

The apparent lack of accountability of international peace-keeping forces in Kosovo and Bosnia-Herzegovina

Introduction

In recent years military forces led by the North Atlantic Treaty Organization (NATO) have played an expanding role in international peace-keeping operations in different countries. The first such deployment was in Bosnia-Herzegovina following the signing, by all parties concerned on 14 December 1995 at the Paris Peace Conference, of a General Framework Agreement for Peace in Bosnia and Herzegovina. This agreement invited the United Nations Security Council (UNSC) to adopt a resolution to establish a peace-keeping force in Bosnia-Herzegovina composed of units from NATO and non-NATO nations. The second NATO-led peace-keeping operation began in 1999 in Kosovo and was sanctioned under UNSC resolution 1244/1999 of 10 June 1999. In both instances the peace-keeping operations were seen as being of limited durations and aimed to be progressively scaled down with the expected stabilization of the respective security situations.

However, the violent events in Kosovo from 17 to 19 March 2004 have seen some 3,500 extra NATO troops deployed to reinforce the 17,000 strong NATO-led international military force in Kosovo (KFOR) already deployed there. The authorities estimated the violence involved some 51,000 people in 33 incidents throughout Kosovo – the violence predominantly involving Albanians attacking Serb enclaves and communities, but also involving Albanians attacking other minorities, notably the Ashkali community in Vučitrn/Vushtrri. There were also reports of Albanians forced to flee the Serb majority areas of N. Mitrovica/Mitrovicë and Leposavić/Leposaviq. The inter-ethnic violence resulted in at least 19 dead - 11 Albanians and eight Serbs - and over 900 civilians injured of whom 22 were seriously injured; over 100 international and domestic police officers and 61 KFOR troops were also injured. In addition the violence resulted in over 4,000 internally displaced people and widespread destruction of houses and Serbian churches. Given the scale of the violence, and the failure of the police, both international and domestic, to control it, it seems likely that KFOR will, in the short-term at least, assume an enhanced role in restoring and maintaining law and order in Kosovo. The likelihood of such an enhancement is compounded by serious allegations of complicity by Albanian members of the Kosovo Police Service (the domestic police force which while being multi-ethnic is predominantly Albanian reflecting the make-up of the population of Kosovo as a whole) in inter-ethnic attacks in Vučitrn/Vushtrri, and elsewhere: allegations which, Amnesty International is informed, are currently being investigated by the authorities.

Amnesty International appreciates the role KFOR is playing in restoring and maintaining law and order, as well as the difficulties involved in this: difficulties which include at times armed attacks from the local populace. However, the organization calls on KFOR to abide at all times by international human rights and standards.

In the light of the increased presence and role of KFOR, Amnesty International reiterates its concerns at the apparent lack of accountability of the NATO-led forces in both Kosovo and Bosnia-Herzegovina. In recent years Amnesty International has repeatedly raised its concerns, both with NATO and with individual governments of respective national contingents of NATO, about instances in which international peacekeeping forces led by NATO in both Kosovo and Bosnia-Herzegovina have failed to adhere to international human rights law and standards when detaining suspects. These violations include incidents of illegal and arbitrary arrests by both KFOR and SFOR - the Stabilization Force in Bosnia-Herzegovina - and failure to respect the rights of people held in their custody.¹ There have also been allegations of ill-treatment of detainees by members of KFOR and SFOR. Amnesty International has also raised its concerns about the failure of NATO troops in Bosnia-Herzegovina to abide by court decisions regarding detainees. These concerns have not been adequately addressed. The organization's concerns are amplified by the fact that the international community is charged with the protection and promotion of human rights and the rule of law in both Kosovo and Bosnia-Herzegovina.

In October 2003 Amnesty International sent a memorandum, published below in its entirety, detailing its concerns to the governments of the then-member states of NATO, NATO Secretary General, KFOR Commander (COMKFOR), SFOR Commander (COMSFOR), and the UN Department of Peace-Keeping Operations (DPKO). The memorandum, *inter alia*, called for central mechanisms in KFOR and SFOR, or on a higher level in NATO itself, for investigating alleged human rights violations and abuses committed by troops in either Kosovo or Bosnia-Herzegovina, rather than leaving such investigation solely to the will and competence of the respective sending state from which the alleged perpetrators came.

Amnesty International subsequently received replies to the memorandum from five national governments of NATO member states, SFOR and from the NATO Secretary General.

On 3 November 2003 Dr Declan O'Byrne, Directorate of Joint Commitments at the UK Ministry of Defence, wrote to reiterate that NATO troops are only subject to the jurisdiction of their particular sending states. On 12 November 2003 Patrick James, Special Advisor to the Canadian Minister of National Defence, merely wrote that the memorandum would be reviewed. The Norwegian Minister of Defence, Kristin Krohn Devold, replied to Amnesty International on 12 November 2003 that while the "issues raised in this memorandum are serious, and need to be addressed with equal seriousness... As your memorandum deals with issues concerning NATO as an organization, it needs to be considered and addressed by NATO itself." As such, he expected "Amnesty International to receive comments on the memorandum from the NATO Secretary General on behalf of NATO and its member states". On 13 November 2003 Chief of the Secretariat of the Polish

¹ For example, in February 2000 the organization raised its concerns about arbitrary arrest and detention by KFOR following a wave of violence in Mitrovica/Mitrovicë, see Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Setting the standard? UNMIK and KFOR's response to the violence in Mitrovica*, AI Index: EUR 70/13/00, March 2000.

Ministry of Defence BrigGen. Witold Szymański wrote to Amnesty International and again stressed that any cases of alleged violations “should be cleared up bilaterally with countries concerned”. The final government response came on 14 November 2003 from M. Vecdi Gönül, the Turkish Minister of National Defence. He wrote: “I believe that NATO, as an international security organization acting according to international norms and having respect for human rights, will investigate the concerns and recommendations of your organization.”

Thus, the governments’ responses essentially either reiterated that sole jurisdiction over KFOR or SFOR troops alleged to have committed human rights violations should remain with the respective sending country, or looked to NATO for guidance.

On 3 November 2003 SFOR replied that it had “forwarded your concerns to higher headquarters [presumably NATO headquarters] to respond”, and on 26 November 2003 the then-NATO Secretary General, Lord Robertson of Port Ellen, replied that he remained “satisfied that the relevant procedures are in place to deal expeditiously and correctly with any allegations of human rights violations by NATO forces”. On the specific issue of the legality of detention operations carried out by KFOR, especially the use of COMKFOR Directive 42 (see below) which Amnesty International believes is in flagrant breach of international human rights standards, Lord Robertson in his correspondence stated that: “The relevant procedures remain in place for the exercise of KFOR’s powers with regard to detention, including through Directive 42 which places the correct emphasis upon the need for correct treatment, whilst ensuring that detentions are lawful and fully respectful on international law.”

Amnesty International believes that both NATO and respective troop sending countries have failed to adequately address the concerns and recommendations as detailed in the memorandum.

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

However, the presiding judge ruled that the soldiers had deliberately and unjustifiably caused the injuries. The judge reportedly reached the “clear conclusion” on the evidence, including that of witnesses and “extremely powerful” forensic findings, that the soldiers were not being threatened with being shot when they opened fire, and there were no reasonable grounds for them to believe that they were. He reportedly stated that: “The British army can justifiably be proud of the operation it carried out in Kosovo. But soldiers are human; from time to time the mistakes are inevitable. In this case the fall from the army’s usual high standards led to tragic consequences for the victims and their families... The Queen’s uniform is not a licence to commit wrongdoing ... The army should be held accountable for such

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shortcomings.” (See UK daily *The Guardian*, 8 April 2004.) Amnesty International believes that the court ruling indicates a failure by the UK military authorities to adequately investigate the incident in question, and illustrates the defects in the NATO system of investigating allegations of human rights abuses committed by its troops.

