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Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after *Behrami*

Cedric Ryngaert[*]

There is a tendency among the judiciary to apply the standard of 'effective control' as the applicable yardstick for apportioning responsibility for wrongful acts between the United Nations and the member states contributing troops to UN peace-support operations. This is evidenced by recent decisions in the cases of Srebrenica *(Dutch Court of Appeal, 2011),* Al Jedda *(European Court of Human Rights, 2011) and* Mukeshimana *(Belgian First Instance Court, 2010), which appear to repudiate the 'ultimate authority and control' standard espoused by the European Court of Human Rights in* Behrami *(2007). This process may have been set in motion by (the current) Article 7 of the ILC's Draft Articles on the Responsibility of International Organizations, which may in due course reflect customary international law. From a policy perspective, the application of an 'effective control' standard is highly desirable, as it locates responsibility with the actor who is in a position to prevent the violation.*

Keywords: International organisations, United Nations, peace operations, responsibility

1. Introduction

One of the most challenging questions in the law of international organisations (IOs) concerns the apportioning of responsibility for internationally wrongful acts among IOs and member states of these organisations, which contribute troops to peace-support operations established or authorised by IOs.

For their operational activities, IOs, such as the United Nations or NATO, depend on member states placing organs (troop or police contingents) at the former's disposal. When wrongful acts are committed in the course of those activities, the question may arise as to whom those acts are to be attributed: to the organisation, to the contributing state, or to both of them jointly? The Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (DARIO), drafted by the International Law Commission (ILC), contemplate this scenario in the current Article 7 (2011 version).[1] Pursuant to this provision, attribution is a function of the level of effective control exercised by either the IO or the state.

[*] Associate Professor of International Law, Utrecht University; Leuven University. The author is grateful to Noemi Gal-Or for comments on an earlier version of this contribution, and to the anonymous reviewers for insightful comments. Email: Cedric.Ryngaert@law.kuleuven.be; C.M.J.Ryngaert@uu.nl.

[1] ILC, Report of the International Law Commission, UN Doc A/66/10, 30 May 2011 ('DARIO 2011'), Ch V 'Reasonability of International Organizations'. An earlier version was adopted in the Report of International Law Commission Sixty-First Session, UN Doc A/64/10, 4 May–5 June and 6 July–7 August 2009, Ch IV 'Responsibility of International Organizations' ('DARIO 2009'), with commentaries.

It is the aim of this article to rationalise and defend the effective control standard as a means of apportioning responsibility in UN military operations. It is our view that only such a standard truly serves a preventative purpose (Section 1), and that, nonetheless, the UN's reservations as to the role of 'effective control' in respect of UN operations, as opposed to UN-*authorised* operations, are not entirely convincing (Section 2).

A second aim of this article is to review recent domestic and regional court decisions concerning the attribution of conduct in the context of UN peace-support operations (Section 3). The analysis starts with the well-known *Behrami* case decided by the European Court of Human Rights (ECtHR) in 2007, but continues with very recent cases from the UK and the ECtHR (*Al Jedda*, 2007–2011), the Netherlands (*Srebrenica*, 2008–2011), and Belgium (*Mukeshimana*, 2010). Whereas the court in *Behrami* failed to properly apply the effective control standard as laid down in Article 7 DARIO, the courts in the latter cases did seem to rely on 'effective control' to reach their conclusion (which, in all cases, was that the relevant acts were attributable not, or not only, to the organisation, but also to the *state*). At the inception of Article 7 by the ILC, there may have been scant evidence of this standard constituting customary international law, but Article 7 appears already to have had an effect on the practice of the courts. Section 4 concludes.

2. International Responsibility for Wrongful Acts Committed in UN Peace Operations: Article 6 *v* Article 7 Dario

In this article, we concentrate on issues of international responsibility arising in the course of peace-support operations (encompassing peacekeeping and peace-enforcement operations) conducted under the auspices of the UN. Internationally wrongful acts are most likely to arise in an operational context where UN-mandated actors (such as troops, police, and administrators) are in direct contact with populations. Such acts may specifically breach norms of international human rights law and international humanitarian law – norms of public international law which have the interests of the individual as the focal point of protection. Since peace operations are typically conducted in difficult circumstances – notably in conflict zones where there is a general breakdown of law and order – the commission of such breaches, even by UN personnel, is not imaginary. Examples include UN peacekeepers abusing local girls during peace operations,[2] or troops answerable to the UN arbitrarily arresting and detaining presumed criminals,[3] or even allegedly wrongfully targeting civilians during a military operation.[4] This may raise the question whether international human rights law or international humanitarian law applies at all to the UN, an international organisation which has not signed up to the relevant conventions. Our research question in this article is not, however, whether the UN is *bound* by substantive norms of human

[2] Machiko Kanetake, 'Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers' (2010) 17 International Peacekeeping 200; Kate Grady, 'Sexual Exploitation and Abuse by UN Peacekeepers: a Threat to Impartiality' (2010) 17 International Peacekeeping 215.
[3] *Saramati v France, Germany and Norway* (2007) 45 EHRR 85.
[4] See, for example, in respect of the UN-authorised NATO operation in Libya: 'NATO Acknowledges Civilian Casualties in Tripoli Strike', 19 June 2011, available at http://www.nato.int/cps/en/natolive/news_75639.htm.

rights and humanitarian law, but whether violations of such norms committed by UN troops are necessarily *attributable* to the UN.

UN peace forces are normally considered to be subsidiary organs of the UN in the sense of Articles 7, 22, and 29 of the UN Charter, which authorise the UN in general, and the UN General Assembly and the UN Security Council in particular, to establish subsidiary organs as may be found necessary. In addition, *semi*-independently operating quasi-protectorate UN territorial administrations, such as the UN Mission in Kosovo (UNMIK), are organs of the UN.[5]

In principle, all wrongful acts committed by UN personnel, acting as agents or organs of the UN, are attributable to the United Nations. Article 6 DARIO, which was largely inspired by relevant UN practice (see below for the UN's positions in this respect), and dicta of the International Court of Justice (ICJ) provide[6] that

> [t]he conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered as an act of that organisation under international law whatever position the organ or agent holds in respect of the organisation.

It is our view, however, that this solution – which comes down to the wholesale attribution of acts of UN peace operations to the UN – may oversimplify the nature of UN peace operations. For every military operation conducted under UN auspices, UN member states place troops at the UN's disposal, which subsequently integrates them into its own subsidiary organs.[7] As a national force commander continues to exercise some measure of command over the national troops placed at the disposal of the UN, such troops are hybrids: they are both UN troops and national troops. This clearly complicates the responsibility question.

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[5] An interesting question is whether subsidiary organs such as UNMIK enjoy a legal personality that is separate from its founding bodies. If they do, wrongful acts may have to be attributed to the subsidiary organ instead of its founding body. The ECtHR in *Behrami* – a case which is discussed below – left this question in relation to UNMIK conspicuously open. For the Court, for responsibility purposes, it was not relevant whether or not UNMIK enjoyed legal personality. What was decisive was that 'UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC': *Behrami v France* (2007) 45 EHRR 85 para 142 ('Whether [UNMIK] was a subsidiary organ of the SG [Secretary-General] or of the UNSC, whether it had a legal personality separate to the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also respected the role of the UNSC for which Article 24 of the Charter provided, UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC').

[6] cf Commentaries (2) and (3) to art 6, DARIO 2011 (n 1), citing *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 177 ('The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts'), and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion [1999] ICJ Rep, 62 [66] ('[…] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity … [t]he United Nations may be required to bear responsibility for the damage arising from such acts').

[7] As far as military operations authorised by the UN Security Council under Chapter VII of the UN Charter are concerned, it is pointed out that there is no standing UN army, as member states have never concluded the necessary agreements under art 43 of the UN Charter: Charter of the United Nations and the Statute of the International Court of Justice (entered into force 24 October 1945) 1 UNTS XVI.

The ILC contemplated this scenario in Article 7 DARIO, which sets out the following rule relating to responsibility:

> 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.

In the first commentary to Article 7 DARIO, the ILC clarifies that the article may have particular relevance for 'the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation', where 'the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent'. It indicates that Article 6 DARIO (relating to the attribution of acts of agents and organs of the IO to the IO itself) is not applicable to such cases of secondment, but only to cases of *full* secondment where the organ of the seconding state becomes an organ of the IO. In case of full secondment, only the responsibility of the organisation can be engaged.

Pursuant to Article 7 DARIO, the burden of responsibility lies on whoever is exercising effective control over the military contingents: the IO (the UN in our case), the contributing state, or both of them jointly (shared responsibility). It flows from the standard set out in Article 7 that contributing states can, in specific circumstances, be held liable for acts carried out within the framework of IOs. To the extent that contributing states, within an operational framework supervised by IOs or their organs, exercise effective control over acts harming third parties, their responsibility can, and should, be engaged.

The rule laid down in Article 7 deserves full support, as it creates a proper responsibility regime that locates responsibility with the actor who is in a position of control over the wrongful acts giving rise to responsibility. This allows the actor to take measures to prevent the commission of the wrongful act. Eventually, such a regime deters the commission of wrongful acts, and furthers compliance with the law. Deterrence and compliance are not particularly furthered if the actor who exercises effective control over the operations of the troops is not exposed to responsibility: such an actor can take a free ride on another actor who is unjustly held responsible.[8] Ultimately, only a principle of attribution which locates responsibility with the actor who directly ordered, or could have prevented the violation of certain rights, appears to be sound. Arguably, this is the rationale behind the 'effective control' basis for attribution (to which we refer in the

[8] On the preventative rationale, see also Kjetil Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test' (2008) 19 European Journal of International Law 509, 520 (noting, regarding the *Behrami* case before the ECtHR, that KFOR, and not the UN, exercised operational command and control, and that '[w]hen 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'). *Behrami* raises the specific issue of UN and NATO member states placing troops at the disposal of NATO's Kosovo Force (KFOR), a force which was subsequently placed at the disposal of the UN: see *Behrami* (n 5). The question then is to examine whether it was the UN, NATO, or the member states who exercised control over the troops and their actions. In fact, the text of art 7, DARIO 2011 (n 1) itself contemplates the placing at the disposal of an IO of organs or agents by *another IO*.

next section). If, as a result of the command structure of a UN operation, sufficient discretion is granted to contributing states for them to be in control of acts of the troops which they contributed to the operation, responsibility should lie with the contributing states.[9] If, in contrast, the UN keeps contributing state troops on a tight leash, by severely limiting the powers of the national force commander and strengthening the powers of the UN command, it is the UN that exercises effective control, and it is the UN whose responsibility will be engaged. If, because of circumstances, both the UN and the contributing state exercise joint, parallel, and/or roughly equal control, the responsibility of both will be engaged jointly and severally. Co-responsibility may in fact be the more typical situation in UN peace operations.[10] The existence of co-responsibility does not mean that states cannot be sued and be held responsible separately, however, as the court cases discussed in the next section demonstrate.

