

## Behrami v. France: An Unfortunate Step Backwards in the Protection of Human Rights

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## COMMENT

*Behrami v. France: An Unfortunate Step Backwards in the Protection of Human Rights*

SADIA R. SORATHIA\*

## I. INTRODUCTION

A young child's death, caused by a forgotten land mine, brought world-wide scrutiny to the laws of international responsibility and attribution.<sup>1</sup> In this potentially shining moment for the European Court of Human Rights (Court) to establish itself as the premier champion of human rights, the Court floundered; casted, instead, as a weak judicial body, incapable of standing up to the powerful nations party to the European Convention.<sup>2</sup> The Court failed to apply generally accepted international law when it conflated two leading principles: attribution and delegation.<sup>3</sup> In creating a test that illogically held the United Nations (UN) responsible, the Court reshaped human rights protection in an unfortunate way.<sup>4</sup> This adoption of an unfounded test has deterred the advancement of international human rights law, hindered the Court's capacity to provide remedies to individuals suffering from human rights violations, and threatened the Court's reputation in human rights protection.<sup>5</sup>

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\* Managing Editor, Maryland Journal of International Law 2010-2011; J.D., University of Maryland School of Law, May 2011.

1. *See infra* Part V.F.1.

2. *See infra* Part V.F.1.

3. *See infra* Part V.C.

4. *See infra* Part V.D.

5. *See infra* Part V.F.2.

## II. THE CASE

### A. *Historical Background*

In 1998, the Kosovo independence movement took a bloody turn when the clash between Serbian and Yugoslav security forces and ethnic Albanian rebels erupted into armed conflict.<sup>6</sup> The Serbian military's refusal to end the conflict at the request of the international community forced the North Atlantic Treaty Organization (NATO) to commence air strikes on the territory then known as the Federal Republic of Yugoslavia (FRY).<sup>7</sup> The military tactics NATO employed partly consisted of dropping cluster bomb units (CBUs) on Kosovo territory.<sup>8</sup> After three months of NATO air strikes, Serbian troops agreed to withdraw from Kosovo.<sup>9</sup>

Shortly thereafter, United Nations Security Council (UNSC) Resolution 1244 required the withdrawal of Serbian troops from Kosovo and established a dual international presence, consisting of both a civil administration, run by the United Nations Mission in Kosovo (UNMIK), and a NATO led military presence (KFOR).<sup>10</sup> NATO divided KFOR into four multinational brigades (MNBs), each responsible for ensuring the security of a specific region of Kosovo.<sup>11</sup> Each MNB was commanded by a different "lead country."<sup>12</sup>

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6. Avnita Lakhani, *Finding a Peaceful Path for Kosovo: A Track Two Approach*, 7 WHITEHEAD J. DIPL. & INT'L REL. 27, 30 (2006). During the 1990s, ethnic Albanians in Kosovo struggled for independence. Serbia acted as the unofficial Kosovo government and Serbian troops carried out repressive measures in order to suppress the ethnic Albanians' movement for international recognition of an independent Kosovo state. *Id.* at 28. The Serbian attempt to quash the independence movement led to the Kosovo Liberation Army insurgency. *Id.* at 30. As a result, the Kosovo Liberation Army gained temporary control of territories within Kosovo. Serbian President Slobodan Milosevic sent Serbian troops to reclaim these territories. *Id.* This counterinsurgency led to a large-scale massacre and expulsion of ethnic Albanians from Kosovo. *Id.*

7. *Behrami v. France*, 46 I.L.M. 746, 747 (2007).

8. *Id.* at 748.

9. *Id.* at 747. Air strikes occurred from March 1999 to June 1999. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

### B. *Facts*

On March 11, 2000, eight young boys were playing in a field near their homes in the Mitrovica region of Kosovo.<sup>13</sup> As the boys were playing, they came upon an undetonated CBU, dropped by NATO in 1999.<sup>14</sup> One of the boys, thinking the CBU was a toy, threw it in the air, causing its detonation.<sup>15</sup> The explosion killed twelve year old Gadaf Behrami and severely injured and permanently disfigured his ten year old brother, Bekim Behrami.<sup>16</sup>

France led the MNB Northeast, which included Mitrovica.<sup>17</sup> Following the incident, UNMIK released an investigation report, stating that KFOR French officers knew of the undetonated CBUs months prior to the accident, and consciously labeled the undetonated CBUs as “not a high priority.”<sup>18</sup> UNMIK concluded that the death was an “unintentional homicide committed by imprudence.”<sup>19</sup>

Agim Behrami, the father of Gadaf and Bekim, petitioned to the European Court of Human Rights, complaining France violated Article 2<sup>20</sup> of the European Convention on Human Rights.<sup>21</sup> Behrami alleged that the incident occurred because French-led KFOR troops deliberately failed to defuse or mark the undetonated CBUs, despite knowing of their existence.<sup>22</sup> Behrami argued that France, and not the UN or NATO, was responsible for the failure to demine because

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13. *Id.*

14. *Id.* at 748.

15. *Id.*

16. *Id.* at 747–48.

17. *Id.* at 747.

18. *Id.* at 748.

19. *Id.* Gadaf Behrami’s autopsy confirmed that his death was a result of the multiple injuries he sustained from the CBU explosion. *Id.*

20. *Id.* at 759; *cf.* [European] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, *entered into force* June 1, 2010, E.T.S. No. 5, *available at* <http://conventions.coe.int/treaty/en/treaties/html/005.htm> [hereinafter *Convention*] (Article 2 of the European Convention on Human Rights: “Everyone’s right to life shall be protected by law.”).

21. *Behrami*, 46 I.L.M. at 759. On October 25, 2001, Agim Behrami argued to the Kosovo claims office that France violated UNSC Resolution 1244. *Id.* at 748. Kosovo rejected the allegation and Behrami then filed a complaint with the European Court of Human Rights. *Id.* at 748, 759.

22. *Id.* at 759. Behrami cannot allege that KFOR is responsible for failing to defuse CBUs because KFOR does not have a separate legal personality and cannot bear responsibility for the acts or omissions of its personnel. *Id.* at 762.

