Behrami and Behrami v. France
Application No. 71412/01
and
Saramati v. France, Germany And Norway
Application No. 78166/01

EUROPEAN COURT OF HUMAN RIGHTS
Grand Chamber Decision As to Admissibility (2 May 2007)
<http://hei.unige.ch/~clapham/hrdoc/docs/ECHRBehrami.doc>

Author's Note: The Grand Chamber joined its examination of both applications. Each dealt with a distinct feature of the U.N.'s oversight role in Kosovo for the well-being of the respective parties.

Note the numerous international organizations mentioned in this opinion, all of which had some role in the establishment or maintenance of the international presence in Kosovo: G-8—the political entity that effectively unleashed the N.A.T.O bombing campaign and subsequent military occupation of Kosovo; the U.N.—via its Security Council, Secretary-General, and transitional U.N. civilian police force); N.A.T.O.—via its KFOR (Kosovo Force) military branch; the O.S.C.E.—Security and Co-operation in Europe human rights organization; and the European Union—tasked with the reconstruction and economic development of Kosovo.

Other international organizations had some "say" as well. The Council of Europe, via its European Court of Human Rights (E.C.H.R.), was the organizational entity articulating this legal analysis about to what States or organizations the Court could attribute responsibility for the harm to the individual applicants for relief. The Court, in turn, heavily relied on the extensive work product of the U.N. General Assembly's International Law Commission—the entity tasked with identifying the evolving standards governing the personality, rights, and obligations of contemporary international organizations. To some degree, the E.C.H.R. further relied on the legal analyses of other international legal institutions—the European Commission for Democracy through Law, and the International Court of Justice.

The author made some editorial enhancements to the organization in this opinion. Its footnote has been omitted.

Court's Opinion:

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THE FACTS

1. Mr Agim Behrami, was born in 1962 and his [co-plaintiff] son, Mr Bekir Behrami, was born in 1990. Both are of Albanian origin. Mr Agim Behrami complained on his own behalf, and on behalf of his deceased son, Gadaf Behrami born in 1988. These applicants live in the municipality of Mitrovica in Kosovo, Republic of Serbia [prior to Kosovo's independence in February 2008]. ... Mr Saramati was born in 1950. He is also of Albanian origin living in Kosovo. …

I. RELEVANT BACKGROUND TO THE CASES

2. The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented [which actually began in 1991]. …

3. UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by "Member States and relevant international institutions," "under UN auspices," with "substantial NATO participation" but under "unified command and control." NATO pre-deployment to The Former Yugoslav Republic of Macedonia allowed deployment of significant [ground] forces to Kosovo by 12 June 1999 (in accordance with … NATO's operational plan for the UNSC Resolution 1244 mission called "Operation Joint Guardian"). By 20 June FRY withdrawal was complete. KFOR contingents were grouped into four multinational brigades ("MNBs") each of which was responsible for a specific sector of operations with a lead country. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

1. UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General ("SG"), with the assistance of relevant international organisations, to establish it and to appoint a Special Representative to the SG ("SRSG") to control its implementation. UNMIK was to coordinate closely with KFOR. UNMIK comprised four pillars corresponding to the tasks assigned to it. Each pillar was placed under the authority of the SRSG and was headed by a Deputy SRSG. Pillar I (as it was at the relevant time) concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Co-operation in Europe ("OSCE") and Pillar IV (reconstruction and economic development) was led by the European Union.

II THE CIRCUMSTANCES OF THE BEHRAMI CASE

2. On 11 March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air: it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured…. It is not disputed that Bekim Behrami was disfigured and is now blind.

3. UNMIK police investigated. They took witness statements from, *inter alia*, the boys involved in the incident and completed an initial report. Further investigation reports … indicated … that UNMIK police could not access the site without KFOR agreement; reported that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority; and pointed out that

the detonation site had been marked out by KFOR the day *after* the detonation [italics added]. The autopsy report confirmed Gadaf Behrami's death from multiple injuries resulting from the CBU explosion. The UNMIK Police report … concluded that the incident amounted to "unintentional homicide committed by imprudence."

4. … [T]he District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued but that Mr Behrami had the right to pursue a criminal prosecution within eight days of the date of that letter. … Agim Behrami complained to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop Contributing Nation Claims Office ("TCNCO"). … TCNCO rejected the complaint stating … that the UNSC Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5 July 1999.

