AS BAD AS IT GETS: THE EUROPEAN COURT OF HUMAN RIGHTS'S *BEHRAMI AND SARAMATI* DECISION AND GENERAL INTERNATIONAL LAW

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Abstract This article examines the European Court of Human Rights's encounter with general international law in its *Behrami and Saramati* admissibility decision, where it held that the actions of the armed forces of States acting pursuant to UN Security Council authorizations are attributable not to the States themselves, but to the United Nations. The article will try to demonstrate that the Court's analysis is entirely at odds with the established rules of responsibility in international law, and is equally dubious as a matter of policy. Indeed, the article will show that the Court's decision can be only be explained by its reluctance to decide on questions of State jurisdiction and norm conflict, the latter issue becoming the clearest when *Behrami* is compared to the *Al-Jedda* judgment of the House of Lords.

I. INTRODUCTION

It is rare for one to see a judgment of a court as eminent as the European Court of Human Rights which is as troubling as the Court's inadmissibility decision in the *Behrami and Saramati* case.[1] Yet, here we are, faced with the ruling that the actions of NATO-led peacekeepers in Kosovo are neither attributable to NATO, nor to any of its Member States, but exclusively to the United Nations, which authorized their presence there. In this article, we hope to demonstrate that the Court's ruling is unsatisfactory both as a matter of law and as a matter of policy. Most disturbingly, it sends a clear message to States

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[1] *Behrami and Behrami v France, Saramati v France, Germany and Norway*, App Nos 71412/01 & 78166/01, Grand Chamber, Decision, 2 May 2007. For the sake of brevity, the decision will be referred to throughout this article simply as *Behrami*. However, when the factual and legal differences between the two joined cases so require, we will refer to *Saramati* separately from *Behrami*, as will be apparent from the context of the discussion.

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that they can do whatever they wish and escape any human rights scrutiny so long as they shield themselves by obtaining the imprimatur of an international organization. As we will show, that message of unaccountability is completely incongruous with the general international law of responsibility.

To that effect, Section 2 of this article will briefly summarize the Court's decision. In Section 3 we will examine the three strategic moves that the Court used to reach the result that it did. First, unlike the parties who argued the case in terms of State jurisdiction within the meaning of Article 1 of the European Convention on Human Rights (ECHR), the Court chose to approach the case from the standpoint of attribution. Secondly, the Court linked the issue of attribution with the mandate granted to the international civil and security presences in Kosovo by the UN Security Council. Thirdly, the Court further tied the question of attribution to the notion of delegation of powers by the Security Council. In Section 4, we will demonstrate that the Court's approach is at odds with the established principles of international responsibility.

However, our interest in writing this article is not just to show that the attribution issue in *Behrami* was wrongly decided. We will also attempt to explore some of the broader undercurrents of *Behrami*, the foremost among them being the Court's encounter with general international law. In that regard we will examine the questions of policy that we believe motivated the Court's decision and the legal issues which it purposefully avoided as they were not to its liking: State jurisdiction, norm conflict and the fragmentation of international law. The latter issue in particular comes into stark contrast when one compares *Behrami* to the *Al-Jedda*[2] case decided by the English Court of Appeal and ultimately by the House of Lords, which did its work in *Behrami*'s shadow, as we will do in Section 5 of this article. Section 6 will make some observations on the troubling lack of separate opinions in *Behrami*, while Section 7 will provide some concluding remarks.

II. THE COURT'S DECISION

The NATO intervention against the Federal Republic of Yugoslavia (FRY, Serbia) in the spring of 1999[3] ended with the signing of the Military Technical

[2] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31, 12 December 2007, hereinafter *Al-Jedda*.

[3] As is well known, starting from 1998, the Kosovo crisis erupted into an armed conflict between Yugoslav and Serbian security forces, on the one side, and ethnic Albanian armed rebels fighting for the independence of Kosovo, on the other. On 24 March 1999, after the failure of the Ramobuillet peace negotiations, NATO commenced air strikes against the Federal Republic of Yugoslavia which ended on 10 June 1999. During the conflict, serious violations of human rights and humanitarian law were committed by both sides, with the Yugoslav and Serbian security forces in particular conducting a systematic campaign to expel the ethnic Albanian population from Kosovo. The Security Council dealt with the crisis in Kosovo since 1998, acting under Chapter VII, in Resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998 and 1203 (1998) of 24 October 1998.

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Agreement between Serbia and NATO on 9 June 1999, whereby Serbia agreed to withdraw its forces from Kosovo.[4] The following day the UN Security Council passed Resolution 1244 (1999) which established a dual international presence in Kosovo—the civil administration run by the United Nations Mission in Kosovo (UNMIK) and the NATO-led military forces, KFOR. Resolution 1244 specified in detail the mandates of the two international forces. KFOR itself was subdivided into several multi-national brigades, each of which had a lead country, and each of which was responsible for maintaining security in a specific area of Kosovo.

The facts of the two joined cases were as follows. In March 2000, several children were playing in an area bombed by NATO during the 1999 conflict. They came upon a number of undetonated cluster bombs and started playing with them, thinking that they were safe to handle. One of the bombs exploded, killing one boy and maiming his brother, who was left blind and permanently disfigured. The applicants in *Behrami* were the boys' father and his surviving son, who alleged a violation of Article 2 of the ECHR, while the respondent State was France, the lead nation in that particular sector of Kosovo.

In *Saramati*, the applicant was arrested by UNMIK police in April 2001 on suspicion of attempted murder. His pre-trial detention was authorized by a judge, and it lasted until June 2001, when his release was ordered by the Supreme Court of Kosovo. Saramati was subsequently detained as a security threat to the international presence on the orders of the KFOR commander, acting pursuant to the authority supposedly granted by Resolution 1244. He alleged a violation of Article 5 of the ECHR, on the account of his extra-judicial detention on preventative grounds, which had lasted for several months. He also alleged that the States which took part in the international presence in Kosovo failed to fulfil their positive obligations under the ECHR to guarantee the human rights of all persons in Kosovo. The applicant initially brought his complaint against Norway, France and Germany, based on the nationality of the KFOR commanders who ordered his detention in relation to the first two States, and because of the alleged involvement of German soldiers in his arrest with regard to the third. However, during the proceedings before the Court the applicant asked for permission to withdraw his claims against Germany, as he could not prove German involvement in his detention. The Court granted his request and unanimously decided to strike his application against Germany off its list of cases.[5]

Beside the applicants and the two respondent States, France and Norway, seven more States and the UN submitted their observations as intervenors. The main point of contention between the applicants and the respondent and intervening States was whether the applicant fell within the jurisdiction of the respondent States at the material time, within the meaning of Article 1 of the

[4] Text available at http://edition.cnn.com/WORLD/europe/9906/09/kosovo.agreement.text/.
[5] *Behrami*, paras 64 & 65; para 1.

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ECHR.[6] In other words, in dispute was the interpretation of this jurisdiction clause and its impact on the extraterritorial applicability of the ECHR, as in other well-known cases before the European Court, such as *Loizidou*,[7] *Banković*[8] and *Ilascu*.[9] That is not, however, how the Court itself chose to approach the case. It considered that:

> [T]he question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo.
>
> Accordingly, the first issue to be examined by this Court is the compatibility *ratione personae* of the applicants' complaints with the provisions of the Convention.[10]

Having thus decided that it would not rule on the issue of Article 1 jurisdiction, the Court then set out the structure of the remainder of its decision:

> [The Court] has, in the first instance, established which entity, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term 'attribution' in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has then examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN.[11]

As to the matter of the mandates to detain and to de-mine, the Court interpreted Resolution 1244 and related instruments as giving KFOR the former, and UNMIK the latter mandate, with KFOR's role being limited only to providing assistance to UNMIK with the de-mining process.[12] The Court then referred to the fact that the foundation of both UNMIK and KFOR was Chapter VII of the UN Charter, after the Security Council determined that

[6] *Behrami*, para 67: 'The respondent Governments essentially contended that the applications were incompatible *ratione loci* and *personae* with the provisions of the Convention because the applicants did not fall within their jurisdiction within the meaning of Article 1 of the Convention . . . The third party States submitted in essence that the respondent States had no jurisdiction *loci* or *personae*.'

[7] *Loizidou v Turkey* (1997) 23 EHRR; App No 15318/89, Judgment (preliminary objections), 23 February 1995; Judgment (merits), 28 November 1996.

[8] *Banković v Belgium*, App No 52207/99, Grand Chamber, Decision on admissibility, 12 December 2001, hereinafter *Banković*.

[9] *Ilascu v Moldova and Russia*, App No 48787/99, Grand Chamber, Judgment, 8 July 2004.

