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Angelini, Antonella

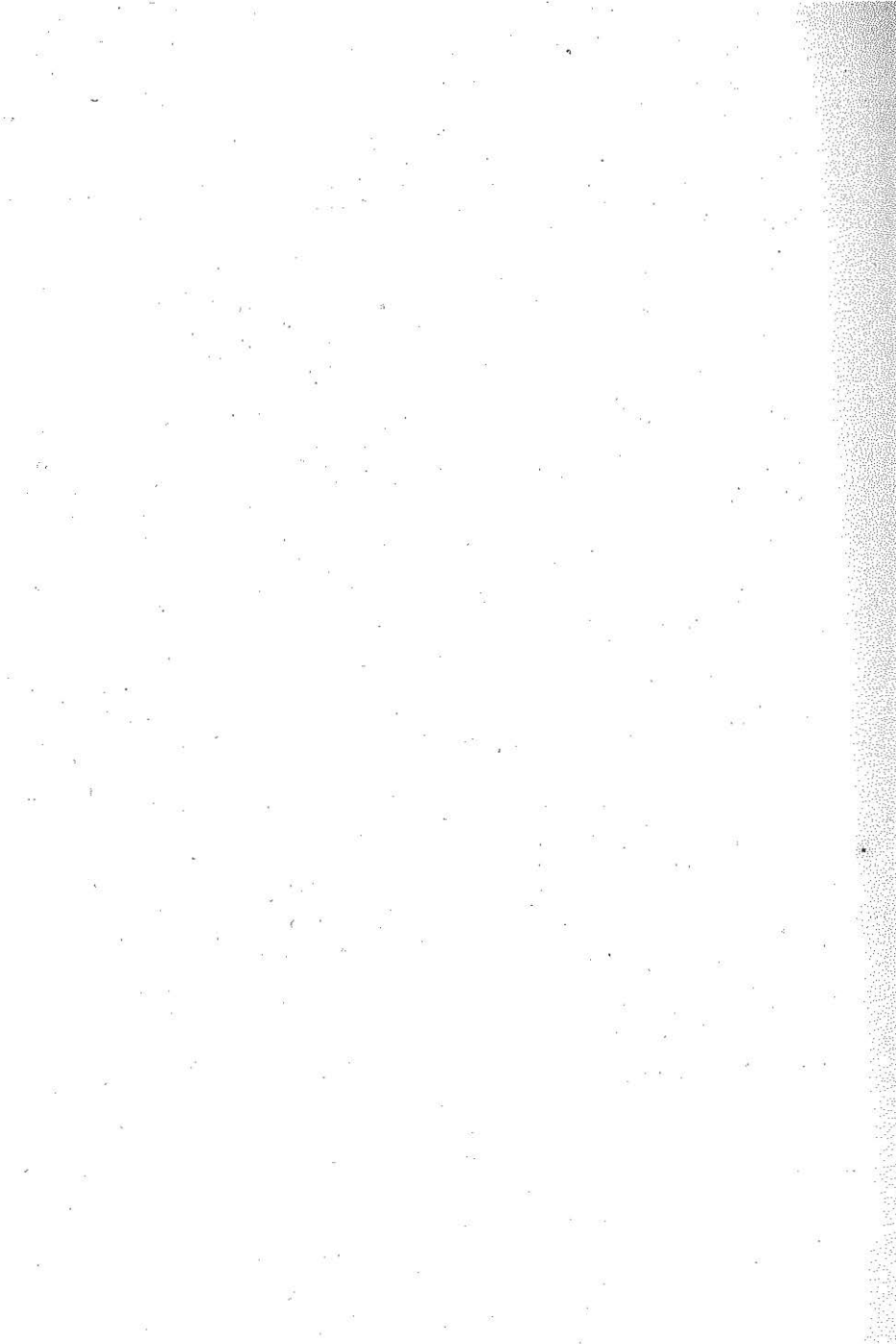
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Behrami and Saramati: When Silence Matters

Antonella Angelini*



I Introduction

As David Kennedy once lucidly said, international lawyers – further than sharing a view of their context and of themselves as professionals – tend to ‘generate a set of common ideas about what the problems are to which their skills and tools are appropriate’.¹

Even a cursory glance suffices to realize that, today, scholars deem as potential frets a staggering number of issues; be that due to the increased density of the international legal environment or induced by a renewal of recurrent fears.² If a review of such a variegated catalogue is likely to bear foremost in descriptive terms, more analytically intriguing might be reflecting on a trend which, far from being new in its dynamic, is both challenging in its content and remarkable in pace. What we refer to is the progressive convergence between two of the major drifts pervading the academic debate: on one side, the extension of the UN Security Council’s scope of action, especially under Chapter VII of the UN Charter;³ on the other, the legalisation – and tribunatisation, one should add – of certain realms at length barely touched by law in international intercourse.⁴

Whilst academics have thoroughly been speculating on the respective consequences of such tendencies, the troublesome aspects lying at their interface had remained shrouded in conjecture⁵ until the decisions recently handed down by the main European regional courts in the *Kadi* and *Saramati* cases (hereafter, respectively *Kadi* and *Behrami*).⁶ Ushering the said *problématique*, this triad of instances has casted a profound spell on the regard of the scholarly community and swiftly imparted a net direction, detectable in commentators’ tendency to discuss the cases as a unit and to hint at systemic considerations. Thus, notions such as monism, dualism,⁷ allegedly objective boundaries between legal orders⁸

¹ PhD Candidate at the Graduate Institute of International and Development Studies, Geneva.

² See Kennedy (1999-2000) 346.

³ *Idid* 375-394. On the recurrent fear towards fragmentation and normative conflict, two umbrella concepts sheltering many others tendencies feared by scholars, see also Martineau (2009).

⁴ Among the many contributions to this topic, see de Wet (2004); more precisely on the expansion of the Matheson (2006); see also Gowlland-Debbas (2000).

⁵ See Shany (2009) 83.

⁶ See, for instance, Wellens (2005) 1159; see also Kolb – Porretto – Vité (2005) 423-430; see also Costello (2006) 125.