Memorandum to member states of NATO, NATO Secretary General, COMKFOR, COMSFOR, UN DPKO

10 October 2003

Amnesty International's concerns

In recent years Amnesty International has repeatedly raised its concerns both with the North Atlantic Treaty Organization (NATO) and with individual governments of respective national contingents about instances in which international peacekeeping forces led by NATO in both Kosovo and Bosnia-Herzegovina have failed to adhere to international human rights law and standards when detaining suspects. These violations include incidents of illegal and arbitrary arrests by both KFOR - the international force in Kosovo - and SFOR - the Stabilization Force in Bosnia-Herzegovina - and failure to respect the rights of people held in their custody. There have also been allegations of ill-treatment of detainees by members of KFOR and SFOR. Amnesty International has also raised its concerns about the failure of NATO troops in Bosnia-Herzegovina to abide by court decisions regarding detainees. These concerns have not been adequately addressed. The organization's concerns are amplified by the fact that the international community is charged with the protection and promotion of human rights and the rule of law in both Kosovo and Bosnia-Herzegovina.

Amnesty International believes that this failure to adequately address allegations of violations of detainees' human rights - including by ensuring effective investigation, appropriate sanctions against perpetrators and reparation to victims - is due to a number of factors. These include the lack of adequate civilian control over the international peacekeeping forces in both Kosovo and Bosnia-Herzegovina, and the lack of real accountability of these forces.

Amnesty International notes that KFOR and SFOR troops are not subject to control by civilian bodies *in situ*, even in Kosovo where KFOR is the sole official armed force - i.e. it is the army - and the UN Interim Mission in Kosovo (UNMIK) is the (temporary) government. Instead, civilian democratic control is exerted by the respective governments of troop-contributing countries who have responsibility for, *and only for*, their respective national contingents. This means that civilian democratic control over KFOR and SFOR troops is divided up between a number of national governments who only have control over their own troops. An additional factor is that these troops are operating outside of their respective national territories, and thus distanced from their democratic overseers. This removal from the areas of operations (i.e. Bosnia-Herzegovina and Kosovo), combined with the multiplication and fragmentation of civilian democratic control over KFOR and SFOR has, in Amnesty International's experience, led to a lack of accountability for human rights violations. An additional factor is the absence of a centralized body initiating prompt, thorough and impartial investigations into all allegations of human rights violations by KFOR or SFOR troops, and ensuring that appropriate remedial measures are taken. The lack of accountability is further compounded by the fact that institutions such as the Ombudsperson offices in both

Bosnia-Herzegovina and Kosovo - bodies specifically set up to defend the rights of citizen - as well as the Human Rights Chamber in Bosnia-Herzegovina - the primary judicial body ruling on human rights violations in Bosnia-Herzegovina – do not have any remit over actions by SFOR or KFOR members.

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

The structural weakness, combined with the general immunity from prosecution, (unless explicitly waived) which is enjoyed by all members of the international community², has contributed to the lack of accountability for human rights violations committed by KFOR and SFOR troops.

In February 2003, the Bosnia-Herzegovina Ombudsman for Human Rights, Frank Orton, commenting on allegations of ill-treatment by SFOR troops, highlighted the need for accountability and prompt and thorough investigations into all allegations of violations by international peacekeepers. He stated:³

"It is important quickly to find out in a trustworthy way, if these allegations are exaggerated or even incorrect and thereby unnecessarily creating tension and unfounded hostility towards SFOR, or if there is any real substance behind them. Even if the Dayton Agreement offers immunity and impunity to SFOR personnel in certain situations, this personnel should reasonably nevertheless in fact be subject to generally accepted legal principles. It is important that justice is done and that justice is seen to be done. Allegations on improper behaviour should therefore be checked as swiftly and properly and due sanctions should be imposed, if there is proper cause.

"In another recent case I stated as my opinion that SFOR - and other bodies under similar regulation - should follow generally accepted legal principles no matter the

² Both UNMIK and KFOR personnel are covered by UNMIK Regulation 2000/47 *On the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo*, 18 August 2000 (see below for differences between UNMIK and KFOR personnel). Under Annex 1A, Appendix B (3), of the General Framework Agreement, members of SFOR are covered by the provision of the Convention on the Privileges and Immunities of the U.N. regarding experts on mission. Article VI, Section 22, provides for "(a) immunity from personal arrest or detention and from seizure of personal baggage; (b) and in respect to words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind." Article V, Section 20, states: "The Secretary-General [of the United Nations] shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity."

³ <http://www.ohro.ba/articles/press.php?id=179>

immunity and impunity that might be at hand in any given situation for at least three reasons.

“Firstly, SFOR should set a good example to others, not least to domestic institutions. Secondly, breaking the law, or behaviour ‘above the law’, dilutes the respect for the legal system in general. And, thirdly, the reason for the authors of the Dayton Agreement was surely not to leave IFOR,⁴ and now SFOR, free to act arbitrarily....

“It is the very essence of the Rule of Law that nobody should be above the Law.”

1. Kosovo – a UN protectorate

It is widely accepted that a factor of good governance is civilian control over the military forces. Indeed, one of the list of commitments that Serbia and Montenegro is obliged to undertake on joining the Council of Europe in April 2003 is “to enact legislation or, preferably, to include provisions in the constitutional charter to bring the army under civilian control”.⁵ However, this does not appear to be the case in Kosovo which, since UN Security Council (UNSC) resolution 1244/1999 of 10 June 1999, is -- until the resolution of its final status -- effectively a UN state.

The text of UNSC resolution 1244 is somewhat ambiguous as to the question of the power relationship between the international civilian presence - the UN Interim Mission in Kosovo (UNMIK) - and the international security presence (KFOR). Paragraph 9, which lists the responsibilities of the international security presence, states in section (f) that these responsibilities will include “[s]upporting as appropriate, and coordinating closely with the work of the international civil presence”. Similarly paragraph 6:

“Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner.”

This does not appear to place the international military presence under the control of the international civil authorities in Kosovo.

However, Paragraph 5 places both the international civil and security presences “under United Nations auspices” which could be interpreted to suggest UNMIK control over KFOR as UNMIK is a UN body whereas KFOR is led by the North Atlantic Treaty Organization (NATO). However, this interpretation is not accepted by KFOR. Former KFOR commander (COMKFOR), General Dr Klaus Reinhardt, in a correspondence of 20 January

⁴ SFOR’s predecessor – see section 2.2.below.

⁵ The Council of Europe, ‘*The Federal Republic of Yugoslavia’s application for membership of the Council of Europe, Opinion No. 239 (2002)*,’ point 12, iii (a), passed by the Parliamentary Assembly of the Council of Europe on 24 September 2002.

2000 to Amnesty International, stated categorically that: “However, you should be aware that UNMIK has neither legal jurisdiction nor mandate to conduct investigations into KFOR activities”.

Moreover, while under UNMIK Regulation 2000/47 the UN Secretary-General has “the right and the duty to waive immunity [from prosecution] of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of UNMIK”⁶, this is not the case for KFOR personnel. Section 6.2 of the same regulation states: “Requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration.” Thus, not even the UN Secretary-General has a mandate to waive immunity for KFOR personnel even though they are operating under the aegis of the UN in what is effectively a UN state.

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

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

This seeks to prevent courts of any state (other than the relevant contributing state) from exercising jurisdiction, and thereby preventing courts in Kosovo, foreign courts (other than those of the relevant contributing state), and courts exercising universal jurisdiction, such as the International Criminal Tribunal for the former Yugoslavia (the Tribunal) and the International Criminal Court (ICC), from exercising jurisdiction. However, Amnesty International believes that in cases of genocide, crimes against humanity and war crimes, courts exercising universal jurisdiction such as the Tribunal and the ICC do have primacy.⁷ However, the ICC or the Tribunal are not likely to exercise jurisdiction over crimes and other

⁶ UNMIK Regulation 2000/47, *On the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo* section 6.1, 18 August 2000. The Kosovo Ombudsperson opined that this regulation “is incompatible with recognised international standards” in particular Articles 6, 8, 15 and Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See Ombudsperson Institution in Kosovo, *Special report No. 1 on the incompatibility 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*, 26 April 2001.

