protect their mandate.¹⁵ For example, when the United Nations

¹³ General Assembly Resolutions 997, UN Doc. A/RES/997 (ES-I) (1956), 998, UN Doc. A/RES/998 (ES-I) (1956) and 1000, UN Doc. A/RES/1000 (ES-I) (1956). For further discussion of UNEF 1 see Ghali, “United Nations Emergency Force 1”, in Dorch, *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis* (1993), Chapter 7.

¹⁴ Examples of this ‘generation’ of peacekeeping operation include the UN Transition Assistance Group in Namibia (UNTAG, 1989–1990) established under Security Council Resolution 632, UN Doc. S/RES/632 (1989), the United Nations Transitional Authority in Cambodia (UNTAC, 1992-3) established under Security Council Resolution 745, UN Doc. S/RES/745 (1992), and the UN Observer Mission in El Salvador (ONUSAL, 1991-5) established under Security Council Resolution 693, UN Doc. S/RES/693 (1991).

The Secretary General, in his Agenda for Peace, supra note 12, acknowledged this evolution of the concept of peacekeeping. See especially paragraph 50.

¹⁵ It could be argued that the restriction on the use of force to only situations of self-defence is still being upheld, but that self-defence extends to defending the mandate of the operations, as well as the strict interpretation of personal self-defence of peacekeepers. However, even the Secretary-General has acknowledged that operations have used “force other than in self-defence...[in] the tasks of protecting humanitarian operations during continuing warfare, protecting civilian populations in designated safe areas...The cases of Somalia and Bosnia and Herzegovina are instructive in this respect”. Para. 34, Supplement to an Agenda for Peace, UN Doc. A/50/60 (1995).

Protection Force (UNPROFOR) met with a lack of proper cooperation from the parties to the conflict in the Former Yugoslavia, Security Council Resolution 836 (1993) was passed under Chapter VII, authorising UNPROFOR to enforce no-fly zones and “to take necessary measures, including the use of force, to reply to bombardments against the safe havens” declared to protect Bosnian Muslims in Bosnia and Herzegovina.¹⁶

However, the UNMIK operation is qualitatively different to the operations described above. With a much broader, more complex mandate than that of the multi-dimensional peacekeeping operations, UNMIK has been termed a form of international territorial administration.¹⁷ With the adoption of Resolution 1244, the Security Council, acting under Chapter VII, sanctioned the creation of peacekeeping operation which was to administer the Kosovo region and fulfil all the functions of a State.

On the other hand, the KFOR operation is similar to the quasi-enforcement form of peacekeeping operations (the third generational type mentioned above) and does not break new ground. It is a multi-national peacekeeping mission comprised of NATO contingents with Russian participation. The KFOR mission functions outside the UNMIK structure and operates under a separate mandate defined in Resolution 1244, although KFOR is to coordinate closely with the Special Representative of the Secretary General in order “to ensure that both presences operate towards the same goals and in a mutually supportive manner”.¹⁸ KFOR is responsible for deterring renewed hostilities; maintaining and where necessary enforcing a ceasefire; supervising the withdrawal of FRY police and forces; demilitarising the KLA; establishing a secure environment to which refugees can return, and UNMIK can operate; ensuring public safety and order (including demining activity) until UNMIK can take over; supporting and coordinating closely with the work of the international civil presence; and ensuring the protection and freedom of movement of KFOR, UNMIK and other international organisations.¹⁹ Significantly, KFOR is to act with all necessary means to achieve this mandate. As such the KFOR operation fits neatly into the category of quasi-enforcement peacekeeping. KFOR consists of NATO troops with a significant Russian contribution, organised into four

¹⁶ See also the example of the transformation of the United Nations Operation in Somalia (UNOSOM I) into UNOSOM II, when the mission was endowed with enforcement powers under Chapter VII of the Charter. See Security Council Resolution 814, UN Doc. S/RES/814 (1993).

¹⁷ See Matheson, *supra* note 9; and Wilde, ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’ (2001) 95 *American Journal of International Law* 580.

¹⁸ Paragraph 6, Resolution 1244.

¹⁹ Paragraph 9, Resolution 1244.

multinational brigades each with their own brigade commander,²⁰ reporting to a KFOR Commander who, in turn, reports to NATO headquarters in Belgium.²¹

Together, both UNMIK and KFOR serve to govern the Kosovo region to the exclusion of the Yugoslav government, and with such a concentration of power it is essential that individuals are adequately protected. This protection, if it exists, must come from international human rights law and/or international humanitarian law, which are both driven and underpinned by the ideal of the protection of individuals. However it remains to be seen the extent to which UNMIK and KFOR operate within the framework of these bodies of law, and it is the task of this thesis to investigate that question. In chapter one, a comparison of the conceptual and material similarities and differences between the international human rights law and international humanitarian law is undertaken, with a view to investigating their relative strengths and weaknesses as means of furthering the aim of protection of the individual. Chapters two and three examine the applicability of international human rights law and international humanitarian law, respectively, to the UNMIK and KFOR operations. Finally, in chapter four, a brief examination of the remedies available to individuals for violation of these legal norms is undertaken.

²⁰ Initially, KFOR was composed of five multinational brigades, but was restructured into four brigades at the end of 2002. See paragraph 30, Report of the Security Council Mission to Kosovo and Belgrade, Federal Republic of Yugoslavia, 19 December 2002, UN Doc. S/2002/1376.

²¹ Russian troops participating in KFOR operate under a special status and are under the control of Russian representatives at NATO headquarters. The terms of Russian participation in KFOR are set out in the Helsinki Agreement: Agreed Points on Russian Participation in KFOR, 18 June 1999.

Chapter One

The Similarities and Differences Between Human Rights and International Humanitarian Law Protections for Individuals.

International humanitarian law has been developed by states that became concerned with the protection of their own nationals during times of war, but realised that such protection of their soldiers and civilians could only be achieved if the same protection were (reciprocally) afforded to the nationals of enemy states. International humanitarian law protections have not been expressed in the form of personal rights of protected persons, but rather by means of rules governing the behaviour of states and their agents during times of conflict. Human rights protections, formulated as personal rights of all individuals, are a relatively recent phenomenon. Although it has become apparent that during armed conflicts and other times of emergency the human rights of individuals are susceptible to being ignored, it being especially difficult at such times to prevent the infringement of the human rights of enemy armed forces and the enemy civilian population, nevertheless, the protection that is afforded to individuals during peace-time via human rights instruments does not cease to apply during a time of conflict. During such times of armed conflict, then, there are two distinct, yet complementary, legal regimes operating to protect individuals.

Despite the fact that the regimes of international humanitarian law and international human rights law are distinct areas of international law, in recent years there has been a tendency for the two regimes to become inter-related. International legal instruments have been signed that form a bridge between international humanitarian law and human rights law. For example the 1989 Convention on the Rights of the Child¹ and the 2000 Optional Protocol to the Convention on the Rights of the Child² are human rights instruments that do not simply refer to the applicability of human rights provisions to children but also set out their own rules applicable in the event of an armed conflict.³ Human rights laws have been created to accommodate the special nature of armed conflict situations and with the understanding that human rights protections may be severely affected by the conflict. Principles of international humanitarian law can serve as substitute protections and can be

¹ 1989 Convention on the Rights of the Child, 1577 UNTS 3.

² 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc. A/RES/54/263 (2000).

³ See Gowland-Debbas, 'The Right to Life and Genocide: The Court and International Public Policy' in Brissande-Chazournes & Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 315.

used to minimise the effect of adverse interferences with human rights. Correspondingly, international humanitarian law acknowledges the principles of humanity and especially the dignity of the individual. There is a distinct overlap in the application and content of norms from each regime.

1. Sources of Law

a) International Human Rights Sources

Human rights are concerned with the value of the human being as an individual and give rise to correlative obligations imposed upon states to secure the protection of human rights to individuals within their jurisdiction.

The international protection of human rights is a recent development in international law, and has only seen fruition as an international concern post-1945, beginning with provisions within the UN Charter.⁴ Within the preamble of the Charter there is mention of the determination “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...”. This determination was given effect by Articles 55 and 56 of the Charter, which state that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion” and that all members of the United Nations are to cooperate with the UN in achieving this purpose. Clearly, the Charter aims to prescribe a universal respect for the human rights and dignity of the individual.⁵

The General Assembly of the United Nations provided an authoritative interpretation of what constituted ‘human rights and fundamental freedoms’ in its Universal Declaration on Human Rights.⁶ The Declaration sets out a collection of rights including both civil and political rights, as well as economic and social rights, ranging from the right to life, liberty and security of the person to the right to an education. The Declaration was not intended to be a binding document spelling out the duties and obligations of states but instead was to

⁴ 1945 Charter of the United Nations, 1 UNTS xvi.

⁵ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] ICJ Rep. 16 (Namibia). The International Court of Justice (ICJ) affirmed that the Charter does confer legal obligations regarding human rights. The ICJ stated: “to establish instead and to enforce distinctions, exclusions, restrictions and limitations, exclusively on the grounds of race, colour, descent or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter”. (para. 131)

⁶ GA Resolution 217A(III), UN Doc. A/810 at 71 (1948).

provide guidance and further clarification of the human rights obligations of member states that were provided for in the Charter.

Documents containing legally binding obligations, in treaty form, were adopted twenty years later in the form of two international covenants: The International Covenant on Civil and Political Rights 1966 (ICCPR)⁷ and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).⁸ Additionally, a plethora of global treaties on specific human rights issues have been agreed, the most important of which are: the Convention of the Prevention and Punishment of the Crime of Genocide 1948,⁹ the Convention on the Elimination of all Forms of Racial Discrimination 1966,¹⁰ the Convention on the Elimination of all Forms of Discrimination against Women 1979,¹¹ the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984¹² and the Convention on the Rights of the Child 1989. In addition, regional regimes for the protection of human rights, operating in concurrence with the global regimes, have also been established, most notably the European Convention on Human Rights 1950 (ECHR),¹³ the American Convention on Human Rights 1969 (American Convention)¹⁴ and the African Charter on Human and People's Rights 1981.¹⁵

Only states can be parties to the main human rights treaties such as the ICCPR, ECHR and American Convention. Article 48 of the ICCPR provides that "the present Convention is open for signature by any State member of the United Nations ..."¹⁶ and similar provisions can be found in both the ECHR and the American Convention.¹⁷ Nevertheless, it is not

⁷ 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

⁸ 1966 International Covenant on Economic, Social and Cultural Rights, 999 UNTS 3.

⁹ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

¹⁰ 1966 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

¹¹ 1979 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13.

¹² 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

¹³ 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

¹⁴ 1969 American Convention on Human Rights, OAS Treaty Series No. 36 (1969).

¹⁵ 1981 African Charter on Human and People's Rights, 1520 UNTS 26.

¹⁶ Nowak: *UN Covenant on Civil & Political Rights: CCPR Commentary* (1993), at 633.

¹⁷ See Articles 59 and 74 of the ECHR and American Convention respectively.

However, there have been calls for the European Union, as an international organisation, to become a party to the ECHR, following an amendment to the accession clause. See the speech of the President of the European Court of Human Rights, Mr Luis Wildhaber, of 23 January 2003 at www.echr.coe.int/eng/Edocs/SpeechWildhaber.htm. The EU has also shown some interest in accession. On 12 December 2002 the Chairman of the Convention, Mr Giscard D'Estaing, spoke of

the case that non-state actors on the international plane, and indeed does states that are not contracting parties to the treaties, do not have obligations to secure individuals' human rights. All states, including those not party to any treaty, will be bound by any human rights obligations established under customary law.

However, the content of the obligations under customary international law has attracted much debate.¹⁸ Norms that are considered to be customary international law are those evidenced by widespread, uniform, consistent and settled practice and a sense of legal obligation that the norm should be upheld. It appears that when looking for evidence of customary human rights norms, much emphasis has been put on declarations and diplomatic statements as evidence of state practice. Hannum has argued that as the Universal Declaration is the basis of most international human rights treaties, and because of its consistent invocation, the Declaration is now part of customary international law.¹⁹ However, this may give too much binding power to the Declaration, which is simply a statement of rights. The better, and more prudent, view is that of the UK Foreign Office in 1991: "although the Declaration was not legally binding *much of its content* can now be said to form part of customary international law".²⁰ In particular, it has been suggested that the prohibitions on genocide, slavery and the slave trade, murder or causing the disappearance of individuals, torture, prolonged arbitrary detention, retroactive penal measures, systematic racial discrimination and the right to self-determination are all to be deemed customary law.²¹

b) International Humanitarian Law Sources

a 'very strong tendency' in favour of accession within the Convention on the Future of Europe. Additionally, see the report of the Convention working group chaired by Commissioner Antonio Vitorino. See also Harmsen, 'National Responsibility for EC Acts Under the ECHR: Recasting the Accession Debate', (2001) 7 *European Public Law* 625.

¹⁸ See, *inter alia*: Hannum, 'The Status of the Universal Declaration of Human Rights in National International Law', (1995) 25 *Georgia Journal of International & Comparative Law* 287; Lillich, 'The Growing Importance of Customary International Human Rights Law', (1995) 25 *Georgia Journal of International & Comparative Law* 1; Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); Paust, 'The Complex Nature, Sources and Evidence of Customary Human Rights', (1995) 25 *Georgia Journal of International & Comparative Law* 147; Simma & Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, & General Principles' (1989) 12 *Australian Yearbook of International Law* 82; Weisburd, 'The Effect of Treaties & Other Formal International Acts on the Customary Law of Human Rights', (1995) 25 *Georgia Journal of International & Comparative Law* 99; American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987), Section 702.

¹⁹ Hannum, *supra* note 18, at 323.

²⁰ As cited in Shaw, *International Law* (1997), at 207.

²¹ See generally, Section 702, *Restatement (Third) Foreign Relations Law of the United States*, *supra* note 18.

The body of law that is known as international humanitarian law has much earlier origins than international human rights law. International humanitarian law has developed over many years, as long as wars have been waged, evolving norms determining ‘civilised’ and honourable behaviour for combatants. However, codification of the laws of war in multilateral treaties only really began in the mid-nineteenth century and this has seen a shift towards sparing victims from the horrors of war, rather than securing the chivalrous conduct of combatants. The International Court of Justice in its Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons, set out the “two cardinal principles contained in the texts constituting the fabric of humanitarian law”, clearly demonstrating this:

The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; ...According to the second principle, it is prohibited to cause unnecessary suffering to combatants...²²

As with international human rights law, international humanitarian law concerns itself primarily with the protection of individuals, albeit during times of hostilities only. However the protection that is accorded to individuals via international humanitarian law, unlike that afforded by international human rights law takes the form of a set of standards that must be upheld rather than a set of rights granted to the individual.²³ The crucial difference between the two regimes is that international humanitarian law is not directly enforceable by the individual. For this reason, ‘rights’ under international humanitarian law are more accurately described as a series of undertakings by states, who then afford individuals protection by complying with the rules of international humanitarian law.

Currently, the regime of international humanitarian law is governed by an abundance of widely-ratified and accepted international agreements and customary obligations. Prior to 1977, these treaties could be divided into two separate streams: Geneva Law, concerned with the protection of the victims of armed conflict, including the 1949 Geneva Conventions I-IV;²⁴ and Hague Law, concerned with restricting the means and methods of

²² *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226, at para. 78.

²³ Provost, *International Human Rights and Humanitarian Law* (2002), at 32.

²⁴ 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (Geneva Convention I); 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (Geneva Convention II); 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 75 UNTS 135 (Geneva Convention III); 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Geneva Convention IV).

warfare, most notably consisting of the Hague Declarations 1899²⁵ and Hague Convention IV 1907.²⁶ However, with the adoption of the Additional Protocols to the Geneva Conventions in 1977,²⁷ these two streams have merged.

It has been argued that the very wide ratification of the Hague and Geneva Conventions means that the content of these treaties form part of customary law, as broad ratification indicates a high level of consensus that the rules codified within these Conventions are to be part of international law.²⁸ However, as Baxter has argued, “as the number of parties to a treaty increase, it becomes more difficult to demonstrate what is the state of customary international law *dehors* the treaty...”. Baxter points out that with treaties for which there is a high level of state acceptance, there is a lack of consistent, uniform, state practice which can be used as evidence that a norm should be considered a rule of customary international law, because the relevant state practice that is present is attributable to the fulfilment of treaty obligations. However, Cassese observes that the need for evidence of state practice may not be as high in the special case of international humanitarian law as it is in other areas of public international law. Cassese looks for evidence of this proposition to the Martens Clause, which first appeared in the 1899 Hague Conventions and had been repeated in the subsequent Geneva Conventions and their Additional Protocols. The Clause states that:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection of and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience.

²⁵ 1899 Hague Declaration II Concerning Asphyxiating Gases, (1907) 1 *American Journal of International Law, Supplement*, 157 and 1899 Hague Declaration III Concerning Expanding Bullets, (1907) 1 *American Journal of International Law, Supplement*, 155.

²⁶ 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, (1908) 2 *American Journal of International Law, Supplement*, 90 (Hague Convention IV).

²⁷ 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (Additional Protocol I); 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (Additional Protocol II).

²⁸ This notion was pointed out in the *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), Judgment of 20 February 1969, [1969] ICJ Rep. 3. The ICJ held that ‘...it might be that ...even without the passage of any considerable amount of time, a very widespread and representative participation in the Convention might suffice of itself, provided that of States whose interests were particularly affected’ (at 42).

It is Cassese's argument that it can be inferred from this that there is no need to refer to state practice for the establishment of a customary rule of international humanitarian law if that rule is based on the 'laws of humanity' or the 'dictates of the public conscience', as these principles are put on the same footing as the usages of states within the clause.²⁹ However, Cassese seems to stretch the meaning of the Marten's Clause placing too much emphasis on the clause "from the laws of humanity, and the dictates of public conscience". It is open to interpretation what this second 'from' means and whether it is to be seen as providing a separate category of customary international humanitarian law derived from the laws of humanity, or rather a second criterion which goes in hand with state practice.

Against this background of the lack of evidence of state practice outside of the fulfilment of treaty obligations, coupled with problems in ascertaining state practice in conflict situations as a result of the complications of propaganda and secrecy, there has been an emphasis on abstract statements of intent and guidelines as to state practice such as diplomatic statements, undertakings and declarations, rather than evidence of concrete practice. This approach was taken by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of Kupreskic et al. When looking at the customary status of the rule prohibiting reprisals against civilians, the Chamber took note of rules within individual states' handbooks, resolutions of the General Assembly and memoranda from the International Committee of the Red Cross.³⁰

It has been widely accepted that, to a large extent, the Hague and Geneva Conventions are part of international custom, and there is much evidence to this effect. With respect to the Hague Conventions, the International Military Tribunal at Nuremberg stated that: "...by 1939 these rules laid down in the Convention were recognised by all civilised nations and were regarded as being declaratory of the laws and customs of war".³¹ One of the most influential judgements to discuss the customary nature of the Geneva Conventions is that delivered by the ICJ in the case of Nicaragua v USA.³² In that case, the Court looked at the actions of the USA in Nicaragua with regard to the USA's obligations under customary international law.³³ The Court held that Common Article 3 of the Geneva Conventions

²⁹ Cassese, *International Law* (2001), at 121.

³⁰ *Prosecutor v Kupreskic et al.*, Judgment, Case no. IT-95-16, Trial Chamber II, 14 January 2000, at paras. 521-536.

³¹ See Schindler & Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (1973), at 63.

³² *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Reports 3.

³³ The United States' acceptance of the International Court of Justice's jurisdiction is limited by a reservation which excludes from its application: "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2)

embodied the customary norms within the Geneva Conventions. Furthermore, McCoubrey has argued that the “very wide ratification of the 1949 G[eneva] C[onvention]s indicated that in wide measure they may be accepted as having become incorporated in *jus cogens* and may be to that extent binding irrespective of treaty obligations”.³⁴ Additionally, the Secretary-General of the United Nations has stated that the entirety of the Geneva Conventions have become part of customary international law.³⁵

It is not yet clear whether the Additional Protocols also represent customary norms. In his discussion of Additional Protocol I, Meron concludes that: “the United States agrees that the bulk of the provisions of Protocol I embodies norms which either have already matured into customary law or are appropriate for maturation into customary law”.³⁶ The President of the International Committee of the Red Cross, Dr Jakob Kellenberger, has reiterated this, stating that both Additional Protocols:

...represent the core of international humanitarian law. In the last 25 years, owing partly to the growing number of states party to the Protocols, and partly to their application by states which are not party to them, a body of universal customary rules has emerged, reflecting the treaty-based norms, binding on all states regardless of ratification. This customary law offers or, rather, should offer, a measure of security in situations where the treaties do not formally apply or where the rules are less developed, especially in non-international armed conflicts.³⁷

It is safe to conclude that at least some elements of the Additional Protocols are a part of customary international law, but it would be prudent to only assume that this applies to the parts of the Protocols that expand upon the norms of the Geneva Conventions 1949, rather than the parts that represent ‘new law’.³⁸

the United States of America specially agrees to jurisdiction” (para. 42 of judgment). Thus, the Court only had the power to look at those claims relating to the customary international obligations of the United States.

³⁴ McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Armed Conflict* (1998), 195.

³⁵ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 & Add. 1 (1993), at para. 35, where it is stated:

“The part of conventional international humanitarian law which has beyond a doubt become a part of international customary law is the law applicable in armed conflicts as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims, the Hague Convention (IV) respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907....”

³⁶ Meron, *Human Rights and Humanitarian Norms as Customary Law*, supra note 18, at 67.

³⁷ Official Statement by Dr Jakob Kellenberger (ICRC President) made on 5 September 2002 (available at www.icrc.org).

³⁸ In 1995 the 26th International Conference of the Red Cross and Red Crescent invited the ICRC to compile a report on the customary rules of international humanitarian law applicable in international and non-international conflicts. Rather than looking at specific treaties and establishing whether their content, as a whole, forms part of customary international law, the project seeks to

2. Circumstances of the Application of Treaty Norms

a) The Circumstances of Application of Human Rights

Unlike most treaties in international law, human rights treaties (including those mentioned above) create obligations that protect the interests of individuals and as such these obligations are objective rather than merely reciprocal. This notion has been confirmed on many levels, including in the jurisprudence of several international human rights tribunals. In the case of Effect of Reservations on the Entry into Force of the American Convention (Articles 74 & 75), the Inter-American Court of Human Rights stated that the Inter-American Convention on Human Rights “did not consist of the reciprocal exchange of human rights and obligations, but instead represented a series of parallel undertakings by States to abide by certain human rights standards”.³⁹ The Human Rights Committee, in its General Comment Number 24, stated that human rights treaties “are not a web of inter-state exchanges of mutual obligations” but instead are concerned with the “endowment of individual rights”.⁴⁰ The European Court of Human Rights echoed this view in the case of Ireland v United Kingdom when it noted that the ECHR “comprises more than mere reciprocal engagements between Contracting States. It created over and above a network of mutual and bilateral undertakings, objective obligations...”.⁴¹

Under Article 60 of the Vienna Convention on the Law of Treaties a state may terminate or suspend its treaty obligations if another contracting party fails to uphold its corresponding obligations. However, as human rights treaty obligations are not merely reciprocal, a contracting state may not suspend its compliance simply because another contracting state is in violation of its obligations. Obligations under a human rights treaty are not owed only to other contracting parties, but rather guarantee rights to individuals within the jurisdiction of a contracting state. It would be inconsistent to terminate the protections of individuals in one jurisdiction simply because another state had reneged on its obligations. This is reflected by Article 60(5) of the Vienna Convention which states that the Article 60 rule is not applicable to ‘treaties of a humanitarian character’ and Provost notes that “human rights

identify certain areas of international humanitarian law and, looking to state practice and other evidence, pinpoint those provisions that can be considered to be customary. This project has now come to an end and the results are due to be published in early 2004.

³⁹ See Provost, ‘Reciprocity in Human Rights & Humanitarian Law’, (1995) 65 *British Yearbook of International Law* 383, at 388.

⁴⁰ See Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’, (2000) 11 *European Journal of International Law* 489, at 498.

⁴¹ *Ireland v UK*, Judgment, (1979-80) 2 EHRR 25.

treaties were meant to be included in the notion of ‘treaties of a humanitarian character’.⁴² Conventional human rights protections are, therefore, granted to individuals at all times, and even when other contracting states are violating their obligations.⁴³

Human rights regimes, formulated to protect individuals from abuses perpetrated by states, were primarily designed for times of peace. Indeed ‘peace, as oppose to war, is a fundamental prerequisite for the full protection of human rights’.⁴⁴ Nevertheless, in times of armed conflict the human rights regimes do not cease to apply, rather they may be tempered by virtue of the derogation clauses that exist within most human rights instruments.⁴⁵ Derogation clauses are designed to apply during times of extreme emergency threatening a nation, and their purpose is to allow a state to “balance the most vital needs of the state with the strongest protection of human rights possible in the circumstances.”⁴⁶ Article 15(1) of the ECHR states:

In time of war or other public emergency threatening the life of the Nation the High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with its obligations under international law.

In the case of *Lawless* the European Court defined ‘public emergency’ as a “situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question”.⁴⁷ During times of international armed conflict a contracting state would certainly be able to invoke Article 15 if that conflict presented a real threat to the life of the nation, and a contracting state would probably also be able to resort

⁴² See Provost, *supra* note 39, at 403. Provost notes that despite the fact that the Vienna Convention on the Law of Treaties does not apply retroactively, the Article 60 rule could be considered to be customary law. He relies upon the ICJ ruling in the *Namibia* advisory opinion where it was held that ‘the rules laid down in the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach...may...be considered as a codification of existing customary law.’

⁴³ However, if human rights protections are not afforded to individuals, then an individual may have recourse to a remedy. This is discussed in Chapter four.

⁴⁴ Vinuesa, ‘Interface, Correspondence and Convergence of Human Rights and Humanitarian Law’, (1998) 1 *Yearbook of International Humanitarian Law* 69, at 73.

⁴⁵ See Article 15, ECHR; Article 4, ICCPR and Article 27, American Convention.

It has been argued that the ability of states to derogate from human rights obligations is not one that is confined to treaty clauses, but rather that the general right to derogate is now a part of customary international law. For a discussion of this see Oraá, ‘The Protection of Human Rights in Emergency Situations under Customary International Law’, in Goodwin-Gill & Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie* (1999), 413.

⁴⁶ MacDonald, ‘Derogations under Article 15 of the European Convention on Human Rights’, (1997) 36 *Columbia Journal of Transnational Law* 225, at 225.

