

*Behrami v. France: Constructive Blue Helmets Protect KFOR Nations from Accountability*

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I. OVERVIEW

The United Nations’ administration of Kosovo was a result of the ongoing armed conflict between Serbian and Kosovar forces in the Federal Republic of Yugoslavia (FRY) that prompted decisive international action on January 30, 1999.<sup>1</sup> On that date, the North Atlantic Treaty Organization (NATO) announced its intention to begin strategic air strikes on Serbian installations should the FRY not meet demands made by the international community to end its activities in Kosovo.<sup>2</sup> That campaign lasted from March 24 to June 8, 1999.<sup>3</sup> The following day, the FRY agreed to the presence of an international peacekeeping force to be established by United Nations Security Council (UNSC) Resolution 1244. The resolution called for, inter alia, the deployment to Kosovo of a NATO security force (KFOR) and the creation of the United Nations Interim Administrative Mission in Kosovo (UNMIK).<sup>4</sup>

On March 11, 2000, Gadaf Behrami was killed and his brother Bekir blinded and permanently disfigured in Mitrovica, Kosovo. They were in a field playing with undetonated cluster bombs dropped almost a year earlier during the NATO air campaign.<sup>5</sup> KFOR operations in the area around Mitrovica were led by France.<sup>6</sup> After an investigation by UNMIK police classified the incident as an “unintentional homicide committed by imprudence,” the boys’ father brought a claim against

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1. Behrami v. France, App. No. 71412/01, Saramati v. France, Germany, and Norway, App. No. 78166/01, 45 Eur. H.R. Rep. (Summaries & Extracts) 85, 85 (2007).

2. *Id.*

3. *Id.*

4. *Id.* at 85-86.

5. *Id.* at 86.

6. *Id.*

France to the Kosovo Claims Office (KCO).<sup>7</sup> The KCO forwarded the complaint to the French Troop Contributing Nation Claims Office which ruled that demining operations under UNSC Resolution 1244 in Kosovo were the responsibility of UNMIK, not KFOR.<sup>8</sup> Consequently, there could be no liability on the part of France, pursuant to its participation in KFOR.<sup>9</sup>

In a separate case, UNMIK police arrested Ruzhdi Saramati near Prizren, Kosovo on April 24, 2001, and investigated him for attempted murder and illegal possession of a weapon.<sup>10</sup> Upon a prosecutor's indictment, the lower court ordered that Saramati be detained during the investigation.<sup>11</sup> He successfully appealed the decision to extend his pretrial detention, and the Supreme Court of Kosovo ordered his release.<sup>12</sup> On July 13, 2001 he was arrested again by order of the Norwegian Commander of KFOR for the area including Prizren.<sup>13</sup> KFOR assumed authority to detain Saramati under its mandate pursuant to UNSC Resolution 1244 to "maintain a safe and secure environment."<sup>14</sup> Saramati was detained by order of KFOR throughout his trial, during which the area command of KFOR passed to a French officer.<sup>15</sup> On January 23, 2002, the lower court found Saramati guilty of attempted murder.<sup>16</sup> The Supreme Court of Kosovo effected his release after quashing his conviction and ordering a retrial.<sup>17</sup>

Both cases were brought before the European Court of Human Rights (ECHR). Behrami claimed that France violated article 2 of the European Convention on Human Rights (European Convention), because French KFOR troops failed to mark or defuse known unexploded ordnance.<sup>18</sup> Saramati complained against France, Germany, and Norway under articles 5, 6(1), and 13 concerning his extrajudicial detention and the obligation of Convention States to provide a fair trial.<sup>19</sup> The ECHR issued a joint decision on the admissibility of the complaints and *held* that it was incompetent *ratione personae* to review complaints when the

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7. *Id.* at 86-87.

8. *Id.* at 87.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; see also S.C. Res. 1244, ¶ 9, U.N. Doc. S/Res/1244 (June 10, 1999).

15. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 88.

16. *Id.*

17. *Id.*

18. *Id.* at 102.

19. *Id.*

impugned conduct was attributable to the United Nations. *Behrami v. France*, App. No. 71412/01, *Saramati v. France, Germany, and Norway*, App. No. 78166/01, 45 Eur. H.R. Rep. (Summaries & Extracts) 85 (2007).