⁷ This is consistent with Article 19 of the Draft Relationship Agreement between the [International Criminal] Court and the United Nations which states: “If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities.”

www.un.org/law/icc/asp/1stsession/report/english/part_ii_g_e.pdf

human rights violations allegedly committed by KFOR troops. Thus, in a case in which, for example, there is sufficient admissible evidence to prosecute but the national courts of the relevant contributing state are not able to take the case up, there will be no court able to exercise jurisdiction.

The ambiguity over the power relationship between UNMIK and KFOR was further evident in UNMIK Regulation 2001/19 'On a Constitutional Framework for Provisional Self-Government in Kosovo', promulgated by the Special Representative of the Secretary-General (SRSG) for Kosovo on 15 May 2001 which initiated the first steps towards handing governmental power to local inhabitants. It allowed for the formation of the Kosovo Assembly, the Provisional Institution of Self-Government (PISG), which met for the first time on 4 March 2002. However, under Article 8.1 of the regulation, most executive governmental powers remained reserved exclusively for the SRSG.⁸

However, the SRSG did not have sole control over military/security matters. In line with the wording of UNSC resolution 1244/99, Article 8.2 of regulation 2001/19 states:

"The SRSG shall **coordinate closely** [emphasis added] with the International Security Presence (KFOR) in: (a) Conducting border monitoring duties; (b) Regulating possession of firearms; (c) Enforcing public safety and order; and (d) Exercising functions that may be attributed to the domain of defence, civil emergency and security preparedness."

Thus UNMIK apparently "coordinates" with but does not control KFOR. This situation was highlighted by the Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles, who characterized the situation as one which "does not amount to the required democratic control over the armed forces", and called for UN SC resolution 1244 "to be interpreted in conformity with the essential requirement of democracy according to which the military is subject to civilian control".⁹ He went on to state:

"The lack of civilian control over the armed forces in Kosovo is particularly incongruous if one considers that the Parliamentary Assembly of the Council of Europe has requested the FRY [the Federal Republic of Yugoslavia since renamed as

⁸ These included: the protection of minority communities; the power to dissolve the Assembly and call new elections; setting the budget; control over monetary policy; control and authority over border customs; appointing and removing judges; deciding on assignment of international judges and prosecutors; exercising powers and responsibilities of an international nature in the legal field; authority over law enforcement institutions and the correctional service; control and authority over the Kosovo Protection Corps (manned in the main by demilitarized ex-members of the Kosovo Liberation Army); concluding and overseeing agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999). In addition, the regulation gave the SRSG power of decision in consultation with or cooperation with the PISG over a number of other governmental functions including: external relations; control over cross-border/boundary transit of goods (including animals); authority to administer public, state and socially-owned property; and administrative control and authority over railways, frequency management and civil aviation functions.

⁹ Council of Europe, Office of the Commissioner for Human Rights, *Kosovo: The Human Rights Situation and the Fate of Persons Displaced from their Homes*, 16 October 2002, p 21 paras 85 and 86.

Serbia and Montenegro], as one of the conditions for its admission to the Organization, the commitment to ‘enact legislation or, preferably, to include provision in the Constitutional Charter to bring the army under civilian control’.”¹⁰

As noted above, the respective governments of troop-contributing countries are required to exert democratic control over the actions of, *and only of*, their respective national contingents. This means that democratic control over KFOR (and SFOR) troops is divided up between a number of national governments who only have control over their own troops. An additional factor is that these troops are operating outside of their respective national territories, and thus distanced from their democratic overseers. This removal of civilian democratic control from the areas of operations (i.e. Bosnia-Herzegovina and Kosovo), combined with the multiplication and fragmentation of democratic control over KFOR (and SFOR – see below) has, in Amnesty International’s experience, led to a lack of accountability for human rights violations. Again, while Resolution 1244/99, Annex 2, Article 4, stipulated that: “[T]he international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control”, there is no single body within NATO for ensuring the initiation of independent investigations of allegations of human rights violations by members of KFOR (or SFOR), or a mechanism to ensure such allegations are dealt with in a consistent manner in accordance with international law.¹¹

1.1 Human rights standards applicable in Kosovo

UNMIK Regulation 1/1999 made the first reference (in Section 2) to the duty of public persons¹² to “observe internationally recognized human rights standards”. [These were

¹⁰ *Ibid* para 87.

¹¹ For cases of human rights violations carried out by KFOR and SFOR troops, this is in line with normal NATO policy as laid out in the 1951 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Article VII, (3) of which states “(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offences arising out of any act or omission done in the performance of official duty.” However, it goes on to state “(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.” In Kosovo while members of the UN civilian presence can, after immunity is waived, be subject to local jurisdiction – e.g. the first trial of a member of the international community accused of a serious crime took place in November 2002 when an Egyptian member of CIVPOL, the UN police, was sentenced to 13 years’ imprisonment for the murder of his interpreter – military personnel, as in SFOR (see below), remain for **all** offences under the sole jurisdiction of their respective national contingents. For example, in August 2000 a US military court in Germany sentenced US Staff sgt Frank Ronghi to life in prison for murder, sodomy and rape of an 11-year-old Albanian girl in Kosovo.

Regarding compensation, KFOR has established an internal claims office for people injured or whose property has been damaged or lost due to KFOR actions. However, while this applies to KFOR Headquarters in Prishtinë/Priština, individual KFOR contingents can choose to be subject to this claims commission.

¹² While in a ‘normal’ state, the military would fall within this rubric of ‘public persons’. However, Section 2 follows on from Section 1.2 which states: “The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person.”

subsequently specified in Section 1.3 of UNMIK Regulation 1999/24 which referred to the standards set out in a wide range of international human rights instruments including: the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); and the International Covenant on Civil and Political Rights (ICCPR).] These standards were again set out as “directly applicable in Kosovo” in Regulation 2001/9 which enshrined the rights of all persons in Kosovo to “enjoy without discrimination on any ground and in full equality, human rights and fundamental freedoms”.

1.1.1 The lack of effective redress for human rights violations

However, there remain unresolved questions concerning certain aspects of the application of these treaties in Kosovo giving rise to questions as to whether individuals can achieve effective redress for human rights violations. In the event of the failure of domestic judicial systems to adequately address violations of rights, an individual from a state which is party to the ECHR can petition the European Court of Human Rights (European Court) for redress.¹³ However the situation in Kosovo is complicated and can be separated into three distinct areas: the question of the jurisdiction of the European Court in cases of alleged violations by local Kosovar (i.e non-international) functionaries; the question of the European Court’s jurisdiction in cases of alleged violations by internationals from states which are party to the ECHR; and cases of alleged violations by internationals from states which are not party to the ECHR (e.g. the USA).

The Federal Republic of Yugoslavia either signed the conventions, or was designated as the successor state to the original party, the Socialist Federal Republic of Yugoslavia. While Kosovo, subject to a decision on final status, remains *de jure* a part of Serbia and Montenegro, in practice it is controlled by UNMIK. This is especially problematic in regard to the entry into the Council of Europe of Serbia and Montenegro on 3 April 2003 and the concurrent signing of the ECHR which Serbia and Montenegro agreed to ratify within one year of accession.¹⁴ This raises the question of whether the European Court has competence over Kosovo generally. Amnesty International believes that when Serbia and Montenegro ratify the ECHR then it should automatically apply to Kosovo, especially as (as noted above) successive UNMIK regulations explicitly stated that the ECHR already applies to Kosovo.¹⁵

As noted UNMIK and KFOR are separate, so it would seem that within the context of this regulation, ‘public persons’ does not apply to the members of NATO.

¹³ While the European Court holds states and not individuals responsible for violations of the ECHR and cannot prosecute individual perpetrators of human rights violations, it can award compensation to victims.