⁴⁷ *Lawless v Ireland*, Judgment, (1979-80) 1 EHRR 1, at para.28.

to use of Article 15 during an internal armed conflict. Thus, there is an overlap between those situations in which international humanitarian law is applicable and those in which a state may benefit from the provisions of Article 15.⁴⁸ However, the definition of ‘public emergency’ goes beyond the situations of armed conflict in which international humanitarian law is applicable.⁴⁹ For example, the UK, on its ratification of Additional Protocol I, asserted that “the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation”,⁵⁰ yet the UK authorities have seen fit to enter derogations against its obligations under the ECHR in response to terrorist activities in Northern Ireland and the terrorist attacks of 11 September 2001.⁵¹ Providing the danger present fulfils the Lawless test of public emergency, the individual’s protections under the ECHR may be curtailed, even though international humanitarian law may not apply.

In Lawless the Court has also stated that “it is evident that a certain discretion – a certain margin of appreciation – must be kept to the Government in determining whether there exists a public emergency which threatens the life of the nation”.⁵² In the case of Ireland v United Kingdom the Court justified this margin of appreciation by claiming that a state is in a better position to assess the situation than the Court because it is closer to the problem. However, this margin of appreciation is coupled with supervision by the Court (and, prior to the adoption of Protocol 11, the Commission) and there has been one occasion, in the case of Denmark, Norway, Sweden and the Netherlands v Greece,⁵³ in which the Commission did not agree with a state that an emergency that warranted a derogation existed. In this case the Greek government argued that its derogation from certain ECHR provisions had been made in order to prevent anarchy and an armed Communist takeover of the state. The Commission looked at the facts and concluded that there was not a “situation of such scope and intensity that it constituted an actual or imminent threat to the life of the Greek nation”.⁵⁴

⁴⁸ See below for a discussion of when international humanitarian law is applicable.

⁴⁹ See below for a discussion of when an armed conflict exists.

⁵⁰ Roberts & Guelff (eds.), *Documents on the Laws of War* (2000), at 510.

⁵¹ See for example, the UK’s derogation with regard to detention and internment in Northern Ireland at (1978) 18 YB 18 and the UK’s derogation with regard to Article 5 after 11 September 2001: (2001) SI 3644, The Human Rights Act 1998 (Designated Derogation) Order 2001.

⁵² *Lawless v Ireland*, supra note 47, at para. 28.

⁵³ Report of the Commission, (1969) 12 YB 113, at para 229.

⁵⁴ *Ibid.* at para. 157.

Despite similar wording in the derogation clause of the ICCPR (contained in Article 4), the Human Rights Committee appears to take a stricter view than the European Court of when a state of emergency exists,⁵⁵ explicitly stating that “the Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation”.⁵⁶ The Committee has two avenues for reviewing a state’s characterisation of a state of emergency. First, the Committee may assess the existence of an emergency justifying derogation when exercising its powers under Article 40 of the ICCPR, namely the power to review a state’s periodic reports. The Committee has even asked for special periodic reports from states experiencing states of emergency, using its powers under Article 40(1)(b) of the Covenant with increasing frequency in recent years,⁵⁷ which has been described a “very welcome development”.⁵⁸ Secondly, the Committee may review the state’s characterisation by way of individual communications under the Optional Protocol to the ICCPR..

In contrast, it has been argued that the wording of Article 27 of the American Convention provides a wider derogation provision.⁵⁹ The derogation clause of the Inter-American Convention refers to a threat to “the independence or security of a State Party”, which appears to be broader than the words “threat to the life of the nation” contained in both the ICCPR and ECHR, although the broad wording of Article 27 has been strictly interpreted by the Inter-American Court.⁶⁰

The jurisprudence under each of the three human rights instruments discussed above all agree that the qualifying state of emergency must be transitory in nature⁶¹ and that the threat to the nation must be imminent.

⁵⁵ This has been demonstrated in several cases concerning perceived internal threats allegedly undermining public order and security. For example see: Comm no. 34/1978, *Landinelli Silva v Uruguay*, decision of 8 April 1981, UN Doc. CCPR/C/OP/1 at 65 (1984).

⁵⁶ See Human Rights Committee General Comment Number 29, States of Emergency (Art.4), 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 3.

⁵⁷ For example special reports have been requested from Iraq in 1991, Peru in 1992 and Rwanda in 1994. See the Report of the Human Rights Committee on the Work of its 51st Session, UN Doc. A/50/40 (1995).

⁵⁸ Oraá, supra note 45, at 422.

⁵⁹ Provost, supra note 23, at 272.

⁶⁰ See *Habeas Corpus in Emergency Situations* (Articles 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion of 30 January 1987, Advisory Opinion OC-8/87 at paras. 19-20.

⁶¹ *Judicial Guarantees in States of Emergency* (Articles 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion of 6 October 1987, Advisory Opinion OC-9/87; Human Rights Committee General Comment Number 29, supra note 56, at para. 2.

Note that the requirement that the emergency be transitory does not necessarily mean that the state of emergency must be short-term, the situation of ‘entrenched emergency’ in Northern Ireland being a case in point. See: Gross, “Once More Unto the Breach’: The Systematic Failure of Applying

It must be emphasised that once the existence of an emergency has been established this does not give a state a *carte blanche* to enter a derogation declaration. Under the ECHR, when derogating a state may only take measures that are “strictly required by the exigencies of the situation” and, although this is also subject to the state’s margin of appreciation, the test is a strict one. This was decided in the case of Greece v United Kingdom and reiterated in the cases of Lawless and Ireland v United Kingdom. In the latter case, the Court observed of the relatively wide margin of appreciation afforded to states that:

...states do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring observance of States engagements (article 19) is empowered to rule on whether the States have gone beyond the extent strictly required by the exigencies of the crisis...⁶²

In assessing the proportionality of the derogatory measures taken by the state, three questions need to be asked: first, whether the state could have thwarted the threat under existing, conforming, domestic law; secondly, whether the measures of derogation were proportionate to the threat/emergency; finally, whether sufficient safeguards were set up to ensure that the emergency powers were not abused.

Additionally, a state’s discretion to derogate from certain provisions is also fettered by lists of non-derogable rights within each of the Conventions. Under Article 15(2) of the ECHR there is an irreducible core of rights from which no derogation is permitted which includes the right to life (where deaths do not occur due to lawful acts of war), the right not to be subjected to torture or other inhuman and degrading treatment, the right not to be held in slavery or servitude and the right not to be tried for an offence which was not criminal at the time it was committed. As well as the core of rights from which no derogation is permitted under the ECHR, which are also non-derogable under the ICCPR, Article 4(2) of the ICCPR provides that there will be no derogation from the right not to be imprisoned for failure to fulfil a contractual obligation, the right to be recognised as a person before the law and also the right to freedom of thought, conscience and religion. The protections under the American Convention go even further than under the ICCPR, and, as well as providing for the same non-derogable rights as those under the ICCPR, under the American Convention no derogation is permitted from the rights to the family, the right to a name, the rights of the child, the right to nationality and the right to participate in

the European Convention on Human Rights to Entrenched Emergencies’, (1998) 23 *Yale Journal of International Law* 437 and Gross & Aolain, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights’, (2001) 23 *Human Rights Quarterly* 625.

⁶² *Ireland v UK*, supra note 41, paras. 78-9.

government. Clearly the fact that the three treaties establish different lists of non-derogable rights is problematic as the level of protection for an individual will differ depending upon which regime they are relying on for protection. Despite the fact that there is no uniform list of non-derogable rights, Oraá has pointed out that at least the four non-derogable rights common to all three treaties “can be assumed to constitute norms of *jus cogens*, and therefore to be non-derogable for states non-parties to these treaties”.⁶³ These rights can be seen as a common core of protection available to all individuals during times of state emergency.

Furthermore, there appear to be limits on apparently proportionate derogation from rights that are not on the non-derogable list. In the case of *Aksoy v Turkey*⁶⁴, the Court held that, despite the fact that Turkey had entered a derogation with regard to its obligations under Article 5 of the Convention (right to liberty and security of the person), it could not “accept that it is necessary to hold a suspect for fourteen days without judicial intervention” and the Court held that “this period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture”.⁶⁵ The Court held that without proper judicial supervision, a denial of the protections under Article 5 (which was a derogable right) might lead to treatment which violated Article 3 (a non-derogable right) and thus there may be occasions in which derogation from Article 5 is impermissible. This decision finds support in paragraph 13 of the Human Rights Committee General Comment on Derogations, as well as in the text of the American Convention where it is stated (in Article 27(2)) that there may be no suspension of “judicial guarantees essential for the protection” of non-derogable rights.⁶⁶ Clearly non-derogable rights and derogable rights are linked inextricably and so this has serious implications for states’ rights of derogation.⁶⁷

Finally, the ability of a state to derogate from its international human rights obligations is limited by its obligations under other international instruments.⁶⁸ Nowak suggests, in his commentary on the ICCPR, that other relevant treaties would include other UN human rights treaties (none of which include a derogation provision) as well as the Geneva

⁶³ Oraá, *supra* note 45, at 433. See also Human Rights Committee General Comment No. 29, *supra* note 56, at para. 11.

⁶⁴ *Aksoy v Turkey*, Judgment of 18 December 1996, (1997) 23 EHRR 553.

⁶⁵ *Ibid.*, at para. 78.

⁶⁶ See the Inter-American Court’s advisory opinions in *Habeas Corpus in Emergency Situations*, *supra* note 60, and *Judicial Guarantees in States of Emergency*, *supra* note 61.

⁶⁷ For more discussion on this point see Marks, ‘Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights’, (1995) 25 *Oxford Journal of Legal Studies* 69, at 82-4.

⁶⁸ See Article 15(1), ECHR; Article 4(1), ICCPR and Article 27(1), of the American Convention.

Conventions and ILO Conventions.⁶⁹ In the case of Cyprus v Turkey even the respondent state conceded that 'other international obligations' included international humanitarian law.⁷⁰ The Inter-American Commission provided further clarification on this point in its decision on precautionary measures for the Detainees at Guantanamo Bay, Cuba,⁷¹ declaring that:

In certain circumstances, however, the test for evaluating the observance of a particular right, ..., in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of the Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the according *lex specialis*.

The Commission went on to say that:

Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law.⁷²

From the discussion above it can be seen that the regimes of protection accorded to individuals by international human rights instruments are applicable during both times of war and peace. All contracting parties are bound to uphold their human rights obligations even when other contracting parties have failed to uphold their corresponding obligations. However, although this protection may be limited by a state's decision to derogate in times of war or other public emergency, the state may not derogate from its obligations under international humanitarian law, if they are applicable.

b) Circumstances of the Application of International Humanitarian Law

At first glance, unlike international human rights law, it would appear that the obligations imposed by the regime of conventional international humanitarian law are reciprocal in nature. Paragraph 3 of Common Article 2 of the Geneva Conventions states that:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are Parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

⁶⁹ Nowak, *supra* note 16, at 85-6.

⁷⁰ Cyprus v Turkey, Decision of 10 July 1976, (1982) 4 EHRR 482, at para. 509.

⁷¹ (2002) 41 *International Legal Materials* 532.

⁷² *Ibid*, at 533.

Clearly there is some element of reciprocity. The Conventions are applicable to the actions of those state parties to the conflict that are parties to the Conventions, and only extend to other non-contracting states when they have expressed a willingness to abide by the provisions within the Conventions. However, it is the period between the commencement of an armed conflict and the expression of the non-contracting state's intentions to uphold the obligations within the Conventions, or not to do so, that is most interesting. Here reciprocity is set aside and instead the Conventions apply to the contracting party "from the moment that hostilities break out until such time as the adverse party has had the time and opportunity of stating his intention".⁷³ The ICRC Commentary claims that this approach is preferable as it encourages the non-contracting party to comply with the provisions, as it removes the possible pretext for non-compliance. However one could argue that this approach encourages the non-contracting state to delay stating its intention and to freeride on the contracting state's obligations. Provost argues that reciprocity is suspended at this time, and only if the non-contracting party chooses not to accept and apply the Convention provisions will the Conventions cease to apply. The Swedish International Humanitarian Law Commission concurs with this reasoning and stated in their 1984 report that "according to general international law and Article 96 of Additional Protocol I, the principle of reciprocity applies. Sweden shall not be required to abide by more comprehensive obligations than those applying to our adversary."⁷⁴

However, these conclusions as to reciprocity are only correct to the extent that the obligations within international humanitarian law are only treaty-based. Many of the obligations that are set out within the regime of the laws of armed conflict are customary and thus cannot be suspended.⁷⁵

Additionally, should a contracting party fail to uphold its obligations, other contracting parties in the conflict may not suspend compliance with their obligations under international humanitarian law.⁷⁶ As stated earlier,⁷⁷ under Article 60(5) of the Vienna Convention on the Law of treaties, a breach of an obligation under a treaty of humanitarian character cannot be met with a corresponding suspension of obligations. In fact, as Rosas

⁷³ Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Volume IV* (1958), at 23.

⁷⁴ Report of the Swedish International Humanitarian Law Committee, (Stockholm, 1984) in Sassoli and Bouvier, *How Does Law Protect in War?* (1999), at 601.

⁷⁵ Article 43, 1969 Vienna Convention on Law of Treaties, 1155 UNTS 331. However, there are certain situations where the laws of war may be suspended in relation to belligerent reprisals.

⁷⁶ However, the state may undertake countermeasures against the violating state. See Meron, *Human Rights and Humanitarian Norms as Customary Law*, supra note 18, at 234-45.

⁷⁷ Text to note 42 above.

has noted, “no state seems to have openly argued a *legal* right to suspend the operation of the Geneva Conventions in whole or in part on the basis of a breach of the Geneva Conventions committed by the adversary”.⁷⁸ Thus a minimum level of protection exists at all times during a conflict.⁷⁹

The primary limitation on the applicability of international humanitarian law, unlike human rights provisions, is that humanitarian law is only applicable to actions that take place during a time of armed conflict or belligerent occupation and not during times of peace. Traditionally, humanitarian law applicable in times of war only,⁸⁰ but providing a legal definition of the term ‘war’ became problematic. As noted in the ICRC Commentary to the Geneva Conventions, “a state can always pretend, when it commits a hostile act against another state, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence”.⁸¹ Therefore, the 1949 Geneva Conventions moved away from the exclusively war-based definition, being applicable 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 recognised by one of them”.⁸² It is now *conflict* which is the trigger application of international humanitarian law, not the formality of war.

The ICRC commentary to the Geneva Conventions defines an armed conflict as being “any difference arising between two states and leading to the intervention of members of the armed forces...”,⁸³ but does not provide any clarification of the threshold level of force that must be crossed for an armed conflict to exist. What is clear is that the existence or otherwise of an armed conflict is a question of fact and does not depend upon a declaration that an armed conflict is taking place. Additionally, the legality of the conflict is not relevant as international humanitarian law applies equally to lawful and unlawful conflicts.

International practice appears to provide some assistance in determining the minimum requirements for an international armed conflict. Following Security Council resolution 665 (1990), in which economic sanctions were imposed on Iraq under Chapter VII of the UN Charter, ships that were suspected of breaking sanctions were fired upon by coalition ships. These actions, and the threat of force to implement and enforce the sanctions, were not

⁷⁸ As cited in Provost, *supra* note 39, at 407.

⁷⁹ A discussion of the remedies available to individuals whose protections are violated by a state can be found in Chapter four.

⁸⁰ Excepting those rules that are already applicable during peacetime, which rules are predominantly concerned with the dissemination of the rules of armed conflict.

⁸¹ Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Volume I* (1952), at 32.

⁸² Common Article 2, Geneva Conventions I-IV.

⁸³ Pictet (ed.), *Geneva Conventions of 12 August 1949, Commentary, Volume IV*, *supra* note 73, at 20.

considered to be acts of war, thus the armed conflict only began at the time of commencement of the coalition military action in January 1991 with the bombing of Iraq.⁸⁴ However, prolonged, intense fighting between UNOSOM II personnel and SNA soldiers in Somalia in action taken against General Aideed, leading to the death of 29 soldiers and the injury of a further 90, was considered to be a 'war' by the UN Commission of Enquiry sent to investigate.⁸⁵ This action took place over four months and involved air strikes, ground sweeps and arms searches. Thus, it would appear that the armed conflict threshold lies somewhere between these examples, and depends upon such circumstances as duration, intensity and the context of force used. Motivation to use force is not relevant.

International humanitarian law also governs internal armed conflicts such as civil wars and instances of belligerent occupation. Regulation of such non-international armed conflicts is mainly provided for within Common Article 3 of the Geneva Conventions and Additional Protocol II. Common Article 3 provides a minimum set of guarantees that are to be respected in all non-international armed conflicts, and applies once the fighting within a state reaches the level at which it can be described as an armed conflict. Additional Protocol II expands the protections accorded to individuals under Common Article 3, but only in a much more limited field of application, applying only to those armed conflicts taking...

...place within the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁸⁶

Thus Additional Protocol II does not cover situations where several armed factions are fighting each other and there is no government involvement, or situations where states intervene in such a conflict taking place on the territory of another High Contracting Party. As with international armed conflicts, there is much disagreement as to the threshold level of internal violence required for a qualifying internal armed conflict. Under Article 1(2) of Additional Protocol II, the notion of internal armed conflict does not cover 'internal disturbances and tensions' as these are not considered to be armed conflicts but rather

⁸⁴ Greenwood, 'Scope of Application of Humanitarian Law', in Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (1995), at 50.

⁸⁵ See Report of the Commission of Enquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, UN DOC S/1994/653 (1994). Several references are made to the 'war' which evolved after the events of 5 June 1993.

⁸⁶ Article 1(1), Additional Protocol I.

‘policing’ matters within the jurisdiction of the local state. The ICRC Commentary to Article 1 of the Protocol defines internal disturbances and tensions falling short of armed conflict as situations in which “the State uses armed forces to maintain order” elaborating that “there are internal tensions without being internal disturbances when force is used as a preventative measure to maintain respect for law and order.”⁸⁷ Evidently, this threshold is something of a grey area.

Of course, in these situations of internal disturbance, individuals are still protected by domestic law and the relevant human rights provisions. However, it is in these situations that the need for effective protection of the individual is at its highest as states may legitimately derogate from their human rights obligations by claiming that an ‘emergency threatening the life of the nation’ exists.⁸⁸ As already observed,⁸⁹ there is no identity between the legal concept of the ‘armed conflict’ (in which humanitarian law is applicable) and that of the ‘state of emergency’ (in which human rights may be derogated from), and the latter concept is broader. This gap in protection has been recognised and in 1990 inspired a group of non-governmental experts to draw up a list of fundamental standards of humanity that are to be upheld at all times, whether or not an armed conflict exists, known as the Declaration on Minimum Humanitarian Standards.⁹⁰ At present, however, this document is not binding and may only provide guidance.⁹¹

Further, the distinction between international and internal armed conflicts has become blurred. Article 1 of Additional Protocol I expands the notion of international armed conflict to include not just armed conflicts between States, but also ‘wars of national liberation’, which one would otherwise presume to be internal conflict. However, upon signing Additional Protocol I, the United Kingdom made a declaration stating that it had only signed the Protocol on the understanding that:

⁸⁷ Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 1355.

⁸⁸ As discussed above.

⁸⁹ Above at text to n 49 and surrounding.

⁹⁰ 1990 Turku/Abo Declaration of Minimum Humanitarian Standards, attached to UN Doc. E/CN.4/Sub.2/1991/55 (1991).

⁹¹ For a discussion of this topic see: Eide, Rosas & Meron, ‘Combating Lawlessness in Gray Zones Through Minimum Humanitarian Standards; Meron, Towards a Humanitarian Declaration on Internal Strife’, (1995) 89 *American Journal of International Law* 215 and Meron, ‘On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument’, (1983) 77 *American Journal of International Law* 589. See also the Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities – Minimum Humanitarian Standards - Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21, UN Doc. E/CN.4/1998/87 (1998).

...in relation to Article 1, that term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or Protocols are to apply to any given situation.⁹²

Clearly there was concern that the Conventions should not be made applicable to small internal uprisings (and in the case of the United Kingdom – they may have been making reference to the problems in Northern Ireland) but was only to be applied to situations which were of a certain intensity.

Finally, specific rules of international humanitarian law apply to situations of belligerent occupation. Article 42 of the Hague Regulations provides the only treaty definition of when a territory is considered occupied, namely: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

It is clear that the drafters of the Hague Regulations saw belligerent occupation as an aspect of warfare that took place during an armed conflict. There is no provision for the regulation of an occupation that has taken place with consent or without a military operation.

However, paragraph 2 of Common Article 2 of the 1949 Geneva Conventions brought about a widening of the application of international humanitarian law beyond belligerent occupations under the Hague Regulations to: “...all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance.”⁹³ The ICRC Commentary to the Geneva Conventions is explicit in stating that this paragraph only applies to pacific occupations meeting no resistance and does not apply to occupations that take place during an armed conflict or once an armistice has been agreed. These latter types of occupation are simply considered to be methods of warfare and thus an extension of the period of the conflict. Consequently, international humanitarian law applies by virtue of the basic definition of armed conflict (in paragraph 1 of Common Article 2), rather than due to any of the extensions or special cases.⁹⁴

⁹² Roberts and Guelff, *supra* note 50, at 467.

⁹³ It should be noted that Serbia and Montenegro, formerly the FRY, is a party to the Geneva Conventions and their Additional Protocols and thus armed conflicts which take place on the territory of this state are to be governed by these instruments.

⁹⁴ Pictet, *supra* note 73, at 21-2.

The existence of an occupation is a question of fact.⁹⁵ Bothe observes that belligerent occupation “is traditionally used for the holding of possession in the sense of actual control of the territory of another state (or parts of it)”⁹⁶ and in the Hostages case it was held that “...an occupation indicates the exercise of governmental authority to the exclusion of the established government.”⁹⁷ Thus, if a territory has been invaded by a hostile entity, whether resisted or not, and the incumbent government is rendered incapable of exercising its authority and instead the invading forces exercise a form of de facto governmental authority, then an occupation exists. Yet, it is worth noting the view of the US that “...it is immaterial whether the government over an enemy’s territory consist of a military or civil or mixed administration...It is a government imposed by force, and the legality of its acts is determined by the law of war”.⁹⁸ Furthermore, no distinction is to be made between an occupation that arises out of the illegal use of force and one that arises from a legal use of force.⁹⁹ The rules of international humanitarian law regulating occupations are applicable in both situations. This has been confirmed by the United State Military Tribunal in the Hostages Case, which held:

International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory...Whether this invasion was lawful or criminal is not an important factor in the consideration of this subject.¹⁰⁰

This corresponds with the more general principle that international humanitarian law applies to situations of internal and international armed conflict without regard to the legality of the conflict.

⁹⁵ See e.g. the US Army Manual, *Department of Army, Field Manual No. 27-10: The Law of Land Warfare* 139 (1956), cited in Marcus, ‘Humanitarian Intervention Without Borders: Belligerent Occupation or Colonisation?’, (2002) 25 *Houston Journal of International Law* 99, at 111.

⁹⁶ Bothe, ‘Occupation, Belligerent’ in Bernhardt (Ed.), *Encyclopaedia of Public International Law, Volume 3* (1997), at 763.

⁹⁷ *List and others (Hostages case)*, US Military Tribunal sitting at Nuremberg, judgment of 19 February 1948, (1948) 15 *Annual Digest* 632, at 637. The British Manual provides a similar definition: ‘(1) Due to the invasion of foreign armed forces, the national authorities are no longer in a position to enforce their own authority in the territory concerned; and (2) the invading forces, by contrast, are in a position to exercise control and to enforce their own authority’, *British Manual of Military Law: The Law of War on Land* (The War Office, 1958) at para. 503, as cited by Gasser, ‘Protection of the Civilian Population’, in Fleck (ed.), *supra* note 84, at 243.

⁹⁸ Meron, *Human Rights and Humanitarian Norms as Customary Law*, *supra* note 18, at 142.

⁹⁹ Under Article 2(4) of the Charter of the United Nations, ‘All Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.’ Exceptions to this rule are provided for in Article 51 of the Charter which allows the use of armed force in individual or collective self-defence; and under Chapter VII of the Charter which permits the Security Council to authorise armed action for the maintenance of international peace and security in response to a threat to the peace, a breach of the peace or an act of aggression. All other uses of force against a state are considered to be illegal.

¹⁰⁰ *Supra* note 97.

3. The Territorial Reach of Treaty Obligations

a) The Territorial Reach of Human Rights

Within the ICCPR, ECHR, and American Convention similar clauses exist limiting the jurisdictional scope of the treaty obligations contained therein. However, despite the fact that these clauses are textually very similar, they have been interpreted in significantly different ways.

Article 1 of the ECHR provides that ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention’. On the most basic of levels, the European Court of Human Rights has interpreted the term ‘jurisdiction’ to reflect the ‘ordinary and essentially territorial notion of jurisdiction’¹⁰¹ as it is understood in public international law and was demonstrated in the preparatory works to the Convention.¹⁰² Similar provisions are to be found within the ICCPR and American Convention. Accordingly, states have traditionally assumed that their human rights treaty obligations are strictly territorial in scope and, therefore, only apply in respect of those individuals who are subject to the state’s jurisdiction within its territory. For example, the United States submitted, in its periodic report to the Human Rights Committee, that the ICCPR lacked, under all circumstances, the reach to apply to extraterritorial actions of the United States.¹⁰³ However, this was not the conclusion that the Human Rights Committee came to. Instead, the Committee held that this view was “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 territory”.¹⁰⁴

The ‘territorial notion of jurisdiction’ has been interpreted by both the Human Rights Committee and the European Court of Human Rights to include a subjective element. The European Court of Human Rights has held that a state may be responsible under the Convention if acts of its officials within its territory result in an individual being treated contrary to Convention standards by officials of another (usually non-contracting) state; typically where an individual is removed from a contracting state party to the jurisdiction of

¹⁰¹ Application no. 52207/99, *Bankovic et al v Belgium et al*, Decision of 12 December 2001, at para. 61.

¹⁰² *Ibid*, at para. 63

¹⁰³ See Concluding Comments of the Human Rights Committee on the periodic report submitted by the United States, UN Doc. CCPR/C/79/Add.50 (1995).