## II. BACKGROUND

Article 1 of the European Convention requires Member States to secure all European Convention protections to “every-one within their jurisdiction.”<sup>20</sup> To ensure that Member States comply with the European Convention, a judicial process was created to review challenged acts.<sup>21</sup> Today, individuals may challenge an alleged violation of the European Convention by bringing a Member State before the ECHR in Strasbourg, France.<sup>22</sup> The Member State is then required by the European Convention to “abide by the final judgment of the Court.”<sup>23</sup> As an organ of the European Convention, the Court may only review complaints against Member States by individuals within that State’s jurisdiction.<sup>24</sup> Traditionally, the Court applies an understanding of jurisdiction in accordance with international law in determining whether it is competent to review an applicant’s complaint.<sup>25</sup> Thus, jurisdiction for purposes of article 1 is primarily territorial but may extend beyond a State’s territory in certain circumstances, and any individual within a State’s extraterritorial jurisdiction is protected by the European Convention and may bring a suit against that State in the ECHR.<sup>26</sup>

Three areas of analysis have arisen within the Court’s jurisprudence to address whether an individual might be within a Member State’s extraterritorial jurisdiction.<sup>27</sup> The first involves acts allegedly taken by one Member State within the recognized territory of another Member State.<sup>28</sup> The second addresses events occurring within the territory of a non-Member State.<sup>29</sup> Third, the Court has considered the jurisdiction of Member States acting, at home or abroad, in cooperation with

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20. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention].

21. *Id.* art. 19.

22. *Id.* art. 34.

23. *Id.* art. 46.

24. *Id.* art. 34.

25. *Bosphorus v. Ireland*, App. No. 45036/98, 42 Eur. H.R. Rep. 1, 40 (2005).

26. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2234-35.

27. *See id.*; *Bankovic v. United Kingdom*, 2001-XII Eur. Ct. H.R. 333, 354-359; *Bosphorus*, 42 Eur. H.R. Rep. at 45.

28. *See Loizidou*, 1996-VI Eur. Ct. H.R. at 2227.

29. *See Bankovic*, 2001-XII Eur. Ct. H.R. at 356-59.

international organizations.<sup>30</sup> These three jurisdictional questions are analytically interdependent and together have created a comprehensive article 1 jurisprudence within the Court.<sup>31</sup>

The Court will find jurisdiction if the accused Member State exercised de facto control over the applicant's rights allegedly violated.<sup>32</sup> This principle directed the Court's decision in *Loizidou v. Turkey*.<sup>33</sup> There, the Court addressed a complaint by a Greek Cypriot that Turkey bore responsibility for the actions of the Turkish Republic of Northern Cyprus (TRNC).<sup>34</sup> Noting that article 1 encompasses more than just territorial jurisdiction, the Court recognized that responsibility under the European Convention arose when a State exercised effective control of an area through military action.<sup>35</sup> The legality or independence of the TRNC as a sovereign state was irrelevant in determining whether individuals affected by Turkey's actions could be considered within Turkey's jurisdiction.<sup>36</sup> Accordingly, the Court found that the sizable number of Turkish troops in northern Cyprus and those troops' role in the establishment of the TRNC demonstrated Turkey's responsibility for ensuring the rights of everyone in northern Cyprus.<sup>37</sup> Turkey's responsibility extended not only to the actions of Turkish troops but also to actions by the TRNC government, because Turkey exercised "effective overall control" of the area.<sup>38</sup>

While overall control will invoke a State's responsibility, it is not a necessary condition for article 1 "jurisdiction."<sup>39</sup> In *Assanidze v. Georgia*, the Court held that actions by authorities in the Ajarian Autonomous Republic fell under the responsibility of Georgia despite the former's de facto independence.<sup>40</sup> Applying the effective control principle would be inappropriate, because unlike in *Loizidou*, where the violations occurred within the internationally recognized territory of an innocent state, the Republic of Cyprus, no other Member State could claim a right to Ajaria but Georgia.<sup>41</sup>

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30. See *Bosphorus*, 42 Eur. H.R. Rep. at 45.

31. See *Loizidou*, 1996-VI Eur. Ct. H.R. at 2234-35; *Bankovic*, 2001-XII Eur. Ct. H.R. 333, 354-56; *Bosphorus*, 42 Eur. H.R. Rep. at 45.

32. *Loizidou*, 1996-VI Eur. Ct. H.R. at 2235-36.

33. *Id.* at 2236.

34. *Id.* at 2227.

35. *Id.* at 2234-35.