The argument that ties liability to effective control and the capacity to prevent rights violations in the context of UN peace operations has been made most convincingly by Dannenbaum.[11] This is a taxonomy which reflects the effective control criterion and therefore deserves support. Dannenbaum distinguishes five different factual patterns which attract liability:

1. Ultra vires acts of troop-contributing states, which the UN cannot prevent and, therefore, for which the contributing state incurs liability.[12]
2. Acts carried out pursuant to authorised discretion by both the UN commander and the national force commander (which means that the respective commanders have been given a *choice* to carry out, or not carry out, a certain act), for which shared liability may apply because the two, or alternatively one of them, could have prevented the act,

[9] It is a well-established principle that states which exercise control over a territory – for example, as an occupying power – are responsible for violations of international law committed by their military forces (being state organs) there. cf *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Uganda*), Judgment, 19 December 2005 [2005] ICJ Rep168, [179]. It is similarly well established that conduct gives rise to the legal responsibility of a state if that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. cf *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*), Judgment, 27 June 1986 [1986] ICJ Rep 65; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, 26 February 2007 [2007] ICJ Rep 43, [399].

[10] Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melbourne Journal of International Law 346, 359 (suggesting that 'peacekeepers are not under the effective control of the UN, but are perhaps under the dual or joint control of both the UN and the TCC [troop-contributing country]. In such circumstances, the UN and the TCC could conceivably be deemed to be acting jointly and it would follow that the conduct of peacekeepers ought to be imputed to both the UN and the TCC').

[11] Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harvard International Law Journal 114.

[12] See also Larsen (n 8) 523 (stating with respect to the *Behrami* case that 'if the [troop-contributing nations] 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'); Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 Human Rights Law Review 151, 166 ('An act committed outside the scope of the international mandate of the operation or outside its chain of command is performed in a national capacity').

depending on the level of control exercised. In such a case liability will apply to the commander in a position to prevent.[13]

3. UN orders instructing international crimes to be committed, which are obviously attributable to the UN, but also to the contributing state, which has a duty to disobey manifestly unlawful orders (both the UN and the contributing states are responsible in this scenario).[14]
4. UN orders instructing violations of human rights law and humanitarian law which do not rise to the level of international crimes, which are only attributable to the UN, and not to the contributing state, which has no right to disobey orders in the chain of command (only the UN is responsible in this scenario).
5. Omissions, representing failures on the part of the UN to provide sufficient support, as a result of unwillingness or inability on the part of the UN (for example, lack of resources, readiness), and that are therefore attributable to the UN.

As far as the fifth scenario is concerned, it is noted that if the UN merely *obstructs* action or fails to exercise sufficient oversight without making action impossible, the contributing state retains some policy discretion, as a result of which responsibility may reside with both the UN and the contributing state.[15]

The bottom line of this argument is that attribution is not based on the fact that troops wear a blue helmet – in which case all acts would be attributed to the UN – but on the level of effective control exercised – in which case acts are attributed to either the UN or the contributing state, or to both jointly. This is not too revolutionary an idea, as it was already implied by Seyersted in his 1966 monograph[16] and, as noted above, has recently been laid down in Article 7 DARIO.[17]

In its commentary to Article 7, the ILC gives some specification of the criterion of control. It states that the criterion is based on 'factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal',[18] and

[13] Compare, in a criminal law context, art 28(a) of the Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 ('ICC Statute') ('A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces').

[14] Compare, in a criminal law context, art 33 of the ICC Statute, ibid ('The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility').

[15] Dannenbaum (n 11) 158–83.

[16] Finn Seyersted, *United Nations Forces in the Law of Peace and War* (AW Sijthoff 1966) 411 (arguing that 'if a Force is under national command, the Organization has no legal responsibility for it and does not represent it internationally'). See also Daphne Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law' in Luigi Condorelli and others (eds), *The United Nations and International Humanitarian Law* (Pedone 1996) 330 ('In 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').

[17] At least one author, however, has stated that it is not fully clear whether this provision truly reflects customary international law: see Larsen (n 8) 518, referring to the Report of the International Law Commission Fifty-sixth session, UN Doc A/59/10, 3 May–4 June and 5 July–6 August 2004, 99, Ch V 'Responsibility of International Organizations', draft art 5.

[18] Commentary (4) to art 7, DARIO 2011 (n 1).

suggests that one should inquire who exercises 'effective control' over the troops.[19] The ILC remains rather vague as to what 'effective control' would look like in practice, limiting itself to agreeing with the UK position that regard should be had to the 'full factual circumstances and particular context'.[20] In UN operations, contributing states typically retain full and exclusive strategic level command and control over their personnel and equipment, whereas the UN exercises operational authority over the troops.[21] In such a situation, the UN and the contributing states could be considered to *both* exercise effective control over the troops, and their responsibility for wrongful acts will be jointly engaged. Nonetheless, in emergency situations, or on the basis of specific arrangements, effective control may shift to either the UN or the contributing state, as a result of which the UN or the contributing state's sole responsibility will be engaged.

The facts underlying the *Srebrenica* and *Mukeshimana* court decisions, which are discussed below, are examples of emergency situations in which regular command structures have broken down, with attendant consequences in terms of apportioning responsibility. An example of a specific arrangement for the exercise of command and control is offered by the joint operation between the UN military mission in Côte d'Ivoire (UNOCI) and the French mission 'Force Licorne'. Pursuant to the relevant UN Security Council resolutions, Force Licorne was authorised to use all necessary means in order to *support* UNOCI in accordance with an agreement to be reached between UNOCI and the French authorities.[22] This agreement has not been made publicly available, but it has been reported that the arrangements between the UN and Licorne were to include the provision by Licorne of a guaranteed Quick Reaction Force (QRF) in support of the UN Force Commander, which, upon deployment, was to report under the Tactical Command of the UN (sector) commander in whose area it operated.[23]Arguably, any breaches of international law that were committed by this French QRF, while it was placed at the disposal *and* under the command of the UN, are attributable to the UN on the basis of Article 6 or 7 DARIO. Conversely, insofar as Licorne forces were not placed at the UN's disposal, or at least remained under French

[19] ibid Commentaries (8) and (9).
[20] ibid Commentary (4).
[21] Patrick C Cammaert and Bert Klappe, 'Authority, Command, and Control in United Nations Peace Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010), 159–60, para 6.16.
[22] UNSC Res 1528(2004), UN Doc S/RES/1528 (2004), 27 February 2004, para 16 ('*Authorizes* for a period of 12 months from 4 April 2004 the French forces to use all necessary means in order to support UNOCI in accordance with the agreement to be reached between UNOCI and the French authorities, and in particular to:
– contribute to the general security of the area of activity of the international forces,
– intervene at the request of UNOCI in support of its elements whose security may be threatened,
– intervene against belligerent actions, if the security conditions so require, outside the areas directly controlled by UNOCI,
– help to protect civilians, in the deployment areas of their units').
See also UNSC Resolution 1975(2011), UN Doc S/RES/1975 (2011), 30 March 2011, para 6.
[23] Lansana Gberie and Prosper Addo, 'Challenges of Peace Implementation in Côte d'Ivoire', Report on an Expert Workshop by KAIPTC and ZIF, Institute for Security Studies (ISS), Pretoria, South Africa, 2004, 28.

command, including operational command, their wrongful acts should be attributed to France rather than to the UN, on the basis of Article 7.[24]

The 'effective control' standard requires that responsibility be delimited on the basis of a detailed factual inquiry. Formal arrangements may provide guidance but are not necessarily conclusive. Ultimately, the reality of operational command and control *on the ground* should be decisive for a responsibility regime to serve a preventative function. Even in respect of a UN operation proper, in fact, this reality may, as *Srebrenica* and *Mukeshimana* remind us, also be that control is wrested, possibly in its entirety, from the UN and transferred to the troop-contributing states, whose responsibility should then logically be engaged.

Importantly, by endorsing the effective control standard, the ILC has distanced itself from the ECtHR 2007 *Behrami* decision,[25] in which the Court held that UN Security Council (UNSC) Resolution 1244, which set up UNMIK, gave rise to a chain of command under which the UN Security Council 'was to retain ultimate authority and control over the security mission'. According to the Court, the Security Council only 'delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence'.[26] Consequently, the troop-contributing NATO and UN member states could not be held responsible for purported rights violations. The 'ultimate control and authority' standard espoused by the ECtHR in *Behrami* was based on neither Article 6 nor Article 7 DARIO. As far as Article 7 is concerned, the Court did not inquire whether or not the UN exercised effective control but satisfied itself with ascertaining that the UN, at least on paper, exercised *ultimate* control. As far as Article 6 is concerned, the Court did not hold that the troop-contributing states acted as organs of the UN. Put differently, the *Behrami* standard has no basis in the DARIO – nor, it seemed, in applicable customary international law.[27]

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[24] Breaches of international law may have occurred in 2011, when UNOCI and Licorne mounted a military operation to protect Ivorian civilians caught up in armed violence after a UN-certified presidential election. For example, it has been alleged by Thabo Mbeki, former President of South Africa and the former African Union mediator in Côte d'Ivoire, that UNOCI and 'the French Licorne forces, as mandated by the United Nations, [failed to] act to protect civilians in the area of Duékoué, where … the most concentrated murder of civilians took place!': Thabo Mbeki, 'What the World Got Wrong in Côte D'Ivoire', *Foreign Policy*, 29 April 2011.