France had “effective control” of the region.<sup>23</sup> “Effective control” stemmed from the fact that France was the lead country where the accident occurred,<sup>24</sup> in addition to possessing command responsibility for the KFOR troops directly responsible for the demining operation in Mitrovica.<sup>25</sup>

France filed its rebuttal with the Court, arguing that KFOR was an international structure established by and answerable to the UN and not France.<sup>26</sup> The rebuttal asserted that the UN, and not France, had effective control of the region.<sup>27</sup> France further alleged that Behrami’s claim was not within the jurisdiction of Article 1<sup>28</sup> of the Court because the incident in question did not occur within French territory.<sup>29</sup>

The UN intervened and argued that it did not play a role in the daily operations of KFOR because daily oversight of KFOR actions was delegated to NATO and the contributing States.<sup>30</sup> The UN further argued that while the mandate to demine fell within UNMIK’s duties, KFOR collected and distributed to UNMIK the CBU information.<sup>31</sup> The UN alleged that KFOR failed to present UNMIK with information about CBUs in the Mitrovica region; therefore, the failure to demine could not be attributed to the UN because

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23. *Id.* at 761, 763.

24. *Id.* at 761.

25. *Id.* at 762. KFOR troops were directly answerable to their national commander; therefore, KFOR troops in Mitrovica took orders from their French commander. *Id.*

26. *Id.* at 768.

27. *Id.* at 760. Numerous states not associated with the litigation, such as Germany and the United Kingdom, submitted third party reports, arguing that the Court, under Article 1 of the European Court of Human Rights, did not have jurisdiction to hold France liable for the incident in question. *Id.* at 764–67.

28. *Id.* at 760. Article 1 of the European Convention on Human Rights says that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Convention, *supra* note 20, art. 1.

29. *Behrami*, 46 I.L.M. at 760. According to France, the chain of command went from KFOR, to NATO, to UNSC. *Id.* at 763. France further argues that it based its actions on directives from NATO. *Id.*

30. *See id.* at 760, 767–68.

31. *Id.* at 760. Even though UNMIK assumed de facto control of demining operations months before the accident in question, UNMIK’s de facto control did not relieve KFOR of its responsibility to engage in demining activities, such as marking and reporting the location of CBUs. *Id.* at 768.

UNMIK's actions to demine are dependent upon KFOR's distribution of accurate information.<sup>32</sup>

### III. LEGAL BACKGROUND

#### A. *Framework of the Mission*

In order to determine whether an international organization or a member-state bears the responsibility of a peacekeeping and security mission, one must first analyze the framework of the international resolutions that mandated the efforts in Kosovo, focusing on the extent of power and control granted to the participating international organizations and its member-states.

On June 9, 1999, KFOR, the Government of the Federal Republic of Yugoslavia, and the Republic of Serbia signed a Military Technical Agreement (MTA).<sup>33</sup> Article 1, section 1 of the agreement discusses deployment of international troops to Kosovo. Specifically, it provides for "effective international civil and security presences" under UN auspices.<sup>34</sup> Section 2 of article 1 asserts that an international security force (KFOR) will operate in Kosovo without hindrance and with the "authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo."<sup>35</sup>

The next day, on June 10, 1999, the MTA was presented to the UNSC, which led to the signing of UNSC Resolution 1244. The Resolution "decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences."<sup>36</sup> The

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32. *Id.* at 760, 768.

33. Military Technical Agreement Between the Int'l Security Force ("KFOR") and the Gov'ts of the Fed. Republic of Yugoslavia and the Republic of Serb., June 9, 1999, 38 I.L.M. 1217 [hereinafter Military Technical Agreement]. The MTA followed the Federal Republic of Yugoslavia's agreement to withdraw its troops from Kosovo. *Behrami*, 46 I.L.M. at 754. In response to this agreement, The Republic of Serbia agreed to suspend air operations against the FRY. *Id.*

34. Military Technical Agreement, *supra* note 33, at 1217. The MTA provided for the phased withdrawal of FRY forces and the deployment of an international security and peacekeeping presence. *Behrami*, 46 I.L.M. at 754.

35. Military Technical Agreement, *supra* note 33, at 1217. Although the MTA states that the international and security presence is under UN auspices, the document is recognized as an agreement between KFOR and the FRY and The Republic of Serbia. NATO is also a signatory. *Behrami*, 46 I.L.M. at 754.

36. S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999). The UN found the power to adopt a resolution requiring security presence in a sovereign country

Resolution also requests the Secretary-General, in consultation with the Security Council, to appoint a special representative to control the implementation of the international civil presence (UNMIK) and to coordinate closely with the international security presence (KFOR), in order to ensure that both presences “operate towards the same goals and in a mutually supportive manner.”<sup>37</sup> It further determined the responsibilities of KFOR, including ensuring public safety and supervising demining efforts when UNMIK can appropriately take over responsibility for the task.<sup>38</sup> UNMIK’s responsibilities, set forth in the Resolution, consist of performing basic civilian administrative functions for as long as required.<sup>39</sup> The Resolution requests the Secretary-General to relay reports from the leadership of the international civil and security presences to the UNSC.<sup>40</sup>

Additional responsibilities of KFOR and UNMIK were determined in various documents that followed the 1244 Resolution. Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo passed on August 18, 2000.<sup>41</sup> The regulation, in section 2, provided that KFOR was immune from jurisdiction before courts in Kosovo. Such personnel would be immune from arrest or detention from any State or organization not acting on behalf of the individual’s sending State.<sup>42</sup> The individual was subject to the exclusive jurisdiction of his or her

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under Chapter 1 and Chapter 7 of the UN Charter. U.N. Charter art. 1–2, 39–51. Chapter 1, article 1, paragraph 1 of the UN Charter states that the primary objective of the UN is to maintain international peace and security. *Id.* art. 1, para. 1. Chapter 7, Article 39 grants the UN the ability to determine the existence of any threat to international peace and make recommendations in accordance with Article 41 and 42 of the Charter. *Id.* art. 39. Article 42 states that when the measures provided for in Article 41 (economic sanctions and diplomatic relations) are inadequate, the UN has the power to take action by force as may be necessary to maintain or restore the goals provided in Chapter 1 (international peace and security). *Id.* art. 42.

37. S.C. Res. 1244, *supra* note 36, ¶ 6.

38. *Id.* ¶ 9.

39. *Id.* ¶ 11.

