

Rights Without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo

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Summary

The past decade of international institution-building in Kosovo has exhibited the inability, on the part of both civilian and security presence, to take full advantage of the entire spectrum of means ensuring vital aspects of good governance that are regularly encountered in liberal constitutions. While the United Nations Interim Administration Mission in Kosovo (UNMIK) created rules to govern the functioning of local institutions, the applicable legal framework failed to set limits on the powers of both the UN's civilian presence and the NATO-led Kosovo Force (KFOR), in charge of maintaining a secure environment. More worryingly, individuals within the territory continued to lack the basic protection mechanism that derived from Serbia's increased acceptance of international human rights instruments in past years. This practice is particularly problematic as the international administration retains authority, even after Kosovo's declaration of independence in February 2008, over aspects of justice and law enforcement – areas which are closely entwined with human rights guarantees. This article discusses the ECtHR Grand Chamber's recent admissibility decision in the joined cases *Behrami* and *Saramati* in which it held that the actions and inactions of UNMIK and KFOR are attributable to the UN, and reflects upon its wider implications for the supranational human rights protection for persons residing in a territory under the administration of international organisations.

Introduction

The extent to which Kosovars may rely on the European Convention on Human Rights (ECHR) to bring claims before the Strasbourg Court has, until its recent decision in the *Behrami* and *Saramati* cases,¹ remained open. Serbia and Montenegro (SCG), the holder of formal sovereign rights over Kosovo, had ratified the ECHR in 2004 without formulating reservations concerning the territorial application of Council of Europe (CoE) instruments. With reference to Art. 29 of the

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¹ *Behrami v. France*, No. 71412/01 and *Saramati v. France, Germany and Norway*, No. 78166/01, ECtHR, 2 May 2007, Decision (Admissibility).

1969 VCLT, there was thus a presumption in favour of the “validity” of the CoE treaty to the entire SCG territory, including Kosovo. This interpretation was, however, consistently challenged by UNMIK officials who argued that the fact *per se* that SCG is a party to any CoE convention did not automatically apply in Kosovo. A rule which committed a UN interim administration to respect all treaties which the state on whose territory it operates has concluded, would limit its mandate which was independently established by the UN Security Council.

More specifically, UNMIK argued that treaties and international agreements to which Serbia is party are not automatically binding on UNMIK owing to the *sui generis* situation of Kosovo under Security Council Resolution 1244.² This position was based on the binding nature of S/RES/1244 which, in the eyes of UNMIK and with reference to Art. 103 of the UN Charter, prevailed over obligations under any other international agreement in case of conflict. In short, UNMIK’s interpretation ensured that the implementation of UN sanctioned collective measures was not obstructed by treaty obligations.³

To partially fill this void, UNMIK rendered an impressive list of human rights treaties “applicable” within the territory through importing them into Kosovo’s legal order.⁴ The explicit imposition of the *jus publicum Europaeum* upon an internationalized territory was of high symbolic value at that time. The reference to human rights regimes not only imbued the new United Nations governance framework with legitimacy; the import of liberal conceptions and practices and the superimposition of foundational ideals of a legal order, especially in the spheres of constitutional, criminal and human rights law, also aimed at facilitating the normative shift from an *ancien régime* to a liberal future. In what seemed like a remote promise of a liberal future, the Venice Commission also concluded, in one of its opinions, that “[i]t is certainly unwarranted to leave the population of a territory in Europe indefinitely without access to the Strasbourg Court”.⁵

The assumption of effective control by a civil and military presence, in any case, meant that, *mutatis mutandis*, Serbia could not be held responsible for an alleged violation of human rights arising from an act or omission committed by UNMIK

² Letter of SRSJ Jessen-Petersen to the ECtHR President Luzius Wildhaber, 3 October 2005. See also the Report Submitted by UNMIK Pursuant to Art. 2.2 of the Agreement Between UNMIK and the CoE Related to the Framework Convention for the Protection of National Minorities (CoE Doc. ACFC(2005)003, Prishtina, 30 May 2005).

³ Danesh Sarooshi, *The United Nations and the Development of Collective Security*, Oxford 1999, at 151.

⁴ UNMIK/REG/1999/24 On the Applicable Law in Kosovo (12 December 1999) states that “in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards ...”, followed by a list of human rights instruments, among them the ECHR and the ICCPR (s.1.3). For a discussion of the “import” of the ECHR into Kosovo’s municipal law see Bernhard Knoll, *Beyond the “Mission Civilisatrice”: The Properties of a Normative Order Within an Internationalised Territory*, 19:2 LJIL 275-304, (2006).

⁵ Report of the European Commission for Democracy Through Law (Venice Commission), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms* (No. 280/2004), 60th Plenary Session, Strasbourg, 11 October 2004, at 17.

or KFOR. After all, it was prevented from (legally) exercising its jurisdiction in the territory of Kosovo due to the presence of an international mission mandated by a Chapter VII Resolution.⁶ The question, therefore, remained the following: is the ECHR merely valid on the territory under international administration or is it also executable?⁷ The latter point remained crucial: do Kosovars possess the procedural capacity to enforce the Convention's provisions *vis-à-vis* the UN and NATO troop contributing nations (TCNs)?

1. Extraterritorial Applicability of Human Rights Instruments

“The [ECHR] was not designed to be applied throughout the world.”⁸

Once it is established that Serbia's responsibility for human rights violations on the UN-administered territory is not engaged, the problem can be further broken down into three issue areas, which will be briefly touched upon. It can be formulated in terms of an instance of extraterritorial applicability of international human rights instruments in which ECHR signatories are “projecting” their *espace juridique* beyond their territorial boundaries. The issue gravitates around the interpretation of the term “jurisdiction” in Art. 1 of the ECHR and the question of whether anyone adversely affected by an act imputable to a contracting state – wherever in the world that act may have been committed or its consequences felt – is thereby brought within its jurisdiction.⁹ While the Court inevitably concluded in

⁶ Cf. UN Human Rights Committee, Report Submitted by UNMIK on the Human Rights Situation in Kosovo since June 1999 (13 March 2006), UN Doc. CCPR/C/UNK/1, § 131. See also the PACE Report, Areas where the ECHR Cannot be Implemented, Committee on Legal Affairs and Human Rights, Rapporteur C. Pourgourides, Doc. 9730, 11 March 2003, at 10: “[i]t would be unreasonable for a State to be held responsible for events which it is unable to prevent because they occur in a part of its territory that it occupied against its will”. While it is certainly impossible to hold Serbia accountable for acts imputable to UNMIK or KFOR, the former's maintenance of governance structures in part of Kosovo (such as parallel courts and police) could engage its responsibility for human rights violations. See PACE Resolution 1417, Protection of Human Rights in Kosovo (25 January 2005), § 18.

⁷ As the PCIJ held in the case *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Peter Pázmány University v. the State of Czechoslovakia)*, PCIJ (Ser. A/B), No. 61 (1933), the “capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself”. See also the distinction made by Hersh Lauterpacht, in: *International Law: Collected Papers*, ed. by E. Lauterpacht, Cambridge 1970, at 286-7: “The faculty to enforce rights is not identical with the quality of a ... beneficiary of its provisions. A person may be in the possession of a plenitude of rights without at the same time being able to enforce them in his own name. This is a matter of procedural capacity.”