III. The Circumstances of the Saramati Case

5. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001 that judge ordered his pre-trial detention and an investigation into those and additional charges. On 23 May 2001 a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001 the Supreme Court allowed Mr Saramati's appeal and he was released.

6. In early July 2001 UNMIK police informed him by telephone that he had to report to the police station to collect his money and belongings. The station was located in Prizren in the sector assigned to MNB [Multinational Brigade] Southeast, of which the lead nation was Germany. On 13 July 2001 he so reported and was arrested by UNMIK police officers by order of the Commander of KFOR ("COMKFOR"), who was a Norwegian officer at the time.

7. On 14 July 2001 detention was extended by COMKFOR for 30 days.

8. On 26 July 2001, and in response to a letter from Mr Saramati's representatives taking issue with the legality of his detention, KFOR Legal Adviser advised that KFOR had the authority to detain under the UNSC Resolution 1244 as it was necessary "to maintain a safe and secure environment" and to protect KFOR troops. KFOR had information concerning Mr Saramati's alleged involvement with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia and was satisfied that Mr Saramati represented a threat to the security of KFOR and to those residing in Kosovo.

9. On 26 July 2001 the Russian representative in the UNSC referred to "the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade [Kosovar civilian police working under supervision of UNMIK police], accused of undertaking activities threatening the international presence in Kosovo."

10. On 11 August 2001 Mr Saramati's detention was again extended by order of COMKFOR. On 6 September 2001 his case was transferred to the District Court for trial, the indictment retaining charges of, *inter alia*, attempted murder and the illegal possession of weapons and explosives. By letter dated 20 September 2001, the decision of COMKFOR to prolong his detention was communicated to his representatives.

11. During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati's representatives requested his release and the trial court responded that, although the Supreme Court had so ruled in June 2001, his detention was entirely the responsibility of KFOR.

12. On 3 October 2001 a French General was appointed to the position of COMKFOR.

13. On 23 January 2002 Mr Saramati was convicted of attempted murder under Article 30 § 2(6) of the Criminal Code of Kosovo in conjunction with Article 19 of the Criminal Code of the FRY. He was acquitted on certain charges and certain charges were either rejected or dropped. Mr Saramati was transferred by KFOR to the UNMIK detention facilities in *Prishtina* [italics added and a spelling that "internationals" working in Kosovo did not employ, because of its pre-independence association with one of the competing ethnic groups].

14. On 9 October 2002 the Supreme Court of Kosovo quashed Mr Saramati's conviction and his case was sent for re-trial. His release from detention was ordered. A re-trial has yet to be fixed.

IV. RELEVANT LAW AND PRACTICE

A. The prohibition on the unilateral use of force and its collective security counterpart

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2015. The UN succeeded the League of Nations in 1946. The primary objective of the UN was to maintain international peace and security (First recital and Article 1 § 1 of the Charter). … Article 2 § 4 [prohibition on use of force by States] and most of the Chapter VII measures [Security Council options to sanction offenders] … amounted to the prohibition of the unilateral use of force in favour of collective security implemented by a central UN organ (the UNSC) with the monopoly on the right to use force in conflicts identified as threatening peace. ...

B. The Charter of the UN, 1945

Accordingly, our respective Governments ... have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

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

. . .

Article 2

[2.]5. *All Members shall give the United Nations every assistance* in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action [italics added].

. . .

[2.]7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

16. Chapter V [of the U.N. Charter] deals with the UNSC and Article 24 outlines its "Functions and Powers" as follows:

[24.]1. In order to ensure prompt and effective action by the [UN], its *Members confer on the [UNSC] primary responsibility* for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the [UNSC] acts on their behalf [italics added].

. . .

Article 25 provides:

The Members of the United Nations agree to accept and carry out the decisions of the [UNSC] in accordance with the present Charter.

17. Chapter VII is entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression." Article 39 provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken … to maintain or restore international peace and security.

The notion of a "threat to the peace" within the meaning of Article 39 has evolved to include internal conflicts which threaten to "spill over" or concern serious violations of fundamental international (often humanitarian) norms.

. . .

18. Chapter VII … [provides in]:

Article 48

> The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
>
> Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.
>
> Article 49
>
> The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

C. Article 103 of the Charter

19. This Article reads as follows:

> 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.