[10] *Behrami*, paras 71–72.

[11] *Behrami*, para 121.

[12] *Behrami*, paras 123–127.

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there was a threat to the peace and decided to establish the international presence in Kosovo. According to the Court, as the Council was since its inception unable to operate in the manner originally intended by the drafters of the Charter, ie through the conclusion of Article 43 agreements and the deployment of forces under UN command in enforcement actions, the Council was by Resolution 1244 'delegating to willing organisations and member states [...] the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command.'[13] The notion of delegation would prove to be crucial in the Court's attribution analysis:

> While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN.[14]

Thus, in the Court's view, attribution depended upon 'whether the UNSC retained ultimate authority and control so that operational command only was delegated.'[15] The Court found this test to be met, after examining the conditions it thought were necessary for a lawful delegation of the Council's powers,[16] and concluded that KFOR 'was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN.'[17] The Court then proceeded to find that the inaction of UNMIK in relation to de-mining was also attributable to the UN, since UNMIK was a subsidiary organ of the UN.[18]

Finally, having established that the conduct of both UNMIK and KFOR was attributable to the UN, the Court examined whether it had jurisdiction *ratione personae* to entertain the applications. Asking this question was to answer it. Since the violations in question were not attributable to the respondent States, but to the UN, which is not itself a party to the ECHR, the Court found the applications to be incompatible with the Convention.[19]

III. A THREE-STEP APPROACH

A. Attribution, Jurisdiction of States and the Competence of the Court

When courts wish to avoid pronouncing on certain issues they frequently resort to framing the question that they are going to answer differently than it was posed by the parties. So the Court did in *Behrami*, where it made three major moves. The first and most important of these was to frame the case in

[13] *Behrami*, para 129.
[14] *Behrami*, para 132.
[15] *Behrami*, para 133.
[16] *Behrami*, paras 134–140.
[17] *Behrami*, para 141.
[18] *Behrami*, paras 142–143.
[19] *Behrami*, paras 144–152.

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terms of attribution and the Court's own jurisdiction *ratione personae*, and not, as the case was in fact argued by the parties, in terms of the contracting States' extraterritorial obligations under the ECHR. The first issue that the Court wanted to avoid was interpretation of Article 1 of the ECHR, which obliges the States Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' We will come to why the Court did so in a moment, but first we must address some terminological and conceptual difficulties.

The most important distinction that must be made is between the concept of State jurisdiction in Article 1 of the ECHR, and the Court's own jurisdiction or competence, or indeed the compatibility *ratione personae*, *loci*, or *materiae* of an application with the provisions of the ECHR. The confusion between these notions is most evident in the submissions of the various respondent and intervening States in *Behrami*.[20]

The notion of 'jurisdiction' found in the ECHR and in many other human rights treaties refers to the jurisdiction of a *State*, not to the jurisdiction of a *court*, even though use of this latter word is otherwise the most frequent. It is a trigger for the application of the treaty, which must be satisfied in order for treaty obligations to arise in the first place.[21] If a State does not have jurisdiction over a person, it does not have the treaty obligation to secure or ensure that person's human rights. Naturally, if a particular human rights treaty does not even apply in the absence of a State's jurisdiction, this would entail the court or treaty body in question lacking jurisdiction *ratione materiae*, in the same way that the treaty body would lose jurisdiction *ratione personae* if it found that the wrongful act complained of was not attributable to the defendant State.[22]

As one of us has argued at length elsewhere, contrary to the European Court's position in *Banković*, the notion of jurisdiction in human rights treaties has nothing to do with that doctrine of jurisdiction in general international law which delimits the municipal legal orders of States.[23] It is, on the contrary, a question of fact, of effective overall control that a State has over a territory, or of authority or control that it has over a particular person. These points will not be further elaborated on here, since however one defines State jurisdiction,

[20] *Behrami*, paras 82–116.

[21] See, eg M O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life After Banković"' in F Coomans & M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 125.

[22] See, eg *Saddam Hussein v 21 Countries*, App No 23276/04, Decision on admissibility, March 2006.

[23] See M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' 8 Human Rights Law Review (2008) 411. See also R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' 40 Israel Law Review (2007) 503, especially at 508, 513–514; O De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' 6 Baltic Yearbook of International Law (2006) 183.

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it is still undoubtedly a threshold criterion for State obligations under human rights treaties. We should recall in that regard Article 2 of the ILC Articles on State Responsibility: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.' The notion of State jurisdiction in human rights treaties falls under Article 2(b)—in terms of the ECHR, does an obligation to secure the human rights of certain persons exist or not?[24]

It has been suggested by a commentator that the Court was mistaken in *Behrami* to venture into the issue of attribution, since the question of State jurisdiction is a preliminary matter which logically must be dealt with before attribution.[25] According to this author, the Court had to determine 'whether national personnel operating as part of KFOR and UNMIK carried out their functions in a national or an international role. This is not a question that is best decided by applying the rules governing international responsibility.'[26] With respect, we fail to see what other rules of international law could answer this question. Moreover, State jurisdiction is not strictly speaking a preliminary issue, certainly not any more so than is attribution. Both are questions of substantive law and both are on the same level of analysis, as is shown by Article 2 of the ILC Articles on State Responsibility cited above.

Indeed, jurisdiction, ie control over territory or persons, can only be exercised by a state through its own organs or agents, ie persons whose acts are attributable to it. To take the facts of the *Loizidou* case as an example, if Turkey had denied (as it had not) that it had soldiers in northern Cyprus, the Court in *Loizidou* would first have had to establish whether the acts of the soldiers on the ground were actually attributable to Turkey before it examined the question of whether Turkey had 'effective overall control' over northern Cyprus. Likewise, in *Behrami*, it was perfectly legitimate for the Court to ascertain whether the actions of the French KFOR commander were attributable to France. It is hard to see how the Court could have established whether France had effective overall control over a part of Kosovo, or authority and control over Mr Saramati, without first establishing whether the French troops on the ground remained properly French.

The Court could indeed have advanced another novel interpretation à la *Banković* of the notion of State jurisdiction in Article 1 ECHR in order to dismiss the *Behrami* case. That, however, would only have confused the Court's case law on Article 1 further, and thankfully the Court chose not to do so. It simply did not want to do a repeat of *Banković*, a decision for which it has been under considerable fire for many years now. Besides that, there was

[24] See R Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans & Kamminga (n 21) 83, 86.

[25] See A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' 8 Human Rights Law Review (2008) 151, 158.

[26] ibid 159.

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only one thing that the Court could have done without pronouncing itself on the issue of attribution—to assume, without deciding, that the respondent States did have jurisdiction under Article 1, but that their obligations under the ECHR were pre-empted pursuant to Article 103 of the UN Charter[27] by the Security Council acting under Chapter VII of the Charter. That issue was indeed the elephant in the courtroom, particularly when it comes to the *Saramati* case, as will be apparent from our later comparison of this case to *Al-Jedda*. Pre-emption under Article 103 was the one thing that the Court wanted to avoid, and it is only if seen against the background of this act of judicial evasion that *Behrami and Saramati* can properly be explained. This brings us to the Court's second strategic move.

B. Attribution and Mandate

While the Court was perfectly within its rights to approach *Behrami* from the angle of attribution, its second move—linking the question of attribution to the mandates granted to UNMIK and KFOR by the Security Council—is much more dubious. First, the Court interpreted Resolution 1244 as granting a mandate to KFOR to issue detention orders.[28] Whether that is so is debatable, as Resolution 1244 does not say a word about military detention. KFOR took this power upon itself by interpreting paragraph 7 of the Resolution, which grants UN Member States the authority to create an 'international security presence in Kosovo [. . .] with all necessary means to fulfil its responsibilities', as providing sufficient authority for preventative military detention without any recourse to independent judicial review.[29] Secondly, the Court concluded that UNMIK, not KFOR, had the mandate to de-mine the afflicted areas of Kosovo, at least since October 1999, prior to the cluster bomb accident.[30] This conclusion is also entirely debatable, as there was in fact not just a dispute between the parties, but also a dispute between UNMIK and KFOR themselves as to who had the duty to de-mine under Resolution 1244, UNMIK in particular claiming that this duty extended to both it and to KFOR.

However, the biggest problem with the Court's conclusions regarding the detention and de-mining mandates under Resolution 1244 is not that they are debatable, but that they are irrelevant for the issue of attribution. Yet, it is exactly in the context of attribution that the Court used its conclusion on mandates—first, in a section under the somewhat misleading heading 'Can the

[27] Which reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[28] *Behrami*, para 124.