36. *Id.* at 2236.

37. *Id.* at 2235-36.

38. *Id.* at 2235.

39. *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221, 261.

40. *Id.* at 262.

41. *Id.*

The distinction between effective control and territorial obligation brought about a peculiar result in *Ilașcu v. Moldova and Russia* where two Member States were held responsible for the same violation.<sup>42</sup> *Ilașcu* involved claims of illegal detention and torture by the authorities in Transdniestria, an area within the territory of Moldova.<sup>43</sup> The applicants in the case were detained and tortured by a separatist regime called the Moldovan Republic of Transdniestria (MRT) that refused to accept orders from the central Moldovan authorities.<sup>44</sup> The Court found Moldova liable under the European Convention, because it did not take measures sufficient to regain effective control of Transdniestria and ensure respect for the rights of people within its territory.<sup>45</sup> In addition, the Court held Russia liable due to the impact of Russian troops actively stationed in Transdniestria aiding the MRT.<sup>46</sup> Russia's influence over the MRT was sufficient to invoke responsibility for the applicant's rights because the European Convention applied to the Russian Federation.<sup>47</sup> Moldova failed to exercise properly its positive obligation to ensure rights within its territory, and Russia failed to ensure rights where it exercised effective control.<sup>48</sup>

These cases demonstrate a concern by the Court not to allow the existence of a vacuum within the territory of Member States where the Convention could be inapplicable.<sup>49</sup> To achieve this end, the Court has employed different standards for finding jurisdiction under article 1 depending on the accused State's relationship to the territory where violations occurred.<sup>50</sup> Such concern is not as relevant, however, when alleged violations have occurred within the sovereign territory of a non-Member State.<sup>51</sup>

In this situation, the Court has been less concerned with allocating responsibility to someone for ensuring European Convention rights, instead focusing on delineating the scope of the European Convention as it applies to a State's extraterritorial activity.<sup>52</sup> In *Banković v. United Kingdom*, citizens of Belgrade in the FRY brought suit against Member

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42. *Ilașcu v. Moldova & Russia*, 2004-VII Eur. Ct. H.R. 179, 303-05.

43. *Id.* at 191-92.

44. *Id.*

45. *Id.* at 266.

46. *Id.* at 279.

47. *Id.* at 280, 282.

48. *Id.* at 272, 282.

49. *See Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. at 2233-34; *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. at 261; *Ilașcu v. Moldova & Russia*, 2004-VII Eur. Ct. H.R. at 266.

50. *See Ilașcu*, 2004-VII Eur. Ct. H.R. at 272, 282.

51. *See Banković*, 2001-XII Eur. Ct. H.R. 359.

52. *See id.* at 356.

States involved in the NATO bombing of the city in 1999.<sup>53</sup> The Court found that the applicants were not within the jurisdiction of any of the accused Member States for purposes of article 1.<sup>54</sup> The only connection between the parties was the impugned act, and so the Court had to decide whether the act itself placed the applicants within the jurisdiction of the respondent States.<sup>55</sup> To bolster the argument that article 1 primarily addresses territorial jurisdiction, the Court referred to the European Convention's *travaux préparatoires*, emphasizing a concern that the European Convention apply to all people within a State's territory, as well as to subsequent State practice and lack of *opinio juris* that the European Convention applies to extraterritorial military engagements.<sup>56</sup> The situation in the noted case did not fall within previously accepted forms of extraterritorial jurisdiction and could be distinguished from *Loizidou* on the ground that NATO forces did not assert "effective control . . . as a consequence of military occupation."<sup>57</sup> The European Convention applies within the "legal space" of the Contracting States.<sup>58</sup> The Court referred to *Loizidou* and *Ilaşcu* and argued that, unlike in those cases, there was no concern of creating a vacuum for human rights protection within that "legal space."<sup>59</sup> Recognizing a State's jurisdiction over the applicants in *Bankovic*, the Court argued, would extend beyond the accepted forms of extraterritorial jurisdiction and expand the reach of the European Convention over all acts with any extraterritorial consequences.<sup>60</sup>

The *Bankovic* court took a dramatically different approach than previous cases by focusing on the intent of the drafters and applying a more strictly territorial understanding of jurisdiction. However, the credibility of this approach was brought into question by two more recent cases against Turkey that demonstrate how the Court could find an exercise of jurisdiction stemming from an extraterritorial act.<sup>61</sup> In the first case, Turkey exercised jurisdiction sufficient to invoke article 1 when its agents arrested a Kurdish separatist in Kenya.<sup>62</sup> In reviewing the detainee's various complaints, the Court held in *Öcalan v. Turkey* that the

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53. *Id.* at 339-40.