20. The ICJ [International Court of Justice] considers Article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement. …

D. The International Law Commission ("ILC")

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1. Draft Articles on the Responsibility of International Organisations

21. Article 3 of these draft Articles … is entitled "General principles" and it reads as follows:

> 1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
>
> 2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (a) Is attributable to the international organization under international law; and
>
> (b) Constitutes a breach of an international obligation of that international organization.

22. Article 5 of the draft Articles … is entitled "Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation" and reads as follows:

> The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.

23. The ILC Commentary on Article 5, in so far as relevant, provides:

> When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded [effectively transferred] to that organization. In this case the *organ's conduct would clearly be attributable only to the receiving organization* [italics added]. ... Article 5 deals with the different 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 the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization. ...
>
> Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ...
>
> Attribution of conduct to the contributing State is clearly linked with 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.
>
> As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the *decisive question* in relation to attribution of a given conduct appears to be *who has effective control over the conduct in question* [italics added].

24. The report noted that it would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation. It continued:

> What has been held with regard to joint operations ... should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [UN] and the [TCN] [Troop Contributing Nation]. While it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

25. As regards UN peacekeeping forces (namely, those directly commanded by the UN and considered subsidiary organs of the UN), the [I.L.C.] Report quoted the UN's [Under-Secretary General and] legal counsel as stating that the acts of such subsidiary organs were in principle attributable to the organisation and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation. This, according to the Report, summed up the UN practice in respect of several UN peacekeeping missions referenced in the Report.

2. Draft Articles on State Responsibility

26. Article 6 if these draft Articles is entitled "Conduct of organs placed at the disposal of a State by another State" and it reads as follows:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

[*State* responsibility] Article 6 addresses the situation in which an organ of a State is put at the disposal of another, so that the organ may act temporarily for the latter's benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

. . .

F. The MTA of 9 June 1999

27. Following the agreement by the FRY [Federal Republic of Yugoslavia] that its troops would withdraw from Kosovo and the consequent suspension of air operations against the FRY, the MTA [Military Technical Agreement] was signed between "KFOR" [N.A.T.O. Kosovo Force] and the Governments of the FRY and the Republic of Serbia on 9 June 1999 which provided for the phased withdrawal of FRY forces and the deployment of international presences. Article I (entitled "General Obligations") noted that it was an agreement for the deployment in Kosovo:

> under United Nations auspices of effective international civil and security presences. The Parties note that the [UNSC] is prepared to adopt a resolution, which has been introduced, regarding these measures.

28. Paragraph 2 of Article I provided for the cessation of hostilities and the withdrawal of FRY forces and, further, that:

> The State governmental authorities of the [FRY] and the Republic of Serbia understand and agree that the international security force ("KFOR") will deploy following the adoption of the UNSC [Resolution] ... and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission. They further agree to comply with all of the obligations of this Agreement and to facilitate the deployment and operation of this force.

. . .

29. [The MTA] Appendix B set out in some detail the breadth and elements of the envisaged security role of KFOR in Kosovo. Paragraph 3 provided that neither the international security force nor its personnel would be "liable for any damages to public or private property that they may cause in the course of duties related to the implementation of this agreement."

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G. The UNSC Resolution 1244 of 10 June 1999

30. The Resolution reads, in so far as relevant, as follows:

> <u>Bearing in mind</u> the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,
>
> . . .
>
> <u>Determined</u> to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,
>
> . . .
>
> 5. <u>Decides</u> on the deployment in Kosovo, *under United Nations auspices*, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the [FRY] to such presences [italics added];
>
> 6. <u>Requests</u> the Secretary-General to appoint, in consultation with the Security Council, a Special Representative *to control the implementation of the international civil presence*, and further requests the Secretary-

> General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner [italics added];
>
> 7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo ... with all necessary means to fulfil its [U.N.S.C.] responsibilities under paragraph 9 below;
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> . . .
>
> 9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:
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> . . .
>
> (e) Supervising de-mining until the international civil presence can, as appropriate, take over responsibility for this task;
>
> (f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;
>
> . . .
>
> 11. Decides that the main responsibilities of the international civil presence will include:
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> . . .
>
> (b) Performing basic civilian administrative functions where and as long as required;
>
> . . .
>
> (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
>
> (j) Protecting and promoting human rights;
>
> . . .