¹⁴ Council of Europe, *The Federal Republic of Yugoslavia’s application for membership of the Council of Europe*, *Opinion No. 239 (2002)*, point 12 ii (a) (b) and (c), adopted by the Parliamentary Assembly of the Council of Europe on 24 September 2002.

¹⁵ Although, as noted above, the European Court holds states and not individuals responsible for violations of the ECHR and can award compensation to victims, this raises the question of who would pay compensation in any case of a person from Kosovo alleging a violation of his/her rights by a Kosovar functionary or body where the European Court ruled that a violation had occurred and awarded compensation to the victim. In such a case it would seem unreasonable for the government of Serbia and Montenegro to pay, but to make a Kosovo body

However, until the ECHR is ratified by Serbia and Montenegro (or by an independent Kosovo should that be the 'final status') petition to the European Court is not possible in 'normal' cases where neither of the two sides in dispute are party to the conventions – e.g. in a case of a Kosovar alleging a violation of his/her rights by a local Kosovar functionary.

However, this is not the case for disputes involving members of KFOR contingents from countries which are party to the ECHR. The competence of the European Court in cases involving extra-territorial actions by military personnel from ECHR contracting states has been the subject of significant rulings by the European Court which, Amnesty International believes, make it clear that Kosovo cases involving KFOR members of national contingents of contracting states are admissible for rulings by the European Court. One of these was the 'Loizidou case' where the European Court ruled that Turkey was in breach of the ECHR in connection with the Turkish army's occupation of northern Cyprus.¹⁶ The European Court has elaborated on case-law on extra-territorial jurisdiction, and stated:

“In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of a Government of that territory, exercised all or some of the public powers normally to be exercised by that Government.”¹⁷

In the case of Kosovo, KFOR is present “through the consent, invitation or acquiescence” of the government of Serbia and Montenegro,¹⁸ and it exercises “some of the public powers [notably in the realms of defence and public order, including the powers to arrest and detain people], normally exercised by that Government”. Thus, the contracting states **can** be held accountable to the European Court for alleged breaches of ECHR by their troops in Kosovo.¹⁹

responsible would be to some extent prejudging 'final status'. As Kosovo remains effectively controlled by the UN, a possible solution, until 'final status' is decided, would be that UNMIK - being the UN's body overseeing Kosovo as its representative - should pay any damages awarded if such cases arise, and that this be seen as a relatively unique situation and not prejudging 'final status'.

¹⁶ *Loizidou v. Turkey* judgment of 23 March 1995 (*Preliminary objections*), Series A no 310, *Loizidou v. Turkey* judgment of 18 December 1996 (*Merits*), *Reports of Judgments and Decisions* 1996-VI, no. 26.

¹⁷ Grand Chamber Decision as to the Admissibility of Application no. 52207/99 (*Banković and others v. Belgium and 16 other Contracting States*), 12 December 2001, para 71.

¹⁸ Many Serbs and some others might see the KFOR presence as being through “military occupation” rather than “consent, invitation or acquiescence” but even so under the European Court ruling contracting states would still be accountable to the European Court for alleged breaches of ECHR by their troops in Kosovo.

¹⁹ However, Amnesty International is informed that NATO's legal advisors consider that the KFOR troops could not be held accountable under ECHR. There are a number of test cases before the European Court at the time of writing which will make the issue clear. In addition, if the European Court does, as Amnesty International believes it will, definitively rule on the admissibility of such cases, the question of exhausting all domestic remedies arises. Will this mean that, for example, in a case of a Kosovar alleging that his/her rights were violated in a single case involving a number of different national contingents of contracting parties, he/she must exhaust all domestic remedies individually within the judicial systems of each relevant country, if that country accepts such a ruling,

However, this would not apply to KFOR members from states which are not a party to the ECHR such as the USA. Furthermore, while the USA - along with all the participating states in both KFOR and SFOR - is a State Party to the ICCPR it has not ratified the Optional Protocol which grants jurisdiction to the UN Human Rights Committee to consider petitions from individuals alleging violations of their human rights. Once more this raises questions concerning a common interpretation of international standards especially in cases where there are allegations of violations committed by KFOR troops from different contingents, some of whom are from ECHR contracting states and thus fall within the jurisdiction of the European Court, and others involved in the same alleged violations, such as the USA who do not.

UNMIK Regulation 38/2000 of 30 June 2000 established an Ombudsperson Institution in Kosovo which, in Section 1.1, stated:

“The Ombudsperson shall promote and protect the rights and freedoms of individuals and legal entities and ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights.”

Section 3 laid out the jurisdiction of the Institution as “to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution”. However, the Ombudsperson Institution does “not have jurisdiction to deal with disputes between the international administration and its staff” (section 3.5). Nor does it have automatic jurisdiction over KFOR. Section 3.4 states: “In order to deal with cases involving the international security presence, the Ombudsperson may enter into an agreement with the Commander of the Kosovo Forces (COMKFOR)”. To Amnesty International’s knowledge, such agreement by COMKFOR for the Ombudsperson Institution to investigate alleged abuses by KFOR members has not been forthcoming. Thus actions by KFOR members once more evade scrutiny by human rights bodies, and people subjected to human rights violations by KFOR members cannot seek redress through this mechanism.

On entry to the Council of Europe Serbia and Montenegro also signed and agreed to ratify within one year of accession the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.²⁰ When it becomes a party to this convention, Serbia and Montenegro will have granted the authority to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

before being allowed to petition the European Court? If so, then such a convoluted process is likely to work to the detriment of the petitioner. This becomes even more complicated when, as noted below, non-contracting states to the ECHR such as the USA are also involved in conjunction with contracting European states.

²⁰ Council of Europe, *The Federal Republic of Yugoslavia’s application for membership of the Council of Europe, Opinion No. 239 (2002)*, point 12 ii (a) (b) and (c), adopted by the Parliamentary Assembly of the Council of Europe on 24 September 2002.

(CPT) to visit any place where a person is deprived of its liberty, and make reports of its findings and recommendations to the authorities, which will be published if and when the government so authorizes. The CPT provides non-judicial preventive machinery to protect detainees; it does not award compensation, it can and does call on the relevant authorities to provide information on individual cases of alleged torture, ill-treatment or degrading treatment or punishment. Similarly to the above discussion on the jurisdiction of the European Court in Kosovo, questions remain about the modalities for the CPT to carry out its mandate to visit all places where people are deprived of their liberty, including in Kosovo, when Serbia and Montenegro ratifies the Convention. Specifically, how will the CPT's access be ensured to KFOR detention centres based in camps of troop-contributing countries parties to the European Convention for the Prevention of Torture or Degrading Treatment or Punishment, as well as to the main KFOR detention facility at US Camp Bondsteel which is controlled by the USA.

2. Bosnia-Herzegovina

Similar concerns arise in Bosnia-Herzegovina although the situation there is somewhat different. The Dayton Agreement of 10 November 1995 ended the hostilities which had begun in 1992. Following this, on 14 December 1995 at the Paris Peace Conference, a General Framework Agreement for Peace in Bosnia and Herzegovina (Framework Agreement) was signed by all parties concerned. This, in Annex 6, included an 'Agreement on Human Rights' which guaranteed all people in Bosnia-Herzegovina the highest level of internationally recognized human rights and fundamental freedoms, including those provided in a number of international agreements including the ECHR, the ICCPR and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

2.1 Human rights protection

The Framework Agreement in Annex 6 Article II established the Human Rights Chamber and an Ombudsperson office to consider alleged or apparent violations of human rights as provided in the ECHR, and Article XI vested in it the authority to issue decisions binding upon both entities as well as the state authorities of Bosnia-Herzegovina. Thus citizens of Bosnia-Herzegovina have considerable access to redress for violations of their rights by public officials from Bosnia-Herzegovina. However, similar questions as in Kosovo arise for alleged violations by SFOR troops.²¹ Ombudsman Frank Orton confirmed that his mandate did not cover either the international police force or SFOR.²²

²¹ While SFOR does not have the same military hegemony as KFOR does have in Kosovo it still, as detailed below, exercises all or some of the public powers normally exercised by authorities of Bosnia-Herzegovina, and so as per the *Loizidou* ruling and the elaboration on extra-judicial jurisdiction by the European Court in the *Banković* ruling (see above), contracting states can, as in Kosovo, be held accountable by the European Court. Again, as in Kosovo there are, at the time of writing, test cases against SFOR-contracting countries before the European Court on this issue.