⁸ *Banković a.o. v. Belgium and 16 Other Contracting States*, (2001), ECtHR, No. 52207/99, 12 December 2001 (Decision [Admissibility]), § 80.

⁹ *Ibid.*, § 75. In general, it should be evident that in view of the purposes and objects of human rights treaties, there is no *a priori* reason to limit a state's obligation to respect human rights to its territory. As Theodor Meron notes, “narrow territorial interpretation of human rights treaties is anathema to the basic idea ... which is to ensure that a state should respect human rights of persons over which it exercises jurisdiction”. Thus the presumption is that the state's obligation continues where

Banković that NATO forces did not exercise effective control of the relevant area when they bombed the Belgrade television station, the judgment cannot be read as excluding the possibility that a state could exercise its jurisdiction when a person is, for instance, brought into the custody or control of its agents.¹⁰ Indeed, the Court concluded in *Banković* that extraterritorial jurisdiction can specifically be recognised in cases where a state effectively controls the relevant territory and its inhabitants (whether as a consequence of military occupation or with the consent, invitation or acquiescence of the territorial government) and employs at least some of the powers normally exercised by that government.¹¹

In short, the first issue thus concerns the question of whether the jurisdiction of a state follows the exercise of public authority by that state and whether its authorized agents (including armed forces) bring other persons “within the jurisdiction” of that state when abroad. In essence, Strasbourg jurisprudence suggests that the ECHR applies extraterritorially in those special cases in which a contracting party exercises control over an area which lies outside its national territory but within the boundaries of the Convention.¹²

Second, the problem may be restated as one of imputability. This is clearly more complex than the *ratione loci* issue. As regards the civil administration of territory, it is unlikely that UN member states (which are parties to the ECHR) are responsible for the actions of their nationals within UNMIK, as they do not exercise any degree of control.¹³ Concerning security tasks, CoE member states regularly contribute troops to the international security force operating in the territory. *Prima facie*, it may be argued that since national KFOR contingents of Convention states are exercising governmental authority over a people in an area over which they exercise control, there is every reason why they should carry responsibility

agents of the state – whether military or civilian – exercise power and authority over persons outside national territory. The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties, 89 AJIL 78-82 (1995), at 80-82.

¹⁰ See the remarks by LJ Brooke in *R. (Al-Skeini a.o.) v. Secretary of State for Defence* (2005), Court of Appeal, EWCA Civ 1609 (Judgment), at § 81. The *Banković* decision is authoritatively discussed by Georg Ress, State Responsibility for Extraterritorial Human Rights Violations. The Case of *Banković*, ZEuS 73-89, (2003).

¹¹ *Banković*, *supra* note 8, §§ 67-73.

¹² As the ECtHR held in *Loizidou v. Turkey*, “the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory” (No. 40/1993/435/514, Judgment of 18 December 1996, § 52). The Court assumed such an extraterritorial applicability in the case of the occupation of northern Cyprus (*Cyprus v. Turkey*, No. 25781/94, 10 May 2001, Judgment, § 52), and in the case of the Russian influence, secured by the presence of Russian military, over the “Moldavian Republic of Transnistria” (*Ilaşcu a.o. v. Moldova and Russia*, No. 48787/99, 8 July 2004, Judgment, § 314). See also the recent ruling of the Lords of Appeal who held that the 1998 Human Rights Act applied to acts of UK public authorities abroad which exercised UK’s jurisdiction for the purposes of Art. 1 ECHR: *Al-Skeini a.o. v. Secretary of State for Defence* (2007), UKHL 26, 13 June 2007. For a novel application of the “effective control” test cf. *Issa a. o. v. Turkey* (2004), ECtHR, No. 31821/96, 16 November 2004 (Judgment).

¹³ Cf. Jens Narsten, Menschenrechtsschutz in internationalen Mandatsgebieten und ihre strukturellen Widersprüche am Beispiel des Kosovo, 17 Humanitäres Völkerrecht 144-151 (2004), at 150.

for securing the human rights of these people.¹⁴ The limitations of the argument are, however, clear: NATO (in our case) is an organisation with an international legal personality distinct from that of its participating states.¹⁵ As the Institut de droit international (IDI) resolved in 1995,

Important considerations of policy, including support for the credibility and independent functioning of international organisations and for the establishment of new international organisations, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of international organisations.¹⁶

The reasoning that guided the IDI in its resolution, formulated in response to a series of cases before English courts that involved the financial collapse of the International Tin Council,¹⁷ can easily be applied to our current discussion. While the extension of member state's "jurisdiction" (in the meaning of Art. 1 ECHR) to peace-building missions would certainly remove harmful inconsistencies in the protection against domestic and external acts of their state organs, holding a contributing State responsible for acts of its troops without enabling it to control the operation may serve as a negative incentive to the participation of some states in international forces.¹⁸ Upon the introduction of a general rule of liability, member States would necessarily begin to intervene in virtually all decision-making which would, in turn, be incompatible with the independent status of an international organisation. It therefore remained doubtful whether NATO's "organisational veil" could be pierced in order to hold individual states responsible for the acts of soldiers under the command and control of a multinational security force.¹⁹ Since an obligation of KFOR personnel to observe human rights can neither be explicitly deduced from Resolution 1244²⁰ nor from UNMIK Regulations stipulating the ap-

¹⁴ Sarah Williams/Sangeeta Shah, Case Analysis. *Banković and Others v. Belgium and 16 Other Contracting States*, EHRLR 775-781 (2002), at 781.

¹⁵ As Zwaneburg concludes with reference to Tomuschat and Pellet, application of the "objective" as well as the "subjective" theory of international legal personality suggests that NATO is, indeed, an international legal person vested with functions distinct from those of the member states, *Accountability of Peace Support Operations*, Leiden/Boston 2005, at 66-7.

¹⁶ The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of their Obligation toward Third Parties, Rapporteur: Rosalyn Higgins, 1 September 1995, available at <www.idi-iil.org>, Art. VIII.

¹⁷ The *Tin Council* cases are authoritatively discussed in a series of articles by Ilona Cheyne, *The International Tin Council*, parts 1, 2 and 3, in: 36 ICLQ 931 (1987); 38 ICLQ 417 (1989); 39 ICLQ 945 (1990).

¹⁸ Cf. Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, Dordrecht 1995, at 77.

¹⁹ See, however, the somewhat disingenuous decision of the hybrid Human Rights Chamber of Bosnia and Herzegovina in *Radić* in which it held that "British SFOR is not a party to the [ECHR] and the Chamber cannot find that any of the acts underlying the instant application falls within the responsibility of the possible respondent Parties", *Draško Radić v. SFOR*, No. CH/00/4194, 7 June 2000, § 7.

²⁰ See, however, the argument briefly presented below which suggests that an explicit mandate to protect human rights contained in a binding SC Resolution extends to TCNs and their contingents by virtue of Art. 25 of the UN Charter.

plicability of human rights instruments,²¹ and as NATO is not a signatory of the ECHR, the latter's protection mechanism may not extend to individuals under the former's effective control.