54. *Id.* at 359.

55. *Id.* at 350.

56. *See id.* at 352-53.

57. *Id.* at 355.

58. *Id.* at 358-59.

59. *Id.*

60. *Id.* at 356-57.

61. *Öcalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 238 (2003); *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 567 (2004).

62. *Öcalan*, 37 Eur. H.R. Rep. at 274.

respondent State had jurisdiction from the moment of the arrest even though it occurred within the territory of another state.<sup>63</sup> The Court distinguished the situation from *Banković* by noting that Turkey had direct physical control of the applicant and forced him to return to its own territory.<sup>64</sup>

In the second case, *Issa v. Turkey*, the Court held that military operations could place the inhabitants of a third-party State, namely Iraqi Kurds, within a Member State's jurisdiction.<sup>65</sup> Although the complaints against Turkey were found inadmissible, the Court reviewed evidence to determine, as it did in *Loizidou*, whether Turkey exerted "effective overall control" over the area where the applicants alleged a violation occurred.<sup>66</sup> While the Court cited its decision in *Banković*, it expressed an understanding of "legal space" to include any place where a Member State exercises jurisdiction, even extraterritorial jurisdiction.<sup>67</sup> The Court distinguished *Issa* from *Loizidou* by noting that Turkey did not exercise "effective control" over all of northern Iraq and so can only be held responsible for acts in which its direct involvement can be proven.<sup>68</sup> Unlike in *Banković*, where the Court warned against an effects approach to extraterritorial recognition of article 1 jurisdiction, the *Issa* opinion suggests a more dynamic approach and stresses the importance of prohibiting a Contracting State from "perpetrat[ing] violations of the Convention on the territory of another state, which it could not perpetrate on its own territory."<sup>69</sup>

Most of the Court's decisions reviewing the extent and interpretation of article 1 result from actions taken by States in their sovereign capacities. Recently, the proliferation and expanding functions of international cooperation have demanded that the Court decide how the European Convention applies after a State has transferred a relevant portion of its sovereignty to an international body.<sup>70</sup> In such cases, the Court has consistently reiterated that the transfer of authority to an international organization does not release a Member State from its obligations under the European Convention.<sup>71</sup> In *Matthews v. United*

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63. *Id.*

64. *Id.*

65. *Issa*, 41 Eur. H.R. Rep. at 589.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 588.

70. *See* *Matthews v. United Kingdom*, 1999-I Eur. Ct. H.R. 251; *Waite & Kennedy v. Germany*, 1999-I Eur. Ct. H.R. 393; *Bosphorus v. Ireland*, 42 Eur. H.R. Rep. 1 (2005).

71. *Matthews*, 1999-I Eur. Ct. H.R. at 266; *Waite*, 1999-I Eur. Ct. H.R. at 410; *Bosphorus*, 42 Eur. H.R. Rep. at 44.

*Kingdom*, the Court ruled that the defendant State had an obligation to ensure that citizens of Gibraltar be able to vote in elections for the European Parliament.<sup>72</sup> While the European Community (EC) cannot be challenged before the Court as a party, Member States must still secure European Convention rights despite a transfer of competences.<sup>73</sup> Moreover, the European Convention protects rights that are “not theoretical or illusory;” rather, those rights must be “practical and effective.”<sup>74</sup> To this end, it is irrelevant whether the source of a violation is domestic or European legislation or if such legislation was the result of a treaty signed by the United Kingdom or of subsequent EC legislation applicable through that treaty.<sup>75</sup>

On the same day that it released its judgment in *Matthews*, the Court issued another judgment relating to the immunity of the European Space Agency (ESA) before German labor courts.<sup>76</sup> The Court held in *Waite & Kennedy v. Germany* that the defendant State did not violate the applicants’ article 6 right to a fair trial by granting immunity to the ESA before domestic courts.<sup>77</sup> Immunity from domestic courts is a vital aspect of international organizations that ensures that they function properly, free from interference by individual governments.<sup>78</sup> The practice of granting immunity to such organizations is legitimate and long-standing and so does not violate article 6 per se.<sup>79</sup> Nevertheless, because European Convention rights are “practical and effective,” the Court held that an individual must have “reasonable alternative means” to pursue his European Convention right of access to a court.<sup>80</sup> The ESA did have an appropriate internal dispute settlement procedure with independent appeals satisfactory for the Court to find that no violation had occurred.<sup>81</sup>

In 2005, the Grand Chamber<sup>82</sup> clarified the Court’s position on the obligations of States acting pursuant to international obligations in *Bosphorus v. Ireland*.<sup>83</sup> Ireland fulfilled its obligation to effect EC

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72. *Matthews*, 1999-I Eur. Ct. H.R. at 266.