⁷ See Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3649; Case T-306/01 *Yusuf and Al Barakat International Foundation v. Council and Commission* [2005] ECR II-3533. See also joined Cases C-402/05 & C-415/05 P *Kadi and Al Barakat International Foundation v. Council and Commission* judgments of 3 September 2008. See also *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, Grand Chamber, Decision on admissibility, 2 May 2007. Whilst in the course of the essay we will use the abbreviation of *Behrami* to refer to the two joined cases, in case of descriptive necessity or in order to discuss the legal issues respectively at stake, we will distinguish *Behrami* from *Saramati*.

⁸ See de Burca (2009).

⁹ See d’Aspremont – Dopagne (2008) 371.

and, conversely, *dédoulement fonctionnel* of organs amenable to a rather intricate bundle of orders within the global arena vividly revived.⁹

The texture of the discussion is, as it appears, particularly thick and the attempt to unravel all its knots could hardly suit the scope of the present contribution. Accordingly, our more modest purpose is to broach only a few points emerged through these pronouncements.

First, the substantive scope of analysis is limited to the *Behrami* case, dealt with by the European Court of Human Rights (hereafter, ECtHR). That, in turn, entails two major consequences. On the one hand, the factual circumstances at stake concern a specific kind of UN-authorized activity, namely the conduct of an organ belonging to a Member State of the European Convention and acting extraterritorially within the framework of a peace-keeping mission. On the other, the judicial actor involved is rooted in a context fairly different from that of the Community courts, masters of the *Kadi* decisions. Evident as it might seem, the latter observation reveals why the ECtHR could not so easily have grappled with the situation by relying on a constitutional discourse as strong as the one adopted by the European Court of Justice (hereafter, ECJ) in order to underpin its *de facto* dualist reasoning in the *Kadi* saga. Notwithstanding whether the delimitation of a legal order is a matter of objective assessment or of stipulative construction,¹⁰ the constitutional tint of the ECtHR jurisprudence is by far paler than that of the ECJ and, at any rate, not enough pronounced to sustain a posture close to 'a declaration of independence from general international law'.¹¹ If the conundrums posed by the *Behrami* case tend to slip away from the 'home backyard' of a defined constitutional order, seizing the fact pattern in its wholeness requires to regard at any subject possibly involved therein.

There comes the second point informing our reflection. The matrix underneath *Behrami* – incidentally, common to *Kadi* as well – is imbued with a value-based component, reflected in the sensibility of the normative bodies at stake, namely the provisions on collective security enshrined in – and coming along with – the UN Charter and the human rights norms contained in the European Convention on Human Rights (thereafter, ECHR). There is, then, an almost intrinsic tendency to look at facts – and carve their judicial outcome – with reference to a broad, value-driven *desideratum*. In that respect, the endorsement of the internal human rights norms at the expenses of those on collective security is less straightforward as a solution than one may expect it to be in view of the vigorous rule-of-law oriented ethos animating the court.¹² If bluntly pursued, such an attitude would, in fact, be tantamount to neglecting the anything but marginal role played by the Security Council as the primary actor operating

⁹ See, De Sena and Vitucci, (2009) 209–213.

¹⁰ On the root of the notion of legal order see Kennedy (1999–2000) 348; Leben (2001) 19; Halpérin (2001) 48 and Abi-Saab (1987) 105–124.

¹¹ See Milanović (2009) 73.

¹² See Shany 88.

through this set of rules and determining to a large extent their features.¹³ Far from coming in isolation, the normative component is thus deeply entrenched with an authoritative one; whence the twofold task pertaining to the ECtHR. First, articulating the relationship between the respective legal branches; second spelling out the relationship between itself as a regional court within the international legal order and the universal political organ *par excellence*.

In the light of these remarks, it is not much of a surprise if, expressly or not, the arguments expounded by the ECtHR, as well as the comments thereon made by scholars, turn on two concepts: fragmentation – with its corollary of normative conflict – and judicial review. Following this track, our reflection will attempt to grasp how both dimensions have framed the Court's reasoning and then eventually propose a few thoughts on a different approach to the matter. Normative conflict and judicial review hint to – or are quite automatically assimilated with – a 'black and white' posture: the choice between two rules/principles, putting aside the defeated one and the pronouncement confirming or quashing the legality of a given act performed by or attributable to a political organ. Our claim is that a regional court, such as the ECtHR, is neither compelled nor advised to feel straight-jacketed into such boundaries. An orientation towards normative-harmonization and an expressive mode of interaction are, respectively, two alternatives likely to yield, if cumulated, a more satisfying result than the legally faltering and policy disturbing one we are left with the current version of *Behrami*.

2 The Posture of the ECtHR in *Behrami*

Ever since its decision, *Behrami* has aroused such a rich flurry of criticism that perhaps it is in vain to search for an aspect yet to be touched. Commentators have progressively unfolded the numerous facets of the pronouncement, assessed its impact within the framework of the ECHR and its reflexes on general international law as well as on UN institutional law.¹⁴ Rather than tracing out this chain of scholarly reflection, we will, as anticipated, concentrate on two axis informing the reasoning of the Court and eventually leading to its highly objectionable conclusions. The first concerns the relationship with the Security Council and its effects on both the Court's attitude and jurisdiction; the second turns on the normative relationship between the ECHR and the UN Charter. Before entering their discussion, let us briefly recall the

¹³ See Gowlland-Debbas (2007) 251–277.

¹⁴ With regard to the contributions solely dealing with *Behrami* see Farrior (2007) 743; Klein (2007) 43; Palchetti (2007) 681; Bodeau-Livinec, Buzzini, Villalpando (2008) 323; Sari (2008) 151; Lagrange (2008) 85; Larsen (2008) 509; Maneggia (2008) 191–210; Sarl (2008) 151; De Sena and Vitucci (2009); Krieger 159; Milanović and Papić (2009) 267. As to other contributions mentioning or discussing the case, see, *inter alia* Milanović (2009); de Burca, (2009); Breitegger (2009), 155.

factual circumstances which have given rise to the case and the overall approach adopted by the ECtHR.

2.1 A. Summary of the *Behrami* Decision

That the ECHR States' implication in the intricate Kosovo situation would have created further hurdles than those sweepingly disposed of through the *Banković* decision¹⁵ is hardly surprising. Following the signing of the Military and Technical Agreement between Serbia and the NATO whereby the former agreed to withdraw its forces from Kosovo, the UN Security Council resolution 1244 of 10 June 1999 inaugurated a new phase by establishing an international presence comprising a civil administration – entrusted to the United Mission in Kosovo (UNMIK) – and a NATO-led military force (KFOR).¹⁶ The participation of several Member States in both entities triggered the recourse to the Court in the two instances at stake.