Solving the issue of imputability means asking the complex question of to which extent military forces are indeed placed at the disposal and under the operational command/control of NATO and whether there exists a joint international authority which cannot be divided into separate jurisdictions. Naturally, each case must be examined as to whether the specific act was performed under the operational control of the organisation or the sending state. If control remains with the TCN, it is critical to inquire whether individual human rights violations are committed within a "sector" of territory for which a CoE member state has genuine responsibility.²² Responsibility could be established even in cases where the contingent to which that member belongs is generally under the operational control of the organisation.²³

Third, the problem can be viewed as one of granting an excessive array of privileges and immunities to international actors. As widely criticised by international legal scholars,²⁴ human rights NGOs²⁵ and international organisations both within

²¹ Cf. John C e r o n e, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EJIL 469-488 (2001), at 473. The argument that since Resolution 1244 cannot authorise KFOR beyond the limitation applicable to the Security Council itself, KFOR is required to pay due regard to such standards. Jürgen F r i e d r i c h, *UNMIK in Kosovo: Struggling with Uncertainty*, 9 Max Planck UNYB 225-293 (2005), at 271-2, has not been substantiated in academic literature.

²² Cf. Heike K r i e g e r, *Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz*, 62 ZaöRV 669-702 (2002), at 677-686. In *Banković* (*supra* note 8), the Court did not decide the question whether Member States of an international organisation could be held responsible for the acts of the latter. Cf., in this context, the interesting admissibility decision in the case *Saddam Hussein v. Albania et al.* in which the ECtHR specified that S a d d a m "did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US and non-US forces except to refer to the overall Commander of coalition forces who was at all relevant times a US General [and did not] indicate which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover ... [T]here is no basis in the Convention's jurisprudence and the applicant has not invoked any established principle of international law which would mean that he fell within the respondent State's jurisdiction on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US ..." (No. 23276/04, 14 March 2006).

²³ Z w a n e n b u r g considers the (hypothetical) situation that the Dutch contingent in Srebrenica received instructions from its government concerning the attitude it must take toward the transfer of the local population by Bosnian Serb forces: "If such were the case, the conduct of the contingent would be attributable to the government, even though the agreement between the Netherlands and the UN concerning the participation of Dutch troops in the operation specified that the UN was in command." *Accountability under International Humanitarian Law for UN and NATO Peace Support Operations*, Ph.D. on file with Leiden University, 2004, at 111.

²⁴ The amount of literature devoted to the incompatibility of UN immunity rules with international human rights law is steadily increasing. See, e.g., Frederick R a w s k i, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 Connecticut JIL 103 (2002), at 124 et seq. and C e r o n e, *supra* note 21.

²⁵ Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Setting the Standard? UNMIK and KFOR's Response to Violence in Mitrovica*, AI Index EUR 70/13/2000, March 2000.

and outside of Kosovo,²⁶ UNMIK was vested with functional immunity that covers both criminal and civil matters, only to be waived by the SRSG if this does not undermine the interest of UNMIK.²⁷ KFOR was granted absolute immunity from jurisdiction before Kosovo courts for administrative, civil and criminal matters.²⁸ As a consequence of this arrangement, the rights of Kosovars to seek review of, and redress for, alleged violations of their rights by UNMIK and KFOR remained non-existent.

2. *The Bebrami and Saramati Cases*

As regards the concrete situation in Kosovo, the Grand Chamber of the ECtHR had to tackle the issue of imputability in the joined cases *Bebrami* and *Saramati*. The first case concerned the responsibility of (French) KFOR troops for an alleged negligent failure to dispose unexploded ordnance in an area for which they were responsible, as a result of which one boy was killed and his brother severely disfigured. The second case involved the arrest of Mr Saramati by the order of the (Norwegian) Commander of KFOR following his earlier release from pre-trial detention by Kosovo's Supreme Court. Mr Saramati's detention was prolonged numerous times by KFOR's command which had, in the meantime, passed to a French national.²⁹ Within this period, Mr Saramati's case had been transferred to a district court for re-trial which eventually convicted him of attempted murder, a judgment that was later overturned by the Supreme Court. Mr Saramati was eventually released, having spent over six months within Kosovo's extra-judicial detention system.³⁰

At the outset, it was clear that an argument that would have sought to limit the ECHR's abstract jurisdictional reach to territories which "would normally be covered by the Convention"³¹ could not have excluded Kosovo. As explained earlier, Serbia (at that time in a state union with Montenegro), at that time the holder of the nominal title over the territory, became a contracting party in March 2004

²⁶ Cf. the various Reports by the OSCE Mission in Kosovo, Department of Human Rights and Rule of Law and especially its Remedies Catalogue. For a critique of the opaque references to, and defective entrenchment of, international human rights law in Kosovo, see the Ombudsman's Special Report No. 2, Certain Aspects of UNMIK Regulation No. 2000/59 (30 May 2001), as well as the report of the CoE Commissioner for Human Rights, Kosovo: The Human Rights Situation and the Fate of Persons Displaced from their Homes Strasbourg, 16 October 2002, CommDH (2002)11, at 48.

²⁷ S. 6.1 of UNMIK/REG/2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000). Similar provisions on the immunity of World Bank personnel were earlier laid down in UNMIK/REG/2000/44 On the Privileges and Immunities of the World Bank Group and Its Officials in Kosovo (10 August 2000).

²⁸ UNMIK/REG/2000/47, S. 2.4.

²⁹ Command over KFOR is rotated every six months with the approval of NATO.

³⁰ For the circumstances of the cases see *Bebrami and Saramati*, *supra* note 1, §§ 5-17.

³¹ *Banković*, *supra* note 8, § 80.

without formulating a reservation as to its non-applicability in Kosovo.³² The Grand Chamber's silence on the *ratione loci* issue in the *Behrami* decision suggests that Kosovars are clearly "capable of falling within" the jurisdiction of respondent States.³³ After all, the central rationale underlying the presumption against extra-territoriality – namely, that it is customarily inappropriate for one state authority to intrude upon the preserve of another – does not apply when it is an international presence that exercises all or some of the public powers normally exercised by a government.³⁴

The first question therefore was whether the Court would draw the conclusions *contrario* from its earlier reasoning in *Banković* and the novel control criteria elaborated therein and consider *Behrami* and/or *Saramati* as "exceptional cases" in which France and/or Norway exercised effective control as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory,³⁵ and whether acts undertaken in their exercise were at all imputable to the respondent States. The second issue for the Court to decide, one would have thought, was whether there was a jurisdictional link between *Behrami*'s death and France, (and *Saramati*'s extrajudicial detention and Norway and France respectively).

An affirmative decision would have constituted a logical progression from established human rights case law, in particular the equivalent protection test devised by the European Commission for Human Rights (EComHR) and further developed by the Strasbourg Court which held that a State cannot free itself from, but must continue to secure, Convention rights when transferring broad functions to international organisations.³⁶ According to this test, compliance with human rights standards is presumed as long as an equivalent level of protection is granted by the same organisation. Such presumption may, however, be rebutted if "it is considered that the protection of Convention rights was manifestly deficient".³⁷ To coun-

³² Post-*Issa*, the argument that the Convention applies only within the proper "jurisdictional space" of the ECHR's High Contracting parties has, in any case, lost much of its vigor: "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or not – in the latter State" (*supra* note 12, § 71).

³³ Cf. *Banković*, *supra* note 8, § 54.

