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Human rights in wartime: a framework for analysis

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***E.H.R.L.R. 689 Introduction**

Until not long ago the relationship between international human rights law and international humanitarian law was understood on the basis of the classic distinction between the law of war and the law of peace¹: international humanitarian law (or the laws of war or *jus in bello*) applies only in wartime, international human rights law in peacetime. It is a view that continues to enjoy some support today, with some arguing that the practice of states has not fundamentally departed from it.²

Against this view, however, militates a growing body of case law, of which the advisory opinions of the International Court of Justice (ICJ) in *Nuclear Weapons*, and more recently in *Legal Consequences of the Wall*, are leading examples.³ The essence of these pronouncements is that human rights protection does not cease in wartime. The main international human rights courts had already moved in this direction before receiving the endorsement of the ICJ, which had the effect of mainstreaming a position until that time regarded as peripheral. This jurisprudence is not premised on a rejection of the constitutive distinction between the law of war and the law of peace. It redefines, instead, the law of war to include, under certain conditions and with some qualifications, aspects of human rights protection.

***E.H.R.L.R. 690** The contributors to this issue of the *European Human Rights Law Review* examine the questions arising from the application of human rights law to armed conflict in three different contexts. Michael Dennis and Andre Surena discuss the position under the International Covenant on Civil and Political Rights (ICCPR), conducting an in-depth analysis of international, regional and domestic case law, and arguing that there is a gap between state practice and judicial trends. Philip Leach focuses on the European Convention on Human Rights (ECHR) jurisprudence in the Chechen cases--by now one of the most comprehensive bodies of rulings by a human rights court on an armed conflict. Conor McCarthy's article deals with the Inter-American Court and Commission, which in many respects pioneered the application of human rights law to armed conflict. It will be seen at the end of this survey that systemic coherence is not the hallmark of this emerging human rights law of armed conflict--not a surprising fact given its judicial rather than legislative origins.

The purpose of my article is to provide a framework for those analyses. I will do so, first, by taking a step back from the detail of this growing case law and considering what the application of human rights law to armed conflict is for, and what concepts and principles underlie it. I will then go on to examine the progressive unhinging of international human rights obligations from territoriality, which has removed one of the main obstacles to the application of human rights law to international armed conflicts. In the following part of this article, I will consider the material scope of application of human rights law, and whether, in particular, there is any merit to the argument that armed conflict, as a subject-matter, is not appropriate for regulation by it or that, in the event of conflict between human rights and the laws of war, the latter should always prevail. I will finally examine a new argument that has been raised against the enforcement--rather than the applicability in principle--of human rights law in UN-authorized multilateral operations: the attribution of the violations to the United Nations itself, with the consequence of excluding the jurisdiction of human rights courts such as the Strasbourg Court.

Human rights and war

One of international law's *raison d'être* has always been the preservation of peace. For most

philosophers and international lawyers, this was not normally equated with the abolition of war, but rather with its containment. Some, like Immanuel Kant in *Perpetual Peace*, went further and conceived a world order free from war. Echoes of that idealism resonate in the document that founded the post-Second World War order: the UN Charter begins with the “peoples of the United Nations” expressing their determination to “save succeeding generations from the scourge of war”. This debate continues today, with philosophers, historians, psychologists, sociologists and economists arguing over the deepest causes of war and its eliminability from human existence.⁴

The legal regulation of the conduct of warfare that emerged between the 19th and the 20th centuries (the *jus in bello*) is premised on the realist acceptance of war as a social phenomenon which can, at best, be contained--its inherent inhumanity constrained but *E.H.R.L.R. 691 not eradicated. The *jus in bello* does however dismantle a powerful and deep-seated idea: that the laws fall mute in times of war (*Silent enim leges inter arma*). Moreover, the *jus in bello* does not negate the idealist move towards the suppression of war, but leaves that goal to the body of international law that regulates the resort to war (the *jus ad bellum*).⁵

Where do human rights fit into this picture? First, there is the idea that human rights can play an important, even decisive, role in the prevention of war. This is, in essence, an extension of one of the most influential grand ideas in international relations, the “democratic peace”--the theory according to which democracies do not go to war against each other.⁶ In its human rights version, the theory maintains that respect for human rights makes war far less likely.

Secondly, and more recently, the argument has focused on the contribution of human rights to the regulation of warfare. This argument may derive, in part, from absolutism of rights--the tendency to approach all questions, political, social or moral, in rights terms. But it also has a much more practical explanation: international human rights law benefits from an enforcement machinery that, for all its faults and limits, is still much better developed than what international humanitarian law offers. Victims, and their lawyers, often have no alternative to articulating their cases in human rights terms, as they can only bring them to international courts the jurisdiction of which is defined by human rights treaties. International courts have, rightly, avoided dismissing these cases outright, preferring to broaden the scope of human rights as previously understood.

That human rights law of armed conflict is a litigation-driven phenomenon does not however preclude an assessment of its conceptual foundations. For this purpose the two central questions are: does war extinguish human rights, or suspend them until peace is restored? And is a war where human rights are fully respected conceivable?