[25] In actual fact, the ILC states that it does not purport to formulate any criticism as regards the Court's criterion of whether 'the United Nations Security Council retained ultimate authority and control so that operational command only was delegated': Commentary (10) to art 7, DARIO 2011 (n 1). Yet, in the same paragraph, it observes pointedly: 'One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question': ibid. It also cites the fact that the United Nations Secretary-General distanced himself from the ECtHR's criterion, when he stated in his 2008 report on Kosovo: 'It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control': ibid. cf Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, UN Doc S/2008/354, 12 June 2008, para 16. See also ILC, Seventh Report on Responsibility of International Organizations, UN Doc A/CN.4/610, 27 March 2009, para 26.

[26] *Behrami v France* and *Saramati v France, Germany and Norway* (2007) 45 EHRR 85, para 135.

[27] In the law of state responsibility, the 'effective control' standard is used, in particular in the context of attributing acts of non-state armed groups to states: see ICJ *Nicaragua v USA* (n 9); ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts [2001] Yearbook of the International Law Commission, vol II pt 2, draft art 8. For the purposes of determining the nature of an armed conflict (international or non-international?), the ICTY has suggested an 'overall' control standard: ICTY *Prosecutor v Dusan 'Duško' Tadić*, IT-94-1-A, Appeals Chamber, 15 July 1999, [145]–[154].

While the ILC did not seem to agree with the decision in *Behrami*, it did agree with a judgment rendered one year later by a Dutch District Court, which attributed the Dutch UN troops' failure to prevent the killing of a number of Bosnian men in the Srebrenica genocide to the UN rather than to the Netherlands as the troop-contributing state, considering it 'to be in line with the way in which the criterion of effective control was intended'.[28] In the Dutch *Srebrenica* case, victims had brought suit in the Hague District Court (a first instance court) against both the UN and the Netherlands as the UN member state contributing the troops for the UN peace mission in Bosnia Herzegovina. The petitioners were twice rebuffed by the Court in 2008, which ruled in one case that 'actions of a contingent of troops made available to the United Nations for the benefit of the UNPROFOR mission … should be attributed strictly, as a matter of principle, to the United Nations',[29] and in another that the UN was entitled to immunity.[30] In 2011, however, the Court of Appeal in The Hague surprisingly overruled the first instance decision in relation to the international responsibility question, and held that the acts of the Dutch UN mission *were* attributable to the Dutch government on the basis of the 'effective control' standard laid down in Article 7 DARIO. This momentous decision is discussed in more detail in Section 4.1.

What is interesting about the first instance *Srebrenica* decision, however, is that it is clearly informed by the UN Secretary General's (UNSG) official position on the question of apportionment of responsibility in UN peace-support operations. The UNSG's position makes Article 7 DARIO seem almost entirely redundant as it considers UN peacekeeping contingents to be UN organs pursuant to Article 6 DARIO. According to the UNSG, if UN operations are conducted under UN command and control (the classic peacekeeping mission), they are transformed into subsidiary organs of the UN in the sense of Article 6, and the UN assumes all responsibility. Alternatively, if the operation is merely *authorised* by the UN but conducted under national or regional command (such as the operation in Libya authorised by UN Security Council Resolution 1973(2011)), all responsibility lies with the state or the regional organisation, and the UN assumes no responsibility whatsoever. As the UN Office of Legal Affairs stated in 2011:

> It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are 'transformed' into a UN subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, 'effective'. In the practice of the United Nations, therefore, the test of 'effective control' within the meaning of [Article 7] has never been

[28] Commentaries (11) and (12) to art 7, DARIO 2011 (n 1) (agreeing with both *R (on the application of Al Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58 ('*Al Jedda* (House of Lords)'), and *Mothers of Srebrenica v United Nations*, Case no 29524, LJN BD6795 and LJN BD 6796 (District Court of The Hague, 10 July 2008) ('*Mothers of Srebrenica* (District Court, The Hague)').

[29] *Nuhanovic v The Netherlands*, Case no 265615/HA ZA 06-1671 (District Court of The Hague, 10 September 2008) ILDC 1092 (ILDC 2008) ('*Nuhanovic* (District Court, The Hague)'), paras 4.10–4.11.

[30] *Mothers of Srebrenica* (District Court, The Hague) (n 28). The latter case was upheld by the Court of Appeal: *Mothers of Srebrenica v United Nations*, Case no 200.022.151/01, LJN BL8979 (Appeal Court of The Hague, 30 March 2010) ('*Mothers of Srebrenica* (Appeal Court, The Hague)').

> used to determine the division of responsibilities for damage caused in the course of any given operation between the United Nations and any of its troop-contributing states. This position continued to obtain even in cases – like UNOSOM II in Somalia – where UN command and control structure had broken down.[31]

In this binary model, there is no room for an inquiry into who was actually exercising effective control over the conduct of the mission. If the effective control standard does not apply[32] it is indeed immaterial, as the UN observed in its comments, whether the UN's command and control structure had broken down or whether the troop-contributing state retained residual control in matters of disciplinary and criminal prosecution, salaries and promotion for the duration of the operation;[33] what matters is simply whether the operation is a UN operation or a UN-*authorised* operation.

3. Assessing The Position of the United Nations

As set out at the end of the previous section, the UN insists on exercising exclusive effective control over UN peace operations. In many cases, however, the assumption of *exclusive* UN control regarding the organisational legal status of a UN peace operation has no foothold in reality. As Sari and Dannenbaum point out, in practice the UN has full command or operational control over national contingents only very rarely. These contingents retain, as state organs, a strong relationship with the state, which continues to exercise effective command (through the national force commander) and control.[34] This has obvious consequences for the liability locus, at least if one accepts that effective control determines with which actor liability lies. Indeed, if the national contingents continue to answer to the state, one cannot reasonably claim that peacekeeping missions are merely subsidiary organs of the United Nations under Article 6 DARIO, as the UNSG claims.

Somewhat confusingly, perhaps, the UN *itself*, in various statements, seems to have accepted that it does *not* always exercise effective operational control over UN peace operations. Thus, it has left the door open for contributing state responsibility within the framework of UN peace

[31] 'Responsibility of International Organizations: Comments and Observations Received from International Organizations' ('Comments and Observations 2011'), UN Doc A/CN.4/637/Add.1, 17 February 2011, 13–14. Compare Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division ('Letter, UN Legal Counsel'), in 'Responsibility of International Organizations: Comments and Observations Received from International Organizations' ('Comments and Observations 2004'), UN Doc A/CN.4/545, 25 June 2004, s II.G ('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').

[32] It is all the more remarkable, then, that eventually the UN Secretariat 'nevertheless supports the inclusion of [Article 7] in the draft Articles as a general guiding principle in the determination of responsibilities between the United Nations and its member states with respect to organs or agents placed at the disposal of the Organization': Comments and Observations 2011, ibid, 16. It is not entirely clear what practical relevance the 'effective control' standard can still have in UN practice.

[33] ibid.

[34] cf Sari (n 12) 159–60; Dannenbaum (n 11) 142–51.

operations pursuant to Article 7 rather than Article 6 DARIO. In an early comment to the DARIO, the UN stated that '[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, *in principle*, imputable to the Organization'[35] – a statement which implies that there could be exceptions to the rule. The existence of the effective control standard as an appropriate yardstick to apportion liability between the UN and its contributing states is even further strengthened by the UN's statement[36] that

> [w]hile the submission of [periodic] reports provides the [Security] Council with an important 'oversight tool', the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the operation, for the ultimate test of responsibility remains effective command and control.

This undercuts the rationale of *Behrami*, which considered the submission of reports to the Security Council as decisive for control and responsibility purposes. And tellingly, in its 2011 comments,[37] the UN explicitly rejected the *Behrami* 'ultimate authority and control' standard in favour of an 'effective command and control' standard:

> The recent jurisprudence of the European Court of Human Rights, beginning with the *Behrami and Saramati* case disregarded this fundamental distinction between the two kinds of operation [UN operations and UN-authorized operations] for purposes of attribution. In attributing to the United Nations acts of a UN-authorized operation (KFOR) conducted under regional command and control, solely on the grounds that the Security Council had 'delegated' its powers to the said operation and had 'ultimate authority and control' over it, the Court disregarded the test of 'effective command and control' which for over six decades has guided the United Nations and member States in matters of attribution.

In truth, this qualification may have to be understood in the context of ultra vires acts (although it is noted that Article 8 DARIO attributes ultra vires acts of organs or agents of the organisation – which peacekeeping contingents are in the view of the UN – to the organisation itself).[38] In addition, as set out above, the UN has clarified that 'this test of "effective command and control" applies "horizontally" to distinguish between a UN operation conducted under UN command and control and a UN-authorized operation conducted under national or regional command and control', and not 'vertically' in the relations between the United Nations and its troop-contributing states.[39] But it is conspicuous that the UN Secretariat terminates its discussion of Article 7

[35] Letter, UN Legal Counsel (n 31) s II.G, as cited in Commentary (6) to art 7, DARIO 2011 (n 1) (emphasis added).
[36] 'Responsibility of International Organizations: Comments and Observations received from Governments and International Organizations', UN Doc A/CN.4/556, 12 May 2005 ('Comments and Observations 2005') 46.
[37] Comments and Observations 2011 (n 31) 12.
[38] art 8, DARIO 2011 (n 1) ('The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions').
[39] Comments and Observations 2011 (n 31) 13.