³⁴ Adapted from *Banković*, § 71 and quoted in *Behrami and Saramati*, *supra* note 1, at § 70. Cf. also LJ Brown of Eaton-Under-Heywood in *Al-Skeini a.o. v. Secretary of State for Defence* (2007), *supra* note 12, § 129.

³⁵ *Banković*, *supra* note 8, § 71.

³⁶ In its Judgment of 18 February 1999 (*Waite and Kennedy v. Germany*), the ECtHR held that "where States establish international organizations ..., and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution", No. 26083/94, 18 February 1999, § 67.

³⁷ *Bosphorus Airways v. Ireland* (2005), ECtHR, No. 45036/98, 30 June 2005 (Judgment), § 156. In this case, the Court essentially endorsed the "equivalent protection" test devised in *M. & Co. v. Federal Republic of Germany* (1990), EComHR, No. 13258/87, 9 February 1990 (Decision), at § 52. Simi-

ter-balance such expansion of the applicability of the Convention, the Court could have adopted a sliding scale of scrutiny and by setting, as it did in *Issa a. o. v. Turkey*, a higher evidentiary threshold.³⁸

Overall, whether or not a jurisdictional link existed between the applicants and the respondent States was, as Aurel Sari correctly notes, a preliminary matter that should have, both in logic and in principle, be addressed before the enquiry into the attributability of the conduct to these States.³⁹ The Court, however, took a different route. It considered that the question raised by the cases was less whether the States concerned exercised extraterritorial jurisdiction in Kosovo but, more centrally, whether it was at all competent to examine those States' contribution to UNMIK and KFOR, as they exercised control over Kosovo.⁴⁰ Its reasoning which eventually led to an inadmissibility decision involved the operation of a con trick known as the Shell Game, in the course of which the pea disappears the quicker the shells are shuffled around. In this exercise, the Court was surrounded by a cheering throng of insiders – troop contributing nations as well as UNMIK. As in the real-life game, the ensuing decision in which responsibility for human rights violations vanished under the skilled hands of the judges gives rise to a heightened sense of anger and disappointment: it confirmed the unavailability of effective remedies against actions of international organizations in a situation in which they undoubtedly exercise effective control over territory and its people.

The operation involved a number of argumentative steps which are worth highlighting. The *Behrami* case which had a lesser chance of admission was thrown out by determining that the mandate for the engagement of a KFOR TCN in this particular field lay with the UN. KFOR, the Court held, was at the time of the accident no more in charge of de-mining, for which UNMIK's Mine Action Coordination Centre had assumed overall responsibility by providing policy guidance, identifying needs and priorities and defining the operational plan and structure. It merely relied on KFOR contingents to implement mine action activities:⁴¹ "Whether ... KFOR had failed to secure the site and provide information thereon

lar: *Matthews v. UK* (1999), ECtHR, No. 24833/94, 18 February 1999 (Judgment), 42 YECHR, 78 (1999), at § 32. See also Danesh Saroshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford 2005, at 64.

³⁸ I.e. rendering the positive obligation under Art. 1 proportionate to the level of control exercised. Cf. Nuala Mole, *Issa v. Turkey: Delineating the Extra Territorial Effect of the European Convention of Human Rights*, 1 EHRLR 86-91 (2005), at 90, as well as Rick Lawson, *Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights*, in: *Extraterritorial Application of Human Rights Treaties*, F. Coomans/M. Kamminga (ed.), Antwerp/Oxford 2004, 83-123, at 105-7.

³⁹ Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 Human Rights Law Review 151-170 (2008), at 158.

⁴⁰ *Behrami and Saramati*, *supra* note 1, § 71.

⁴¹ *Ibid.*, § 55. The conclusion that the mandate for supervising de-mining was taken over by the UNMACC prior to the detonation date and that KFOR contingents remained involved as service providers acting on behalf of UNMIK is found at § 124-5.

to UNMIK, this would not alter the mandate of UNMIK.”⁴² Attribution of conduct could be determined only according to the factual criterion of effective control exercised in joint operations.⁴³ Since UNMIK did not exercise any control over State organs placed at the disposal of KFOR in the meaning of Art. 5 of the ILC Draft Articles on the Responsibility of International Organisations,⁴⁴ it could not be “responsible” for their conduct. The international responsibility of an international organisation for Behrami’s death had thus fallen, and vanished, between the cracks of UNMIK’s overall abstract mandate characterized by the lack of control over the service providers it merely coordinated and KFOR’s functions of transitional security assistance undertaken in this field on behalf of another entity.

Of the two cases, *Saramati* was clearly the more difficult to resolve, because KFOR had the authority to detain under Resolution 1244 independently of UNMIK when it deemed this necessary to maintain a safe and secure environment and to protect KFOR troops.⁴⁵ This has been admitted by the implicated Norwegian COMKFOR in a letter to the OSCE’s resident Head of Mission within the critical time period: “SHAPE has authorized me as COMKFOR to take appropriate measures with regard to detention. KFOR itself has formulated basic rules on this subject.”⁴⁶ As confirmed by the SRSG in an earlier letter, “[a]s such, KFOR detentions are entirely distinct from cases that must be processed throughout the Kosovo judicial system ... Where KFOR is unable to make available sensitive information [to the judiciary], including intelligence, UNSCR 1244 vests KFOR with the authority to determine the subsequent detention of such individuals.”⁴⁷

⁴² Ibid, at § 126.

⁴³ See *ibid.*, § 32, with reference to the ILC Commentary on Art. 5.

⁴⁴ “The conduct of an organ of a State or an organ or agent of an international organisation that is placed under the disposal of another international organisation shall be considered under international law an act of the latter organisation *if the organisation exercises effective control over that conduct.*” (author’s emphasis). Art. 5 was adopted in 2004 during the ILC’s 56th session, see the Report of Special Rapporteur Gaja on the Responsibility of International Organisations of 2 April 2004, UN Doc. A/CN.4/541.

⁴⁵ On its part, UNMIK has also authorised and carried out preventive detentions, arguing that an individual poses a threat to public safety and order. The SRSG has issued a number of executive orders extending detention periods without specifying the grounds for the continued detention, and without providing the detainee with an opportunity to challenge the lawfulness of the decision. The Kosovo Ombudsperson found that the absence of judicial control over deprivations of liberty imposed under those Executive Orders constituted a clear violation of the ECHR, Special Report No. 3: On the Conformity of Deprivations of Liberty under “Executive Orders” with Recognised International Standards, Prishtina, 29 June 2001. See also Elisabeth Abraham, *The Sins of the Saviour: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions In Its Mission in Kosovo*, 52 *American University LR* 1291-1337 (2003).

⁴⁶ Letter from Lieutenant General Thorstein Skiaker, Commander Kosovo Force, to Amb. Daan Everts (Prishtina, 6 September 2001, on file with the author), p. 1 (also referenced in *Behrami and Saramati*, *supra* note 1, § 51).

⁴⁷ Letter from SRSG Hans Hækkerup to Amb. Daan Everts (Prishtina, 31 August 2001, on file with the author), p. 2. That KFOR’s security mandate included issuing detention orders was confirmed by the Court in *Behrami and Saramati*, at § 124 and § 127.

