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Abstract

On March 11th, 2000, two children who were playing in the neighborhoods of Mitrovica, Kosovo, got hurt by an “unexploded ordnance”. One of them died in the explosion, the other was severely injured. An inquire clarified that the ordnance was a “bomblet”, a part of a cluster bomb dropped during the 1999 NATO air campaign against the Federal Republic of Yugoslavia.

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Introduction

On March 11th, 2000, two children who were playing in the neighborhoods of Mitrovica, Kosovo, got hurt by an "unexploded ordnance". One of them died in the explosion, the other was severely injured. An inquire clarified that the ordnance was a "bomblet", a part of a cluster bomb dropped during the 1999 NATO air campaign against the Federal Republic of Yugoslavia.

Since the aftermath of the campaign, following the UN Security Council Resolution (UNSCR) 1244, the Serbian province of Kosovo has been put under UN interim administration (UNMIK), while the overall military security has been conferred to KFOR, the NATO-led international security force. At that time Mitrovica was within the sector for which French troops were responsible. According to the complaint filed to the European Court of Human Rights (ECtHR), KFOR commanders, in spite of being aware of the high number of unexploded ordnance, failed to inform inhabitants or properly marking or fencing the area. The applicants sued France for compensation invoking Article 2 (right to life) of the European Convention in connection with the death of Gadaf Behrami and the wounding of Bekim Behrami, who suffered permanent injuries[1] .

The Court decided the case in May, 2007, as well as another case concerning the "executive detention" -i. e. without judicial oversight- of a Kosovan Albanian issued by the KFOR commander (COMKFOR) under Resolution 1244[2]. The UN mandate entitles KFOR commanders to adopt those measures they judge necessary to guarantee a safe and secure environment in Kosovo, including arrest and detention of persons who might interfere with mission accomplishment[3]. In this second case, the applicant, who was convicted for murder and arms trafficking, detained *incommunicado*, transferred to UNMIK and then released by order of the Supreme Court of Kosovo, invoked Articles 5 (right to freedom) and 6 (right to a fair trial), as well as Articles 13 (right to an effective remedy) and, more generally, Article 1, alleging that Germany, France and Norway failed to guarantee to people residing in Kosovo the rights set forth in the European Convention.

Respect for international human rights is a core feature of the mission issued by UNSCR 1244. Resolution 1244, in its Section 11, provides that "The main responsibilities of the international civil presence will include … j. protecting and promoting human rights", and gives KFOR, in its Section 9, the specific mandate of

[1] European Court of Human Rights (ECtHR) *Behrami v. France* (application no. 71412/01).

[2] ECtHR, *Saramati v. France, Germany and Norway* (Application no. 78166/01).

[3] The KFOR Commanders' (COMKFOR) authority over Kosovo was established in a Military Technical Agreement (MTA) negotiated in Kumanovo (Macedonia) between NATO and the Former Republic of Yugoslavia on June 9th, 1999. The UN Security Council issued Resolution 1244 the day after. Concerning the degree of authority conferred to COMKFOR, the MTA provides in its Article V that "The international security force ("KFOR") commander is the final authority regarding interpretation of this Agreement and the security aspects of the peace settlement it supports. His determinations are binding on all Parties and persons."

"Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered." The safeguard of human rights is believed to depend also on an ultimate mechanism of judicial review of acts performed by UNMIK and KFOR, not implemented so far. In the view of the sending States, admissibility of such complaints, considered a distortion of the scheme of the Convention, risks undermining significantly the States' participation in international missions. Intervening in the case of ***Berhami,*** Britain and five others countries argued that no international operation of that kind could ever be mounted if sending States would be held accountable for any violations of human rights they committed during military operations.[4]