¹⁰⁴ *Ibid*.

a non-contracting party by extradition or deportation and is mistreated there. The case of Soering v UK¹⁰⁵ provides a clear example of this principle.¹⁰⁶ In this case the European Court held that the extradition of the applicant from the United Kingdom to the United States, where it was alleged that he might have suffered treatment contrary to Article 3 of the ECHR at the hands of the United States authorities, was governed by the United Kingdom's responsibilities under the ECHR. It was held that, as Soering was within the territory of the United Kingdom (where he was not at risk of ill-treatment), when the decision was made to extradite him it was only because of the decision of the United Kingdom government that he would have been exposed to a 'real risk' of treatment contrary to Article 3. Thus, it was held that the United Kingdom should not take any decision that would result in exposure to a 'real risk' of ill-treatment, even though the actual treatment would be at the hands of the government of another state. The Human Rights Committee has applied the same, essentially causal, principle in similar cases, and the Committee appears to add that even though the sending state may be in violation of the Covenant, this does not abrogate the responsibility of the extraditing state at the hands of which the victim would suffer (as long as it is a state party to the Covenant).

Additionally, each of the three treaty enforcement bodies have also developed a line of authority which indicates that a state may be responsible for the exercise of jurisdiction extraterritorially if it exercises 'effective control' over either persons or an area outside its own territory through the actions of its own state agents.¹⁰⁷ With respect to the ECHR, this principle was stated by the European Court in Loizidou v Turkey (Preliminary Objections).¹⁰⁸

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. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.¹⁰⁹

¹⁰⁵ Judgment, (1989) 11 EHRR 439.

¹⁰⁶ See also the Human Rights Committee cases: Comm. no. 539/1993, *Cox v Canada*, Decision of 9 December 1994, UN Doc. CCPR/C/52/D/539/1993 (1994) and Comm. no. 470/1991, *Kindler v Canada*, Decision of 30 July 1993, UN Doc. CCPR/C/48/D/470/1991 (1993); and the following cases which came before the European Court and Commission on Human Rights: *X v Germany*, 8 Yearbook 158; *X v UK* 12 D.R. 73; *Cyprus v Turkey*, 2 DR 125; *Cyprus v Turkey*, 13 D.R. 85 and *Drozd & Janousek v France & Spain*, (1992) 14 EHRR 745.

¹⁰⁷ However, this exercise of extra-territorial jurisdiction has been emphasised by the European Court as being one that is "exceptional and requiring special justification in the particular circumstances of each case".

¹⁰⁸ Judgment, (1995) 20 EHRR 99.

¹⁰⁹ *Ibid*, at para. 62.

According to this test, individuals are within the jurisdiction of a contracting state where its officials exercise effective control over those individuals in a manner that is comparable to the control exercised by the state over individuals within its own territory. It would appear that the notion of ‘effective control’ is the key element in determining whether a state is exercising its jurisdiction extraterritorially. In the case of *Cyprus v Turkey*, it was held that in “having effective overall control over Northern Cyprus...Turkey’s ‘jurisdiction’ must be considered to extend to securing the *entire range* of substantive rights set out in the Convention” [emphasis added],¹¹⁰ thus demonstrating that with ‘effective control’ comes the concomitant obligation to secure the entire set of rights. The implication of this is that, for effective control, it must be *possible* for the state to secure the entire range of Convention rights, otherwise fulfilment of the obligation that comes with effective control would be impossible. Thus in the case of *Bankovic*,¹¹¹ the European Court held that there was no jurisdictional link between the individual victims of the NATO bombing of the Radio-Television Serbia facilities in 1999 and the respondent states, as none of the states exercised effective control in the Federal Republic of Yugoslavia; and control of the airspace above the ground was not considered to be sufficient to pass the effective control test.¹¹²

Under Article 2(1) of the ICCPR, each state party “undertakes to respect and ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognised in the ...Covenant [emphasis added]”. The use of the word ‘and’ in this provision could be read conjunctively for a restrictive interpretation of the reach of the Covenant protections, in which case acts committed outside the territory of the state would not be covered. However, the Human Rights Committee has rejected such an interpretation, instead opting for a disjunctive reading of Article 2(1)¹¹³ so that it covers all individuals that are *either* within the territory of a contracting party *or* ‘subject to the jurisdiction’ of the contracting party.¹¹⁴ Article 1 of Optional Protocol I to the Covenant reaffirms this reading of Article 2

On the facts of *Loizidou* the European Court held that acts committed against individuals within a part of northern Cyprus subject to Turkish control was capable of falling within Turkish jurisdiction. The Court dismissed the respondent government’s assertion that the Turkish Republic of Northern Cyprus was the sovereign State in Northern Cyprus, and that the exercise of public authority was not imputable to Turkey. Cyprus had been invaded by Turkish forces in 1974, and since then Turkey had administered areas of Northern Cyprus to the exclusion of the Cypriot authorities.

¹¹⁰ *Cyprus v Turkey*, Judgment, (2002) 35 EHRR 30, at paragraph 77.

¹¹¹ *Bankovic*, supra note 101.

¹¹² *Ibid.* at para. 76.

¹¹³ See Buergenthal, “To Respect and to Ensure: State Obligations and Permissive Derogations” in Henkin, (ed.): *The International Bill of Rights* (1981), at 72-7.

¹¹⁴ Although this interpretation appears to follow the object and purpose of the ICCPR (thus following the approach in article 31 of the Vienna Convention on the Law of Treaties), it is problematic, since if a disjunctive meaning was intended one wonders why the drafters of the

by providing that the Human Rights Committee is competent to hear any communications “from individuals subject to [the state’s] jurisdiction” who claim to be victims of a violation at the hands of the state. Further, in the case of *Delia Saldas de López v Uruguay*,¹¹⁵ the author claimed that her husband was kidnapped by Uruguayan agents in Buenos Aires and then transported back to Uruguay where he was detained and tortured. The Committee held that:

It would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Convention on the territory of another State, which violations it could not perpetrate on its own territory.¹¹⁶

The Human Rights Committee has interpreted the word ‘jurisdiction’ as relating “not to the place where the violation occurred, but rather to the relationship between the individual and the state”,¹¹⁷ and thus moved away from an emphasis on control of the territory in which the victim is, and towards an emphasis on the relationship between the respondent state and the victim. In the case of *Montero v Uruguay*,¹¹⁸ the applicant’s passport was confiscated by the Uruguayan consulate in Germany, allegedly a violation of the Article 12 right to freedom of movement. Despite the fact that the passport was confiscated in Germany, the Human Rights Committee held that the act could be construed to have taken place in the jurisdiction of Uruguay. Additionally, the Committee has expressed concern with regard to the action of Belgian soldiers in Somalia, noting that Belgium had recognised the applicability of the Covenant to such a situation where its troops were stationed in another territory on a military mission.¹¹⁹ Thus it would appear that the Committee has taken a very broad interpretation of the notion of extraterritorial exercise of jurisdiction and thus state parties are obliged to ensure that their agents do not violate the ICCPR rights of persons abroad.

This European Court and Commission take a different view of jurisdiction to the Human Rights Committee, stemming from the slightly different wording of the ECHR. Article 1 of the ECHR provides that: “the High Contracting Parties shall secure to everyone *within* their

Covenant did not simply use the word ‘or’ (although perhaps such a word would lead to unnecessary confusion in the usual case in which an individual is both within a state’s territory and subject to its jurisdiction).

¹¹⁵ Comm. no. 52/1979, *Delia Saldas de Lopez v. Uruguay*, Decision of 29 July 1981, UN Doc. CCPR/C/OP/1 at 88 (1984).

¹¹⁶ *Ibid.* at para. 12.3.

¹¹⁷ *Ibid.*, at para. 12.2.

¹¹⁸ Comm. no. 106/1981, Decision of 31 March 1983, UN Doc. CCPR/C/OP/2 at 136 (1990). See also Decision of Comm. no. 56/1979, *Celiberti de Casariego v Uruguay*, Decision of 29 July 1981, UN Doc. CCPR/C/OP/1 at 92 (1984).

¹¹⁹ See the Human Rights Committee’s Concluding Comments on the periodic report submitted by Belgium, UN Doc. CCPR/C/79/Add.99, at para. 14.

jurisdiction” [emphasis added]’ whereas Article 2(1) of the Covenant provides that a contracting party “undertakes to respect and ensure to all individuals within its territory and *subject to its jurisdiction*” [emphasis added]. The different wording of the ECHR more strongly suggest a territorial focus for jurisdiction, with the Human Rights Committee’s interpretation of the ICCPR as depending upon a relationship link less tenable in the case of the ECHR. A territorial emphasis may make more sense in the case of the ECHR, since it is a regional treaty and was drafted so as to operate within the “legal space (*espace juridique*) of the Contracting States”¹²⁰ and is thus not designed to be applied outside this arena. In contrast, the ICCPR has a more individual rights-based approach to protection of individuals than the ECHR.¹²¹

The Inter-American Commission, also a regional body interpreting a regional treaty, appears to take a similar approach to the Human Rights Committee. In the case of Coard et al. v United States,¹²² the Inter-American Commission reiterated that contracting parties were to ensure that they upheld their human rights obligations with respect 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. In principle, the inquiry ... [depends] on whether, under the specific circumstances, the state observed the rights of a person subject to its authority and control.¹²³

Clearly there is no territorial element restricting this obligation to acts within the territorial space of the Organisation of American States. Furthermore, in the case of Alejandro et al. v Cuba,¹²⁴ decided on the same day as Coard, the Commission extended the obligation to respect the rights within the American Convention to actions that take place within international airspace. In this case a Cuban MiG-29 military plane shot down two unarmed, civilian aeroplanes, killing four people. The Commission held that:

¹²⁰ See *Bankovic* decision, supra note 101, at para 80.

¹²¹ An interesting example arose when an application was raised in respect of the sinking of the General Belgrano by the United Kingdom during the Falklands war, although no decision as to whether the Convention applied was made because the application was declared inadmissible on the basis that it had not been filed within the requisite six month period. See Application Number 58692/00, *Romanero de Ibanez & Rojas v United Kingdom*, decision of 19 July 2001. See also the case of Application number 31821/96, *Issa, Omer, Ibrahim Murty Khan, Muran & Others v Turkey*, decision of 30 May 2000, where the victims claimed violations in relation to Turkish soldiers in Northern Iraq, and the Court held that the admissibility issues were inextricably linked to the substantive issues of the case. As yet the case has not been decided. In a similar vein see Application number 39473/98, *Xhavara & Others v Italy & Albania*, decision of 11 January 2001.

¹²² Case no. 10.951, *Coard et al. v United States*, Decision of 29 September 1999, Report no. 109/99.

¹²³ *Ibid.*, at para.37.

The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because as previously stated, when agents of the state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues...'¹²⁵

Clearly what can be concluded is that under each of the human rights instruments discussed above, rights are to be guaranteed to all individuals within the territory of the contracting party. This is the central, primary, case of application of the ICCPR, ECHR and American Convention. Beyond territorial control, in the exceptional case of application to extra-territorial activity, different approaches have been taken, loosely based upon 'effective control'.

b) The Territorial Reach of International Humanitarian Law

In relation to international armed conflicts, the Geneva Conventions and Additional Protocol I are not limited geographically in the same manner as the human rights treaties discussed above. Where territory is mentioned, it is only for the purpose of stating that the protections contained within the Conventions are to apply throughout the territory of the High Contracting Party who is engaged in an international armed conflict.¹²⁶

In relation to non-international armed conflicts, there are certain territorial limitations to the application of Common Article 3 of the Geneva Conventions and Additional Protocol II to contracting parties. The protections within the Protocol only apply to conflicts that take place within the territory of a High Contracting Party,¹²⁷ although protection is not limited to those individuals within the area of fighting. The International Criminal Tribunal for Rwanda in the case of *Akayesu* held that the protections apply to the entire territory of a High Contracting Party engaged in civil conflict, and not just to the areas where the armed uprisings were taking place.¹²⁸

¹²⁴ Case no. 11.589, *Alejandro et al v Cuba*, Decision of 29 September 1999, Report number 86/99.

¹²⁵ *Ibid.*, at para 25.

¹²⁶ For example: Article 6(2) of Geneva Convention IV states: 'In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations'.

¹²⁷ Article 1, Additional Protocol II.

¹²⁸ *Prosecutor v Akayesu*, Judgment, Case number ICTR-96-4-T, Chamber I, September 2, 1998, at para. 635.

If a third state aids parties to an armed conflict, it may be bound to ensure that its actions comply with international humanitarian law, even if those actions do not amount to any actual fighting, provided the state is in effective control of fighters. In the Nicaragua case,¹²⁹ the International Court of Justice examined, among other issues, whether the military activities of an insurrection movement (the *contras*) against the Nicaraguan government were imputable to the United States. Nicaragua asserted that the *contras* were no more than bands of mercenaries who had been recruited, trained, commanded and paid by the US government and thus their actions, and thus any breaches of international humanitarian law, were imputable to that government. However, the Court held:

All the forms of United States participation...and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.¹³⁰

Thus effective control of military operations in a non-international armed conflict, in addition to actually being engaged in that conflict, gives rise to the applicability international humanitarian law to the controlling party's actions. This is similar to the test of effective control that was discussed earlier as giving rise to the applicability of international human rights law to extra-territorial actions (although those actions need not, of course, relate to armed conflict).

4. Protected Persons

a) Persons Protected By Human Rights

In principle, human rights are universal claims which all individuals have against all governments. As a matter of law, the protections contained within international human

¹²⁹ *Nicaragua*, supra note 32.

¹³⁰ Ibid. at para 115. See also the *Tadić* case, in which the International Criminal Tribunal for the Former Yugoslavia examined the question of whether the acts of the Bosnian Serb authorities were attributable to the former Federal Republic of Yugoslavia. The Trial Chamber found, by a majority, that the acts of the Bosnian Serb authorities could not be attributable to the former Federal Republic of Yugoslavia due to a lack of evidence of direct and effective control of military operations, as opposed to mere shared aims. (*Prosecutor v Tadić*, Appeals Judgment, Case no. IT-94-1, Appeals Chamber, 15 July 1999, at para. 146).

rights treaties are to be accorded to all individuals within (or subject to) the jurisdiction of contracting parties.¹³¹ The ECHR, ICCPR and American Convention all contain provisions that oblige contracting parties to ensure that the rights contained therein are secured in favour of nationals and non-nationals, without any discrimination.¹³² Indeed, discrimination in securing the rights contained within these treaties is not permitted on certain grounds including: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or birth – and, it must be realised that this list is not an exhaustive one.

The obligation on states to secure the rights contained within the ECHR, ICCPR and American Convention without discrimination is one which does permit a “differentiation of treatment” as long as the “criteria for such a differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate”.¹³³ The European Court of Human Rights, in *Belgian Linguistics*, elucidated when such a differentiation is permissible:

*A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.*¹³⁴

However, what is considered to be a legitimate aim is a matter which is to be decided by each treaty body on the facts of the cases before it.¹³⁵

During times of emergency, when derogation is permitted,¹³⁶ both the ICCPR and American Convention provide that derogation measures must not discriminate on the grounds of race, colour, sex, language, religion or social origin.¹³⁷ Clearly, in comparison with times of normalcy, the list of grounds on which discrimination is not permitted is a reduced one, and Nowak notes that in relation to the ICCPR at least, this list is

¹³¹ See above for a discussion of ‘jurisdiction’.

¹³² See article 14, ECHR; Article 2(1) and 3, ICCPR and Article 1(2), American Convention.

¹³³ Human Rights Committee General Comment Number 18, Non-Discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994).

¹³⁴ *Belgian Linguistics v Belgium*, Judgment of 9 February 1967, [1968] ECHR (Ser.A) 6, at para. 34.

¹³⁵ In the case of the ECHR, the European Court of Human Rights has relied upon the concept of the ‘margin of appreciation’ in relation to whether an aim being pursued is ‘legitimate’. For a discussion of the margin of appreciation see Lavender, ‘The Problem of the Margin of Appreciation’, [1997] *European Human Rights Law Review* 381.

¹³⁶ See earlier for a discussion of when derogations from international human rights treaty obligations is permissible.

¹³⁷ Article 4(1), ICCPR, and Article 26(1) American Convention.

exhaustive.¹³⁸ However, the ECHR contains no such provision compelling contracting parties to adopt non-discriminatory derogation measures. In the case of *Ireland v UK*,¹³⁹ the Court examined the Irish government's complaint that the internment policy adopted by the UK government had been applied discriminatorily to Republican suspects. The Court held that there were objective and reasonable differences between the violence caused by the Republicans and Loyalists, and also found that the authorities had found it easier to proceed in the ordinary courts against Loyalist suspects. Thus, the Court held that there had been no violation of Article 14 with respect to Article 5, and so the question was not considered under Article 15. However, the question that needs to be asked is whether a breach of Article 14 can be 'strictly necessary' within the terms of Article 15(1).¹⁴⁰ It seems reasonable to assume that, in general, when action is considered 'strictly necessary' for the purposes of Article 15, reasonable grounds for differentiation will be established for the purpose of Article 14, thus leading to the conclusion that there would be no breach of Article 14. However, it is important to note the example of a situation where it is considered 'strictly necessary', for the purposes of Article 15, to differentiate between different racial groups. Differentiation on purely racial grounds is considered to be degrading treatment, which is prohibited under Article 3 (a non-derogable right), so differentiation between racial groups, while strictly necessary for the purposes of Article 15, may not be permitted under Article 14.¹⁴¹ Therefore, differentiation which amounts to a violation of a non-derogable provision is never permissible.

b) Persons Protected by International Humanitarian Law

Whereas it is an important principle of international humanitarian law that all human beings equally benefit from its protections, international humanitarian law has identified three specific groups that require special protection during international armed conflicts, namely:

¹³⁸ Nowak, *supra* note 16, at 85-6.

¹³⁹ *Supra* note 41.

¹⁴⁰ This question was raised by Judge Matscher in his dissenting opinion.

¹⁴¹ However, can any treatment which violates Article 14 ever be 'strictly required'? There is no Strasbourg authority on this, although there is some discussion of the point in UK jurisprudence. Under Part 4 of the Anti-terrorism, Crime and Security Act 2001, the Home Secretary is given the authority to issue against any non-UK national a certificate of reasonable belief that the individual's presence in the UK is a threat to national security and that this person is a suspected terrorist. On the basis of such certification, the individual may be detained. An action was brought on behalf of some of the individuals detained before the Special Immigration Appeals Commission (SIAC), and the Commission accepted that there was a situation that satisfied the public emergency test under the ECHR, but was not persuaded that such a distinction between the detention of nationals and non-nationals was a proportionate response to the terrorist threat (*A & Others v Home Secretary*, Appeal no. SC/1-7/2002). However, the Court of Appeal quashed the SIAC decision and found that non-nationals and nationals were not in an analogous situation, and so Article 14 was not violated by the certification and detention process (*A, X, Y and others v Secretary of State for the Home Department*, [2002] EWCA Civ. 1598, 6 November 2002).

the wounded, sick and shipwrecked; prisoners of war and civilians. Each of these groups is equally protected by the rules regulating the conduct of hostilities (the so-called 'Hague Law'),¹⁴² but, in addition to these protections, each of the four Geneva Conventions of 1949 protects one of these categories of 'protected persons'. Geneva Conventions I and II protect the sick, wounded and shipwrecked, Geneva Convention III protects prisoners of war and Geneva Convention IV's protections are directed at civilians.

Those protections within Geneva Conventions I, II and III, are directly aimed at protecting lawful combatants,¹⁴³ i.e. those individuals who take part in hostilities and satisfy the legal definitions of lawful combatancy. There are three types of combatants who all receive the same level of protection within an international armed conflict. First, the classic sense of 'combatant' is a member of the armed forces *stricto sensu* of a party to an international armed conflict who respects the obligation to distinguish himself from the civilian population.¹⁴⁴ Secondly, as set out in Article 4 of Geneva Convention III, any member of an armed group that acts under a responsible command, wearing a fixed and distinctive sign, carrying their arms openly and respects international humanitarian law, and is party to an international armed conflict is to be considered a combatant. This rule was developed to ensure that irregular combatants were accorded the same protections as are accorded to members of regular forces. Finally, Article 44 of Additional Protocol I maintains that individuals will retain their combatant status as long as they "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". In exceptional circumstances where, due to the nature of hostilities, a combatant cannot distinguish himself, this duty will be satisfied as long as the combatant carries his arms openly.¹⁴⁵ Each of these groups, as lawful combatants, is entitled to take direct part in hostilities and may not be punished for their mere participation in hostilities. Any combatant who does not comply with those conditions associated with combatant status will forfeit his entitlement to prisoner of war status if captured. Such an individual may be

¹⁴² See Article 13, Geneva Convention IV on the field of application of Article 14-26; and also Articles 49 and 50, Additional Protocol I.

¹⁴³ The issue of unlawful combatants will be addressed later in this chapter.

¹⁴⁴ See Article 4(1), Geneva Convention III.

There are also some non-combatant members of armed forces, such as chaplains and medical personnel, who are not entitled to take part in hostilities. If they are captured, they are not considered prisoners of war, but rather are to be accorded treatment equivalent to prisoners of war, with certain extra privileges.

¹⁴⁵ It should be noted that this provision is highly controversial and was one of the main reasons that the US refused to ratify Additional Protocol I. The UK entered a declaration at the time of ratifying the Protocol, stating that the exceptional circumstances may only arise in situations of occupation or in a conflict covered by Article 1(4) of the Protocol, i.e. wars of national liberation. See Roberts and Guelff, *supra* note 50, at 510. It is clear that this provision is only binding between states that have ratified the Protocol and other states are still bound by the stricter criteria laid down in the Geneva Conventions.

tried and convicted for the unlawful bearing of arms, yet prior to any legal proceedings the individual must be treated in the same manner as any other prisoner of war and the decision about his status must be taken by an independent tribunal.

Geneva Convention IV provides protection for civilians who find themselves in the power of an enemy state, either on the territory of an enemy state or as part of the civilian population of an occupied territory.¹⁴⁶ However this protection for enemy civilians does not extend to individuals who are nationals of a neutral state or nationals of a co-belligerent state. Thus, a key difference between the protection accorded to civilians by international humanitarian law and international human rights law relates to the former's higher level of protection for enemy nationals within the area of conflict, whereas the latter applies to all equally irrespective of nationality.

Those protections that are accorded to civilians by Geneva Convention IV will be forfeited if the civilians take up arms and take a direct part in hostilities. Such individuals are considered to be unlawful combatants and are not entitled to prisoner of war status, and its related protections, and may be tried and punished for their belligerent acts.

Within international armed conflicts it would appear that the level of protection accorded to individuals depends upon their willingness to abide by the rules of international humanitarian law and maintain the distinction between civilians and combatants. The protections that are accorded to combatants and non-combatants are not identical, unlike the protections accorded to the same groups by international human rights law. Clearly the designation of individuals as combatants or civilians is an important one in determining what protections are accorded to those individuals. Recently, the Inter-American Commission on Human Rights decided that this designation of the legal status of detainees whose status is unclear should be determined by a "competent court or tribunal, as opposed to a political authority".¹⁴⁷ It was asked to determine whether precautionary measures were necessary to determine the legal status of detainees held in Guantanamo Bay, who had been captured by US forces in their campaign against terrorism in Afghanistan. The US Government asserted that the individuals were terrorists and did not fit the criteria for lawful combatants, and thus were not to be accorded prisoner of war status. It is clear from the Commission's decision the designation of combatant status is of fundamental

¹⁴⁶ Article 4, Geneva Convention IV. See for example the ICTY Trial Chamber decision in *Prosecutor v Ivica Rajic (Article 61 Procedure)*, Case no. IT-95-12-R61, Trial Chamber II, 13 September 1996, at paras. 34-7.

¹⁴⁷ Decision of Inter-American Commission on Human Rights, 12 March 2002, reproduced in (2002) 23 *Human Rights Law Journal* 15.

importance and cannot be left to political authorities to determine and instead must be decided by a court or tribunal.¹⁴⁸

Combatants who take part in hostilities in non-international armed conflicts do not gain the same privileged status, with regard to international humanitarian law, that they would receive were they engaged in an international conflict. In fact, in such conflicts there is no distinction made between civilians and combatants, and both are liable for prosecution for acts that take place during the course of the conflict, and neither are entitled to prisoner of war treatment if captured. Solf argues that this is because:

... governments fear that any international rule establishing the combatants' privilege and prisoner of war status in internal armed conflicts would not only enhance the perceived standing of insurgents, but also tend to encourage insurrection by reducing the personal risks of the rebels.¹⁴⁹

Thus in non-international armed conflicts, international humanitarian law, like international human rights law, affords civilians and those taking part in hostilities the same protections. Yet, these protections afforded by international humanitarian law are rather basic, and do not reach the detailed and comprehensive level of protections accorded to the sick, wounded and shipwrecked; prisoners of war or civilians caught within an international armed conflict. The characterisation of the nature of an armed conflict, as internal or international, is therefore of paramount importance.

5. Conclusions

International human rights law and international humanitarian law both seek to protect individuals, but, at least at present, their two systems are complementary and overlapping, rather than fully integrated into one greater system of protection. This is exemplified by their general applicability: international human rights are applicable at all times although many may be derogated from in times of public emergency. One major category of public emergency is the armed conflict, and during that type of emergency, international humanitarian law will apply. In other type of public emergency, states will still be permitted to derogate from some international human rights obligations but international humanitarian law will not apply.

¹⁴⁸ For further discussion of this see: Shelton, 'The Legal Status of the Detainees at Guantanamo Bay: Innovative Elements in the Decision of the Inter-American Commission on Human Rights of 12 March 2002', (2002) 23 *Human Rights Law Journal* 13.

¹⁴⁹ Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice', (1983) 33 *American University Law Review* 53, at 59.

Human rights are applicable to state action within their own territory, as well as extra-territorial state action where a state can be said to be exercising effective control. Humanitarian law is applicable to states that are parties to armed conflict, or those exercising effective control over fighters in an armed conflict, although it applies differently to an internal armed conflict than to an international armed conflict.

Human rights may be claimed by any individual to whom the rights are accorded, against states bound by a specific obligation, from the time that the obligation becomes binding on the state. International humanitarian law, however, does not accord rights, but rather differing levels of protections for different groups of individuals depending upon the (international or intra-national) nature of the conflict in which they are engaged, and their role within that conflict. These protections are to be afforded by states to individuals, and are not rights that individuals can claim. In particular, combatants in international conflict are afforded certain immunities and enemy civilians are afforded particular protections.

Despite these complexities, though, when considering the impact of human rights in conditions of armed conflict it is necessary to take account of international humanitarian law, and vice versa. Only when the two regimes are overlaid can a true picture of the protections applicable be seen, and only then can the two regimes be used to reinforce their common objective rather than operating inconsistently or even in contradiction.