This meant, *prima facie*, that responsibility for the detention could not be passed on to UNMIK, as in *Behrami*. It stuck with KFOR, a force made up of NATO and non-NATO troops over which, as the Venice Commission remarked, COMKFOR had mere limited powers of operational control, as opposed to full command.⁴⁸ At this juncture, the Court could have interrogated the argument, presented by the applicant,⁴⁹ that COMKFOR had authorised Mr Saramati's extra-judicial detention and consecutively prolonged it without reference to NATO's high command but on the basis of the default authority that the TCNs Norway and France and their respective Ministries of Defence maintained over their nationals. In other words, it could have inquired whether COMKFOR acted in a national capacity whose conduct was directly imputable to a Convention signatory, or whether he acted as an international organ in the exercise of his powers delegated by NATO Headquarters. Given the absence of a truly integrated chain of command that functions to the exclusion of TCNs, the Grand Chamber could have also given consideration to the role of the commanders of the four multi-national brigades in the review of detention cases and their tight and daily interaction with authorities in their capitals on essential questions pertaining to the maintenance of security.⁵⁰

It would be facetious to argue that a properly undertaken investigation along those lines proposed here would have resulted in a positive admissibility decision. The Court may have looked for jurisprudential guidance in the *ratione decidendi* of the *Hess* decision in which the EComHR found that Spandau prison was established on the basis of a collective decision of the *Kommandatura* and that the subject of the complaint was a matter for which the Four Powers were jointly responsible.⁵¹ Following such considerations, accountability may have evaporated by virtue of a recognition that multilateral military arrangements involve the assumption of "communal" responsibilities that are indivisible and cannot be imputed to one Contracting party.⁵² While a more intensive examination of the matter may have still yielded a disappointing outcome, it would have forced the Grand Chamber to reconcile such recognition with its equivalent protection doctrine.

⁴⁸ Opinion No. 280/2004, *supra* note 5, at § 14.

⁴⁹ *Behrami and Saramati*, § 78.

⁵⁰ Lieutenant General Skiakeer admitted in the letter quoted above, "extended detention is only possible if authorised by me personally in each individual case. Each of these cases is carefully reviewed by the staff and the commanders of the multinational brigades concerned as well by a review panel at KFOR Main Headquarters. The criterion for extended detention is that the person in question represents a threat to the safe and secure environment."

⁵¹ *Hess*' application was inadmissible because the joint authority could not be divided into separate jurisdictions; the Commission was without *ratione personae*, *Ise Hess v. United Kingdom* (1975), EComHR, No. 6231/73, Decision of 28 May 1975, 2 DR 9, at 74. For the question of whether France and Britain were bound by the ECHR in the Allied occupation of Berlin, cf. Joachim Herbst, *Gerichtlicher Rechtsschutz gegen Hoheitsakte der Alliierten in Berlin (West)*, Frankfurt a.M. 1991, at 53-64.

⁵² In the present decision, the Court was satisfied that it found "no suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter" (§ 139).

Second, had the Court entered into a discussion on the “divisibility” of authority over people into different national jurisdictions, it would have encouraged Kosovar applicants whose fundamental freedoms had indeed been limited upon the explicit order of a TCN capital.⁵³ Surely, the presumption that the conduct of troops that are an integral part of a peace support operation is attributable only to the international organisation must be rebuttable if it is established that the contingent acted upon the order and on behalf of the TCN.⁵⁴

To evade this bind, the Court took a completely different turn, by which it closed all avenues for individual complaints against acts of multilateral peacekeeping missions mandated under Chapter VII of the Charter. Instead of concerning itself with jurisdictional issues and the question of imputability to TCNs,⁵⁵ it stove-piped accountability to the only body which cannot be held to it: the UN Security Council.

These final moves within the Shell Game deserves closer consideration since the judges seem to have taken at face value the TCNs’ contention that the SC retained “ultimate authority and control” over KFOR.⁵⁶ While the SC has, in exercise of its responsibility for the maintenance of international peace and security, “authoriz[e] Member States and relevant international organizations” to establish an international security presence,⁵⁷ the Charter basis for this Resolution remained Art. 48 which stipulates that “[s]uch decision shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies”.⁵⁸ Member States had not, as argued by Denmark,⁵⁹ put military personnel at the disposal of the UN in Kosovo. They had put personnel at the disposal of NATO, which was furnished by the SC with a mandate distinct from UNMIK, with which it did not stand in a hierarchical relationship.⁶⁰ By outsourc-

⁵³ According to most national rules of engagement, the use of force must be (co-)authorised by the TCN, thus facilitating a determination whether the acts of a national contingent (say, the forceful dispersal of a demonstration in Mitrovica by the French KFOR contingent) was imputable to a Convention party.

⁵⁴ Cf. the commentary to Art. 5 of the draft Articles on the Responsibility of International Organizations as well as *Zw a n e n b u r g*, *supra* note 23, at 132.

⁵⁵ Note the argumentative steps employed in the Court’ assessment (§ 121) which merely refer to the process of ascertaining whether the impugned action of KFOR could be attributed to the UN.

⁵⁶ For France: § 83 of the decision; Norway: § 87; joint oral submission of France and Norway: § 95; Denmark: § 98; Germany: § 104; Greece: § 109. Interestingly, the argument that the SC retained “ultimate control” over KFOR was not made by the UN in its submission (§§ 118-120).

⁵⁷ S/RES/1244, § 7. The argument that delegation to NATO was “neither presumed nor implicit, but rather prior and explicit in the Resolution itself” (*Behrami and Saramati*, *supra* note 1, § 134) is misconceived.

⁵⁸ Emphasis supplied. Art. 48 has to be contrasted to Art. 42 which gives a range of military options which the SC *itself* may take.

⁵⁹ *Behrami and Saramati*, *supra* note 1, § 99.

⁶⁰ In Resolution 1244, the Security Council requested the Secretary-General to instruct his Special Representative merely to “coordinate closely with the international security presence to ensure that both presences operate towards the same goal and in a mutually supportive manner” (§ 6, author’s emphasis). The SG was not authorized to exercise “overall control” over KFOR on behalf of the SC,

ing the establishment of a security force to another international organisation, the SC intended precisely to free KFOR's planning and operations of the political constraints that "ultimate control and authority" entail, especially in view of the veto power of two of its recalcitrant permanent members.⁶¹ The Court misinterpreted the use of the term "authorisation" in S/RES/1244 by contending that what the Resolution had actually intended was to delegate operational command only to NATO to exercise its (that is, the SC's) functions.⁶² Given that its entire intellectual operation that steered the shifting of responsibility from TCNs to the Security Council hinges on this differentiation, it is astonishing that the Grand Chamber has not invested more thoroughly into inquiring how public law concepts of delegation, authorisation and agency are reflected upon in the pertinent literature.

Given the decision's lack of argumentative depth in this regard, it is thus not surprising that it never explained how the Security Council's "ultimate control" over KFOR has manifested itself in the years since 1999. Did the Court consider the SC's competence to eventually terminate KFOR's mandate (and replace S/RES/1244) as sufficient to qualify the relationship as "ultimate control"?⁶³ Did it seriously believe that "ultimate control" was established by an obligation of the UN Secretary-General to submit regular reports to the SC which should include reports not only from the civil but also the security presence in Kosovo?⁶⁴ Or

irrespective of the fact that both civil and security presence operated under "UN auspices". Cf. Sari, *supra* note 39, at 165. On the issue of periodic reporting to the SC see also note 64 *infra*.