Extraterritorial Jurisdiction

Accountability of troop-contributing nations implementing a international mandate is strictly related to the conditions of troops deployment. As a general rule, servicemen are immune from any criminal, civilian or administrative proceeding[5]. The sending State retains the operational command as well as criminal and disciplinary powers over their own personnel. In Kosovo, KFOR Headquarters (HQ) based in Pristina maintains the overall command and control on the military mission. In a footnote to a press statement on the cases cited above, the European Court stated on the matter as follows: "Resolution No. 1244 provided for the establishment of KFOR under UN auspices with "substantial NATO participation" under "unified command and control". Each multinational brigade had a national commander, with disciplinary powers over the troops, who applied national rules of engagement. However, KFOR command retained operational control and command of the brigades." Actually governments regulate troops serving abroad behaviour through a set of rules of engagement (ROE) which prescribes limits in the use of military force. Further limitations in operational matters depend on *caveats* due to national policies or regulations. The freedom to act and, consequently, the accountability regime, depends on operational environment too. The use of lethal force in preventing loss of life or serious bodily harm is accepted as a general form of self-defense. In some situation, mainly in those of peace-enforcement, defendants might invoke combat immunity. In principle, combat immunity should be considered as an exemption from liability for damages caused by military personnel under attack or threat of attack. Mandates include normally the power to arrest and detain individuals, to search houses and to seize properties. Scholars infer that, as an emanation of the executive branch abroad sharing such a power, troops are not immune from human rights obligations arising from treaties that sending States ratified or from customary international law.

States members of the Council of Europe have to grant fundamental rights resulting from the European Convention on Human Rights (ECHR) to all persons *within*

[4] *Governments contest human rights accountability of troops in Kosovo,* The Guardian, November 13, 2006.

[5] UNMIK Regulation 2000/47 (18 August 2000), Article 2.

their jurisdiction. In *Loizidou v. Turkey* the ECtHR held that "The concept of "jurisdiction" under Article 1 of the [European] Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory". The Court added that "The responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory."[6] In deciding a complaint against the NATO bombing of a broadcasting station in Belgrade, the Court argued that "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 the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[7] Significantly, the Court dismissed the applicants' argument aimed at sustaining that the control of the airspace over Belgrade by NATO forces was a form of extraterritorial jurisdiction. In addiction to the test of "effective control", the Court pointed out that the ECHR is a treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.[8]

In its General Comment n. 31, the UN Human Rights Committee held that "a State party must respect and ensure the rights laid down in the [1966 UN] Covenant [on Civil and Political Rights] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party", adding that "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, *such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation*."[9]

On the accountability for wrongful acts committed outside the legal space of the Convention, in 2005 the Supreme Court of Judicature, in the case of *R (Al-Skeini and Others) v. the Secretary of State for Defense*, held the British government responsible for violation of Articles 2 and 3 of the Convention in respect to the death of an Iraqi civilian detained in a British military prison in Basra, while dismissed the other five complaints concerning Iraqi nationals killed during confrontations between British soldiers and militia fighters, assuming that in those cases victims were not within the jurisdiction of the United Kingdom under Article 1 of the Convention.

In a report issued in 2001, the OSCE mission in Kosovo stated expressly those human rights obligations of Governments participating KFOR apply to the conduct of their troops abroad. In particular, in relation to the detention facility inside the US base of Camp Bondsteel, recalling Inter-American Commission on *Coard et al. v. the United*

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[6] ECtHR, *Loizidou v. Turkey*, § 52.

[7] ECtHR, *Bankovic and Others v. Belgium and 16 other Contracting States*, § 71.

[8] *Bankovic,* § 80.

[9] UN Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments), § 10 (emphasis added).

States, the report underlined that as the US ratified both the ICCPR and the American Declaration, the standards set forth in these instruments are binding on US KFOR.[10]

Law Applicable in Kosovo and Human Rights Protection

In accordance with UNMIK Regulation 1999/24 (as amended by regulation 2000/59), the law applicable in Kosovo is: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments; and (b) The law in force in Kosovo on 22 March 1989 (prior to the constitutional modification reducing the autonomy of the province). In exercising their functions public authorities have to observe internationally recognized human rights standards resulting form the international and regional instrument listed in section 1 par. 1.3 of the regulation. In 2001 the UN interim administration issued a Constitutional Framework. According to its Chapter 3, the ECHR as well as the 1966 International Covenant on Civil and Political Rights (ICCPR), is part of the constitutional framework[11].

In this frame, UNMIK and KFOR enjoy special status. On 17 August 2000 an agreement between the Special Representative of the Secretary General and COMKFOR, then reprinted as UNMIK Regulation 2000/47, stated that "All KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General insofar as they do not conflict with the fulfillment of the mandate given to KFOR under Security Council resolution 1244 (1999)."[12] KFOR has a general duty to respect the laws applicable in the territory of Kosovo, but *insofar* as they do not conflict with the fulfillment of the mandate. The Constitutional Framework, in its Chapter 13, provides that "Nothing in this Constitutional Framework shall affect the authority of the International Security Presence (KFOR) to fulfill all aspects of its mandate under UNSCR 1244(1999) and the Military Technical Agreement (Kumanovo Agreement)".