As a matter of positive law the answer to the first question is incontrovertible: human rights can only be suspended in war if, and to the extent, allowed by derogation clauses, such as Art.4 of the ICCPR or Art.15 of the ECHR.⁷ It is also difficult to conceive of an argument that justifies the outright suspension of human rights in times of war within the framework of one of the various theories of human rights. In essence, if human rights are rights that we have by virtue of our humanity, they cannot cease in times of war for the simple reason that our humanity does not cease in times of war.⁸ Some theories of human rights--Locke's for example--may even posit that freedom, and human rights, are more extensive in a state of war.⁹ Outside the framework of human rights theories, arguments justifying the abrogation of human rights in wartime *E.H.R.L.R. 692 are conceivable, on utilitarian grounds for example, but this discussion would lead us into an analysis of the legal philosophical foundations of human rights, which is well beyond the scope of this article. The point here is that the postulate that human beings inherently possess fundamental human rights cannot easily accommodate their disappearance in wartime.

The second question is more insidious. The jurisprudence that has sealed the application of human rights law in wartime seems to proceed on the assumption that it is *practically possible* to respect human rights in those circumstances. This assumption is evident, for example, in discussions on the *capacity* of the state to respect human rights found in cases such as *Bankovic* and *Al-Skeini*.¹⁰ The reason for this assumption is that, in the eyes of lawyers and judges, respect for the law can never be presented as an axiomatic impossibility--lest the credibility of law as an effective system for the regulation of human and social conduct be questioned. To say that states must respect human rights in times of war is thus believed to entail the proposition that they can do so, although the passage from the former proposition to the latter is certainly not required by logic.

This assumption, which is part of the framework of the emerging human rights law of armed conflict, is in my view distinctly problematic, for it risks giving war a “human face”. In doing so, it weakens our

repugnance of war as an evil inherently inimical to progressive ideas such as human rights. “War with a human face” is not the same as humanitarian intervention, a doctrine which in certain circumstances justifies war as a means to put an end to gross human rights violations but does not postulate the theoretical possibility of the consistency of warfare with human rights. Nor is “war with a human face” coextensive with the just war doctrine, for just war is a *jus ad bellum* doctrine and not one on the conduct of warfare.

International humanitarian law, built on a sense of pragmatism, even of pessimistic realism about war, sought to limit the brutality without aspiring to provide the basis for a progressive social order. If, instead, we nourish the idea--or rather the illusion--that war can have a human face, that even human rights can be respected in the course of it, another illusion might soon follow as a corollary: that war need not be, after all, a “scourge” from which, as the first words of the UN Charter recite, “succeeding generations” must be saved. Ideas need to be sufficiently practical to matter in the real world, but they also need to be sheltered from those very pernicious aspects of the real world which they are meant to ameliorate.

There is, therefore, the risk that in promoting the application of human rights law to armed conflict without the necessary *caveats* we invent the philosophical aberration of war with a human face. Horror of war is central to the political thought of such different thinkers as Grotius, Hobbes and Locke. It is constitutive--or least co-constitutive--of the social order. The state of war does not extinguish our natural rights, but makes their enjoyment “very uncertain ... very unsafe, very insecure”,¹¹ and our lives, in Hobbes's immortal words, “poor, nasty, brutish and short”.¹²

***E.H.R.L.R. 693** To voice caution about the application of human rights in armed conflict is not to accept the arguments of those who take the view that human rights law should cease to apply in wartime, but simply to remind ourselves that, while human rights may not be extinguished by war, they can never be fully enjoyed during it. In applying human rights, we should not persuade ourselves that a human rights-compliant war is ever a possibility. This is one of those situations where the law is mandatory, but full respect for it is an impossibility. Different degrees of inobservance are however possible: some states will violate human rights *less* than others in war, and it is entirely appropriate that human rights NGOs, or human rights courts when seised of these cases, should assess the various instances of non-compliance with human rights standards despite their axiomatic unattainability in wartime. Moreover, while there is an insoluble conflict between war and human rights, no such conflict exists with international humanitarian law: premised on a more pragmatic balance between norm and fact, the obligations international humanitarian law imposes and the rights it confers are *always* fully attainable in armed conflict.

Territorial scope of application

One of the first hurdles for the emerging human rights law of armed conflict is the application *ratione loci* of human rights obligations. For human rights law to play a significant role in international armed conflicts in particular, it must be susceptible to extraterritorial application. Human rights treaties normally contain provisions on territorial application that are, on their terms, quite limiting. The ECHR, for example, obliges each state to ensure Convention rights “within its jurisdiction” (Art.1)--a locution that is similar to the one found in the American Convention on Human Rights which guarantees rights “to all persons subject to their [the states parties'] jurisdiction” (Art.1). The ICCPR contains an even narrower prescription, requiring each state party to respect and ensure Covenant rights “within its territory and subject to its jurisdiction” (Art.2(1)). In contrast, the Geneva Conventions and Additional Protocol I on victims of international armed conflicts stipulate that states parties have “to respect and to ensure respect for the present Convention *in all circumstances*” (Art.1 common to the four Geneva Conventions and Additional Protocol I--emphasis added).