DARIO by supporting the latter's inclusion – and thus the existence of an effective control standard in all cases in which member states place troops at the UN's disposal – as 'a general guiding principle in the determination of responsibilities between the United Nations and its member States with respect to organs or agents placed at the disposal of the Organization'.[40] In so doing, the UN seems to backpedal on its embrace of the binary model of UN operations versus UN-authorised operations. It does not exclude that also in UN operations, responsibility could, at least under certain circumstances, shift to contributing states if the latter exercise effective control. This will presumably happen when those member states back out of the UN's command structures by giving instructions that contradict UN instructions.

Finally, even if one is of the view, as the present author is, that national troop contingents are not to be considered as organs of the UN as they are not *fully* seconded to the UN (the contributing state retaining a measure of command and control), the question remains whether they may not qualify as *agents of the organisation* pursuant to Article 6 rather than as organs *of a state* pursuant to Article 7. An 'agent' of an organisation is an entity which is charged by the organisation with carrying out, or helping to carry out, one of its functions, and thus through whom the organisation acts.[41] For purposes of attribution, agents of IOs are treated on the same footing as organs of IOs: both engage the responsibility of the IO by their wrongful conduct.

It has been our position that national troop contingents taking part in UN operations are organs of a state that are placed at the disposal of the UN, as a result of which the legal regime of Article 7 rather than Article 6 controls this issue. But still, the concept of an 'agent of an organisation' may be so malleable as to possibly include national troops that carry out a peace and security-related mandate of the UN. The UN, however, seems to have excluded this interpretation: criticising the ILC's broad concept of 'agent', it even pointed out that it does not necessarily regard persons and entities who perform functions that are also performed by the organisation as 'agents' of the organisation, 'but rather as partners who assist the Organization in achieving a common goal'.[42] The UN's responsibility would then not be engaged by the conduct of mere 'partners'. Remarkably, indeed, the UN does not consider the performance of mandated functions as 'conclusive', but rather draws attention to various factors that should be considered on a case-by-case basis, 'such as the status of the person or entity, the relationship and the degree of control that exists between the Organization and any such person or entity'.[43] Apparently, in the UN's view, the 'control standard' is also relevant in the context of Article 6. Ultimately, it seems, an IO's responsibility is simply engaged by the acts of persons or entities who had a sufficiently close relationship with the IO or over whom the IO had sufficiently strong

[40] ibid 14.
[41] DARIO 2011 (n 1) art 2(d).
[42] UN comments in Comments and Observations 2011 (n 31) 9 ('It is the view of the Secretariat that the broad definition adopted by the ILC could expose international organizations to unreasonable responsibility and should thus be revised').
[43] ibid.

(effective) control. Both Articles 6 and 7 DARIO then appear to be manifestations of one and the same rule.

Having analysed the UN's official statements on control over UN peace-support personnel, it is now apt to examine what might explain the insistence of the UN that it exercises effective control. At first sight, it may seem strange that an actor is willing to shoulder the burden of exclusive responsibility – it is indeed much more common for actors to pass the buck and come up with all sorts of arguments so as *not* to be held responsible. On closer inspection, the political rationale of the UN's position is rather self-evident. Claiming that the UN and a contributing state are jointly responsible for a wrongful act, or even that the contributing state is exclusively responsible, would amount to admitting that the UN does not and cannot exercise effective control over its own operations.[44] This is not exactly an image that a dynamic international organisation wishes to project, and partly explains the UN's observation in its 2011 comments to the ILC that '[f]or a number of reasons, *notably political*, the UN practice of maintaining the principle of UN responsibility … is likely to continue'.[45]

Incidentally, it is relatively harmless for an IO to attract responsibility for itself, as there are no, or very few, mechanisms to hold such organisations to account.[46] The Dutch *Srebrenica* case aptly illustrates how victims are then caught between the devil and the deep blue sea. On the one hand, the Court of Appeal, hearing the case against the UN, held that the UN enjoyed immunity in proceedings before Dutch courts on the basis of Article 105 of the UN Charter and the UN Convention on Privileges and Immunities. On the other hand, the Court tersely noted that victims had access to reasonably available alternative remedies against the Dutch state – the contributing state which could be, and was, also sued by the victims,[47] while ironically the first instance court

[44] Outside the context of peace operations, however, the UN appears at times to have refused to assume responsibility for acts of subsidiary bodies established by it. A notable example is the statement by senior UN personnel in New York working at the Department of Administration and Management and at the Office of Legal Affairs that 'they did not bear responsibility for the effectiveness or functionality of the [International Criminal Tribunal for the former Yugoslavia]'. While the statement uses the word 'they', arguably, what is meant are the UN headquarters, and the UN as an organisation. Thus, the statement may relate to institutional rather than personal responsibility, or the lack thereof. See, for criticism of this stance, informed by the 'independence' of the tribunal: Karl Paschke, Head of the UN's Office of Internal Oversight Services, in 'Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994', UN Doc A/51/789, 6 February 1997.

[45] Comments and Observations 2011 (n 31) 14.

[46] For a rare example, see the recently established Kosovo Human Rights Advisory Panel, which has jurisdiction over human rights violations attributable to UNMIK. The panel, however, is merely advisory in nature; information is available at http://www.unmikonline.org/human_rights/index.htm.

[47] *Mothers of Srebrenica* (Appeal Court, The Hague) (n 30) para 5.12 ('The State cannot invoke immunity from prosecution before a Netherlands court of law, so that a Netherlands court will have to give a substantive assessment of the claim against the State anyway. This will be no different if in that case, as the Association *et al.* say they expect – and with some reason, cf. the statement in the interim proceedings at first instance instigated by the State under 3.4.8 – the State to argue that its actions in Srebrenica must strictly be imputed to the UN. Even if this defence is put forward (which the Association *et al.* contest in anticipation anyway, cf. the initiating writ of summons nos. 347 and ff.), a court of law will fully deal with the claim of the Association *et al.* anyway, so that the Association *et al.* do have access to an independent court of law').

had earlier held in the case against the Dutch state that the acts of a contributing state's personnel – in line with long-standing UN practice – were attributable to the UN and not to the contributing state.

Another important political rationale underlying the view of the UN on the question of the attribution of wrongful conduct to either the UN or its contributing states is the need to safeguard the capability of the UN to send peace missions to far-flung corners of the world. The argument might be made that if states incur responsibility when they contribute troops to the UN, they might well refrain from contributing troops to future UN operations. Pursuant to this utilitarian approach, a liability regime should not be pushed to such limits that the very operation of peacekeeping missions is compromised. Such an approach is consequentialist and extrinsic in that it emphasises the end-goal and the possible spillover effects of an effective control-based liability regime (it factors in the adverse repercussions on member states' willingness to contribute troops) rather than the intrinsic fairness of the regime.

It is interesting to observe in this respect that the courts' quasi-automatic attribution of peacekeepers' conduct to the UN rather than to the troop-contributing nations coincides with the post-1999 international 'Responsibility to Protect' discourse. This discourse emphasises the need for international intervention in conflict-prone regions where vulnerable populations are at risk, and thus the need to *increase* the UN's peacekeeping commitments. Arguably, the very effectiveness of such commitments may suffer when member states refuse to provide troops for fear of being held responsible for the wrongful acts of troops under their control. Of course, such responsibility disappears if contributing states cede effective control entirely to the UN, but given the historical impossibility of creating a standing UN army[48] it is not to be expected that contributing states stand ready to transfer control over their own troops to the UN, however beneficial this could be for the effectiveness of UN missions. This leaves us only with a possible refusal by contributing states to commit sufficient troops. But is there indeed a genuine risk that contributing states will refuse to put troops at the UN's disposal if the effective control standard is embraced? Dannenbaum, while noting that 'states participate in peacekeeping for a variety of complex reasons'[49] – of which the risk of incurring costs as a result of potential liability is but one factor – appears ready to countenance the reduction of contributions if 'in exchange [this reduction] would improve the quality of those that are deployed'.[50] Granted, the risk of liability may encourage states to train troops with a view to preventing rights violations, so that the troops that *are* on the ground are model troops. But is there no tipping point: may the adaption costs not outweigh the perceived benefits of participation in peacekeeping missions, possibly rendering states more reluctant to commit troops in the first place? And if states continue to contribute troops, would they not tend to micro-manage their troops, thereby undermining the UN command structure?

[48] UN Charter, art 43.
[49] Dannenbaum (n 11) 184–86.
[50] ibid.

Some court decisions appear to be informed by such concerns, notably the ECtHR's decision in *Behrami* (2007) and the Dutch courts' decisions in *Srebrenica* (2008, 2010).[51] It is, however, conspicuous that *no* government has taken issue with the ILC's effective control standard in its comments to the ILC on the grounds that it has adverse political effects. In the latest round of comments (2011), only three states (Austria, Belgium, Germany) gave input regarding Article 7 DARIO, and none of them criticised the content of the provision, rather on the contrary.[52] Earlier, states such as Denmark and Poland had already rejected the automatic exclusive attribution of acts performed during UN peace operations, and emphasised the importance of an effective control standard in apportioning responsibility.[53]

These governmental positions may surprise, as they attract member state responsibility for wrongful acts committed by troops seconded to the UN. At the same time, they are understandable, as refusing to accept responsibility would amount to accepting that the troop-contributing state has no control over the troops that it places at the UN's disposal – a position that, for reasons of state sovereignty and democratic control over armed forces, is not desirable (this is the mirror image of the UN's position). Also, as hinted at above, states have always retained a measure of control over and, even more, have micro-managed the troops they second to the UN, a situation which has been tolerated by the UN as long as the command structure is not impeded.[54] In fact,

[51] As regards the *Srebrenica* decision, see Guido den Dekker, 'Immunity of the United Nations before the Dutch Courts', 28 July 2008, 9, available at http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3(2)/Journal%20-%20Den%20Dekker%20-%203.2%20-%20EN.pdf, observing that the Dutch decisions may have been informed by the concern that 'a different outcome would constitute an impediment to the effective implementation of the duties of (future) international missions under UN responsibility'.