73. *Id.* at 265.

74. *Id.* at 266.

75. *Id.*

76. *Waite*, 1999-I Eur. Ct. H.R. at 401-02.

77. *Id.* at 412.

78. *Id.* at 409.

79. *Id.* at 409-10.

80. *Id.* at 410-11.

81. *Id.* at 412.

82. For an explanation of the role of the Grand Chamber, see European Convention, *supra* note 20, arts. 27, 30-31.

83. See *Bosphorus v. Ireland*, 42 Eur. H.R. Rep. 1, 44-45 (2005).



sanctions against Yugoslavia when it impounded a Yugoslav aircraft leased by a Turkish airline.<sup>84</sup> To determine whether there was an interference with property sufficient to violate the European Convention, the Court had to weigh the need for States to uphold the practical and effective safeguards of the European Convention against the importance of international mandates.<sup>85</sup> The balance at which the Court arrived recognizes that the responsibility for European Convention compliance rests with States, but that action taken pursuant to an international obligation is presumed to comply with the European Convention if the organization provides equivalent human rights protections.<sup>86</sup> The protection must be both substantive and procedural, and the presumption may be rebutted if, in the circumstances of an individual case, that protection is deemed manifestly deficient.<sup>87</sup> This approach frees the Court from the need to judge its fellow international organizations, which it is not competent to do, and provides an amicable position for the Court within the European public order.<sup>88</sup> However, the Court emphasized that a State would retain full responsibility under the European Convention even when acting under international authority if the State acted within its own discretion.<sup>89</sup>

Article 1 cannot be read to allow a vacuum for human rights protections within the territory of Contracting States.<sup>90</sup> No part of a State's jurisdiction is exempt from the European Convention, so States remain responsible for the consequences of international agreements into which they enter subsequent to accepting the obligations of the European Convention.<sup>91</sup> The Court's position in the European international community and the importance of allowing other institutions to function effectively mean that if a State's actions stem from international obligations, deference will be given to the protections provided by the relevant organization, though the State remains responsible for securing the European Convention rights of everyone within its territory.<sup>92</sup>

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84. *Id.* at 7-9.

85. *Id.* at 44-45.

86. *Id.* at 45.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. at 2233; *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. at 261; *Ilaşcu v. Moldova & Russia*, 2004-VII Eur. Ct. H.R. at 266.

91. *Matthews v. United Kingdom*, 1999-I Eur. Ct. H.R. at 266; *Bosphorus*, 42 Eur. H.R. Rep. at 44.

92. *Bosphorus*, 42 Eur. H.R. Rep. at 45.

## III. THE COURT'S DECISION

In the noted case, the ECHR weakened the European Convention's extraterritorial reach.<sup>93</sup> The importance of collective security and the eminence of the UNSC's chapter VII authority in international law<sup>94</sup> led the Court to absolve Member States of their European Convention responsibilities when their actions involve a UNSC Resolution.<sup>95</sup> The acts alleged in the applicants' complaints were attributed to the United Nations.<sup>96</sup> While the Court acknowledged the test it developed in *Bosphorus*, accepting equivalence absent manifest deficiency, the special nature of the United Nations and the UNSC's role in providing collective security warranted an exception.<sup>97</sup> Thus, the Court found itself incompetent *ratione personae* and the complaints inadmissible.<sup>98</sup> The Court found it unnecessary to consider any remaining admissibility issues argued by the parties.<sup>99</sup>