40. *Id.* ¶ 20. In addition to the main language of the Resolution, there are two Annexes. Annex 1 discusses the general principles regarding a political solution to the crisis in Kosovo, and Annex 2 puts forth general principles of the mission, including that the “international security presence with substantial [NATO] participation must be deployed under unified command and control.” *Id.* annexes 1–2.

41. UNMIK, On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, Reg. No. 2000/47, U.N. Doc. UNMIK/REG/2000/47 (Aug. 18, 2000).

42. *Id.* §§ 2.3–2.4.

member-state.<sup>43</sup> Further, UNMIK personnel were immune from legal process in respect to actions—verbal or physical—taken in their official capacity.<sup>44</sup>

The European Commission for Democracy through Law (Venice Commission) described the limited power the UN had over KFOR troops.<sup>45</sup> The Venice Commission stated that “KFOR, unlike UNMIK, is not a UN peacekeeping mission.”<sup>46</sup> KFOR is not a subsidiary organ of the United Nations even though it derives its mandate from UNSC Resolution 1244.<sup>47</sup> Accordingly, the actions of KFOR, even possible human rights violations, are not attributable to the UN because KFOR is not an international legal person.<sup>48</sup>

The only control the UN had over KFOR brigades was “unified command and control.”<sup>49</sup> Unified command and control is a military term that encompasses only a limited form of the transfer of power over troops.<sup>50</sup> Troop Contributing Nations (TCNs) have not transferred to the UN full control over their troops.<sup>51</sup> The structure was such that the NATO commander, acting through the UN mandate, gave operational commands to the commander of the respective national unit but not to an individual soldier.<sup>52</sup> This system allowed TCNs to preserve the power to withdraw their soldiers at any moment.<sup>53</sup> The reasoning behind such a military scheme is to ensure that TCNs retain political responsibility and control over their soldiers, while remaining compatible with the obligations of the military effort.<sup>54</sup>

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43. *Id.* § 2.4(a).

44. *Id.* § 2.3. The Secretary-General holds the right to waive immunity of UNMIK personnel in order to preserve justice. *Id.* § 6.1. The respective state’s commander, however, retains the right to waive jurisdiction over KFOR personnel. *Id.* § 6.2.

45. European Comm’n for Democracy through Law (Venice Comm’n), *Opinion on Human Rights in Kosovo*, Opinion No. 280/2004, ¶ 14, CDL-AD (2004)003 (Oct. 11, 2004) [hereinafter Venice Comm’n].

46. *Id.* ¶ 79.

47. *Id.*

48. *Id.*

49. *Id.* ¶ 14.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

The responsibilities regarding demining stem from various documents detailing the measures taken by the international effort to ensure safety in Kosovo. On June 12, 1999, the Secretary-General outlined the structure of UNMIK in a speech to the UNSC.<sup>55</sup> UNMIK was responsible for creating the United Nations Mine Action Coordination Centre (UNMACC), the primary UN organization charged with demining operations in Kosovo.<sup>56</sup> UNMACC was designed to plan mine action activities and to coordinate between KFOR, UN agencies, and international organizations.<sup>57</sup>

On August 24, 1999, UNMIK assumed responsibility for humanitarian mine action in Kosovo.<sup>58</sup> Five days later, however, KFOR announced that it remained highly involved in the demining efforts.<sup>59</sup> According to this directive, MNBs were to conduct demining tasks in accordance with a priority list provided by UNMIK and UNMACC.<sup>60</sup> KFOR conducted mission essential mine clearance, and although UNMACC assumed de facto responsibility for demining, this assumption of responsibility did not relieve KFOR of its own responsibility to support the demining mission (specifically to identify, mark, and report CBU locations).<sup>61</sup>

#### B. *Test to Determine Attribution of an Organization's Actions*

Although there is no binding law explaining when actions of an international organization are attributable to the State, there is a near consensus on how to approach the problem in the academic community.<sup>62</sup> The International Law Commission (ILC) has discussed this precise issue at considerable length, especially in its Draft Articles on the Responsibility of International Organizations.<sup>63</sup>

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55. See generally U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999)*, U.N. Doc. S/1999/672 (June 12, 1999).

56. *Id.* ¶ 12.

57. U.N. Secretary-General, *Rep. of the Secretary-General on the U.N. Interim Admin. Mission in Kosovo*, ¶ 99, U.N. Doc. S/1999/779 (July 12, 1999).

58. *Behrami v. France*, 46 I.L.M. 746, 758 (2007).

59. *Id.*

60. *Id.*

61. *Id.* at 758–59.

62. See generally Marko Milanović & Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law*, 58 INT'L & COMP. L.Q. 267 (2009).

63. See generally Rep. of the Int'l Law Comm'n, 59th Sess., May 7–June 5, July 9–Aug. 10, 2007, U.N. Doc. A/62/10; GAOR, 62d Sess., Supp. No. 10 (2007)

Article 5 of the draft articles proposes a test that puts forth a method of determining whether a State or an international organization is responsible for actions that occurred during a mission orchestrated by the international organization. The test put forth in draft article 5 is: “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 the conduct.”<sup>64</sup>

Commentary in draft article 5 is provided to help define effective control. Draft article 5 describes effective control as “factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.”<sup>65</sup> “Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent.”<sup>66</sup> The degree of control the State possesses over its troops is, therefore, the relevant factor in determining whether troop misconduct is attributable to the State.<sup>67</sup>

The ILC in draft article 7 of the Responsibility of International Organizations puts forth the notion that more than one State or international organization can retain effective control over the troops. The commentary for article 7 provides that although dual attribution may not occur often in practice, “attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization.”<sup>68</sup>

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[hereinafter 2007 ILC Report]. The ILC’s ability to interpret international law comes from the United Nations Charter, Article 13(1)(a) and U.N. Resolution 174. “The General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law.” U.N. Charter art. 13(1). Resolution 174 established the International Law Commission. G.A. Res. 174 (II), U.N. Doc. A/RES/174(II) (Nov. 21, 1947).

64. 2007 ILC Report, *supra* note 63, drft. art. 5 (emphasis added). The most recent revision of the draft articles rennumbers draft article 5 as draft article 6. *Compare id.*, with Rep. of the Int’l Law Comm’n, 61st Sess., May 4–June 5, July 6–Aug. 7, 2009, drft. art. 6, U.N. Doc. A/64/10, 21; GAOR, 64th Sess., Supp. No. 10 (2009).