The extraterritorial application of the laws of war is a logical predicate for a system of rules conceived specifically for the regulation of activities outside the borders of the state. Indeed, the Geneva Conventions contain references to territory only for those rules that apply to internal armed conflicts (Art.3 common to the Four Geneva Conventions and Additional Protocol II).¹³ On its face the position on territorial application under international humanitarian law is, therefore, the reverse of that under international ***E.H.R.L.R. 694** human rights law. International humanitarian law began by regulating conflict outside the territory of states, and only moved to the realm of internal conflicts: the humanisation of inter-state conflict was its first great historical mission.¹⁴ International human rights law has, instead, always been grounded in the territory of the state: its essence, and extraordinary innovation, was to impose a wide range of legal obligations on states affecting their relationship with

the governed. Consistent with this account of their origins is the observation that, whereas the laws of war are one of the main original creations of international law, international human rights law is the result of the transposition onto the international arena of an invention of political philosophy and constitutional law.

One should not however be tempted to view the progressive expansion of international humanitarian law into the internal sphere, and of international human rights law into the international one, as processes moving on similar tracks and inevitably leading to convergence. A fundamental difference is that the laws of internal armed conflict have been developed legislatively: states have created them with the well-oiled mechanism of the multilateral treaty. The extra-territorial application of human rights law is, instead, a judicial invention, one which may enjoy wide and growing support among national and international judicial bodies, but which states still appear to be resisting.¹⁵

The human rights jurisprudence on extraterritoriality has been examined in some detail by scholars.¹⁶ The leading authority under the ICCPR is *Lopez Burgos v Uruguay*.¹⁷ *E.H.R.L.R. 695 The question in that case was whether the ICCPR applied to the abduction of a dissident by Uruguayan security forces in Argentina. The Human Rights Committee held that:

“... [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”¹⁸

One of its members, Christian Tomuschat, expressed some reservations about such a sweeping statement, highlighting that “instances of occupation of foreign territory” are “another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory” (Individual Opinion of C. Tomuschat).

Whatever one makes of the interpretation of the Human Rights Committee, it is difficult to deny that it does stretch the literal meaning of the words “within its territory and subject to its jurisdiction” in Art.2(1) ICCPR. States, as mentioned, have not generally welcomed these interpretations, and have insisted on a literal approach. One example is the response of the Netherlands to the request of the Human Rights Committee to provide information about the conduct of Dutch peacekeepers in Srebrenica. The Dutch Government replied that “the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope” of Art.2(1) of the Covenant.¹⁹ The ICJ has sought to put these objections to rest endorsing, in the advisory opinion on the *Wall*, the position of the Human Rights Committee on the West Bank, Gaza and East Jerusalem, and asserting that the ICCPR, and indeed other human rights instruments, apply to the actions of the Israeli authorities in the occupied territories.²⁰

The most extensive case law analysing the question of extraterritorial application comes from the European Court of Human Rights.²¹ In *Bankovic v Belgium*, the Grand Chamber held that the NATO bombings of the Federal Republic of Yugoslavia (as it was then known) during the 1999 Kosovo campaign were not acts “within the jurisdiction” of the states parties to the Convention. The Court rejected the applicants' argument that a “cause-and-effect” approach should be adopted to define the term “jurisdiction” in Art.1 of the ECHR, an approach--the Court went on to explain--that would be tantamount to

“... arguing that anyone adversely affected by an act imputable to a contracting state, wherever in the world that act may have been committed or its consequences *E.H.R.L.R. 696 felt, is thereby brought within the jurisdiction of that state for the purpose of Article 1 of the Convention”.²²

The solution opted for by the European Court sought instead to strike a compromise between strict territoriality and unfettered extraterritoriality. In Lord Brown's summary in *Al-Skeini*, *Bankovic* stands for an “essentially territorial” notion of jurisdiction with “other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case”.²³ One of the *Bankovic* exceptions is material to the application of human rights law in armed conflict providing that the Convention applies where the state:

“... through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]”.²⁴

In distinguishing *Bankovic* from the northern Cyprus cases, the Court referred to another notion,

which has given rise to some difficulty: the “legal space” (or *espace juridique*) of the Convention. It reasoned that:

“... [T]he inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's ‘effective control’ of the territory and by the accompanying inability of the Cypriot Government, as a contracting state, to fulfil the obligations it had undertaken under the Convention.”²⁵

In contrast--the Court held--the Federal Republic of Yugoslavia “does not fall within this legal space”.²⁶

In *Issa v Turkey* a Chamber of the Court appeared to dismiss the relevance of the *Bankovic* finding on the *espace juridique* of the Convention. The case concerned a large-scale military operation by Turkish forces into northern Iraq, and thus outside the legal space of the Convention. The Court this time held that:

“In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there (‘extra-territorial act’) may amount to exercise by them of their jurisdiction within the meaning of Art.1 of the Convention. According to the relevant principles of international law, a state's responsibility may be engaged where, as a consequence of military action--whether lawful or unlawful--that state in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, *E.H.R.L.R. 697 whether it be exercised directly, through its armed forces, or through a subordinate local administration.

