
Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test

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Abstract

The article addresses the issue of whether conduct in international peace operations is attributable to the troop contributing states or to the United Nations, taking the European Court of Human Rights' admissibility decision in the Behrami and Saramati cases as a point of reference. The Court concluded that conduct by UNMIK and KFOR troops in Kosovo is attributable to the United Nations. The article examines the content of the 'ultimate authority and control' test that is applied by the Court, and argues that the Court should have taken a different approach. The Court's test is in the author's view difficult to reconcile with the International Law Commission's work on the responsibility of international organizations, with United Nations practice on responsibility for unlawful conduct in peace operations, and with the Court's own jurisprudence concerning attribution of conduct to the state. The author argues further that the Court's arguments are incomplete even if the Court's approach were to be considered correct. The article concludes by expressing concern that the Court's decision, when seen in connection with previous case law, in practice renders the European Convention on Human Rights irrelevant in international peace operations.

1 Introduction

When can a state be held accountable for human rights violations committed by members of its armed forces during international peace operations? This is the issue that will be addressed here, taking as a point of reference the European Court of Human

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Rights' admissibility decision in the *Behrami* and *Saramati* cases,¹ which in particular concerned the issue of attribution of conduct as a requirement for the establishment of accountability. The Court was asked to decide whether actions² committed by the NATO Kosovo Force (KFOR) and the United Nations Mission in Kosovo (UNMIK) constituted violations of the Troop Contributing Nations' (TCN) obligations under the European Convention on Human Rights (ECHR). The Court concluded that the alleged human rights violations were attributable to the United Nations and not to the individual TCNs, and therefore the Court was not competent *ratione personae* to examine the relevant actions. The applications were accordingly declared inadmissible.³

The decision was eagerly anticipated, for several reasons. The case presented the Court with an opportunity to confirm or depart from the controversial decision in the *Banković* case, where an application concerning the NATO bombing of Belgrade in 1999 was also declared inadmissible.⁴ It was also the first time that the Court had addressed the issue of accountability under the ECHR for actions carried out by the armed forces of Contracting States while taking part in a United Nations (UN) mandated peace operation (as the *Banković* case, of course, concerned NATO actions in the time prior to authorization from the UN Security Council). Further, this was the first case before any international court or tribunal which concerned accountability for human rights violations in a territory under UN administration. The case also provided the Court with an opportunity to clarify how it regarded the complex issue of human rights protection in Kosovo. This is an issue which has caused much concern and debate, also within the scope of the Council of Europe, where the Parliamentary Assembly had previously requested an opinion from the European Commission on Democracy through Law (the Venice Commission).⁵

The background to the deployment of UNMIK and KFOR in Kosovo is well known, and need not be elaborated here,⁶ but the facts of the specific cases should be set out.⁷

The *Behrami* case concerned actions by UNMIK and KFOR in the municipality of Mitrovica in March 2000. While playing, some children found a number of undetonated

¹ App. No. 71412/01 *Agim Behrami and Bekir Behrami v. France*, and App. No. 78166/01 *Ruzhdi Saramati v. France, Germany and Norway*, Grand Chamber decision of 2 May 2007 (hereinafter *Behrami/Saramati*).

² In this article, the term 'actions' also includes omissions, i.e., the failure to act.

³ The decision has been followed up in later cases. In the Court's decision of 5 July 2007 in App. No. 6974/05 *Kasumaj v. Greece*, which concerned the occupation by Greek KFOR forces of two plots of land for the establishment of a main national base, the Court referred to its previous decision, and stated without further discussion that '[i]n the light of that decision, the application had to be declared inadmissible. See also the decision of 28 Aug. 2007 in App No 31446/02 *Gajić v. Germany*, which concerned the refusal of German KFOR troops to pay rent for the use of an apartment that the applicant claimed ownership of. The application would in any case have been declared inadmissible because the applicant had failed to exhaust national remedies, but the Court also referred to *Behrami/Saramati*, *supra* note 1, as an independent justification for declaring the application inadmissible.

⁴ App. No. 52207/99 *Banković and others v. Belgium and others*, Grand Chamber decision of 12 Dec. 2001.

⁵ *Opinion 280/2004 on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, adopted by the Venice Commission on 8–9 Oct. 2004, CDL-AD (2004) 033.

⁶ See in particular UN Security Council res. 1244 (1999). See also *Behrami/Saramati*, *supra* note 1, at paras 2–4.

⁷ The facts of the *Behrami* case, *supra* note 1, are described in paras 5–7, and the facts of the *Saramati* case, *supra* note 1, are described in paras 8–17.

cluster bomb units, which had been dropped during the NATO bombardment in 1999. Among the children were two of Agim Behrami's sons, Gadaf and Bekim. When a cluster bomb unit exploded, Gadaf was killed while Bekim was seriously injured and permanently blinded. The application to the Court was founded on Article 2 ECHR, as it was submitted that French KFOR troops had failed to mark and/or defuse the undetonated cluster bomb units which the troops knew to be there.⁸

The *Saramati* case concerned a Kosovar who was arrested in April 2001 on suspicion of attempted murder and illegal possession of a weapon. He was released in June, but he was arrested again in July. His period of detention was repeatedly extended by the Commander of KFOR (COMKFOR), until he was convicted in January 2002. He based his application on Article 5 ECHR (both alone and in conjunction with Article 13) and Article 6, as he claimed to have been subject to extrajudicial detention without access to court.⁹ The application was brought against France and Norway because the COMKFORs who issued the detention orders were – consecutively – a Norwegian and a French officer.¹⁰

In addressing the admissibility issue, the Court took as a starting point that it was undisputed that Kosovo was not under the control of the Federal Republic of Yugoslavia at the time of the incidents, and it stated that the territory was 'under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY'.¹¹ As such, it appears that the Court considered that the requirements for extraterritorial application of the ECHR were met. But the Court continued to say that the relevant question in the case was not primarily about extraterritorial effect, but whether the Court was competent *ratione personae* to examine the states' contributions to the civil and security presence in Kosovo. In order to address this issue the Court had to decide whether the conduct could be attributed to the United Nations.¹² In the same manner, this article is therefore not one on the extraterritorial effect of the ECHR, but rather on the Court's assessment of attribution of conduct as an element in establishing accountability for human rights violations. As will be shown below, however, there are clear connections between these two issues.

The merits of the case will be discussed in Section 2 below, before Section 3 provides some remarks about whether the decision is a reasonable one, or whether it represents a set-back to human rights protection in Europe and globally. This section also briefly addresses a further element in the decision, namely that of the Court's competence (or lack thereof) to review conduct which is covered by a UN Security Council resolution. Finally, in Section 4, some comments are made about the consequences of the *Behrami/Saramati* case for the doctrine on the extraterritorial effect of the ECHR.

⁸ *Ibid.*, at para. 61.

⁹ *Ibid.*, at para. 62.