⁶¹ The mandate of KFOR is to continue unless the SC decides otherwise, S/RES/1244, § 19. This provision avoided the risk that by using its veto, a permanent member could terminate the mandate.

⁶² See the remarkable § 43 to which § 129 refers. Whether operational command only was delegated is considered as a "key question" in § 133. This focus was unwarranted as S/RES/1244 did not mention delegation in this context, nor was it presumed or implicit. Instead, according to the Resolution's § 5, the SC merely decided "on the deployment in Kosovo, under United Nations auspices, of international civil and security presence" (author's emphasis). Erika de Wet's contention that "what is important is that overall control of the operation remains with the Security Council" is too general as to be of assistance in this regard. The Chapter VII Powers of the United Nations Security Council, Oxford/Portland Oregon 2004, at 265.

⁶³ In § 134 of the decision, the Court seems to say that it does not. See also *supra* note 61.

⁶⁴ S/RES/1244, § 20. This interpretation seems to have been supported by Norway, which argued that the authority of the UN over the security presence was exercised through the SC as it "monitored the discharge of the mandate through the SG reports ... The monitoring systems in place confirmed this: ... the UNSC received feedback *via* the SG from KFOR and UNMIK." *Behrami and Saramati*, §§ 88 and 89. The Court made only a fleeting reference to KFOR's obligation to report to the UNSC so as to allow it "to exercise its overall authority and control" (§ 134). While periodic reporting may be regarded as a type of "answerability" that regularly operates within international organisations, the delegation of functions must be accompanied by mechanisms for oversight and direction to fulfil the condition of "overall authority" – a requisite clearly not met within the relationship between the SC and KFOR. This understanding is confirmed by the UN Secretariat which, invited by the ILC to comment on the attribution of the conduct of peacekeeping forces to the UN or to contributing states in case that a TCN's wrongful conduct was not requested but only authorised by the organisation, responded: "[a] measure of accountability was ... introduced in the relationship between the Security Council and member states conducting an operation under Security Council authorization, in the form of periodic reports to the Council on the conduct of the operation. While the submission of these reports provides the Council with an important 'oversight tool', the Council itself or the United Na-

should the Court have rather scrapped its unfounded conclusion and characterized the relationship between the UN Security Council and the North Atlantic Council (NAC) as one of “consultation/interaction”, as KFOR and Russia did in their “Agreed Points on Russian Participation in KFOR”?⁶⁵ It is in this regard rather disquieting that the Court did not deepen its discussion on the issue of responsibility should a State avail itself of the separate legal personality of an international organisation, in this case NATO, to circumvent its obligations by providing the latter with competence to commit an act which would be wrongful had it been committed by the State.⁶⁶

At the end of the day, the “stove-piping” of responsibility from NATO to the Security Council allowed the Court to evade all of the questions raised above. While the UN is clearly capable of being internationally “responsible” for an internationally wrongful act, it would not have fulfilled the factual criterion of effective control which Art. 5 of the Draft Articles on the Responsibility of International Organisations requires for the attribution of an act of an agent of an international organisation (such as NATO) to another organisation.⁶⁷ Second, even if the lack of attributability had been less obvious as in the case under consideration, the Court had to declare itself incompetent *ratione personae* to review any such act that could have been attributed as the UN is not a signatory of the ECHR. The search which the Court undertook to interrogate its competence to examine “under the Convention ... State’s contribution to the civil and security presence which did exercise the relevant control of Kosovo”⁶⁸ did not, as regularly observed in con tricks of this variety, reveal the locus of accountability. While the moves were hardly noticeable, the pea was hurled from one nutshell to the next before it evaporated to reveal a protection vacuum.

tions as a whole cannot be held responsible for an unlawful act by the state conducting the operation, for the ultimate test of responsibility remains ‘effective command and control’, A/CN.4/556, 12 May 2005, at 46. The quarterly SG reports to the SC on the activities of his subsidiary organ do not establish such or any other form of control; they merely contain separate sections on KFOR and its operations while the annexes in his reports are devoted to the technical assessments of the progress in standards implementation and are prepared by the SRSG alone. As LJ Bingham dryly remarked: “it is one thing to receive reports, another to exercise effective command and control”. *R (on the application of Al-Jedda) v. Secretary of State for Defence* (2007), House of Lords, UKHL 58, 12 December 2007, § 24.

⁶⁵ 18 June 1999, see § 44 of the *Behrami and Saramati* decision. It is NATO’s North Atlantic Council (and not the UN) which maintains authority over KFOR, its subsidiary organ. The new International Military Presence that may take over from KFOR in due course will be embedded in the same framework, according to the (fifth) draft of the SC Resolution to replace S/RES/1244 which key NATO members tabled on 17 July 2007 (and later withdrew due to the threat of a Russian veto). Annex II of S/2007/437 foresaw that the IMP “will operate under the authority and be subject to the direction and political control” of the NAC “through the NATO Chain of Command” (§ 2).

⁶⁶ Cf. Art. 28 of the ILC Draft Articles on the Responsibility of International Organizations, ILC Report 2006 (UN Doc. A/61/10), at 283-286.

⁶⁷ See *supra* note 44.

⁶⁸ *Behrami and Saramati*, *supra* note 1, § 71.

3. Use and Abuse of Art. 103 of the UN Charter

As a result of its finding that the SC retained “ultimate authority and control” over COMKFOR’s decision to arrest and detain Mr Saramati outside of Kosovo’s criminal justice system, the Court observed that “KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, ‘attributable’ to the UN”.⁶⁹ The Court’s obsessive focus on the legality of KFOR action obscured the wider point – namely, that the “lawfulness” of a military operation under international law is not the decisive criterion for the determination of accountability for human rights violations. As the ECtHR held in *Issa a.o.*, a state may be held accountable for the violation of rights of complainants residing in the territory of another state “but who are found to be under the former state’s authority and control through its agents operating – lawfully or unlawfully – in the latter state”.⁷⁰ As *nemo plus iuris transferre potest quam ipse habet*, it would also have been interesting to see the ECtHR inquire into the competence of the SC to indefinitely detain persons without access to a court. Due to considerations of *ratione personae*, it refrained from such investigation.

One of the most worrying aspects of the Court’s reasoning, undertaken in an important passage towards the end of the decision, is its discussion of the relationship between the ECHR and the UN Charter. The inquiry itself was, strictly speaking, not necessary as attributability had already been shifted away from ECHR signatories to the responsibility vacuum in which the Security Council is situated. In its attempt to establish a hierarchy between Chapter VII mandates and human rights obligations of presumably lower normative quality, the Grand Chamber had regard to the Articles 25 and 103 of the Charter.⁷¹ Art. 103, it is recalled, stipulates that in the event of a conflict between obligations under “any other international agreement” and Charter obligations (and by extension obligations under a UNSC Resolution based on a Chapter VII mandate), the latter should prevail. The utilisation of this argument in the present context is cause for great concern. The confirmatory references to the applicability of Art. 103 of the Charter in this context can only be interpreted as meaning that the Court suggested that measures taken in pursuit of a Chapter VII mandate cannot – neither in this nor in any future instance – be measured against concrete standards of human rights treaty law, as a matter of normative hierarchy.