A state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating--whether lawfully or unlawfully--in the latter state. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.”²⁷

Various commentators have been at pains to reconcile *Bankovic* and *Issa*.²⁸ The House of Lords took this task on itself in *Al-Skeini*,²⁹ concluding that the European Convention applies extraterritorially where a state party to the Convention exercises “such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in section 1 of the Convention”³⁰ --a situation that did not occur in Iraq where, according to the House of Lords, the British presence fell far short of such control. It was held that the Convention did not cover the bulk of the claims in *Al-Skeini* --those concerning fatalities as a result of allegedly excessive force used during patrolling or similar operations by British troops in Iraq--but that it did cover the one case of death in custody at a British military base, for it was analogous to cases involving embassies and consulates and, as such, not predicated on the exercise of effective control over the surrounding territory.

The key criterion identified in *Bankovic* and *Al-Skeini* for the extraterritorial application of human rights obligations is that the measure of effective control exercised by the state should entail the *capacity* to secure Convention rights. But what exactly does this mean in the case, for example, of the right to fair trial? An occupying power, regardless of the degree of effective control it exercises, is not able to guarantee this right in the measure required under the Convention unless an independent, impartial and effective legal system is already in place; rules and institutions cannot be created overnight. Furthermore, it is difficult to escape a sense of arbitrariness once these conclusions are considered not in the abstract, but in relation to the concrete examples that gave rise to those cases: is it really plausible to distinguish the case of the person killed by British troops during a patrol in Basra from that of the person who dies while in their custody so definitively as to conclude that one was the victim of an actionable human right violation and the other was not?

Despite these limits in terms of legal clarity and determinacy, the recent case law on extraterritoriality has effectively deprived states of the implausible argument that *E.H.R.L.R. 698 “legal black-holes” outside their frontiers are beyond the reach of international and constitutional human rights protection. The approach to extraterritoriality developed by the ICJ and by human rights bodies has also paved the way for the applicability of human rights law to situations previously regarded as the exclusive domain of the laws of war. One clear example, already referred to, is military occupation.³¹ As the ICJ stated in the Advisory Opinion on the *Wall* :

“The applicable law governing Israel's rights and duties in the Occupied Palestinian Territory, including East Jerusalem, is both international humanitarian law and international human rights law.”³²

Another example is the treatment of prisoners of war, to which the Third Geneva Convention applies. From the case law outlined above it is clear that the ICJ, the Human Rights Committee and the European Court of Human Rights would, in all likelihood, find that, even in the absence of an overall military occupation, the detention of prisoners engages the human rights obligations of the detaining state.³³

Material scope of application

As discussed above, there are serious theoretical problems with the notion that international human rights law ought to be confined to peacetime. The canonical distinction between war and peace, on which this notion rests, has a descriptive rather than normative value. There are rules applicable only in war, but from their existence it *E.H.R.L.R. 699 is not possible to infer a “macro-principle” that prescribes that *all* rules of international law shall apply either to peace or to war.³⁴

In international humanitarian law treaties the field of material application is clearly defined: they apply to international armed conflicts, except for Additional Protocol II, which applies to internal armed conflict, and Common Art.3, which applies to armed conflict of a non-international character.³⁵ The same cannot be said of human rights treaties, where no general stipulation can be found to the effect of either limiting their application to peacetime or extending it to wartime. Specific provisions do however refer to war. For example, Art.15 ECHR allows states parties to derogate from certain standards in times of “war or other public emergency threatening the life of the nation”: war can, therefore, be a ground for a limited suspension of certain human rights guarantees, not for their abrogation *tout court*.³⁶ Another example is Art.2 of the Convention Against Torture which provides that:

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

In the *Nuclear Weapons* opinion the ICJ first took the view, now settled in its jurisprudence, that:

“... [T]he protection of the International Covenant on Civil and Political Rights does not cease in time of war except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”³⁷

In the *Wall*, after reiterating the principle in *Nuclear Weapons*, the Court went on to explain:

“The relationship between international humanitarian law and international human rights law is thus not one of exclusion but of coordination. Where international human rights law deals in general terms with some matter (e.g. ‘arbitrary’ deprivation of life) which is regulated in more detail and specificity by international humanitarian law, the latter provides the content to the applicable law, i.e. it determines the scope of the legal standard. Where on the other hand international human rights law excludes certain treatment entirely--e.g. torture--then that treatment remains internationally unlawful at all times and places including during armed conflict or occupation.”³⁸

***E.H.R.L.R. 700** Having disposed of the question of the applicability in principle of human rights law to war, the next question, as identified in the above passage, is how to solve conflicts between human rights rules and international humanitarian law. Specificity, the main criterion identified by the Court for this purpose, is a general rule of interpretation of international obligations: the specific one (the *lex specialis*) prevails over the general one, because it represents more accurately the intention of the states.³⁹

In some cases the task of the interpreter is facilitated by a constructive *renvoi* to the *lex specialis*. Article 15 ECHR, for instance, provides that derogations from the right to life are not permissible, “except in respect of deaths resulting from lawful acts of war”. In other cases, however, things are more difficult: what to make, for example, of the duty of an Occupying Power under Art.43 of the Hague Regulations to respect the laws in force in the occupied country? Does that need to be reinterpreted as referring only to laws that do not violate human rights? And what about the rules in international humanitarian law that allow the internment of enemy aliens, or of civilians in occupied territories under conditions that would probably fall foul of human rights law?