65. 2007 ILC Report, *supra* note 63, drft. art. 5 cmt. 3.

66. *Id.* drft. art. 5 cmt. 6.

67. *Id.* drft. art. 5 cmt. 7.

68. *Id.* drft. art. 7 cmt. 4.

Although the international community overwhelmingly believes that the issue of State responsibility should be determined by whether the actions are *attributable* to the State, the European Court of Human Rights and a minority of international scholars believe that the question should be whether the power was *delegated* to the State. Danesh Sarooshi, in his book *The United Nations and the Development of Collective Security*, asserts that the “delegation must be sufficiently limited . . . for the acts of the delegate entity to be attributable to the UN.”<sup>69</sup> His writings put forth a new test that analyzed whether the international organization or the State exercised “overall authority and control over the forces.”<sup>70</sup>

Sarooshi’s book asserts that the foundation for this rule can be found in article 5 of the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (State Responsibility).<sup>71</sup> Draft article 5 of State Responsibility purports that “conduct of an entity. . . [that] is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law.”<sup>72</sup> According to Sarooshi, article 5, when applied to the context of international organizations and troop misconduct, renders an organization responsible even when it delegates some of the powers in question to a State.<sup>73</sup> He further argues that for a delegation to be lawful, the UN must at all times

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69. *Behrami v. France*, 46 I.L.M. 746, 770 (2007).

70. DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* 163 (Ian Brownlie ed., 1999); *see also* 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*, 11 INT’L CMTY. L.R. 155, 169 (2009). This test was proposed prior to draft article 5. 2007 ILC Report, *supra* note 63, drft. art. 5.

71. SAROOSHI, *supra* note 70, at 164 n.85. Sarooshi finds foundation for his argument in then article 7(2) of the ILC draft article, which is now known as draft article 5. Milanović & Papić, *supra* note 62, at 284 n.69.

72. *Responsibility of States for Internationally Wrongful Acts*, Int’l Law Comm’n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, drft. art. 5, U.N. Doc. A/CN.4/L.602/Rev.1 (July 26, 2001) [hereinafter *Responsibility of States*].

73. *See* SAROOSHI, *supra* note 70, at 165.

The acts of forces authorized by the Council are attributable to the UN, since the forces are acting under UN authority. . . . The importance of this position is that it iterates the fact that the forces are carrying out military enforcement action of an international nature under the overall control of the Council.

*Id.* *See also* Milanović & Papić, *supra* note 62, at 284.

retain “overall authority and control” over the exercise of the delegated powers.<sup>74</sup> This, Sarooshi claims, is the foundation for his delegation theory.

#### IV. THE COURT’S REASONING

The Court puts forth a control test to determine whether France or the UN was responsible for the demining mission.<sup>75</sup> The Court’s test is “whether the UNSC retained ultimate authority and control so that operational command only was delegated.”<sup>76</sup> In order for the UN to retain “ultimate authority and control,” the delegation of UNSC powers to France “must be sufficiently limited.”<sup>77</sup> If the delegation of UN powers to France was sufficiently limited, then the UN was responsible for failing to demine and thus liable for Behrami’s death.<sup>78</sup> In determining that the UN possessed ultimate authority and control over the mission, the Court concluded that the UN held the mandate to demine and the troop’s inaction was attributable to the UN.<sup>79</sup>

##### A. Which Entity held the Mandate to Demine?

Article 9(e) of UNSC Resolution 1244 stated that KFOR retained responsibility for leading the demining mission until UNMIK established a UN demining organization to take over.<sup>80</sup> Such an organization (UNMACC) was established by October 1999,<sup>81</sup> well before the detonation in question in this case. The Court reasoned that after the transfer of power, KFOR remained involved in demining projects; however, its actions were no longer independent but rather were taken on behalf of UNMIK.<sup>82</sup>

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74. SAROOSHI, *supra* note 70, at 34 (“[T]he Council must at all times retain overall authority and control over the exercise of delegated Chapter VII powers”); Kjetil Mujezinović Larsen, *Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test*, 19 EUR. J. INT’L L. 509, 521 (2008).

75. Behrami v. France, 46 I.L.M. 746, 770 (2007).

76. *Id.*

77. *Id.* (citing SAROOSHI, *supra* note 70).

78. *Id.*

79. *Id.* at 768–69.

80. *Id.* at 769.

81. *Id.*

82. *Id.*

B. *Could the Impugned Inaction Be Attributed to the UN?*

UNSC Resolution 1244 granted the UN the ability to establish and command an international security presence.<sup>83</sup> Acting pursuant to this power, the Court believed the UN delegated its authority to participating member-states.<sup>84</sup> Actions of member-states are attributable to the UN only if the UN did not release—but only delegated—its powers to the participating States.<sup>85</sup> Even though KFOR did not properly assist UNMIK with the demining efforts<sup>86</sup> when it both failed to secure the site and provide vital information to UNMIK regarding which territories needed to be demined,<sup>87</sup> the Court determined that this misconduct was attributable to the UN because the UN merely delegated its powers, leaving UNMIK in ultimate control of the mission.<sup>88</sup>

The Court argued that the UN created a chain of command that provided KFOR with control over the member-states, while remaining subservient to the UN.<sup>89</sup> At the bottom of the chain are MNBs, who are commanded by lead officers from a TCN, such as France.<sup>90</sup> NATO devised an operational plan, which allowed it to directly command the TCN through KFOR. The UN intended that NATO's command of operational matters would be effective and not exclusive. The Court reasoned that since this operational plan was not exclusive, the UN possessed ultimate control.<sup>91</sup> The Court further argued that TCN involvement was not incompatible with NATO possessing effective operational control.<sup>92</sup> The Court concluded that the UN retained ultimate authority since only effective command was delegated and thus, any inaction regarding demining was attributable to the UN.<sup>93</sup>

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83. *Id.*

84. *Id.*

85. *Id.* at 770.

86. *Id.* at 769.

87. *Id.*

88. *Id.* at 770.

89. *Id.*

90. *Id.* at 771.

91. *Id.*

92. *Id.*

93. *Id.* at 772.