21. Decides to remain *actively seized* of the matter [i.e., continuing U.N. Security Council jurisdiction—italics added].

. . .

31. Annex 1 listed the general principles on a political solution to the Kosovo crisis adopted by the G-8 Foreign Ministers on 6 May 1999. Annex 2 comprised nine principles (guiding the resolution of the crisis presented in Belgrade on 2 June 1999 to which the FRY had agreed) including:

> 3. Deployment in Kosovo under [UN] auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

> 4. The international security presence with substantial [NATO] participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.
>
> 5. Establishment of an interim administration for Kosovo as a part of the international civil presence..., to be decided by the Security Council of the [UN]. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo. ...

32. While this Resolution used the term "authorise", that term and the term "delegation" are used interchangeably. 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.

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J. NATO/KFOR …Main Standing Operating Procedures ("SOP"), March 2003

33. Referring to UNSC Resolution 1244 and UNMIK [UN Mission in Kosovo] Regulation No. 2000/47, the SOP was intended as a guide. The KCO [N.A.T.O. Commanding Officer] would adjudicate claims relating to the overall administration of military operations in Kosovo by KFOR …. [and] would also determine whether the matter was against a TCN [troop contributing nation], in which case the claim would be forwarded to that TCN.

34. TCNs were responsible for *adjudicating* claims that arose from their own activities in accordance with their own rules and procedures [italics added]. While there was at that time *no approved policy for processing and paying* claims that arose out of KFOR operations in Kosovo, TCNs were encouraged to process claims (through TCN Claims Offices—"TCNCOs") … [italics added]. While the adjudication of claims against a TCN was purely a "national matter for the TCN concerned," the payment of claims in a fair manner was considered to further the rule of law, enhance the reputation of KFOR and to serve the interests of force protection for KFOR [but not mandated by the U.N. Security Council or Kosovo's U.N. governor].

. . .

K. European Commission for Democracy through Law ("the Venice Commission"), Opinion on human rights in Kosovo: Possible establishment of review mechanisms

35. The relevant parts of paragraph 14 of the [Venice Commission] Opinion read:

KFOR contingents are grouped into four multinational brigades. KFOR troops come from 35 NATO and non-NATO countries. Although brigades are responsible for a specific area of operations, they all fall "under the unified command and control" (UN SC Resolution 1244, Annex 2, para. 4) of [COMKFOR] from NATO. "Unified command and control" is a military term of art which only encompasses a limited form of transfer of power over troops. [TCNs] have therefore not transferred "full command" over their troops. When [TCNs] contribute troops to a NATO-led operation they usually transfer only the limited powers of "operational control" and/or "operational command." These powers give the NATO commander the right to give orders of an operational nature to the commanders of the respective national units. The national commanders must implement such orders on the basis of their own national authority. NATO commanders may not give other kinds of orders (e.g. those affecting the personal status of a soldier, including taking disciplinary measures) and NATO commanders, in principle, do not have the right to give orders to individual soldiers. ... In addition, [TCNs] always retain the power to withdraw their soldiers at any moment. The underlying reason for such a rather complex arrangement is the desire of [TCNs] to preserve as much political responsibility and democratic control over their troops as is compatible with the requirements of military efficiency. This enables states to do the utmost for the safety of their soldiers, to preserve their discipline according to national custom and rules, to maintain constitutional accountability and, finally, to preserve the possibility to respond to demands from the national democratic process concerning the use of their soldiers.

L. Detention and De-mining in Kosovo

1. Detention [*Saramati* case]

36. A letter from COMKFOR [N.A.T.O. commander] to the OSCE [human rights pillar of international presence in Kosovo] … described how COMKFOR authorised detention: each case was reviewed by KFOR staff, the MNB [N.A.T.O.'s four mutli-national brigades] commander and by a review panel at KFOR HQ, before being authorised by COMKFOR….

2. De-mining [*Behrami* case]

37. Landmines and unexploded ordinance (from the NATO bombardment of early 1999) posed a significant problem in post-conflict Kosovo, a problem exacerbated by the relative absence of local knowledge given the large scale displacement of the population during the conflict. The UN Mine Action Service (UNMAS) was the primary UN body charged with monitoring de-mining developments in general.