Given that the right to seek protection from the courts is an essential element of any democratic legal system, the insinuation that considerations of security leading to prolonged extrajudicial detentions prevail over obligations to provide for a fair trial and secure effective remedies is a thoroughly disturbing argument coming from a supranational human rights court in Grand Chamber formation. Art. 103 was meant to provide a rule in case that international obligations conflicted, yet it

⁶⁹ Ibid., § 141.

⁷⁰ *Issa a.o. v. Turkey*, *supra* note 12, § 71.

⁷¹ *Behrami and Saramati*, *supra* note 1, § 147 referring to § 26.

was never meant to generate a hierarchy of treaty law according to which states could be absolved *in toto* of their human rights obligations with reference to binding instruments of the SC. While Articles 25 and 103 allow for the derogation of international treaty law, the SC must be presumed to do so explicitly.⁷² The Grand Chamber, in other words, should have taken into account the principle that exceptions to a general rule must be interpreted narrowly.

Secondly, the Court failed to specify the nature of the “conflict” between the requirements of the Convention and the authorisation contained in Resolution 1244 that could be considered in the light of Art. 103. To be sure, the authorisation of “member states and relevant international organisations to establish the international security presence” (S/RES/1244, §7) that is to ensure public safety and order had never stood in “conflict” (Art. 103) with the requirement, under Art. 6 of the ECHR, to provide Mr Saramati with access to an independent tribunal. Quite the opposite: There is nothing on the face of S/RES/1244 which “requires” detentions to be carried out in a manner inconsistent with, or conflicting with, the ECHR. Insofar as there is an “obligation” to undertake internment for imperative reasons of public safety and order, it does not lead, in and of itself, to a conflict with the ECHR.⁷³ Indeed, S/RES/1244 contains a clear mandate for the international civil presence to protect and promote human rights,⁷⁴ which through Art. 25 of the UN Charter (obliging members states to carry out the decisions of the SC) may arguably extend to those that contribute troops to a multinational peacekeeping operation such as KFOR.

It is at this point convenient to note that a finding that Mr Saramati’s rights had been breached at the merits stage would not have fully rectified the outlandish situation (both figuratively and literally) within an “internationalized” territory, as many TCNs are outside the reach of the ECHR, not least the state that operates the infamous Camp Bondsteel that was home to a number of detainees arrested under extrajudicial orders. Yet the Court failed to close a significant protection gap that had opened as the UN Security Council *de facto* freed ECHR parties active in Kosovo’s security sector from their international legal obligations and effectively

⁷² Such explicit authorisation to intern is arguably found in S/RES/1546 (8 June 2004) in which the SC, acting under Chapter VII of the Charter, “decide[d] that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution ...” (§ 10). The annex contains two letters by PM Alawi and Secretary of State Powell addressed to the President of the SC. Mr. Powell’s letter affirmed that the MNF will pursue activities necessary to counter ongoing security threats, including “internment where this is necessary for imperative reasons of security”. With regard to US citizens held overseas by American forces operating subject to a US chain of command, see the recent ruling by the Supreme Court in *Munaf et al. v. Geren*, Secretary of the Army (Nos. 06-1666, 07-394), 553 U.S. (2008). It held that actual government custody suffices for jurisdiction, even if that custody could be viewed as “under the color of another authority”, such as the MNF.

⁷³ Adapted from the interveners’ memorial in the case of *Al-Jedda*, *supra* note 64, by James Crawford/Shahed Fatima, 11 October 2007, § 68.

⁷⁴ S/RES/1244, § 11(j). See also the obligation of officials in Kosovo to observe human rights standards enshrined in UNMIK/REG/1999/24, *supra* note 4.

allowed them to perpetrate violations which they could not perpetrate with impunity within their own territories.⁷⁵ Kosovars, while in principle falling within the jurisdiction of an ECHR signatory, thus continue to find themselves excluded from the benefits of the Convention.

A decision affirming admissibility would undoubtedly have revolutionized the Court's stance on the ECHR's jurisdictional reach. Had the Court recognized that acts of troops and their commanders operating in a multinational framework were imputable not merely to a faceless "international community" but to a High Contracting Party, the Convention's jurisdiction would have been expanded to all territories in which peacekeeping troops of ECHR signatories are and will be deployed. While such a development would have dovetailed neatly alongside the recent affirmation of the extraterritorial application of provisions of international human rights treaties by the ICJ,⁷⁶ it presented a daunting prospect for some. On the one hand, it would have required the maintenance of structures capable of delivering all the rights and performing all the obligations required of ECHR signatories under the ECHR at a time when the Kosovo Police Service and Kosovo's nascent security force (KPC) were gradually taking over competencies in the area of policing, crime investigation, crowd control and other sensitive areas. Such an imperative would have clearly been at odds with the overall *raison d'être* of a mission that seeks to devolve powers to local institutions in synchronisation with their increasing capacities.

Yet, on the other hand, one could maintain that the protection of fundamental freedoms is an intrinsic part of an institution-building mission after the end of immediate humanitarian emergencies; once the international community assumes responsibilities and control over swaths of territory, its component parts – TCN contingents – drag their human rights obligations into the new theatre of operation. As LJ Sedley remarked in the *Al-Skeini* appeals case, it sits ill in the mouth of a state which has helped to displace and dismantle by force another nation's civil authority to plead that it has so little control that it cannot be responsible for securing the population's basic rights.⁷⁷ This argument is even more pertinent as KFOR did in no moment in 2001-2002 (the critical period in which Mr Sarajati was arrested) face the kind of anarchy and mayhem that British forces did in Basra between mid-2003 and mid-2004. Had TCNs in Kosovo believed that due to a

⁷⁵ Adapted from *Issa a. o. v. Turkey*, note 12, § 71.

⁷⁶ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports (2004) 136, §§ 109-111 (concluding that "the ICCPR is applicable in respect of acts done by a State in exercise of its jurisdiction outside its own territory"). For a discussion of this aspect of the Advisory Opinion, see John C e r o n e, *Out of Bounds? Considering the Reach of International Human Rights Law*, CHR/GJ Working Paper No. 5, 2006, at 5-6. For a critique of the Opinion in this regard, see Michael D e n n i s, *Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation*, 100 ASIL Proceedings 86-90 (2006).

⁷⁷ With reference to the British occupation of Basra region: *Al-Skeini a.o.* (2005), *supra* note 10, § 194.

public emergency they could not perform their security tasks (and put an end to what was, in comparison to Basra, a minor insurgency in neighbouring Macedonia fuelled by former KLA fighters) within the limits of the Convention, they could have temporarily derogated from their obligations under Art. 15(1) ECHR. No such derogation was deposited with the Secretary General of the Council of Europe.

Conclusion

The threat that no operations of this kind could ever be mounted in the future if TCNs were told that they would be accountable for the violations of human rights they committed in the course of their military operations abroad was put to the Court in a vigorous manner.⁷⁸ It appears the Grand Chamber was swayed as it produced the criterion of effectiveness – troop support from member states – which it saw as vital for the implementation of a Chapter VII mandate. In what may permanently deter persons under international mandate from seeking redress, the Grand Chamber held that “the Convention cannot be interpreted in a manner which would subject the acts or omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN’s key mission in this field, including ... with the effective conduct of its operations.”⁷⁹ With this statement of political expediency, the Grand Chamber not only achieved its aim of avoiding any further implication in issues of international peace and security. Considering the contemporaneous Opinion of the Lords of Appeal in *Al-Skeini* that affirmed that the 1998 Human Rights Act applied to acts of UK public authorities abroad as they brought persons within the jurisdiction of the UK for the purposes of Art. 1 ECHR,⁸⁰ the *Behrami and Saramati* decision yielded a remarkably asymmetric protection outcome: an Iraqi claimant falling under the effective control of an occupying power by virtue of his detention in a military prison may be more successful in seeking remedies than a Kosovar applicant who is held in custody under an order of a TCN.