## V. ANALYSIS

In *Behrami v. France*, the European Court of Human Rights held that the failure to demine certain areas in Kosovo was attributable to the UN and not France because the UN retained ultimate authority and control over the demining regulation.<sup>94</sup> In so holding, the Court improperly conflated two distinct legal theories in international law, resulting in a new test for international attribution that departed from the standard established by leading international scholars and created a negative impact on public policy. Had the Court applied the test that the overwhelming majority of international scholars support, the Court would have concluded that the failure to demine was attributable to France and not the UN. Further, had the Court adopted the correct test for this situation, the Court would have been given the opportunity to find that the actions were attributable to all the actors (NATO, UN, and France) under the theory of dual or multiple attribution. By adopting a test that does not have roots in international attribution, the Court not only created for itself a backlash against its ability to handle such cases, it also scarred its reputation as a fair and unprejudiced arbitrator.

A. *Delegation Theory Does Not Apply to Situations of International Responsibility*

The foundation of the Court's improper holding lies in the phrasing of the issue. The Court framed the issue as whether the Security Council retained "ultimate authority and control" over the international security presence as was necessary to render the delegation of its powers lawful under the UN Charter.<sup>95</sup> In order to determine what constituted the necessary international security presence to render its powers delegated, the Court put forth its own test. The Court stated that "any delegation of authority by the [Security] Council must be sufficiently limited to assure that the acts of the delegated entity are attributable to the United Nations."<sup>96</sup> The root of the Court's illogical reasoning stems from this test.<sup>97</sup> The

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94. *Id.* at 769–73.

95. Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUM. RTS. L. REV. 151, 164 (2008) (citing *Behrami v. France*, 46 I.L.M. 746, 771 (2007)).

96. Pierre Bodeau-Livinec et al., *International Decisions: Behrami & Behrami v. France; Saramati v. France, Germany & Norway*, 102 AM. J. INT'L L. 323, 328 (2008).

97. Sari, *supra* note 95.

notion of “ultimate authority and control” and “delegation” is not a theory the Court adopted based on precedent or international law.<sup>98</sup> It is language taken from one piece of academic literature that focuses on the delegation of power rather than the attribution of responsibility.<sup>99</sup>

By adopting this test, the Court conflated two leading principles of international law: attribution and delegation. The central issue of this case deals with attributing the acts of a nation-state to an international organization—the United Nations. The issue of whether the United Nations sufficiently rendered their delegable powers to the State should never have been considered. The Court’s decision to use the delegation test rather than the internationally accepted attribution test stemmed from Danesh Sarooshi’s book on collective security.<sup>100</sup> Sarooshi relies upon draft article 5 of State Responsibility, which states that “conduct of an entity . . . [that] is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law.”<sup>101</sup> From this language, Sarooshi reasons that the “delegation must be sufficiently limited. . . for the acts of the delegate entity to be attributable to the United Nations.”<sup>102</sup> Accordingly, Sarooshi concludes that the appropriate test is whether the international organization or the State exercised “overall authority and control over the acts of the forces.”<sup>103</sup>

This test does not stem from ILC’s Draft Articles of International Responsibility nor does it find support in the Court’s jurisprudence.<sup>104</sup> The Court simply assumes that Sarooshi’s delegation model is the proper way of approaching the issue of

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98. See generally Breitegger, *supra* note 70; Heike Krieger, *A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights*, 13 J. INT’L PEACEKEEPING 159 (2009); Christopher Leck, *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct*, 10 MELB. J. INT’L L. 346 (2009); Bodeau-Livinec et al., *supra* note 96; Milanović & Papić, *supra* note 62.

99. See sources cited *supra* note 98.

100. *Behrami v. France*, 46 I.L.M. 746, 770 (2007).

101. *Responsibility of States*, *supra* note 72.

102. *Behrami*, 46 I.L.M. at 770 (citing SAROOSHI, *supra* note 70, at 35 (“[T]he council cannot delegate to Member-states an unrestricted power of command and control. . . . [T]he Council must at all times retain overall authority and control over the exercise of its delegated Chapter VII powers”)).

103. SAROOSHI, *supra* note 70, at 165.

104. Krieger, *supra* note 98, at 167.

whether the UN or the States had authorization to demine in Kosovo<sup>105</sup> without first explaining why delegation was the proper test or why the internationally supported attribution model should not apply to this case.<sup>106</sup>

The critical problem with the Court's adoption of Sarooshi's delegation theory is that Sarooshi "thinks of international organizations as if they were States."<sup>107</sup> He believes that the same rationale behind the Articles of State Responsibility can equally apply to the responsibility of international organizations.<sup>108</sup> Sarooshi fails to address that it is the States who set up international organizations and that it is through States that the international organization may act.<sup>109</sup> At no point does Sarooshi or the Court explain why UN responsibility should be analyzed in the framework of the delegation theory.<sup>110</sup> Nor does Sarooshi provide an explanation for why the ILC's Draft Articles on State Responsibility should even apply to the question of UN responsibility.<sup>111</sup>

Because the Court applied the wrong test, the Court reached a troublesome conclusion. The Court held that Resolution 1244 was a delegation of the Security Council's powers to KFOR.<sup>112</sup> The Court concluded that any act KFOR performed pursuant to its delegated powers is thus attributable to the UN.<sup>113</sup> Instead, the Court should have asked if the Security Council exercised effective control over the troops so as to render the failure to demine attributable to the UN.<sup>114</sup> Had the Court applied the effective control test found in draft article 5 of International Responsibility, the Court would have arrived at the correct conclusion that the failure to demine was attributable to France.

### B. *ILC Draft Articles and Its International Support*

The crux of the *Behrami* case is the issue of attribution and whether an international organization or the nation-state was

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105. Milanović & Papić, *supra* note 62, at 278.

106. *Id.* at 281–84.

107. *Id.* at 281.

108. *Id.*

109. *Id.* at 285.

110. *Id.* at 281.

111. *Id.* at 281; 2007 ILC Report, *supra* note 63.

112. *Behrami v. France*, 46 I.L.M. 746, 769 (2007).

113. *Id.* at 773.

114. Sari, *supra* note 95.

responsible for the failure to demine. Since the international rules of responsibility govern the attribution of internationally wrongful conduct to an international organization,<sup>115</sup> the Court should have applied the ILC's effective control test.