[52] Still, they may not necessarily agree with the practical outcomes of the application of the effective control standard. The author was surprised to find out, at a meeting of the Belgian Foreign Office in early 2011, that the government was supportive of the principle laid down in DARIO 2011 (n 1) art 7 (which was translated into the Belgian comment to the provision, UN Doc A/CN.4/636, 14 February 2011, 13–14), while at the same time it took issue with, and appealed against, a Brussels court's very application of the Article 7 standard in *Mukeshimana*.

[53] UN General Assembly, 6th Committee, statement by Denmark on behalf of all Nordic countries on 'Responsibility of International Organizations', 29 October 2007, available at http://www.missionfnnewyork.um.dk/en/menu/statements/UNGA626thCommitteeJointNordicStatement.htm ('This does and must not mean that the UN should always be responsible for all acts performed during UN peacekeeping operations. In our view it is not clear to what extent the same result would be reached by the [European] Court of Human Rights with regard to acts performed during other peacekeeping operations under a chapter VII mandate. Decisive for the outcome would probably be the particular command and control structure and legal framework for each individual peacekeeping operation'); Poland in 'Responsibility of International Organizations: Comments and Observations Received from Governments', UN Doc A/CN.4/547, 6 August 2004 ('Comments and Observations Received from Governments 2004') 9 ('The responsibility of member States cannot be absolutely excluded if the armed forces are acting on behalf of the sending States and/or are directly controlled by officers (commanders) from the respective States').

[54] Leck (n 10) 355 (stating that 'the UN seems to have tacitly accepted, resignedly, that TCCs will often impose such restrictions and micro-manage their contingents on the ground to safeguard their interests and protect their peacekeepers. At the same time, given the difficulties that such restrictions pose, the UN has declared that it cannot accept restrictions by TCCs that will compromise the mission; that unity of command is critical to the effective functioning of a PKO; and that TCCs should not provide, and NCCs [national contingent commanders] should not abide by, any national directions, in the hope that TCCs will minimize restrictions on the employment of their contingents').

the very willingness of states to contribute troops to the UN hinges on their retaining control. Findings of responsibility of contributing states reflect the existence of such control, and ultimately reinforce it. Accordingly – and somewhat counter-intuitively perhaps – states may be *more*, rather than less willing to contribute troops to the UN if responsibility were to be based on effective control.

There is an obvious danger that the enhanced control exercised by states may prove to be an impediment to the fulfilment of the mandate of the UN operation, and thus compromises the political goals pursued by the UN. The UN, however, should counter this danger by urging states to subscribe to the UN command structure, and attract responsibility for itself – which indeed it has (these are the 'political reasons' referred to by the UN in its response to the ILC). In fact, this tug of war between the UN and the contributing states can be found in almost all UN operations[55] and, as observed above, will typically result in the contributing states retaining full and exclusive strategic level command and control over their personnel and equipment, and the UN exercising operational authority.[56] Both contributing states *and* the UN then exercise effective control over the troops, and share responsibility for any wrongful acts that may be committed. Such shared responsibility need not necessarily be joint responsibility, but could well be separate responsibility for violations of different obligations albeit in the context of the same act. For instance, the contributing state's responsibility for commission may be engaged (because, for example, it gave orders to commit violations), whereas, arising out of the same act, the UN's responsibility for negligence may be engaged (for example, because the UN failed to prevent the commission of the violations, although it had the power to do so).

A regime of shared responsibility is desirable since, as Leck also pointed out, it prevents the 'behavioural externalities and other undesirable consequences' that flow from attributing wrongful acts to either the UN or the contributing states.[57] If those acts are attributed solely to the UN (that is, the logical consequence of the *Behrami* 'ultimate authority and control' standard), the contributing states may be tempted to take a free ride without the UN having the power and control to correct missteps, or – as Bell has noted – 'recipient states of peace support operations [may] vigorously oppose the entrance of UN missions because of the fear of impunity for any resultant damages',[58] or the UN may even hesitate to deploy missions in the first place if it attracts all responsibility.[59] If, conversely, wrongful acts are attributed solely to the contributing state, the result could be state micro-management of UN operations or, possibly, reluctance by states to contribute troops. Both scenarios are undesirable. A rule of shared responsibility is preferable instead, as it locates responsibility where it is due – where effective control is exercised, typically by both the UN and the contributing states – and ultimately limits the separate responsibility of the actors involved. This rule does justice to the political autonomy of both the UN and the contributing states in

[55] ibid 352–57.
[56] Cammaert and Klappe (n 21).
[57] Leck (n 10) 364.
[58] Caitlin A Bell, 'Reassessing Multiple Attribution: the International Law Commission and the *Behrami* and *Saramati* Decision' (2010) 42 New York University Journal of International Law and Politics 502, 548.
[59] ibid 544.

designing and contributing to UN peace operations, and is arguably the only attribution rule that reconciles rival political considerations as well as closes any impunity gaps.[60]

The responsibility regime discussed above refers to the *external* responsibility of the actor who wronged the injured party. The externally responsible actor (the UN and/or the contributing state) may eventually, however, not necessarily have to provide the full amount of reparation due to the injured party: the UN and the contributing state may decide *inter partes* on the apportionment of the reparations between them. However, such an internal arrangement does not bind third parties.

The UN, for instance, appears as one front *vis-à-vis* the injured party, in the sense that the latter could only engage the responsibility of the UN and not of the contributing state – as noted above, the UN considers the troops of the contributing state to be merely subsidiary organs of the UN pursuant to Article 6 DARIO. However, it has not excluded that, under certain circumstances, it may want to revert to the contributing state. Citing the Model Memorandum of Understanding between the UN and troop-contributing states, the UNSG observed[61] in its latest reflections on Article 7 DARIO:

> Mindful of the realities of peacekeeping operations but keen to maintain the integrity of the UN operation *vis-à-vis* third parties, the United Nations has struck a balance, whereby it remains responsible *vis-à-vis* third parties, but reserves the right in cases of gross negligence or wilful misconduct to revert to the lending State.

In stating that a contributing state and an IO could conclude an agreement with the receiving IO over who incurs responsibility when an organ or agent is placed at the disposal of the latter organisation, the UN, however, appears to have distanced itself from the ILC: the ILC noted that such an agreement 'is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the state or organization which is responsible under the general rules'.[62]

States and IOs may indeed be free to decide, *inter partes*, on the ultimate apportionment of the payment of damages on the basis of an agreement as contemplated by Article 9 of the Model Memorandum of Understanding between the United Nations and Participating States

[60] This may be the 'fundamental legal answer' to the 'fundamental principal question' of how to apportion responsibility between the UN and the contributing states that my former colleague, Guido den Dekker, was looking for: den Dekker (n 51) 9.

[61] Comments and Observations 2011 (n 31) 14, citing art 9 of the 'Memorandum of Understanding'(between the United Nations and the [participating state] contributing resources to [the United Nations Peacekeeping Operation]), in 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations', UN Doc A/C.5/60/26, 11 January 2006 ('The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this MOU. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims'); Comments and Observations 2004 (n 31) 17–18.

[62] Commentary (3) to art 7, DARIO 2011 (n 1).

contributing resources to a UN Peacekeeping Operation. Such an agreement could allow one actor to recover from another, whether or not the other is also liable under international law *vis-à-vis* the third party.[63] However, such an agreement cannot be detrimental to third parties. Representing the principle of *res inter alios acta*, it does not diminish the right of third parties to claim the entire amount from the party that is responsible (whether or not jointly). And precisely because victims can often more easily file complaints against states than against IOs, one should be cautious in recognising an IO's unilateral acceptance of responsibility as conclusive: it may serve to exclude the responsibility of the contributing state and adversely affect victims' interests. In the final analysis, all responsibility should rest on the intensity of control exercised by either the contributing state or the UN.

A responsibility regime that is based on effective control is desirable, but that does not mean that an injured party will necessarily have access to a remedy against the actor whom it deems responsible. The DARIO, like the Articles on State Responsibility for that matter, are concerned only with rules of responsibility, and remain silent on accountability mechanisms.[64] The availability of remedies for injuries suffered by acts or omissions of UN peace-support personnel may be particularly problematic, especially if the UN's position of quasi-automatic attribution of wrongful acts to the UN itself is followed. The UN is ordinarily considered to be immune from suit before the courts of its member states (on the basis of Article 105 of the UN Charter), while there is no internal UN judicial mechanism with proper jurisdiction to hear complaints lodged against the UN. Even where the responsibility of the contributing state may be engaged, typically by the courts of that very state, national troops may possibly enjoy immunity from claims relating to combat action,[65] or a state's human rights obligations may not apply extraterritorially.[66] This may potentially lead to the extremely undesirable situation that recognised human rights standards do not seem to apply to victims of violations committed in the course of UN-mandated peace operations, and that victims thus find themselves in a legal limbo.[67]

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[63] Absent an agreement, it would seem that the actors are expected to contribute on the basis of their respective roles in ordering or facilitating the wrongful conduct, ie, on the basis of the extent of their responsibility *vis-à-vis* the injured third party. Dannenbaum, however, has spoken out against a duty of contribution, which then logically implies that the responsible actor who is targeted first by the victim has to pay the entire amount of damages without the possibility of recovery: Dannenbaum (n 11) 59.

[64] On the accountability of international organisations, however, see International Law Association, 'Report on the Accountability of International Organizations', Berlin Conference 2004, available at http://www.ila-hq.org/en/committees/index.cfm/cid/9.

[65] This principle applies primarily in common law jurisdictions: see, for example, *Multiple Claimants v MoD* [2003] EWHC 1134, QB, Owen J; (2007) Lords Hansard, cols GC227–GC234 (UK Parliament discussing the Corporate Manslaughter and Corporate Homicide Bill). The principle may, however, lose its force in the face of human rights claims. See *R (Al Skeini) v Secretary of State for Defence* [2008] 1 AC 153, HL; Dijen Basu, 'Challenging the Combat Immunity Principle', 13 May 2008, available at http://www.devereuxchambers.co.uk/downloads/challenging-the-combat-immunity-principle---dijen-basu.pdf.