¹⁰ The application against Germany was based on allegations that a German officer had been involved in Mr Saramati's arrest and that Germany was the lead nation in the Multinational Brigade Southeast, where the detention facilities were located. Based on a lack of evidence concerning the possible involvement of a German officer, and a recognition by Mr Saramati that German KFOR control over the sector was an insufficient factual nexus, the case against Germany was withdrawn: see *ibid.*, at paras 64–65.

¹¹ *Ibid.*, at para. 70.

¹² *Ibid.*, at para. 71. See also at para. 121.

2 To Which Entity is the Conduct of KFOR and UNMIK Attributable?

A Determining the Proper Test for Attribution

Under Article 2, read together with Article 1, of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001,¹³ a state may be held responsible for internationally wrongful acts when an action or omission is attributable to the state and constitutes a breach of an international obligation of the state. In the Draft Articles on Responsibility of International Organizations,¹⁴ Draft Article 3.2 sets out a corresponding principle for international organizations. It is the first element in this definition that will be addressed in what follows, i.e., the attribution of conduct to a state or an international organization.

Chapters II of both ASR and DARIO define in detail in what circumstances conduct is attributable to a state or to an international organization, respectively, and both regimes need to be addressed in order to determine the attribution of conduct during international peace operations. A natural starting point is Article 4 ASR, according to which the conduct of a state organ is considered an act of the state whether the organ exercises legislative, executive, judicial, or any other functions, whatever position the organ holds within the state and whatever its character is. A state's armed forces are an organ of the state, and clearly fall within the scope of this provision. The situation during peace operations is, however, ordinarily that military personnel do not act as agents of their home state, but that they are rather placed at the disposal of the UN or another international organization (e.g., NATO). This complicates the legal picture.

International responsibility for actions committed during international peace operations has traditionally been assessed in an *ad hoc* manner. Ever since the United Nations operations in Congo (ONUC, 1960–1964) the UN has in practice assumed responsibility for damage caused by the military forces during peace operations in the performance of their duties,¹⁵ but the legal basis for this practice has largely been unclear. The *Behrami/Saramati* case illustrates this point, as the Court does not explicitly make clear what legal basis it applies in the decision. The Court introduces Draft Article 5 DARIO and Article 6

¹³ Adopted (with commentaries) by the Commission on its 53rd session in 2001, and endorsed by the UN GA: see res. 56/83 (28 Jan. 2002) and res. 59/35 (16 Dec. 2004) (hereinafter 'ASR'). The Articles with commentaries are also reproduced in J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

¹⁴ A topic still being considered by the International Law Commission. For reference see: http://untreaty.un.org/ilc/summaries/9_11.htm (last visited on 20 Feb. 2008). Arts 1–3 with commentaries were provisionally adopted by the Commission during its 55th session in 2003: see Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10 (A/58/10), at paras 49–54. Arts 4–6 with commentaries were provisionally adopted at the 56th session in 2004: see Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10), at paras 64–72 (hereinafter 'DARIO').

¹⁵ The Special Rapporteur's *Second Report on Responsibility of International Organizations* (2004), A/CN.4/541, at paras 34 ff. It falls well outside the scope of this article to analyse UN practice in this regard. See K. Schmalenbach, *Die Haftung Internationaler Organisationen* (2004), at 166–512.

ASR (both of which will be addressed below) in the description of 'relevant law and practice' (paragraphs 30 and 34), but the Court does not refer to them in its further assessment.

In the legal literature, the prevailing view has been that international responsibility is linked with operational command over the operations in question. Seyersted argued that 'if a Force is under national command, the Organization has no legal responsibility for it and does not represent it internationally'.¹⁶ Amrallah stated that 'the U.N. would be responsible for the unlawful activities carried out by the armed contingents put under its disposal by participating states as long as those activities are committed in the exercise of U.N. functions and under its real and exclusive operational control' and that '[t]he amount of operational control or authority which is exercised over the U.N. force can be a useful criterion to determine the responsibility of the various parties involved in the peace-keeping operation other than the U.N.'¹⁷ Peck has claimed that '[t]he question of who makes the political, strategic, and operational decisions that together comprise the right to command and control United Nations forces is central to determining who is responsible for actions taken by U.N. soldiers'.¹⁸ Shraga submits that '[i]n enforcement actions carried out by States under the authorization of the Security Council . . . operational command and control is vested in the States conducting the operation, and so is international responsibility for the conduct of their troops',¹⁹ and Schmalenbach goes as far as stating that the legal literature is in unison in the view that '*[d]en Vereinten Nationen ist das Handeln der Peace-keeping-Soldaten zuzurechnen, da sie während der Einsatzes unter dem operativen Kommando der Vereinten Nationen stehen*'.²⁰

The view is also supported by official UN statements, although these indicate that a distinction must be made according to the legal status of the operations. Peace operations under the operational control of the UN are regularly given the status of subsidiary organs of the organization,²¹ and the UN Legal Counsel stated in 2004 that:²²

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.

¹⁶ F. Seyersted, *United Nations Forces in the Law of Peace and War* (1966), at 411.

¹⁷ Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces' [1976] *Revue Egyptienne de Droit International* 57, at 65–66.

¹⁸ Peck, 'The U.N. and the Laws of War: How can the World's Peacekeepers Be Held Accountable?', 21 *Syracuse J Int'l L & Com.* (1995) 283, at 293.

¹⁹ Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law', in L. Condorelli *et al.* (eds), *The United Nations and International Humanitarian Law* (1996), at 330.

²⁰ Schmalenbach, *supra* note 15, at 249 (original footnotes omitted): '[t]he conduct of peacekeeping soldiers is attributable to the United Nations when they are under the operational command of the United Nations' (author's translation).

²¹ Comments and observations received from international organizations (2004), A/CN.4/545, at 18: '[t]he principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ'.

²² Unpublished letter of 3 Feb. 2004 from the UN Legal Counsel to the Director of the UN Office of Legal Affairs' Codification Division, quoted in A/59/10, *supra* note 14, at 112, para 5.

In 1996 the Secretary-General stated that the international responsibility of the UN for combat-related activities of UN forces ‘is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations’, and that ‘[w]here a Chapter VII-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation’.²³

In the International Law Commission’s work on the responsibility of international organizations, the attribution of conduct in peace operations has received considerable attention. While Draft Article 4 DARIO establishes the same principle, *mutatis mutandis*, for international organizations as Article 4 ASR does for states,²⁴ it is Draft Article 5 DARIO that governs situations where an organ of a state is placed at the disposal of an organization. The provision reads:

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

The corresponding provision in the ASR is Article 6, which provides that the conduct of an organ placed at the disposal of a state by another state shall be considered an act of the former state if the organ is acting in the exercise of elements of the governmental authority of that state. It should be noted here that the reference in Article 6 ASR to ‘the governmental authority of the State’ necessitated an amendment with regard to the responsibility of international organizations, as these do not possess any governmental authority.²⁵ The ILC has instead opted for a reference to the ‘effective control’ over the conduct. This is a similar test to that used in Article 8 ASR, which states that the conduct of a person (or entity) is considered an act of the state if the person ‘is in fact acting on the instructions of, or under the direction or control of, that State’.²⁶ This requirement of ‘direction or control’ in Article 8 ASR points, in particular, to the ‘effective control’ test which was applied by the International Court of Justice in the *Nicaragua*²⁷ and *Genocide* cases,²⁸ and, to a lesser extent, the ‘overall control’ test which was applied by the Appeals Chamber in the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.²⁹ Following the ICJ’s judgment in the *Genocide* case, it appears that the application of the ‘overall control’ test is restricted only to

²³ Report of the Secretary-General (1996), A/51/389, at para. 17.