An additional difficulty in these cases concerns the role of the decision-maker: should a human rights

court apply international humanitarian law, even where it sets a standard that is lower than the human rights one? The Inter-American Commission on Human Rights has answered these questions affirmatively in the *Tablada* case.⁴⁰ The Commission ruled that the violent confrontation at the Tablada base in January 1989 between Argentine armed forces and a well-organised group of attackers was not equivalent to “forms of domestic violence not qualifying as armed conflicts”,⁴¹ and that, by virtue of its scale, it “triggered the application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities”.⁴² The Commission argued that, while human rights treaties “apply both in peacetime, and during situations of armed conflict”, they were not “designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare”⁴³ : the answer must therefore come from international humanitarian law, which, perhaps surprisingly, the Commission considered itself competent to apply.

In *Isayeva v Russia* the European Court of Human Rights approached these problems differently.⁴⁴ The case arose out of a Russian military operation in a village in Chechnya where a large group of fighters had based themselves. Believing that they had been granted safe passage, civilian residents sought to escape on minibuses. Russian airplanes bombed it, causing the death of many civilians. The Court concluded unanimously that there had been a breach of the right to life (Art.2). In reaching this conclusion, it applied the well-established principles in its case law on the use of lethal force by state agents.⁴⁵ *E.H.R.L.R. 701 It has been pointed out that the application of international humanitarian law would have produced a different outcome in this case⁴⁶ ; at the very least it would have entailed a different approach, with the Court beginning its analysis with the determination whether “there was a legitimate military objective to be targeted”.⁴⁷ In *Isayeva* , the Court placed great reliance on the fact that the Russian Government had declared neither martial law nor a state of emergency, and had made no derogation under Art.15. The Court proceeded on the basis that these events had taken place “outside wartime”⁴⁸ --again a questionable assumption from the point of view of international humanitarian law.

There can be little doubt that the level of violence involved in *Isayeva* , and in the Chechen conflict in general, was substantially greater than the confrontation at the Tablada base in Argentina in January 1989. Yet, one human rights court decided to apply international humanitarian law to a less serious and isolated violent confrontation, while the other applied human rights law, even unqualified by derogations, to a large-scale and protracted armed conflict. The basic principle that human rights obligations apply in wartime and are not automatically displaced by international humanitarian law ones is shared by human rights courts, but much uncertainty remains about the concrete working of *lex specialis* in this area. Moreover, this case law is, by its very nature, imperfect in the sense that the subject-matter of the jurisdiction of the courts which are producing it is defined by human rights rather than both international humanitarian law and human rights. The present state of international law offers very little by way of precedents applying the *lex specialis* in an even situation, where, that is, the law applicable to the dispute by the international court includes international human rights law and international humanitarian law on an equal footing.

Human rights in peacekeeping operations

A recent decision of the European Court of Human Rights in two joined cases, *Behrami and Behrami v France and Saramati v France, Germany and Norway* , has raised another issue: the application, and enforcement, of international human rights law in UN-authorized peacekeeping operations.⁴⁹ The applicants in the *Behrami* case complained, under Art.2, of the death of Gadaf Behrami, son of one of the applicants and brother of the other, and of the serious injury suffered by one of them as a result of the explosion of a cluster bomb, dropped during the 1999 Kosovo war, devices which--it was alleged--the French KFOR troops knew to be present on that site but failed to remove. The applicant in the *Saramati* case complained, under Art.5 alone as well as in conjunction with Art.13 of the *E.H.R.L.R. 702 ECHR, about his extra-judicial detention by KFOR troops between July 13, 2001 and January 26, 2002, and, under Art.6, about the lack of access to courts.

The respondent states raised jurisdictional objections on both *ratione personae* and *ratione loci* grounds, succeeding on the former. The essence of their successful objection was that the acts of which the applicants complained were not attributable to the respondent states, but to the United Nations, and thus could not engage the jurisdiction of the Court since the United Nations is not a party to the ECHR.