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38. … [In 1999, about two years before the death and blinding of the Behrami boys, the] Deputy SRSG [assistant to U.N. civilian governor of Kosovo] wrote to COMKFOR noting paragraph 9(e) of UNSC Resolution 1244 …confirming that "we are now in a position to officially assume responsibility for mine action in Kosovo" and underlining the critical need for UNMIK and KFOR to co-operate and to work closely together.

. . .

39. By letter dated 6 April 2000 to COMKFOR, the Deputy SRSG drew the latter's attention to recent CBU [mine] explosions involving deaths and asked for the latter's [COMKFOR] personal support to ensure KFOR continued to support the mine clearance project by marking CBU sites as a matter of urgency and providing any further information they had.

40. In 2001 UNMAS [U.N.'s Mine Action Service] commissioned an external evaluation of its mine action programme in Kosovo for the period mid-1999–2001. The report … commented as follows:

> At the beginning of August 1999, the MACC [U.N. Mine Action Co-ordination Centre] had *de facto* taken full control of the mine action programme, although formally it still fell under KFOR's responsibility. ... This was followed, on 24 August, by UNMIK's … Memo … [and related letter].... Through this letter the formal handing over from the military to the civilian sector of the mine action programme for Kosovo took place, as mandated in [UNSC Resolution] 1244; although, in reality, this had already taken place towards the end of August.

COMPLAINTS

41. Agim Behami complained under … [the European Convention on Human Rights right to life provision, further addressed in textbook §10.3], on his own behalf and on behalf of his son Gadaf Behrami, about the latter's death and Bekir Behrami complained about his serious injury [naming *France* as the responsible party]. They submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated CBUs [mines] which those troops knew to be present on that site.

42. Mr Saramati complained ... about his extra-judicial detention by KFOR between 13 July 2001 and 26 January 2002. He also complained … that he did not have access to court and about a breach of the respondent States' positive obligation to guarantee the Convention rights of those residing in Kosovo [naming *France, Germany* [this particular claim was later withdrawn by the detainee plaintiff]*, and Norway* as the responsible parties].

THE LAW

43. … The President of the Court agreed that the parties' submissions to the Grand Chamber could be limited to the admissibility of the cases [whether this court could legally decide the matters presented].

II. THE CASES AGAINST FRANCE AND NORWAY

A. The issue to be examined by the Court

44. The applicants [in both cases] maintained that there was a sufficient jurisdictional link … between them and the respondent States and that their complaints were

compatible *ratione loci*, *personae* [i.e., court had jurisdiction over the defendant States] and *materiae* [and jurisdiction over the subject matter of their complaints]….

67. … The UN, intervening as a third party in the *Behrami* case at the request of the Court, submitted that, while de-mining fell within the mandate of UNMACC created by UNMIK [U.N. Mission in Kosovo], the absence of the necessary CBU [mine] location information from KFOR meant that the impugned inaction could not be attributed to UNMIK.

. . .

45. … UNSC Resolution 1244 was adopted … [and] KFOR was mandated to exercise complete military control in Kosovo. UNMIK was to provide an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC comprised all legislative and executive power as well as the authority to administer the judiciary. …

46. The Court therefore considers that the 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.

47. Accordingly, the first issue to be examined by this Court is the compatibility … of the applicants complaints with the provisions of the [European] Convention [on Human Rights]. The Court has summarised and examined below the parties' submissions relevant to this question.

. . .

[Parts C. and D, containing the submissions of the respondent States, and third-party *States* not named as defendants, are omitted.]

D. The Submissions of the Third Parties

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8. The UN

48. The UN outlined the respective mandates and responsibilities of UNMIK and KFOR as set out in UNSC Resolution 1244. The mandate adopted by the UNSC was an expression of the will of the member states to grant a UN organ authority, as opposed to a duty, to act: it was not an obligation of [*sic*] result. In executing the mandate, the UN operation retained, unless otherwise specified, discretion to determine implementation including timing and priorities. The UN recalled the relevant provisions of UNSC Resolution 1244 which outlined the main responsibilities of the civil and security presences, noting that the general and at time "imprecise" mandate was, for the most part, left to be concretised and agreed upon in the realities of their daily operations.