²⁴ Draft Art. 4.1 reads as follows: ‘[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.’

²⁵ A/59/10, *supra* note 14, at 111 para. 3.

²⁶ DARIO does not include a similar provision to Art. 8 ASR.

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, merits, judgment of 27 June 1986 [1986] ICJ Rep 14.

²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 Feb. 2007, not yet reported.

²⁹ ICTY Appeals Chamber judgment of 15 July 1999, *Prosecutor v. Duško Tadić*. See Crawford *supra* note 13, at 110–111.

the use to which it was originally put in the *Tadić* case, namely that an armed conflict may be qualified as international if a state exercises overall control over a group that is involved in an otherwise non-international armed conflict on another state's territory. The test cannot, as it has been speculated,³⁰ be used to establish state responsibility.³¹ In the ICJ's view, therefore, the 'effective control' test in *Nicaragua* is the proper test under Article 8 of the Articles on State Responsibility.³²

In the commentary on Draft Article 5 DARIO, the ILC points out that the control criterion plays a different role in the context of the responsibility of international organizations from the one it plays in the context of state responsibility, because it does not concern the issue whether certain conduct is attributable at all to a state or an international organization, but rather to which entity – the state or the international organization – the conduct is attributable.³³ It is therefore not clear whether the 'effective control' test in Draft Article 5 DARIO is to be interpreted identically to the corresponding test in Article 8 ASR. In the commentary on the provision – and as cited by the Court – the test is described as follows:³⁴

(1) Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization.

(6) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ... Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

(7) As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.

In describing the 'effective control' test under Draft Article 5 DARIO as a question of effective control over specific conduct, it appears that the ILC intends the test to be similar to the test under Article 8 ASR. The organization must exercise effective control over the conduct of an organ of a state that is placed at the organization's disposal in order for the conduct to be attributable to the organization.

³⁰ Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 84 *IRRC* (2002) 401, at 408.

³¹ *Genocide* case, *supra* note 28, at paras 402–407.

³² See, however, Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649, at 665, who argues that the ICJ failed to pay sufficient attention to state practice and case law.

³³ A/59/10, *supra* note 14, at 111, para. 4.

³⁴ The *Behrani/Saramati* case, *supra* note 1, at paras 31 ff; A/59/10, *supra* note 14, at 110–115.

For the sake of completeness, it might also be interesting to note what the Court does not cite from the commentary. Paragraph (3) of the commentary reads as follows:

The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 5 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. Article 6 of the draft articles on Responsibility of States for internationally wrongful acts takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that 'the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. However, the commentary to article 6 of the draft articles on Responsibility of States for internationally wrongful acts explains that, for conduct to be attributed to the receiving State, it must be 'under its exclusive direction and control, rather than on instructions from the sending State'. At any event, the wording of article 6 cannot be replicated here, because the reference to 'the exercise of elements of governmental authority' is unsuitable to international organizations.

Two elements appear from this. First, attribution must be based on factual control, and be assessed with regard to the specific conduct in question. This is a common requirement in the 'effective control' test. And, secondly, the commentary's reference to Article 6 ASR may indicate that the 'exclusive direction and control' criterion also applies, i.e., that the conduct is attributed to the organization only if the organization exercises this *exclusive* direction and control. This criterion of 'exclusive control' is not the same as the 'effective control' test, as the former concerns overall control over an operation rather than control over specific conduct. It appears from the text that a notion of exclusive control is also included in Draft Article 5 DARIO. This may be supported by paragraph (5) of the commentary, which points out that '[t]he United Nations assumes that in principle it has exclusive control over the deployment of national contingents in a peacekeeping force'.

The commentary states further (in paragraph (8)) that:

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

It seems therefore to be accepted under these principles that even if the UN claims *exclusive* command and control over the peacekeeping forces, specific conduct may still be attributable to the TCN if the state has *effective* control over that conduct. Here the commentary provides a relevant example from the UNOSOM II operation in Somalia from 1993 to 1995.³⁵ The Report of the Commission of Inquiry states that:

The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations ...

³⁵ A/59/10, *supra* note 14, at para. 7.

The commentary states that this conduct 'would be difficult to attribute to the United Nations'.

A summary is required. It is submitted that if one applies Article 8 ASR in order to assess the responsibility of the TCNs, the proper test is whether the state exercised 'effective control'. It is further submitted that if one applies Draft Article 5 DARIO in order to assess the responsibility of the UN, the proper test is still whether the UN exercised 'effective control' over the specific conduct in question, which must be assessed on the basis of factual criteria. It also appears that even if attribution is assessed in the light of Draft Article 5 DARIO, one must add the further element that attribution to the state may be established if the state retains certain powers over its forces.

This brings me to the issue of possible dual or multiple attribution. The question is whether any given conduct must be attributed to one entity only, or whether it may be attributed to two or more entities, e.g., the UN, NATO, and/or one or more TCNs simultaneously. This issue is addressed in the commentaries on ASR as well as on DARIO. In the commentary on Article 6 ASR, it is clearly stated – albeit briefly – that dual attribution may occur:³⁶

Situations can also arise where the organ of one State acts on the joint instructions of its own and another State ... In these cases, the conduct in question is attributable to both States under other articles of this Chapter.

The same point is explicitly made in the commentary on DARIO:³⁷

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

One can thus argue that even if given conduct is attributable to the UN, this does not in itself rule out attribution *also* to NATO or to one or more TCNs. This aspect is, however, missing in the Court's assessment.

Before we return to the case at hand, two further remarks need to be made: First, does DARIO and/or ASR provide the proper legal basis when the European Court of Human Rights assesses attribution? And, secondly, are there any specific circumstances that warrant another threshold for attribution of conduct under human rights law? I will address these issues only briefly.

The first issue concerns the possible status of ASR and DARIO as customary international law. A good case can be made that the ASR are in whole or at least in part an expression of international customary law. In the *Genocide* case, the ICJ explicitly refrains from addressing the customary law status of the ASR as such, as it was considered unnecessary in that case.³⁸ The ICJ nevertheless indicates that Articles 4 and 8 ASR reflect international customary law, and it has previously indicated in its

³⁶ Crawford, *supra* note 13, at 103.

³⁷ A/59/10, *supra* note 14, at 101.

³⁸ *Supra* note 28, at para. 414.