In an opinion released in 2004 on human rights in Kosovo, the European Commission for Democracy through Law (Venice Commission) argued peremptorily that "There is no *international* mechanism of review with respect to acts of UNMIK and KFOR."[13] In the Commission's opinion, "Each of the three main sources of potential human rights violations in Kosovo – UNMIK, KFOR and the Provisional Institutions of Self-Government – calls for a specific interim review mechanism."[14]

Accountability for Human Rights Violations in the Existing Situation

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[10] OSCE, *Kosovo Review of the Criminal Justice System,* October 2001, p. 40. In *Coard*, concerning the detention *incommunicado* of several civilians during the US intervention in Grenada, in 1983, the Inter-American Commission held that "Each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad" , see case 10.675, Report No. 51/96, § 37.

[11] For a comprehensive view on the issue see KNOLL, *Beyond the* Mission Civilisatrice: *The Properties of a Normative Order within an Internationalized Territory* in LEIDEN J. INT'L LAW, Vol. 19, No. 2, June 2006.

[12] See Section 2.2

[13] See Opinion n. 280/2004 (11 October 2004) - CDL-AD(2004)033, § 75.

[14] *Ibidem*, § 113.

The Venice Commission underlined that notwithstanding UNMIK acts or failures to act do not come within the jurisdiction of the ECHR, it does not mean to say that UNMIK is *legibus soluta.* Indeed, limitations derive from general international law and are linked to its own nature as an auxiliary body of the United Nations. Concerning KFOR, the question is more complex. KFOR is not part of the machinery of the UN. Moreover, the Force is under NATO command and control but a relevant part of its activities refers ultimately to troop-contributing nations[15]. The hybrid nature of the mission, as well as the margin of appreciation deserved to the participants, raises the issue of referring acts to NATO rather than to troop-contributing States. During Operation Allied Force, the 1999 NATO air campaign against Serbia, each participant State retained full control over its air crews through the right to deny authorization to sorties it did not agree. In *Bankovic* the respondent States maintained that "In accordance with the "*Monetary Gold* principle" of the ICJ, this [the European] Court cannot decide the merits of the case as it would be determining the rights and obligations of the United States, of Canada and of NATO itself, none of whom are Contracting Parties to the Convention."[16] France sustained that "The bombardment was not imputable to the respondent States but to NATO, an organization with an international legal personality separate from that of the respondent States."[17]

In Kosovo all relevant actors have to respect international human rights standards, but there is a vacuum in the regime of protection in terms of effectiveness. The solution proposed by the Venice Commission foresees an independent (judicial) review of UNMIK and KFOR acts, but there is little room for implementing that mechanism. KFOR is to guarantee a Kosovo-wide safe and secure environment. UNSCR 1244 conferred to KFOR powers which normally belong to police and security units. KFOR has gradually dropped its police tasks to UNMIK and local police forces (KPS), but it retains a residual responsibility on overall security. In particular, COMKFOR is the ultimate authority in implementing the mandate and the military technical agreement. In addiction, immunity granted by UNMIK Regulation 2000/47 excludes any form of local or international judicial power over acts performed in the accomplishment of the mission. On this point, Regulation 2000/47 provides also that any request to waive jurisdiction over KFOR personnel shall be referred to the *respective commander of the national element* of such personnel *for consideration* (emphasis added). It means that any remedial action against KFOR personnel -which do not arise from "operational necessity"- depends on the will of the troop-contributing nation. In its Standard Operating Procedure (SOP) 3023 (22 March 2003) COMKFOR stated that in claims arising from activities of troop-contributing nation, national regulations shall apply. In case of deny, the SOP provides for a mechanism of appeal which is merely voluntary.

[15] KFOR Standard Operating Procedures (SOP) 3023 (22 March 2003), concerning adjudication of claims for compensation, provides under Section 6 that each "Troop Contributing Nation [TCN] is responsible for adjudicating claims that arise from their own activities, in accordance with their own claims rules, regulations and procedures."

[16] *Bankovic,* § 31.

[17] *Bankovic,* § 32.

In 2005 the European Union Commission issued a "Kosovo (under UNSCR 1244) 2005 Progress Report", aimed at verifying the implementation of the Stabilization and Association process in the province. Concerning human rights, the document asserts that "Pursuant to the constitutional framework for provisional self-government in Kosovo, the main international human rights and fundamental freedoms instruments [including the European Convention on Human Rights] are directly applicable in Kosovo". As seen above, this statement does not correctly figure the current structure of human rights protection in Kosovo.