The Decision of the Grand Chamber sets out the mandate of KFOR, and of the UN Mission in Kosovo (UNMIK) and their legal bases in detail, describing the relationship between these two entities in the

following terms:

“UNMIK was a subsidiary organ of the UN endowed with all-inclusive legislative and administrative powers in Kosovo including the administration of justice ..., it was headed by a Special Representative of the Secretary General and reported directly to the UN Security Council via the Secretary General. KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO led operation authorised by the UN Security Council under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence.”⁵⁰

Having considered the legal bases for the two contested activities, that is de-mining (*Behrami*) and detention (*Saramati*), the Court concluded that the supervision of demining fell within UNMIK's mandate while the issuing of detention orders fell within the mandate of KFOR. The Court then reasoned that both the inaction of UNMIK (its failure to de-mine the land) and the action of KFOR (the order to detain Mr Saramati) were attributable to the United Nations because of the Chapter VII foundations common to both UNMIK and KFOR.

Attribution to the United Nations posed a greater difficulty for KFOR than for UNMIK: KFOR is an example of the Security Council delegating its powers to Member States, while UNMIK is a subsidiary organ of the United Nations. The Court explained that, for the acts of KFOR to be attributable to the United Nations:

“... [D]elegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UN Security Council collective security constitutionally necessary under the Charter.”⁵¹

The “key question” for the Court was “whether the UN Security Council retained ultimate authority and control so that operational command only was delegated”⁵² --a question which it held should be answered affirmatively in the case of KFOR.

The British Government relied on *Behrami* and *Saramati* in the *Al-Jedda* case, which concerned the detention without trial in Iraq of a British citizen on suspicions of *E.H.R.L.R. 703 terrorism.⁵³ It submitted that the detention of Al-Jedda, like that of Saramati, was attributable to the United Nations rather than Britain, given that a number of Security Council resolutions, adopted after the invasion of Iraq, defined the terms of Anglo-American presence in Iraq. The House of Lords, rightly, rejected the analogy between Iraq and Kosovo, which would have had the absurd consequence of the events such as Abu Ghraib being attributed to the United Nations, rather than the United States; it did not however articulate the legal bases for the distinction between the two in cogent terms. The existence of a UN Security Council authorisation in Iraq at the relevant time had, after all, striking elements in common with the authorisation effected through Security Council resolution 1244 in relation to Kosovo. Lord Brown, the member of the Committee who admitted to having greater difficulty with this question, concludes that the only basis for distinguishing Iraq from Kosovo is the lack of “ultimate authority and control” by the United Nations in Iraq; a term that, he underscores, is “somewhat elusive”.⁵⁴

The decision of the European Court of Justice in *Kadi v European Union Council*, albeit not arising from a peacekeeping operation, might have an impact on this field. The Court asserted its jurisdiction to review the legality of an EC measure giving effect to a Security Council resolution, concluding that the measure in question did constitute an infringement of fundamental rights. The narrow approach to attribution in *Behrami* and *Saramati* however constitutes a significant obstacle to attempts to assert jurisdiction on UN peacekeeping operations, and can offset the benefits of the purposive approach to extraterritoriality developed in other cases, or of the indirect review of Security Council measures asserted in *Kadi*. In the present state of the law the argument that jurisdiction *ratione personae* precludes the European Court of Human Rights from exercising jurisdiction over the United Nations is unassailable, but the premise of that argument as presented in *Behrami* --attribution--is not.

Conclusion

It is right to characterise the relationship between the laws of war and human rights as one of co-ordination rather than exclusion--as the ICJ did in the *Wall*-- but this is only a starting point in the analysis raising more questions than it answers.

*E.H.R.L.R. 704 It is also important to bear the different origins and rationales of these two areas of law in mind. International humanitarian law was created by states as a special body of rules on armed

conflict, the product of a careful balancing exercise between the brutal reality of warfare and moral imperatives, between military necessity and humanitarian conscience. Some of its rules--for example those in the Third Geneva Convention on the Treatment of Prisoners of War--are highly detailed and specific; others, like the Martens Clause,⁵⁵ are general. The concept of military necessity, one of the cornerstones of the laws of war, has no equivalent in human rights law.⁵⁶ It reflects the realist and pragmatic assumptions of the laws of wars, which, while seeking to minimise the consequences of armed conflict, essentially regard war as a social fact and historical reality.

Human rights law was, instead, "discovered" by international law in the 20th century, imported into the international arena from the constitutional traditions of Western liberal democracies, once it was accepted that international law should play a role in the relationship between the government and the governed, and embrace a vision of government grounded in the liberty and dignity of the governed. Human rights law is not predicated on the distinctions that characterise the laws of war, most importantly between combatants and non-combatants. The rules of human rights law are not normally specific and detailed: its language is that of bills of rights, of broad statements of self-evident entitlements, from which an officer in the theatre of operations can often derive little practical guidance.