Advisory Opinion in the *Cumaraswamy* case that Article 6 ASR also reflects customary law.³⁹ But more relevant at present is that it is doubtful whether Draft Article 5 DARIO can be said to reflect international customary law. While certain elements of the responsibility of international organizations may have acquired this status, there seems not to be sufficient practice either by states or by international organizations with regard to Draft Article 5 DARIO to enable one to draw this conclusion. Most of the practice concerning attribution of conduct of state organs being placed at the disposal of international organizations concerns peacekeeping forces,⁴⁰ and it is at least difficult to claim the status of international customary law for a rule that is not supported by this practice. As has been shown above, the adoption of the ‘effective control’ test seems not wholly to reflect the complexities of the existing practice.

Turning to the second issue, it is unresolved whether the general rules on international responsibility apply to human rights treaties. Article 55 ASR provides a *lex specialis* rule, according to which the rules do not apply ‘where and to the extent that the conditions for the existence of an internationally wrongful act or the content of the implementation of the international responsibility of a State are governed by special rules of international law’. Regardless of whether one considers that human rights treaties in their entirety are excluded from the scope of application of the general rules on international responsibility,⁴¹ or that these general rules are applicable insofar as the secondary rules under the human rights treaties are non-existent or ineffective,⁴² it should be examined whether the human rights instruments provide independent rules and principles concerning attribution of conduct.

The various human rights instruments require – albeit implicitly – that an action be attributable to the state for responsibility to be established: see, for instance, Article 1 ECHR which places the duty to respect and secure human rights on the states (‘[t]he High Contracting Parties shall secure to everyone within their jurisdiction ...’). It has been argued that the supervisory organs under the human rights conventions increasingly find degrees of state involvement not rising to the level established under the ASR sufficient to render the state responsible.⁴³ The *Loizidou* case provides a useful

³⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion), 29 Apr. 1999 [1999] ICJ Rep 62, at para. 62.

⁴⁰ The Special Rapporteur’s *Second Report on Responsibility of International Organizations*, 2 Apr. 2004 (A/CN.4/541), at paras 34 ff. UN practice is described in Schmalenbach, *supra* note 15; see also, *inter alia*, Shraga, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’, 94 *AJIL* (2000) 406, at 406–412, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005), at ch. 12; M. Zwanenburg, *Accountability of Peace Support Operations* (2005).

⁴¹ A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 318.

⁴² Simma and Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17 *EJIL* (2006) 483, at 485; Simma, ‘Human Rights and State Responsibility’, in A. Reinisch and U. Kriebaum (eds), *The Law of International Relations* (2007), at 365.

⁴³ Cerone, ‘Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations’, 39 *Vanderbilt J Transnat’l L* (2006) 1, at 13 (also published, with minor amendments, as Cerone, ‘Human Rights on the Battlefield’, in S. Lagoutte *et al.* (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (2007), at 97–131).

illustration.⁴⁴ Here the Court found that Turkey exercised 'effective overall control' over Northern Cyprus, and that it was therefore unnecessary to determine whether 'Turkey actually exercises detailed control over the policies and actions of the authorities' in the territory,⁴⁵ i.e., that a state's jurisdiction over a territory in itself means that the actions of the authorities in that territory are attributable to the state referred to.⁴⁶ This 'merger' between the 'effective control' test and the 'overall control' test into an 'effective overall control' test provides a test for attribution that is different from the 'effective control' test in itself. As mentioned, the 'effective control' test refers to specific conduct, while the Court's test in *Loizidou* was rather based on overall control over a territory, which – as also mentioned – following the ICJ's judgment in the *Genocide* case does not seem to be a proper test for attribution of conduct under the general rules on international responsibility.

Other examples of a lower threshold concern the states' so-called positive (or affirmative) obligations, i.e., that states may be held responsible under human rights law for private persons' actions if the states have not taken sufficient measures to prevent the given action. This doctrine is well acknowledged in the Court's case law,⁴⁷ as well as in the practice of other international human rights tribunals. For instance, the Inter-American Court of Human Rights stated that the 'sole requirement is to demonstrate that the State authorities *supported or tolerated* infringement of the rights recognized in the Convention',⁴⁸ and, equally relevantly, that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the *lack of due diligence to prevent the violation or to respond to it* as required by the Convention.⁴⁹

I do not claim on this basis that a state can be held responsible under human rights instruments for having 'supported or tolerated' human rights violations by the UN, nor do I say that actions by the UN should be assessed like actions by private persons. A further analysis of these issues falls outside of the scope of this article, but it should be recalled that, while the question with regard to acts by private persons is whether the acts are attributable at all to the state, the question when it comes to acts during

⁴⁴ App. No. 15318/89 *Loizidou v. Turkey*, judgment (merits), 18 Dec. 1996.

⁴⁵ *Ibid.*, at para. 56.

⁴⁶ *Ibid.*, at para 57: '[i]t follows from the above considerations that the continuous denial of the applicant's access to her property in Northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 and is thus imputable to Turkey.'

⁴⁷ For a brief description see, e.g., C. Ovey and R.C.A. White, *The European Convention on Human Rights* (4th edn, 2006), at 28–32 and 51–52 with further references, or (in Norwegian) A. Mirmotahari, *EMK og mellomprivate konflikter* (2007), in particular at 38–45. For a general presentation not restricted to the ECHR see Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', 5 *Melbourne J Int'l L* (2004) 1.

⁴⁸ *Paniagua-Morales et Al. v. Guatemala*, judgment of 8 Mar. 1998, at para. 91 (emphasis added). See also the Inter-American Commission on Human Rights' report of 6 Apr. 2001 in Case 62/01 *Riofrio massacre*, at para. 48.

⁴⁹ *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, at para. 172 (emphasis added).

peace operations is whether the acts are attributable to the state or to the UN. But although this is a relevant distinction, it does not without further clarification from the Court explain satisfactorily why the principle of holding a state responsible for the failure to prevent a human rights violation should not apply at all, insofar as the state is in fact in a position to ‘prevent the violation or to respond to it’. This is relevant where the UN does not exercise operational command and control, with KFOR as a clear example. When a human rights infringement occurs through KFOR actions, the Member States of NATO are undoubtedly in a position to prevent the violation or to respond to it, either through national orders – where the state has retained this authority – or through their involvement in NATO itself.

To conclude, this author submits that the correct approach in *Behrami/Saramati* would have been (i) to apply the ‘effective control’ test, regardless of whether one regards the proper question to be whether the troops were placed at the disposal of the UN or whether they were acting under the direction or control of the UN or the TCNs, (ii) if it is concluded that the conduct is attributable to the UN, then to consider whether the situation calls for dual or multiple attribution, and (iii) that in assessing dual or multiple attribution, to apply the seemingly lower threshold for attribution of conduct under human rights law.