In principle, the applicability of the ECHR to KFOR activities lays on Regulation 1999/24 and on Chapter 3 of the Constitutional Framework for Provisional Self – Government. More generally, as an international security force established to fulfill a UN mandate, KFOR must comply with the relevant international law, including human rights. This means that in spite of its unique deployment, KFOR would not act in a legal vacuum.[18] However, KFOR retains an outstanding freedom of action. It must be kept in mind that those provisions concerning the status of KFOR personnel, apparently issued by UNMIK in its Regulation 2000/47, simply reprinted a "Joint Declaration on the status of KFOR and UNMIK and their personnel, and the privileges and immunities to which they are entitled". This declaration was subscribed between COMKFOR and the Special Representative of the Secretary General[19], an agreement between two quasi-sovereign subjects[20]. Moreover, UNMIK Regulation 2000/47 states that KFOR shall respect law applicable in the territory of Kosovo *insofar* as they do not conflict with the fulfillment of the mandate. It means that, whenever it was necessary for the fulfillment of its mandate, KFOR could autonomously exercise momentous powers, far beyond that executable by a State in case of emergency. While a State member of the Council of Europe –*within its territory*– may take measures derogating from their obligations under the Convention, to the extent strictly required by the exigencies of the situation, and in doing so it must respect limitations set forth in Article 15, KFOR theoretically might not.

In particular, considering its extra-judicial nature and the lack of *habeas corpus* procedures, KFOR power to detain civilians is actually not consistent to the ECHR.[21] In its judgment on *Jecius v. Lithuania,* the European Court pointed out that "A person may be deprived of his liberty only for the purposes specified in Article 5 § 1. A person may be detained within the meaning of Article 5 § 1 (c) only in the context of criminal

[18] CERONE, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, EUR. J. INT'L LAW (2001) Vol. 12 No. 3, 469 – 488.

[19] The preamble of Regulation 2000/47, in its fifth "paragraph", reads: "For the purpose of implementing, within the territory of Kosovo, the Joint Declaration on the status of KFOR and UNMIK and their personnel, and the privileges and immunities to which they are entitled."

[20] B. KNOLL described UNMIK and KFOR as "Holders of *imperium*". See *Beyond the* Mission Civilisatrice: *The Properties of a Normative Order within an Internationalized Territory* in LEIDEN J. INT'L LAW (2006), Vol. 19, No. 2, p. 290. C. STAHN described the unique status of UNMIK and KFOR as a "Self-accorded grant of immunity from any administrative, civil or criminal responsibility". See *The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis* in Max Planck UNYB, 5, 2001, p. 159.

[21] No individual results in custody inside KFOR detention facility of US camp "Bondsteel" after 2004. OSCE, Department of Human Rights and Rule of Law- Legal System Monitoring Section, *Kosovo Review of The Criminal Justice System 1999-2005, Reforms and Residual Concerns*, March 2006, p. 33.

proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offense."[22]

The Decision on Behrami *and* Saramati

Sitting on 2 May 2007 the Court declared, by a majority, inadmissible the application of *Behrami* and *Behrami* and the remainder of the *Saramati* application against France and Norway.

Before the Grand Chamber, the Respondent States disputed their jurisdiction *ratione loci* arguing, *inter alia*, that the applicants were not resident in the "legal space" of the Convention. As pointed out by the Court, Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling within their "jurisdiction", which is primarily territorial. According to the Court assessment a notion of "personal jurisdiction", or *ratione personae*, was in question. However, it considered the issue of the extraterritorial jurisdiction as a marginal question, arguing that the core question was whether it was competent to examine under the Convention States' contribution to the civil and security presences endorsed by the Security Council.