In *Behrami*, the claim arose from the explosion of an undetonated cluster bomb killing one young boy and seriously injuring the latter's brother. The plaintiffs – the boy's father and his surviving son – claimed a violation of Article 2 (right to life) of the ECHR, ensuing from the omission to clear the mine field. They argued that France, the KFOR leading nation in the region where the accident occurred, was responsible for that task.¹⁷

The *Saramati* case, for its part, concerned Articles 5 (right to liberty and security) and 13 (right to an effective remedy) of the ECHR. Their breach allegedly stemmed from Mr. Saramati's extra-judicial detention on preventative grounds in furtherance of a KFOR Commander's order. The applicant addressed his complaint to those States – France and Norway – whose nationals had decided and repeatedly confirmed the said measure.¹⁸

Though the submissions of the parties¹⁹ primarily hinged on whether the applicants fell within the respondent States' jurisdiction according to the meaning of Article 1 of the Convention,²⁰ the Court decided to approach the

¹⁵ See *Banković v. Belgium*, App. No 5207/99, Grand Chamber, Decision on admissibility, 12 December 2001, hereinafter *Banković*. We also recall the *Marković* Case, disposed by the Court relying on the *Banković* precedent; see *Marković and Others v. Italy*, App. No 1398/03, Grand Chamber, Judgment, 14 December 2006. On the latter see Shah, 'Seeking Remedies for Violations of International Humanitarian Law: *Marković v. Italy*', 7 *HRLR* (2007) 412.

¹⁶ See S/RES/1244 (1999), 10 June 1999. On the specific mandates of the civil and military presences see, respectively, paras. 10-11 and paras. 7 and 9 of the resolution. On this part see also *Behrami*, paras. 1-17.

¹⁷ See *Behrami*, paras. 5-7 and 73-81.

¹⁸ See *Behrami*, paras. 8-17 and 73-81. The applicant had initially included Germany among the respondent, but in the course of the proceedings asked the Court – and received the permission – to withdraw such allegation for lack of proof, see paras. 64 and 65.

¹⁹ It is worth stressing that seven more states and the UN as well had submitted observations in quality of interveners.

²⁰ See *Behrami*, par. 67.

matter from a different angle, namely from that of the Court's *ratione personae* competence. As it has been aptly remarked by two commentators,²¹ this shift of perspective was the 'first and most important' step of a threefold move. After swiftly resolving that UNMIK was the entity vested with the mandate to de-mine,²² the Court proceeded, in fact, by asking 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' and finally addressed the issue of its competence '*ratione personae* to review any such action or omission found to be attributable to the UN'.²³ Answering affirmatively to the first question yields the solution of the case: given the patent lack of personal jurisdiction towards the UN, the joined cases could only be incompatible with the provisions of the Convention and, therefore, be quashed.²⁴

One cannot help perceiving a sort of mismatch between the mechanic of this logic pattern and the decision as a whole. The articulation of the Court's reasoning does not, *prima facie*, suffer of flaws severe enough to prompt the sharp criticisms raised in many quarters. Among these voices, the most recurrent drawback traced in *Behrami* concerns the gap in the protection and guarantee of the Conventional set of rights and correlated remedies.²⁵ More subtly, it has been noticed that – far from being confined to the operative side – the latter trend is likely to impact on the deeper fabric of general international law, primarily by instilling a message of unaccountability utterly at odds with the rationale of international responsibility.²⁶ Common to these fears, lies a sort of feeling that the attitude shown in *Behrami* might thoroughly be reiterated by the Court in similar cases. And yet, the virtual automaticity thereby supposed does not stem – at least not necessarily – from the path guiding the ECtHR in its decision. The essence of the problem, in fact, lies elsewhere. On the one hand, it resides in the way the Court interpreted and used the rules on the international responsibility of International Organisations (IOs);²⁷ on the other it derives from the considerations purported in paragraph 149 – and similarly reiterated later –²⁸ whereby the Court held that:

'since operations established by the 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 the support from

²¹ See Milanović and Papić (2009) 270–274.

²² See *Behrami*, paras. 123–127.

²³ See *Behrami*, para. 121.

²⁴ See *Behrami*, paras. 144–152.

²⁵ Whereas almost all the cited Authors discuss or at least hint to this aspect, for the analysis more focused on this point see the essay by Fabbrini in this volume; Sari, *supra*, note 14.

²⁶ See Milanović and Papić (2009) 268, 281–289.

²⁷ On this point, see particularly Palchetti, *supra*, note 14, 686–694; Sari, *supra*, 14, 162–166; Milanović and Papić, *supra* note 14, 274–281; Larsen, *supra* note 14; Manegga, *supra* note 14.

²⁸ See particularly, *Behrami*, para. 151.

member states, the Convention cannot be interpreted in a manner which would subjects the acts and omissions which occur prior to or in the course of such missions, to the scrutiny of the Court.²⁹

One might feel a little puzzled in realizing that, when it comes to a Chapter VII missions, most discussions on attributions become almost dubious, given that any act – attributable or not to the UN – is anyway protected from any interference of the Court. Certainly, that sheds light on scholars' anxieties for a lock stock and barrel repetition of *Behrami*. However, the Court's goal in carving this approach remains unclear. Inquiring on that aspect entails an attempt to reveal the 'hidden rings' of the reasoning chain followed by the Court. In this respect, it seems quite unlikely that either the discourse on attribution of acts to IOs or the Court's position in paragraph 149 might simply be a redundancy. Likely, the two axis are not primarily aimed at reinforcing one another, but rather at furthering different goals sought by the Court. We believe, that the ECtHR's interpretation of the rules in IOs' responsibility and the overtly policy-grounded position expressed on Chapter VII missions were instrumental to a double avoidance: first, on Article 1 of the ECHR – more precisely on the extraterritorial scope of the obligations posed by the instrument – second, on Article 103 of the UN Charter as a rule injecting a quasi-hierarchical dimension within the international legal system.³⁰ More profoundly, the latter remarks flesh out the features assumed in *Behrami* by those knots that regional courts have to disentangle if confronted with issues of collective security. On the one hand, the matter of delimiting the contours of its field and mode of action as a judicial organ, thereby spelling out the relationship with the Security Council; on the other articulating the bundle of rules flowing, in turn, from the Charter, general international law and the conventional regime.