Although the Articles on Responsibility of International Organizations are only in the drafting phase, the ILC has provisionally adopted the articles.<sup>116</sup> Even though the articles are not a definitive statement on international law, the ILC's work on the responsibility of international organizations is nonetheless a valuable guide<sup>117</sup> on how to approach the issue of attribution when dealing with international organizations and nation-states. The draft articles of international responsibility have already gained large support in the international community; and a number of international and national tribunals,<sup>118</sup> such as the UN and the ICJ,<sup>119</sup> have invoked draft article 5.

Draft article 5 states that the conduct of a State placed at the disposal of an international organization shall be considered under international law an act of the international organization if the international organization exercised *effective control* over the conduct.<sup>120</sup> Commentary in draft article 5 describes effective control as factual control that is exercised over specific conduct.<sup>121</sup> Attribution of misconduct to the State is clearly linked with the State's retention of some power over its national contingent.<sup>122</sup>

A presumption against the international organization is incorporated into the ILC draft articles.<sup>123</sup> As part of the ILC design, there is a presumption that the misconduct of a UN peacekeeping operation is attributable to the UN.<sup>124</sup> The presumption may be rebutted, provided that the international organization can prove, with particular conduct, that the nation-state rather than the international organization exercised effective control.<sup>125</sup> In order to attribute

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115. *Id.* at 163.

116. Leck, *supra* note 98, at 348.

117. Sari, *supra* note 95, at 163.

118. Leck, *supra* note 98, at 346.

119. *Id.* at 348–49.

120. 2007 ILC Report, *supra* note 63, drft. art. 5.

121. *Id.* drft. art. 5 cmt. 3.

122. *Id.* drft. art. 5 cmt. 6.

123. Breitegger, *supra* note 70, at 159.

124. *Id.*

125. *Id.*

misconduct to a participating nation-state, the international organization must provide specific instances of misconduct that occurred while the State retained effective control over the troops.<sup>126</sup>

The State's retention of power over its troops is the key to determining attribution.<sup>127</sup> If the misconduct was executed as a result of instructions from the participating State, rather than the direction and control of the international organization, the conduct will be attributed to the State.<sup>128</sup> Actions of the troops are not attributable to the international organization so long as the participating troops remain under the control of the nation-state, in respect to deployment and conduct.<sup>129</sup>

### C. *Conflation of International Law Principles: Delegation and Attribution*

Not only did the Court fail to apply the appropriate ILC test with respect to the attribution of the misconduct to the UN, the Court applied the Sarooshi test incorrectly. The Court began its reasoning of attribution by putting forth Sarooshi's delegation method.<sup>130</sup> The Court then conflated the international theories of attribution and delegation by applying the ILC effective control test to NATO in order to conclude that the UN sufficiently delegated its authority.<sup>131</sup> Had the Court began and ended its analysis on NATO's effective control, the Court would have correctly applied the appropriate test and come to a reasonable conclusion.

In its reasoning, the Court states that in order to attribute the troops demining misconduct to the UN, the UN must have "ultimate authority and control" over the demining mission so as to have

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126. Leck, *supra* note 98, at 348 ("[T]he effective control test is not applied generally to the overall conduct of the organ, but rather to each specific unlawful act, in order to verify if the act in question of the organ was performed under the control of the [international organization] or the sending state.") (quotations and footnote omitted).

127. *Id.* ("If the unlawful act was executed on the instructions of the sending state, the conduct should be attributed to the state. If carried out on the direction and control of the [international organization], the act should be imputed to the [international organization].") (footnote omitted).

128. *Id.*

129. Krieger, *supra* note 98, at 166.

130. *Behrami v. France*, 46 I.L.M. 746, 770 (2007).

131. *See id.* at 769–73.

delegated limited authority to the troops.<sup>132</sup> After discussing Sarooshi's theory of delegation in relation to the UN and the demining mission, the Court concluded that the UN had ultimate authority and control over the demining mission because NATO had effective control over the troops.<sup>133</sup> By analyzing both delegation and attribution in order to determine that the UN was responsible for demining, the Court unreasonably conflated the two theories. At no time during the Court's analysis did it explain how or why it conflated the theories of delegation and attribution.<sup>134</sup> The Court both failed to explain on what grounds the conflation of international law was justified and why NATO's effective control was even relevant to the UN's attribution.

By conflating the theory of delegation and attribution, the Court failed to comply with established international law and theory.<sup>135</sup> Further, the Court's reasoning was nonsensical because it determined that NATO's effective control of the troops was relevant in the analysis of whether the UN retained ultimate authority and control after delegating sufficiently limited power to the troops.<sup>136</sup> It was the UN's—and not NATO's—effective control that should have been dispositive. By failing to explain this leap in reasoning, the Court's conclusion that the misconduct was attributable to the UN lost significant credibility.<sup>137</sup>

#### D. Attribution of Demining Misconduct in International Law

Because the Court conflated leading legal theory and made illogical jumps in reasoning without explanation or justification, the conclusion that the demining misconduct is attributable to the UN is incorrect. In order to determine whether the misconduct is attributable to France, the UN, or NATO, one must apply the ILC draft article effective control test, as it is the leading legal theory on attribution in international law.

The Court concluded that the demining misconduct was not attributable to France based on UN Resolution 1244, which

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132. *Id.* at 768–71

133. *Id.* at 772.

134. *See generally id.* at 769–73.

135. *See infra* Part V.C.

136. *See infra* Part V.D.

137. *See infra* Part V.F.

authorized the peacekeeping mission in Kosovo.<sup>138</sup> Resolution 1244 stated that KFOR was responsible for the supervision of demining until the UN civil presence, UNMIK, could take over.<sup>139</sup> Because KFOR is not an international legal person, demining misconduct cannot be attributable to it under international law.<sup>140</sup> The Court, therefore, had the option of attributing the conduct to the UN, France, or NATO. The Court concluded that at the time a land mine killed Behrami in Kosovo, UNMIK had taken responsibility for demining from KFOR.<sup>141</sup>

This conclusion is unjustified, as there was not convincing evidence that, at the time in question, UNMIK had effective control over the mandate to demine.<sup>142</sup> Although UNMIK assumed responsibility for the demining mission, KFOR announced that it remained highly involved in the efforts.<sup>143</sup> Because KFOR assumed de facto responsibility for the demining mission,<sup>144</sup> Resolution 1244's demining mandate to UNMIK is not dispositive, as the real question for attribution is whether UNMIK had effective control over the mission and not whether it had a mandate from the UN.

