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Attribution of Wrongful Conduct Via "Effective Control" as Intended in the International Law Commission's Draft Articles on the Responsibility of International Organizations

Nicholas W Mull, Wayne State University

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ATRIBUTION OF WRONGFUL CONDUCT VIA "EFFECTIVE CONTROL" AS INTENDED IN THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Nicholas Mull

I. Introduction.

Presented with the increased prominence of international organizations (IOs) and the dilemma of determining responsibility for wrongful conduct associated with IOs, the International Law Commission (ILC) decided in 2002 to take the reins to solve the riddle.1 The ILC made this decision after adopting the Articles of State Responsibility for Wrongful Acts (ASR) in 2001.2 While the ILC is charged with the task of the codification and progressive development of international law, the Draft Articles on the Responsibility of International Organizations (DARIO) are clearly weighted toward the progressive development of law as opposed to codification.3 This is quite contrary to the ILC's work in the ASR, which was based on a large body of state practice and precedent from international judicial bodies. It has created a large amount of controversy and criticism by states, international


2 Id.

3 Id. at ¶ 5.
organizations, and leading scholars of international law.

Without the in depth assessment of state practice like that in the ASR, the attempted application of principles espoused in the DARIO has also proven equally difficult. This paper will focus on one of those particular problems: the application of the ILC's notion of "effective control" as it pertains to what is currently labeled as draft article 7 of DARIO. Since the notion of article 7 seemingly will only apply to situations of state troop contingents to forces of IOs such as the North Atlantic Treaty Organization (NATO) or the United Nations (UN), the article will treat the analysis from the standpoint of military operations. More specifically, it will focus on the implications of state troop contingents of UN peacekeeping forces.

First, a background of the concept of legal responsibility for international organizations, DARIO, and more specifically draft article 7, will be provided. Second, an introduction to the three most prominent examples of judicial application of "effective control" as intended in draft article 7 by the ILC: (1) Behrami & Saramati, (2) Nuhanovic, and (3) Al-Jedda. These

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cases provide the framework of argument critical to the analysis of how "effective control" should be tested according to the ILC. Third, drawing an analysis from the cases and ILC commentary as well as that of prominent scholars, will be an assessment of what test best meets the intent of the ILC. Fourth, will be a review of real and political implications of the ILC framework as it applies to state contingents of UN peacekeeping forces. Finally, a conclusion of the likely progression of the "effective control" doctrine as it pertains to the future of UN peacekeeping.

II. Background.

It is a well-settled and accepted notion that States, as subjects of international law with legal personality, are responsible for their wrongful acts in violation of international law. With that notion comes a reinforcement of the general principle of international law that there must be a remedy for a wrong, which is covered in Part II of ASR. That leaves open the question of what if the wrongful conduct can be said to be that of an IO, and not the state. This is precisely the question that the ILC sought to answer in its DARIO.

Whether IOs have international legal personality was answered by the International Court of Justice (ICJ) shortly after

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after the formation of the UN. In the Reparations case, the ICJ in an advisory opinion, concluded that the UN had international legal personality.\textsuperscript{6} With said legal personality, the UN and other IOs are subjects of international law with certain rights and duties. While the ICJ made a specific finding with regard to the UN, the rationale of its finding applies to all IOs. The ICJ found that States, as the preeminent subjects of international law with the full scope of rights and duties in the international realm have the power to form entities in international law with legal personality in order to fulfill specified purposes.\textsuperscript{7} The ICJ was careful to note however, that an IO has legal personality and rights and duties similar to states, but that an IO is not a super state. Its rights and duties as a subject of international law are limited "depend[ing] upon its purposes and functions as specified or implied in its constituent documents and developed in practice."\textsuperscript{8}

The fact that it was not until 1949 in which it was found that IOs are subjects of international law helps to explain in part the lack of practice concerning holding IOs responsible for wrongful conduct. It can also be attributed to the fact that IOs


\textsuperscript{7} Id. at 185.

\textsuperscript{8} Id. at 180.
did not take a prominent role in the affairs of the international community until after World War II. More specifically, IOs did not take an active role in the conduct of armed conflict until the formation of the UN and NATO. Prior to World War II, the conduct of military operations involving more than one state was set up through state-based alliances that were not a result of standing organizations. The great need for a codification of rules regarding the responsibility of IOs has been generated mostly as a result of UN peacekeeping operations, and to a lesser extent NATO campaigns. Although NATO has been very active in conducting military operations, the real problem is with regard to UN peacekeeping operations because peacekeepers are put together from voluntary state troop contingents in which the states are less interested strategically in the operation. As such, states are less likely to be willing to accept attribution for wrongful conduct, but will instead claim attribution should rest with the UN and the UN alone.