[29] Such detention by KFOR has been criticized, inter alia, by the Human Rights Committee in its consideration of the UNMIK report on Kosovo—see Concluding Observations of the Human Rights Committee—Kosovo (Serbia), UN Doc CCPR/C/UNK/CO/1, 14 August 2006, para 17.

[30] *Behrami*, paras 125–126.

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impugned action be attributed to KFOR?',[31] the Court held that the detention of Mr Saramati by KFOR was attributable to the UN; then, under the heading 'Can the impugned inaction be attributed to UNMIK?', the Court ruled that the failure by UNMIK to de-mine the relevant area was also attributable to the UN.[32]

And so the Court did two things. It set the stage for its analysis of the delegation of Chapter VII powers by the Security Council to KFOR and UNMIK, which, as we shall see shortly, was how it managed to attribute the actions of KFOR to the UN. More immediately, however, it in effect summarily disposed of the *Behrami* case, leaving only *Saramati* open. The *Behrami* applicants were not complaining of a failure by UNMIK to de-mine, nor were they alleging that the actions of UNMIK were attributable to any of the UN Member States.[33] What the Court in fact did was to reinterpret the applicants' own submissions—because they were complaining of the failure to de-mine, and because, according to the Court, de-mining fell under UNMIK's, not KFOR's mandate under Resolution 1244, the applicants were complaining against the conduct of UNMIK, a subsidiary organ of the UN whose actions were undoubtedly attributable to the UN itself.

However, the question presented in both *Behrami* and *Saramati* was not whether Resolution 1244 was violated, but whether the *ECHR* was violated. Whether KFOR had the mandate to detain people under Resolution 1244 is immaterial for the purposes of attribution since KFOR did, in fact, detain Mr Saramati. Likewise, whether or not KFOR had the duty under Resolution 1244 to de-mine areas that NATO itself saturated with cluster bombs is not the point. The issue is whether *France* had the obligation to do so *under the ECHR*, in the same way as France would undoubtedly have had such a positive obligation to secure the human rights, namely the right to life, of persons within its own territory if, say, a fighter aircraft dropped a few cluster bombs on a vineyard in Champagne. The distribution of duties of the civil and military international missions in Kosovo under Resolution 1244 would only be relevant to answering the merits question of whether France acted with due diligence in the fulfilment of its positive obligations.[34]

[31] *Behrami*, paras 132–141.
[32] *Behrami*, paras 142–143.
[33] *Behrami*, paras 73–81.
[34] It could be argued that the issue of mandate, though irrelevant for attribution, is relevant for ascertaining whether the applicants in *Behrami* fell within the jurisdiction of France, within the meaning of Article 1 of the ECHR—see Sari (n 25) 161. In our view this is not the case, since this notion of 'jurisdiction' has nothing to do with the legal competences of a state or any other entity, but with the actual, physical power that a State exercises over territory or people—see Milanovic (n 23). The only other possible, and quite controversial effect of Resolution 1244, would be the displacement of States' obligations under the ECHR pursuant to Article 103 of the Charter. In any event the effects of the UN mandate belong entirely with the merits. For a recent case in which the Court found a violation of Article 2 ECHR because of a State's failure to fulfil its positive obligations in relation to de-mining, see *Albekov v Russia*, App No 68216/01, Judgment of 9 October 2008.

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C. Attribution and Authorizations-Delegations

Now we come to the Court's ultimate argument—the notion of delegation by the Security Council of its Chapter VII powers. Basically, the Court held that Resolution 1244 was a delegation of powers that the Council itself had under the Charter to KFOR, the international military presence in Kosovo. Since that delegation of powers was within the limits prescribed by the Charter and thus lawful, this, according to the Court, meant that any act performed by KFOR pursuant to its delegated powers is attributable to the UN. Strictly speaking, this move by the Court was relevant only for the *Saramati* application, as *Behrami* was doomed the instant the Court decided to examine the attributability to the UN of the conduct of UNMIK, instead of that by KFOR, in relation to de-mining. However, even if the Court had not done so, it would still have employed the same approach that it used to dispose of *Saramati* to reject *Behrami* as well.

First, we must briefly explain how this notion of 'delegation' found its way into the Court's decision. As originally conceived, military enforcement measures under Chapter VII of the UN Charter were supposed to take place entirely under UN control. Pursuant to Article 43 of the Charter, the Member States undertook to enter into special agreements with the Security Council, by which they would make their armed forces available to the Council at the Council's call. Moreover, Article 49 of the Charter provides for the creation of a Military Staff Committee, which would be responsible to the Council and would have strategic command over the forces put at the Council's disposal.

As is well known, this regime of collective security envisaged by the Charter never came to pass, since UN Member States were not prepared to enter into Article 43 agreements with the Council. A substitute for the original enforcement mechanism evolved through practice—if the Council decided that the use of force was necessary to put an end to a breach of international peace and security it would, acting under Chapter VII of the Charter, pass a resolution *authorizing* willing Member States to engage in military action. Resolution 678 (1990), which authorized the use of force against Iraq in the First Gulf War, is the classic example.[35]

The problem with these authorizations by the Council is precisely that they do not fit very well with the original security scheme and text of the Charter, particularly its Article 42, which speaks of the Council's power to use force, but does not explicitly give it the power to authorize the Member States themselves to use force. This discrepancy between the text of the Charter and State practice led some authors to develop the notion of delegation of Chapter VII powers by the Council as the proper way of describing the authorizations to use force that it gave to Member States. In doing so, these authors contend, the Council is in fact transferring its own powers under Chapter VII to willing

[35] See also *Behrami*, paras 21–25.

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Member States, pursuant to the general principles of the law of international organizations.[36] Besides reconciling reality with the text of the Charter, the delegation model as it has been developed in the literature has one more express purpose—to define the limits of permissible delegations, so that the Security Council does not shirk its responsibilities by issuing blanket authorizations to States to use force.[37]

This is the delegation model that the Court took up in its *Behrami* decision. It first distinguished authorizations from delegations:

> While this Resolution [1244] used the term 'authorise', that term and the term 'delegation' are used interchangeably [in the Court's decision]. Use of the term 'delegation' in the present decision refers to the empowering by the UNSC of another entity to exercise its function as opposed to 'authorising' an entity to carry out functions which it could not itself perform.[38]

The Court then found as follows:

> Resolution [1244] authorised 'Member States and relevant international organisations' to establish the international security presence in Kosovo as set out in point 4 of Annex 2 to the Resolution with all necessary means to fulfil its responsibilities listed in Article 9. Point 4 of Annex 2 added that the security presence would have 'substantial [NATO] participation' and had to be deployed under 'unified command and control'. The UNSC was thereby delegating to willing organisations and members states (see paragraph 43 as regards the meaning of the term 'delegation' and paragraph 24 as regards the voluntary nature of this State contribution) the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command. In addition, the SG was authorised (Article 10) to establish UNMIK with the assistance of 'relevant international organisations' and to appoint, in consultation with the UNSC, a SRSG to control its implementation (Articles 6 and 10 of the UNSC Resolution). The UNSC was thereby delegating civil administration powers to a UN subsidiary organ (UNMIK) established by the SG. Its broad mandate (an interim administration while establishing and overseeing the development of provisional self-government) was outlined in Article 11 of the Resolution.
>
> While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so

[36] The theoretically most developed such account is found in see D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP, 1999) 10–16.

[37] See, eg E de Wet, 'The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VII of the United Nations Charter' 71 Nordic JIL (2002) 1.

[38] *Behrami*, para 43.

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> act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK.[39]

The Court's analysis calls for several comments. First, the Court simply assumes that the delegation model, as it has been developed in the literature, is the proper way of conceptualizing UN Security Council authorizations to States to use force. That may or may not be so, but it was at the very least a question worthy of some discussion. This is especially true since the Council itself never uses the term 'delegation', but solely the term 'authorization', in its use of force resolutions. The distinction between the two, correct or not, is a purely academic construct.[40] One could just as easily see the Council's power to authorize the use of force by Member States as a distinct (implied) power it possesses under Chapter VII.[41]

Secondly, and more importantly, assuming the general validity of the delegation model, can Resolution 1244 really be qualified as a delegation of the Council's own powers to UNMIK and KFOR, particularly if we bear in mind that the Council did *not* authorize the use of force against Serbia in the 1999 NATO bombing campaign which preceded the deployment of KFOR? As the Court itself notes, the Council can delegate only those powers that it itself has. Did the UN Security Council really have 'civil administration powers' over Kosovo, which it delegated to UNMIK, or did it have the power to *create* such an administration under Chapter VII? Moreover, can it truly be said, as the Court in fact implicitly held, that the Security Council somehow has the direct power to detain persons indefinitely, which it then supposedly delegated to KFOR?