The ILC Report of 2004 states that actions of military forces provided by nation-states are not attributable to the UN when the UNSC authorizes States to take necessary measures outside UN chain of command.<sup>145</sup> Meaning that, in international law, an act committed outside the chain of command is attributable to the State.<sup>146</sup> "Command is the essence of effective control, and this is something that the [UN] most certainly did not exercise in relation to KFOR" troops.<sup>147</sup> The UN clearly distinguished between UNMIK and KFOR

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138. *See Behrami*, 46 I.L.M. at 773.

139. S.C. Res. 1244, *supra* note 36, ¶ 9(e).

140. Milanović & Papić, *supra* note 62, at 287–88 (citing Venice Comm'n, *supra* note 45, ¶ 79); *see also* Krieger, *supra* note 98, at 164 n.19.

141. *Behrami*, 46 I.L.M. at 772. The Court concluded that UNMIK had the mandate to demine without further examination of the nature or content of the obligation. Bodeau-Livinec et al., *supra* note 96, at 327.

142. Bodeau-Livinec et al., *supra* note 96.

143. *Behrami*, 46 I.L.M. at 758.

144. *Id.* at 758–59.

145. Rep. of the Int'l Law Comm'n, 56th Sess., May 3–June 4, July 5–Aug. 6, 2004, drft. art. 5 cmt. 5, U.N. Doc. A/59/10, 102; GAOR, 59th Sess., Supp No. 10 (2004) [hereinafter 2004 ILC Report].

146. Sari, *supra* note 95, at 166.

147. Milanović & Papić, *supra* note 62, at 286.

and provided for separate control structures.<sup>148</sup> The UN chose to authorize member-states to deploy forces rather than to establish a UN operation with UN troops.<sup>149</sup> Requiring periodic submissions of reports regarding demining activities was the only means by which the UN exercised some control over KFOR.<sup>150</sup> This, however, does not equate to effective control because UNMIK was entirely dependent upon the States' troops for these submissions regarding the sites of land mines in Kosovo.<sup>151</sup>

The fact that the demining conduct did not occur on a TCN's territory does not decisively rule out State attribution.<sup>152</sup> The contributing States' retention of substantial powers over their troops is evidence that the States had effective control over the demining conduct.<sup>153</sup> Troops fell within the exclusive jurisdiction of their nation-state for civil and criminal matters. KFOR was immune from UN detention and arrest, and only the States and not the individual retained the right to waive this immunity.<sup>154</sup> Additionally, each nation established and followed individual rules of engagement.<sup>155</sup> Deployment decisions and the financing of the troops were solely national decisions,<sup>156</sup> and soldiers wore national uniforms with their national flags.<sup>157</sup> Further, States were financially liable for damage caused by the troops.<sup>158</sup>

Most importantly, KFOR troops were directly answerable to their national commander.<sup>159</sup> The soldiers were allowed to refuse to

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148. *Behrami v. France*, 46 I.L.M. 746, 769–70 (2007); *see also* Krieger, *supra* note 98, at 164.

149. Larsen, *supra* note 74, at 525.

150. Sari, *supra* note 95, at 165.

151. Breitegger, *supra* note 70, at 165–66 (“[I]n the absence of [information from KFOR, UNMIK] . . . could not take any action to demine.”).

152. Krieger, *supra* note 98, at 175.

153. Milanović & Papić, *supra* note 62, at 286.

154. *Id.*

155. *Id.* Although KFOR had its own rules of engagement, each nation's interpretation of these rules varied. Breitegger, *supra* note 70, at 170–71. The individual states examined NATO's proposed rules of engagement and individually determined whether the rules were in alignment with national standards. Krieger, *supra* note 98, at 172.

156. Milanović & Papić, *supra* note 62, at 286.

157. Krieger, *supra* note 98, at 172. The national flags were worn along with the NATO flag. *Id.* at 173.

158. *Id.* at 173.

159. Milanović & Papić, *supra* note 62, at 286.

perform an order if it conflicted with the individual State's national objectives and interests.<sup>160</sup> Although KFOR issued directives, the troops only acted on their national commander's specific orders.<sup>161</sup> If a human rights violation were to occur through KFOR actions, the participating nation-states were undoubtedly in the position to prevent or respond to such a violation.<sup>162</sup> The nation-state could make a national order preventing the troops from participating in such a human rights violation. Such an extent of State power over the competency of the soldiers constitutes a decisive degree of effective control over the troops.<sup>163</sup>

#### E. *Possibility of Dual Attribution*

The Court failed to address the possibility that the demining misconduct could be attributed to more than one actor.<sup>164</sup> ILC draft article 7 of the Responsibility of International Organizations put forth the notion of dual attribution.<sup>165</sup> Such a situation allows for the possibility that more than one State and/or international organization can retain effective control over troops in an international mission.<sup>166</sup>

The Court could have adopted the Venice Commission's opinion that demining, at least in part, may have been attributable to NATO.<sup>167</sup> The Venice Commission likely came to this conclusion because "unified command and control" was not placed with UN commanders, but rather, it rested with NATO and national officials.<sup>168</sup> The chain of command used by the Court to establish attribution to the UN in reality illustrates the possibility of NATO effective control over the demining mission.<sup>169</sup> The national commanders were to take actions in accordance with a plan NATO

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160. Breitegger, *supra* note 70, at 171 (noting that "any troop contributing country" could refuse to carry out a given order if it conflicted with national objectives).

161. Krieger, *supra* note 98, at 170–71.

162. Larsen, *supra* note 74, at 520.

163. *Id.* at 173.

164. *See* Behrami v. France, 46 I.L.M. 746, 769–73 (2007).

165. 2007 ILC Report, *supra* note 63, drft. art. 7.

166. *Id.*

167. *See* Krieger, *supra* note 98, at 170.

168. *See id.* at 168.

169. *Id.*

devised.<sup>170</sup> The troops operated under the authority and were subject to the political direction of the NATO chain of command.<sup>171</sup> Even though individual nations have their own rules of engagement, these rules were subject to the approval of NATO.<sup>172</sup> Although the national leaders held effective control over the troops, NATO likely shared effective control through the theory of dual attribution.