It is not surprising that there are tensions, and sometimes contradictions, between human rights law and the laws of war, and that substantial differences have arisen even between human rights courts--as examined in detail by the each of the contributors to this issue of the *European Human Rights Law Review*. Without delving into a comparison of the approach of international humanitarian law and human rights law to the various questions that can arise in armed conflict, it must be emphasised that it would be wrong to assume the degree of protection offered by international human rights law to be always greater than what is provided for under international humanitarian law: the rules on medical experimentation, for example, are more exacting in the Third and Fourth Geneva Conventions and in Additional Protocol I than in the ICCPR.⁵⁷

The differences between international human rights law and international humanitarian law are important to keep in mind also with a view to accepting the practical impossibility of a war in which human rights are, truly and fully, respected. Unlike international humanitarian law, human rights law never contained an implicit acceptance of war, and it would be ironic if such an acceptance were to be inadvertently read into it as a result of its expansion into new areas--in other words as a result of its success. The impossibility of respecting human rights in wartime should not cause us to give up on the task of monitoring compliance with them, bringing cases to national **E.H.R.L.R. 705* and international courts, and, more generally, making human rights-based arguments for the victims of armed conflict. These tasks are not entirely Sisyphean for they may make a practical difference, by providing remedies for example, but, even if it were to be shown that they make no practical difference whatsoever, they would still help us nourish the light of our inherent humanity in the darkest of hours.

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1. Philip Jessup wrote in favour of the adoption of an intermediate state between peace and war but his proposals have not had a significant following (P. Jessup, "Should International Law Recognise an Intermediate Status Between Peace and War?" (1954) 48 *American Journal of International Law* 98).
 2. See Michael Dennis's and Andre Surena's piece in this issue.
 3. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) 43 I.L.M. 1009.
 4. Two excellent recent contributions are D. Livingstone Smith, *Human Nature and the Origins of War* (2007) and A. Gat's monumental *War in Human Civilisation* (2006).
 5. On this history see G. Verdirame, "The Sinews of Peace: International Law, Strategy, and the Prevention of War" (2006) 77 B.Y.B.I.L. 83. On the *jus ad bellum*, see C. Gray, *International Law and the Use of Force*, 2nd edn (2004).
 6. See, e.g. Gat, *War in Human Civilisation* (2006), pp.574 et seq.
 7. The African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights do not contain derogation clauses.
 8. For a short introduction to those theories see J. Griffin, *On Human Rights* (2007), Ch.1. Positive human rights are not necessarily the same as natural human rights--a point also analysed extensively by Griffin.
 9. J. Locke, *The Second Treatise of Civil Government* (1690), Ch.III.

10. See the section on material application below.
11. Locke, *The Second Treatise of Civil Government*, para.123.
12. Hobbes, *Leviathan*, Ch.XIII. The states of nature and war to which Hobbes and Locke referred were not necessarily historical states, but rather heuristic devices part of a philosophical argument. Nevertheless, their analysis of the concept of the state of war and of natural rights in it--centred on the tension between norm and fact, between entitlement and enjoyment--is entirely relevant to this discussion. "Real" wars are not conceptually the same as the state of war, not least because they are not defined by anarchy, but they do share some of its features.
13. Common Art.3 reads: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. ..." There is a difference in the field of application of Common Art.3 and Additional Protocol II. Article 3 applies to any "armed conflict not of an international character", Protocol II to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".
14. On the history of this transition see S. Neff, *War and the Law of Nations* (2005), pp.358 et seq.
15. See Dennis's and Surena's article in this journal.
16. In addition to contributions in this special issue of the *Review*, see C. Byron, "A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies" (2007) 47 *Virginia Journal of International Law* 839; F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); R. Wilde, "Legal 'Black Hole': Extraterritorial State Action and International Treaty Law on Civil and Political Rights" (2005) 26 *Michigan Journal of International Law* 739.
17. *Lopez Burgos v Uruguay* (Human Rights Committee, Communication No.52/79).
18. *Lopez Burgos*, para.12.3.
19. The recent decision of the Grand Chamber of the European Court of Human Rights in *Behrami and Saramati*, discussed below, would have offered another argument to the Netherlands: an objection to the jurisdiction *ratione personae* of the Committee under the Covenant (that is the scope of *personal* application of the Covenant) given that the Dutch troops were part of a UN peace-keeping force.
20. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep. 36 at [416] et seq.
21. *Bankovic v Belgium* (2001) 44 E.H.R.R. SE5; *Ilascu v Moldova and Russia* (2004) 40 E.H.R.R. 46; *Issa v Turkey* (2004) 41 E.H.R.R. 27; *Loizidou v Turkey (Preliminary Objections)* (1995) 20 E.H.R.R. 99; *Loizidou v Turkey (Merits)* (1996) 23 E.H.R.R. 513.
22. *Bankovic* (2001) 44 E.H.R.R. SE5 at [73].
23. *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153 at [109], analysing *Bankovic* especially at [70]-[80].
24. *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [109].
25. *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [78].
26. *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [78].
27. *Issa v Turkey* (2005) 41 E.H.R.R. 27 at [68]-[71].
28. R. Wilde, "The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?" [2005] E.H.R.L.R. 115.
29. As a general observation in human rights adjudication in England and Wales, the trend, as evidenced also in *Al-Skeini*, is for English courts to engage in over-refining analysis of Strasbourg authorities, a curious approach given that the European Court is not the kind of common law jurisdiction where such highly-detailed analyses of precedents make historical and jurisprudential sense.
30. *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [79] per Lord Rodger.
31. Some scholars have expressed reservations about the actual beneficial impact of these developments on populations living under military occupation. See A.M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation" (2007) 18 E.J.I.L. 1.
32. *Wall, Advisory Opinion* [2004] ICJ Rep. 36 at [394]. See also *Ilascu v Moldova* (2005) 40 E.H.R.R. 46 at [313]. The traditional definition of occupation for the purposes of international humanitarian law is found in the 1907 Hague Regulations (Art.42), but modern international humanitarian law has adopted a broader more purposive definition: "the effective control of a power (be it one or more states or an international organisation such as the United Nations) over a territory to which the power has no sovereign title, without the volition of the sovereign of that territory" (E. Benvenisti, *The Law of Occupation* (2004), p.4). In the *Advisory Opinion on the Wall*, the ICJ explained that: "Under international law, an Occupying Power does not have sovereignty over the territory subject to its occupation. It merely exercises authority over the territory on a temporary basis. Furthermore, the essential test is one of actual overall control. It does not matter that day-to-day administration may be exercised by local authorities. Territory once occupied remains occupied until a definitive withdrawal from that territory, or a definitive, internationally acceptable settlement" (at [346]). On the different types of occupation see A. Roberts, "What is Military Occupation?" (1985) 55 B.Y.B.I.L. 249.
33. The position on extra-territoriality under the Inter-American human rights system is similar to that developed by the Human Rights Committee and the European Court of Human Rights (see, e.g. *Coard v United States*, Report of September 29 (1999), paras 36-44). See ConorMcCarthy's piece in this issue of the E.H.R.L.R.
34. The argument based on state practice has more merit and is considered by Dennis and Surena in this issue of the E.H.R.L.R.
35. C. Greenwood, "Scope of Application of International Humanitarian Law" in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (1999), p.39. On the distinction between internal armed conflict and armed conflict not of an international character, see fn.13.