[66] For an excellent overview of the problems of giving extraterritorial application to human rights treaties, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

[67] Larsen (n 8) 531 (submitting that 'the ECHR is in effect rendered irrelevant during international peace operations'); Sari (n 12) 166 (referring to the creation of a void).

This legal limbo can only be remedied if responsible actors – the UN and troop-contributing states – provide adequate mechanisms whereby victims can bring their cases. Both the UN and troop-contributing states may want to set up dispute settlement mechanisms that are endowed with more due process assurances than internal review boards. The UN, for one, could finally act on Section 29 of the 1946 UN Convention on Privileges and Immunities ('1946 UN Convention') – that the UN 'shall make provisions for appropriate modes of settlement' for disputes to which the UN or a UN official is a party. The establishment of a UN Standing Claims Commission, a quasi-judicial body, was envisaged in this section, but it never materialised. Instead, UN local claims review boards have been established in the conflict theatre itself, but these boards can hardly be considered to be judicial institutions.[68] Alternatively, such mechanisms can be made available outside the conflict theatre: a special mechanism may be established at the UN headquarters or claims may be brought in the domestic courts of the troop-contributing state (compare the claim brought by the relatives of some Srebrenica victims in the District Court in The Hague). As far as domestic courts are concerned, claims against the UN as an organisation can, of course, only be successful provided that the said courts do not automatically uphold the immunity of the organisation. It is suggested in this respect that domestic courts tie the grant of immunity to the UN to the availability of adequate dispute settlement mechanisms within the UN system (compare Section 29 of the 1946 UN Convention), in line with the ECtHR's case law in this regard.[69] The UN may enjoy immunity on the basis of Article 105 of the UN Charter and the 1946 Convention, but such immunity should be reviewed in light of the individual right to a remedy (Article 6 of the European Convention on Human Rights (ECHR), Article 14 of the International Covenant on Civil and Political Rights): only if the UN offers reasonably alternative means of dispute settlement should immunity be granted. To its credit, the Dutch Court of Appeal hearing the *Srebrenica* case against the UN did realise that the UN's immunity had to be reconciled with the right of access to a court, but unfortunately the alternative means of dispute settlement suggested could hardly be considered as adequate.[70]A domestic avenue is only a

[68] See at length on these boards: Kirsten Schmalenbach, 'Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations' (2005) 10 International Peacekeeping 33 ('The settlement of disputes by the local claims review board has developed into a form of adjudication that does not allow the injured party to have any significant influence on the result') 42, ('it may be difficult to demonstrate a direct entitlement on the basis of internal liability rules') 50, ('In establishing its liability practice, the international organization acts as a unilateral legislator and can establish the legal position within the limits of its obligations under international law') 51: Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Lang 2004).

[69] *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999).

[70] The Appeal Court, for instance, took the view that the claimants could have brought a case before a court of law meeting the requirements of art 6 ECHR against *other persons* who could incur responsibility for the events in Srebrenica: the very perpetrators of the genocide (probably before a Bosnian civil court), and the Dutch state which contributed the troops to the UNPROFOR operation in Bosnia (before a Dutch court): *Mothers of Srebrenica* (Appeal Court, The Hague) (n 30), para 5.11. The availability of the cited alternatives seems to be beside the point, as they concern remedies against other persons (individuals, a state, as opposed to the UN as an international organisation) for other acts (genocide in respect of the perpetrators, as opposed to a failure to prevent genocide). Moreover, the availability of the identified mechanism appeared hypothetical and illusory. First, the court did not adduce any evidence of Bosnian courts being available to hear civil cases in relation to the Srebrenica genocide. Secondly, The Hague District Court had earlier held that the failure of UN troops to act

second-best option but at least the risk of domestic litigation may exert pressure on the UN to establish adequate dispute settlement mechanisms where victims could file claims with a reasonable chance of success.

4. EFFECTIVE CONTROL IN *SREBRENICA*, *AL JEDDA*, AND *MUKESHIMANA*

In the previous sections, we have defended the standard of 'effective control' as the appropriate standard to allocate responsibility for wrongful acts committed in the course of UN peace operations. We have criticised the UN's position on the attribution of responsibility – and The Hague District Court's decision which was informed by it – since it fails to take operational realities into account and thus fails to serve a preventative function. We have also criticised the ECtHR's decision in *Behrami*, since the 'ultimate authority and control' standard it embraces similarly fails to do justice to effective operational realities. In *Behrami*, unified 'effective' command and control was not exercised by the UN – to which the Court attributed all wrongful acts that may have been committed by troops in Kosovo – but by NATO.[71] The ECtHR's observation that the UN Security Council had only '*delegated* to NATO … the power to establish, as well as the operational command of, the international presence, KFOR'[72] and thus that the UN 'was to retain ultimate authority and control over the security mission'[73] is not relevant in this respect, as this observation relates to the *institutional* legality of the delegation rather than to the locus of responsibility for violations committed in the exercise of delegated powers.[74] What was relevant to apportioning responsibility was the level of control exercised by the national contingents. It was NATO and its member states which exercised effective control, and not the UN. This criticism, which was voiced in the literature in the immediate aftermath of *Behrami*,[75] has recently also been voiced by the UN itself, which

in Srebrenica was attributable to the UN rather than to the Netherlands, and thus dismissed the case against the Dutch state.

[71] Georg Nolte, 'Preliminary Comments on the Possible Establishment of a Human Rights Supervisory Mechanism for Kosovo', Human Commission for Democracy through Law (Venice Commission), Strasbourg, 10 June 2004, para 79 ; available at http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp ('KFOR, unlike UNMIK, is not a UN peacekeeping mission. Therefore, although KFOR derives its mandate from UN SC Resolution 1244, it is not a subsidiary organ of the United Nations. Its acts are not attributed in international law to the United Nations as an international legal person'). See also Marko Milanovic and Tatiana Papic, 'As Bad as it Gets: the European Court of Human Rights' *Behrami* and *Saramati* Decision and General International Law' (2009) 58 International and Comparative Law Quarterly 267, 286; Sari (n 12) 164–65; Larsen (n 8) 525 (deriving from Security Council Resolution 1244 (1999) and its Annex 2 that the UN would not have command and control).

[72] *Behrami* (n 26) para 135 (emphasis added).

[73] ibid.

[74] Sari (n 12) 164; Milanovic and Papic (n 71) 275, 281.

[75] For example, Milanovic and Papic (n 71); Larsen (n 8); Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: a Critique of *Behrami* & *Saramati* and *Al Jedda*' (2009) 11 International Community Law Review 155; Heike Krieger, 'A Credibility Gap: the *Behrami and Saramati* Decision of the European Court of Human Rights' (2009) 13 Journal of International Peacekeeping 159.

suggested in its 2011 comments to the ILC that the rules of *state* responsibility should have applied to a *Behrami*-style UN-*authorised*, as opposed to a UN, operation.[76]

Our argument in this section is that the said criticism of *Behrami* is reflected in post-*Behrami* court practice. Domestic courts in three different states – the Netherlands (*Srebrenica*, 2011), the United Kingdom (*Al Jedda*, 2007), Belgium (*Mukeshimana*, 2010) – have recently heard cases regarding the allocation of responsibility in UN peace-support (UN-authorised or UN-supervised) operations in Iraq, Bosnia Herzegovina, and Rwanda, respectively. These courts applied a proper 'effective control' standard, in line with Article 7 DARIO, and – finding that in all cases the *state* exercised effective control over the troops deployed in various conflict theatres – located responsibility with the state rather than the UN. The UK House of Lords' decision in *Al Jedda* was recently confirmed by the ECtHR, the very court that rendered the misguided *Behrami* decision.[77] One is indeed tempted to identify a tendency in recent domestic courts' – and thus state – practice in favour of the application of an 'effective control' standard, and in favour of the attribution of conduct to troop-contributing states rather than to the UN in peace-support operations in cases of effective control by the state.

4.1 *SREBRENICA*

The *Srebrenica* case before the Dutch courts concerned the responsibility in tort of the Dutch government for the conduct of Dutch UN troops ('Dutchbat', part of the UNPROFOR mission) deployed in Bosnia in 1995, not for their failure to prevent the massacre in Srebrenica, but rather for their refusal to allow the family of a Bosnian interpreter and a Bosnian electrician working for Dutchbat to remain on the Dutchbat compound and to be evacuated together with Dutch troops – as a result of which they were killed by Bosnian Serb troops and paramilitaries commanded by General Mladic.

It is recalled that, at first instance, The Hague District Court dismissed the complaint on the grounds that the operational command and control of Dutchbat lay with the United Nations, rather than the Netherlands, and that Dutchbat did not back out of the UN command structure.[78]

[76] Comments and Observations 2011 (n 31) 13. It may, however, not be entirely accurate to view the relationship between KFOR and UNMIK as authorisation. KFOR supports UNMIK but it is not subordinate to it. The UN Security Council authorised the Secretary General to establish UNMIK as an international civilian presence (para 10) while member states and relevant international organisations are authorised to establish the international security presence in Kosovo (para 9): UNSC Res 1244(1999) UN Doc S/RES/1244 (1999), 10 June 1999. It is conspicuous that the resolution refers to KFOR, which was deployed two days after the adoption of the resolution, *before* it refers to UNMIK.

[77] This is not to suggest that the other cases were not confirmed: they did not reach international courts because the individuals won in the domestic courts, not only on the law but also on the facts. Only in *Al Jedda* did the individuals win on the law, while responsibility was denied on the facts – hence their appeal to the ECtHR.