B An Analysis of the Court’s Approach

This was, however, not the Court’s approach. The Court initially concluded that the issuing of detention orders fell within the mandate of KFOR and that the supervision of de-mining fell within the mandate of UNMIK,⁵⁰ and that the mandates were properly based on a resolution under Chapter VII of the UN Charter.⁵¹ Considering that UNMIK ‘was a subsidiary organ of the UN created under Chapter VII’, the Court concluded that the actions of UNMIK were attributable to the UN.⁵² This is not controversial, as the UN itself assumes responsibility for conduct during operations with the status of subsidiary organs.⁵³ The Court’s reasoning about KFOR is, however, more controversial.

The key question put forward by the Court was whether the Security Council ‘retained ultimate authority and control so that operational command only was delegated’.⁵⁴ The Court’s interpretation of SC Resolution 1244 (1999) was that the Security Council retains ultimate authority and control over KFOR, and that operational command was delegated to NATO.⁵⁵ While it was acknowledged that the TCNs

⁵⁰ *Supra* note 1, at para. 127.

⁵¹ *Ibid.*, at para. 130.

⁵² *Ibid.*, at para. 143.

⁵³ Note, however, that the UN in its observations to the Court concluded that the actions in the cases could not be attributed to UNMIK: see *ibid.*, at para. 120. This is a different issue, as it concerns the relationship between KFOR and UNMIK, not between the states and the UN. The Court concluded (at para. 127) that the supervision of de-mining fell within UNMIK’s mandate, and seemingly therefore that the actions in the *Behrami* case were attributable to UNMIK. This is not the central issue in this article.

⁵⁴ *Supra* note 1, at para. 133.

⁵⁵ *Ibid.*, at para. 135.

retained some authority over their troops, the Court found the essential question to be whether NATO's operational command was 'effective'.⁵⁶ Answering this question in the affirmative, the Court concluded that 'KFOR was exercising lawfully delegated powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN'.⁵⁷

At least three questions arise out of this. One, what is the relationship between the 'ultimate authority and control' test that is applied by the Court, and the 'effective control' (alternatively 'exclusive control') test? Two, taking into consideration the similarities between the 'occupation' in the *Loizidou* case and the 'administration' in Kosovo, why does the Court not discuss the 'effective overall control' test? And, three, why does the Court not address the possibility of dual attribution? These questions will be addressed in this order below.

The Court does not explicitly provide the legal basis for its 'ultimate authority and control' test. This expression does not occur in any case law from the Court itself;⁵⁸ it is not used in the commentaries on ASR or DARIO, nor is it used by the ICJ in its case law. The Court adopted instead an approach that has been advocated in legal literature concerning the legality of delegations from the Security Council.⁵⁹ The argument is that in order for a delegation to be lawful, the Council must at all times retain overall authority and control over the exercise of the delegated powers,⁶⁰ and that international responsibility for the exercise of powers cannot be transferred as this rests with the entity to which powers were initially given.⁶¹ Sarooshi submits that 'the question of who exercises *operational* command and control over the force is immaterial to the question of responsibility. The more important enquiry is who exercises *overall* authority and control over the forces.'⁶² He continues by stating that 'acts of forces authorized by the Council are attributable to the UN, since the forces are acting under UN authority', and that the only two exceptions to this principle are cases where the Council is 'prevented from exercising overall authority and control over the force', or when the forces act *ultra vires*.⁶³

The Court thus has theoretical support for its approach, but it is surprising that the Court does not attach any comments either on the large amount of literature which links attribution of conduct with operational control, or on the 'effective control' test in Draft Article 5 DARIO, or on the official UN statements concerning UN practice.

⁵⁶ *Ibid.*, at para. 138.

⁵⁷ *Ibid.*, at paras 140–141.

⁵⁸ However, in App. No. 24833/94 *Matthews v. United Kingdom*, judgment of 18 Feb. 1999, the UK Parliament's 'ultimate authority' to legislate for Gibraltar may have been a relevant factor when the Court concluded that the UK was responsible for securing the rights guaranteed by Art. 3 of Prot. 1 to the ECHR in Gibraltar (see at para. 8).

⁵⁹ See the references in *ibid.*, para. 130.

⁶⁰ D. Sarooshi, *The United Nations and the Development of Collective Security* (1999), at 34. See also E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 265–268.

⁶¹ Sarooshi, *supra* note 60, at 23, n. 89.

⁶² *Ibid.*, at 163 (original emphasis).

⁶³ *Ibid.*, at 165. See also at 250, n. 8, where the author states that the responsibility for acts delegated to regional arrangements (e.g., NATO) must be assessed in the same manner as acts delegated to states.

It is evident that the ‘ultimate authority and control’ test bears no resemblance to the ‘effective control’ test. It is not linked with any direct control over a specific action, and it is not linked with operational command and control. This follows from the Court’s description of the test: whether the UN Security Council had retained ultimate authority and control ‘so that operational command only was delegated’. It is further evident that the test does not require *exclusive* control, which the Security Council clearly did not have over KFOR, and it appears that the test is also different from an ‘overall control’ test. The Court does not explain why it addresses ‘ultimate’ control rather than ‘overall’ control, which is a more common test in international case law as well as in the legal literature to which the Court referred.

As mentioned above, the Court developed an ‘effective overall control’ test in the *Loizidou* case in order to conclude that actions carried out in the occupied territory in Northern Cyprus were attributable to Turkey. An implicit premise here is that the occupying power controls the authorities in the occupied territory. Although the term ‘occupation’ is consistently avoided by the UN when describing the situation in Kosovo, the UN administration bears many similarities to an occupation, in that an outside power carries out all functions of government in the territory. Shraga has stated that ‘in the administration of Kosovo ... principles analogous to those of the laws of occupation applied to questions of respect for the local law and international human rights standards’.⁶⁴ But the Court does not discuss whether an analogy could be drawn with regard to attribution of conduct. The differences between an occupation and the UN transitional administration do not in themselves explain why the very test of attribution, i.e., ‘effective overall control’, could not be used similarly. It appears that the Court considered this test to be inappropriate in the case, and accordingly it must be assumed that ‘ultimate authority and control’ must have different content from the test in the *Loizidou* case.⁶⁵ If the Court had argued that the UN maintained effective overall control over Kosovo, then there would at least have been consistency in the case law. Now it appears that effective overall control is the correct test if a Contracting State occupies a foreign territory, but not if more Contracting States have been authorized by the UN to administrate a foreign territory.

Let me then turn to the five factors put forward by the Court in support of its conclusion that the UN retains ultimate authority and control:⁶⁶ one, that the UN Charter Chapter VII allows the Security Council to delegate certain powers to other entities; two, that the relevant power was a delegable power; three, that the delegation was

⁶⁴ Shraga, ‘Military Occupation and UN Transitional Administrations – the Analogy and its Limitation’, in M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (2007), 479, at 487.

⁶⁵ This point is further confused by the Court’s decision of 16 Oct. 2007 in App. No. 36257/04 and several others, *Berić and others v. Bosnia-Herzegovina*, which concerned acts by the High Representative in Bosnia-Herzegovina. The question here was ‘whether the UNSC, in delegating its powers ... retained *effective overall control*’ (emphasis added). In presenting this test the Court referred to *Behrami/Saramati*, *supra* note 1 (i.e. the ‘ultimate authority and control’ test) and Draft Art. 5 DARIO (i.e., the ‘effective control’ test), but not to the *Loizidou* case, *supra* note 44.