2.2 When Silence Matters; What the Court Avoids in *Behrami*

A hidden move on jurisdiction and attribution

A trend of cases decided on similar grounds of admissibility as *Behrami* confirm that the latter was foreseen by the Court as a standard it would use in the future.³¹ It is fair to say that the Court has once more been able to turn a potentially bogging-down situation into a golden opportunity to revise its set of

²⁹ See *Behrami*, para. 149.

³⁰ On this latter point, see also the observations of Milanović and Papić, *supra*, note 14, 289–293.

³¹ See *Kasumaj v. Greece*, App. Nos 6974/05, First Section, Decision on admissibility, 5 July 2007; *Galif v. Germany* App. No. 31446/02, First Section, Decision on admissibility, 28 August 2007; *Berčić and Others v. Bosnia and Herzegovina*, App. Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05, and 25496/05, Fifth Section, Decision on admissibility, 16 October 2007; *Dragan Kalinić and Milograd Bilbić v. Bosnia and Herzegovina*, App. Nos 45541/04 and 16587/07, Fifth Section, Decision on Admissibility, 13 May 2008.

jurisdictional tools and mainly try to limit the scope of the jurisdictional provision of the Convention. *Banković*, which is the Court's most notable attempt to curtail the extra-territorial application of the Convention, immediately comes to mind. Indeed, as pointed out by one early commentator of *Behrami*, 'it is striking that the Court has preferred to evaluate the admissibility of the instances relying on attribution [...] as it could simply have acknowledged that the alleged violations had not occurred within the 'legal space' of the Convention'.³² *Banković* represented a Pyrrhic victory for the Court³³ and sufficiently explains the shift endorsed in *Behrami* however, assessing the strategic or tactic character of the latter move requires further investigation. It seems that the Court, not wishing to fall in another *cul de sac*, sought a jurisdictional tool to grasp with complex extra-territorial issues. *Behrami* illustrates that: by embracing a more subtle technique for phrasing jurisdictional matters and relying – at least nominally – on the rules on IOs' responsibility, the Court crafted a brand-new approach to delimit the scope of ECHR States' obligations and, thereby, of its own jurisdiction.

The Court's first step was to redirect the focus from Article 1 of the ECHR – as framed by the parties – to its own *ratione personae* jurisdiction:

[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.³⁴

The adjustment thereby purported is not of minor relevance.

Marco Milanović and Tatjana Papić noticed that '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* [...] and it is a trigger for the application of the treaty obligations to arise in the first place'.³⁵ Although different, the two concepts are closely related to each other. On the one hand, if a human rights instrument does not apply i.e., if the State does not have obligations under that instrument, then the relevant court – or monitoring body – does not have *ratione materiae* jurisdiction in that specific instance. This also applies if an allegedly wrongful act is not attributable to the defendant State, then the judicial or quasi-judicial organ at stake lacks *ratione personae*

³² See Palchetti, *supra*, note 14, 685. (translated from Italian by the present Author).

³³ On the plethora of comments raised by *Banković* see, among others, Greenwood, 'Jurisdiction, NATO and the Kosovo Conflict', in Capps (2003) 145-171; Lawson (2004) 55-136; Wilde (2005) 115.

³⁴ See, *Behrami*, paras. 71-72.

³⁵ See Milanović and Papić, *supra*, note 14, 272; see also Milanović (2008) 411.

jurisdiction to review the argued conduct. Spelt with reference to the present case, the latter remarks unveil the first choice made by the ECtHR: avoiding to directly determine the *existence* of ECHR obligations for the respondent States. Approaching the facts of *Behrami* from the standpoint of attribution the Court was not a mistake; however, it somehow blurred the logical relationship between the two dimensions we have spotted.³⁶

The notion of jurisdiction in human rights treaties is primarily 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'.³⁷ Without venturing into a thorough inquiry, it is fair to say that the the Court's case-law – though less tersely – hinges on similar basis.³⁸ Spelt with reference to the circumstances at stake, the latter approach would require consider the *single* impugned acts and ascertain whether the respondent States were exercising authority or control over the relevant portion of the territory (*Behrami*) or over the plaintiff (*Saramati*). Additionally, given that whatever the circumstances, a State operates through its own organs or agents, assessing the issue of control entails a concurrent determination of the attribution. The two facets of the analysis stand, in fact, on the same logical level and are equally determining. In *Behrami*, the body of rules normally relevant for attribution – those relative to State responsibility – matters little because the contingents deployed in Kosovo are undoubtedly organs of the defendant States.³⁹ But within the framework drawn by SC Resolution 1244, determining the entity – the contributing State or the UN – to which the

³⁶ A certain drift of the debate on the ECtHR judgement bears witness of that, notably in some scholars' discussion on the logical order and mutual relationship between the issues of jurisdiction and attribution. One of the first commentators of the decision had in fact maintained that 'the Court was mistaken in *Behrami* to venture in the issue of attribution, since the question of State jurisdiction is a preliminary matter which logically must be dealt with before attribution' see, Sari, *supra*, note 14, 159. The latter stance had later been criticised by two other commentators, who had in turn hold that 'State jurisdiction is not strictly speaking a preliminary issue, certainly not any more so than is attribution', see Milanović and Papić, *supra*, note 14, 273.

³⁷ *Ibid.*, 272. On the notion of jurisdiction in human rights treaties see also Meron (1995) 78; De Schutter (2006); Wilde (2007) 503, especially at 508, 513-514; 183. Whereas, more specifically on Article 1 of the ECHR see De Sena (2002); Cohen-Jonatan (2002) 1069-1082.

³⁸ Further than *Banković*, see *Drozd and Janousek v. France and Spain*, App. Nos. 12747/87. ECtHR (plenary session), Judgment of 26 June 1992; *Loizidou v. Turkey*, 15318/89. ECHR, Judgment, 18 December 1996; *Cyprus v. Turkey*, App. No. 25781/94. Grand Chamber, Judgment, 10 May 2001; *Issa and Others v. Turkey*, App. No. 31821/96. Second Section, Judgment, 16 November 2004; *Ilaşcu and Others v. Moldova and Russia*, App. No. 48787/99. Grand Chamber, Judgment, 8 July 2004; *Öcalan v. Turkey*, App. No. 46221/99. Grand Chamber, Judgment, 12 May 2005; *Hussein v. Albania and Others*, App. No. 23276/04. Fourth Section, Decision on admissibility, 14 March 2006.