Chapter Two

The Regulation of the UNMIK and KFOR Operations in Kosovo by International Human Rights Law.

Human rights norms compel states to refrain from causing 'harm' to their nationals or other persons within their jurisdiction. They essentially function to protect the individual from the excesses of states and governments within whose power they are. In Kosovo, both UNMIK and KFOR function collectively as the *de facto* state authority¹ and it is from the excesses of this international administration that the citizens of Kosovo need protection. Thus, questions need to be asked as to whether an international legal obligation exists for the UNMIK/KFOR administration to guarantee the human rights of the citizens of Kosovo.

UNMIK and KFOR, although both functioning towards the same ultimate goal, are separate operations with differing legal bases and competencies. UNMIK, as the transitional administration in Kosovo, operates under the authority of the Security Council, whereas KFOR is a multi-national peacekeeping force which, although authorised by the Security Council, is primarily led by NATO and remains subject to national control. These important differences between the two operations mean that their respective human rights obligations may also differ in nature, application and source.

Security Council Resolution 1244 (1999) specifically mandates UNMIK to protect and promote human rights in Kosovo, whereas there is no similar such mandate for KFOR.² KFOR is mandated to support the work of UNMIK, and as such one could argue that there is an implied obligation for KFOR to also protect human rights. Yet, this is a tentative link, and there is no further reiteration or reinforcement of this obligation in the Military Technical Agreement (MTA) which provides further elaboration of KFOR's mandate.³ Additionally, it is proposed that both UNMIK and KFOR are to ensure that they carry out their mandates in accordance

¹ In fact the Kosovo Ombudsperson has pointed out that UNMIK "acts as a surrogate state". Ombudsperson Institution in Kosovo, "Special Report No. 1 on the Compatibility with Recognised International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of UNMIK and their Personnel in Kosovo of 18 August 2000", 26 April 2001, at para. 23.

² "...the main responsibilities of the civil presence will include...protecting and promoting human rights", UN Doc. S/RES/1244 (1999), at para. 11(j).

³ Military Technical Agreement Between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999, attached to UN Doc. S/1999/682 (1999).

with any human rights obligations they may be bound by. This duty seems implicit in the obligation to protect and promote human rights. One could hardly assume that such a mandate would be successfully carried out, if human rights are not regarded in its commission. Moreover, there are other sources of human rights obligations which are applicable to the KFOR and UNMIK operations, including those of the United Nations and personnel contributing states.

However, it is not only the human rights obligations of the international operation that are important. Issues are raised in relation to the obligations that Federal Republic of Yugoslavia may have to its citizens in Kosovo. As stated above, human rights are held by an individual with respect to the state, and as Resolution 1244 takes pains to say, there has been no transfer of sovereignty with the introduction of the UNMIK/ KFOR operation.⁴ Thus, as the FRY is still the state with sovereignty over Kosovo, in principle the Belgrade authorities are responsible for securing the human rights of all individuals within its jurisdiction, including Kosovo. Each of these complex issues shall be addressed within this chapter.

1. Human Rights Protections Within the UNMIK and KFOR Mandates.

a) UNMIK

Although Security Council Resolution 1244 provides that UNMIK is to protect and promote human rights, there is no clarification within the resolution as to how this element of the mandate is to be fulfilled. Elucidation of this element of the UNMIK mandate was provided by the Secretary-General in his Second Report on UNMIK in which he wrote:

In its resolution 1244 (1999), the Security Council requests UNMIK to protect and promote human rights in Kosovo. In assuming its responsibilities, UNMIK will be guided by internationally recognised standards of human rights as the basis for the exercise of its authority in Kosovo. UNMIK will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administration.⁵

⁴ Resolution 1244, *supra* note 2, makes a point of “Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia...”.

⁵ Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), 12 July 1999, UN Doc. S/1999/779, at para. 42.

This commitment to be 'guided' by international human rights standards was formally reaffirmed by UNMIK in UNMIK Regulation 1999/24 on the law applicable in Kosovo.⁶ Guarantees were provided that "all persons undertaking public duties or holding public office in Kosovo" would not discriminate against any individual on any grounds, and were to "observe internationally recognised human rights standards" as reflected in: the Universal Declaration of Human Rights; the ECHR; the ICCPR; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and the International Convention on the Rights of the Child.⁷ Although this is an impressive list of international instruments, there is something wanting in UNMIK's commitment to human rights. Use of words such as 'observe' and 'guided' lack any real force, providing what can only be described as a political commitment to the human rights instruments. There is no mention of the direct applicability of these instruments to the Kosovo administration, and no concession to being bound by them either.

The Ombudsperson Institution established by UNMIK, found this level of undertaking of human rights protection to be insufficient with regards to the obligations set out in paragraph 11(j) of Security Council Resolution 1244 (1999).⁸ UNMIK's human rights obligations, as set out in Security Council Resolution 1244 (1999), appear to go further than a commitment to observe human rights standards. The Ombudsperson held that the relevant obligation in Security Council Resolution 1244 (1999) included "affirmative obligations to secure human rights to everyone within UNMIK jurisdiction".⁹ The ICCPR, ECHR and American Convention contain similar provisions, and these have been interpreted as imposing both negative and positive obligations on the contracting parties.¹⁰ As well as being obliged to refrain from interfering in an individual's human rights, this provision compels UNMIK to uphold its positive obligations with regard to human rights and thus *inter alia* protect an

⁶ This was amended by UNMIK Regulation 2000/59 to include a provision replacing the death penalty with imprisonment for up to forty years.

⁷ Para. 3, Section 1, UNMIK Regulation 1999/24.

⁸ See Ombudsperson Institution in Kosovo, 'Special Report No. 2 on Certain Aspects of UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo', 27 October 2000, at para. 14.

⁹ *Ibid.* at para. 7.

individual's rights from interference by other private persons.¹¹ However, this positive obligation is one which is not fulfilled by the UNMIK administration. The UNMIK regulations only provide that those persons undertaking public duties must observe human rights standards and does not provide any guarantees that the body of law applicable in Kosovo will comply with international human rights standards.

UNMIK Regulation 2000/59 provides three sources of law applicable in Kosovo: i) UNMIK Regulations; ii) the law in force in Kosovo on 22 March 1989; and finally, iii) the law in force after 22 March 1989 which covers situations not covered by the other two sources of law and is not discriminatory, which complies with internationally recognised human rights standards. This final source of law is the only source that requires the law to comply with international human rights standards. However, it is only a subsidiary source of law to sources i) and ii), which are not subject to any review for their compatibility with human rights standards. To fulfil the Security Council obligation to uphold human rights, it is arguable that UNMIK has a positive obligation to ensure that recourse to these sources of law is compatible with human rights norms.

However, the various obligations to uphold human rights for the citizens of Kosovo have been interpreted by UNMIK in light of the emergency situation that exists within Kosovo. As UNMIK has acknowledged, a public emergency exists within Kosovo "given the security situation and the need for an international military force to maintain peace and order".¹² Many international human rights treaties provide for states to derogate from their human rights obligations during a time of public emergency. 'Guided' by international human rights

¹⁰ Article 2, ICCPR reads: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the right recognised in the present Convention...". Comparable provisions can be found in Article 1 of the ECHR and Article 1(1) of the Inter-American Convention.

¹¹ For example see the European case of *Young, James & Webster v UK*, Judgment of 13 August 1981, (1982) 4 EHRR 38, where the Court held that there was a breach of the right not to join a trade union (protected by Article 11, ECHR), as English law permitted the dismissal of an employee if they failed to join a trade union.

See also the judgment of the Inter-American Court in the case of *Caballero Delgado and Santana (Preliminary Objections)* Judgment of 29 January 1997, Series C no. 31 (1997), in which the Court held that the Article 1(1) obligation:

...implies the duty of the state parties to organise the government apparatus, and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation states must prevent, investigate, and punish any violation of the rights recognised by the Convention. (para. 67).

¹² See UNMIK, 'Security and the Rule of Law in Kosovo', 12 January 2000, at 5.

standards, UNMIK has availed itself of the ability to derogate from certain human rights obligations by virtue of the emergency situation in Kosovo. For example UNMIK adopted a policy of executive detention orders which operated outside of the judicial system and were in clear violation of the right to liberty¹³ and justified such detentions by reference to the emergency conditions in Kosovo:

The situation in Kosovo is analogous to emergency situations envisioned in the human rights conventions. UNMIK's mandate was adopted under Chapter 7, which means that the situation calls for extraordinary measures and force can be used to carry out the mandate. Any deprivation of liberty by an Executive Order is temporary and extraordinary, and its objective is the effective and impartial administration of justice.¹⁴

Therefore, it would appear that UNMIK is only to 'observe' those principles of international human rights that may not be derogated from in a time of emergency. The Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child do not provide any possibility for derogation from their respective provisions, and thus, UNMIK has committed itself to uphold the general principles underlying each of these conventions. Essentially, the international administration must ensure that it does not discriminate against individuals by virtue of their race, or sex, and must not tolerate such discrimination within the territory concerned; there is an absolute prohibition on torture, inhuman and degrading treatment or punishment; and finally, it must secure certain rights to individuals under the age of eighteen.

The ICCPR, ICESCR and ECHR each include provisions for derogation from certain obligations in certain situations. Article 4 of the ICESCR provides that there may be legitimate limitations to the rights guaranteed by the Covenant, if determined by law, and if such a limitation is for the purpose of promoting the general welfare of society. There are no absolute rights that are excepted from this possible limitation, and it is possible that UNMIK could argue that it is not compelled to abide by the provisions contained within the Covenant which do not aid the administration with the completion of its mandate. However, the

¹³ See Amnesty International, 'Amnesty International calls for an end to Executive Orders of Detention', 3 August 2001. See also Ombudsperson of Kosovo, 'Report Number 3: The Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards', 29 June 2001, and 'Report Number 4 on The Establishment of a Detention Review Commission for Extra-judicial Detentions based on Executive Orders', 12 September 2001.

ICCPR and ECHR both contain certain non-derogable rights, which UNMIK personnel are compelled by UNMIK Regulation 1999/24 to 'observe'. Additional to those rights already provided for by the Conventions discussed above, these rights include: the right to life,¹⁵ the prohibition of slavery and servitude,¹⁶ the prohibition of retroactive criminal laws,¹⁷ freedom from imprisonment for inability to fulfil a contract,¹⁸ the right to recognition before the law,¹⁹ and finally, freedom of thought, conscience and religion.²⁰

Most importantly, however, is that each of these treaties provides institutional control mechanisms to monitor the use of derogations.²¹ However, as UNMIK is not a party to any of these human rights treaties, it is not subject to these controls. Yet, there are general principles governing human rights in states of emergency which should be observed.²² These include the principle that an exceptional threat must exist; the principle of proportionality, and as such that all derogation measures must be strictly required by the exigencies of the situation; the principle of non-discrimination, that derogation measures must not be discriminatory; and finally non-derogability from the four common non-derogable rights: the right to life, freedom from torture or other inhuman or degrading treatment or punishment,

¹⁴ UNMIK/KFOR/UNHCR/UNMIK Police Press Briefing, 2 July 2001.

¹⁵ Article 6, ICCPR and Article 2, ECHR. Yet, a death sentence commuted by a court is not to be considered a violation of this provision. Note also the further exceptions in Article 2(2) of the ECHR. Deaths which occur: a) in defence of a person from unlawful violence, b) in order to effect a lawful arrest, and c) in action lawfully taken to quell a riot or insurrection, will not be considered to be a violation of the right to life.

¹⁶ Article 8 (1 & 2), ICCPR and Article 4(1), ECHR.

¹⁷ Article 15, ICCPR and Article 7, ECHR.

¹⁸ Article 11, ICCPR.

¹⁹ Article 16, ICCPR.

²⁰ Article 18, ICCPR.

²¹ Article 15(3), ECHR provides that a state relying on the right to derogate must "keep the Secretary-General of the Council of Europe fully informed of any measures that it has taken, and the reasons therefor." Review of these actions is, however, only available incidentally as part of proceedings which have been instituted before the European Court. Article 4(3), ICCPR provides for a similar system of notification and review is only achieved during a Human Rights Committee consideration of a state party's periodic report, or through proceedings before the Committee.

²² See Oraà, 'The Protection of Human Rights in Emergency Situations Under Customary International Law', in Goodwin-Gill and Talmon (eds.), *The Reality of International Law – Essays in Honour of Ian Brownlie* (1999), 413.

There have been several other studies of minimum human rights standards in a state of emergency. See, *inter alia*, Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as State of Siege or Emergency, UN Doc. E/CN.4/Sub.2/1982/15 (1982); Fitzpatrick, *Human Rights in Conflict: The International System for Protecting Human Rights During States of Emergency* (1994); Chowdhury, *Rule of Law in States of Emergency: The Paris Minimum Standards of Human Rights in a State of Emergency* (1989) and Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency', (1985) 79 *American Journal of International Law* 1073.

freedom from slavery or servitude and the right not to be tried for an offence which was not criminal at the time it was committed.²³ UNMIK must, at the very least, satisfy these general principles which are considered to be customary international law.²⁴

b) KFOR

Security Council Resolution 1244 (1999) provides that KFOR and UNMIK are to “operate towards the same goals ... in a mutually supportive manner”.²⁵ This duty has been interpreted by both the OSCE component of UNMIK²⁶ and the Special Representative of the Secretary General,²⁷ as restraining KFOR to acting in a manner that is consistent with UNMIK’s mandate. Thus KFOR should, at the very least, observe international human rights standards. However, this is a rather tenuous interpretation of KFOR’s mandate and perhaps imposes more duties on KFOR than was intended by the Security Council when drafting the resolution. For example, the mandate for KFOR provided in the MTA makes no mention of protection or promotion of human rights. The main priorities for KFOR are to ensure security for the Kosovo region. Security Council Resolution 1244 (1999) specifically mandates KFOR with the responsibility of “supporting, *as appropriate*, and coordinating closely with the work of the international civil presence”[emphasis added].²⁸ If KFOR is only to support the work of UNMIK when appropriate, it could be proposed that there may be situations when it is not appropriate for KFOR to protect human rights in order to pursue its goal of security for the region.

2. To What Extent are the UNMIK and KFOR Operations Bound by International Human Rights Law When Carrying Out their Mandate?

In adopting Resolution 1244, the Security Council delegated its power, under Chapter VII of the UN Charter, to the Secretary-General to create the UNMIK administration to govern

²³ For further discussion of each of these principles see chapter one.

²⁴ See later for a discussion of why UNMIK is bound by principles of customary international law.

²⁵ Resolution 1244, *supra* note 2, at para. 6.

²⁶ OSCE, ‘Kosovo: Review of the Criminal Justice System (October 2001)’, 8 November 2001, at 39.

²⁷ Statement of the Acting Special Representative of the Security General on the Right of KFOR to Apprehend and Detain, 4 July 1999.

²⁸ Resolution 1244, *supra* note 2, at para. 9(f).

Kosovo under UN auspices.²⁹ The Security Council cannot create an organ that is not bound by the same general obligations that it is bound by. Thus, those human rights obligations that bind the UN, and the Security Council in particular, will also bind the actions of UNMIK. Unlike UNMIK, KFOR is not a body subsidiary to the UN, and does not operate under UN command and control. KFOR is a NATO force stationed in Kosovo with the authorisation of the Security Council, and, as such, cannot be held to be bound by those human rights obligations binding on the UN. However, as KFOR is a security presence deployed under UN auspices, it has been argued that KFOR is still bound to act in accordance with the principles and purposes of the UN, and thus must promote human rights.³⁰ If this argument were followed, then KFOR, like UNMIK, would be bound to uphold all customary and peremptory human rights norms binding upon the UN. There are certain merits to this argument. As human rights are considered to be of fundamental importance in the international community, it could be argued that the UN could not have delegated functions to other international organisations without ensuring that the latter organisation uphold human rights norms in the execution of their duties.

However, these obligations are not the only source of duties for UNMIK and KFOR, and it could be submitted that an obligation to operate within the bounds of international human rights law emanates from the obligations of the individual states that contribute staff to the operations.

a) UN Obligations

i) Obligations under the Charter

The powers, and their limitations, of the Security Council are determined by the UN Charter. This is a principle that has been stated and reiterated many times. Article 24(2) of the Charter which states: “the Security Council shall act in accordance with the Purposes and Principles of

²⁹ The UNMIK administration acts under the direct control of the Security Council, via the Special-Representative of the Secretary General. The Special Representative has “overall authority to manage the mission and to coordinate the activities of all UN agencies and other international organisations operating as part of UNMIK”. (UN Doc. S/1999/672 (1999), at para.3). In addition, the activities of UNMIK are reported directly to the Security Council via monthly reports by the Secretary-General, an obligation set out within Resolution 1244, *supra* note 2, at para. 10.

³⁰ See Cerone, ‘Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo’ (2001) 12 *European Journal of International Law* 469, at 473.

the United Nations” in the discharge of its duties.³¹ Additionally, the Secretary-General, in a statement in 1947, said that the Security Council’s powers are “commensurate with its responsibility for the maintenance of international peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.”³² More recently, the ICTY has held that:

the Security Council is an organ of an international organisation, established by a treaty which serves as a constitutional framework for that organisation. The Security Council is thus subjected to certain constitutional limitations....³³

The purposes and principles of the UN include a specific reference to the obligation to promote and encourage respect for human rights.³⁴ This obligation does not expressly bind the UN to uphold human rights, but the International Court of Justice, in its advisory opinion in the *Namibia* case, held that: “the denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter”.³⁵

However, it has been argued that the Security Council, when performing its Chapter VII functions, should maintain some discretion and should not be constrained by the law.³⁶ This

³¹ This limitation on the Security Council’s powers to act has been accepted and emphasised on many separate occasions. In his separate opinion in the ICJ case of *Application of the Convention on the Prevention and Punishment of Crime of Genocide, Preliminary Objections, (Bosnia and Herzegovina v Federal Republic of Yugoslavia)*, Judgment of 11 July 1996, [1996] ICJ Rep. 595, Judge Lauterpacht wrote:

“Nor should one overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purpose and Principles of the United Nations.” (para. 101)

See also the separate and dissenting opinion of Judge Weeramantry in the case of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libya v UK)*, Provisional Measures, Judgment of 27 February 1998, [1998] ICJ Reps. 9, at 61. Further evidence of this view can be found in the following commentaries: Sands and Klein, *Bowett’s Law of International Organisations* (2001), at 33; Gowland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’, (1994) 43 *International and Comparative Law Quarterly* 55, at 91; and Shaw, *International Law* (1997), at 877.

³² Secretary-General’s statement of 10 January 1947, as cited in Gill, ‘Legal and Some Political Limitations on the Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter’, (1995) 26 *Netherlands Yearbook of International Law* 33, at 70.

³³ *Prosecutor v Tadić*, Decision on Jurisdiction, Case no. IT-94-1-D, Trial Chamber I, 10 August 1995, at para. 28.

³⁴ Article 1(3), UN Charter.

³⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] ICJ Rep. 16, at para. 131.

³⁶ For further discussion see Kelsen, *The Law of the United Nations* (1964), at 294.

view is based on the idea that the Security Council can only exercise its functions³⁷ when not restrained in the manner in which it deals with threats to international peace and security. Further evidence of this view can be taken from the Charter itself. Article 1(1) of the Charter obliges the UN to comply with principles of international law only when settling disputes peacefully (ie under Chapter VI), and this obligation does not extend to “collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace” (ie those actions taken under the Chapter VII banner). However, there is only reference to international law not being applicable to actions taken under Chapter VII, there is no reference to Charter ‘constitutional’ limitations not being applicable to Chapter VII action. Therefore, it could be argued that the Security Council should not be subject to international law in relation to its Chapter VII activities, unless such restraints are specifically stated within the Charter. And so it follows, that as protection for human rights is a purpose of the UN which the Security Council must uphold, international law relating to the protection of human rights must be upheld. The Appeals Chamber of the ICTY have concurred with the view that the Security Council must uphold human rights protections, even when acting under Chapter VII of the Charter. In its discussion of the establishment of the tribunal, the Appeal Chamber stated that the establishment of a judicial organ by the Security Council should be “rooted in the rule of law and offer all guarantees embodied in the relevant international instruments”.³⁸ The tribunal elaborated further:

...for a tribunal...to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognised human rights instruments.³⁹

ii) Treaty obligations

Therefore, the actions of the Security Council, its subsidiary organs such as UNMIK, and operations authorised by it such as KFOR, should be regulated by international human rights law. As stated earlier,⁴⁰ only states, and not international organisations, can be parties to the main human rights treaties, including the ICCPR, ECHR and American Convention. The

³⁷ Kelsen notes that the “purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law”.

³⁸ *Prosecutor v Tadić*, Appeals Judgment, Case no. IT-94-1-A, Appeals Chamber, 15 July 1999, at para. 42.

³⁹ *Ibid.* at para.45.

⁴⁰ See Chapter one.

accession clauses of these treaties provide that only states can become contracting parties. The UN is not a state; it is an international organisation. Thus, despite being an international organisation with international personality,⁴¹ the UN cannot be bound by the obligations directly by becoming a party to these treaties.

It appears that at the conception of the ICCPR, ECHR, and American Convention it was not envisaged that an international organisation, such as the UN, would ever be in a position where it was acting as a *de facto* state body and thus might have had the opportunity to violate an individual's human rights. Both the ECHR and American Convention are regional treaties and thus it would not be appropriate for the UN to be bound by these. However, were the accession clauses to the ICCPR amended to take account of the new roles that are being undertaken by the UN, the UN then would have a normative list of rights that it was to uphold during operations such as that in Kosovo. International organisations may only enter into treaties whose subject matter falls within "the overall field of competencies of the organisation".⁴² As stated above, one of the purposes of the UN is to promote and encourage respect for human rights, clearly the UN would not be acting *ultra vires* were it to accede to a human rights treaty.

iii) Customary law obligations

Despite the fact that the UN is not bound by conventional international human rights law, as a subject of international law, the UN possesses international rights and duties dictated by customary international law. In the Reparations for Injuries Suffered in the Service of the United Nations case the ICJ stated that the UN has the "capacity to resort to customary methods recognised by international law for the establishment, the presentation and the settlement of claims".⁴³ It must follow that UN operations, such as UNMIK, must observe customary international human rights norms. These include prohibitions on: genocide; slavery and the slave trade; murder or causing the disappearance of individuals; torture; prolonged arbitrary detention; retroactive penal measures and systematic racial discrimination, and the right to self-determination.⁴⁴

⁴¹ See *Reparations for Injuries Suffered in the Service of the UN*, Judgment of 11 April 1949, [1949] ICJ Reps 174, at 178-9.

⁴² Sands & Klein, *supra* note 31, at 481.

⁴³ *Supra* note 41, at 177.

iv) Jus Cogens

Further to the protections accorded to individuals by customary international human rights law, the UN is also bound to uphold peremptory norms of international law. These peremptory norms, known as *jus cogens*, are defined as:

...a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁴⁵

Human rights obligations which appear to have attained the status of peremptory norms include: rules prohibiting genocide,⁴⁶ torture,⁴⁷ slavery and racial discrimination.⁴⁸ Although these norms may seem to have the same character as customary norms, the key difference between the two is that no treaty obligation may override a *jus cogens* obligation.⁴⁹ As there is no possibility of derogation from *jus cogens* norms, even the Security Council acting within its Chapter VII powers cannot disregard its obligations under these peremptory norms. As Dixon writes: "...any conduct contrary to the rule of *jus cogens* will usually be regarded as illegal".⁵⁰ Judge Lauterpacht, in his separate opinion in the Bosnia (Genocide) case, agreed with such an interpretation. The case involved claims by Bosnia and Herzegovina that Security Council Resolution 713 (1991), which imposed an arms embargo on the country, aided a policy of genocide, as it prevented the victims from defending themselves. Judge Lauterpacht noted that the Security Council could not take action, even under Chapter VII, which is contrary to a *jus cogens* prohibition:

⁴⁴ See Chapter one.

⁴⁵ Article 53, 1969 Vienna Convention on the Law of Treaties, 1158 UNTS 331.

⁴⁶ See the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, Judgment of 28 May 1951, [1951] ICJ Rep. 15.

⁴⁷ See *Prosecutor v Furundžija*, Judgment, Case no. IT-95-17/1-T, Trial Chamber II, 10 December 1998, at paras. 153-57. See also the House of Lords judgement in *R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte*, [1991] 1 All ER 481, especially the decisions of Lord Browne-Wilkinson at 589, Lord Hope of Craighead at 626, and Lord Millet at 626.

⁴⁸ Racial discrimination was a widely cited example of conduct prohibited by *jus cogens* at the Vienna Diplomatic Conference on the Law of Treaties which drafted the Vienna Convention on the Law of Treaties. See American Law Institute, *Restatement (Third) Foreign Relations of the United States* (1987), at 167, which states that the international norms prohibiting "systematic racial discrimination" are peremptory in character.

⁴⁹ Where custom and treaty law conflict, it is the general position that the treaty norm will prevail in relations between those parties to the treaty, and that customary law will continue to apply in all other relations.

⁵⁰ Dixon, *Textbook on International Law* (2000), at 38.

[I]t is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights.⁵¹

In conclusion, UNMIK and KFOR must ensure that they act in compliance with, at the very least, *jus cogens* norms regarding human rights, if not the full body of customary international human rights law.

b) Obligations of Individual Personnel Contributing States

There is support, within ECHR jurisprudence, for the idea of state responsibility for the acts of an international organisation of which a European Convention State is a member, and for responsibility where state officials work under the authority of an international organisation. UNMIK and KFOR personnel-contributing states may be bound to fulfil their human rights obligations in Kosovo, if it can be established that these sending states retain control over their personnel, and as such exercise effective control within Kosovo.⁵²

The case of Drozd & Janousek v. France & Spain⁵³ provides useful clarification on when personnel are acting on behalf of their state, or as independent officials. The application concerned the administration of justice in Andorra, a principality heavily influenced in its administration by France and Spain. Within the judicial system, French and Spanish judges sat as members of the Andorran courts, and thus it was asserted by the applicant that the respondent governments were responsible for the administration of justice in accordance with their obligations under the European Convention. However, the European Court held that

⁵¹ Supra note 33, at para.102.