The approach of the ICTY Appeals Chamber in the *Tadić* case seems to be far more logical.[42] The defendant in that case disputed the legality of the creation of the ICTY by the Security Council by saying, inter alia, that since the Council itself did not have the power to adjudicate on the criminal responsibility of individuals, it could not have created a subsidiary organ endowed with such powers. The Chamber quite rightly rejected this argument:

> The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which

[39] *Behrami*, paras 129–130.

[40] See also B Fassbender, '*Quis judicabit*? The Security Council, Its Powers and Its Legal Control' 11 EJIL (2000) 219.

[41] See, eg H Fruedenschuß, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council' 5 EJIL (1994) 492; T Franck & F Patel, 'UN Police Action in Lieu of War: "The Old Order Changeth"' 85 AJIL (1991) 63.

[42] *Prosecutor v Tadić* IT-95-1, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

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does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ('UNEF') in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards*, the International Court of Justice, in addressing practically the same objection, declared:

'[T]he Charter does not confer judicial functions on the General Assembly [...] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations.' (Effect of Awards, at 61.)[43]

It seems to us far more sensible to say that the Security Council had the power, under Chapter VII, to create or authorize an international presence in Kosovo in the same way that it had the power to create the ICTY, than to say that the Council delegated its own powers in areas such as detention or de-mining to KFOR and UNMIK. This latter interpretation stretches not only the meaning of the word 'delegation', but also greatly overstates the already vast powers that the Council has under the Charter.

But, even assuming that Resolution 1244 could properly be characterized as a delegation, it is the Court's linking of this question to that of attribution that is the most objectionable. First, the Court said that:

While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN (as well as Chesterman, de Wet, Friedrich, Kolb and Sarooshi all cited above, see Gowlland-Debbas '*The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*' EJIL (2000) Vol 11, No. 2 369–370; Niels Blokker, '*Is the authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by 'Coalition of the Able and Willing'*, EJIL (2000), Vol 11 No. 3; pp. 95–104 and *Meroni v High Authority* Case 9/56, [1958] ECR 133).[44]

As we can see, the Court here relied on two propositions. First, the delegation of Security Council powers must be limited in order to be compatible with the Charter. That must be correct, as a delegation of some of the Council's most

[43] ibid para 38.

[44] *Behrami*, para 132.

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essential powers, such as the one to determine a threat to or breach of international peace and security, would certainly be improper. But then, in an evident *non sequitur*, the Court says that delegation must also be limited 'for the acts of the delegate entity to be attributable to the UN'. How and why that is so, the Court does not explain. Moreover, of the eight authorities that it cited in support of these two propositions, all but one support solely the first proposition on the constitutional limitations on the delegation of powers. It is only Sarooshi who argued—and not at much length—for the attribution to the UN of acts committed by States acting under delegated powers.[45] Indeed, five of the authorities cited by the Court do not discuss the issue of attribution at all,[46] while the two studies beside Sarooshi's which do deal with attribution adopt a position completely contrary to the one for which they are being cited.[47]

The Court then examined the chain of command in relation to KFOR, finding that the Security Council 'retained ultimate authority and control so that operational command only was delegated' to NATO.[48] Moreover, according to the Court, '[t]his delegation model demonstrates that, contrary to the applicants' argument [...] direct operational command from the UNSC is not a requirement of Chapter VII collective security missions.'[49] But that is not at all what the applicants argued. Their argument was not that the Council could not lawfully establish a Chapter VII mission without itself exercising direct operational command. Rather, their case was that if the Council did in fact establish such a mission, the mission's conduct would not be attributable to the UN, but to the contributing States.[50]

[45] Sarooshi (n 36) 163–166.

[46] See S Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (OUP, 2002) 165 ff; R Kolb, *Ius Contra Bellum—Le Droit international relatif au maintien de la paix* (Bruylant, 2003); V Gowlland-Debbas 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' 11 EJIL (2000) 369; The *Meroni v High Authority* case also does not in any way deal with matters of attribution. Blokker notes the existence of the problem, but expressly refrains from adopting a position, though he seems to lean against attribution to the UN—see N Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' 11 EJIL (2000) 541, 545–546.

[47] See J Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty', 9 Max Planck Yearbook of United Nations Law (2005) 225, 272: '[T]he sending states remain internationally responsible for the actions of their troops'; and at 275: 'As KFOR troops are effectively exercising control and at least some governmental functions, especially with regard to security, the sending states are responsible under the ECHR'; E de Wet, *Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 378–382, esp 380: 'States may remain responsible under international human rights law for the consequences of the exercise of the powers by the international organizations' and at 381: 'Any other conclusion would create a dangerous loophole by which member states, by exercising powers in the context of an international organization rather than unilaterally, could evade international responsibility for its obligations to respect human rights.'

[48] *Behrami*, paras 133 & 134.

[49] *Behrami*, para 136.

[50] *Behrami*, para 77: '[The applicants argued that] since there was no operational command link between the UNSC and NATO and since the TCNs retained such significant power, there was no unified chain of command from the UNSC so that neither the acts nor the omissions of KFOR troops could be attributed to NATO or to the UN.'

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Finally, the Court concluded that 'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN.'[51]

Why is the Court's reliance on the notion of delegation so inappropriate in the context of attribution? The answer to this question is quite simple. The rules of attribution, and the rules of international responsibility in general, are secondary rules, which continue to apply in an identical fashion across multiple fields of primary rules unless a *lex specialis* is shown to exist. The delegation model, on the other hand, is a part of the institutional law of international organizations and has nothing to do with the law of responsibility. Its purpose is to determine whether an organ of an international organization can lawfully empower some other entity, according to the rules of its own internal law. It does not, and conceptually cannot, establish whether a state, or an international organization, or both, are responsible for a given act or not. An authorization by the Security Council may preclude the wrongfulness of an act by a state, but it cannot have an impact on attribution.

We will now proceed to analyze *Behrami* in more detail from the standpoint of the applicable rules of the law of responsibility, as elucidated by the International Law Commission.

IV. THE LAW OF INTERNATIONAL RESPONSIBILITY AND *BEHRAMI*

A. Applicable Rule of Attribution

As is well known, the ILC has completed its work on State responsibility with the adoption of its Articles, and is now working on the Draft Articles on the Responsibility of International Organizations.[52] In *Behrami*, under the heading traditionally entitled 'Relevant Law and Practice', the Court invoked Article 5 of these Draft Articles,[53] which provides as follows:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization

[51] *Behrami*, para 141.

[52] For the provisionally adopted text of the Draft Articles on Responsibility of International Organizations when this article was submitted see ILC Report on its 59th Session (7 May to 5 June and 9 July to 10 August 2007), *General Assembly Official Records*, Sixty-second Session, Supplement No. 10, UN Doc. A/62/10, ch VIII 185–199.

[53] As is well known, draft articles adopted by the ILC are not legally binding, but they are frequently considered to reflect international customary law and are hence relied upon by courts. As an example, some provisions of the ILC Articles on State Responsibility were explicitly considered to reflect international customary law by the ICJ. See, eg *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 27 February 2007 (available at http://www.icj-cij.org/docket/files/91/13685.pdf), paras 385, 401, 407. The ILC's Draft Articles on Responsibility of International Organizations are of course still a work in progress. However, whether particular rules stipulated in them reflect customary law or not can be gauged, inter alia, by the comments that States send to the ILC, as well as by the discussions of State representatives in the Sixth Committee of the General Assembly. So far, no State has objected in any way to draft Article 5.

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> shall be considered under international law an act of the latter organization if the organization exercises *effective control over that conduct*.[54]

This rule of attribution articulated by the ILC is central to the *Behrami* case, so we must dwell on it for a moment in order to explain its purpose and its limitations. This Article does not deal with the situation when an organ or agent of a State or international organization is fully seconded to some other organization, since in that case the conduct would be attributable only to the receiving organization.[55] It rather deals with the situation 'in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of lending organization.'[56] That, of course, is exactly the situation in *Behrami*.

According to the ILC, attribution depends on 'the retention of some powers by that State over its national contingent and thus on *the control that the State possesses in the relevant respect*.'[57] When a sending State retains control over disciplinary matters and criminal affairs, this can have consequences on the attribution of conduct.[58] In such a situation the ILC stated that the decisive criterion is that of the 'degree of effective control, both with regard to the peacekeeping and to joint operations.'[59] Thus, even if the UN claims that it has exclusive command and control over national contingents in a peacekeeping force (as a subsidiary organ of the UN) practice related to peacekeeping indicates that 'attribution of conduct should also in this regard be based on a factual criterion.'[60] As we can see, the ILC is very clear: the only criterion for deciding on attribution of a conduct of organs/agents placed at the disposal of an international organization by a State or another international organization is *effective control over the conduct in question*.[61] In other words, who is giving the orders—the State or the organization?