36. See also Art.26 of the American Convention on Human Rights.
37. *Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep. 226 at [25].
38. *Wall, Advisory Opinion* [2004] ICJ Rep. 36 at [422].
39. On *lex specialis* in the Inter-American system see Conor McCarthy's piece.
40. *Abella v Argentina*, Case 11.137, Report No.55/97. See also *Avilan v Colombia*, Case 11.142, Report No.26/97. See the analysis of these cases in Byron, "A Blurring of the Boundaries" (2007) 47 *Virginia Journal of International Law* 839, 856 et seq.
41. *Abella*, Case 11.137, Report No.55/97, para.154.
42. *Abella*, Case 11.137, Report No.55/97, para.156.
43. *Abella*, Case 11.137, Report No.55/97, para.158.
44. (2005) 41 E.H.R.R. 38. Philip Leach examines the Chechen cases extensively in his article.
45. The leading Strasbourg authority on this is *McCann v United Kingdom* (1995) 21 E.H.R.R. 97. Louise Doswald-Beck has argued in favour of an approach to the right to life in armed conflict that integrates human rights law and international humanitarian law ("The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?" (2006) 88 *International Review of the Red Cross* 881).
46. N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict" (2005) 87 *International Review of the Red Cross* 737, 743-744.
47. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict" (2005) 87 *International Review of the Red Cross* 737, 743-744.
48. *Isayeva* (2005) 41 E.H.R.R. 38 at [191].
49. *Behrami v France and Saramati v France, Germany and Norway (Admissibility)* (2007) 45 E.H.R.R. SE10.
50. *Behrami and Saramati* (2007) 45 E.H.R.R. SE10 at [118].
51. *Behrami and Saramati* (2007) 45 E.H.R.R. SE10 at [132].
52. *Behrami and Saramati* (2007) 45 E.H.R.R. SE10 at [133].
53. *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332.
54. *Al-Jedda* [2007] UKHL 58; [2008] 1 A.C. 332 at [148]. In the end, the *Al-Jedda* appeal failed on a separate and even more troubling point: the effect of Art.103 of the UN Charter and the acceptance by the House of Lords of the view that Art.103 can act as a trump card, albeit with certain qualifications. A critical analysis of *Al-Jedda* is beyond the scope of this paper. Suffice it to say that it represents a major setback on the question of the rule of law in the "war on terror", and a refutation of the proposition that European and British courts have done a better job than the US courts in upholding human rights protection. True, the jurisprudence of the House of Lords and the European Court of Human Rights on extraterritoriality is far more progressive than that of the US Supreme Court, but the approach to Art.103 embraced by the House of Lords would be unthinkable in the United States for it represents an expansion of executive power incompatible with any tradition of liberal constitutionalism. The European Court of Justice has grappled with these issues in *Kadi v European Union Council* (Joined Cases C-402/05 C-415/05P) [2008] All E.R. (D) 34 (Sep).
55. The most recent formulation of the Martens Clause is in Art.1(2) of Additional Protocol I: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."
56. The law of international armed conflict is "predicated on a subtle equilibrium between ... military necessity and humanitarian conscience" (Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), p.16).
57. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), p.24.