⁵² Although much of the following discussion relies on jurisprudence from the European Court of Human Rights it is still a valuable source of interpretation of human rights obligations found within human rights instruments other than the ECHR. In the case of *Mamatkulov & Abdurasulovic v Turkey*, Judgment of 6 February 2003, Application nos. 46827/99 and 46951/99, the European Court looked to the jurisprudence of other international courts to aid its interpretation of the binding force of interim measures. The Court held that the ECHR should be interpreted in light of the Vienna Convention on the Law of Treaties and especially Article 31(3): “any relevant rules of international law applicable in the relations between the parties” should be taken into account. It stated that “the Court must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human rights protection...” (para. 99). The Court then proceeded to examine the issue of interim measures in light of jurisprudence of the Human Rights Committee, the UN Committee Against Torture, the Inter-American Court of Human Rights and the International Court of Justice. Therefore, a certain unity exists in the interpretation of obligations within human rights instruments.

⁵³ (1992) 14 EHRR 745.

these judges exercised their judicial role independently of the French and Spanish governments. Specifically, it was stated:

Whilst it is true that judges from France and Spain sit as members of the Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts ... exercise their functions in an autonomous manner; their judgements are not subject to supervision by the authorities of France or Spain.⁵⁴

However, even if a state does not retain control over their personnel, this does not absolve the state of its human rights responsibilities. The Commission held in the case of M & Co. v Federal Republic of Germany that:

...the transfer of powers [to an international organisation] does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantee could wantonly be limited or excluded and thus be deprived of their peremptory character.⁵⁵

The European Court concurred with this opinion in the case of Matthews v UK.⁵⁶ By an act of the European Community the population of Gibraltar had been prevented from participating in European Parliament elections. The applicant maintained that this was a violation of Article 3 of Protocol I to the Convention: the right to free election of the legislature. The Grand Chamber of the Court agreed that there had been a violation of this right by the UK and noted that:

The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer.⁵⁷

There is a duty on contracting parties to the Convention, to ensure that human rights are still secured to individuals, within the state's jurisdiction, even after a transfer of competences to an international organisation.

⁵⁴ Ibid. at para. 96.

⁵⁵ Application no. 13258/87, *M. & Co. v Federal Republic of Germany*, Admissibility Decision, 9 February 1990.

⁵⁶ (1999) 28 EHRR 361.

⁵⁷ Ibid. at para. 32.

Yet, had the transfer taken place prior to the state's accession to the ECHR, no such obligation would exist. In the case of Hess v UK the Commission held that the joint administration of Spandau prison in Berlin by the UK, US, France and USSR, did not engage the obligations of the UK to ensure Convention rights to the applicant. However, the Commission did note that an issue could be raised under the Convention if the agreement concerning Spandau prison had been entered into when the Convention was already in force for the UK government.⁵⁸

Human rights treaties only compel contracting parties to secure the rights of individuals within their jurisdiction.⁵⁹ In the case of CFDT v European Communities⁶⁰ an application was made against the European Community itself, as well as its member states, both jointly and severally, that a particular French trade union was not designated by the European Council as a representative organ entitled to submit representatives to the Consultative Committee of the European Coal and Steel Community. The complaint was held inadmissible against the European Community as it was not a party to the Convention, and was also held inadmissible against the individual member states of the Community. The Commission noted: "the applicant is complaining of the act of an organ of the Communities, i.e. the Council of the European Communities, relating to the composition of another organ of the Communities, i.e. the Consultative Committee to the High Authority".⁶¹ As the actions complained of took place at the hands of the European Communities and could not be attributed to a specific state, no complaint could be entertained against an individual member state of the European Community.⁶² In the Hess case, the Commission noted that administration of Spandau prison:

...cannot be divided into four separate jurisdictions and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision

⁵⁸ *Hess v UK*, 2 DR 72, at 74. However, this was not the only grounds on which the Commission decided the application was inadmissible. See further for a discussion of the other reasons.

⁵⁹ For a discussion of the term 'jurisdiction', including extra-territorial jurisdiction, as it is used in human rights treaties see chapter one.

⁶⁰ 13 DR 231 (1978).

⁶¹ *Ibid.* at 239.

⁶² Recently, the Court was once again asked to look at the liability of individual member states of the European Union (EU) for a decision of an EU body in *Senator Lines GmbH v 15 Member States of the European Union*, Application no. 56672/00. The applicants claimed that an order to pay a fine imposed by the European Commission, before a pending appeal had been heard was a violation of Article 6, ECHR. However, the Court did not get a chance to hear the case, as the Court of First Instance set aside the fine three weeks before the issue was to be heard by the Court. See Press Release issued by the Registrar of 16 October 2003.

of Spandau prison is not a matter “within the jurisdiction” of the United Kingdom, within the meaning of Article 1 of the Convention.⁶³

Thus, once competences are transferred to an international organisation, if a state retains, or establishes, jurisdiction over individuals is it still bound to uphold its human rights obligations with respect to these individuals.

UNMIK exercises governance functions similar to that of the government of a state. Therefore, if the actions of UNMIK personnel could be attributed to individual states, it could be held that each state exercises jurisdiction in Kosovo and should secure the rights of the citizens of Kosovo. However, UNMIK officials have been described as “international civil servants”⁶⁴ and do not act as representatives of their respective governments. Instead they are recruited by UNMIK, a subsidiary body of the Security Council, and act under the control of the UN. It would be very difficult to assert that the home states of such officials exercised effective control over their personnel and over Kosovo, and so it would appear that there is no obligation for a state to ensure that UNMIK, or its nationals who are UNMIK officials, comply with international human rights standards.

The situation is entirely different with respect to KFOR troops. Although the overall command of KFOR is with the KFOR Commander, the operation is divided into four regions, each of which are headed by a major contributor of troops. O’Neill demonstrates that each of these contingents do not act exclusively under the command of the KFOR Commander but rather “check with their commanding officers back in their national capitals and then inform Commander KFOR if they can and will follow his orders”.⁶⁵ However, is there really an

⁶³ Hess, *supra* note 58, at 74.

Yet, had the Commission been able to separate the joint authority into four jurisdictions, an interesting question would have arisen as to whether the Court could have adjudicated on the matter due to application of the ‘Monetary Gold Principle’, which determines that a Court cannot decide on an issue which may determine the rights and obligations of parties not party to the proceedings. (See *Monetary Gold Removed from Rome in 1943, (Italy v France, UK and US)*, Jurisdiction, Judgment of 15 June 1954, [1954] ICJ Reps. 19). As the US and USSR were not parties to the Convention at the time of Hess’ application, any determination of the issues would have been a clear violation of the principle.

⁶⁴ O’Neill, *Kosovo: An Unfinished Peace* (2001), at 15.

⁶⁵ *Ibid.* at 43. He cites an example of when the US Pentagon refused to allow US troops to be stationed in Mitrovica as violence was flaring up in early February 2002:

The Pentagon deemed the risk to US soldiers too high given US politicians’ zero tolerance for armed professionals to suffer casualties. So General Klaus Reinhardt, the German Commander of KFOR...was forced to find troops from other contingents to deal with the tense situation in Mitrovica.

exercise of jurisdiction by these states in each of the regions for which they are responsible? KFOR is not responsible for the 'running' of Kosovo as UNMIK is. As stated earlier,⁶⁶ the jurisdiction clauses of the ECHR and ICCPR have been formulated slightly differently. Under the ECHR individuals are within the jurisdiction of a contracting state where its officials exercise effective control over those individuals in a manner that is comparable to the control exercised over individuals within its own territory. However, the ICCPR provides a broader view of jurisdiction, looking to the relationship between a state official and an individual. At the beginning stages of the Kosovo operation until the full establishment of UNMIK, each of the major troop-contributing states exercised overall military control over a region in Kosovo. Therefore they could be held to be exercising extra-territorial jurisdiction fulfilling the jurisdiction tests of both the ECHR and ICCPR, thus obliging the state to ensure that their troops secure the rights of all individuals within this jurisdiction. However, after the establishment and arrival of UNMIK, these duties were withdrawn. Yet, it is arguable that each individual KFOR contingent exercised effective control in relation to KFOR-run detention camps,⁶⁷ such as the one at the US KFOR base, Camp Bondsteel. Individuals detained at Camp Bondsteel were detained outside the domestic judicial system, and could only have their rights accorded and protected by the individual KFOR contingents.⁶⁸

Even if the 'effective control' test of the ECHR is not fulfilled by the actions of KFOR contingents, the broader notion of jurisdiction under the ICCPR would be fulfilled. There has been recognition by the Human Rights Committee that obligations under the ICCPR are to be honoured by state agents, even when undertaking a peacekeeping operation under the auspices of the UN. In its Concluding Observations on the Third Periodic Report of Belgium, the Human Rights Committee wrote:

The Committee is concerned about the behaviour of Belgian Soldiers in Somalia under the aegis of the United Nations Operation in Somalia (UNOSOM II), and acknowledges that the State party has recognized the applicability of the Covenant in this respect and opened 270 files for purposes of investigation.⁶⁹

⁶⁶ See Chapter one.

⁶⁷ From mid-2000 KFOR developed a practice of detaining persons based on its mandate under Resolution 1244 to ensure public safety and order.

⁶⁸ See OSCE, *supra* note 26.

⁶⁹ Concluding observations of the Human Rights Committee: Belgium, UN DOC: CCPR/C/79/Add.99 (1998) at para. 14.

Both the Human Rights Committee and Belgium noted that the human rights norms within the Covenant were to be upheld by the Belgian soldiers in Somalia, and that ultimate responsibility for this lay with the state party Belgium.⁷⁰ Thus, it is certainly arguable that each KFOR contingent exercises extra-territorial jurisdiction for the purposes of, at the very least, the ICCPR and possibly even the ECHR. As such they must secure the rights contained within each of these treaties to those individuals who fall within their jurisdiction, as defined by each instrument.

Could this obligation be subject to certain qualifications, if the troop-contributing state entered a notice of derogation?⁷¹ It is contended that none of the major troop-contributing states could validly enter a notice of derogation with regard to their actions in Kosovo. The derogation clauses of the ICCPR, ECHR and American Convention each refer to an 'emergency threatening the life of the nation' as the trigger for validating a derogation notice. Yet, it would appear that the emergency has to threaten the life of the nation entering the notice of derogation. There is no inclusion within any of the human rights treaties for emergencies threatening the life of neighbouring nations,⁷² or allied states. This appears to be a flaw within the international human rights system. Although there is acknowledgement that a state may exercise jurisdiction extra-territorially, there is no recognition that this exercise of jurisdiction may occur during a period of emergency when it is impossible to guarantee the full complement of international human rights. The situation in Kosovo, although an emergency situation within the FRY, could, in no way, be considered to constitute an emergency in a KFOR troop-contributing state implying that the full range of human rights are to be accorded to individuals within the jurisdiction of a KFOR contingent.

One of the key human rights provisions which KFOR contingents are bound to uphold is the right to life, described by the Human Rights Committee as "the supreme right".⁷³ This right

⁷⁰ It should be noted that the key difference between the Belgian soldiers in UNOSOM II and UNMIK personnel is that the UNMIK personnel are recruited as international civil servants and their actions are divorced from their state of nationality, whereas the Belgian soldiers, although acting in an international operation, retained their status as Belgian soldiers and did not become UN troops. (Evidence of this is to be found in the fact that the discipline of soldiers remained with the Belgian authorities and was not delegated to the UN Commander of UNOSOM II).

⁷¹ See Chapter one and above for a discussion of derogations.

⁷² However, an emergency in a state could possibly be considered to extend to neighbouring states, if huge flows of refugees were envisaged creating a situation of emergency in the receiving state.

⁷³ Human Rights Committee, 'General Comment 6', UN Doc. HRI\GEN\1\Rev.1 at 6 (1994), at para. 6. The European Court of Human Rights has reiterated this opinion and held that "Article 2 ranks as one of the most fundamental provisions in the Convention ... it also enshrines one of the basic values

imposes both negative obligations, in terms of the right not to be arbitrarily or unlawfully deprived of life by the state or its agents, and positive obligations, in that the state must adopt measures that promote the right to life.

Article 2 of the ECHR provides for three exceptions to the right to life: no violation of the provision shall be found when the death resulted from the use of force in defence of another from unlawful violence; in order to effect an arrest or prevent the escape of an arrested person; and, in action lawfully taken for the purpose of quelling a riot or insurrection. Article 15 of the ECHR provides a further exception to the right to life, which permits the loss of life due to lawful acts of war.⁷⁴ However, this exception is only applicable during a time of public emergency threatening the life of the contracting party. Article 6 of the ICCPR provides that in addition to the imposition of a death sentence by a court of law, a further permissible exception to the right to life may be deaths which are not the result of arbitrary killing by state forces, but rather are strictly regulated and controlled by law.

Therefore, if fighting broke out between KFOR troops and other groups in Kosovo prior to the establishment of the UNMIK administration (when KFOR contingents exercised overall military control over the region), which fulfilled the criteria of an armed conflict,⁷⁵ then it could be contended that any deaths that occur during this conflict are a violation of the state's obligation not to kill individuals within its jurisdiction. Were the fighting to be designated as quelling a riot or insurrection then deaths which occur may not be considered, under the European system, to be a violation of the right to life. However, there are two conditions to the use of force for this purpose. Firstly, the use of force must be no more than is "absolutely necessary" for the achievement of the aim of quelling the riot or insurrection.⁷⁶ This includes an obligation to ensure that all operations are "planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force".⁷⁷ Secondly, as part of the

of the democratic societies making up the Council of Europe". *McCann v UK*, (1996) 21 EHRR 97, at para. 147.

⁷⁴ The ICCPR does not contain a comparable provision. However, the Human Rights Committee has not specifically criticised a state for participating in a war. Yet, the Committee has obliquely referred to a state's obligations to ensure that deaths are compliant with the laws of war by criticising states for violating the international humanitarian law principle of proportionate use of force. See Concluding Comments on the Federal Republic of Yugoslavia (Serbia and Montenegro), UN Doc A/48/40 (1992), at paras. 6-7; and Concluding Comments on the Russian Federation, UN Doc. CCPR/C/79/Add. 54 (1996), at paras. 26-30.

⁷⁵ See Chapter three for further discussion of this.

⁷⁶ See *Stewart v UK*, 39 D & R 162, at 169-171.

⁷⁷ *McCann v UK*, supra note 73, at para. 194.

positive duty to 'secure' the right to life, states are compelled to investigate deaths occurring as a result of the use of force by state agents.⁷⁸ Therefore, each KFOR contingent must ensure that any force used is proportionate and is under an obligation to investigate the circumstances under which deaths take place.

When taking prisoners, KFOR troops must uphold the human rights of their prisoners, including freedom from arbitrary detention⁷⁹ and the right not to be tortured or subjected to inhuman or degrading treatment⁸⁰. Additionally, none of the prisoners are to be required to perform forced or compulsory labour.⁸¹ All detentions that take place must be specifically authorised and sufficiently circumscribed by law. For KFOR 'the law' not only includes the laws applicable in the territory of Kosovo and regulations issued by the Special-Representative of the Secretary-General, but also the mandate given to KFOR under Security Council resolution 1244 (1999). Procedures must be in place to ensure that reasons, and, if appropriate, details of criminal charges, must be given to an individual for their detention, and court control of the detention must be available.⁸² There must be an opportunity for an individual to challenge the lawfulness of their detention in a court without delay and proceedings carried out in accordance with fair trial provisions.⁸³ There must be access to an independent and impartial tribunal established by law; the hearing must take place within a reasonable period of time, and the proceedings should be public with pronouncement of a reasoned decision. However, no one should be held guilty of a criminal offence that was not criminal at the time of its commission.⁸⁴ Additionally, if an individual is captured by KFOR troops and is to be tried on criminal charges, it is for the troop-contributing state to ensure that the individual is guaranteed a fair trial in accordance with the provisions above. Furthermore, the state must ensure that the individual's rights to be presumed innocent; to be informed of the charge and given an

⁷⁸ Ibid. at para. 161; *Kaya v Turkey*, (1999) 28 EHRR 1, at section III B. See the decisions of the Human Rights Committee in the following cases: Comm. no. 161/1983, *Herrera Rubio v Colombia*, Decision of 2 November 1987, UN Doc. Supp. No. 40 (A/43/40) at 190 (1988); Comm. no. 181/1984, *Sanjuan Arevalo v Colombia*, Decision of 3 November 1989, UN Doc. Supp. No. 40 (Vol. II) (A/45/40) at 6; Comm. no. 119/1991, *Miango Mujo v Zaire*, Decision of 27 October 1987, UN Doc. Supp. No. 40 (A/43/40) at 218 (1988) and Comm. no. 119/1991, *Mojica v Dominican Republic*, Decision of 10 August 1994, UN Doc. CCPR/C/51/D/449/1991 (1994). See also Registration number 8/01/I, *Concerning the Right to Life of V.S. & V.N.*, Ex Officio Report of the Kosovo Ombudsperson, 29 January 2002.

⁷⁹ Article 9, ICCPR; Article 5, ECHR and Article 7, American Convention.

⁸⁰ Articles 7 and 10, ICCPR; Article 3, ECHR and Article 5, American Convention. See Article 1 of the Torture Convention for a widely used definition of torture.

⁸¹ Article 8, ICCPR; Article 4, ECHR and Article 6, American Convention.

⁸² See Human Rights Committee 'General Comment 8', UN Doc. HRI/GEN/1/Rev.1 at 8 (1994).

⁸³ For such provision see Article 14, ICCPR; Article 6, ECHR and Article 8, American Convention.

⁸⁴ Article 15, ICCPR; Article 7, ECHR and Article 9, American Convention.

opportunity to prepare a defence and get legal assistance; and to call and cross-examine witnesses, are all fulfilled. Other rights to be guaranteed include: freedom of movement within the territory of a state;⁸⁵ certain procedural rights against expulsion;⁸⁶ the right to non-interference with privacy, family, home or correspondence;⁸⁷ freedom of thought, conscience and religion;⁸⁸ freedom of expression;⁸⁹ freedom of assembly and association;⁹⁰ protection of the family;⁹¹ protection of children;⁹² right of political participation;⁹³ and finally, rights of non-discrimination,⁹⁴ including protection of the rights of minorities.⁹⁵

Although international human rights law may not bind KFOR, as an entire operation, each individual contingent is bound to fulfil the human rights obligations of its sending state. However, it is apparent that there is no corresponding obligation for states contributing personnel to UNMIK, as national authorities do not retain any control over their nationals who are UNMIK personnel. Each state contributing troops to the KFOR operations is bound to ensure that their soldiers uphold their human rights obligations in the course of the operations where they exercise jurisdiction over individuals. There is no possibility of derogation from this obligation, and the state is obliged to uphold the entire range of conventional human rights it has signed up to. Although beneficial to individuals in the jurisdiction of KFOR troops, assurance of these rights places a heavy administrative, and perhaps very costly, burden on the contributing state to ensure that each of these rights are guaranteed to international standards.

3. The Human Rights Obligations of the FRY.

The human rights obligations of the FRY may include an obligation to ensure that the UNMIK/ KFOR operations secure international human rights in Kosovo, despite its lack of

⁸⁵ Article 12, ICCPR; Article 2, Additional Protocol IV to the ECHR and Article 22, American Convention.

⁸⁶ Article 13, ICCPR.

⁸⁷ Article 17, ICCPR; Article 8, ECHR and Article 11, American Convention.

⁸⁸ Article 18, ICCPR; Article 9, ECHR and Article 12, American Convention.

⁸⁹ Articles 19 and 20, ICCPR; Article 10, ECHR and Article 13, American Convention.

⁹⁰ Articles 21 and 22, ICCPR; Article 11, ECHR and Articles 15 and 16, American Convention.

⁹¹ Article 23, ICCPR; Article 12, ECHR and Article 17, American Convention.

⁹² Article 24, ICCPR; and Article 19, American Convention.

⁹³ Article 25, ICCPR; and Article 23, American Convention.

⁹⁴ Article 26, ICCPR and Article 14, ECHR.

⁹⁵ Article 27, ICCPR.

control over the actors and territory.⁹⁶ There has been much debate as to which human rights obligations are binding on the FRY. The FRY maintains that it is a continuation of the former Socialist Federal Republic of Yugoslavia (SFRY) and thus “it shall strictly abide by the commitments that the SFRY assumed internationally”,⁹⁷ including human rights commitments. SFRY was only party to the ICCPR, and currently ‘Serbia and Montenegro’ is listed as a party to the ICCPR and the FRY has submitted a special report to the Human Rights Committee,⁹⁸ suggesting that it has accepted, and been accepted, to abide by those human rights obligations binding on the SFRY.

Even if the FRY’s contention that it is a continuation of SFRY is held to be invalid, there is much academic opinion to suggest that there is a general rule of automatic continuity of human rights obligations to successor states.⁹⁹ The rationale for such an approach is best explained by the Human Rights Committee in its General Comment Number 26:

...once the people are accorded 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 power designed to divest them of the rights guaranteed by the Covenant.¹⁰⁰

⁹⁶ It should be remembered that the FRY retains sovereignty over Kosovo, even if it does not actually exercise authority over such territory.

⁹⁷ FRY Proclamation of 27 April 1992.

However, note that this was not a view that was generally accepted by the international community. See Security Council Resolution 777, UN Doc. S/RES/777 (1992) in which the Council declared that “the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist” and that “the Federal Republic of Yugoslavia cannot continue automatically the membership of the Former Socialist Federal Republic of Yugoslavia in the United Nations.” See also Opinion No.8 of the Arbitration Commission, E.C. Conference on Yugoslavia of 4 July 1992, 92 ILR 199.

⁹⁸ UN Doc. CCPR/C/88 (1992).

⁹⁹ See, *inter alia*, the separate opinions of Judge Weeramantry and Judge Shahbudeen in *Application of the Genocide Convention*, supra note 33; Human Rights Committee, ‘General Comment No. 26’, UN Doc. CCPR/C/21/Rev1/Add 8/Rev (1997); Kamminga, ‘State Succession in Respect of Human Rights Treaties’, (1996) 7 *European Journal of International Law* 469; and Cassese, *International Law* (2001), at 53.

For a less favourable view of automatic succession to humanitarian treaties see Rasulov, ‘Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?’ (2003) 14 *European Journal of International Law* 141.

¹⁰⁰ General Comment No. 26, supra note 98, at para. 4.

Following this reasoning, one could question whether the same principle applies to the UNMIK/KFOR administration, and as a change in government of the region, the human rights obligations of the FRY continue to bind the new international administration in Kosovo.

Thus it would appear that there is large body of evidence to demonstrate that the FRY is bound by duties to the rights contained within the ICCPR.

There are indications from ECHR jurisprudence to suggest that the FRY may have an obligation to ensure that the human rights of individuals within the entire territory of the FRY are guaranteed, even if the Belgrade authorities are not in control of the Kosovo region. In the case of Ilaşcu, Leşcu, Ivanțoc, Petrov-Popa v Moldova and the Russian Federation,¹⁰¹ the Court was asked to examine whether the Moldovan government should have acted to end violations of the Convention which took place on their territory, at the hands of a secessionist movement entitled the Moldovan Republic of Transdniestria. On accession to the Convention, the Moldovan government had entered a reservation to its obligations with regard to the actions of the Moldovan Republic of Transdneistra, stating that it would be:

...unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester Republic within the territory actually controlled by such organs, until the conflict in the region is finally definitively resolved.¹⁰²

The Moldovan government argued that it did not exercise any control in the area where the alleged violations had taken place, and as such the events did not take place within its jurisdiction. The Court held that such a reservation was invalid and that there was nothing in the Convention allowing a restriction of the term 'jurisdiction' as to only include part of the territory of a High Contracting Party. However, it left, for examination at the merits stage, the issue of whether Moldova's responsibility was engaged for acts that took place at the hands of the secessionist group, in an area which it did not control but which was a *de jure* part of the territory of the Moldovan state.

The situation in Kosovo has many similarities to that in Moldova. Kosovo, although a *de jure* part of FRY territory, is under the complete executive and legislative control of the international administration UNMIK. The FRY has no control over the territory or the people therein and arguably is in no position to guarantee the rights of individuals in Kosovo. However, the decision of the Court seems to be incongruous with its other judgments. In the cases involving Cyprus and Turkey, the Court has agreed that by virtue of the Turkish

¹⁰¹ *Ilaşcu, Leşcu, Ivanțoc, Petrov-Popa v Moldova and the Russian Federation*, Application number 48787/99, Admissibility Decision of 4 July 1999.

¹⁰² *Ibid.* at para. 7B.

‘occupation’ of Northern Cyprus, an obligation exists for the Turkish authorities to secure Convention rights to individuals in the region.¹⁰³ The Moldovan government relied on the similarities between the Transdnistria region and Northern Cyprus to argue the validity of its reservation. However, the Court did not agree.

It must be remembered that the Court only declared that Moldova’s reservation was invalid and that the application was admissible. The Court may still on the merits of the case follow its jurisprudence in the Cyprus cases and lead us to the strange situation whereby a reservation to the Convention restricting the territorial application of the ECHR is invalid, but if control of the region is factually restricted, as in Northern Cyprus, then the responsibility of the state is severed. If the Cyprus jurisprudence is to be followed then it would appear that the FRY’s responsibility to guarantee human rights to individuals in Kosovo is not engaged whilst Kosovo is under the administration of UNMIK.

However, in its admissibility decision in the case of Mr & Mrs X v Federal Republic of Germany the European Commission noted that:

...it is clear that, if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty.¹⁰⁴

The declaration that the FRY was to ‘strictly abide’ by the international obligations of the SFRY was made in April 1992, and Serbia and Montenegro is listed as a party to the ICCPR from the same date. The Belgrade authorities agreed to the “deployment in Kosovo of effective international civil and security presences” and the “establishment of an interim administration for Kosovo”¹⁰⁵ when agreeing to the Ahtisaari-Chernomyrdin peace plan and signing the Military Technical Agreement in May and June 1999 respectively. Thus, it could be argued that, following the European Human Rights Commission’s comments in Mr & Mrs X v Federal Republic of Germany, the FRY was compelled when agreeing the terms of the peace plan to ensure that its ICCPR obligations were to be upheld by any interim administration.¹⁰⁶ Yet, the

¹⁰³ *Loizidou v Turkey*, (1997) 23 EHRR 513, at para. 62. See also *Cyprus v Turkey*, (1982) 4 EHRR 482; and *Cyprus v Turkey*, (1993) 15 EHRR 509.

¹⁰⁴ *Mr & Mrs X v Federal Republic of Germany*, 1958/9 DR 256, at 300.

¹⁰⁵ See Statement by the Chairman on the Conclusion of the meeting of the G-8 Foreign Ministers held at the Petersburg Centre on 6 May 1999, Annex 1 to Security Council Resolution 1244, *supra* note 2.