A. DARIO.

As indicated in article 57 of the ASR, the principles of the ASR neither apply to IOs nor to states for the conduct of IOs.\(^9\) Given this gapping hole in international law for

\(^9\) DARIO, supra note 1.
attributing wrongful conduct to IOs, and the large number of IOs with increasing functions that were traditionally left to states, the ILC decided to answer the "two questions that had been left without prejudice in article 57 on State responsibility." 10 Those two questions concern when an IO is responsible for its wrongful conduct, and second, when states can be held responsible for the wrongful acts of IOs. 11

In drafting the DARIO, the ILC relied heavily on the rules concerning state responsibility, both because it determined that in many situations the same rules should apply to IOs as they do states, and as a result of its concession that there is extremely limited practice regarding responsibility of IOs. 12 Also, like the ASR, the DARIO is concerned only with what is dubbed the "secondary rules, which consider the existence of a breach of international obligation and its consequences for the responsible [IO]." 13 The DARIO does not address the primary rules concerning what international obligations an IO has, which is in itself a highly debated question beyond the immediate scope of this Paper.

10 Id.
11 Id. at ¶ 2.
12 Id. at ¶¶ 4-6.
13 Id. at ¶ 3.
1. Reactions to DARIO.

The ILCs reliance on the ASR and the fact that the DARIO appears to be largely void of codification of existing customary international law (CIL) has resulted in a vast amount of criticism of the entire process.

Jose Alvarez has been a leading critic of the ILCs work regarding the DARIO. Largely, he criticizes the over-reliance on the ASR and the over-breath of the DARIO. Concerning the over-breath of the DARIO, he notes that the ILC purports to apply the DARIO to all IOs, without regard to whether they are intergovernmental, or to what functions it has per its charters, which limits its scope of legal personality in accordance with the Reparations advisory opinion.

Alvarez cites five general problems with the DARIO: (1) "lack of evident state practice;" (2) "lack of clarity as to status of an IO's internal rules or procedures;" (3) "assumption that all IOs are equal and subject to the same general rules;" (4) "assumption that IOs are presumptively 'responsible' for

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15 Id.
their acts;" and (5) "assumption that states are presumptively 'responsible' for their IO acts." To solve these problems, Alvarez recommends the current DARIO be scrapped, and the ILC begin anew by forming draft articles based in state practice and practical utility.\textsuperscript{17}

Even starting fresh will present a problem though, because there are so few examples of state practice to draft articles that are truly a codification of CIL. Specifically, the problem is that most pertinent IOs, most especially the UN, have absolute immunity in national courts, and international courts lack jurisdiction to hear claims against the IOs.\textsuperscript{18} Additionally, unlike states that need to accept responsibility for their actions based on a need to interact with other states, IOs are generally not in the same position according to Alvarez.\textsuperscript{19}

Despite the noted criticisms, however, the DARIO has already been taken seriously as at a minimum soft law. Contrary to Alvarez's criticism of the reliance on the ASR in the DARIO, other prominent scholars such as Alain Pellet believe it to be

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\textsuperscript{16} Id.

\textsuperscript{17} Id.


\textsuperscript{19} Id.
"the case that the responsibility of [IOs] is largely governed by the same general principles which apply to the responsibility of States, and that, see from afar, it has the same general characteristics and is susceptible of the same type of analysis." 20 Time will ultimately tell whether the DARIO will, like the ASR did, turn from "soft law" to hard law in a short amount of time. 21 As will be discussed further in section II.B, application of at least draft article 7 of DARIO has already taken root in courts despite the lack of CIL supporting it. However, unlike the seeming intent of the ILC to draft rules that would attribute responsibility to IOs to remedy their wrongs, the draft article has only been used as a means to attempt to evade responsibility of states, leaving victims with no remedy due to absolute immunity of the IOs. 22


Certainly any discussion of the meaning of a proposed rule of law should begin with the actual text of that proposed rule:

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

20 Alain Pellet, The Definition of Responsibility in International Law, in The Law of International Responsibility 7 (James Crawford, Alain Pellet, & Simon Olleson eds. 2010).