[54] ILC Report on its 56th Session (3 May to 4 June and 5 July to 6 August 2004), *General Assembly Official Records*, Fifty-ninth Session, Supplement No 10, UN Doc A/59/10, (hereinafter: ILC Report 2004), ch V at 99 (emphasis added).

[55] ILC Report 2004, Commentary Art 5, 110, para 1.

[56] ibid.

[57] ibid 113, para 6 (emphasis added).

[58] ibid 112.

[59] ibid 114, para 8.

[60] ibid.

[61] It is also important to distinguish the primary rule of attribution articulated in draft Art 5 from the Rules on the Responsibility of States for the Acts of an Organization set out in Draft Articles 25–29; see ILC Report on its 58th Session (1 May to 9 June and 3 July to 11 August 2006), *Official Records of the General Assembly*, Sixty-first Session, Supplement No 10, UN Doc A/61/10, ch VII 277–291. As a general matter, States do not incur responsibility for acts of an international organization possessing separate legal personality, of which they are members, by the virtue of membership alone. However, a State may incur responsibility, if it (1) aids, assists, directs, controls or coerces an international organization to commit an internationally wrongful act (Art 25–27); (2) accepts responsibility for an internationally wrongful act of an international organization or has led injured party to rely on its responsibility (Art 29, with a note that State responsibility is subsidiary). Furthermore, a member State of an international organization incurs responsibility 'if it is to circumvent one of its international obligations by providing the organization with the competence in relation to that obligation' (Art 28). Crucially, these articles become applicable only if it is first determined that the conduct in question is indeed attributable to the

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B. Did the Court Apply this Rule?

This, therefore, is the rule of attribution which either had to be applied or discussed and rejected by the Court so it could decide *Behrami*. Yet, despite the fact that the Court mentioned draft Article 5 on two occasions,[62] it remains entirely unclear whether it thought (1) that this rule of attribution was applicable; and (2) that its requirements were met, ie that the conduct in question was under the effective control of the UN. There are indeed several indications to the contrary.

First, the Court actually never says that it is applying this rule. Secondly, it mentions 'effective control' only in relation to NATO's, not the UN's, command over operational matters.[63] If the Court had determined that the actions of KFOR troops were attributable to NATO as a separate legal person, that conclusion might have been acceptable. One could agree or disagree with it, but it would certainly fall within the limits of reason.[64] The Court, however, avoided the question of attribution to NATO, or the responsibility of Member States for the actions of NATO, as it did before in *Banković*. What it did instead was to attribute the conduct in question to the UN, yet it was the UN's, not NATO's, effective control over that conduct which should have been dispositive.

Thirdly, the Court's attribution analysis involved assessing whether Resolution 1244 constituted a lawful delegation of powers by the Security Council within the limits of Chapter VII of the UN Charter. The central question for the Court was whether the Council 'retained ultimate authority and control so that operational command only was delegated' to NATO.[65] It was only upon answering this question in the affirmative,[66] and concluding

organization, exceptionally allowing for the piercing of the veil of its international legal personality in specific circumstances. In *Behrami*, however, the issue was precisely whether the conduct was attributable to the UN or not in the first place, and that question is regulated by draft Article 5.

[62] *Behrami*, paras 30–31, 138.

[63] *Behrami*, para 138: 'The Court considers it essential to recall at this point that the necessary [. . .] donation of troops by willing [troop contributing nations (TCNs)] means that, in practice, those TCNs retain some authority over those troops (for reasons, inter alia, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO's command of operational matters was not therefore intended to be exclusive, but the essential question was whether, despite such TCN involvement, it was "effective" (ILC Report cited at paragraph 32 above).'

[64] Compare, for example, the views of Stein, who argues that the actions of NATO can be attributable to its member states, to those of Pellet, who asserts that they cannot—see T Stein, 'Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States', in C Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (Kluwer, 2002) 181 ff; A Pellet, 'L'imputabilité d'éventuels actes illicites—Responsabilité de l'OTAN ou des Etats membres', in Tomuschat ibid 193 ff.

[65] *Behrami*, para 133.

[66] *Behrami*, para 134: 'In the first place [. . .] Chapter VII allowed the UNSC to delegate to "Member States and relevant international organisations". Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the

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that 'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC', that the Court decided 'that the impugned action was, in principle, "attributable" to the UN.'[67] However, as explained above, the issue of delegation is a matter for the institutional law of international organizations, not the law of responsibility. General rules of attribution provide that the internal law of the organization ('rules of organizations') is relevant only when determining the functions of organs and agents of the organizations, in exactly the same way that a State's domestic law is relevant when it comes to assessing its responsibility.[68]

Finally, as mentioned above, the Court picked up its whole delegation-means-attribution rationale from the work of a single author, Professor Sarooshi. However, Sarooshi did not base his analysis on the rule of attribution dealing with the situation in which a State places one of its organs at the disposal of an international organization. Of course, at the time Sarooshi wrote his book, the ILC had not begun to draft its articles on the responsibility of international organizations, nor had it even completed its work on State responsibility. Indeed, Sarooshi used Article 5 of the ILC's work on State responsibility,[69] to fashion an analogous rule applicable to international organizations. Article 5 of the Articles on State Responsibility deals with the conduct of persons or entities exercising elements of governmental authority, and provides that the:

> '. . . conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

For Sarooshi, this rule, when transposed to the context of international organizations, would render an organization responsible when it delegated some of its powers to a State.[70]

delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions [. . .] could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the SG present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.'

[67] *Behrami*, para 141.

[68] And even there the 'possibility remains open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.' See ILC Report 2004, Commentary Art 4, 107, para 9.

[69] Then draft Article 7(2).

[70] Sarooshi (n 36) 163–166, esp 166, fn 85.

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In our view, the problem with Professor Sarooshi's analysis is that he thinks of international organizations as if they were States. The rationale behind Article 5 of the Articles on State Responsibility is that States, which are, on the international plane, seen as aggregates of all persons and entities subordinate to them, may not escape their responsibility by delegating their functions at the domestic level to entities which nominally may not be their organs, but are still essentially within their sphere of plenary control. That same rationale cannot apply to the context of international organizations delegating their functions to States, as the situation is precisely the reverse from the domestic level. It is States who set up international organizations, among other things so they can avoid their own responsibility, not the other way around, and it is most commonly through States that an organization may act.

Be that as it may, in its work on the responsibility of international organizations the ILC did not use the analogy proposed by Sarooshi. In fashioning Article 5 of its Draft Articles on the Responsibility of International Organizations it did not rely on Article 5 of the Articles on State Responsibility, but on Article 6 of the same Articles, which deals with the situation in which one State puts one of its organs at the disposal of another State.

To conclude, even if the Court did think it was applying Article 5 of the Draft Articles on the Responsibility of International Organizations, its analysis is questionable at best. It conflated the lawfulness of delegation of powers by the Council (if any) to KFOR with the issue of attribution, and it failed to distinguish between 'ultimate authority and control' by the Council as a condition for lawful delegation with 'effective control' as the condition for attribution.[71] The factors that the Court raised in support of the 'ultimate authority and control' of the Council over KFOR relate solely to supervision over the exercise of delegated powers.[72] If we take, as an example, the reporting requirement that the Court refers to in support of its 'ultimate authority and control' test, we must stress that this is a standard requirement in authorization resolution regardless of the degree of control exercised by the Council in practice.[73] Furthermore, in its comments to the ILC on the issue the UN Secretariat itself stated that:

> While the submission of [periodic] reports provides the Council with an important 'oversight tool', the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the

[71] The Court also used the term 'overall authority and control' synonymously with 'ultimate authority and control.' *Behrami*, para 134. This might create the mistaken impression that the Court actually applied the 'overall control' test of attribution adopted by the ICTY in *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Judgment, 15 July 1999. The 'overall control' language used by the Court comes directly from Professor Sarooshi's book, which was written before *Tadić* was handed down. See Sarooshi (n 36) 163–166.

[72] See (n 66).

[73] See N Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' 11 EJIL (2000) 541, 564 and 565.