¹⁰⁶ See the discussion of the unity of human rights regimes at note 52.

peace plan itself, and the principles upon which it was based, make no mention of human rights whatsoever. An explanation for the Belgrade authority's failure to ensure that any interim administration would secure the human rights of the citizens of Kosovo could be that they only agreed to such an administration which was deployed under UN auspices, and as such would be bound to uphold the principles of the UN including the promotion of human rights. However, as demonstrated above, there is no definitive opinion on whether operations conducted under Chapter VII of the Charter are to be bound by the restraints of international law. Therefore a sole reliance upon such an obligation would be ill-advised.

4. Conclusions

There are two levels of human rights protections the UNMIK and KFOR operations must adhere to. Firstly, UNMIK, and possibly KFOR, are mandated to protect human rights; and secondly, there is the general human rights framework of obligations that bind the operations. Furthermore, it could be contended that the human rights obligations of the FRY include an obligation to ensure that UNMIK and KFOR contingents secure international human rights for individuals in Kosovo.

UNMIK is mandated under Security Council Resolution 1244 to protect and promote human rights, and its main human rights responsibilities are derived from this. In addition, UNMIK, as a body created by the Security Council, is bound by those general obligations binding on the Council itself. It is thus bound to act in compliance with those human rights norms that are *jus cogens*, as well as those norms that are part of the body of customary international law.

It is a tenuous argument that the KFOR contingents are mandated to protect human rights by virtue of their responsibility to support the work of the UNMIK operation. Rather, the KFOR contingents are bound by the human rights obligations of their sending states. The contingents are certainly bound by the *jus cogens* and customary human rights obligations of each state. They will also be bound by each state's treaty obligations, where each contingent exercises jurisdiction, and arguably this takes place in the detention camps established.

Although it is clear that a state of emergency exists in Kosovo, neither UNMIK nor the sending states of KFOR contingents may avail themselves of the treaty right to derogate from their human rights obligations. Whilst UNMIK is not a party to any human rights treaty, the

KFOR contingent sending states cannot use their treaty right to derogate with regard to the actions of their national contingents in Kosovo, as they are not combating an emergency within their own territory. Instead, the UNMIK operation and KFOR contingents must rely on the customary right to derogate.

Protections for individuals in Kosovo are derived from the UNMIK operation's and KFOR contingents' compliance with the human rights norms they are bound by.

Chapter Three

The Regulation of the UNMIK and KFOR Operations in Kosovo by International Humanitarian Law.

Within the mandates set out in both Security Council Resolution 1244 and the Military Technical Agreement, there is no provision that the actions of either UNMIK or KFOR are to be regulated by international humanitarian law.¹ However, it is arguable that international humanitarian law should apply and it is this issue which is explored within this chapter. Issues raised are whether the operations are in fact bound by international humanitarian law, and does the situation in Kosovo warrant an application of this body of law? If so, is this advantageous to the operation envisaged, or does it hinder the fulfilment of the UNMIK/ KFOR mandates?

1. To What Extent are the UNMIK & KFOR Operations Bound by International Humanitarian Law?

a) UNMIK.

UNMIK, as a subsidiary organ of the Security Council, is bound by those rights and duties under international humanitarian law which are binding upon the UN. However, as with international human rights law, the duties of personnel-contributing states should not be ignored.

i) UN Obligations.

Treaty obligations.

The UN is not a party to the Geneva Conventions or any other international humanitarian law treaty, and, as such, “is not bound by any of these treaties”.² However, there is a possibility that

¹ Contrast this with Security Council Resolution 1483, UN Doc. S/RES/1483 (2003), relating to the situation in post-conflict Iraq, which “[c]alls upon all concerned to comply fully with their obligations under international law in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”. (para. 5).

² Greenwood, ‘International Humanitarian Law and United Nations Military Operations’, (1998) 1 *Yearbook of International Humanitarian Law* 3, at 16.

However, the UN is bound by those provisions of international humanitarian law treaties which are also declaratory of customary international law principles. See below for a discussion of this.

the UN could accede to the Geneva Conventions and their Additional Protocols. Generally, the capacity of an international organisation to conclude treaties is governed by the rules of that organisation. The UN Charter contains very few express provisions under which the UN can enter into treaty relations. Nevertheless, it appears that there is a general acceptance “that the United Nations has the implied capacity to enter into treaties with other international [sic.] persons, at least to the extent necessary for the Organisation to discharge its functions”.³ If it is a purpose of the United Nations to maintain international peace and security, including taking armed action to these ends, and to promote and respect human rights, then, clearly accession to the Geneva Conventions would aid the fulfilment of these obligations.

The accession clauses of the Geneva Conventions state that they “shall be open to any Power”.⁴ The question that needs to be asked is whether the UN could be considered a ‘Power’? The Commentaries to the Geneva Conventions point out that “[t]he Geneva Conventions, which draw their strength from their universality, are treaties open to all”.⁵ It could be contended that the drafters of the Conventions had intended the term ‘Power’ to allude to states, but this is not made apparent. If this was the case, then why not use the term ‘state’ in the accession clauses? Greenwood demonstrates that there has been some controversy over whether the term ‘Power’ solely refers to states. He points out that there have been inconsistencies in the application of the term. Whilst the Holy See has been accepted as a party to the Geneva Conventions and their Additional Protocols; the Swiss Government, as depository of the Conventions, could not determine whether Palestine could accede to the Conventions when it submitted a document purporting to become a party, “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”.⁶ Yet, if the UN has the power to create operations to which the laws of armed conflict would apply, then surely the UN fulfils the notion of a ‘Power’. Shraga points out that the UN believes its operations are carried out on behalf of the international community as a whole and as such, the UN itself is not a ‘party’ to a conflict or a ‘Power’ within the meaning of

³ Tittlemore, ‘Belligerents in Blue Helmets: Applying International Law to United Nations Peace Operations’, (1997) 33 *Stanford Journal of International Law* 61, at 95

⁴ See Article 60, Geneva Convention I; Article 59, Geneva Convention II; Article 139, Geneva Convention III; and Article 155, Geneva Convention IV.

⁵ Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Volume I* (1952), at 408-9; Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Volume II* (1960), at 279; *The Geneva Conventions of 12 August 1949, Commentary, Volume III* (1960), at 644; and *The Geneva Conventions of 12 August 1949, Commentary, Volume IV* (1958), at 621.

⁶ Greenwood, *supra* note 2, at fn. 42.

the Geneva Conventions.⁷ However, this argument appears to be inconsistent with the widely held notion that an international organisation, such as the United Nations, has an international legal personality that is distinct from the international personality of its constituent states.⁸ Thus, it seems a more convincing argument to assume that the UN can be considered a 'Power' for the purposes of international humanitarian law.

However, there is general opinion within the UN that the organisation should not accede to the Geneva Conventions and their Additional Protocols. It has been argued that the Conventions presuppose that there is some form of state structure that can legislate and fulfil the obligations therein. In a Memorandum to the Under-Secretary-General for Special Political Affairs, the Secretariat of the United Nations wrote:

3. We have always maintained, however, that the United Nations is not substantively in a position to become a party to the 1949 Geneva Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organisation does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty.⁹

There is a need for courts and a body of criminal law to try and punish those responsible for war crimes. As violations of international humanitarian law have been considered to be a threat to international peace and security,¹⁰ the Security Council could act under Chapter VII of the UN Charter to create the necessary judicial bodies and instruments to try individual UN officials who commit such violations, in a manner similar to the creation of the Ad-Hoc Criminal Tribunals for the Former Yugoslavia and Rwanda. It could even refer violations to the Prosecutor at the International Criminal Court.¹¹ The Statute of the International Criminal

⁷ Shraga, 'The United Nations as an actor bound by international humanitarian law', Condorelli, La Rosa & Scherrer (eds.), *The United Nations and International Humanitarian Law* (1996), page, at 323.

⁸ See *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ Rep Series A No.23.

⁹ Memorandum to the Under-Secretary-General for Special Political Affairs on the Question of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims, UN Doc. ST/LEG/SER.C/10 (1972), at para. 3.

¹⁰ See, for example, Security Council Resolution 808, UN Doc. S/RES/808 (1993), which established the Ad-Hoc International Criminal Tribunal for the Former Yugoslavia.

¹¹ See Article 13(b), 1998 Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9 (1998).

Court provides the relevant legislation for the prosecution of war crimes, and the UN could simply make use of these facilities to fulfil its international humanitarian law obligations.¹²

Approaching the situation from a slightly different angle, Common Article 2 of the Geneva Conventions provides that non-contracting parties engaged in a conflict with a High Contracting Party may benefit from the protections accorded by the Conventions if they accept and apply the provisions contained therein.¹³ Thus, the UN could choose to bind itself to the provisions within the Geneva Conventions without formally acceding to the Conventions. However, the Conventions are silent as to whether the same rule applies to conflicts in which none of the Powers are High Contracting Parties. If one non-contracting Power within a conflict chose to apply the Conventions as a minimum standard of behaviour, there is nothing within the Conventions to suggest that this would compel another non-contracting Power to behave in a similar manner.

Thus, despite the reasons why the UN may not wish to accede to the Conventions, there are possibilities for it to do so. Yet, for the purposes of this examination, the UNMIK operation is not bound by conventional international humanitarian norms.

Customary obligations.

Even though the UN is not, and currently cannot, become a party to the Geneva Conventions or their Additional Protocols, as with customary human rights norms for much the same reasons, the UN is bound by customary international humanitarian law to the extent that it engages in an armed conflict or a belligerent occupation. Thus, one of its main organs, the

¹² However, at the time of writing, cases involving the actions taken in the course of a UN established or authorised operation by nationals of those states who are not party to the Rome Statute are not to be investigated. This explicit exclusion of the jurisdiction of the International Criminal Court was adopted within Security Council Resolution 1422, UN Doc. S/RES/1422 (2002), which was renewed on 12 June 2003 for a further one year. There has been much criticism of this so-called 'immunity' resolution. See the 2003 Amnesty International Report, 'The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice', AI Index: IOR 40/006/2003.

¹³ The relevant provision of Common Article 2 reads:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provision thereof.

It is noted in the Commentaries to the Geneva Conventions that an explicit acceptance to abide by the rules contained within the Geneva Conventions is not always necessary. As long as the Power actually, in fact, abides by the Conventions, then this is enough to trigger reciprocity and bind High Contracting Parties to conduct their operations in accordance with the rules set out in the Conventions.

Security Council would be bound and any delegation of powers that the Council performs would also include the delegation of the duty to uphold these obligations.

ii) Other Sources of Obligations.

The UN has recognised the applicability of some provisions of international humanitarian law to its operations, and has undertaken on several occasions to ensure that its missions conduct their operations with full respect for the 'principles and spirit' of the general conventions applicable to the conduct of military personnel, including the Geneva Conventions, their Additional Protocols, and the Hague Convention on the Protection of Cultural Property in the Event of an Armed Conflict.¹⁴ However, what was meant by the term 'principles and spirit' was not defined. No such undertaking was provided for with respect to the UNMIK operation.

In 1999, the Secretary-General promulgated a Bulletin on Observance by United Nations Forces of International Humanitarian Law¹⁵ that was to form core regulations for UN forces in situations of armed conflict. This document resolves the issues of whether treaty or customary law applies to UN operations, and the problematic notion of 'principles and spirit' of international humanitarian law, by providing a restatement of existing key rules within the Geneva Conventions, their Additional Protocols and the Hague Cultural Property Convention. The Bulletin provides for protection of the civilian population, including the principle of distinction; provisions on the means and methods of warfare; treatment of detained persons in accordance with the relevant principles of the Third Geneva Convention; and for the protection of the wounded and sick, and medical and relief personnel. However, the Bulletin is only applicable to "UN forces when in situations of armed conflict they are actively engaged therein as combatants".¹⁶ It is questionable as to whether the Bulletin could be applicable to UNMIK. The UNMIK personnel are certainly not 'forces', as they are, by definition, part of a civilian operation. However, as will be discussed later, the UNMIK administration could be considered to be a form of belligerent occupation to which international humanitarian law

¹⁴ For examples of such undertakings see, *inter alia*: the Agreement on the Status of the United Nations Assistance Mission for Rwanda 1993; the Agreement on the Status of the United Nations Mission in Haiti 1995; the Agreement on the Status of the United Nations Peacekeeping Operation in Angola 1995; the Agreement between the United Nations and the Government of the Republic of Croatia 1995; the Agreement on the Status of the United Nations Interim Force in Lebanon 1995; and the Agreement concerning the Status of the United Nations Mission in Western Sahara 1999.

¹⁵ UN Doc. AT/AGB/1999/13 (1999).

¹⁶ Article 1.1 of the Bulletin.

applies. If this is the situation, then could the Bulletin not also be applicable to the UNMIK personnel?

Additionally, there have been various Security Council resolutions that request “the Secretary-General to disseminate appropriate guidance and to ensure that ... United Nations personnel have the appropriate training” in the relevant provisions of international humanitarian law.¹⁷ Yet, this is an undertaking to only respect parts of international humanitarian law, and there is no indication of what these provisions may be.

Therefore, it can be concluded that UNMIK, as a subsidiary organ of the Security Council, is bound by those international humanitarian law obligations that the UN is bound to uphold. Apart from the Secretary-General’s Bulletin, the UN’s undertaking to respect international humanitarian law has been very vague. However, as UNMIK is not bound by the provisions within the Secretary-General’s Bulletin, the most prudent outlook would be to denote that UNMIK, like the UN, is bound by those provisions of customary international humanitarian law.

As discussed previously, in Chapter two, UNMIK is composed of personnel from different international organisations, such as the OSCE and the EU, and it is arguable that the personnel are too far removed from their home state to be bound by the state’s obligations under international humanitarian law. Therefore, individual member states’ obligations cannot be relied upon as a replacement for the customary international humanitarian law obligations upon the UN, and should rather be used as additional evidence that UNMIK should carry out its operations in accordance with customary international humanitarian law norms that bind the UN in its operations.

b) KFOR.

As stated earlier,¹⁸ KFOR is not a UN force and thus cannot be held to be bound by those obligations binding on the activities of the UN or the Secretary-General’s Bulletin promulgated

¹⁷ Paragraph 19, Security Council Resolution 1296, UN Doc. S/RES/1296 (2000). See also Security Council Resolution 1265, UN Doc. S/RES/1265 (1999); Security Council Resolution 1327, UN Doc. S/RES/1327 (2000) and Security Council Resolution 1379, UN Doc. S/RES/1379 (2001).

¹⁸ See Chapter two.

to regulate UN operations. With regard to the Bulletin, it has been convincingly argued and stated in many arenas that:

The Bulletin applies only to UN forces conducting operations under the command and control of the UN. It does not apply to organisations authorised by the Security Council which are placed under the command of a State or regional organisation. In such cases the States, or groups of States concerned must comply with customary and treaty-based rules by which they are bound.¹⁹

As discussed in Chapter two, although under a central NATO command, the *de facto* command of KFOR troops stays with the head of each national contingent's forces and thus it is individual state's obligations under international humanitarian law that bind the respective troops. Yet, problems are bound to ensue in relation to the differing international humanitarian law obligations of each contingent and a perverse situation may apply where individuals in different areas of Kosovo are accorded different levels of protection.²⁰

2. The Applicability of International Humanitarian Law to the UNMIK and KFOR Operations.

As shown above, it can be demonstrated that UNMIK and KFOR contingents may be bound, to a degree, by rights and duties under international humanitarian law. However, these rules only come into play in situations of armed conflict or belligerent occupation.

a) Armed Conflict.

UNMIK, as an international civil presence, has been mandated to provide an interim administration for the region of Kosovo. There are no provisions for it to use force, although there are provisions for the maintenance of "civil law and order, including establishing police personnel to serve in Kosovo".²¹ However, action taken by police forces, even armed police forces, is hardly likely to constitute the intensity of armed force that is needed for an armed

¹⁹ ICRC statement to the General Assembly, 20 October 1999. For similar views see Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict', (2001) 50 *Air Force Law Review* 1, at 59; Roberts & Guelff (eds.), *Documents on the Laws of War* (2000), at 722; and Shrager, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations Related Damage', (2000) 94 *American Journal of International Law* 406, at 408.

²⁰ For example the United States of America has not ratified either of the Additional Protocols whereas the other KFOR contingents, including the UK, France, Germany and Italy have.

conflict to take place. Thus it would appear unlikely that those international humanitarian obligations binding upon the actions of UNMIK would be triggered into application.

However, the situation is entirely different with regard to KFOR personnel and their actions. The Security Council, acting under Chapter VII, authorised KFOR to ‘use all necessary means’ to fulfil and protect its mandate. The phrase ‘all necessary means’ is one that was first used during the Gulf conflict in Security Council Resolution 678 where authorisation was given to “use all necessary means to uphold and implement Resolution 660... and to restore international peace and security in the area”.²² It has been noted that in this instance, and since, the phrase ‘all necessary means’ was interpreted by states to mean that an invitation to use force. Lavalle even claims that “the only restrictions to which the use of force under Resolution 678 (1990) was subject, in addition to those imposed by the obligation not to exceed the Council’s objectives, the need to observe the laws of war and generally recognised principles of international humanitarian law applicable to armed conflicts”.²³ The phrase ‘all necessary means’ has been used frequently in recent years and each time it has been used to authorise the use of force in order to execute a mandate.²⁴ Additionally, the Military Technical Agreement signed by KFOR and the Serbian government expresses the right of the peacekeeping force to “take all necessary means to establish and maintain a secure environment for all the citizens of Kosovo”²⁵, where ‘all necessary means’ permits the use of force to “protect the international security force (KFOR) and the international civil implementation presence, and to carry out the

²¹ Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), para. 11(i).

²² Security Council Resolution 678, UN Doc. S/RES/678 (1990).

²³ Lavalle, ‘The Law of the United Nations and the Use of Force Under the Relevant Security Council Resolutions of 1990 and 1991 to Resolve the Persian Gulf Crisis’, (1992) 23 *Netherlands Yearbook of International Law* 3, at 32.

²⁴ Use of the phrase can be found in, *inter alia*, Security Council Resolution 770, UN Doc. S/RES/770 (1992), re. Bosnia & Herzegovina; Resolution 794, UN Doc. S/RES/794 (1992), re. Somalia; Resolution 814, UN Doc. S/RES/814 (1993), re. Somalia; Resolution 836, UN Doc. S/RES/836 (1993), re. Bosnia & Herzegovina; Resolution 837, UN Doc. S/RES/837 (1993) re. Somalia; Resolution 940, UN Doc. S/RES/940 (1994) re. Haiti; Resolution 958, UN Doc. S/RES/958 (1994) re. Bosnia & Herzegovina; Resolution 1031, UN Doc. S/RES/1031 (1995), re. Bosnia & Herzegovina; Resolution 1080, UN Doc. S/RES/1080 (1996), re. Great Lakes region; Resolution 1101, UN Doc. S/RES/1101 (1997), re. Albania; Resolution 1270, UN Doc. S/RES/1270 (1999) re. Sierra Leone; Resolution 1272, UN Doc. S/RES/1272 (1999), re. East Timor; Resolution 1289, UN Doc. S/RES/1289 (2000) re. Sierra Leone; and Resolution 1291, UN Doc. S/RES/1291 (2000) re. Democratic Republic of Congo.

²⁵ Article 1(2), Military Technical Agreement between the International Security Force (KFOR) and the Government of the Federal Republic of Yugoslavia and the Republic of Serbia, adopted 9 June 1999. Document enclosed to letter dated 15 June 1999 from the Secretary-General to the President of the Security Council. UN Doc. S/1999/682.

responsibilities inherent in ...[the] military-technical agreement and the peace settlement which it supports".²⁶

It is clear that KFOR is permitted to use force in the execution of its mandate, yet it is unclear whether this use of force, if it crossed the threshold of an armed conflict, would constitute an international armed conflict or an internal armed conflict. This distinction is important as the full body of international humanitarian law does not apply to internal armed conflicts; these are solely regulated by the 'mini-convention' contained in Common Article 3 of the Geneva Conventions, which is considered to contain customary norms, and Additional Protocol II, which binds those states who are party to it. In particular, the designation of a conflict as international provides greater protection for those fighting and they would be accorded prisoner of war status and treated according to the protections within the third Geneva Convention. Those individuals fighting in a non-international armed conflict are not entitled to such status.

It should be remembered that the responsibilities placed upon the KFOR forces include: "detering renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces" as well as "demilitarising the Kosovo Liberation Army (KLA) and other Kosovo Albanian groups"²⁷ all with the consent of the FRY.²⁸ There are, then, two 'opponents', with significantly different characteristics, that the KFOR forces face: the FRY armed forces, (armed forces of the state) and armed insurgent groups including the KLA (rebel groups). Moir has suggested that there could be a co-existence of two different types of conflict within the same overall region of conflict and thus suggests the use of a theory of pairings. He suggests the "application of different legal regimes between various parties according to their relations with each other"²⁹ rather than trying to designate the conflict with one brush which may be wholly unsatisfactory. There is some evidence of such an approach being used. During the civil war that took place in the Arab Republic of Yemen from 1962 to 1970 between the republican government, supported by Egypt, and the royalist forces of the ousted Imam, supported by Saudi Arabia the conflict had a dual nature. Rosas points out that

²⁶ Ibid., at para.2, Appendix B.

²⁷ Security Council Resolution 1244, supra note 21, at paras. 9(a) & 9(b).

²⁸ See the Military Technical Agreement, supra note 25.

²⁹ Moir, *The Law of Internal Armed Conflict* (2002), at 47.

“...the royalists considered the conflict to be of an international nature in relation to the Egyptian forces and an internal one in relation to the republicans”.³⁰

Common Article 2 of the Geneva Conventions, which lays down the objective criteria for determining the field of application of the provisions of the Conventions, provides that the “Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties”.³¹ Additionally, to increase the application of the Conventions to as many conflicts as possible, provision was made in paragraph 3 of the Article for the application of the Convention to conflicts between a High Contracting Party and another Power provided that “the latter accepts and applies the provisions thereof”.

At first glance it would appear that if KFOR troops did enter into an armed conflict with FRY forces³² then this would simply be categorised as an international armed conflict. The KFOR operation is a peacekeeping force comprised of troops from several different countries and as “it is indisputable that an armed conflict is international if it takes place between two or more States”,³³ by definition armed conflicts involving KFOR troops would be international.

However, it could be argued that the lack of “overall control”³⁴ over the troops by the sending state means that there is no action by states against the FRY and so an international armed conflict does not exist. None of the KFOR troops are acting on behalf of their individual countries and instead are deployed under UN auspices and report to a central command. None of the troops are fighting on behalf of their home state. In the *Nicaragua*³⁵ case, brought before the ICJ, the question was asked whether the United States, by virtue of its ‘support’ of the operations conducted by the contras against the government, was responsible for violations of international humanitarian law committed by the rebels. The ‘support’ involved financing, organising, training, equipping the contras as well as planning the operations that took place. The ICJ held that:

³⁰ Rosas, *The Legal Status of Prisoners of War* (1976), at 157.

³¹ Common Article 2(1), 1949 Geneva Conventions.

³² Yugoslavia is listed as party to the Geneva Conventions, and both Additional Protocols. See <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JMKH?OpenDocument>.

³³ *Prosecutor v Tadić*, Appeals Judgment, Case no. IT-94-1, Appeals Chamber, 15 July 1999, at para. 84.

³⁴ *Ibid.*, at para. 146.

³⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment of 27 June 1986, [1986] ICJ Reports 3

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.³⁶

Following from this, if the US was not responsible for the actions of the contras, then the conflict between the rebel contras and the state was essentially an internal one. If this situation is transposed to that of Kosovo and the KFOR troops, once again there is no direction of the KFOR troops by any state, rather they are directed by a single, unified NATO command under the auspices of the UN and thus there is no action by another state against the host state, the FRY. Thus, any prolonged fighting between the KFOR troops and the FRY forces would only be regulated by the Geneva Conventions, if the KFOR Commander had agreed to abide by the said Conventions. However, there does not appear to be any such undertaking.

Some authors have been cautious of such an approach and have instead opted to look at the “facts of the situation” to determine the character of a conflict.³⁷ As stated earlier, there is evidence to show that the KFOR troops, despite their envisaged unified command and control, are *de facto* directed by their national governments. If such a factual approach is taken, then it is clear that if prolonged fighting does take place between KFOR and FRY troops, an international armed conflict would exist between those states contributing troops to KFOR and the FRY.

With regard to any action between KFOR troops and the KLA and other Kosovan Albanian groups, the situation is equally problematic. Even if it is taken that KFOR represents each individual troop-contributing state, neither the KLA nor any other Kosovo Albanian groups are contracting parties to the Geneva Conventions. They are simply rebel groups, and action between such groups and High Contracting Parties are deemed to be internal armed conflicts regulated by Common Article 3 of the Geneva Conventions and Additional Protocol II. However, Additional Protocol II applies only in situations where the armed forces of the government are confronted by organised groups of armed individuals in their own territory. It does not cover situations where several armed factions are fighting each other and there is no

³⁶Ibid., at para. 115.

³⁷ See Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua’s* Fallout’, in Meron, *War Crimes Law Comes of Age* (1998), at 295.

government involvement, or situations where states intervene in a conflict taking place on the territory of another High Contracting Party. Clearly, any fighting of the severity of an armed conflict which takes place between KFOR troops and armed rebel groups in Kosovo will take place in the territory of the FRY and not any troop-contributing state.

Common Article 3, however, provides a much lower threshold for application. In its judgement in *Tadic (Jurisdiction)* the ICTY found that an 'armed conflict', for the purposes of Common Article 3, exists whenever "there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".³⁸ As Provost points out "[i]nternal strife involving several non-governmental factions, such as the ones which occurred in Lebanon or Somalia, is covered by Article 3."³⁹ Thus, any conflict, such as those clashes between rebel groups and KFOR which took place in Mitrovica in late 1999 and early 2000, would be regulated by the Common Article 3 'mini-convention'.