F. *The Court's Decision Has Deterred the Advancement of International Human Rights Law*

When the Court improperly conflated the principles of delegation and attribution, it severely hampered the progression of international human rights law, removed itself as an effective judicial body in the protection of human rights, and damaged its reputation within the international community.

1. Impeding the Progression of International Human Rights Law

By carelessly conflating established international principles, the Court damaged the legitimacy of the ILC's draft articles on international responsibility. The Court's application of an unsupported test complicated the progression and universal adoption of the ILC draft articles.<sup>173</sup> Because European national courts defer to the European Court of Human Rights, other courts may adopt the Court's legally unfounded test.<sup>174</sup> The Court's decision prevents the progression of international human rights law because now States can have it both ways; States can retain effective control over their forces, while simultaneously denying liability for the misconduct of their

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170. *Id.* at 168–69 (quoting *Behrami v. France*, 46 I.L.M. 746, 771 (2007) (“MNB action was to be taken according to an operational plan devised by NATO and operated by . . . KFOR.”)).

171. *Id.* at 168.

172. *See id.* at 172.

173. Sari, *supra* note 95, at 170.

174. Naina Patel, *Al-Jedda v. SSD: Who is Responsible for British Troops Abroad?*, BLACKSTONE CHAMBERS (Mar. 1, 2008), <http://www.blackstonechambers.com/document.rm?id=256>. In *Al-Jedda v. SSD*, the House of Lords was asked to determine whether the actions of British troops operating as a multinational force in Iraq are attributable to the British government or to the UN. *Id.* Since the European Court of Human Rights addressed this question in *Behrami v. France*, the House of Lords adopted an analogous conclusion. *Id.* The Lordship's argument prior to the release of the *Behrami* decision refers to the “effective control” test. *Id.* However, the House of Lords eventually adopted *Behrami's* “ultimate authority and control” test. *Id.*

troops because the Court determined that such actions are solely attributable to the UN.<sup>175</sup> Allocating responsibility to the UN, instead of where responsibility actually lies, may encourage the troops to participate in reckless conduct for which they will not bear responsibility.<sup>176</sup>

## 2. European Court of Human Rights is now an Ineffective Judicial Body in the Protection of Human Rights

In addition to preventing the progression of international human rights law, the Court failed to protect the dignity of human rights in international peacekeeping missions, a goal it was tasked to uphold. Holding that States, even with effective control over their troops, are not accountable for troop misconduct, the Court created a void in the realm of human rights protection.<sup>177</sup> In light of this decision, States will no longer fear that they must answer to the European Court of Human Rights for troop misconduct.<sup>178</sup> The Court has sent a clear message to States that they can escape punishment for human rights violations so long as they shield themselves behind an illusion of working under the control of an international organization.<sup>179</sup> By failing to attribute the misconduct to the States, the Court missed an important opportunity to advance the protection of human rights.<sup>180</sup> This case has established an unfortunate precedent in assigning responsibility<sup>181</sup> and created a “legal black hole over which there is no independent human rights supervision.”<sup>182</sup>

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175. Milanović & Papić, *supra* note 62, at 289.

176. Leck, *supra* note 98, at 363.

177. Sari, *supra* note 95, at 166.

178. Stephanie Farrior, *Introductory Note to Behrami and Behrami v. France and Saramati v. France, Germany & Norway*, 46 I.L.M. 743, 744 (2007).

179. Milanović & Papić, *supra* note 62, at 268.

180. Krieger, *supra* note 98, at 159.

181. Boudeau-Livinec et al., *supra* note 96, at 326 (“[T]he decision arguably reflects a debatable interpretation” of the United Nations Charter and the ILC Draft Articles); *see also id.* at 328 (“[T]he Court seems to base its reasoning on a questionable assumption” that may have “significant implications for the United Nations and the fulfillment of its functions.”); *id.* at 330 (“Notwithstanding the potential drawbacks of such a judicial approach, the Court’s reasoning . . . has already been adopted in a number of other judicial decisions.”); Sari, *supra* note 95, at 170 (“More importantly, *Behrami* . . . sets the wrong precedent for the protection of human rights in peace support operations.”).

182. Milanović & Papić, *supra* note 62, at 295. The Court has already used this case to dismiss several allegations of human rights violations in Kosovo. *Id.*

If States insist on retaining control over aspects of international operations, then it is only logical for human rights responsibility to follow.<sup>183</sup> Individuals who have suffered because of misconduct during a peacekeeping operation usually have only limited legal options available to them. This case has now removed the European Court of Human Rights as a valuable source for human rights remedies.

### 3. Damage to the European Court of Human Rights' Reputation

The Court, by holding that it would not attribute misconduct to the States, removed itself as the likely forum to hear lawsuits regarding international peacekeeping operations.<sup>184</sup> It is no longer realistic to believe that the European Court of Human Rights will provide an effective remedy to individuals harmed by misconduct in peacekeeping missions.<sup>185</sup> It is not unreasonable for the international community to expect an international judicial body to demonstrate greater competence in applying the rules of international responsibility.<sup>186</sup> The Court's decision to protect the States instead of protecting the victims of human rights violations damages its credibility.<sup>187</sup> By carelessly manipulating the laws of international responsibility to fit the Court's agenda, the Court has, in effect, rendered itself irrelevant in resolving international peacekeeping disputes.<sup>188</sup>

## VI. CONCLUSION

In holding that the death of an innocent child due to the failure to demine was attributable to the UN and not to France, the Court misinterpreted and inappropriately applied established international law.<sup>189</sup> This departure has impeded the development and universal acceptance of the ILC's draft articles of international responsibility, portrayed the Court as a judiciary unwilling and unable to apply

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183. Larsen, *supra* note 74, at 529.

184. Farrior, *supra* note 178.

185. Breitegger, *supra* note 70, at 157.

186. Sari, *supra* note 95, at 169.

187. *See* Krieger, *supra* note 98, at 161. This decision also harms the credibility of future peacekeeping missions because participating states will not share in the responsibility to uphold international law. *Id.*

188. Larsen, *supra* note 74, at 531.

189. *See supra* Part IV.C.

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international law in order to remedy blatant violations of human rights, and tarnished the Court's reputation as a champion of protecting human rights.<sup>190</sup>

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190. *See supra* Part IV.F.