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> operation, for the ultimate test of responsibility remains 'effective command and control'.[74]

Moreover, the Security Council's 'ultimate authority and control' is abstract at best. It can pass whatever Resolution it likes, but that does not mean that States will actually obey it. Command is the essence of effective control, and this is something that the Council most certainly did not exercise in relation to KFOR. The fact that home States did retain substantial powers over their troops is evidence of their effective control over the specific conduct.[75] KFOR troops were directly answerable to their national commanders and fell exclusively within the jurisdiction of their home State which decided on waiver of immunities; moreover, home States retained jurisdiction in disciplinary, civil and criminal matters and KFOR personnel were immune from arrest and detention other than by their State;[76] rules of engagement were national, deployment decisions were national, as was the financing of the troops.[77] To the Court none of this seemed to matter.

C. The Court's Failure to Discuss Contrary Authority

As we have seen, from a simple factual criterion for attribution to the UN—whether the troops on the ground took their orders from New York or not—the Court made something far less comprehensible. Unfortunately, the Court did so while failing to even acknowledge or discuss authorities which ran contrary to its analysis. To start with the ILC, though the Court cited its work on several occasions and quoted extensively from its commentary,[78] the Court does not even mention the following views of the Commission:

> As was done on second reading with regard to the articles on State responsibility, the present articles only provide positive criteria of attribution. Thus, the present articles do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, *that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations*. This point, *which is hardly controversial*, was recently expressed [in a letter by the UN to Belgium].[79]

The Court also fails to mention several examples given by the ILC of peacekeeping operations which were authorized by the Security Council, but over which the UN did not exercise effective control and was accordingly not

[74] See *Responsibility of international organizations—Comments and observations received from Governments and international organizations*, ILC, 57th Session (2 May–3 June and 4 July–5 August 2005), UN Doc A/CN.4/556, 46.

[75] See (n 57) and (n 58) and accompanying text.

[76] UNMIK Regulation 2000/47, ss 2.4. and 6.2.

[77] *Behrami*, para 77.

[78] *Behrami*, paras 31–33.

[79] ILC Report 2004, 102, para 5 (emphasis added).

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responsible for.[80] The ILC also makes it clear that 'effective control' means operational control, not ultimate or overall political control over an operation.[81] Moreover, the ILC quotes the UN Secretary-General as stating that:

> The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the *exclusive command and control of the United Nations* [. . .] In joint operations, international responsibility for the conduct of the troops lies where *operational command and control* is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.[82]

The Court accords a similar treatment to the Venice Commission.[83] Though it refers to the views of the Venice Commission with regard to the structure and operational command of the multinational security forces,[84] it does not quote the Commission's views on the relationship between the UN, NATO and KFOR and on the issue of attribution:

> As to applications for alleged human rights breaches resulting from actions or failures to act by KFOR troops, the matter is very complex. KFOR, unlike UNMIK, is not a UN peacekeeping mission. Therefore, although KFOR derives its mandate from UN SC Resolution 1244, it is not a subsidiary organ of the United Nations. *Its acts are not attributed in international law to the United Nations as an international legal person. This includes possible human rights violations by KFOR troops*. It is more difficult to determine whether acts of KFOR troops should be attributed to the international legal person NATO or whether they must be attributed to their country of origin. Not all acts by KFOR troops which happen in the course of an operation 'under the unified command and control' (UN SC Resolution 1244, Annex 2, para. 4) of a NATO Commander must be attributed in international law to NATO but they can also be attributed to their country of origin. Thus, acts by troops in the context of a NATO-led

[80] ibid 112–114.

[81] ibid 113, fn 297.

[82] ibid 114, citing UN Doc A/51/389, paras 17–18 (emphasis added).

[83] The European Commission for Democracy through Law (Venice Commission: http://www.venice.coe.int/) is an advisory body of the Council of Europe which deals with constitutional issues. Its membership totals 53 States, and includes all members of the Council of Europe as well as Algeria, Chile, Israel, Kyrgystan, South Korea, and Morocco. The Commission consists of independent experts 'who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science' who serve in their individual capacity (Art 2 (1) of its Statute). Most of the Commission's members are academics, while some served as members of the European Commission and Court of Human Rights, or highest national courts. While its opinions are of an advisory character, the high quality of the expertise and research behind them, as well as the reputation of the Commission's members, have made these documents a highly influential expression of jurists' opinion on the state of international and European law.

[84] *Behrami*, para 14.

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> operation cannot simply all be attributed either to NATO or to the individual troop-contributing states.[85]

Likewise, the overwhelming majority of scholarly opinion goes against the Court's position, yet it is also ignored. Even among the scholars that it actually cites in its decision, all but one of those who do take a position on attribution say exactly the opposite of what the Court itself held, yet the Court never addresses them.[86] Nor does the Court discuss any other contrary authorities, including the seminal study on the legal status of UN forces written by Seyersted almost 50 years ago,[87] the prestigious commentary on the UN Charter edited by Judge Bruno Simma,[88] and numerous other authors.[89]

[85] European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo: Possible establishment of review mechanisms, 11 October 2004, No 280/2004, CDL-Ad (2004) 033, at 18, para 79 (citations omitted, emphasis added).

[86] See the works of Friedrich and de Wet in (n 47) and accompanying text. See also the article by Wolfrum cited by the Court in *Behrami*, at para 130–R Wolfrum, 'International Administration in Post-Conflict Situations by the United Nations and Other International Actors,' 9 Max Planck Yearbook of United Nations Law (2005) 649, 690: 'As far as KFOR is concerned its national contingents are bound by the international human rights instruments to which its governments have adhered to, in particular the [ECHR] and to international humanitarian law. It is established that international human rights instruments apply also to the extraterritorial application of the jurisdiction of its States parties. Having been integrated in KFOR the national contingents remain under the authority of the sending state and thus are bound to the obligations their governments are committed to.'

[87] Seyersted differentiated between forces over which the UN has operational command or control, and forces which it authorizes, but are under the command of a member State or States, and concluded that responsibility must remain with contributing States if they exercise operational command. See F Seyersted, 'United Nations Forces: Some Legal Problems' 37 BYBIL (1961) 351, 369–370 (discussing the Korean War); 389–390 (discussing UNEF); and 411 ff, esp. 428–435.

[88] See A Paulus, 'Article 29', in B Simma (ed), *The Charter of the United Nations—A Commentary* (OUP, 2002) 542, MN 9: 'The delegation of tasks to subisidary organs is to be distinguished from authorization of other bodies or States. For instance, the [Security Council] may entrust the [Secretary General] with certain tasks [. . .], or authorize member States to act. In the latter case, the action is attributed to the member State, whereas acts of subsidiary organs are attributed to the parent body which exercises both authority and control over them;' J Frowein & N Kirsch, 'Article 42', in Simma, ibid 759, MN 29, who state that '[w]here member States are authorized to apply force, the armed forces remain fully under their control, with respect to both their deployment and their actual conduct. Their acts are, therefore, not attributable to the UN.' Moreover, even if the action is under full UN command and control 'the question may arise whether the use of force is to be attributed to the States providing the contingents or to the UN itself.'

[89] See, eg CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd rev ed, CUP, 2005) 403: 'Imputability of the acts of forces of the UN becomes possible where national contingents become organs of the UN by being placed under the authority of the UN or under a commander appointed by and taking orders from it and in circumstances where the states providing them have ceded their organic jurisdiction over them. Where the contingents are organs of the national state and under the full organic jurisdiction of the national state, even if they were acting in execution of a UN decision, the UN cannot be held responsible for their acts, as was the case in Korea in 1950, for instance'; J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' 12 EJIL (2001) 469, esp 486, who noted that despite the fact that KFOR 'assumes responsibility for directing the activities of the forces [. . .] the national governments of the contingents ultimately retain significant control over soldiers, bolstering a finding of individual state accountability for the acts of the troops each state has contributed to KFOR.'

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Indeed, the scholarly consensus on the point that effective *operational* command or control by an organization is required for attribution of conduct to that organization is such that the ILC itself has said it to be 'hardly controversial'.[90] And yet, despite all this authority, and despite the views on the matter expressed by the ILC, the Venice Commission, and the UN itself, the European Court ruled that any action authorized by the UN is ipso facto attributable to the organization. Even if we were somehow to accept the Court's conclusion, why should this attribution be exclusive only to the organization, and not also extend to the participating States? As the ILC itself has stated:

> Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization.[91]

Finally, not only is the Court's *Behrami* decision wrong as a matter of law, but it also leads to unacceptable results as a matter of policy. The system of collective security that was envisaged in the Charter did not come to pass precisely because States did not wish to cede control over their armed forces to the UN. Yet now, according to the European Court, States can have it both ways, as they can retain actual control over their forces and at the same time have absolutely no liability for anything that these forces do, since their actions are supposedly attributable solely to the UN. It is staggering that such a message of unaccountability could have been sent by a court of human rights.