In addition, it was important to understand the legal status of UNMIK and its relationship to KFOR. UNMIK was a subsidiary organ of the UN endowed with all-inclusive legislative and administrative powers in Kosovo including the administration of justice, it was headed by a SRSG [civilian U.N. governor] and reported directing to the UNSC *via* the SG [U.N. Secretary-General]. KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO led operation

authorised by the UNSC under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence. However, both were required to co-ordinate and operate in a mutually supportive manner towards the same goals.

. . .

49. In sum, while the de-mining operation would have fallen within UNMACC's mandate, in the absence of the necessary location information from KFOR, the impugned inaction could not be attributed to UNMIK.

E. The Court's Assessment

50. The Court has adopted the following structure in its decision set out below. It 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 [i.e., could the European Court of Human Rights do something, neither the International Court of Justice nor any other international court has never done—decide whether the *U.N.* is subject to compliance with an international judicial decision, assuming the European Court were to find this international organization responsible for the events which are the subject matter of the plaintiffs' de-mining and detention complaints].

51. In so doing, the Court … must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State [and international organizational] responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty.

1. The entity with the mandate to detain and to de-mine

52. The respondent and third party States argued that it made no difference whether it was KFOR or UNMIK which had the mandate to detain (the *Saramati* case) and to de-mine (the *Behrami* case) since both were international structures established by, and answerable to, the UNSC. The applicants maintained that KFOR had the mandate to both detain and de-mine and that the nature and structure of KFOR was sufficiently different to [from] UNMIK as to engage [make responsible] the respondent States individually.

. . .

53. Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate.

2. Can the impugned [de-mining] *action and inaction be attributed to the UN?*

(a) The [U.N. Charter] Chapter VII foundation for KFOR and UNMIK

. . .

54. The solution adopted by UNSC Resolution 1244 to this identified threat was, as noted above, the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK).

In particular, that Resolution authorised "Member States and relevant international organisations" to establish the international security presence in Kosovo as set out in ... the Resolution with all necessary means to fulfil its responsibilities…. 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 … 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 [Secretary-General] was authorised to establish UNMIK with the assistance of "relevant international organisations."

. . .

55. … the MTA [Military Technical Agreement regarding N.A.T.O forces] was completed on the express basis of a security presence "under UN auspices" and with UN approval and the Resolution had already been introduced before the UNSC. The Resolution was adopted the following day, annexing the MTA and no international forces were deployed until the Resolution was adopted.

(b) Can the impugned [detention] action be attributed to KFOR?

56. While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited … for the acts of the delegate entity to be attributable to the UN.

. . .

57. The Court considers that the key question is whether the UNSC retained ultimate authority and control so that *operational command only* was delegated [italics added—the U.N. has no standing army, and must rely on member States to assist when necessary to fulfil its peacekeeping raison d'être]. …

58. That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, is borne out by the following factors.

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 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 (see the UN submissions, paragraph 118 above) 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 [U.N. Secretary-General] present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.

. . .

59. Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR. NATO fulfilled its command mission *via* a chain of command. … MNB [de-mining] action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.

. . .

60. Accordingly, … the Court finds that the UNSC retained *ultimate* authority and control and that effective command of the relevant *operational* matters was retained by NATO [italics added].

61. In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action [detention] was, in principle, "attributable" to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.

(c) Can the impugned inaction be attributed to UNMIK?

62. In contrast to KFOR, UNMIK was a subsidiary organ of the UN. …

63. Accordingly, … the impugned inaction was, in principle, "attributable" to the UN in the same sense.

3. Is the Court competent ratione personae [to order the U.N. to act in any way, such as ordering it to pay compensation to the individual applicants in these cases]*?*

64. It is therefore the case that the impugned action [detention] and inaction [failure to de-mine] are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (*The Reparations case*, ICJ Reports 1949) and that that organisation is not a Contracting Party to the [European] Convention [on Human Rights].

. . .

65. The question arises in the present case whether the Court is competent … to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

. . .

66. Of … significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to

the [European] Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force….

67. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

68. In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible … with the provisions of the [European] Convention [and the Court's ability to subject the UN to its judgment].

. . .

For these reasons, the Court

. . .

Declares, by a majority, inadmissible the application of *Behrami* and *Behrami* and the remainder of the *Saramati* application against France and Norway [because the UN is in principle responsible, but this regional court is unable to command the UN to comply with its judgment].

Christos ROZAKIS
President