The first task the Court undertook was to determine which entity established under UNSC Resolution 1244 had the mandate relevant to each of the two complaints.<sup>100</sup> Resolution 1244 and other relevant documents guided the Court in its finding that the issuance of detention orders, such as that for Saramati, clearly fell within the security mandate of KFOR.<sup>101</sup> The responsibility to demine the region was granted by Resolution 1244 initially to KFOR with the understanding that the job would eventually be taken over by UNMIK.<sup>102</sup> KFOR continued to undertake demining activities but was doing so under UNMIK supervision before the date when Behrami's sons were injured. The Court considered unpersuasive the argument that responsibility lay with NATO for initially dropping the cluster bomb units or with KFOR because it maintained daily control of the demining process or failed to properly inform UNMIK of the explosives left in Mitrovica.<sup>103</sup> Rather,

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93. See generally *Behrami v. France*, App. No. 71412/01, *Saramati v. France, Germany, and Norway*, App. No. 78166/01, 45 Eur. H.R. Rep. (Summaries & Extracts) 85, 122 (2007).

94. Chapter VII of the U.N. Charter grants the Security Council the power to identify security threats and authorize the use of force in order to "maintain or restore international peace and security." U.N. Charter arts. 39-51.

95. See *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 121-22.

96. See *id.* at 120.

97. *Id.* at 122.

98. *Id.*

99. *Id.* at 122-23.

100. *Id.* at 114-16.

101. *Id.* at 115.

102. *Id.* at 115-16.

103. *Id.* at 116.

the delegation to UNMIK of the authority to supervise the demining process meant that any failure in that task rested solely with UNMIK.<sup>104</sup>

Next, the Court examined the nature of KFOR and UNMIK to determine whether their actions or inactions could be legally attributed to the United Nations.<sup>105</sup> Both KFOR and UNMIK were established by Resolution 1244 under chapter VII and considered by the UNSC to be vital to international peace and security.<sup>106</sup> Resolution 1244 authorized U.N. Member States to establish an international security presence in Kosovo under “unified command and control.”<sup>107</sup> This constituted a delegation of the UNSC’s collective security power to the individual States comprising KFOR.<sup>108</sup> UNMIK was a U.N. subsidiary organ created by Resolution 1244 to exercise civil administrative powers complementing the activities of KFOR in order to stem the threat to international peace and security developing in Kosovo.<sup>109</sup> The Court considered that both entities relied not on any independent powers they might have had, but rather on expressly delegated power held by the UNSC, specifically its authority under chapter VII of the U.N. Charter to maintain international peace and security.<sup>110</sup> It was not necessary for the Court to specify upon which provision in chapter VII the UNSC relied.<sup>111</sup> Nor did the Court find relevant the status of the FRY’s U.N. membership (which might affect the application of chapter VII), because the FRY had agreed to the presence of KFOR and to cooperate with Resolution 1244.<sup>112</sup>

Having determined that KFOR and UNMIK actions are attributable to the United Nations, the Court needed next to decide if the detention and failure to demine alleged in the complaints were attributable, respectively, to KFOR and UNMIK.<sup>113</sup> In other words, it had to determine whether the activities were sufficiently tied to the United Nations rather than the Respondent States.<sup>114</sup> Concerning UNMIK, the Court quickly pointed out its nature as a subsidiary organ of the United Nations under direct control of a Special Representative to the Secretary

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104. *Id.*

105. *Id.* at 116-20.

106. *Id.* at 116-17.

107. *Id.* at 117; S.C. Res. 1244, *supra* note 14, annex 2, ¶ 4.

108. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 117.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 117-18.

113. *Id.* at 118-20.

114. *Id.*

General and answerable to the UNSC.<sup>115</sup> As for KFOR, the Court looked to the degree of accountability and authority exercised by the UNSC to find that KFOR activities should be attributed to the United Nations.<sup>116</sup> Since the UNSC had not concluded an article 43 agreement<sup>117</sup> with any Troop Contributing Nation (TCN), the Court concluded that attributability rested on whether the UNSC retained ultimate authority by limiting its delegation to operational command only.<sup>118</sup> Resolution 1244 retained ultimate authority for the UNSC in five ways: the Charter permitted the UNSC to delegate power to Member States and relevant international organizations, chapter VII permitted the delegation of the exercised powers, the delegation was explicit in the Resolution, the Resolution set specific objectives and related mandates, and the leadership of KFOR was required to make reports to the UNSC.<sup>119</sup> In response to applicants' argument that the level of autonomy retained by TCNs, which was greater in Kosovo than in other U.N. peacekeeping missions, undermined the unity of any central command, the Court decided that the overall operational command was not effectively damaged by any discretion retained by the TCNs, even as to the detention-related decisions.<sup>120</sup>