21 See Alvarez, supra note 18.

22 See generally Dannenbaum, supra note 4.
the latter organization if the organization exercises effective control over that conduct.\textsuperscript{23} (emphasis added).

In applying this draft article to any situation, it is critically important to realize that "dual or even multiple attribution of conduct cannot be excluded."\textsuperscript{24} As such, attribution of conduct to an IO under the DARIO does not necessarily mean that same conduct is not also attributable to the State and vice versa.\textsuperscript{25} On a first reading of the text of the article, it may not seem apparent, but as indicated this is an accepted principle of the ILC. The notion of holding a state and IO joint and severally liable for the same conduct has been reaffirmed by numerous scholars and even some courts as will be discussed later.\textsuperscript{26}

Specifically, there are rare situations in which an organ or agent of a state may be "fully seconded" to an IO in which the IO would be solely responsible for any conduct.\textsuperscript{27} This type of situation would be governed by draft article 6 however,

\begin{itemize}
\item \textsuperscript{23} DARIO, supra note 1, at art. 7.
\item \textsuperscript{24} Id. at chapter 2, ¶ 4.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} See, e.g., Pierre Klein, The Attribution of Acts to International Organizations, in The Law of International Responsibility 297 (James Crawford, Alain Pellet, & Simon Olleson eds. 2010).
\item \textsuperscript{27} DARIO, supra note 1, at art. 7, ¶ 1.
\end{itemize}
because that "fully seconded" organ or agent becomes a de facto organ of the IO.\textsuperscript{28} Contrary to that situation, draft article 7 applies to situations in which the donor state still retains a level of control over the organ or agent so that the default attribution to the state would remain absent a finding that it was the IO and not the state that had "effective control" over the wrongful conduct.\textsuperscript{29}

Draft article 7 seems to only apply to situations in which state troop contingents are provided to forces under the auspices of an IO; at least any and all practice cited is related to UN peacekeeping.\textsuperscript{30} Since draft article 7 looks to "effective control" over the specific conduct, it leaves open the possibility that both the state and the IO may have "effective control."\textsuperscript{31}

\begin{flushleft} \textsuperscript{28} See id. \end{flushleft}

\begin{flushleft} \textsuperscript{29} See id. \end{flushleft}

\begin{flushleft} \textsuperscript{30} See id. \end{flushleft}

\begin{flushleft} \textsuperscript{31} Special Rapporteur on the Responsibility of International Organizations, \textit{Eighth Report on Responsibility of International Organizations}, Int'l Law Comm'n, UN Doc. A/CN.4/640 (Mar. 14, 2011) (by Girogio Gaja) [hereinafter \textit{Eighth Report}]: "[E]ffective control of a particular conduct may belong to the contributing State rather than to the United Nations;" implying that "effective control" applies equally to the State and the IO, and since multiple attribution is noted as a possibility by the ILC, both the State and the IO could be responsible based on both entities having "effective control" over the wrongful conduct. \end{flushleft}
The primary question based on the text of the draft article and most relevant to this Article is what exactly does it mean to have "effective control" over the wrongful conduct. Does the meaning of "effective control" vary depending on the nature of the challenged conduct? Can "effective control" mean control over territory? Or, does it imply "effective control" over the personnel such as operational control or administrative control? Does "effective control" indicate the party that was in the best position to prevent the wrongful conduct? Does "effective control" only apply to situations in which the IO directly orders the wrongful conduct? Is "effective control" determined by agreements between the IO and state?

The questions noted above are all legitimate concepts for determining "effective control" over military contingents, and should potentially be analyzed in further discussions concerning revisions of the DARIO. Some of them have even been the interpretations of some courts or commentators, and others may just be ways to produce more just or logical results.

Either way, the notion of "effective control" that has been proposed by the ILC as the proper interpretation of draft article 7 points to one general concept. The ILC commentary

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32 In military terminology, administrative control refers to the control over military personnel that involves: pay, promotion, training, discipline, personnel assignments, and other matters not directly related to conducting a military operation.
indicates a position that effective control over specific conduct in the military context should be determined by operational control. But, that does not help that much in application. Instead of asking whether the IO had "effective control" the question becomes whether it had operational control. So, how is operational control determined?