The above discussion demonstrates that there is a difficulty in determining and designating the character of any conflict that KFOR forces enter into. It is clear that there are elements of both an international and internal armed conflict. Although there may be academic merits in treating such conflicts separately, there may be difficulties with enforcing such a situation on the ground. It can hardly be practical to instruct forces to pursue their mandates in different manners depending upon whether they are fighting KLA or FRY soldiers. Realistically, the battlefield is not the place where distinctions between different combatant groups can be made, and it would be fanciful to assume any different. It is perhaps more sensible to designate the situation as one of a particular type of conflict, and treat all individuals according to such a designation. By the end of the Vietnam conflict elements of a war of national liberation, civil strife and an inter-state conflict were present. In this situation, to avoid difficult classifications of different conflicts between factions, the official position of the United States and the Saigon government (including their allies) was that "the hostilities...have assumed such proportions recently that there can be no doubt that they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied".⁴⁰ The Powers took the view that the totality of the Geneva Conventions applied to the situation and did not distinguish between the internal conflict and the inter-state conflict. It is contended that a similar approach

³⁸ *Prosecutor v Tadić*, Opinion and Judgment, Case no. IT-94-1-T, Trial Chamber II, 7 May 1997, at para. 70.

³⁹ Provost, *International Human Rights and International Humanitarian Law* (2002), at 267.

⁴⁰ See Rosas, *supra* note 30, at 167.

should be taken with regard to Kosovo. The KFOR troops should be ordered to act in compliance with their obligations under the full body of international humanitarian law applicable to international armed conflicts, at least until the FRY forces had left Kosovo (as was required of them in the Military Technical Agreement).

However, such a designation may provide certain political difficulties. One of the main purposes of the United Nations is to “maintain international peace and security”⁴¹ and to have an operation established under UN auspices designated as a party to an international armed conflict could be seen as being in direct conflict with such a purpose. In addition there may be problems of whether the other parties to the conflict would agree to such a designation and act in accordance with their related obligations. There have been many instances within history where the parties to the conflict have not agreed on the classification of an armed conflict.⁴² However, to designate a conflict as international provides greater protections for those individuals caught up within the conflict, including, for example, the granting of prisoner of war status and related protections to those protected individuals who are captured.⁴³ If these parties do not agree to such a designation of a conflict, then there is no duty upon KFOR to abide by obligations over and above those their adversaries have chosen to abide by. Thus, if the UN-authorized mission were to act in accordance with those rules governing international armed conflicts, it may prove persuasive for the other parties to the conflict to comply with their reciprocal obligations and provide the highest level of protection for those entangled within the conflict.

If KFOR troops do enter into an armed conflict, either internal or international, then their actions will be governed by the fundamental principle that there are limitations on the actions of belligerents.⁴⁴ The recognition of these restrictions upon the means and methods of warfare is the international community’s response to the notion that often violence and destruction

⁴¹ Article 1, Charter of the United Nations.

⁴² For example the Algerian war. The Algerian Liberation Front declared its intention of applying the Geneva Conventions, in their totality, in February 1956. However, the original French position was that the Algerian action was merely an internal uprising and that action was being taken to restore law and order and not even covered by Common Article 3. Later, in June 1956, the French accepted the applicability of Common Article 3, but not to the total applicability of the Geneva Conventions. Yet it should be noted that the French still accorded the Algerian prisoners of war with those protections contained within the third Geneva Convention, despite its official line being that the conflict was one only to be regulated by Common Article 3. For further examples see Rosas, *supra* note 30, at 142-218; Moir, *supra* note 29; and Provost, *supra* note 39, at Part III.

⁴³ See below for a discussion of these protections.

⁴⁴ Article 22, Hague Regulation; Article 35(1), Additional Protocol I.

were superfluous to the military necessity of a war. The aim of a war is to defeat the adverse party and international humanitarian law aims to ensure that the legitimate pursuit of overcoming the enemy by force does not involve unnecessary infliction of humanitarian harm. The basic principles of international humanitarian law regulating the conduct of the KFOR forces, during a conflict, are: military necessity, proportionality, and the distinction between combatants and civilians.

The idea of military necessity was expounded in the *Hostages* case where it was noted: “there must be some reasonable connection between the destruction of property and the overcoming of enemy forces”.⁴⁵ By this standard, the military action must have the intention of gaining a particular, imperative, military advantage from the action and it must not be a wanton act of destructiveness. However, applying the notion of military necessity is problematic as there is a large degree of subjectivity involved in assessing whether there is a real military requirement for a particular action and much depends on the situation presented. Nevertheless, military necessity is not an excuse to violate the positive rules of warfare – it only “permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money”.⁴⁶ Humanitarian convictions underlie the reasoning behind the restrictions on the use of military necessity justification.

Proportionality is intrinsically linked to the notions of military necessity and humanity. The principle of proportionality demands that there be an acceptable relationship between the contribution to the military purpose of the action and any undesired collateral effects. This prohibits any injury or damage that is disproportionate to the military advantage sought by the belligerents’ action. This principle is well established in customary international humanitarian law and is codified in several international documents from the Declaration of St Petersburg 1868 to Article 51(5b) of Additional Protocol I. However, the principle of proportionality depends upon personal assessments and subjective balancing, and therefore, belligerents enjoy a wide margin of appreciation. There are virtually no objective tests that can establish proportionality, leaving it to military commanders to make an informed decision as to whether their actions will result in disproportionate damage.

⁴⁵ *List and others (Hostages case)*, US Military Tribunal sitting at Nuremberg, Judgment of 19 February 1948, (1948) 15 Annual Digest 632.

⁴⁶ *Ibid.*

Parties to an armed conflict are required, at all times, to distinguish between combatants and civilian populations, as well as civilian objects and military objectives.⁴⁷ A civilian is “any person who is not a member of the armed forces or of any organised group of a party to the conflict”.⁴⁸ In short, civilians do not take part in the hostilities. Military objectives are those objects and targets which by “their nature, location, purpose or use” contribute effectively to the enemy’s military action and whose “total or partial destruction, capture or neutralisation, in the circumstances ruling at the times, offers a definite military advantage”.⁴⁹ Article 51(4) of Additional Protocol I provides that “indiscriminate attacks are prohibited. Indiscriminate attacks are ... of a nature to strike military objectives and civilians or civilian objects without distinction”. Included within the prohibition on indiscriminate attacks are the use of means and methods of warfare that strike at military and civilian objectives as a single military objective. There is a qualification to this duty. Article 57 of Additional Protocol I there is a duty to do everything ‘feasible’ to verify that the proposed attack is against a military objective. The qualification of ‘feasible’ on the duty makes it one that is practical in the throes of armed conflict. Yet, it is inevitable that civilian damage will occur however carefully planned the attacks are and, given this, any collateral damage must follow the principles of proportionality and therefore be kept to a minimum. Careful consideration needs to be given to the risk of civilian damage or casualties and if this is disproportionate to the military advantages of the offensive then the attack should be suspended.

Therefore, the actions of the KFOR contingents, were they to enter into any type of armed conflict, will be regulated by the three key norms of international humanitarian law: military necessity, proportionality and distinction between combatants and non-combatants.

In addition to the general battlefield rules of international humanitarian law, KFOR troops would also have certain obligations relating to any combatants interned during the course of fighting. These prisoners would be designated prisoners of war, and gain the inherent protections accorded to such protected persons by Geneva Convention III. Prisoners of war are captured for the sole purpose of preventing them from rejoining the enemy’s armed forces, and as such are not to be treated as criminals or hostages. Prisoners of war may be tried for offences committed after capture, war crimes, or common crimes prior to capture, but may not be tried simply for their participation in hostilities, and these proceedings must be carried out in

⁴⁷ Articles 25 & 27, Hague Regulations, and Article 48, Additional Protocol I.

⁴⁸ Article 50, Additional Protocol I.

⁴⁹ Article 52(2), Additional Protocol I.

accordance with fair trial standards as set out in Geneva Convention III.⁵⁰ The prisoners are to be released and repatriated at the end of active hostilities.⁵¹ However, to detain an individual without any legal process to challenge the detention is a clear violation of the individual's right to liberty. There does not appear to be any provision within any of the major human rights treaties for the detention of prisoners of war. Although each of the treaties allows for detentions which are to fulfil a legal obligation, the Geneva Conventions do not oblige contracting parties to take prisoners of war, but rather make allowances for this as a legitimate method of warfare, and thus prescribe certain procedures for the protection of those individuals who are detained. Thus, a derogation from the right to liberty provisions of each of the human rights treaties would be necessary, if prisoners of war are taken by KFOR. Yet, as demonstrated in the preceding chapter no national emergency exists in any of the troop-contributing states and thus no derogation measure would be available to these states. Thus those human rights aimed at protecting individuals who are detained would have to be upheld by the KFOR contingents. Additionally, KFOR troops would have obligations and positive duties towards any captured combatants. The most important of these is that: prisoners of war are to be treated humanely, and the detaining power is under a strict obligation to ensure that no individual is murdered, tortured or abused by state agents or by civilians.⁵² The general obligation is that prisoners of war are to be treated with respect and considerations of humanity are paramount.

Yet, once the FRY troops had left Kosovo, and KFOR was left to fight KLA forces and other Albanian groups who were conducting revenge attacks against the Serb minorities left in Kosovo, one could contend that in fact the KFOR contingents were simply to regard the rebel groups as criminals, rather than to accord them any special status. Yet, Common Article 3 does provide that those persons who are placed "*hors de combat* by...detention...shall in all circumstances be treated humanely". The article then expressly forbids murder, mutilation, torture or other cruel treatment and other outrages on personal dignity, and finally the passing of any sentence other than by a court which observes internationally recognised standards of due process. In addition, this treatment is to be afforded without any discrimination on any

⁵⁰ Article 99, Geneva Convention III.

⁵¹ Article 118, Geneva Convention III.

⁵² Article 13, Geneva Convention III.

Note also Article 17 of the Convention which prevents the detaining power from coercing individuals into giving more information than their name, rank, date of birth and identification number. Although interrogation is permitted, there is to be no punishment for the non-provision of further

grounds. Therefore, whether the rebel groups are considered criminals or not, they are to be accorded certain basic protections, which correspond, to a large extent, with various human rights obligations.

b) Occupation.

It is possible that the laws of armed conflict will regulate KFOR and UNMIK as it could be contended that Kosovo is an occupied territory.⁵³ However, as Roberts and Guelff have noted, there are distinct negative connotations with designating a particular area as an occupied territory. They point out:

...states have only rarely been willing to view themselves as having the status of an occupying power. At various times, certain states have put forward arguments purporting to show that the situations in which their forces are involved are not military occupations, or at least differ in significant respects from the understanding of occupation in the Regulations annexed to 1907 Hague Convention IV and Geneva Convention IV.⁵⁴

Clearly if individual states are unwilling to acknowledge that they are involved in a military occupation, an operation that is sanctioned, and, in part, led by the United Nations, an organisation which prides itself on being neutral in all conflicts, is certain not to be openly accepted as fulfilling the criteria for a military occupation. Roberts has noted that many operations that could be considered military occupations have actually been termed: international territorial administration, civil administration or even a peacekeeping operation – rather more neutral terms.⁵⁵

It is envisaged that to designate an UN-authorized peacekeeping operation an occupation would entail denoting the United Nations as being party to an international armed conflict. Occupations are to be regulated by Common Article 2 of the Geneva Conventions and their

details. Geneva Convention III also details several requirements in relation to the conditions in which prisoners of war may be held – all designed to ensure that considerations of humanity are paramount.

⁵³ One author who has proposed such an interpretation is Cerone. See Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', (2001) 12 *European Journal of International Law* 469 at 583.

⁵⁴ Roberts & Guelff, *supra* note 19, at 300.

⁵⁵ Roberts, 'What is a Military Occupation?', (1984) 55 *British Yearbook of International Law* 249, at 301.

ensuing obligations rather than those rules governing internal armed conflicts. Kwakwa points out that in the 1980's conflict in Afghanistan, the Mujahadin were engaged in an international armed conflict, as there was a foreign occupation in Afghanistan undertaken by Soviet forces. According to Kwakwa it does not matter that the foreign forces were in Afghanistan by invitation, an occupation still existed *de facto* and thus any fighting that took place was within the confines of an international armed conflict.⁵⁶

On first appearances the UNMIK/ KFOR operation, as one complete operation, seems to fulfil the criteria for a belligerent occupation. Both the civil and military presence provide an interim administration for the territory to the exclusion of the government of the Federal Republic of Yugoslavia and all governmental and security functions are provided by them. Marcus has argued that action under the pretext of humanitarian intervention, where states intervene in the internal affairs of another state to prevent gross violations of human rights, may be a situation to which the laws regulating belligerent occupation should apply.⁵⁷ She states that there is a direct parallel between belligerent occupation and action taken in the name of humanitarian intervention:

First, the intervening force seeks to suspend the power of the local authorities over the population in order to protect the population from the authorities' abusive practices. Thus, the intervenors seeks to "render" the local authority "incapable of publicly exercising its authority within the [target] territory." Second the intervenors replace the power of the local authorities with the power of the intervening force, often installing civilian authorities as part of the later phases of intervention. Thus the intervenors are "in a position to substitute [their] own authority for that of the legitimate government."⁵⁸

In a similar vein, it has been argued that the entrance of KFOR troops into Kosovo is a belligerent occupation that has taken place in the aftermath of the NATO air strikes and that the UNMIK/ KFOR operation is simply a continuation of this action.⁵⁹ However, the Military Technical Agreement, which provided for the withdrawal of FRY forces from Kosovo, explicitly stated that the principles under which the FRY agreed to a ceasefire were "to include deployment in Kosovo under United Nations auspices of effective civil and security

⁵⁶ Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (1992), at 47. See also Reisman & Silk: Which Law Applies to the Afghan Conflict?, (1988) 82 *American Journal of International Law* 459.

⁵⁷ Marcus, 'Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization', (1995) 25 *Houston Journal of International Law* 99.

⁵⁸ *Ibid.* at 116 (footnotes omitted).

⁵⁹ Cerone, *supra* note 53, at 485.

presences".⁶⁰ In fact during the Security Council meeting during which Resolution 1244 (1999) was adopted, it was the opinion of the representative from Belgrade that "the United Nations mission in Kosovo and Metohija ... would have ... the mandate and the authority of the United Nations and the Security Council".⁶¹ Therefore, it could be argued that there is no continuation of the NATO action but a completely separate entrance of a United Nations peacekeeping operation with a mandate to administer territory.

Even if the operation within Kosovo is not a continuation of the NATO action it is still clear that the criteria for an occupation, as stated in Chapter one, have been fulfilled albeit with UN authorisation. Even though the operation takes place under a UN mandate this does not negate the application of international humanitarian law to the operation. As has been stated earlier it is a question of fact as to whether an occupation exists and there is no distinction between a lawful and unlawful occupation, they are all to be governed by the same set of rules.

However, it should be appreciated that the FRY gave consent for the entrance of both KFOR and UNMIK into Kosovo when signing the Military Technical Agreement and agreeing to the Ahtisaaria-Chernomyrdin plan. Does this consent negate the label of occupation that could be accorded to the UNMIK/ KFOR operation in Kosovo? Is the entrance of the UN operation to be considered an entrance of non-hostile forces, which would not fulfil the Hague Regulations definition of an occupation? Cerone argues that this consent is invalid. He claims that when the Federal Republic of Yugoslavia expressed its consent for the entrance of troops into Kosovo, it did so under the threat of force. Under Article 52 of the Vienna Convention on the Law of Treaties "a treaty is void if its conclusion has been procured by the threat of use of force in violation of the principles of international law embodied in the Charter of the United Nations and Cerone argues that "the validity of the MTA turns on the legality of the initial NATO intervention, which is a question that has been definitively settled".⁶² Thus, there could be an argument that a belligerent occupation does exist and the regime of international humanitarian law governing occupied territories will become applicable.

⁶⁰ Military Technical Agreement, *supra* note 25.

⁶¹ See comments of Mr Jovanović during 4011th meeting of the Security Council held on 10 June 1999. UN Doc. S/PV.4011. Other members of the Security Council made similar statements. See the comments of Mr Lavrov of the Russian Federation, Mr Dejammet of France and Mr Fowler of Canada.

⁶² Cerone, *supra* note 52, at 484. The legality of the NATO air strikes is a question that is currently being considered by the International Court of Justice in the case of *Legality of the Use of Force (Yugoslavia v Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and United Kingdom)*.

If it is ascertained that FRY consent was gained without the threat of illegal force, then the administration of Kosovo is not being undertaken by hostile entities and an occupation does not exist. However, an argument could be made that international humanitarian law norms should still apply to operations such as the UNMIK/ KFOR operation in Kosovo, to provide a minimum level of protection for those individuals who are within the territory and this level of protection could be supplemented by UN resolutions and further agreements. The purpose of the body of international humanitarian law governing belligerent occupation is to regulate the relationship between an occupying power and the occupied territory, including its inhabitants, in a manner very similar to that of human rights protection but specifically adapted to the situation of occupation with no possibility of derogation. The rules on occupation are not a ticket for an occupying power to act, but rather a set of limitations on their power to act in order to promote the welfare of those civilians within the occupied territory. As it is only the issue of consent that precludes the application of these laws, and this consent does not guarantee the protection of individuals, on a purely humanitarian level it makes sense to apply international humanitarian norms. This policy was adopted in East Timor. As Kelly points out Geneva Convention IV was applied as a matter of policy during the INTERFET operations:

The INTERFET deployment drew extensively upon the law of occupation for the establishment of an interim justice system. While it is the ADF [Australian Defence Force] view that the law of occupation does not require an armed conflict *de jure*, INTERFET forces were not occupying East Timor because Indonesia consented to the deployment. Here the law of military occupation provided a framework of guiding principles.⁶³

Thus, even if the situation in Kosovo does not appear to fulfil the criteria for an occupation, there may be an argument to apply the laws regulating belligerent occupation by analogy to provide protection for civilians caught in such situations.

What are the ramifications of designating a territory as occupied? Would it really be advantageous for Kosovo to be deemed as an occupied territory? Regimes of belligerent occupation are governed by conventional international humanitarian law provisions to be found in the Hague Regulations, the Fourth Geneva Convention and Article 75 of Additional

⁶³ Kelly, 'The UN, Security and Human Rights: Achieving the Winning Balance'. Conference paper given at the University of Nottingham's Human Rights Law Centre Conference on "The United Nations and Human Rights Protection in Post-Conflict Situations." (12 & 13 September 2002)

Protocol I, as well as by customary international law provisions regulating international armed conflicts. There are specific obligations to be upheld by occupying powers. The general position is that occupying powers are to ensure that civilian life continues much as it would have done prior to the occupation, provided that this conforms to the minimum standards of humanity provided for in the instruments stated above. The occupying power does not gain sovereignty over the occupied territory. Following from the rule that there is to be no acquisition of title to territory by the use of force, a transfer of sovereignty to the occupying authority would be untenable.⁶⁴ Thus, as Gasser points out, any control over another state's territory which is procured by the use or threat of the use of force should be considered temporary and the only rights that an occupying power has to administer a territory are those that are conferred upon it by the international law relating to occupations.⁶⁵

In principle the occupying power is under an obligation to respect the national laws of the occupied territory.⁶⁶ As law-making is a feature of sovereignty, it would be incongruous with the belief that the occupying power does not gain sovereignty over the occupied territory if this were not the case. However, there are certain exceptions to this rule. If the national laws prejudice the security of the occupying power, or hinder the application of international humanitarian law in the occupied territory, then they may be amended. In addition the occupying power may legislate in certain limited spheres, namely: to aid with the application of the Convention; to help maintain public law and order; and for its own protection. These laws must be promulgated in the language of the inhabitants of the occupied territory.⁶⁷ Following from this, the occupying power may be required to set up administrative and military judicial bodies, but only if these do not exist or have collapsed during the conflict. Any legal proceedings that take place, either in a military court or in the national courts of the occupied territory, are to be conducted with fair trial provisions identical to those provided for in international human rights instruments.⁶⁸ Under international human rights instruments these provisions could be derogated from if the situation in the occupied territory was considered to

⁶⁴ This is derived from the prohibition on the use of force to be found in Article 2(4) of the Charter which is a rule of customary international law applying to all states and international organisations. This principle is reiterated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN, General Assembly Resolution 2625 (XX) of 24 October 1970.

⁶⁵ Gasser, 'Protection of the Civilian Population', in Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 209, at 246.

⁶⁶ Article 43, Hague Regulations; Article 64, Geneva Convention IV.

⁶⁷ Article 65, Geneva Convention IV.

⁶⁸ Articles 67, 69-75, Geneva Convention IV; Article 75, Additional Protocol I.

be one of a national emergency.⁶⁹ Additionally, the occupying power may not alter the status of public officials or judges.⁷⁰ This is a corollary of the principle that the administration of the occupied territory should, as far as possible, remain as it was prior to occupation. However, provision is made for situations where public officials refuse to perform their duties, and these officials may be removed from their posts. Judges are to remain separate from the administration and thus may not be removed from their position. It should be noted that any changes that the occupying power may make are only temporary in character, and when the power leaves the legality of these regimes may be challenged.

There are not only restraints on the actions of occupying powers but also positive obligations to act. There is a general duty on the occupant to “restore, and ensure, as far as possible, public order and safety”⁷¹ and Greenwood has interpreted this to include not only an obligation to promote law and order but also to “prevent economic collapse”.⁷² Further, the occupier is responsible for, *inter alia*, ensuring that food and medical supplies reach the civilian population⁷³ and ensuring public hygiene and health.⁷⁴ Additionally, the occupying power is under a duty to ensure that relief efforts providing foodstuffs, clothing, medical supplies, undertaken for the benefit of the civilian population are not to be hindered.⁷⁵ The education of children is not to suffer and the occupying power is to “facilitate the proper working of all institutions devoted to the care and education of children”.⁷⁶ Thus the occupying power is required to administer the occupied territory.

There are also essential minimum humanitarian standards that are to be observed by the occupying power. These protections for individuals are by no means comprehensive as those set out within human rights instruments, but they do provide a basic level of protection that is tailored to be applied during a belligerent occupation and may not be derogated from under any circumstances, unlike comparable protections under international human rights law. Individuals are entitled to a general right of inviolability including the right to be protected from

⁶⁹ See Chapters one and two for a discussion of derogations.

⁷⁰ Article 54, Geneva Convention IV.

⁷¹ Article 43, Hague Regulations.

⁷² Greenwood, ‘The Administration of Occupied Territory’, in Playfair (ed.), *International Law and the Administration of Occupied Territories* (1992) 241, at 246.

⁷³ Article 55, Geneva Convention IV.

⁷⁴ Article 56, Geneva Convention IV.

⁷⁵ Articles 59 & 60, Geneva Convention IV.

⁷⁶ Article 50, Geneva Convention IV.

“murder, torture, corporal punishment, mutilation and medical or scientific experiments”⁷⁷ as well as respect for their family rights, their religious beliefs, manners and customs and protection for women from rape, enforced prostitution or indecent assault.⁷⁸ Each of these guarantees is to be accorded without discrimination.⁷⁹ Article 47 of Geneva Convention IV provides further essential guarantees to the protection given by the Convention itself:

Protected persons who are in occupied territory shall not be deprived ... of the benefits of the present Convention by any change introduced, as the result of occupation of a territory, into the institutions or government of said territory, nor by any agreement concluded between the authorities of the occupied territories...

The human rights protection contained within the Geneva Convention are of paramount importance. With no possibility of derogation or avoidance by further treaty obligations, international humanitarian law provides an important source of human rights obligations that the occupying power must adhere to.

Looking at the situation in Kosovo, it would seem that Security Council Resolution 1244 has conferred further rights to UNMIK and KFOR to administer Kosovo than those granted by international humanitarian law for the administration of an occupied territory. Despite the provision within the resolution “reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”, the mission of the UNMIK/ KFOR operation was to ultimately ensure the “development of provisional democratic, self-governing institutions to ensure that conditions for a peaceful and normal life for all inhabitants of Kosovo.”⁸⁰ Although it is clear that the UNMIK/ KFOR operation has fulfilled much of its obligations under international law to ‘restore, and ensure’ public order and safety, the powers of the Special Representative of the Secretary-General appear to go much further than those allocated to the General of an occupying power by international humanitarian law. UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo outlined the powers of the Special Representative:

⁷⁷ Article 32, Geneva Convention IV; Article 75, Additional Protocol I.

⁷⁸ Article 27, Geneva Convention IV; Article 75, Additional Protocol I.

⁷⁹ Article 27, Geneva Convention IV.

⁸⁰ Paragraph 10, Resolution 1244 (1999), *supra* note 21.

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.
2. The Special Representative ... may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person.⁸¹

This regulation clearly allocates sovereign powers to the Special Representative that reach beyond the scope of the powers to be exercised by an occupying power.

Even if the UNMIK/ KFOR operation is designated as an occupation of FRY territory, the international humanitarian law obligations of individual troop contributing states could be overcome with reference to Articles 25 and 103 of the UN Charter. Article 25 obliges all Member States to “accept and carry out the decisions of the Security Council” whilst Article 103 provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Thus if, in order to fulfil the obligations in Security Council resolution 1244, the Member States were to breach their obligations under international humanitarian law, their obligations under the Charter would overcome all other obligations.

However, one should be careful about relying upon this analysis. As stated above, the United Nations is bound by customary international humanitarian law, and in particular the Hague Regulations and the Geneva Conventions. Could the Security Council authorise actions that could prove to be a violation of its international law obligations? This cannot be the case. Article 24(2) of the Charter provides that there are to be limitations on the power of the Security Council to act: “in accordance with the Purposes and Principles of the United Nations”, including the bringing about the resolution of international disputes by peaceful means “and in conformity with the principles of justice and international law”.⁸² The Security

⁸¹ Section 1, UNMIK/REG/1999/1.

⁸² Article 1, United Nations Charter. This states:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

Council is bound not to violate general international law, unless the Charter specifically allows it to do so. Therefore, there can be no justification for the United Nations or individual troop-contributing states to violate norms of international humanitarian law.

Finally, if international humanitarian law does apply in Kosovo further problematic consequences may arise. Although it may be legitimate for the occupying force to hold elections and modify internal laws to make these elections effective; to appoint judges and other officials, the legality of these regimes is only applicable for the duration of the occupation and for no longer. On the withdrawal of UNMIK and KFOR there would need to be a legitimising act by the Belgrade authorities to ensure that all the institution-building and development work that had taken place in Kosovo was not in vain.

3. Conclusions

International humanitarian law is only applicable during armed conflicts and situations of belligerent occupation. The protections contained within international humanitarian law are obligations states are to fulfil, and are not accorded to individuals as rights.