Finally, the Court addressed whether it was competent *ratione personae* to review acts attributable to the United Nations.<sup>121</sup> The Court held that the UNSC's chapter VII authority and its special place within international law coupled with articles 25 and 103 of the U.N. Charter<sup>122</sup> required the Court to withhold judgment of actions taken in pursuance of the United Nations' role as the keeper of international peace and security.<sup>123</sup> It would be inappropriate for the Court to interfere in any mission linked to a UNSC Resolution when chapter VII was involved.<sup>124</sup> This included reviewing even voluntary acts of Contracting States taken prior to, or in the course of, any such mission.<sup>125</sup> The Court recognized its

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115. *Id.* at 120.

116. *Id.* at 118.

117. Article 43 of the U.N. Charter prescribes the method in which the UNSC acquires military cooperation from Members and calls for the making of agreements governing troop numbers, type, and disposition. U.N. Charter art. 43.

118. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 118.

119. *Id.*

120. *Id.* at 119-20.

121. *Id.* at 120-22.

122. Article 25 grants binding authority to Security Council Resolutions. U.N. Charter art.

25. Article 103 declares that obligations arising under a State's U.N. membership trump all other international obligations. U.N. Charter art. 103.

123. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 121-22.

124. *Id.* at 122.

125. *Id.*

holding in *Bosphorus*, but argued that its review of the noted case did not invoke the *Bosphorus* test.<sup>126</sup> To distinguish the two cases, the Court noted that while *Bosphorus* concerned the application of an EC regulation enacting a UNSC Resolution, it also involved an act within the territory of Ireland approved by one of the country's Ministers.<sup>127</sup> The noted case differed as to the application of article 1, because the impugned acts occurred neither within the territory of the respondent States nor on a decision by their authorities.<sup>128</sup> Ultimately though, *Bosphorus* did not apply, and the complaints were inadmissible because the European Convention must not impede any exercise of the UNSC's imperative collective security objective.<sup>129</sup>

#### IV. ANALYSIS

The noted case clarifies the role of the European Convention in relation to the UNSC at the expense of the Court's previous efforts to create a balance between facilitating international cooperation and ensuring the effective protection of human rights. The Court demonstrates a heightened sensitivity to international law and the roles of different international institutions, itself included, in the global legal order. It fashions its analysis in accordance with *Bankovic* notwithstanding cases that placed the future of that approach in question. Moreover, it is not clear from the Court's opinion whether further exceptions to *Bosphorus* may be acknowledged in the future. Ultimately, the noted case adds a new dimension to the Court's case law concerning jurisdiction and State responsibility under international obligations. The decision has implications for the scope and effectiveness of the European Convention as well as for future U.N. peacekeeping missions.

Of the two analytical approaches available to the Court, it chose *Bankovic*'s top-down method, focusing on attributability rather than on jurisdiction.<sup>130</sup> The Court looked to the design of UNSC Resolution 1244 to determine which entity bore the mandate to deal with the impugned activities. Attributability came from the scope of the UNSC's delegation of chapter VII power, and the propriety of a judgment hinged on the importance of chapter VII and the UNSC's imperative collective security objective.<sup>131</sup> This approach focuses on preserving the functionality of the

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* at 104.

131. *See id.* at 115, 119-20, 122.

United Nations and recognizing the European Convention's proper place in international law rather than on ensuring practical and effective protection of European Convention rights.<sup>132</sup>

While the decision seems to sidestep the jurisdiction approach applied in cases from *Loizidou* to *Bosphorus*, rather than reconciling that approach with *Bankovic*, the result is certainly appropriate. Notwithstanding the Court's emphasis on the inherent supremacy of collective security concerns, article 103 of the U.N. Charter does insist that obligations arising under U.N. membership shall prevail over any other international obligations.<sup>133</sup> This provision handicaps the ECHR especially, as it challenges the general competence of the Court to judge the case, not just the propriety of applying the European Convention. Moreover, applying the alternative standard in cases involving UNSC Resolutions might not guarantee a result compatible with article 103 of the U.N. Charter.