First and foremost, it is clear that the ILC did not intend attribution to rest on a notion of exclusive control over the state troop contingents since states always retain administrative control over their troops, which includes disciplinary measures and criminal jurisdiction. Instead, "effective control" is to be determined on a case-by-case basis of the factual operational control over the specifically challenged conduct and not simply based on which party claims to have, or actually has ultimate strategic authority and control. The importance of this is the fact that generally the UN purports to accept responsibility for acts of peacekeeping forces that it considers to be a subsidiary organ of the UN despite the nature of the contingents being state organs. Thus,

33 See DARIO, supra note 1 at art. 7, ¶ 10.


35 Eight Report, supra note 31 at ¶ 33-35.
the claim of the UN to accept responsibility as a means to entice states to volunteer their forces will not control the legal determination of which, if not both of the parties is responsible.

B. Application of "Effective Control" by the Courts.

Although there is a limited amount of cases applying, or at least purporting to apply draft article 7, the decisions in these cases have been influential in driving the discussion of the appropriate standard of assessing responsibility between the UN and troop contributing nations (TCN). The case law, like the DARIO, is in its infancy, and still has much room to grow both in authority and interpretation. However, the point of this Paper is to assess what interpretation best suits the intent of the ILC, which is more based in logic as opposed to political realities.

The only three cases that have attempted to apply draft article 7 to decide the merits of cases have all generally been an argument between attributing conduct to the UN or to the State.

The three cases are limited to Europe; two with the European Court of Human Rights, and one with the Court of Appeal in the Hague for the Netherlands. All three have resulted in at least slightly different interpretations of draft article 7, but all rests on a determination of what is "effective control."
1. Behrami & Saramati.

The first court to purport to apply what is now draft article 7 of the DARIO to a contentious case on the merits was the European Court of Human Rights (ECHR) in 2007. The court combined two cases: Behrami and Behrami v. France, and Saramati v. France, Germany and Norway.36 Both cases involve different situations in the same context of the situation in Kosovo after the NATO bombing campaign during the implementation of UN Security Council Resolution (UNSC) 1244.

Behrami concerned a complaint against France by the family of two boys, one of which killed and the other seriously injured as a result of playing near a cluster bomb that previously did not detonate upon impact.37 The claim is that France, as part of the Kosovo Force (KFOR) unit responsible for the area, omitted to clear undetonated ordinance as required under UNSC 1244; whereas, France claimed that responsibility had previously been transferred to the UN mission in Kosovo (UNMIK) in accordance with UNSC 1244.38

The Saramati case concerned a complaint for unlawful detention by German and Norwegian officers, who led troop


37 Id. at ¶5.

38 Id. at ¶¶ 6-7.
contingents of their respective nations as part of KFOR and UNMIK. The KFOR and UNMIK forces, like other international coalitions were comprised of various state units from TCNs that were a part of the larger entity formed by the UN and NATO.

The court in this case began its analysis with an introduction to the article 7 standard of "effective control" in order to answer the question whether the actions/omissions could be attributed to the state. An interesting note is that the court actually sought to answer the ultimate issue by determining whether the action was attributable to the IOs instead of the state, which indicates its assumption that the conduct could only be attributed to one or the other. 39

Further, the court although stating the applicable standard was whether the UN or NATO had "effective control" over the state contingents, translated that into a standard of "ultimate authority and control." 40 Instead of focusing on the specifically challenged wrongful conduct, the court made a general application of its test to the entire operation based in UNSC 1244. In its analysis, the court found that the UN only delegated operational command but not control, and that the

39 Id. at ¶ 133.

40 Id. at ¶¶ 133-144.
operational command was delegated to NATO.\textsuperscript{41} That operational command of NATO was determined to be "effective" despite the retention of administrative control by TCNs.\textsuperscript{42}

Without actually answering the question of whether conduct could be attributed to the states, the court determined that in both cases (\textit{Behrami & Saramati}) the wrongful conduct was attributable to the UN since it retained "ultimate authority and control."\textsuperscript{43} Subsequently noting that the UN is not a party to the European Convention on Human Rights, the Court found it lacked jurisdiction to issue a remedy.\textsuperscript{44}

2. \textit{Al-Jedda}.

Several years later in July of 2011, the ECHR was presented with another opportunity to apply draft article 7 after suffering a vast amount of criticism from the ILC and scholars alike for its finding in \textit{Behrami & Saramati}.\textsuperscript{45} The case involved a complaint from a man, Al-Jedda, that he was unlawfully detained by British authorities in violation of the European

\textsuperscript{41} \textit{Id.} at ¶ 135.

\textsuperscript{42} \textit{Id.} at ¶ 138.