⁶⁶ *Behrami*, *supra* note 1, at para. 134.

explicit in the resolution; four, that the resolution established sufficiently defined limits on the delegation; and, five, that the leadership of KFOR was required to report to the Security Council.⁶⁷ These criteria by no means amount to 'effective control' or 'exclusive control', and as a test of attribution they seem to be very wide. The only explicit control mechanism is that KFOR should report to the Security Council. The generalization is that if the delegation from the Security Council is lawful and sufficiently defined, then all actions carried out in accordance with the delegation are attributable to the UN as long as the delegate has an obligation to report to the Security Council.

It seems to be of significance for the Court that the Security Council has the power to revoke the delegation.⁶⁸ As the Court points out, SC Resolution 1244 is drafted differently in this regard from other resolutions concerning the establishment of peacekeeping forces. While many operations are given fixed time limits that must be actively renewed, SC Resolution 1244 determines that the operation shall continue until it is actively revoked. With the permanent members' veto power in mind, it is evident that the Security Council's control is actually *less* over KFOR than over other peacekeeping forces.

The Court also states that direct operational command from the Security Council is not a requirement of Chapter VII resolutions. As the Court has concluded that operational command is not decisive for the attribution of conduct, this becomes nothing more than an element in the discussion of whether the delegation was lawful and whether power was exercised in accordance with the delegation. The Court continues to discuss the relationship between NATO and the TCNs, and it is argued that the TCN involvement – including authority concerning safety, discipline, and accountability – was not incompatible with the effectiveness of NATO's operational command. At this stage the Court includes the 'effective control' test, in concluding that NATO holds effective control over KFOR *vis-à-vis* the TCNs. This argument is relevant because power was delegated to NATO, and not to the TCNs. Accordingly, if the TCNs had interfered with NATO's operational control, they could have been held responsible for the actions on the basis of having acted outside of the scope of the delegation. But again this raises new questions. If the Court considers that TCN involvement amounting to effective operational control would result in attribution to those TCNs, why does the Court not discuss this from the perspective of dual attribution? And why does the Court not say, as it did in, *inter alia*, the *Waite and Kennedy*,⁶⁹

⁶⁷ The Court also points to the obligatory final clause where the Security Council decides to remain 'actively seized of the matter'. This clause, albeit sometimes without the word 'actively', is included in all or practically all Security Council resolutions, and it can in my opinion not be said to carry any legal consequences.

⁶⁸ *Supra* note 66.

⁶⁹ App. No. 26083/94 *Waite and Kennedy v. Germany*, judgment of 18 Feb. 1999, at para. 67: 'where States establish international organizations ... and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.'

Matthews,⁷⁰ and *Bosphorus* cases,⁷¹ that the Contracting States cannot be absolved from their obligations under the ECHR by establishing an international organization which carries out functions that would otherwise be carried out by the state.⁷²

The Court is vested with the authority to ‘ensure the observance of the engagements undertaken by the High Contracting Parties’: see Article 19 ECHR. As such, the relevant subject-matter for the Court’s assessment is the conduct of Contracting States. It therefore appears insufficient when the Court ends its discussion by concluding that conduct is attributable to the UN. This is not what the Court is asked to decide. The Court is asked to decide whether one or more Contracting States can be held responsible, which makes it necessary to discuss whether the action can be attributable to at least one such state. The Court’s abrupt conclusion would have been appropriate if single attribution were the only possible solution, as the establishment of attribution to the UN would then rule out attribution to NATO and/or TCNs. But it can be argued that multiple attribution is not ruled out, as the citations from the commentaries on ASR and DARIO show, in which case the Court would need to include this aspect in the discussion. Even if it is considered that the concept of multiple attribution is unclear and disputed, or that the UN holds such a position in international law that multiple attribution is ruled out if a specific action is attributable to the organization, the Court would still have to discuss the concept with a view to determining its applicability. It is surprising that the Court, which in other situations has been known to stretch its competence, the interpretation of the ECHR, and the application of general principles under international law very far in order to ensure the effective protection of human rights, in this case seems to interpret these same elements as narrowly as possible in order to avoid a conclusion of admissibility.

Before we turn to the next section, it may be in order to make a disclaimer. This article does not address the command and control structures of KFOR, and it is not intended to draw any conclusions about the correct assessment of attribution. Assuming that the ‘ultimate authority and control’ test is appropriate, the Court’s conclusion appears to be correct. There is indeed an element of ultimate control involved, as the Security Council has the competence to revoke the mandate or to amend it. It may well also be the case that multiple attribution is restricted to very narrow situations, if

⁷⁰ *Matthews v. UK*, *supra* note 58, at para. 32: ‘[t]he Convention does not exclude the transfers of competences to international organizations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.’

⁷¹ App. No. 45036/98 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Grand Chamber judgment of 30 June 2005, at para. 154: ‘[i]n ... establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty, the Court has recognized that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards ... The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.’

⁷² See Cerone, ‘Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo’, 12 *EJIL* (2001) 469, at 485–487, who argues that the same principle applies to KFOR.

it exists at all, and that it is not applicable in this case. It is further arguable that even NATO holds such a position in international law that the principle from the *Matthews* case and other cases is not applicable to it. But the Court has not discussed these issues sufficiently, and this is in itself unfortunate.

Still, some remarks about the structure of KFOR are warranted. KFOR cannot automatically be regarded in the same way as other peacekeeping operations, as its organizational structure is very different. Most of the practice and scholarly contributions on attribution of conduct during peace operations concern operations which are subsidiary organs of the UN, and where the UN holds exclusive operational control through a UN Commander. In these operations a Special Representative of the Secretary-General is appointed to act as a co-ordinator and to have overall authority during the operation. This is explicitly stated in many UN Security Council resolutions: see as mere examples (among many) SC Resolution 1542 (2004) on the establishment of MINUSTAH, operative clause 3,⁷³ or SC Resolution 1545 (2004) on the establishment of ONUB, operative clause 3.⁷⁴ In SC Resolution 1244 (1999), it was explicitly stated that KFOR would *not* be controlled by the Special Representative (operative clause 6) and, although the security presence – i.e., KFOR – would operate 'under United Nations auspices' (clause 5), the UN Security Council chose to 'authorize' Member States and relevant international organizations to deploy forces (clause 7) rather than to 'establish' a UN operation. Annex 2, paragraph 4, further stated that the security presence had to be deployed 'under unified command and control', but this command and control is not placed with a UN Commander. The Court has to a very small extent – if at all – considered the structure of KFOR as compared to the structure of other peace operations, and it has not discussed whether KFOR constitutes a *sui generis* body which necessitates a different approach on the issue of attribution.