V. COMPARISON WITH *AL-JEDDA*: NORM CONFLICT

Comparing the European Court's decision in *Behrami and Saramati* with the judgment of the House of Lords in the *Al-Jedda* case puts into stark relief one of the themes that the European Court wanted to avoid: norm conflict. The facts of the *Al-Jedda* case were for all practical intents and purposes identical to those in *Saramati*. The applicant, who was suspected of being a terrorist, was detained by the UK military in Iraq. He was kept in executive detention, without any judicial supervision or criminal charges, under the authority that the UK drew from Security Council Resolution 1546 (2004). This resolution, like Resolution 1244, used the 'all necessary means' language and did not expressly authorize military preventative detention, though it was apparent that such was the Council's intent since the Council referred to a letter from the US Secretary of State asking precisely for such an authorization.[92]

[90] See (n 79).

[91] ILC Report 2004 101, para 4.

[92] Resolution 1546, para 10.

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Mr Al-Jedda challenged his detention before UK domestic courts, relying on the Human Rights Act 1998 and Article 5(1) of the ECHR, which prohibits preventative detention. His claims were rejected, with the Court of Appeal ultimately ruling that Resolution 1546, through Article 103 of the Charter, prevailed over the ECHR, which therefore provided the applicant with no protection in respect of his detention on preventative grounds.[93] The applicant was allowed to bring a further appeal to the House of Lords.

Before the Court of Appeal the UK Government did not argue that its actions were attributable to the UN and to the UN alone—on the contrary, its arguments were focused on the pre-emptive effect of Article 103, ie on the conflict between a Charter obligation and the ECHR. Moreover, as an intervener in *Behrami*, the UK Government also made no such argument in regard to attribution, but argued solely in terms of State jurisdiction under Article 1 of the ECHR.[94] However, while *Al-Jedda* was pending on appeal before the House of Lords, the UK Government received an unexpected gift in the form of the European Court's *Behrami* decision. The Government quite understandably seized the moment, did a volte-face and raised *Behrami* and attribution to the UN as a new issue before the House of Lords.

Unfortunately for the Government, when translated to the context of Iraq *Behrami* seemed even more absurd than it does in relation to Kosovo. Was the House of Lords truly supposed to say that all of the actions of the US and UK troops in Iraq were attributable to the UN? As Lord Bingham himself noted, up until then nobody claimed that the UN was responsible for the Abu Ghraib torture scandal.[95] Moreover, if we recall that the legal basis that the US and the UK relied on for invading Iraq in the first place was implied authorization by the Security Council,[96] the logical consequence of the UK Government's reliance on *Behrami* is that the *entire war and occupation*, all of it, was attributable to the UN. Faced with such a prospect, it is hardly surprising that the House was not going to follow *Behrami*. What it did instead was to distinguish it:

> The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to

[93] [2006] EWCA Civ 327, [2007] QB 621.
[94] Intervenor's submissions on file with the authors.
[95] *Al-Jedda* (per Lord Bingham) para 23.
[96] See, eg D Kritsiotis, 'Arguments of Mass Confusion' 15 EJIL (2004) 233, 241–245.

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> me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.[97]

With respect, we do not find Lord Bingham's attempt to distinguish *Behrami* to be particularly persuasive. There certainly are many differences between Iraq and Kosovo, yet Iraq and Kosovo are exactly the same where it matters. In both cases there was a military intervention of dubious legality, and a subsequent UN Security Council resolution authorizing an international presence. If this authorization should be thought of within the framework of delegation, the two situations are identical. The only real difference is the lack in Iraq of a UN civil administration in the likeness of UNMIK. That, of course, is because the US and the UK were unwilling to give such a role to the UN mission, and moreover because the UN mission that was in Iraq, such as it was, was bombed out of the country in the summer of 2003. Yet this one difference has no bearing on the military detention of individuals by the UK forces in Iraq, or by KFOR in Kosovo.

Lord Bingham also seems to make much of the fact that Resolution 1244, unlike Resolution 1546, refers to an international civil and security presence 'under UN auspices'. However, as Lord Rodger points out in his judgment,[98] no particular significance was attached to this fact by the European Court in *Behrami*,[99] which referred to this same language in the Military Technical Agreement between the FRY and NATO that preceded the adoption of Resolution 1244.[100] We might only add that the words 'under UN auspices' were added both to the Agreement and to Resolution 1244 as a face-saving measure for the Milošević regime in the FRY. Indeed, this enabled Milošević's propaganda machine to proclaim 'victory' over NATO (for purely domestic purposes of course) by saying that, as a consequence of the Serbian resistance to NATO, it was UN, and not NATO forces that were coming into Kosovo, as was foreseen in the Rambouillet accords which were previously rejected by the FRY.[101] In reality, however, KFOR troops are under no more UN control than are the coalition troops in Iraq.

[97] *Al-Jedda* (per Lord Bingham) para 24.

[98] *Al-Jedda* (per Lord Rodger) para 90.

[99] *Behrami*, para 131.

[100] See (n 4).

[101] For example, in the address to the nation in which he announced the cessation of hostilities, Milošević said the following:

> Our army and our people have through their heroic defence of our country from the vastly superior forces of the aggressor managed to preserve the territorial unity, territorial integrity and sovereignty of our country, and have succeeded to place the problem which needs to be resolved in the southern Serbian province *under UN auspices* and also preserve our army and its combat potentials (emphasis added).

Available at http://www.b92.net/info/vesti/index.php?yyyy=2008&mm=03&dd=24&nav_category=11&nav_id=290676 (in Serbian, authors' translation). See also the Letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/1999/649. Annexed to this letter is the peace plan which ended the NATO bombing, which was negotiated between Milošević and international representatives. Item 3 of this plan refers to the deployment of an international force under UN auspices.

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In our view (and as Lord Rodger has shown in his judgment),[102] *Behrami* cannot really be distinguished from *Al-Jedda*. In distinguishing *Behrami* the House of Lords avoided telling their fellow judges in Strasbourg they got it wrong. That is not to say that the House of Lords could not have said so, particularly as the whole question of attribution is not one of the interpretation of the ECHR, but of general international law, on which topic the House of Lords is at least as competent as is the European Court.

More important, however, is what the House of Lords did after distinguishing *Behrami.* It first explicitly applied the effective control test from Article 5 of the ILC Draft Articles on the Responsibility of International Organizations, and thus established that the UK forces in Iraq are (obviously) under the UK's control,[103] and that the ECHR in principle applies to these forces' conduct. However, like the Court of Appeal before it, it found that there was a norm conflict between Article 5(1) of the ECHR, which prohibited preventative detention, and Resolution 1546, which permitted it. It also rejected the applicant's main argument against the application of Article 103 of the Charter—that this article cannot be applicable to a permissive norm, an *authorization* by the Council to a State, since it is textually limited only to a State's *obligations* arising from the Charter.[104] Their Lordships' conclusion on this point is debatable, though it is in our view probably correct, and is supported by significant authority.[105]

The House of Lords thus concluded that Article 103 of the Charter is applicable, and that it serves to displace or qualify the protections granted by Article 5(1) of the ECHR. However, the position of the House of Lords on this sort of pre-emption was somewhat more nuanced than that of the Court of Appeal, as it ruled that:

> '[T]he UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed *to any greater extent than is inherent* in such detention.'[106]

In other words, the pre-emption is not wholesale, and Article 5 does not simply disappear into thin air.

[102] *Al-Jedda* (per Lord Rodger) paras 93–111. This conclusion seems to be supported by the fact that Lord Brown, who was the only judge seriously to attempt at distinguishing *Behrami*, seems to have changed his mind after the judgment was officially proclaimed, as he added a rather strange postscript to his opinion in which he expresses doubts as to the continuing validity of his earlier reasoning.

[103] *Al-Jedda* (per Lord Bingham) paras 5 & 23.

[104] *Al-Jedda* (per Lord Bingham) paras 26–35.

[105] See, eg R Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council,' 64 *ZaöRV* (2004) 21; Sarooshi (n 36) 150; Gowlland-Debbas (n 46); Frowein & Kirsch, 'Article 39', in Simma (n 88) 729, MN 33.

[106] *Al-Jedda* (per Lord Bingham) para 39. See also *Al-Jedda* (per Baroness Hale) paras 126 & 129, and *Al-Jedda* (per Lord Carswell) para 136.