As usual, before the Court all key actors declined responsibility. In deciding the question, the Court raised a number of question marks. The most controversial was *Can the impugned action and inaction be attributed to the UN?* The Court stated that "UNSC Resolution 1244 gave rise to the following chain of command [in the present cases]: The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR". This "delegation model" is not convincing. Actually, since the Military Technical Agreement (MTA) was signed (by COMKFOR, the day before Resolution 1244 was issued) the chain of command stops at the North Atlantic Council (NAC) level[23]. Accordingly, the statement that "[…] KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was in principle "attributable" to the UN cannot be subscribed. While KFOR was exercising powers lawfully delegated under Chapter VII, its actions were not directly attributable to the UN. Indeed, the UN, in its submission to the Court, held that "KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO led operation authorised by the UNSC under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence."[24]

In the view of the Court, the fact that troop contributing nations (TCN) provided materially for their troops would have no relevant impact on NATO's operational control. Nevertheless, NATO's operational control should not affect the obligations each TCN participating the Council of Europe assumed, first of all that of guaranteeing to everyone

22 *Jecius v. Lithuania* - 34578/97 [2000] ECHR 404 (31 July 2000), § 50.

23 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.

24 *Behrami v. France* and *Saramati v. France, Germany and Norway,* § 118.

within their jurisdiction the rights and freedoms defined in the Convention.Intervening as a third party in *Berić and Others against Bosnia and Herzegovina*, the British government held that the Contracting States were not completely absolved from their Convention responsibilities in respect of compliance with obligations resulting from their membership of an international organisation to which they had transferred part of their sovereignty[25]. The Court argued that, when the responsibility of contributing States for actions or inactions of KFOR is at issue, the question raised is less whether the respondent state exercised extra-territorial jurisdiction in Kosovo, but rather whether this Court is competent to examine under the Convention that State's contribution to the civil and security presences which exercised the relevant control of Kosovo [26]. This is the ultimate assumption on the matter, since the Court confirmed it in the cited *Berić and Others against Bosnia and Herzegovina* (16 October 2007).

A Different Point of View

The European Convention on Human Rights is an international treaty having regional character that binds States members of the Council of Europe. NATO is an international organization with an originally-limited expanding regional scope. The majority of its members are also members of the Council of Europe, but NATO itself does not. Only European *States* can be members of the Council of Europe. Even if NATO and its non-European members would actually undertake the obligation to obey the decisions issued by the European Court, it should be a case-by-case obligation fully incompatible with the Article 1 of the Convention.

Assuming the impossibility to sue NATO for incidents involving troops under its command and control, are inhabitants of Kosovo really entitled to sue a member of the Council of Europe claiming misconduct of its troops belonging to KFOR?

Referring to the cited cases, a first issue concerns the fact that, at the relevant time, Kosovo was not part of the European legal space, normally coinciding with the territory of the State parties to the Convention. However, according to the last decisions on the matter, acts performed in Kosovo under direct national authority of a member of the Council of Europe, even if in a framework where the UN or NATO are in command, should be considered acts of State entailing its responsibility under Article 1 of the Convention. Such a conclusion should descend from the statement in *Issa and Others v. Turkey,* concerning the killing of six Iraqi nationals in Kurdistan. In *Issa* the Court did not exclude the possibility that, as a consequence of a massive cross-border military action, the respondent State could be considered to have exercised, temporarily, effective overall control over a particular portion of territory in northern Iraq -which clearly lies outside the *European legal space*.[27]

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[25] See on the matter *Berić and Others against Bosnia and Herzegovina,* 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 [2007] ECHR (16 October 2007). *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC] 45036/98, [2005] ECHR.

[26] *Gajic v. Germany*, 31446/02 [2007] ECHR (28 August 2007) § 1.

[27] See *Issa v. Turkey*, § 74.

A second issue regards the capability to ascribe acts performed under NATO control to a sole country. When wrongful acts are performed jointly by different contingents, the conclusions set forth in *Hess v. the UK* should apply. In that case, the European Commission on Human Rights decided for the impossibility to separate the joint authority exercised over Western Berlin by the Four Powers into single distinct jurisdictions. Hess was detained in the Spandau prison, in the British sector of West Berlin. The complaint aimed at challenging the conditions of his detention. The Commission held the case inadmissible arguing that the UK alone -i.e. without the consent of the other Four Powers- could not modify those conditions[28].

A further question concerns the possibility to sue UNMIK or KFOR before the European Court. Kosovo is still a Serbian province. Serbia and Montenegro ratified the European Convention in 2004, but, pending Resolution 1244, Serbia do not retain jurisdiction over Kosovo in the meaning of Article 1. UNMIK as the interim administration, exercises overall executive and legislative power and supervises over self-government authorities, but it cannot be considered as acting as a subsidiary organ or a substitute of the Serbian government. Consequently, Kosovars are not entitled to sue UNMIK before the European Court. Concerning the security force, the question is more complex. KFOR itself, as "the international security presence", is not within the jurisdiction of the Court. Sending States joined in KFOR should be.