²² Interview with Frank Orton published in *Oslobodjenje*, 18 March 2003, Sarajevo.

Unlike Kosovo where as noted above the situation has ambiguities until the question of final status is resolved, Bosnia-Herzegovina was admitted to the Council of Europe in January 2002 and ratified the ECHR in July 2002 and thus falls within the jurisdiction of the European Court. It is also party to the European Convention for the Prevention of Torture. The CPT visited some police stations, prisons and psychiatric institutions during its first visit to Bosnia-Herzegovina in April 2003, but it did not visit NATO bases. The question remains as to how its powers of access will be exercised in respect of all detention facilities so as to include those at US Eagle Base where non-military personnel and civilians have been detained, (similarly to US Camp Bondsteel in Kosovo see above).

2.2 SFOR

SFOR is the direct descendant of the multinational Implementation Force (IFOR) and its predecessor the UN Protection Force (UNPROFOR). The Framework Agreement, in Annex 1A 'Agreement on the Military Aspects of the Peace Settlement', laid down the basis for the creation of IFOR. Article I (1) (a) invited the UNSC to adopt a resolution to establish IFOR which was to be composed of units from NATO and non-NATO nations. Article I (1) (b) stated:

“It is understood and agreed that NATO [emphasis as in the original] may establish such a force [IFOR], which will be under the authority and subject to the direction and political control of the North Atlantic Council (“NAC”) through the NATO chain of command.”

As regards accountability of NATO troops, Annex 1A, Appendix B, Article 7 of the Framework Agreement explicitly states:

“NATO military personnel under all circumstances and at all times shall be subject to the exclusive jurisdiction of their respective national elements in respect to any criminal or disciplinary offences which may be committed by them in the Republic of Bosnia and Herzegovina. NATO and the authorities of the Republic of Bosnia and Herzegovina shall assist each other in the exercise of their respective jurisdictions.”

As noted below, there have been serious problems of “assistance” between NATO and the authorities; NATO, specifically the US military, has been extremely reluctant to hand over civilian detainees to the relevant authorities of Bosnia-Herzegovina despite rulings by the Human Rights Chamber, Bosnia-Herzegovina’s human rights court.

Annex 1A to the Framework Agreement also set out a number of obligations that “the Parties” – the state of Bosnia-Herzegovina, and its two constituent parts, the Federation of Bosnia and Herzegovina (Federation) and the Republika Srpska (RS) - had to comply with. The purposes of these obligations were laid out in Article I (2) as being:

“(a) to establish a durable cessation of hostilities.... (b) to provide support and authorization for IFOR to take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection; and (c) to establish lasting security and arms control measures”.

Article VI specified that IFOR had “the right to fulfill its supporting tasks”. These included in (d) (d) “to observe and prevent interference with the movement of civilian populations, refugees and displaced persons, and to respond appropriately to deliberate violence to life and person”.

The following day, 15 December, the UNSC passed Resolution 1031 (1995) which formally set up IFOR. Article 14 of this resolution

“*Authorizes* the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement [i.e. NATO] to establish a multinational implementation force (IFOR) under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement.”

The resolution in Article 17 recognized the right of IFOR to “take all necessary measures to defend itself from attack or threat of attack”. This along with the above noted task “to respond appropriately to deliberate violence to life and person” appears to be the basis for any detention by IFOR or later SFOR²³ troops; SFOR claims that its authority to arrest and detain persons is based on Annex 1 of the Framework Agreement. In November 2002 Lt Commander Yves Vanier of SFOR stated in connection with the arrest and detention of Sabahudin Fijuljanin by SFOR (see below):

“The General Framework Agreement for Peace gives us the authority to detain him as long as we deem necessary to continue our investigations, and his detention will continue for as long as we deem it appropriate.”²⁴

Amnesty International, however, believes that if people are apprehended by SFOR they should forthwith be handed over to the relevant authorities of Bosnia-Herzegovina, and that their detention should be authorized by a judicial body. Both domestic law and international standards provide that a person may only be deprived of their liberty in accordance with a procedure prescribed by law.²⁵

²³ SFOR was established and took over from IFOR under UNSC resolution 1088 (1996) of 12 December 1996. The only significant factor was the change of name reflecting the development of the peace process. The powers of SFOR and its relationship to the civilian authorities remained essentially as before for IFOR.

²⁴ SFOR press conference, Coalition Press Information Centre, Tito Barracks, 26 November 2002. This was again stated in a SFOR press release of 30 January 2003 which stated that SFOR “will continue to enforce its mandate under the General Framework Agreement for Peace (GFAP), and will when necessary, conduct similar detentions in order to both protect SFOR personnel and provide a safe and secure environment for all BiH [Bosnia-Herzegovina] citizens.”

²⁵ There is also the issue of the failure to pay compensation for NATO’s use of land in Bosnia-Herzegovina. Annex 1A, Article VI, of the Framework Agreement stated: “The IFOR shall have complete and unimpeded freedom of movement by ground, air and water, and utilize any areas or facilities to carry out its responsibilities as required for its support, training, and operations, with such advance notice as may be practicable. The IFOR and its personnel shall not be liable for any damages to civilian or government property caused by combat or combat related activities.” This provision has apparently been used to avoid paying recompense for use of property by IFOR/SFOR. For example, on 13 and 14 August 1998 SFOR destroyed several Serb villages in Glamočko Polje in

2.2 The High Representative

The Office of the High Representative (OHR) was set up under Annex 10 'Agreement on Civilian Implementation' of the Framework Agreement. Article V states: "The High Representative is the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement." This was confirmed in Article 27 of UNSC Resolution 1031 (1995). Thus, similar to the SRSG in Kosovo, the OHR is the final arbiter in civilian matters. However, unlike the situation in Kosovo there is no ambiguity as to the question of whether the OHR has control over military matters. Article II (9) of Annex 10 of the Framework Agreement clearly states:

"The High Representative shall have no authority over IFOR [26] and shall not in any way interfere in the conduct of military operations or the IFOR chain of command."

However, similarly UNSC resolution 1031 noted in paragraph 29 that "close cooperation between IFOR, the High Representative and the agencies [27] will be vital to ensure successful implementation [of the peace agreement]".

Thus similarly to Kosovo there is no civilian control in theatre of the international military, only cooperation between the two.

The High Representative is appointed by the UN Security Council; currently the position is filled by Lord Ashdown, who is also the special representative of the European Union. Under Article 1.2 of Annex 10, the High Representative was instructed to "facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement." The High Representative's powers were significantly increased during the 1997 meeting of the Peace Implementation Council²⁸ in Bonn, which explicitly authorized him to remove from office

the Federation to build a firing range, without paying any compensation to the owners. In September 2001, the highest human rights court in Bosnia-Herzegovina, the Human Rights Chamber, ruled that recompense should be paid to refugees and displaced people from the neighbouring villages where the Federation Army had built another firing range. However, there has been no similar recompense for those displaced by SFOR: illustrating once more the lack of accountability of SFOR. In November 2002 the Human Rights Chamber declared it could not look into complaints brought by a group of Serb villagers regarding the use of their land by SFOR as the Chamber could not hold SFOR responsible for its activities.

²⁶ Amnesty International notes that at the time - 14 December 1995 - IFOR was not even formally constituted. As noted it was formally established the next day by UNSC resolution 1031 (1995) of 15 December 1995.