Although the UNMIK operation is not mandated to enter into any form of armed conflict, the mandate given to the KFOR contingents permits the use of force, even to the level of an armed conflict. However, designation of the type of conflict (internal or international) the KFOR contingents will participate in is a difficult task. It is contended that to gain the highest level of protection possible for individuals caught up in any fighting, the KFOR contingents should abide by those norms of international humanitarian law applicable to international armed

It has been argued by some authors, such as Kelsen, that on a literal reading of Article 1(1) of the UN Charter, the Security Council need not act in accordance with international law when it is acting to maintain or restore international peace and security. There appears to be a separation in the clause with two distinct phrases: one for effective collective measures and the second for peaceful measures, and it is only in respect of those peaceful measures that the UN is to act in accordance with international law. Despite this textual analysis, Akande argues, relying upon the *travaux préparatoires* of the Charter, that this was not the intention of the drafters of the Charter and that the actions of the Security Council are regulated by international law, unless specifically derogated from by the Charter. See Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?', (1997) 46 *International and Comparative Law Quarterly* 309, at 317-21. See also: Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', (1995) 26 *Netherlands Yearbook of International Law* 33; and Gardam, 'Legal Restraints on Security Council Military Enforcement Action', (1996) *Michigan Journal of International Law* 285.

conflicts. Yet, this does not ensure a uniform level of protection for individuals in the power of differing national contingents.

It is certainly arguable that the UNMIK and KFOR operations, together, form a belligerent occupation, especially if one takes a *de facto* approach to when such an occupation exists. However, noting the possible consent of the FRY government, it is questionable whether Kosovo can be deemed an occupied territory. Yet provisions within the body of law regulating the actions of occupiers provide useful guidelines on protections to be accorded to individuals in such a post-conflict situation. These protections cannot be derogated from, like human rights protections, and are specifically tailored for use in such situations. Thus they provide an ideal set of standards which the UNMIK and KFOR operations should maintain in Kosovo.

Chapter Four

Remedies for Individuals for Violations of International Human Rights Law and International Humanitarian Law

If, as has been argued above, the UNMIK operation and KFOR contingents are to operate within a framework of international human rights and international humanitarian law, what happens if they fail to fulfil these obligations to protect individuals? What recourse exists for an individual to get a remedy? This chapter provides a brief examination¹ of the remedies available to individuals in Kosovo, if their protections under international human rights law and international humanitarian law have not been upheld.

1. General Provisions

International law does not provide individuals with an automatic right to an international remedy within either international human rights law or international humanitarian law. Both regional and universal human rights instruments provide individuals with a right to a remedy.² However, this right is not necessarily a right to an international remedy, but rather, at the first instance, the right to an effective domestic remedy.³ If this domestic remedy is not supplied, or proves ineffectual, then certain human rights instruments provide for individuals to gain international redress. For example, Article 13 of the ECHR provides:

¹ Due to the word limit constraints of this paper, this examination of remedies serves only as a brief discussion of the issues.

For a fuller discussion of some of the issues discussed here see Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis', (2001) 5 *Max Planck Yearbook of United Nations Law* 105; Verdirame, 'Compliance with Human Rights in UN Operations', (2000) 2 *Human Rights Law Review* 265 and Wilde, 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor', (2001) 7 *ILSA Journal of International & Comparative Law* 455.

² See, for example, Article 2(3), ICCPR; Article 13, ECHR; Article 25, American Convention; Article 14, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and Article 6, International Convention on the Elimination of All Forms of Racial Discrimination

³ Although these domestic remedies need not be judicial, it has been demonstrated that the European Court is "influenced by the judicial model in determining the effectiveness of [a] remedy", Harris, O'Boyle & Warbrick, *The European Convention on Human Rights* (1995), at 450.

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Convention also provides a procedure for individuals to bring complaints to the European Court of Human Rights, should they be victims of a violation of one or more of the Convention rights. However, “the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...”⁴

Yet, access to an international remedy is not always automatic. Article 2(3) of the ICCPR creates an international legal obligation for contracting parties to provide an effective remedy to victims of violations of rights. Only by signing and ratifying the Optional Protocol to the ICCPR, do states allow individuals to seek redress at the international level, should domestic procedures not provide adequate remedies. As with the ECHR, individuals must have exhausted their domestic remedies before communicating a complaint under the Optional Protocol to the Human Rights Committee.⁵ As a rule, states are to have the first opportunity to redress a wrong that has been alleged.

Whether a similar right to a remedy exists within customary international human rights law is debatable. Provost argues that “there is little evidence to suggest that [the right to a remedy for individuals] ... has evolved into customary laws”.⁶ Noting that actions have been taken in the US whereby individuals have sought redress for a violation of their customary human rights under the Alien Tort Claims Act, Provost interprets these as fulfilment of the US’ obligation to protect internationally guaranteed human rights rather than an application of a general right to a remedy. The Alien Tort Claims Act has been interpreted to provide US federal courts with the jurisdiction to entertain private claims by non-nationals against other individuals⁷ for violations

⁴ Article 35, ECHR.

⁵ Article 2, 1966 Optional Protocol to the ICCPR, 999 UNTS 171. In November 2003 there were 151 states party to the ICCPR, and 104 states party to the Optional Protocol demonstrating that at least two thirds of states party to the ICCPR have accepted the jurisdiction of the Human Rights Committee to entertain communications from individuals.

⁶ Provost, *International Human Rights and Humanitarian Law* (2002), at 44.

⁷ In *Kadic v Karadzic*, 2nd Circuit, 70 F.3d 232 (1995), the Court of Appeals for the Second Circuit held that an action could be brought against a private individual for a violation of the law of nations. Prior to this in *Filartiga v Pena-Irala*, 2nd Circuit, 630 F.2d 876 (1980), the Second Circuit explicitly states that an individual could only be liable for a violation of the law of nations if the individual perpetrator was a state official.

of the law of nations.⁸ One could construe this as evidence towards the formation of a customary right to a remedy for a violation of human rights, at least in national courts, but this is not evidence that such a right has crystallised into a norm of customary international law. Additionally, with not all human rights instruments providing for an automatic right to a remedy in the international legal sphere one is inclined to agree with Provost. Thus, unless specifically provided for within international human rights instruments there is no right to a remedy accorded to individuals for violations of human rights norms.⁹

There is no corresponding right to a remedy for individuals under international humanitarian law. Although this body of law aims to protect individuals, it is not formulated in a distinct set of rights for individuals but rather as a set of norms to which states, and their armed forces, are to uphold. Individuals do not have an enforceable set of rights, of which they can claim a violation. The only remedy envisaged within international humanitarian law is set out in Article 3 of the 1907 Hague Convention IV, and is replicated in Article 91 of Additional Protocol I. The provision holds that belligerent parties which violate the laws of war shall be liable to pay compensation, and that it shall be held responsible for all actions of its armed forces. Although, this provision is considered to be part of customary international law¹⁰ there is no similar provision for non-international armed conflicts. This is presumably because any restitution payable is to states and not individuals. As is stated in the Commentary to Geneva Convention IV “the Convention does not give individual men and women the right to claim compensation...the state is answerable to another contracting state and not to the individual”.¹¹ An individual’s right to remedy passes to his state. Redress for each individual is not conceived of in the framework of international humanitarian law.¹²

⁸ An investigation of the possibilities of pursuing a similar form of civil redress in the United Kingdom began in 1996 undertaken by the Human Rights Committee of the British Branch of the International Law Association. See Human Rights Committee, International Law Association (British Branch), ‘Report on Civil Actions in English Courts for Serious Human Rights Violations Abroad’, (2001) *European Human Rights Law Review* 129.

⁹ Note that a lack of remedy for an individual does not preclude state responsibility for a violation. The International Law Commission’s Draft Articles on State Responsibility firmly reiterates the general principle of international law: every internationally wrongful act of a state entails the international responsibility of that state, unless circumstances preclude the wrongfulness of the conduct. For the origins of this principle see Crawford, *The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries* (2002), esp. at 77-80.

¹⁰ Provost, *supra* note 6, at 45.

¹¹ Commentary IV, at 211.

¹² See Provost, *supra* note 6, at 46 for a discussion of unsuccessful attempts by individuals to gain compensation for violations of humanitarian law.

The Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda both provide the right of victims to restitution.¹³ In addition, the Rules of Procedure and Evidence make allowance for compensation to be paid.¹⁴ The International Criminal Court Statute goes one step further: providing for various forms of reparations where proceedings can be initiated by the victim or the Trial Chamber, as well as the establishment of a trust fund for the benefit of victims and their families.¹⁵ However, this is not an acknowledgement of the right of individuals to a remedy under international humanitarian law, rather it is a consequence of international criminal proceedings against individual perpetrators of international crimes.

There has been a movement within the international community towards creating a right to a remedy for victims of violations of international human rights and, vitally, humanitarian law. Commissioned by the Human Rights Commission, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law recognises that a state's obligation to respect and enforce international human rights law and international humanitarian law include a duty to "afford appropriate remedies to victims".¹⁶ The Principles are "drafted to reflect a victim-based perspective...according to the needs and rights of victims".¹⁷ An individual is a victim where:

...as a result of acts or omissions that constitute a violation of international human rights or humanitarian norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that persons' fundamental rights.¹⁸

¹³ Article 24(3), 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, (1993) 32 ILM 1192; Article 23(3), 1994 Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1598.

¹⁴ Rule 106, ICTY Rules of Procedure and Evidence, UN Doc. IT/32/Rev.17 (1993) provides that the Registrar of the Tribunal shall transmit to the relevant national authorities the judgment finding the accused guilty of a crime that has caused injury to a victim. It will be for the victim to claim compensation before a competent national court.

¹⁵ See Articles 75 and 79, 1998 Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998). See Ferstman, 'The Right to Reparation at the International Criminal Court', (2002) 15 *Leiden Journal of International Law* 667.

¹⁶ Article 3(d), Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62 (2000).

¹⁷ Para. 6, The Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, Note by the High Commissioner, UN Doc. E/CN.4/2003/63 (2002).

¹⁸ Basic Principles, *supra* note 16, at Article 8.

Remedies include: access to justice, reparation for harm suffered and access to factual information concerning the violation.¹⁹ The Principles are currently not binding and have no enforcement mechanism. They rely on state action. However, the Principles have the potential to impact domestic and international norms and provide further evidence towards a customary norm of the right to a remedy.

In conclusion, remedies for violations of international human rights are only available if prescribed by an international legal instrument. There is no such comparative right to a remedy under either conventional or customary international humanitarian law. Therefore, in the context of this study, only remedies for violations of human rights shall be examined.

2. Remedies for individuals in Kosovo.

Human rights are held by an individual vis à vis the state. Provisions for remedies within international human rights instruments maintain that states should be the first port of call for an individual seeking redress for a violation of their rights. In the context of Kosovo, remedies for violations of human rights by the state may be sought from the UNMIK administration and the KFOR operation. Therefore, this examination of the remedies available to individuals in Kosovo will firstly, investigate the possibility of remedies within the Kosovo legal system as established by the UNMIK administration and secondly, look to the broader international picture for additional remedies. Although other means of accountability of the UNMIK and KFOR operations may be available, such as the commissioning of internal reports and independent inquiries by the UN²⁰ and recommendations of the Special Rapporteur for the Former Yugoslavia,²¹ these do not provide for an individual remedy for the persons affected and so will not be discussed.

a) Remedies in Kosovo.

¹⁹ Ibid., at Article 11.

²⁰ For example Security Council Resolution 885, UN Doc. S/RES/885 (1993) established a commission to investigate the armed attacks on UNOSOM II personnel. See the Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, UN Doc. S/1994/653 (1994). See also the Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, UN Doc. A/54/549 (1999) which examined the fall of the UN safe area at Srebrenica in Bosnia.

²¹ Established by the UN Commission on Human Rights.

i) Remedies in domestic courts

Whether remedies can be sought within the courts in Kosovo,²² relies upon the question of whether the immunities accorded to UNMIK and KFOR personnel preclude the courts' jurisdiction to determine whether rights of individuals have been violated by the international operations. UNMIK Regulation 2000/47 sets out the immunities and privileges of UNMIK, KFOR and their personnel.²³

KFOR, as an operation, is immune from any legal process.²⁴ KFOR personnel are accorded full immunity from the jurisdiction of the courts in Kosovo and sole jurisdiction is given to national states. They cannot be detained by persons other than those acting on behalf of the sending state.²⁵ Locally recruited staff are immune from process with regard to actions taken in the course of fulfilment of the KFOR mandate.²⁶ They are otherwise subject to the legal system in Kosovo. A request to waive immunity for KFOR personnel shall be referred to the commander of the national contingent concerned.²⁷

Correspondingly, the UNMIK operation, as a whole, is immune from any legal process.²⁸ There are varying levels of immunity accorded to UNMIK staff. Senior personnel are immune from "local jurisdiction in respect of any civil or criminal act performed by them in the territory of Kosovo".²⁹ Other UNMIK personnel are immune from legal process with regard to actions taken in the furtherance of the UNMIK mandate as set out in Security Council Resolution 1244.³⁰ Waiver of these immunities is a decision for Secretary-General who has may exercise

²² At the commencement of operations the legal infrastructure within Kosovo was in ruins. However, a priority of the UNMIK administration was to ensure that functioning courts existed within the region. See Betts, Carlson & Gisvold, 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law', (2001) 22 *Michigan Journal of International Law* 371; Lorenz, 'The Rule of Law in Kosovo: Problems and Prospects', (2000) 11 *Criminal Law Forum* 127 and Strohmeyer, 'Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor', (2001) 95 *American Journal of International Law* 46.

²³ Although the Regulation was only adopted on 18 August 2000, it has retrospective effect and is to apply from the commencement of operations in Kosovo, 10 June 1999.

²⁴ Section 2.1, UNMIK Regulation 2000/47.

²⁵ Ibid. at Section 2.4.

²⁶ Ibid. at Section 2.3.

²⁷ Ibid. at Section 6.2.

²⁸ Ibid. at Section 3.1.

²⁹ Ibid. at Section 3.2.

³⁰ Ibid. at Section 3.3.

this power when “the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK”.³¹

The general principle behind immunities for international organisations from the jurisdiction of national courts is to allow the organisations to perform their functions without interference.³² However, Wilde argues that this interpretation of immunities for administrations created by the United Nations is now outdated. Whereas the traditional role of the international organisation was to regulate the relations between states, he argues that this role has now changed. Referring to international administrations, he argues that increasingly international organisations are undertaking duties which involve control of individuals.³³ The Kosovo Ombudsperson agrees, noting:

...the main purpose of granting immunity to international organisations is to protect them against the unilateral interference by the individual government of the state in which they are located, a legitimate objective to ensure the effective operation of such organisations...the rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration...in fact acts as the surrogate state. It follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself.³⁴

However, these immunities do exist within Kosovo and create “an insurmountable procedural bar to any legal process”.³⁵ As such challenges to the interim administration or any KFOR contingent cannot be entertained in the Kosovo courts. Any breach of an individual’s human rights which takes place at the hands of the international operations whilst carrying out their mandate cannot be challenged in a Kosovo court.

ii) The Ombudsperson Institution

There is an appreciation of the need for review of actions taken by the administration and UNMIK Regulation 2000/38 established the Ombudsperson Institution in Kosovo. The Institution is mandated to:

³¹ Ibid. at Section 6.1.

³² Cassese, *International Law* (2001), at 73-74.

³³ Wilde, *supra* note 1, at 457.

³⁴ Ombudsperson Institution in Kosovo, ‘Special Report No. 1 on the Compatibility with Recognised International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of UNMIK and their Personnel in Kosovo of 18 August 2000’, 26 April 2001, at para. 23.

...promote and protect the rights and freedoms of individuals and legal entities and ensure that all persons are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards...and to provide...mechanisms for the review and redress of actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution.³⁶

The jurisdiction of the Ombudsperson is limited to actions that take place in Kosovo after 30 June 2000. Complaints will be entertained from any legal person in Kosovo which concern an abuse of authority by the administration especially allegations of severe or systematic violations and those founded on discrimination.³⁷ Whereas the actions of UNMIK are automatically subject to the jurisdiction of the Ombudsperson KFOR contingents are not. Only by special agreement with the Commander of the KFOR forces can the Ombudsperson entertain complaints regarding KFOR contingents.

Although the creation of the Ombudsperson institution is a step in the right direction for the protection of human rights, it is not sanctioned to allocate remedies to individuals where a violation of a right is found. The institution can only receive communications from individuals, investigate these and make recommendations to the interim authority on the results of these investigations. Although these measures may form a remedy of sorts to individuals in Kosovo, the recommendations of the Ombudsperson are not binding. If the relevant authority fails or refuses to comply with the measures proposed, the institution is restricted to bringing the matter to the attention of the Special-Representative of the Secretary General and to making a public statement regarding the issues.³⁸

It has been noted that, under the case law of the European Court of Human Rights, an effective remedy has four inter-linked elements.³⁹ Firstly, there needs to be institutional effectiveness where the decision maker is independent of the authority alleged to be responsible for the rights violation. Secondly there needs to be substantive effectiveness, whereby individuals should be able to raise the substance of a Convention argument before a national authority. Thirdly, should an individual's arguments be accepted by a national authority then a

³⁵ Ibid. at para. 21.

³⁶ Sections 1.1 and 1.2, Regulation 2000/38.

³⁷ Ibid. at Section 3.

³⁸ Ibid. at Section 4.

³⁹ Harris, O'Boyle and Warbrick, *supra* note 3, at 450-458.

remedy should be available. This is known as remedial effectiveness. Finally, there needs to be material effectiveness, whereby an individual should be able to take advantage of the remedy available. Clearly the Ombudsperson institution does not fulfil the third criterion. No remedies are available for an individual whose claim is upheld by the Ombudsperson. As a corollary of this the fourth criterion is not satisfied. It could also be argued that the Ombudsperson also lacks institutional effectiveness. The Ombudsperson is appointed for a fixed term by the Special-Representative of the Secretary-General.⁴⁰ He may be removed from his office by the Special-Representative should there be cause to believe that the Ombudsperson has failed to exercise his functions or has been placed in a position incompatible with the due exercise of his functions.⁴¹ Therefore, although the Ombudsperson has reviewed many complaints from individuals⁴² and has issued several reports regarding the compatibility of UNMIK regulations with international human rights law,⁴³ it is ineffective as a source of remedies for individuals.

b) Other Sources of Remedies

Although provision of remedies is scant within the Kosovo legal system there may be provision for individuals to seek redress at the international level. UNMIK is not a party to any international human rights instruments and has not agreed to be subject to the jurisdiction of any international human rights bodies, such as the Human Rights Committee or the European Court of Human Rights. Therefore, individuals cannot seek, at the international level, a judicial remedy against UNMIK directly.

However, as was discussed in Chapter two, there is the possibility of a residual obligation of the FRY to ensure that human rights are secured to individuals in Kosovo. If such a contention is permissible, as the FRY has agreed to the provisions of the Optional Protocol to the ICCPR,

⁴⁰ Section 6, UNMIK Regulation 2000/38

⁴¹ *Ibid.*, at Section 8.2.

⁴² For example: *Avdi Behtuli v UNMIK*, Decision of 12 September 2001, re the deprivation of liberty following an Executive Order by the Special Representative of the Secretary-General and *Hamdi Rashica v UNMIK*, Decision of 31 October 2001, re ill-treatment by UNMIK police officers.

⁴³ For example: 'On the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the implementation of the above Regulation', Special Report no. 1, 26 April 2001; 'Certain Aspects of UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (27 October 2000)', Special Report no. 2, 30 May 2001; 'On the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards', Special Report no 3, 29 June 2001 and 'On Certain Aspects of UNMIK Regulation No. 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Based on Executive Orders', Special Report no. 4, 12 September 2001

individuals could communicate their complaints regarding the actions of UNMIK to the Human Rights Committee, claiming that the FRY had a duty to ensure that their rights were protected.

In relation to KFOR, if it can be established that an individual contingent exercises effective control in the region,⁴⁴ then the treaty-based human rights obligations of the sending state are engaged. Individuals whose rights have not been secured by an individual KFOR contingent could bring an action to the relevant treaty supervisory body.⁴⁵

3. Conclusions

The provision of remedies for violations of human rights by the UNMIK administration and KFOR contingents is poor. The possible route for action domestically, within Kosovo, is solely through the Ombudsperson institution – an institution that is not a judicial organ and whose decisions and recommendations are not binding. Recourse to international supervisory mechanisms may be possible in relation to the actions of KFOR contingents, but cannot be relied upon to challenge the acts of UNMIK. Instead, it is contended that applications could be made against the FRY for failure to ensure that the interim administration respects the human rights of individuals in Kosovo. Yet, it is preferable for human rights questions to be determined domestically rather than relying on international mechanisms that may entail lengthy delays before a complaint is heard. Therefore, it is suggested that the powers of the Ombudsperson institution need to be enhanced for it to be classified as an effective remedy. Its jurisdiction over KFOR should be automatic and decisions need to be binding on both

⁴⁴ See Chapter two.

⁴⁵ It should be remembered that for claims against both the FRY and KFOR contingents to be entertained, each individual must ensure that they fulfil the victim criteria of the international instrument whose provisions they are relying on. General criteria which are common to the main human rights treaties include: individuals must be a victim of a violation which took place at the hands of a contracting state; they must claim a violation of a right specifically provided for within the treaty; they must make their application within the requisite time limits; the application must not be an abuse of the right to a remedy, and they must have exhausted all domestic remedies. (See Articles 1, 2 & 3 Optional Protocol I, ICCPR; Articles 34 & 35, ECHR and Articles 46 & 47, American Convention).

The duty to exhaust domestic remedies is one that individuals bringing a claim against KFOR contingent nations or the FRY may not have to fulfil. If it can be demonstrated that the remedies in Kosovo are ineffective, and there is no access to remedies in the domestic courts of the KFOR contingents, then there is an exemption from this obligation. See *Akdivar v Turkey*, (1997) 23 EHRR 143.

UNMIK and KFOR. In addition, the Ombudsperson should be encouraged to use the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law and thus be able to accord individuals with a remedy for violations of international humanitarian law as well as international human rights law.

Conclusions

In recent years the Security Council has diversified the mandates of its peacekeeping operations. The newest 'generation' of peacekeeping operations have been mandated to administer territory and fulfil all governmental functions within a region. In Kosovo, such an administration has been created, and with the aid of an international security presence, KFOR, the UNMIK operation administers Kosovo to the exclusion of the Yugoslav government. If the United Nations is to continue to sanction such post-conflict operations, then the protections afforded to individuals who find themselves in the 'power' of operations such as UNMIK and KFOR should be clarified and the framework within which these types of operation operate should be elucidated.

International human rights law and international humanitarian law are the two main bodies of international law that provide for the protection of individuals. Although they share this common goal, the two bodies of law are distinct. They differ in their general applicability, and the type of protections afforded. International human rights, ideally, are to be accorded to all persons, everywhere and at all times. However, many human rights obligations may be derogated from in a time of emergency and are applicable to state actions within their own territory, and only extra-territorially where the state exercises effective control. Human rights may be claimed by any individual to whom the rights are accorded, against states bound by a specific obligation, from the time that the obligation becomes binding on the state. Conversely, international humanitarian law only applies during times of armed conflict and belligerent occupation, and its protections vary according to the status of individuals claiming protection and the nature of the armed conflict they are participating in. These protections are not accorded to individuals as rights, but rather are standards that states are to adhere to during conflicts.

The applicability of these bodies of law to the operations in Kosovo has been examined in this paper and it would appear that framework of protections for individuals is patchy. Although UNMIK is mandated to protect human rights, it is only bound by those non-derogable, customary human rights norms which bind the actions of the Security Council. The UNMIK operation has only made a commitment to observe other internationally recognised human rights standards set out in certain international human rights instruments and as such no individual can avail themselves of the enforcement machinery accompanies these instruments. Instead individuals must rely upon the declaratory judgments of the Kosovo Ombudsperson. KFOR contingents are not mandated to protect human rights and are only bound by those human rights obligations which bind sending states, and then

only when they are exercising extra-territorial jurisdiction. Therefore, only when taking prisoners are individual KFOR contingents concerned with the protection of human rights. Remedies for a violation of human rights by KFOR contingents can only be sought at the international level as there is no avenue for an effective domestic remedy.

As international humanitarian law is only applicable in armed conflicts or belligerent occupations, its application to Kosovo may seem limited. UNMIK is not mandated to use force and so international humanitarian law protections related to armed conflicts are not applicable to the actions of UNMIK personnel. KFOR is mandated to use force and it is argued that to avoid problems associated with the labelling types of conflict, each contingent should operate within the constraints of those rules applicable to international armed conflicts, thereby affording individuals within their 'power' the greatest level of protection. However, as international humanitarian law does not accord individuals with enforceable rights, if protections are not accorded to individuals by the KFOR contingents then an individual is left without an enforceable remedy.

There is the possibility that the provisions of international humanitarian law that are applicable to belligerent occupations may apply to the UNMIK and KFOR operations. International humanitarian rules relating to belligerent occupations are designed to be applied in post-conflict situations and provide individuals with basic protections that cannot be derogated from. However, with the distinct negative connotations of designating a territory as occupied, including the notion that there was a lack of consent from the FRY authorities for the establishment of UNMIK and the deployment of KFOR, this is a route that the UN is unlikely to take.

It is clear that the international human rights and international humanitarian law framework in which UNMIK and KFOR operate is a tangled web of obligations and commitments. Clarification needs to be made as to what norms of international human rights law and international humanitarian law apply to this new generation of peacekeeping operations. Although a step forward has been taken with the promulgation of the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law, it has been demonstrated above that this does not apply to either UNMIK or KFOR personnel. Similar guidelines need to be created for post-conflict administrations and the security forces that support them. It is proposed that the international humanitarian law provisions which regulate situations of belligerent occupation provide a good basis for these guidelines, as they provide a basic level of protections which reflect human rights considerations and are genuinely attainable in high pressure situations such as post-conflict

societies. If these rules are only used as guidelines, this avoids the negative implications of designating a territory occupied, but still affords protection to individuals. Although these rules will not provide a list of rights for individuals, the guidelines should provide individuals with recourse to a remedy should their protections be violated. The remedies available for individuals caught up in such situations should be effective. An Ombudsperson, such as the one set up in Kosovo, provides an ideal forum to entertain claims from individuals against the actions of interim administrations. However, improvements could be made to the structure to allow for claims to be heard against all elements of an operations, and no peacekeeping personnel, including security forces, should be immune from process before the Ombudsperson. Additionally, the Ombudsperson should be given greater powers in enforcement of their decisions. Although these improvements should provide clarification of the protections available to individuals who find themselves in the 'power' of this new generation of peacekeeping operations, it is questionable whether they will be accepted by the political body that is the United Nations.

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