According to Article 19 of the European Convention, the Court of Strasbourg has been set up in order to ensure the observance of the engagements taken by the High Contracting Parties. The Convention, in its current formulation, allows the Court to receive applications from any person or group claiming to be victim of a violation by one of those Parties. The most part of KFOR "contributors", as members of the Council of Europe, ratified the Convention. Those European members of the Force should be responsible in principle for wrongful acts committed by their troops outside the boundaries of their territories, but extraterritorial jurisdiction requires further special justification.

Acts committed abroad by its military entail the jurisdiction of the sending State only if the contingent exercises *overall effective control*, i. e. it exercises in a portion of the foreign country powers normally reserved to a State, or, in the words of the Court, "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 the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[29] No foreign contingent serving in Kosovo seems to retain such a power. It means that while inhabitants of Kosovo have theoretically the possibility to file an application before the Court, pending the current restrictive interpretation on extraterritorial powers, the conclusion of *Behrami v. France* in terms of "inadmissibility" should be correct, as the Court "[it] is not satisfied that the applicants and their deceased relatives were capable

[28] Eur. Comm. HR, *Hess v. the United Kingdom* (Application No. 6231/73).

[29] *Bankovi*c , § 71.

of coming within the jurisdiction of the respondent States on account of the extra-territorial act [or failure to act] in question."[30]

The case of *Saramati* is quite different. Everyone who is arrested has a right under Article 5 § 3 to be brought promptly before a judge. This rule aims at avoiding arbitrary behaviours, detention *incommunicado* and ill-treatment. In this second case the applicant was actually in the hands of State agents (troops) serving abroad. The respondent State should have been considered as exercising "personal jurisdiction" over the arrested. According to some scholars, personal jurisdiction, basically founded on the physical control of the arrested, instead of being "A broad form of extra-territorial personal jurisdiction effected by the exercise of state authority anywhere in the world"[31] is simply an exception to the primary doctrine of territorial jurisdiction, and is based on the "effective control of an area" rather than on the material apprehension of the individual. In the case of *Ocalan v. Turkey* concerning the arrest of the leader of the PKK in Kenya, the Court, moving away from the main opinion, observed that "The applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority *outside its territory*. It is true that the applicant was *physically* forced to return to Turkey by Turkish officials and was under their authority and control (emphasis added)."[32] The jurisdiction of the State in the meaning of Article 1 laid on the concept of "personal jurisdiction" and is based on the liaison between State jurisdiction and physical control exercised over the individual, even if the arrest occurred outside the European legal space. In the present case Mr. Saramati was arrested and detained *incommunicado* by State agents -even if under NATO command and control- outside the national territory of the State concerned in violation of the provisions set forth in Article 5. Accordingly, the Court should have stated violations imputable to the respondent States.

Conclusion

The involvement of NATO-led forces in atrocities is a highly improbable scenario. However misconducts damaging fundamental rights cannot be excluded, mainly in the use of powers limiting freedom of movement as well as during house-searching, which affects private and family life. Detention of individuals in order to gather intelligence or prevent crimes, without the possibility to challenge in a court the exercise of such a power, is in principle a violation of their fundamental rights, deserving scrutiny in Strasbourg.

More generally, by assuming the obligations set forth in the instruments on human rights, States assume also the duty to implement those rules, giving them effectiveness. Effectiveness claims judicial review of acts concerning individual rights. Arguing that no international operation of that kind could ever be mounted if sending

[30] Ibidem, § 82.

[31] *Al Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2004] EWHC 2911 (Admin) (14 December 2004), § 253.

[32] *Ocalan v. Turkey*, 46221/99 [2005] ECHR 282 (12 May 2005), § 91.

States would be held accountable for any violations of human rights, instead of adopting all measures to avoid such claims, is contrary in principle to the spirit and the contents of human rights law. In a report in 2003 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe underlined that "Yet there are areas where the application of the Convention comes up against insurmountable obstacles." The Committee reported that peace-keeping forces violate human rights is not a merely hypothetical situation, while concluding that "It is impossible, however, to analyze this question in any detail here, also because the present report is not meant to address operations outside the "legal space" of the Council of Europe."[33] The main issue remained the real extention of that legal space.

[33] See Doc. 9730, 11 March 2003, *Areas where the European Convention on Human rights cannot be implemented*, Report, *Summary* and section C, § 50.