C Applying the Behrami/Saramati Test in Iraq: The Al-Jedda Case

British domestic courts have recently addressed two cases concerning responsibility for human rights violations during the multinational operations in Iraq. Most significant in relation to attribution of conduct is the *Al-Jedda* case.⁷⁵ Al-Jedda had been held in custody by British troops in Iraq since 2004 on suspicion of involvement in terrorist activities, and complained that his rights under Article 5(1) ECHR were violated. On the issue of attribution of conduct it was ruled – by a majority of four to one – that the detention was attributable to the UK and not to the UN.⁷⁶ However, the Law Lords' approaches to the issue vary significantly. Lord Bingham, with the concurrence of Baroness Hale⁷⁷ and Lord Carswell,⁷⁸ in reality discussed 'effective control'. After

⁷³ 'Requests the Secretary-General to appoint a Special Representative in Haiti who will have overall authority on the ground ...'

⁷⁴ 'Decides that ONUB will be headed by the Special Representative of the Secretary-General, ...'

⁷⁵ *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* [2007] UKHL 58.

⁷⁶ Lord Brown, who was part of the majority, gave a postscript where he stated that he had come to doubt his conclusion, but that he left the final conclusion open since this would not influence the final result.

⁷⁷ *Supra* note 75, at para. 124.

⁷⁸ *Ibid.*, at para. 131.

describing the ‘ultimate authority and control’ test from *Behrami/Saramati*, he presented the legal issues as follows:⁷⁹

Were UK forces placed at the disposal of the UN? Did the UN *exercise effective control* over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have *effective command and control* over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq?

The further discussion confirms that the test was indeed applied. After stating that ‘it cannot realistically be said that US and UK forces were under the effective command and control of the UN’,⁸⁰ Lord Bingham stated that:⁸¹

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

As argued above, this ‘effective control’ test is in my opinion the correct test, but the approach is difficult to reconcile with *Behrami/Saramati*. There are indeed factual differences between the establishment of the forces in Kosovo and Iraq, and it may be argued that the ‘effective control’ test remains relevant when assessing acts in Iraq. However, the judgment does not explicitly explain why this test is appropriate, but it rather implies that the factual circumstances warrant a different conclusion while applying the same test. It is not at all evident why it should be decisive whether the force was or was not established at the ‘behest of the UN’. The European Court of Human Rights did not consider KFOR to be a subsidiary organ of the UN, and it can therefore not be decisive that the multinational force in Iraq was also not a subsidiary organ. If one argues that there indeed ‘was no delegation of UN power in Iraq’, even after SC Resolutions 1511 (2003) and 1546 (2004), then one may pose a question about what authority the multinational force actually has. Further, it is indeed ‘one thing to receive reports, another to exercise effective command and control’, but the fact remains that the European Court of Human Rights attached weight to the former and not to the latter. And, finally, it may well be argued that it is not significant whether the UN reserved the power to revoke its authority, but, again, the fact remains that the European Court of Human Rights considered this fact to be relevant. In sum, I consider that in applying the ‘effective control’ test in the manner in which it did, the House of Lords in effect presented a convincing critique of *Behrami/Saramati*,

⁷⁹ *Ibid.*, at paras 21–22 (emphasis added).

⁸⁰ *Ibid.*, at para. 23.

⁸¹ *Ibid.*, at para. 24.

but it is improbable that the European Court of Human Rights would follow the argument.⁸²

3 A Hard Case Making Bad Law?

A few years ago, the *Banković* case created heated discussions, with two clear sides.⁸³ One side argued that the decision was right and proper. The Court should not review NATO military actions, it could not review actions occurring outside the Convention area (the *espace juridique*), and the Contracting States in any case did not have jurisdiction over the territory in question. The other side argued that the decision was a serious set-back to human rights protection. The decision was political, and the Court did not dare to stand up to NATO. Jurisdiction should rather be assessed under the heading of 'facticity creates normativity'; when NATO decided to bomb Belgrade, this fact had normative consequences. Without entering into this discussion, it appears clear that the decision, especially when seen in connection with both older and more recent case law, has created serious challenges when it comes to establishing the Contracting States' responsibility for alleged human rights violations committed outside their own territories, i.e., extraterritorially. Attempts to reconcile the case law have resulted in complex theoretical constructions concerning control over a territory versus control over an individual, the significance of acting inside or outside the *espace juridique*, etc. It is feared that the decision in *Behrami/Saramati* adds further complications. Now it is established that it is insufficient to hold effective control over a territory because conduct inside that territory must additionally be attributable to a Contracting State, and this will rarely be the case in UN-authorized operations.

It has been debated whether the Court would accept the extraterritorial effect of the ECHR in Kosovo, and there was no visible consensus on the matter. To illustrate this, it is noteworthy that the Venice Commission came to a different conclusion from the Court:⁸⁴

As to applications for alleged human rights breaches resulting from actions or failures to act by KFOR troops, the matter is very complex. KFOR, unlike UNMIK, is not a UN peacekeeping mission. Therefore, although KFOR derives its mandate from UN SC Resolution 1244, it is not

⁸² See the opinion of Lord Rodger, who represents the minority. Focusing on 'ultimate authority and control', he argues that the European Court of Human Rights would reach the same conclusion in the *Al-Jedda* case, *supra* note 75, as it did in *Behrami/Saramati*, *supra* note 1. Lord Brown's opinion also illustrates the challenge. He disagrees with the view that there was no delegation of UN powers in Iraq, and analyses the factors that the Court used in assessing 'ultimate authority and control'. In reaching a conclusion that the conduct was attributable to the UK, he focused on the fact that KFOR was expressly formed under UN auspices, while the UN efforts in Iraq amounted only to a recognition of forces already deployed. As the postscript shows, this argument is not particularly convincing.

⁸³ Suffice it here to point to the different contributions in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), *inter alia*, those of Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', at 83, and O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic"', at 125.

⁸⁴ *Supra* note 5, at para. 79 (footnote omitted, emphasis added).

a subsidiary organ of the United Nations. *Its acts are not attributed in international law to the United Nations* as an international legal person. This includes possible human rights violations by KFOR troops. It is more difficult to determine whether acts of KFOR troops should be attributed to the international legal person NATO ... or whether they must be attributed to their country of origin ...

Granted the issue is a complex one, and the Court would be subject to criticism regardless of the outcome. As a result of the decision, criticism is likely to be made that the Court is undermining human rights protection in Europe, that it consciously accepts and endorses the fact that a population within the Council of Europe area is outside the protection of the ECHR, and that it once more backs away from confronting NATO when it has every incentive to do so. Had it reached another conclusion and found Norway and France to be responsible, it would likely be accused of jeopardizing the effectiveness of international peace operations and interfering with the competence of the UN. As can be gathered from Section 2 above, it is this author's opinion that the Court is also due some criticism for having provided insufficient reasons for its decision, and thereby created unnecessary confusion about the legal framework.