³⁹ At Art. 4, Draft Articles on Responsibility of States for Internationally Wrongful Acts, see ILC Report on its 53rd session (23 April–1 June and 2 July–10 August 2001) *General Assembly Official Records*, Fifty-sixth Session, Supplement No. 10, (A/56/10) at 40.

conducts at stake are to be attributed is decisive. Hence, we will examine IOs' responsibility rules.

In case of state organs placed at the disposal of the UN for the purposes of peace operations,⁴⁰ Article 5 of the Draft Articles on the Responsibility of International Organizations⁴¹ is the pertinent evaluation criterion. After précisising that for the purpose of attribution of acts to IOs, control plays a different role than with reference to State responsibility,⁴² the commentary of the provision foresees control as follows: '[...] 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'.⁴³ Hence, two main consequences follow: first, in deciding whether a contingent acted in its national or international capacity, the analysis purports on the specific act at stake; second, the question to be answered comes down to deciding in whose name an organ was acting at the moment when the act occurred.

In summary, it appears that the process of evaluation the Court might have been expected to follow is a two-tiered one, comprising an assessment of the jurisdictional link existing between the claimants and the respondents States – i.e., whether any organ of the latter was exercising authority or control over the former – and the determination of the entity with effective control on the acting organ. However, the Court proceeded in a rather different way.

While approaching the case as one of *ratione personae* jurisdiction, the Court added an element into its framing of the matter when it stated that 'the civil and security presences [...] did exercise the relevant control of Kosovo'. Indeed, while hinting at control, the latter stance keeps the contours of the matter undefined with regard to ECHR States, by means of a general reference to the UN missions on the terrain. Essentially, the overall reference to control, if not incorrect at a starting point, cannot stand on its own in the circumstances at stake. The assessment of a jurisdictional link – and concurrently of attribution – neces-

⁴⁰ The term is taken from the 'Brahimi Report' and refers to 'operations of conflict prevention and peace-making; peacekeeping; and peace-building', see Report of the Panel on UN Peace Operations (Brahimi Report) UN Doc. A/55/305-S/2000/809, 21 August 2001; see also Bourtois-Ghali, (1992).

⁴¹ For the provisionally adopted text of the Draft Articles on Responsibility of International Organizations see ILC Report on its 60th Session (5 May to 6 June and 7 July to 8 August 2008) *General Assembly Official Records*, Sixty-second Session, Supplement No. 10 (A/63/10), ch. VII, 249-299.

⁴² See para. 4, which reads as follows: 'With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State. In the context of the placement of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct is attributable', see ILC Report 56th session (3 May-4 June and 5 July-6 August 2004) *General Assembly Official Records*, Fifty-ninth session, Supplement No. 10 (A/59/10), ch. V, 94-142, at 111-113.

⁴³ *Ibidem*, 113.

sitate, as stressed above, an analysis tailored to the specific allegedly unlawful conduct. A similar attitude then also pervades the interpretation given to the rules on IOs' responsibility. Many commentators have highlighted the flaws in this part of the decision.⁴⁴ One word suffices to convey the most noticeable trait of the Court's overall approach: formalism. Indeed, the reference to Resolution 1244 in order to ascertain *who* – of KFOR or UNMIK – detained the mandate to de-mine and detain, as well as the attempt to ascertain the link between the Security Council and KFOR on the basis of the notion of delegation of powers under Chapter VII of the Charter were both purely formalistic.

The repartition of competence contained in the resolution is, at best, of little guidance for the purpose of deciding on attribution. Indeed, the framework sketched therein is certainly far from reflecting the administrative and institutional matrix existing in Kosovo.⁴⁵ Such a reliance, although understandable in view of the said complexity, remains *per se* insufficient. Moreover, in light of the following discussion on the delegation of powers by the SC, one is induced to conclude that, rather than attempting to disentangle the Kosovo byzantine situation, the Court was apparently casting its spell in interpreting the rules on attribution.

Indeed, in paragraphs 128-141 of the decision, we undeniably notice the distance between the posture of the Court and the relevant factual background; which reflects the deductive reasoning carried out in tracing the actions of the TCNs' contingents back to the SC. There are two pivotal steps: first, articulating the link between the SC and KFOR (paras. 132-136) and second, rejecting the arguments advanced by the parties with regard to the level of TCNs' involvement allegedly detaching troops from their international NATO mandate (paras. 137-141). Interestingly, the Court adopted two different modalities to define the notion of control. With regards to the NATO-TCNs relationship, it upheld a *factual* criterion based on the ultimate retention of operational command; whereas – just a few lines before – it had grounded the attribution of KFOR's acts to the SC on the *legality* of the delegation of powers supposedly disposed by Resolution 1244.⁴⁶ The effort in forging a construction as convincing as possible is remarkable as well as the ability in juggling with the scholarly sources cited to bolster the discussion on the SC's Chapter VII powers.⁴⁷ The result, however,

⁴⁴ See particularly, Palchetti, *supra*, note 14 particularly at 686-694; Milanović and Papić, *supra* note 14, particularly at 274-289; Larsen, *supra* note 14; Maneggia, *supra* note 14.

⁴⁵ On the latter aspect, see Picone (2005) 30-31, see also references in footnotes 131-133 therein.

⁴⁶ On this lack of coherence see also Maneggia, *supra*, note 14, 200. As to the notion of delegation, incidentally never used by the SC in the dispositive of its resolution, the Court had previously made a distinction between authorization and delegation, see para. 43 '[...] use of the term 'delegation' in the present decision refers to the empowering by the UNSC of another entity to exercise its functions as opposed to 'authorizing' an entity to carry out functions which it could not itself perform.', see *Behrami*, para. 43.

⁴⁷ In the latter respect, it is quite remarkable to notice not only the extensive reference made to scholarly contributions but also the distortive way of using the latter. Indeed, among the Authors cited in square

is far from meeting the intended goal. In fact, an important conceptual loop-hole, deprives the reasoning of consistency: the fact that a SC resolution might provide for a legal delegation of powers i.e., respecting the institutional criteria determining its legality has nothing to do with attribution, neither in the light of previous UN practice, nor within the scope of Article 5 of the Draft Articles on the responsibility of IOs. The implied *non sequitur* is evident when conjunctly reading paragraphs 133 and 136 of the decision:

'The Court considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the Article 43 agreements never concluded'.