[78] *Nuhanovic* n 29, para 4.14. The Court addressed the question whether the state 'cut across the United Nations command structure' as follows: 'If Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests. This then creates scope for attribution to the state. The same is true if Dutchbat to a greater or lesser extent backed out of the structure of UN command, with the agreement of those in charge in the Netherlands, and considered or shown themselves as exclusively

As a result, the responsibility of the Dutch government could not be engaged. This reasoning was open to criticism as, according to the facts of the case, in the period before the Srebrenica massacre, the Netherlands arguably retained a significant amount of control and command over the Dutch UN troops deployed at the compound close to Srebrenica. Moreover, to consider the national troops' backing out of the UN command structure as the sole exception to UN responsibility, as the Dutch court maintained,[79] seems to have no basis in international law.[80] Again, effective control appeared to be the relevant standard, much more persuasive than legal minutiae of organisational hierarchy: in fact, since in peace operations national troop contingents are never *fully* part of the UN command structure, and the command may have been the responsibility of the troop-contributing state in the first place, the military themselves cannot really back out of the *UN* command structure. Of course, to the extent that, *arguendo*, they were indeed initially under the effective control and command of the UN, then the national troops' backing out of the UN command structure through receipt of instructions exclusively from the Dutch government evidences that effective control was in fact being exercised by the Dutch.

In spite of the misgivings one can have about the District Court's decision, it nonetheless came as a surprise that, on appeal in 2011, The Hague Court of Appeal overruled the decision; after all, the latter decision reflected the UN's position, and any other decision might have serious financial consequences for the Dutch government.[81] Applying the effective control standard laid down in Article 7 DARIO,[82] it found that, given the circumstances of the case, Dutchbat's acts in

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under the command of the competent authorities of the Netherlands for that part. If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution.' (para 4.14.1). It eventually concluded: 'There are insufficient grounds for the point of view that Dutchbat by assisting in the evacuation of the citizens of Srebrenica obeyed an order given by the state which should be considered as an infringement of the UN command structure, for even if Nicolai ordered the evacuation of the civilians this does not mean that he did so strictly or for the most part on the authority of the Netherlands … At most, parallel instructions were issued … On the basis of all this the court establishes that there can be no matter of any actions taken in contravention of UN policies initiated or approved by the state.' (para 4.14.5).

[79] ibid para 4.14.

[80] That is to say, backing out of the chain of command *is* an exception, but it is not the only one, since we argue that, in general, the responsibility of the UN is not engaged to the extent that member states exercise control over the troops they contribute to UN peace operations. On backing out of the chain, see DARIO 2009 (n 1) 58, Commentary (5) (the ILC stating that 'the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations').

[81] Court of Appeal of The Hague, *Mustafic v the Netherlands*, LJN: BR0132, 5 July 2011; Court of Appeal of The Hague, *Nuhanovic v the Netherlands*, LJN: BR0133, 5 July 2011, ILDC 1742 (NL 2011). Hereafter, reference is made to the relevant paragraphs in *Nuhanovic. Mustafic* has corresponding paragraphs.

[82] *Nuhanovic* (n 81) paras 5.8–5.9 ('In the international law doctrine and in the work of the ILC, it is generally accepted that if a state places troops at the disposal of the UN with a view to carrying out a peace mission, the question of to whom the specific conduct of such troops should be attributed depends on the question of who has "effective control" over the relevant conduct … This view is also expressed in [Article 7 of] the draft articles on the Responsibility of International Organizations of the ILC… Although, strictly speaking, this provision only refers to "effective control" in relation to attribution to the "borrowing" international organisation, it is accepted that the same criterion also governs the question whether the conduct of troops should be attributed to the state which places those troops at the disposal of the organisation. … The question whether the state had 'effective

respect of the Bosnian interpreter's family and the electrician were attributable to the Dutch government. The Court was of the view that after the fall of Srebrenica on 11 July 1995, both the UN and the Dutch government had control over Dutchbat's remaining task to assist and evacuate the Bosnian refugees, and the preparation of the complete withdrawal of Dutchbat from Bosnia. This was so for various reasons: (i) the Dutch chief of staff of UNPROFOR headquarters served in a dual role as a representative of the UN and the Dutch government; (ii) two high-ranking Dutch military men, together with the French UN Force Commander, had taken the decision to evacuate Dutchbat and the refugees; and (iii) the Dutch Minister of Defence had given specific instructions to Dutchbat. Since the Dutch government was so closely involved in the (preparation of the) evacuation, according to the Court, it had the power to prevent Dutchbat from ordering the Bosnian men to leave the Dutchbat compound – an order which, in the Court's view, also violated UN instructions to protect refugees as much as possible.[83] Because the Dutch government allowed the men to leave the compound and failed to have them taken to a safe area – as a result of which they subsequently met their death at the hands of Mladic's men – the Court concluded that the government had acted wrongfully as far as these men were concerned.[84]

The Court of Appeal's decision in *Srebrenica* is based on an arguably correct understanding and application of the 'effective control' standard, and the preventative rationale which this standard serves. The Court inquired in detail into the factual circumstances that were present at the time, and located responsibility, at least in part, at the level of the Dutch government, given its involvement in the peace operation in Srebrenica, and the power to prevent the evacuation of the Bosnian employees. The link between the power to prevent and effective control was not explicitly made by the ILC.[85] But, as was also argued by Dannenbaum,[86] an actor's omission or failure to prevent does engage that actor's responsibility if, all things considered, it could have exercised control over the situation.

It could be gleaned from various passages in the judgment that, in the Court's view, not only the Netherlands but also the UN was to blame, possibly legally (under the effective control standard).[87] Both the Netherlands and the UN would then share international responsibility[88] – which,

control' over the conduct of Dutchbat … is to be answered on the basis of the circumstances of the case. It is not only significant in this respect to answer the question whether that conduct constituted the execution of a specific instruction given by the UN or the state, but also the question whether, failing such a specific instruction, the UN or the state had the power to prevent the conduct') (Author's own translation).

[83] *Nuhanovic* (n 81) para 5.18. The latter consideration refers to the Netherlands cutting across UN command lines, thereby engaging its own responsibility.

[84] ibid para 6.14 (stating that there is a causal link between the men's forced departure from the compound and their death); ibid para 6.20.

[85] See also André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Removal of Individuals from the Compound of Dutchbat', Comment A5 on *Nuhanovic* ILDC (n 81), 8 July 2011; available at http://www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat/#more-644.

[86] Section 2 above, text at n 15.

[87] *Nuhanovic* (n 81) para 5.9 (the Court stating that 'it is generally accepted that it is possible that more than one party can have "effective control", as a result of which it is not excluded that the application of this criterion may lead to attribution to more than one party').

[88] See also Nollkaemper (n 85).

as argued above, may reflect the command and control structure in typical UN operations. The likelihood of the UN's legal responsibility was not pursued by the Court, however, because the UN was considered to enjoy immunity.[89]As regards the more general failure of the UN with regard to the fate of all Srebrenica refugees (beyond the specific individuals mentioned in *Nuhanovic* and *Mustafic*, who, as employees of Dutchbat, had a particularly close connection with the Dutch government), one may wonder whether the UN had committed sufficient resources to the UN mission in terms of air support, etc. The possibility that the Dutch troops might have required such reinforcement, and that had more UN support been forthcoming the Srebrenica massacre could have been prevented, represent facts which are material to the allocation of responsibility. Thus, it may be submitted that, alongside the Netherlands, it is reasonable to expect that the UN also exercised control over the situation in Srebrenica, and for that reason its responsibility should be engaged.[90]

4.2 *Al Jedda*

In the immediate aftermath of *Behrami*, in 2007, the United Kingdom House of Lords decided the *Al Jedda* case, which concerned liability for violations committed against a detainee in Iraq (holding nationality of both the UK and Iraq) by UK troops who allegedly acted under UN auspices.[91] As, on the facts, Al Jedda's claim was denied,[92] he applied to the ECtHR, which decided in July 2011 that the applicant's right to liberty under Article 5(1) of the ECHR had been violated.[93]

The facts of *Al Jedda* differed considerably from the facts of *Behrami*. UN Security Council resolutions may have governed the presence of international troops (Resolutions 1511 and 1546, in particular), but this presence was clearly not a typical UN peace-support mission of which the establishment was initiated by the UN, nor were the troops deployed to support an international

[89] *Mothers of Srebrenica* (Appeal Court, The Hague) (n 30).
[90] Compare Dannenbaum (n 11) 183 (pleading joint and several liabilities in respect of Srebrenica where UN action, or the failure thereof, merely significantly obstructed compliance with the law, but did not make it impossible). See also above on 'forced omissions', and Jan Klabbers, *An Introduction to International Institutional Law* (CUP 2009) 285.
[91] *Al Jedda* (House of Lords) (n 28). In fact, in an older case (in 1970), the UK House of Lords had already heard a similar case concerning UK participation in a UN operation in Cyprus, and had ruled that UK troops involved in an international peace operation 'remain[ed] in their own national service' and 'continued … to be soldiers of Her Majesty', which is a most interesting example of a court attributing liability to a troop-contributing state: *Attorney General v Nissan* [1970] AC 179 (HL). We limit our analysis to post-*Behrami* decisions.
[92] The House of Lords decision only addressed the applicable legal regime. Following that decision, the Court of Appeal ruled that, in the circumstances, a review procedure under Coalition Provisional Authority Memorandum no 3 (Revised) provided sufficient guarantees of fairness and independence to comply with Iraqi law, and thus that his detention was not unlawful: see *Al Jedda v Secretary of State for Defence* [2010] EWCA Civ 758.
[93] *Al Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011) ('*Al Jedda* (ECtHR)'). On the same day, the Court rendered its opinion in the *Al Skeini* case, which revolved around the territorial scope of the European Convention on Human Rights: *Al Skeini v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011).

territorial administration. One may wonder, however, whether those factual differences, emphasised by both the House of Lords[94] and the ECtHR,[95] should really matter from a conceptual point of view: the relevant criterion, after all, is the exercise of effective control, not the mode of establishment of a UN peace operation. Command and control may not always be exercised in the same manner in all operations in which the UN is involved, but it is the same standard of responsibility which governs the legality of acts committed during all UN peace operations: who exercises effective control over the conduct giving rise to the violation?[96]

In spite of the UN framework within which the UK was operating – and which, in fact, allowed the UK to detain prisoners for security reasons – Lord Bingham, after analysing the factual background of the case, observed not surprisingly: 'It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.'[97] The ILC stated in its commentary to Article 7 DARIO that '[t]his conclusion [which located responsibility with the UK] appears to be in line with the way in which the criterion of effective control was intended'.[98]

The standard of responsibility on which the House of Lords' decision was based was subsequently endorsed by the ECtHR in *Al Jedda*, which also cited Article 7 DARIO in support.[99] But it is conspicuous that the ECtHR was visibly at pains to do justice to both the effective control standard of Article 7 *and* the *Behrami* ultimate control standard: it held literally that 'the United Nations Security Council had *neither effective control nor ultimate authority and control* over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations'.[100] The reference to 'ultimate authority and control' is undesirable, as explained above, but it is understandable that the Court was reluctant to set aside, given its previous – and, after all, very recent – case law. Instead, it simply opted to 'add' the effective control standard as a review standard. The coexistence of two control standards may be confusing, but it is a step forward in that the Court

[94] *Al Jedda* (House of Lords) (n 28) [24] (per Lord Bingham) ('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').