Not limiting its reasoning to chapter VII supremacy, the Court's opinion also distinguishes the facts from those in *Bosphorus* to argue that the test would not apply to the impugned acts.<sup>134</sup> The Court characterized the facts in *Bosphorus* so as to allow bypassing the test unless an impugned act was "carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers."<sup>135</sup> Having attributed the conduct to KFOR and UNMIK, the Court found that the acts were not carried out by authorities of the Respondent States or pursuant to a decision made by an authority of the States.<sup>136</sup> The Court's emphasis on territory, however, seems to be a departure from the Court's case law. While the Court has repeatedly held that jurisdiction for the purposes of article 1 is primarily territorial, it is defined by public international law and not limited solely to a Member State's territory.<sup>137</sup> There are a number of ways that extraterritorial acts can invoke article 1, including effective overall control through military action,<sup>138</sup> taking an individual into custody,<sup>139</sup> or materially supporting a separatist regime.<sup>140</sup> It remains unclear within the Court's case law whether a State's

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132. *Id.* at 120-22.

133. *See* U.N. Charter art. 103.

134. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 122.

135. *Id.*

136. *Id.*

137. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. at 2234; *Bankovic v. United Kingdom*, 2001-XII Eur. Ct. H.R. at 353-56; *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. at 588.

138. *Loizidou*, 1996-VI Eur. Ct. H.R. at 2235-36.

139. *Öcalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 238, 274.

140. *Ilaşcu v. Moldova & Russia*, 2004-VII Eur. Ct. H.R. 179, 279-80.

responsibility begins at effective overall control or whether responsibility increases as control increases.<sup>141</sup> However, the noted case suggests that *Bosphorus* only applies to territorial acts.<sup>142</sup> This contradicts the Court's own words in *Bosphorus* that article 1 "does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention."<sup>143</sup>

Finally, it bears notice that KFOR and the TCNs involved in Kosovo maintained an unusually high level of autonomy compared to other U.N. peacekeeping missions.<sup>144</sup> This is due in great part to the prominent involvement of NATO throughout the Kosovo conflict.<sup>145</sup> The Court discussed at length the importance of Security Council oversight in order to attribute the acts of KFOR to the United Nations, but the UNSC had accepted a much smaller responsibility in Kosovo than it had for other operations.<sup>146</sup> TCNs were even authorized to handle claims themselves and to decide whether to waive any immunity.<sup>147</sup> Not only does this anomalous situation support the applicant's argument that TCNs maintained autonomy sufficient to garner attributability, but that immunity from private actions against the TCNs, like the applicants' claims, was an exercise of discretion, not an international obligation.<sup>148</sup> While the Court understood the realities of the United Nations' oversight role in Kosovo and found it sufficient for attributability purposes, the unusual nature of the mission weakens the need for a general immunity for States acting with chapter VII authorization.<sup>149</sup> Placing the attributability threshold lower and requiring greater control by the United Nations if States are to avoid responsibility would strengthen the European Convention without impeding future peacekeeping missions. Providing a clear line without confusing the Court's case law could have promoted greater accountability in U.N. peacekeeping missions by ensuring that TCNs gain responsibility when the UNSC avoids it by granting greater discretion.

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141. *See Issa*, 41 Eur. H.R. Rep. at 589.

142. *Behrami v. France*, App. No. 71412/01, *Saramati v. France, Germany, and Norway*, App. No. 78166/01, 45 Eur. H.R. Rep. (Summaries & Extracts) 85, 120 (2007).

143. *Bosphorus v. Ireland*, App. No. 45036/98, 42 Eur. H.R. Rep. 1, 44.

144. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 105; *see also* MARTEN ZWANENBERG, ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS 34-50 (2005).

145. ZWANENBERG, *supra* note 144, at 45, 50.

146. *Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 106, 119.

147. *Id.*

148. *See Bosphorus*, 42 Eur. H.R. Rep. at 45.

149. *See Behrami*, 45 Eur. H.R. Rep. (Summaries & Extracts) at 116-20.

## V. CONCLUSION

It is important for the ECHR to determine its place in the growing community of international organizations, but it must not do so in a way that diminishes the effectiveness and applicability of the European Convention. The protection of human rights should not take a backseat to collective security, because the two are not mutually exclusive. On the contrary, the crisis in Kosovo aptly demonstrates how the two may be interrelated and could depend on each other to achieve compatible goals. Ultimately, the noted case fails to find a proper balance between international cooperation and the protection of European Convention rights. This is particularly alarming because such a balance had already been found, and the Court chose not to apply it. If the rights enshrined in the European Convention are to remain “practical and effective,” the Court must advocate their application more consistently.

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