[...]

'This *delegation model* demonstrates that, contrary to the applicants' argument at paragraph 77 above, direct operational command from the UNSC is not a requirement of Chapter VII collective security missions.' (emphasis added)

First, the standard endorsed in the first part of the above extract is doubtful. Notwithstanding that the expression is squarely taken from the work of one scholar,⁴⁸ it is arguable whether the maintenance of the 'ultimate authority and control' might be compatible with a complete divestment of control over the conduct of operations or, at any rate, whether the reporting system might provide a sufficient toll to exercise 'overall control and authority'.⁴⁹ The whole inquiry on any sort of 'delegation model' is irrelevant altogether, given that the parties had put forward operational command as a potential indicator of effective control for the purpose of attribution, and not as a matter of Charter legality. Consequently, these two aspects are conflated in the argumentation of the Court, which – already faltering as a reconstruction of the Charter framework for peace missions – is far from passing the muster when it comes to demonstrating why the 'ultimate authority and control' test is a pertinent attribution criterion.⁵⁰ Unsurprisingly, the risk that such a dangerous move may creep into the practice of other courts or, even worse, be endorsed by States has prompted the reaction of the 'generalists', beginning with the ILC Special Reporter on the responsibility of IOs, Giorgio Gaja. He has commented 'without denying the

brackets at para. 132 only the contribution of Prof. Sarooshi had, in fact, drawn the link between the notion of delegation of powers by the SC with that of attribution. The other Authors mentioned had rather dealt with the practice of delegation and legality thereof, without raising the matter of attribution.

On this point, see also Milanović and Papić, *supra*, note 14, 285–286.

⁴⁸ See Sarooshi, *The United Nations and the development of collective security. The delegation by The UN Security Council of its Chapter VII powers* (1995) 268–284.

⁴⁹ See Behrami, para. 134.

⁵⁰ On this point, see particularly Larsen and Manegga, *supra*, note 14. It should be noticed that in a later case decided on the same basis of *Behrami*, namely *Berčić*, the Court had recourse to the expression of 'effective overall control' instead of 'ultimate authority and control', see *Berčić*, para. 27.

importance of this jurisprudence that it would be difficult to accept, simply on the strength of the judgment in *Behrami* and *Saramati*, the criterion applied in those cases as a potential universal rule. Also as a matter of policy, the approach taken by the European Court of Human Rights is unconvincing. It would lead to attributing to the United Nations conduct which the organization has not specifically authorized and of which it might have little knowledge or no knowledge at all.⁵¹

It seems that both the elusive mention of control and the thorough discourse on attribution have been crafted with the purpose of avoiding an analysis of the alleged violations taken in isolation. Furthermore, such an approach demonstrates the Court's attempt to skip the confrontation with its previous jurisprudence on the meaning of the jurisdictional clause of the Convention and, especially with the related thorny question of effective control. The reasons behind a similar choice of judicial policy might be manifold – definitely including the wish to limit *à la Banković* ripples effects on jurisdictional matters – and hard to seize from an external standpoint. Contrarily, its major effect is quite patent: considerably curtailing the coverage of the Convention. The all-encompassing approach taken in *Behrami* resembles – if not conceptually, at least in its functioning – to the notion labelled in *Banković* as the 'legal space of the Convention'. In other terms, it operates as a jurisdictional tool to dispose of complex situations, whose context may give rise to a bundle of claims the Court is not willing to deal with. Similarly, certain commentators have maintained that *Behrami* 'sends a clear message to States saying they are free to do whatever they wish to do and escape any human rights scrutiny as long as they protect themselves by obtaining the imprimatur of an international organization'.⁵² To clarify, it is wrong to expect the Court to uphold its *Behrami* doctrine on attribution – and thereby refrain from exercising its jurisdiction – in any situation implicating an IO. Proof of this resides in the arguments relative to distinguishing the circumstances of *Behrami* from those of its previous pronouncement in *Bosphorus*,⁵³ particularly in paragraph 151 whereby the Court held that:

'in the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. [...] There exists, in any event, a fundamental distinction between the nature of the international organization 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

⁵¹ See Gaja, *Seventh Report on responsibility of international organizations*, ILC 61st session (4 May–5 June and 6 July–7 August 2009) A/CN.4/610 at 12.

⁵² See Milanović and Papić, *supra*, note 14, 268.

⁵³ See *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, Grand Chamber, Judgment, 30 June 2005.

UNSC. As such, their actions were directly attributable to the UN, an organization of universal jurisdiction fulfilling its imperative collective security objective. (emphasis added).⁵⁴

Therefore, we should see the Court's move not exactly as granting a 'blank check' to ECHR States acting under the aegis of any IO, but rather as defining an approach easily adjustable to extra-territorial contexts as well as to situations – whether or not within the 'legal space of the Convention' – implying multiple layers of governance. Cases so far decided *à la Behrami* bear evidence of that, the gamut of claims having aroused from the UNMIK-KFOR presence in Kosovo but also from some acts performed by the High Representative in Bosnia and Herzegovina.⁵⁵

Along with such versatility, the posture endorsed in *Behrami* strikes for being replete with overt policy considerations to one main addressee: the Security Council, depositary of the 'imperative collective security objective' pursued by the UN. Here comes the second turning point of our reflection. The avoidance of Article 1 ECHR sought to forge an alternative jurisdictional tool to resolve *en bloc* situations charged with issues of collective security. The reasons underpinning – almost compelling – a similar choice of self-restraint clearly stand out by reading the previously cited paragraphs 149 and 151. Indeed, the reference to the need to not interfere with the ECHR States' participation in peace operations and the mentioning of the imperative collective security objective fostered by the UN are moves which, arguably, leave little room for any sort of activism.

In conclusion, the Court decided to refrain from scrutinizing the acts of the ECHR States acting within the framework of the UN system of collective security and has therefore attempted to define a doctrine capable of meeting this need. Yet, the very fact that the latter arguments are endorsed and reiterated so prominently, spurs further speculation. In other words, their phrasing in terms of the primacy of *certain Charter values* raises the question of their correspondent on the *normative* side. At this point, Article 103 of the Charter, the so called 'supremacy-clause' of the Charter immediately springs to mind.⁵⁶ Therefore,

⁵⁴ See *Behrami*, para. 151.