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Good arguments could be made both for and against their Lordships' ultimate conclusion on norm conflict. That, however, is not the point of our discussion here.[107] It is to the comparison between *Behrami* and *Al-Jedda* that we wish to draw attention, as *Behrami* can best be explained by considering what it does *not* say, rather than what it does. Unlike the House of Lords, the European Court does not say a word about norm conflict. It does mention Article 103 of the Charter in passing, to reinforce the importance of the Chapter VII system,[108] but it is most certainly not ruling that Resolution 1244 has any sort of pre-emptive effect while, on the other hand, the respondent and intervening States extensively relied on the pre-emptive effect of Article 103.[109]

If we now put ourselves in the collective shoes of the European Court, its reluctance to say anything about norm conflict is perfectly understandable. That 15 States sitting in a smoke-filled room in New York could by their fiat simply displace the ECHR, the 'constitutional instrument of European public order'[110]—the Court, which sees itself as the guardian of this public order, was not about to say *that*, not if it could help it. Neither would it, however, accept the applicants' position, and as a consequence antagonize so many powerful States and interfere with peacekeeping and the Chapter VII system. And so it is that we have *Behrami*, as the only logically possible, yet profoundly unsatisfactory, outcome of these two competing policy considerations.

VI. AN AMBIGUOUS MAJORITY

The Court's *Behrami* decision has one more regrettable feature. Since the *Behrami* decision is, despite its great significance, 'just' an inadmissibility decision of the Court, all that it says in its operative paragraph is that it was decided by a majority. The decision does not state, however, by how large a majority it was rendered; nor are there any separate or dissenting opinions attached to it. This is presumably so because Rule 56(1) of the Rules of Court,[111] which sets out the content of (inadmissibility) decisions, provides that '[t]he decision of the Chamber shall state whether it was taken unanimously or by a majority and shall be accompanied or followed by reasons.' On the other hand, Rule 74, which sets out the contents of a judgment on the merits, provides not only that the judgment should say whether it was delivered by a majority or not, but that it must also state the number of judges constituting the majority (Rule 74(1)(k)), while it also expressly allows

[107] For more on *Al-Jedda*, see the discussion by Tobias Thienel and commentors on the *Opinio Juris* weblog, at http://www.opiniojuris.org/posts/1200312204.shtml and http://www.opiniojuris.org/posts/1200490105.shtml.

[108] *Behrami*, paras 26 and 147.

[109] *Behrami*, paras 97, 102, 106, 113.

[110] *Behrami*, para 145. See also *Loizidou* (preliminary objections) para 75.

[111] Available at http://www.echr.coe.int/

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for separate opinions by individual judges (Rule 74(2)). This distinction is derived from Article 45(2) of the ECHR, pursuant to which judges are 'entitled to deliver a separate opinion' in respect of judgments on the merits, but which makes no mention of such an entitlement in respect of admissibility decisions.

One hardly needs to remark how unsatisfactory it is not to know the size and composition of the majority, nor to have any dissenting opinions in a case as important as *Behrami*. The fact that we are speaking of an admissibility decision, instead of a merits judgment, does not change this conclusion one bit, since this particular admissibility decision is not routine and is far more important than the vast majority of judgments produced by the European Court. The Court's reasoning in a case such as this one is of much greater import than the final outcome, and the lack of separate opinions merely serves to limit our understanding of the decision and create a false impression of certainty and unanimity. Incidentally, the same thing happened in another extremely important decision of the Court, *Banković*. Just as with *Banković*, it is difficult to assess the impact of *Behrami* as a precedent and the likelihood of it being overturned in the future, as we certainly hope will ultimately happen with both of these decisions. *Behrami* could just as easily have been decided by nine votes to eight as with only one dissent—we just have no way of knowing.

Surely there must be a way out of this situation. The judges of the European Court could come up with an informal arrangement within the ambit of the existing Rules to allow for separate opinions in important inadmissibility decisions, or they could proceed to change the Rules themselves. Article 45(2) of the ECHR would not be a bar in that regard. It does indeed *entitle* judges to deliver separate opinions in respect of judgments, but it does not *prohibit* such opinions in respect of all decisions on admissibility. The fact that a judge is not expressly entitled to deliver a separate opinion in an admissibility decision does not mean that he or she cannot be allowed to do so by the Court itself.

Finally, one could also express the hope that in cases as complex and important as was this one, the Court will make publicly available through its HUDOC information system the written pleadings of the parties and the verbatim records of the oral hearings, as is for instance the practice of the ICJ. This would cost the Court very little, since it already produces the transcripts for its internal purposes, and as it already makes available to the public the video recordings of some of its hearings. More transparency would be welcome.

VII. CONCLUSION

As we have seen, the only reasonable explanation for the Court's reliance on the notion of delegation from the institutional law of international organizations to fashion a standard of attribution, despite so many contrary authorities,

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is in the Court's desire to preclude applications regarding peacekeeping actions, but to do so in a way which would avoid the issues of state jurisdiction and norm conflict. One can to an extent be sympathetic to the Court's position. It has an enormous backlog and more than enough hot potatoes on its plate already, as is shown by its several recent judgments on Russian human rights abuses in Chechnya, for which it was duly punished by the Russian refusal to ratify Protocol No 14, thereby putting a halt to the Court's own reform process.[112] Antagonizing the other major European powers over Kosovo and possibly disrupting future peacekeeping operations would, from the Court's perspective, be an understandably unappetizing prospect. That, of course, does not make *Behrami* any more correctly decided.

Behrami has already produced ripple effects internationally, as evidenced by the House of Lords' *Al-Jedda* decision. Moreover, in the Sixth Committee of the General Assembly, which is considering the ILC's work on the responsibility of international organizations, several States have opportunistically invoked *Behrami* and called upon the ILC to take it into account in its work on the Draft Articles on the Responsibility of International Organizations.[113]

More important from our perspective, however, is the real-life implications that *Behrami* has for the protection of human rights in Kosovo. The Court has already used *Behrami* to dismiss several claims brought against European States for purported human rights violations in Kosovo.[114] Indeed, Kosovo has now truly become the only lawless land of Europe, a legal black hole over which there is no independent human rights supervision. Furthermore, Kosovo's recent declaration of independence, even if it proves ultimately to be successful,[115] will only exacerbate the lack of any meaningful human rights supervision, since Serbia and its allies will block the admission of Kosovo to the UN and to the Council of Europe, and consequently block Kosovo's succession or accession to many human rights treaties, including the ECHR and the ICCPR.[116] They will moreover in all likelihood manage to do

[112] See, eg B Bowring, 'Russia's relations with the Council of Europe under increasing strain', *EU-Russia Centre*, 28 February 2007, available at http://www.eu-russiacentre.org/

[113] See the statement by the representative of Denmark on the behalf of Nordic countries, UN Doc A/C.6/62/SR.18, at 17; statement by the representative of Greece, UN Doc A/C.6/62/SR.19, 3.

[114] See *Gajic v Germany*, App No 31446/02, Decision, 28 August 2007; *Kasumaj v Greece*, App No 6974/05, Decision, 5 July 2007. See also *Beric v Bosnia and Herzegovina*, App Nos 36357/04 (etc), Decision, 16 October 2007.

[115] On 8 October 2008 the UN General Assembly adopted resolution A/RES/63/3 in which it requested the ICJ to render an advisory opinion on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law. After conducting written and oral proceedings, the Court is expected to issue its advisory opinion in the next year or so. Case materials are available at http://www.icj-cij.org/.

[116] See Art 48(1) of the ICCPR, which provides that it is 'open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant' and

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so despite the controversial principle of automatic succession to human rights treaties.[117]

Finally, though the Court might have thought to have permanently rid itself of the irritating Kosovo problem through its delegation-means-attribution rationale in *Behrami*, the reality on the ground might interfere with its calculation. When Kosovo proclaimed independence, the EU sent a new mission to Kosovo, EULEX, which will now assume many powers in the field of law enforcement from UNMIK.[118] Even if one somehow finds the legal basis for the deployment of EULEX in Resolution 1244, as the EU purports to do,[119] one could hardly say that the Security Council delegated some of its powers to this new mission. In other words, if a case alleging a violation of human rights in Kosovo by the EULEX ever came before the European Court, it is difficult to see how it could use *Behrami* to dismiss it, and it might be forced to confront squarely the issue of the responsibility of EU Member States for the acts of the organization. Hope, as they say, springs eternal.

Art. 59(1) of the ECHR, which stipulates that it 'shall be open to the signature of the members of the Council of Europe.'

[117] See, eg Human Rights Committee, General Comment No 26, 2 November 1994.

[118] Council Joint Action on EU Rule of Law Mission in Kosovo, No. 5928/08, 4 February 2008, available at http://www.eupt-kosovo.eu/new/legalbasis/docs/st05928en08.pdf.

[119] It should be noted, however, that the Serbian government has recently become more amenable to the presence of EULEX, and that it might give its consent to the mission's presence.

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