²⁷ It is not clear in the resolution what these 'agencies' are although Article 7 refers to "the invitation by the parties to the United Nations Commission on Human Rights, the OSCE [Organization for Security and Co-operation in Europe], the United Nations High Commissioner for Human Rights and other intergovernmental or regional human rights missions or organizations to monitor closely the human rights situation in Bosnia and Herzegovina".

²⁸ This comprises members and representatives from 55 countries and agencies that support the peace process in many different ways - by assisting it financially, providing troops for SFOR, or directly running operations in Bosnia-Herzegovina. These include: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Egypt, Federal Republic of Yugoslavia, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Jordan, Luxembourg, Malaysia, Morocco, Netherlands, Norway, Oman, Pakistan, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovak

public officials whose actions had violated the provisions of the Framework Agreement. In addition the High Representative was empowered to impose laws on the entity and state level if the domestic legislatures failed to do so. Successive High Representatives have resorted to the use of these powers and have dismissed scores of public officials – including elected members of the government – in many cases on grounds of obstructing the process of minority returns. It is not possible to appeal dismissal by the OHR. Also in the exercise of these powers, a vast number of laws and regulations on a variety of matters, were drafted and imposed by OHR, including a comprehensive overhaul of the legal regime on property in order to accelerate the return process.

3. Violations of international standards by KFOR and SFOR

Amnesty International's concerns at the lack of accountability of KFOR and SFOR for human rights violations committed in Kosovo and Bosnia-Herzegovina respectively are highlighted by the following cases. As noted above, the organization's concerns are amplified by the fact that the international community is charged with the protection and promotion of human rights and the rule of law in both Kosovo and Bosnia-Herzegovina. Amnesty International understands that some of these illegal arrests and detentions were apparently carried out as part of the global campaign: the so-called "war against terror" led by the USA after the attacks of 11 September 2001 in the USA and other attacks such as that against the US aircraft carrier *USS Cole* in October 2000. The organization has called for those responsible for the attacks of 11 September and other serious crimes to be brought to justice. However, Amnesty International maintains that any measures taken to enhance security must be carried out in accordance with international human rights standards. The organization has underscored in particular that all measures in respect to any individual must meet international fair trial standards and not result in the imposition of the death penalty.

3.1 Kosovo - unlawful arrest, detention and allegations of ill-treatment by KFOR

On 14 December 2001, three foreign staff of an Islamic humanitarian organization, Ahmad H. Said, Dr Abdul Raqiz and A.B.²⁹, were arrested by Italian KFOR in Djakovica (Djakovë) and detained by KFOR at the US Bondsteel Detention Facility. They remained in detention until 21 January 2002 without judicial authorization before being released without charge. In July 2002, three more foreign staff of an Islamic humanitarian organization, Muhamed Zentagui, Redouane Guesmia and Ameer Sofiane, were arrested and detained by KFOR for between 43

Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States of America; the Council of Europe and the European Commission. It has a Steering Board which provides the OHR with political guidance. This is chaired by the OHR and its members are Canada, France, Germany, Italy, Japan, Russia, United Kingdom, United States, Presidency of the European Union, the European Commission, and the Organisation of the Islamic Conference (OIC), represented by Turkey. In Sarajevo, the High Representative chairs weekly meetings of the Ambassadors to Bosnia-Herzegovina of the Steering Board members. In addition, the Steering Board meets at the level of political directors every four to eight weeks and at the level of Foreign Ministers once a year.

²⁹ Name withheld on request

and 51 days again without any judicial authorization before being released without charge. Amnesty International believes that the arrest and detention of these six men violated international law - including the right not to be arbitrarily detained, and in both cases the organization wrote to the Commander of KFOR (COMKFOR) requesting clarification of the legal basis under which KFOR conducts arrests and detentions.

The organization is also concerned about allegations that Ahmad H. Said, Dr Abdul Raqiz and A.B. were ill-treated by KFOR personnel, and denied their rights while in detention, and raised these concerns in its letter to COMKFOR calling for a full investigation into the allegations.

To the best of Amnesty International's knowledge, based upon the replies received (see below) to date, no adequate investigation has been conducted into any of these allegations, nor have any of the six men received reparation. This again highlights the central concern in this paper: the lack of accountability of NATO-led international peacekeepers.

On 6 June 2002, Amnesty International prepared an 18-page memorandum detailing its concerns about the arbitrary arrest and unlawful detention of Ahmad H. Said, Dr Abdul Raqiz and A.B., their allegations of ill-treatment and the denial of their rights while in detention, as well as the unlawful detention of at least another 25 persons, including minors, during the same KFOR "search and detention operation". This memorandum was sent to COMKFOR, the relevant MNB commanders, and the governments of the national contingents involved - namely those of Italy, Spain, the UK and the USA. On 9 August 2002, Lord Robertson, Secretary General of NATO, replied. In his letter to Amnesty International Lord Robertson wrote:

"...I am quite clear that the existing legal framework allows KFOR, within its current mandate and, where appropriate, in coordination with competent civil authorities, to carry out detentions.... So far as the specific allegations in respect of [names of the three men arrested] are concerned, the NATO military authorities have reviewed these cases. However, further action lies with the individual nations involved in the detention operation and at Camp Bondsteel [the United States KFOR base where the men were detained]. I have therefore brought your letter to the attention of these national authorities, requesting that they undertake whatever investigations they believe may be required as well as any follow-up action as appropriate."

Amnesty International has, to date, received no reply from any of the national authorities involved on the concerns raised in the memorandum, and to the best of the organization's knowledge, no adequate investigations have been conducted into any of the allegations.

On 11 September, COMKFOR Lieutenant General Marcel Valentin similarly replied to Amnesty International's letter of 30 August 2002 concerning the unlawful detention of Muhamed Zentagui, Redouane Guesmia and Ameer Sofiane. General Valentin merely wrote:

“I acknowledge receipt of Reference A. I wish to confirm that your letter has been forwarded up the chain of command to the Secretary General for his response. This is a Nato lead operation, therefore the co-ordination of the response to your letter will be the same as adopted for your earlier letter dated 06 June 02.”

At the time of writing, Amnesty International had received no further replies on these issues apart from a letter of 18 November 2002 from the Under-Secretary-General for Peacekeeping Operations at the UN, Jean-Marie Guehenno, which failed to address the specific issues raised. He stated that KFOR “continues to play a vital role in maintaining security” and that this “requires detaining suspects from time to time...[but] only as a last resort, when civilian authorities are unable to take action, and hand over detained persons to the civilian authorities as soon as conditions permit”. He also assured the organization that it was “the policy of the United Nations to defend and protect human rights in all of its activities, particularly where, as in Kosovo, the United Nations itself exercises governmental power”. However, he did not elaborate how or whether this “governmental power” included control over KFOR.

The organization also notes that these detainees, as well as those detailed below who were detained by SFOR, may be entitled to appropriate reparation, in accordance with Article 5(5) of the ECHR and Article 9(5) of the ICCPR, which guarantee an enforceable right to compensation for any person who has been the victim of an unlawful arrest or detention. Also, in accordance with Article 2(3) of the ICCPR and Article 13 of the ECHR any person whose rights - under these treaties - have been violated has the right to redress to a competent authority for an effective and enforceable remedy, including in respect of their alleged ill-treatment, both during arrest and while in detention.

3.1.1 The lack of legal basis for KFOR detentions

Amnesty International believes that there is no legal basis for the continuation of such KFOR detentions. The organization has also repeatedly expressed its view that the detention of people by KFOR without review by any judicial body violates national and international law and standards. Amnesty International understands from previous correspondence with both KFOR and the SRSG that KFOR considers that their authority to arrest derives from UNSC resolution 1244/99, which at Para. 9(d) charges the international security presence in Kosovo with responsibility for “ensuring public safety and order until the international civilian presence can take responsibility for this task”. Amnesty International believes that, given the progress made by UNMIK in establishing the rule of law in Kosovo over the past three years - and in particular, the existence of a fully-functioning international (UN CIVPOL) and domestic (KPS) police service - this justification is no longer applicable. In this period, Kosovo has seen the development of a comprehensive body of applicable law and UNMIK Regulations with regard to arrest and detention and the establishment of a functioning judicial system.