⁵⁵ For the list of cases so far decided relying on the *Behrami* precedent see *supra*, note 31. Most of them concern the situation in Kosovo within the framework of SC Resolution 1244. Those related to tin Bosnia and Herzegovina are – at the moment of writing – only two, namely the *Berić* and *Kalinć* cases. As to the legal background of the case and the role of the High Representative – a figure instituted by the so-called 'Peace Agreement' (Annex 10 thereto) and lately endorsed by the SC through its resolution 1031 of 15 December 1993 – see *Berić*, paras. 10–19.

⁵⁶ Article 103 of the UN Charter 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.' The latter provision has progressively attracted a growing number of scholarly reflections. On some of its aspects see Liivoja (2008), see also Kolb (2004). In more general terms, see Bernhardt (2002) 1297.

what is the relationship articulated by the ECtHR between the two normative bodies of the UN Charter and the ECHR? Additionally, how does the overtly disclaimed value-oriented dimension enter such a dimension?

Supremacy of values, conflict of norms: a thorn ECtHR

The interplay between the normative and the value-based dimensions permeates the reasoning of the Court to such an extent that their contours are not that easy to seize. One may compare it to the illusion created by a ventriloquist: understanding who is speaking for whom – the person or his puppet – can sometimes be quite a tricky exercise. On the one hand, in fact, the numerous stances reiterating the primacy of the goals of collective security pursued by the UN would have stood completely in the air without a reference – at least nominal – to Article 103 of the UN Charter. On the other, the legal implications deriving from the cited article are neither spelt out in their scope, nor articulated with reference to the legal obligations enshrined in the ECHR. The Court is, in this respect, completely silent. Although a complete neglect of the provision – incidentally, extensively quoted by the respondent and the intervening States⁵⁷ – could have hardly been possible, the Court still remained reluctant to pick up and address the main issue adumbrated by Article 103, namely normative conflict. Most importantly, normative conflict is, indeed, the big elephant in the courtroom. As subtly noted by two commentators, the ECtHR was certainly not willing to spell out once and for all the *hierarchical* relationship supposedly existing between the obligations imposed by the Charter and those enshrined in its own constitutive instrument.⁵⁸ Hence, the need to fall back on policy arguments which is an argumentative device arguably much easier to mould and eventually refine according to future needs. In other words, the daunting perspective of seeing the ECHR displaced by a bunch of norms external to the 'constitutional instrument of the European public order'⁵⁹ led the Court to blur the problem of conflict by purporting a value-based, rather than normative, primacy.

The successful attempt to merge the two mentioned dimensions is not only reflected in the relevant part of the decision – the pivotal paragraphs, quite tellingly, following one another⁶⁰ – but is also confirmed by a certain trend of doctrinal contributions.

The recourse to Article 103 has been widely deemed as the trigger of the solution purported by the Court. Seeing the final outcome of *Behrami* as the transposition of the Court's view on Article 103, commentators have at length criticized the far-reaching scope allegedly accorded to that provision.⁶¹ Consequently, extending 'the primacy of any act and omissions of contracting States covered by SC Resolution 1244, irrespective of whether they are

⁵⁷ See *Behrami*, paras. 97, 102, 106, 113.

⁵⁸ See Milanović and Papić, *supra*, note 14, 293.

⁵⁹ See *Behrami*, para. 145.

⁶⁰ See *Behrami*, paras. 147–149.

⁶¹ See particularly Palchetti, *supra*, note 14, 696–704; De Sena and Vitucci, *supra*, note 14, 204–205.

imposed [...] whether they are only authorized or even whether they are only voluntary' (emphasis in the original) has been seen as tantamount to stretch the intended purpose of Article 103 up to tearing it into pieces.⁶² Undoubtedly, that would squarely have been the case if the Court had taken a similar stance. As a matter of fact, it did not. Instead, it reached a similar result through the considerations of primacy of the alleged main objective of the Charter which are collective security and peace maintenance.

Thus, the ensuing question is twofold. First, what does such a posture say about the Court's perception of its own relationship with the SC as the main universal political organ? Second, did the ECtHR – as a regional judicial organ vested with the task of protecting human rights – have any alternative choice?

A swift conclusion on either the policy stances or the use of Article 103 may, as shown, be oblivious of some deeper – at time contrasting – drifts lying at their root. Whether the Court tried or not to constrain itself for the future when eluding the riddle of normative conflict, the result we are confronted with today does not leave much room for nuances. The strength of the endorsement of values pursued by the Court goes far beyond a mere posture of self-restraint. Accordingly, some authors have even ventured as far as to saying that the *Behrami* ruling might be seen through the lenses of Georges Scelle's theory of *dédoublement fonctionnel*.⁶³ They believe that, through its decision the ECtHR has *de facto* aimed at furthering certain values emanating from the UN legal order, at the expenses of those enshrined in their own order. The lack of a solid normative construction and the blunt statement made by the Court may probably yield sufficient evidence to share such a position, at least in its main tenants.⁶⁴ Yet, we cannot help thinking that the endorsement made by the ECtHR was imbued with a further component. Mindful of the remarks made on the internal effects of the *Behrami* doctrine on attribution and jurisdictional matters, it is quite tempting to conclude that the primacy attributed to the UN objective of collective security gives a sort of 'final imprimatur' to the reject of claims systematically made by the Court. As mentioned above, if one looks at the effects entailed by the sweeping stance of paragraph 149 and then turns to the whole discussion on attribution, the feeling is that the former hollows out the latter, even if it were only to be for the actions performed by ECHR States in connection with a Chapter VII operations. As a matter of fact, whatever the shortcomings and strains suffered by the discourse on attribution, the Court found a way to protect the result it sought. By putting forward an almost overriding argument, it underpinned its wish to discard a whole bunch of situations having the features we have spotted above. However, an inquiry on motives may, eventually risk to see too much in certain stances or passages of the reasoning

⁶² See De Sena and Vitucci, *supra*, note 14, 205.

⁶³ *Ibid.*, 209–213.

⁶⁴ The starting point of the two Authors is, in fact, different from ours as far as the Court's use of Article 103 is concerned. They, in fact, start from the premise of insufficiency of the supremacy clause as spurring a fall back on the value-based dimension; *Ibid.*, 204.

developed by a Court. Therefore, rather than further delving into the folds of *Behrami*, we would like to address an ultimate question arising from the actual discussion. What was, in the end, the compelling need to perceive the relationship between the UN Charter legal system and the one defined by the ECHR as one of conflict? Plus, why should the relationship between itself – as a judicial organ – and a political one be described according to the dichotomy of either an unwarranted interference or unfettered liberty of action? Providing a thorough answer to both questions certainly represents a broad task but simply suggesting a few hints in this respect will definitely be useful.