\textsuperscript{43} \textit{Id.} at ¶¶ 140-43.

\textsuperscript{44} \textit{Id.} at ¶ 144.

\textsuperscript{45} \textit{See} DARIO, supra note 1 at ¶ 110, FN 115.
Convention on Human Rights. His detention took place between 2004-2007 in Iraq at which time a multinational force led by the United States and UK was present to provide security in Iraq as authorized per the UN and the government of Iraq.

Relying on the court's holding in Behrami, the UK stated any wrongful conduct was attributed to the UN and not the state because the detention of Mr. Al-Jedda was in accordance with UNSC 1546. United Nations Security Council Resolution 1546 authorized the multinational force to "take all necessary measures to contribute to the maintenance of security and stability in Iraq." Since the UNSC retained "ultimate authority and control" it would be attributed to the UN alone. The applicant on the other hand stated the proper standard in multinational military operations was effective command and control exercised over the conduct, and that multiple and concurrent attribution is possible.

Thus, this case provided the ECHR with an opportunity to revisit and overrule its holding in Behrami as an erroneous

47 Id. at ¶ 60.
48 Id. at ¶ 35.
49 See id. at ¶ 66.
50 Id. at ¶ 69.
application of draft article 7. However, the ECHR refused to overrule Behrami despite the vast criticism of the ruling, but it still found the conduct attributable to the UK. Instead, the ECHR held that the UN neither had "effective control" nor "ultimate authority and control" over the detention of Mr. Al-Jedda.\(^{51}\)

The court added some confusion to its analysis by combining the discussion of whether the claim fell within the jurisdiction of the court based on Article 1 of the European Convention on Human Rights, and whether the alleged conduct is attributable to the UK. The first jurisdictional question is based on whether Mr. Al-Jedda was subject to the jurisdiction of the UK when he was detained so that the obligations of the UK arising from the convention could be applied extra-territorially. The second question concerns whether the detention itself was attributable to the UK based on the laws of responsibility.\(^{52}\) The close relationship between both questions regards the nature of the alleged conduct being unlawful detention. The first question looks to whether the UK had "effective control" over the detention facility so that a detainee in that facility is subject to the jurisdiction of the UK for purposes of applying

\(^{51}\) Id. at ¶ 84.

\(^{52}\) See id. at ¶ 60.
the convention. The second question relates to whether the UK or the UN, or both, had "effective control" over the wrongful conduct, which was the act of detaining. While both applications are based on the phrase "effective control" only the second application is with reference to draft article 7 of the DARIO.

The court carefully distinguished Al-Jedda from the Behrami & Saramati cases to come to a conclusion that with regard to Iraq, the UN was an outside third party that did not exercise control over the operation. This was illustrated in part by the fact that the UN organ in Iraq condemned the actions of the multinational force, and the UNSC did not create the presence of the force but merely authorized it after the fact. Whereas, in Kosovo, the UN authorized the formation of the security force along with specific mandates and directed it to work in coordination with the UN administrative organ on the exercising the governmental authority.

The conclusion that the UN exercised neither "effective control" nor "ultimate authority and control" emphasizes two

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53 See id. at ¶¶ 85-86.

54 See id.

55 Dannenbaum, supra note 4 at 139.

56 See generally Al-Jedda, App No. 27021/08 at ¶¶ 80-85.
immediate points. First, the court implicitly acknowledges that "effective control" is not the same as "ultimate authority and control." And second, the holding suggests that attribution can be determined by both standards.


The third and final case of a court applying draft article 7 was the Court of Appeal in the Hague of the Netherlands, which published its decision in Nuhanovic on 5 July 2001, two days prior to the ruling in Al-Jedda.\textsuperscript{57} It also presents a different mode of analysis than the ECHR.

This case was brought by the Hasan Nuhanovic, whose father and brother were massacred at Srebrenica in July 1995 after the Dutch troop contingent of the United Nations Protection Force (UNPROFOR) expelled them from their compound turning them over to Bosnian Serb forces. He claims the decisions to remove them from the protected compound violated numerous human rights provisions, including those in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is the same convention cited in Behrami & Saramati and Al-Jedda.