One possible interpretation of the judgment, however, may be that the discussion on attribution was little more than a suitable pretext for reaching a decision that the Court considered it necessary to reach. Under this interpretation, the real *ratio decidendi* of the decision is found in paragraphs 144 ff, where the Court addresses whether it is competent *ratione personae* to review the actions. The UN is not a party to the ECHR and not subject to the Court's jurisdiction. But the Court poses the question whether it is competent to review 'the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter'. The Court argues that the UN Security Council is the primary actor for the protection of international peace and security, and that the Court cannot interfere with the Security Council's decision:⁸⁵

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

Let me briefly address two concerns arising from this. First, one could ask whether the effectiveness of peace operations is at all relevant for the Court's assessment of

⁸⁵ Behrami/Saramati, *supra* note 1, at para. 149.

human rights infringements. Under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, one should take into account 'any relevant rules of international law applicable in the relation between the parties' when interpreting a treaty,⁸⁶ and it thus appears reasonable that the effectiveness of decisions made under the UN Charter is a relevant factor when interpreting the ECHR. The effectiveness argument would be that if TCNs are held accountable under human rights law, the Contracting States would be even more reluctant to contribute troops than they presently are. This could jeopardize future operations and create even greater negative impact on the protection of human rights as well as the protection of peace and security. Further, the execution of a mandate would in itself be threatened, as human rights law can prohibit actions that appear necessary from a security perspective – extrajudicial detention (see the *Saramati* case) being an example. But it is questionable to what extent the argument is valid. Only in very few operations do peacekeeping troops have jurisdiction over a territory, and these operations could – with some effort from the actors involved – be organized so that operational control rests with the UN. When troops are not placed under the exclusive operational control of the UN, it is because national authorities insist on retaining a certain degree of control. A reasonable argument would be that if a TCN so insists, then human rights responsibility follows. Under this line of reasoning the effectiveness of a peacekeeping operation is threatened not by possible accountability for human rights violations, but by the TCNs' reluctance to place their troops under the operational command of the UN. Regarded from this perspective, the effectiveness argument appears less relevant.

Secondly, the Court makes no qualifications in its statement, and it appears that there are no exceptions to its lack of competence to review actions that are covered by a UN Security Council resolution. But what if, hypothetically, the Court is presented with a case where the facts resemble the case of Mr Baha Mousa in the British *Al-Skeini* case?⁸⁷ Mr Mousa was detained by British forces in southern Iraq and taken to a military base. He was brutally beaten, and he died during the night as a result of his injuries. In such a case would the Court still say that it could not review the actions? Or would it, if such a case later came up, try to distinguish the cases by arguing that these acts were not 'covered' by the UN Security Council resolution? The answers to these questions are not clear. It falls outside the scope of this article to elaborate on the issue, other than to submit that in this author's view the House of Lords approached the issue in a more appropriate manner in the *Al-Jedda* case. In Baroness Hale's words, the rights under the ECHR are 'qualified but not displaced', and 'qualified only to the extent required or authorised by the resolution'.⁸⁸ *Behrami/Saramati*, on the other hand, does not indicate that the rights under the ECHR may be 'qualified'; it appears rather that the Court considers the rights to be 'displaced'.

⁸⁶ See also *Behrami/Saramati*, *supra* note 1, at paras 122 and 147.

⁸⁷ *Al-Skeini and others v. Secretary of State for Defence* [2007] UKHL 26. Attribution of conduct was not raised as an issue in this case.

⁸⁸ *Supra*, note 75, at para. 126.

While it may easily be agreed that the Court was faced with a hard case, there will be differing opinions about whether the decision makes good law or bad law – although it may safely be assumed that many human rights advocates will take the latter view, while many government officials and military personnel will take the former. For the purpose of this article, I find it sufficient to conclude that the case makes *challenging* law: challenging for scholars in their efforts to construct a coherent framework for extra-territorial effect or for attribution of conduct; challenging for human rights advocates in their efforts to establish accountability for international organizations; and – most importantly – challenging for the civilian population in territories under UN administration, which is excluded from the ECHR's scope of application.

4 The End of Extraterritorial Effect?

To conclude, let me briefly address one possible consequence of the decision. Does this in effect mean the end of extraterritorial effect? The simple answer may appear obvious: Of course not. The criteria for extraterritorial effect that have been developed by case law remain unchanged by the decision.⁸⁹ When a state exercises jurisdiction over another territory or a person inside that territory, the state's human rights obligations may apply. If one takes a formal view, *Behrami/Saramati* is not at all concerned with the extraterritorial effect of the ECHR. As the Court puts it:⁹⁰

The Court therefore considers that the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo.

However, it is my view that the question should be given a more complex answer. The decision does not mark the end of extraterritoriality, but it does indicate that the significance of the extraterritorial effect of the ECHR is reduced for many Contracting States.

While the conditions for extraterritorial effect have been addressed extensively in academic work in recent years, the practical application of this effect appears to have received less attention: When does a state in fact find itself in a position in which it does

⁸⁹ See, e.g., Coomans and Kamminga (eds), *supra* note 83; Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005) 119, at 132; Pedersen, 'Territorial Jurisdiction in Article 1 of the European Convention on Human Rights', 73 *Nordic J Int'l L* (2004) 279; Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *EJIL* (2003) 529; Lett, 'The Age of Interventionism: The Extraterritorial Reach of the European Convention on Human Rights', in R. Arnold and G.-J. A. Kooops (eds), *Practice and Policies of Modern Peace Support Operations under International Law* (2006), at 117–140. Explicit reference to peace operations is made by Tondini, 'UN Peace Operations: The Last Frontier of the Extraterritorial Application of Human Rights', 44 *The Military Law and the Law of War Review* (2005) 175, and Grenier, 'Extraterritorial Applicability of Human Rights Treaty Obligations to United Nations-mandated Forces', in A. Faite and J.L. Grenier (eds), *Report: Expert Meeting on Multi-national Peace Operations* (2003), at 79–85.

⁹⁰ *Behrami*, *supra* note 1, at para. 71.

or may exercise jurisdiction outside its own territory? If one disregards uncontroversial issues like, e.g., the State's jurisdiction over its embassies or consulates, practice has shown that the issue of extraterritorial effect occurs in quite a limited number of situations: occupation of foreign territory, military operations, the capturing or treatment of prisoners abroad, or, finally, participation in international peace operations. For many states, participation in international peace operations stands out as the situation in which the state is most likely to be in a position to exercise jurisdiction extraterritorially – after all, few states occupy foreign territory, conduct military operations abroad without the host state's consent, or intervene to capture individuals abroad. One possible consequence of *Behrami/Saramati* is that the Court has now removed participation in international peace operations from the list of practical scenarios for extraterritorial effect. When concluding that actions by KFOR are attributable to the UN based on an 'ultimate authority and control' test, it is difficult to see how conduct during any peace operations with a UN authorization can be attributable to the individual state. The apparent result – especially when *Behrami/Saramati* is seen in relation to the previous *Banković* case – is therefore that the ECHR is in effect rendered irrelevant during international peace operations.