⁷⁸ France and Norway: § 94 (warning of “serious repercussions which the recognition of TND jurisdiction would have including deterring TCN participation in, and undermining the coherence and therefore effectiveness of, such peacekeeping missions”); Germany: § 108 (“would run counter to the spirit of the Convention and its jurisprudence which supported international cooperation”); Poland: § 113 (“devastating effect on such missions”); and, most outspokenly, the UK: § 115 (“To superimpose that human rights structure upon a peace keeping force established by the universal organization would be inappropriate as a matter of principle and run counter to the *ordre public* to which the Court frequently referred and, further, risked causing serious difficulties ... in participating in ... peacekeeping operation outside the territories of the Convention States”).

⁷⁹ *Behrami and Saramati*, *supra* note 1, § 149.

⁸⁰ Opinion of June 2007, *supra* note 12. See in this regard Tobias Thienel, *The ECHR in Iraq*, 6 *Journal of International Criminal Justice* (2008), 115-128.

Andrew Clapham's recent assertion that "perhaps the clearest example of the application of international human rights law to the United Nations has been in the context of Kosovo"⁸¹ is open to challenge. In fact the opposite is true: if understood as a normative relationship between an addressee and a beneficiary, the concept of human rights in Kosovo appears deformed as international mechanisms and agents to effectively enforce abstract entitlements remained absent throughout the institution-building phase. The case of Kosovo is indeed instructive as it demonstrated how the institutional design of an administration rooted in the peace-keeping ideology drove an effective wedge between the validity/claimability and the executability of human rights norms by first neutralising and later filling in for the previous holder of human rights obligations. Not without a sense of sarcasm, Kosovo's Ombudsman pointed out that the UN has placed a people under its control, "thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place".⁸²

The Grand Chamber's decision, it must be said, embraced a mistaken view as it regarded the loose supervision exercised by the SC over the international security presence in Kosovo as amounting to "ultimate control" for which the SC lacks both the legal authority and the practical means. It further confused the question of attributability with the larger issue of the authorisation of, and mandate for, the deployment of an international military presence. Yet this is only part of the havoc that the decision created. The Grand Chamber mischaracterised the relationship between the international legal order and a regional human rights regime by insinuating that a UN member state's "obligations" under Chapter VII-authorized SC Resolutions displaced, by virtue of Art. 103 of the Charter, its ECHR obligations, hence making redundant the principle of equal protection.

Since the Grand Chamber's landmark decision in *Behrami and Saramati*, this has become a popular⁸³ yet haphazard way of reasoning for it ensures that the implementation of UN-sanctioned collective measures is not obstructed by human rights treaty obligations. The assertion by the Court that it would lack the compe-

⁸¹ Human Rights Obligations of Non-State Actors, (Oxford/New York 2006), at 128.

⁸² Second Annual Report 2001-2002 (Prishtina, 2002), at 5.

⁸³ It is striking that the ECtHR has already applied the line of reasoning developed in *Behrami and Saramati* to a number of subsequent inadmissibility decisions. See, e.g., *Ilaz Kasumaj v. Greece* (2007), No. 6974/05, 5 July 2007 and *Slaviša Gajić v. Germany* (2007), No. 31446/02, 28 August 2007 regarding the occupation of land and an apartment by TNC respectively. Relying on the argumentative structure developed in *Behrami and Saramati*, the Court also concluded that the High Representative in Bosnia and Herzegovina exercised lawfully delegated Chapter VII powers, thus yielding an equally worrying protection outcome: his conduct would be attributable to the UN which, having delegated its powers, retained "effective overall control" over it, *Dušan Berić a.o. v. Bosnia and Herzegovina* (2007), 16 October 2007, Decision (Admissibility), §§ 27, 28. The Court hence implicitly admitted in this decision that a CoE Member State is not in a position to secure the individual's protection of rights and freedoms, and cannot be held responsible for their breach. As a consequence, it absolved Bosnia's state institutions from their responsibilities under the Convention in relation to the field of activity of the High Representative and confirmed that an international authority may operate beyond the limits the ECHR sets for the exercise of authority.

tence to scrutinise such conduct sends precisely the wrong signal: sheltering member states from responsibility for acts committed by their national forces under the “veil” of the SC will not supply an incentive to prevent future violations. In the final analysis, by effectively absolving the international community from making proper progress in affording to individuals whom it subjects to its effective control an equivalent level of protection, the Court fell short of complying with the ECHR’s *ordre public* mission which it had so often invoked. Its mandate, it will be recalled, is to ensure the observance of the obligations entered into by the Contracting States under the Convention, not to legitimise a protection vacuum that opened as the Security Council removed Kosovo from Serbia’s jurisdiction. Its responsibility would have been to “guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper.”⁸⁴ By prioritising the politically expedient, the Court defaulted on its own famous interpretation of the Convention, which it had once held to “guarantee not rights that are theoretical or illusory but rights that are practical and effective.”⁸⁵

The ECtHR’s excessive deference to the Security Council’s primary responsibility for matters of international peace and security sits even more awkwardly with the views of the UN Human Rights Committee, which confirmed in 2004 that ICCPR parties are required to respect and ensure the rights to all persons who may be within their territory *or* to all persons subject to their jurisdiction. This principle applied explicitly to those people “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 ... assigned to an international peace-keeping ... operation.”⁸⁶

Even after its declaration of independence in February 2008, Kosovo remains a territory in which the ECHR has been rendered applicable by a subsidiary organ of the UN in discharge of its Chapter VII mandate.⁸⁷ The import of international treaty law into Kosovo’s municipal context had clearly furthered the legitimacy of the international civil and security governance framework. The failure of the Court

⁸⁴ Adapted from the Opinion of Advocate General Maduro, *Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (C 415/05P), 23 January 2008, § 45.

⁸⁵ *Airey v. Ireland* (1979), ECtHR, No. 6289/73, 9 October 1979 (Judgment), § 24.

⁸⁶ General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), § 10 (author’s emphasis). See, however, the submissions by Spain regarding the alleged misconduct of a Spanish Police Unit in Kosovo before the Human Rights Committee in *Azem Kurbogaj and Ghevdet Kurbogaj v. Spain*, No. 1374/2005, CCPR/C/87/D/1374/2005, 11 August 2006 (Admissibility): “[t]he entity ultimately responsible is UNMIK, which is not a party to the Covenant. A State party to the Covenant cannot be held responsible by resorting to the argument that UNMIK regulations are ineffective ...” (§ 4.1).

⁸⁷ Cf. also the new Constitution of the Republic of Kosovo (15 June 2008) which guarantees the direct applicability of human rights contained in a number of international agreements and instruments, among them the ECHR (Art. 22).

to hold those TCNs operating beyond the strict confines of their territorial boundaries to these standards may well have the opposite effect.

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