Although it explicitly mentioned Article 31.3 c) of the Vienna Convention on the Law of Treaties (VCLT),⁶⁵ the Court with regard to the UN legal order, restrained itself to considering Articles 25 and 103 of the UN Charter.⁶⁶ Such a narrow reading calls for several critical considerations. Overall, one may notice that in its previous case-law, the Court had not shied away from using the cited provision in order to open up the conventional legal order to a considerable number of external norms.⁶⁷ Thus, there were no obstacles preventing the inclusion of those Charter provisions referring to human rights; eventually the Court might even have had regard to the many important human rights treaties concluded in the framework of the UN. Incidentally, a similar conclusion would be warranted also by a more careful reading of Article 103, which makes reference to 'the obligations under the present Charter' thereby putting on the same level – and according the same primacy – to the whole bundle of Charter obligations, rather than those stemming from a given resolution. In other terms, a contextual reading of the Charter was not only an available but was also a legally sounder option at the disposal of the Court.⁶⁸ Indeed, that might have put in perspective the compelling need to avoid any normative conflict, precisely because such a conflict would, to a large extent, have faded away.

If a path of normative harmonization to reconcile the Charter provision and those of the ECHR was then possible, that does not completely unravel the core

⁶⁵ See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S., 331, 8 I.L.M. 679 (entered into force on January 27, 1980). The Court introduces Article 31.3 c) by holding that 'It also recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State 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' see, *Behrami*, para. 122.

⁶⁶ See *Behrami*, para. 147.

⁶⁷ We refer to the following cases: *Al-Adsani v. the United Kingdom*, App. No. 35763/97, Grand Chamber, Judgment, 21 November 2001; *Fogarty v. the United Kingdom*, App. No. 37112/97, Grand Chamber, Judgment, 21 November, 2001; *McElhinney v. Ireland*, App. No. 31253/96, Grand Chamber, Judgment, 21 November, 2001; *Banković*, see *supra*, note 15. For a discussion on the use of the said article see particularly *McLachlan* (2005) 304-306. As to a critical appraisal of the Court case-law on the triad of cases on immunity, see particularly *Orakhelashvili* (2003) 529.

⁶⁸ In a similar vein, see also *De Sena and Vitucci*, *supra*, note 14, 213.

issue in *Behrami*. Indeed, as mentioned above, the problem hinged on a value-based dimension. At the forefront, one feels puzzled by the Court's assertion that the 'imperative objective' of the UN is one of collective security. Leaving aside the fact that, literally, collective security is one of the aims of the UN rather than the one and only, one should not be oblivious of the fact that 'collective security' is a goal which has progressively acquired a number of facets, certainly, not excluding altogether human rights.⁶⁹ Plus, the fear of interfering with the effectiveness of the operations engaged in by ECHR States looses much of its strength once the relationship between the two branches of obligations incumbent on States as Members of the UN and concurrently of the ECHR is crated in a more harmonic way. What probably remains is the wish to avoid engaging in any kind of relationship with the Security Council in its quality of universal political organ. Whether the latter reticence stems from a genuine concern of putting unwarranted laces to the SC's efforts in maintaining peace and security or, from a quite opportunistic desire to discard many delicate situations, we leave the issue up to the reader's own assessment. Nevertheless, it is worth noticing that both hypothesis stand on the quite debatable assumption that the interaction between a political and a judicial organ primordially turns on either an interference or a quasi-indifference. Without lifting the lid of a debate as rich as the one on this matter, our perception can aptly be illustrated through some observations made by José Alvarez during the post-*Lockerbie* debate on the relationship between the ICJ and the Security Council. Once revealed that the main positions of that moment – namely, those of the 'legalist' and of the 'realist' – had engendered the fake perception that judicial review had to be seen 'as a choice between hegemonic (or systemic) needs and the 'rule of law'',⁷⁰ he argued that 'the Court and the Council faced a continuum of options and interpretative modes [...] judicial review [being] an evolutionary process, emerging from a dialogue among all international actors'.⁷¹

The ECtHR, though potentially partaking in this dialogic pattern, has not seized the occasion provided by *Behrami* to cast its own spell on the matter. In the end, this probably represents the most strident silence of the ECtHR in *Behrami*.

3 Concluding Observations

In an intriguing essay, Vaughan Lowe maintained that the establishment of the Permanent Court of International Justice – and the ensuing shift from arbitral to judicial dispute settlement – had also entailed a shift in perception as far as the normative completeness – or lack thereof – of the international legal system was concerned.⁷²

⁶⁹ See Gowlland-Debbas, *supra*, note 13, particularly at 259-266.

⁷⁰ See Alvarez (1996) 39.

⁷¹ *Ibid.*, 39.

⁷² See Lowe (2000) 207-236.

The flurry of claims brought before the major European judicial bodies may, today, mark a drift of a similar importance. They might, in fact, trigger an effort to articulate the relationship between two pivotal moves informing the international legal system, namely the hierarchical judicialisation of several of its normative branches and the centralization of certain functions of collective interest, often merging political and legal aspects. To a certain extent, the fact that such a process has been spurred by the action of certain individuals does not have to be underestimated. Just a few years ago, one might have hardly expected a similar upsetting drift to have this as its *primum movens*. If anything, the latter novelty has at least revealed how deep the value-based dimension has crept into the international legal system; that, in return, leaves the door open for improvements.

From a more general perspective, one may spot a further aspect of interest in these cases taken as a whole. They have, in fact, brought to light a need which has silently been pervading the 'community' of international scholars since a while: 'facing – and grappling with – the growing complexity not only of the legal system(s), but also of their own perception of the latter'.

In conclusion, the recent cases and the reflection thereon can be seen as a piece of a broader trend, whereby international lawyers are trying to re-define their 'common view' of both problems and the appropriate solutions thereto. In the light of this latter observation, the timidity or the opportunism of the ECtHR in *Behrami* – and its manifold shortcomings – can, at least intellectually, be seen in a less frustrating way. However, we cannot stop lingering over its bitter taste.

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