The organization understands that Memoranda of Understanding have been signed between KFOR and CIVPOL, within each of the KFOR Multi-National Brigade Boundaries, under which investigative primacy, including the power of arrest and detention, has been transferred from KFOR to CIVPOL in each of the KFOR Multi-National Brigade areas.

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

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

The directive lays special emphasis on the exceptional circumstances for such detentions. Article 3 (d) states: "COMKFOR authority to detain will only be used as a last resort when civil authorities are unable to take action addressing the threat to KFOR or the safe and secure environment in Kosovo." The special emphasis on the exceptional circumstances for such detentions is repeated in section 4 (a) dealing with standards which states: "Persons may be detained under the authority of COMKFOR only if they constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter." Furthermore the directive in section 5 (a) (2) (3) and (7) underlines the importance of engaging the civil police at every opportunity. Section 5 (a) (2) states: "Once the situation is stabilised and safe, and after any questioning required by the circumstances, the on-scene commander will *immediately* [emphasis added] relinquish authority over the restrained person and the crime scene to civilian police authorities." Section 5 (3) states:

"If a civilian police authority is not present, the on-scene commander will make every effort to summon civilian police authority to the scene. Every effort should be made to transfer the restrained person to civil authorities at the location where the person was restrained. However, the restrained person may be moved for reasons of the safety of the restrained person or the restraining unit."

Despite these instructions, the directive then goes on to detail the procedures for KFOR detention. Section 5 (b) allows MNB commanders to detain people for up to 72 hours on their own authority even without recourse to COMKFOR approval which is needed for detention after this initial 72-hour period.

This raises a number of concerns, especially as the Organization for Security and Cooperation In Europe (OSCE) has reported, on the basis of information received from

KFOR, that an average of 10 persons per month were held under the authority of MNB Commanders' authority.³⁰

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

Amnesty International also notes the concerns expressed by the UN Special Representative of the Commission on Human Rights, Jose Cutileiro, that arrests and detentions by KFOR, under COMKFOR Detention Directive 42 (9 October 2001), "may be incompatible with basic human rights principles"; the Special Representative has also questioned the need for KFOR detention practices on the basis that the grounds on which KFOR may arrest under directive 42 are "adequately covered by existing legislation".³¹

Similar concerns were expressed by the OSCE which recommended that "KFOR should stop its detention practice and officially renounce its authority in this area",³² as well as by the Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles.³³

Amnesty International believes that persons detained solely under this directive are victims of arbitrary detention in clear contravention of Article 5 of the ECHR and Article 9 of the ICCPR in that they have not been deprived of their liberty in accordance with procedures prescribed by applicable law, including their right to judicial scrutiny of their detention, and their right to *habeas corpus*. The non-derogable nature of the right to *habeas corpus*, even in times of emergency, has been affirmed by the (UN) Human Rights Committee.³⁴ Judgments

³⁰ OSCE Mission in Kosovo, *Kosovo: Review of the Criminal Justice System*, September 2001 - February 2002, p. 51, footnote 92.

³¹ E/CN.4/2002/41, 8 January 2002, pp. 23-4.

³² OSCE Mission in Kosovo, *Op. Cit.*, p 51.

³³ Council of Europe, Office of the Commissioner for Human Rights, *Op. Cit.*, pp 22-23, paras 88-97.

³⁴ See UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, which stated: "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly

by the European Court of Human Rights make it clear that there must be judicial supervision of detention and respect for the rights of detainees even during emergency situations and armed conflicts.³⁵

3.2 Bosnia-Herzegovina - unlawful arrest and detention by SFOR

Similar violations to those in Kosovo have occurred in Bosnia-Herzegovina with a number of people arrested and/or detained by SFOR troops. For example, on 11 May 2001, at around 7.35am, four Bosnian men were arrested by US military police as they were passing the pedestrian entrance to the SFOR Eagle Base near Tuzla. These men were employed on the base as ground operations personnel through the company Brown & Root Services. The four men - Jasenko Karahmet, Amir Selimović, Amir Tobudić and Besim Hodić - were reportedly pushed to the ground and handcuffed by US soldiers. They were then taken to separate rooms inside the base where they were detained incommunicado for 58 hours until the early evening of 13 May.

According to Amnesty International's information, the men were not informed of the reasons for their arrest and detention until around 4pm on 11 May, when a female officer of the US Federal Bureau of Investigation (FBI) told them that they were under suspicion of preparing a terrorist attack on the Eagle Base. They were reportedly briefly shown a written statement which said they had been charged under US law, as they were deemed to be on US territory. No details were supplied to them as to the specific US legislation under which they had been charged. Apparently, at no point were they informed of their rights under US, Bosnian or international law.

guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant". CCPR/C/21/Rev.1/Add. 11, para. 16, 31 August 2001.

³⁵ In the following two cases, the countries involved had derogated from provisions of the ECHR on the basis of states of emergency. These cases examine measures taken regarding detention in light of their necessity and proportionality. *Brannigan and McBride v. the UK*, Judgment of the European Court of Human Rights, 26 May 1993, in which the Court stated that a period of seven days before bringing a detainee before a court was legitimate in an emergency situation. However, it noted that in Northern Ireland all detainees had the right to *habeas corpus* and access to a lawyer within 48 hours and to a doctor and family, while in *Aksoy v. Turkey*, European Court of Human Rights, 18 December 1996, the Court considered 14 days was too long even in a region suffering armed conflict, especially as there was no right of *habeas corpus* and access to a lawyer, doctor or relative was denied. Similarly in the decision of 29 September 1999 by the Inter-American Commission on Human Rights regarding *Coard et al. v. United States*, the Commission stated that detention for nine to 12 days without access to an independent review of the legality of their detention was too long for the US army to detain persons, even though the US army was engaged in hostilities for some of that time.

The men were subsequently reportedly subjected to repeated interrogations by two FBI officers which lasted throughout the night. These interrogations reportedly continued over the following two days and nights, with a military police officer joining in on 12 May, until approximately 4am on 13 May. On that day a fifth man, Šaban Jukanović, was arrested around 11am and held for questioning until 6pm when he was released together with the other four men, as it had transpired that suspicions against them had been based on a piece of mistranslated information.

Throughout the entire period of detention all five men were reportedly denied the rights to access to a lawyer, to inform their families or have them informed of their detention and were not brought before a judge. Moreover, their parents were misinformed by SFOR officers at the base about their whereabouts on 11 May, when they were told that their sons had been assigned to an overnight mission. When the parents returned to the base the next day they were informed about the detention and apparently interrogated about the alleged activities of their sons, without having the assistance of a lawyer. Although the men's lawyer has filed a complaint with SFOR's claims commission, this action was dismissed as the SFOR legal advisor in April 2002 claimed that the men had no legal grounds for raising a claim.³⁶

In another case, foreign nationals suspected of being involved in hostile activities against NATO member states have been transferred to NATO, primarily US, custody. In January 2002, the Bosnia-Herzegovina Federation and state authorities transferred six Algerians³⁷ who had Bosnian citizenship, Boudella Hadz, Saber Lahmar, Boumedienne Lakhdar, Mohamed Nechle, Mustafa ait Idir and Bensayah Belkacem, into US custody, after which they were subsequently transferred to Camp X-Ray in Guantánamo Bay, Cuba. This was in violation of an order by the Bosnia-Herzegovina Human Rights Chamber which ruled that four of the men should not be transferred to the US pending a final decision on the case by the Federation Supreme Court on 11 February. Amnesty International recalls that under the General Framework Agreement for Peace in Bosnia and Herzegovina, the Human Rights Chamber is vested with the authority to issue decisions binding upon both entities as well as the state authorities of Bosnia-Herzegovina. The decision by the Bosnian authorities to ignore

³⁶ SFOR Legal Advisor, Colonel Rocco J. Lamuro of the US Air Force wrote to the men's lawyer: "The claims you submitted for wrongful termination and future lost wages are for losses related to an investigation and detention carried out for force protection purposes. We have reviewed the claims and all relevant facts. Under the standards established pursuant to the Dayton Agreement for the payment of claims, we must deny your claims. The legal basis for claims against SFOR or its troops contributing nations is Paragraph 15 of the SOFA [Status of Forces Agreement] between NATO and Bosnia and Herzegovina. Claims may only be paid for damages resulting from non-combatant activities. Paragraph 9 (a) Article VI Annex I-A (The Military Annex) of the Dayton Agreement specifically bars payment of claims arising out of activities that are combat related or of an operational necessity. In addition, the Headquarters, Stabilization Force Standard Operating procedures (SOP) 3400 bars claims arising out of contracts. Considering the above cited provision of the Dayton Agreement and all the relevant facts and circumstances surrounding the incident involving your clients, their claims relating to the termination of their employment contracts are barred in their entirety, and are dismissed with prejudice. Because the dismissal of these claims is based upon an exercise of the SFOR Commander's authority under Article XII, Annex 1-A to the GFAP, there is no right to appeal to the claims Commission or Arbitration Tribunal."