[95] *Al Jedda* (ECtHR) (n 93) para 83 ('The Court agrees with the majority of the House of Lords that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999. The comparison is relevant, since in the decision in *Behrami and Saramati* (cited above) the Court concluded, *inter alia*, that Mr Saramati's detention was attributable to the United Nations and not to any of the respondent States').

[96] cf Milanovic and Papic (n 71) 292 (suggesting that *Al Jedda* and *Behrami* could *not* be distinguished conceptually).

[97] *Al Jedda* (House of Lords) (n 28) [23].

[98] Commentary (12) to art 7, DARIO 2011 (n 1).

[99] *Al Jedda* (ECtHR) (n 93) para 84. The judgment still refers to art 5 of one of the previous DARIO versions.

[100] ibid (emphasis added).

seems at least to have understood the true meaning of Article 7 DARIO (without, however, going as far as to refer *Behrami* to the dustbin of history).[101]

The semantic question remains, however, whether the abstract standards of 'ultimate' and 'effective' control really capture different situations. The national force commander of a peacekeeping or peace-enforcement contingent may have effective control over its troops, but lack the power to make any major strategic decisions if the UN commander is endowed with that power. In that case, the UN may be said to exercise ultimate and effective control. Ultimately, the locus of responsibility – and the control standard used to identify that locus – should be where decisions affecting the enjoyment of rights are taken. The ECtHR in *Behrami* may then perhaps not have adopted the wrong control standard, but simply wrongly applied it.

Because the UK exercised effective and/or ultimate control over its troops in Iraq, it was the liability of the UK rather than that of the UN that was engaged.[102] Therefore, the fact that UK troops acted under the auspices of the UN in Iraq in no way removed the UK troops' own obligations under international human rights law *vis-à-vis* individuals over whom they exercised effective control. The question then arose, however, whether the UK may not have been under an *obligation* to intern Al Jedda pursuant to UNSC Resolution 1546.[103] This issue – which concerns the relationship between UN Security Council action and human rights obligations – will not be further dealt with here, as it is a primary rule question rather than a secondary one with which this article is concerned.

4.3 *MUKESHIMANA*

A third decision that correctly applied the effective control standard is the Belgian *Mukeshimana* interim decision (2010) rendered by a first instance civil court in Brussels.[104] This decision, regarding the apportioning of responsibility between the UN and Belgium for the failure of Belgian UN peacekeepers to prevent a massacre in Rwanda in 1994, emphasises the *operational* character of effective control and, unlike the Dutch *Srebrenica* decision, admits that *in reality*, in the midst of a UN peace operation (in this case MINUAR, the UN Mission for Assistance in Rwanda), as a result of the chaotic conditions in the field and corresponding communication problems, UN effective command and control over national troop contingents may shift to the troop-contributing state. In that case, the state is to be held responsible if wrongful acts were committed.

Mukeshimana is the first – interim – judgment in a tort case brought before a Belgian court against the Belgian state (and a number of Belgian commanders) by victims of the massacre following their evacuation from the compound where they had sought refuge. The court accepted the plaintiffs' argument that control over the troops stationed at the compound no longer rested

[101] In fact, in the entire paragraph 83 of the judgment, the Court *defends* the application of the ultimate control and authority standard it espoused in *Behrami*, at least with respect to the facts of that case.
[102] *Al Jedda* (ECtHR) (n 93) paras 85–86.
[103] ibid para 101.
[104] *Mukeshimana and Others v Belgian State and Others*, Case no RG 04/4807/A and 07/15547/A (Brussels Court of First Instance, 8 December 2010) (on file with the author), ILDC 1604 (BE 2010).

with MINUAR but was placed under the exclusive responsibility of the Belgian state. Examining the operational circumstances surrounding the peacekeeping operation in great detail, the court made it clear that it is immaterial whether command and authority over the UN peace operation may initially have been understood to rest with the UN commander. What is relevant is who, in the midst of the events unfolding, was *actually* exercising authority over the troops. In Rwanda, the MINUAR troops based at the compound were under the authority of the national force commander who consulted the Belgian army's chief of staff and not the UN commander.[105] Accordingly, responsibility for any internationally wrongful acts committed by the Belgian MINUAR troops lay – and should indeed lie – with Belgium as the troop-contributing state, and/or the Belgian commanders.[106]

Precisely because the court inquired into who *in fact* exercised effective control and command over the troops, regardless of the actor's formal authority in the circumstances, its decision deserves considerable support in light of the control standard enunciated in Article 7 DARIO. It is unclear, however, whether this interim decision will be upheld at a later stage of the proceedings or on appeal.

5. CONCLUSION

The 2009 ILC Commentary to current Article 7 DARIO contained only a few references to state, institutional, and court practice that supported the 'effective control' standard laid down in that provision. In fact, most references *undermined* the standard. First, UN practice was cited at length,[107] but as argued above, the UN takes the view that, in principle, it always has effective control over UN troops, a view which ultimately renders Article 7 redundant. Second, the *Behrami* case, cited by the ILC,[108] was based on a standard of 'ultimate control and authority' rather than 'effective operational control'. And third, the Dutch District Court in *Srebrenica*, also cited by the ILC,[109] failed to inquire in any in-depth manner as to who actually exercised control over the Dutchbat troops, assuming, just like the UN, that all acts and omissions of UN troops should be attributed strictly, as a matter of principle, to the United Nations. In fact,

[105] *Mukeshimana*, ibid para 38 (author's own translation of the French text) ('It was clear that there was major friction between the Belgian authorities and the MINUAR, and that entire contingents of the Belgian forces *de facto* no longer fell under MINUAR authority. MINUAR's General Dallaire explicitly complained that the Belgian soldiers present at the airport and the Belgian officers no longer fell under his authority. General Dallaire also stated that authority over the Belgian blue helmets encamped at the [compound] was withdrawn from him. At no time was the concrete decision to evacuate the ETO the subject of a dialogue between [the Belgian troops] Colonel Marchal and General Dallaire. In fact, there was a permanent dialogue between Marchal and the chiefs of staff of the Belgian army, which did not hesitate to carry on regardless of consultations with the MINUAR. Therefore, the decision to evacuate the [compound] ETO was a decision taken by Belgium and not by MINUAR').

[106] Decisions on the blameworthiness of the commanders and the evaluation of the damages to be awarded were reserved for a later date; ibid para 48 *in fine*, para 52.

[107] Commentaries (6)–(9) to art 7, DARIO 2011 (n 1).

[108] ibid Commentary (8).

[109] ibid Commentary (12).

only the case of *Al Jedda* could be cited in support of Article 7 DARIO,[110] but that case was so specific – it concerned the responsibility of a state for acts carried out within the framework of a multinational military operation (Iraq) that was initially *not* authorised by the UN, and with which the UN later entertained tenuous links only – that it could hardly serve as a precedent.

Ever since, however, practice supporting the rule in Article 7 DARIO has been growing. In July 2011, the European Court of Human Rights confirmed the UK House of Lords' *Al Jedda* decision, and juxtaposed the ILC's 'effective control' standard to the *Behrami* ultimate control standard. At about the same time, The Hague Court of Appeal overruled the District Court's decision in *Srebrenica*; applying the ILC's 'effective control' standard, it held that Dutchbat's acts were attributable to the Netherlands rather than to the UN only, given the intensity of Dutch government involvement in Dutchbat. And in December 2010, a Belgian first instance court provisionally ruled that the acts of the Belgian MINUAR troops, deployed in Rwanda in 1994, were to be attributed to Belgium rather than (only) the UN, given the effective control exercised over those troops by commanders of the Belgian army rather than UN commanders.

Clearly, there is a tendency among the judiciary to apply the standard of 'effective control' as the applicable yardstick to apportion responsibility between the UN and its member states. This process may have been set in motion by the ILC's (current) Article 7 DARIO, which may in due course start to reflect customary international law.[111] From a policy perspective, this process is highly desirable, as it locates responsibility with the actor who is in a position to prevent the violation.

[110] ibid Commentary (11).

[111] Compare International Law Association, Committee on the Formation of Customary (General) International Law, Statement of Principles on the Formation of Customary (General) International Law, London Conference 2000; available at http://www.ila-hq.org/en/committees/index.cfm/cid/3.0; see Rule 30 ('Resolutions of the General Assembly can (but do not necessarily) constitute an historic ("material") source of new customary rules'); Rule 31 ('Resolutions of the General Assembly can in appropriate cases themselves constitute part of the process of formation of new rules of customary international law').