³⁷ Bensayah Belkacem is joint Algerian/Yemeni by nationality, while the other five are all Algerian nationals.

the Human Rights Chamber's order and hand the men over to US custody undermined respect for this institution as well as adherence to international human rights law as prescribed by the Framework Agreement.

Amnesty International further notes that achieving implementation of Human Rights Chamber decisions and orders has been one of the top priorities for human rights officers working for inter-governmental organizations and the international community. Amnesty International considers that the blatant flouting of an order by the Chamber in this case set a dangerous precedent which may have far-reaching consequences for future adherence to applicable national and international law and implementation of the Chamber's decisions. The organization deeply regrets the involvement of the US authorities in such a potentially destructive step, and urges all possible measures to be taken by the US authorities to ensure respect for Human Rights Chamber decisions in the future.

The six men remain arbitrarily detained in Guantánamo Bay, in violation of Article 9 (1) of the ICCPR to which the US is a party. They also face the possibility of trial before a special military commission: such commissions, Amnesty International believes, are in violation of international standards such as the ICCPR which guarantee the right to a fair trial and freedom from discrimination. The organization is also concerned that they face the possibility of the death penalty if they eventually face trial for a capital offence under US law.

On October 2002 and April 2003, the Human Rights Chamber issued decisions in the cases of the alleged unlawful transfer of the six men to US custody.³⁸ The Chamber found in all cases that the transfer of the men by Federation and Bosnian State authorities had violated several of their rights under the ECHR and its Protocols, including the right to liberty and security of person and the right not to be arbitrarily expelled in the absence of a fair procedure. Furthermore, the fact that the Bosnian authorities failed to seek guarantees that the men, upon transfer, would not be sentenced to death, violated Article 1 of Protocol 6. The Chamber ordered the Bosnian authorities to pay the men compensation and to use diplomatic channels in order to protect their basic rights. The authorities were also instructed to retain lawyers to represent the men while in custody with the view to ensuring the protection of their rights in case they would stand trial in the US. According to information available to Amnesty International, while the Bosnian authorities have sought some meetings with US representatives (who reportedly acknowledged the right of the detainees to receive visits from the Bosnian consulate to the US), the Chamber's decision remains largely unimplemented. In June 2003 Bosnia-Herzegovina's Foreign Ministry announced that it would send a delegation to visit the men in Guantánamo Bay. Amnesty International has called upon the Bosnian authorities to ask for the men's immediate and unconditional release from Guantánamo Bay,

³⁸ The representatives of the men had filed applications with the Chamber on different dates, the Chamber ruled in the case of Boudella Hadz, Saber Lahmar, Boumedienne Lakhdar and Mohamed Nechle on 11 October 2002, and subsequently issued largely similar decisions in the separate cases of Bensayah Belkacem and Mustafa ait Idir on 4 April 2003.

if the US authorities cannot charge them with a recognizable offence. The organization has sent the same appeal to the US Government.

In another case, on 26 October 2002, Sabahudin Fijuljanin, married with four children, was taken from his home in Gornja Maoca near Brčko in Bosnia-Herzegovina, and detained for three months at the SFOR Eagle Base without judicial authority. He was reportedly suspected of the illegal possession of a rocket-launcher and holding passports of several states. He was reportedly also suspected of espionage by SFOR though no formal charges were brought against him during his detention by SFOR. On 13 January 2003, the Bosnia-Herzegovina Human Rights Chamber ordered the Bosnia-Herzegovina State and Federation authorities to formally request that Sabahudin Fijuljanin be placed immediately under the jurisdiction of the Federation authorities [order no: CH/02/12499]. The chamber stated: "Considering that if provisional measures are not ordered, the applicant [Sabahudin Fijuljanin] will suffer harm which cannot subsequently be remedied." However, despite requests by the Federation authorities for him to be released into their custody, SFOR refused to do so until, after intense lobbying by Amnesty International, he was finally transferred to the Federation authorities on 30 January 2003.³⁹

During his detention at US Eagle Base, Sabahudin Fijuljanin was denied immediate access to his lawyer in violation of Article 63(2) of the Federation Code of Criminal Procedure and Principle 1 of the UN Basic Principles on the Role of Lawyers. He was subsequently only allowed to see his lawyer on two occasions, during which their conversations were recorded and videotaped by SFOR personnel, in contravention of UN Basic Principles on the Role of Lawyers and Principle 18 (4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment both of which guarantee the confidentiality of lawyer client communications. He was only allowed one visit from his family in December 2002, in contravention of Principle 19 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

4. Amnesty International's recommendations

Amnesty International believes that the lack of unified civilian (or even military) control over the conduct of both KFOR and SFOR personnel has resulted in allegations of violations of human rights in Kosovo by KFOR and in Bosnia Herzegovina by SFOR to be insufficiently investigated and redressed. Amnesty International is:

- calling for both SFOR and KFOR to respect international human rights standards and stop detaining people arbitrarily;
- calling on both KFOR and SFOR to immediately turn over to the domestic authorities all those they arrest who are not connected to the respective NATO-led military missions;
- calling for COMKFOR Detention Directive 42 to be immediately revoked;

³⁹ Sabahudin Fijuljanin was charged in February 2003 with illegal possession of arms and convicted and sentenced to five months' imprisonment in April by the Srebrenik municipal court. He is appealing against his conviction.

- calling on both KFOR and SFOR to ensure reparations including paying appropriate compensation to victims of human rights violations committed by KFOR or SFOR members;
- calling on NATO to grant jurisdiction to the relevant Ombudsperson's office to extend their mandates to cover KFOR and SFOR activities;
- calling for UNMIK Regulation 2000/47 'On the Status, Privileges and Immunities for KFOR and UNMIK and their Personnel in Kosovo' to be amended so that the "exclusive jurisdiction of the respective sending States" be ended in cases of alleged human rights violations by KFOR personnel, and that the decision to waive immunity in such a case be taken by the UN rather than by the commanders of the respective national element;
- calling on NATO to publicly commit itself to abide by the highest standards of international human rights law, and to ensure a common interpretation and application of such standards;
- calling on NATO to establish centralized transparent procedures - one each for KFOR and SFOR - whereby allegations of human rights violations by KFOR and SFOR troops are thoroughly and impartially investigated, to bring alleged perpetrators to justice in accordance with international standards, and to make adequate reparation if the allegations are substantiated;
- recommending to the UN that it consider establishing an international independent oversight mechanism - such as an international Ombudsperson - with full authority to investigate or ensure that effective investigations are conducted into allegations that actions by members of UN authorized international operations fall short of international human rights or humanitarian law standards; to monitor the actions taken by troop contributing countries to bring perpetrators to justice or subject them to appropriate disciplinary procedures; and to report and make recommendations to the UN Secretary-General if such actions are deemed insufficient