The court's analysis is framed to determine whether the wrongful conduct should be attributed to the UN, the State, or

\textsuperscript{57} Hof 5 July 2011 Case No. 200.020.174/01(Nuhanovic/Neth.) (translation in English) available at: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388.
possibly to both.\textsuperscript{58} While phrasing it as "command and control" the Dutch court quickly dismisses the standard of \textit{Behrami & Saramati}, and recognizes that the appropriate analysis is which party has "effective control" over the conduct in question.\textsuperscript{59} In determining attribution, the court begins with the presumption that the "effective control" standard of draft article 7 is to apply equally to the IO and the State, and that it is possible that both parties exercised "effective control" over the conduct in question.\textsuperscript{60} Based on this, the court only analyzes whether the State had "effective control" and does not determine whether or not the UN did as well since it lacks jurisdiction to hear a claim against the UN.

The court asserts a two-stage mode of analysis: first, to evaluate whether the conduct was a result of a specific instruction from the State or the IO; and second, if there was no specific instruction ordering the conduct, the court will look to which of the parties had the real power to prevent the conduct from occurring.\textsuperscript{61} In applying the second factor, the court notes the significance of the retention of sole criminal

\textsuperscript{58} \textit{Id.} at ¶ 5.1.

\textsuperscript{59} See \textit{id.} at ¶¶ 5.7-5.8.

\textsuperscript{60} \textit{Id.} at ¶¶ 5.8-5.9.

\textsuperscript{61} \textit{Id.} at ¶ 5.9.
jurisdiction over the troop contingent and ability of the state to withdraw its troops from participating in the operation at any time it chooses.\textsuperscript{62}

However, a simple theoretical control by the state over the troop contingent is not enough. That retained control must be real and exercised. The standard of "effective control" brought forth by this court is focused on operational control exercised, not simply a formal chain of command relationship. In this case, the court found the conduct was attributable to the Netherlands without prejudice to whether it is also attributable to the UN, because the government of the Netherlands was closely involved in the decision making process. The state government was not only aware of the pending decision, but despite its communications with officers on the ground did nothing to prevent the execution of the decision.\textsuperscript{63}

\textbf{III. ANALYSIS.}

In looking to the standards of "effective control" from the ILCs draft article 7 of the DARIO that has been applied by the ECHR and the Court of Appeal in the Hague, the two questions left posed is which will prevail and which best illustrates the intent of the ILC, if any. Furthermore, what will be the

\textsuperscript{62} Id. at \S 5.10.

\textsuperscript{63} See id. at \S 5.18.
practical political implications of the standard adopted on the future ability of the UN to form peacekeeping forces from voluntary state troop contingents?

A. What Test Should Be Applied?

As a preliminary matter, just as in Al-Jedda, it is important to re-emphasize the difference between the "effective control" standard for jurisdiction and that of attribution. These two concepts are often discussed together by the court because they can be closely related, but the difference is important with regard to future applications and revisions of draft article 7 of the DARIO.

As noted before, the concept of "effective control" that looks to the amount of factual control a state had over territory at the time in which an alleged human rights violation occurred is a jurisdictional matter irrespective of attribution. 64 This notion of "effective control" is directly related to the primary rules of international law not the secondary rules in that it goes to the element of breach as opposed to attribution.

As is common to both the ASR and the DARIO, there are two elements of an internationally wrongful act: one, conduct is attributable to the IO or state; and two, that conduct constitutes a breach of an international obligation of the state or IO. The second element of the internationally wrongful act concerns the primary rules of international law of which the ASR and the DARIO do not determine. The purpose of the DARIO is to be able to determine whether the first element is met, which is the specific question that the draft article 7 "effective control" test resolves.

Therefore, "effective control" for purposes of draft article 7 is generally without regard to territorial concepts. For purposes of attribution, it is not relevant whether the state or IO has any control over territory. While there may be specific human rights abuses in which control over territory may be in alignment with "effective control" over the actual wrongful conduct as it was closely in Al-Jedda, but the potential overlap does not merge the issues as one. For

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65 E.g. DARIO, supra note 1 at art. 4.

66 See Al-Jedda App No. 27021/08 at ¶ 61; see also Kjetil Mujezinovic Larsen, Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test, 19(3) E.J.I.L. 509, 511 (2008) (noting the connection between the "effective control" notion providing extraterritorial effect of the ECHR, but that the "effective control" of attribution of conduct is distinct).
example, in *Al-Jedda*, the court looked to whether the UK had "effective control" over the territory in which he was detained because that would trigger the UK's international obligation under the European Convention.\(^67\)

To determine attribution, "effective control" refers to the level of factual operational control, which is affirmed not only by the ILC but *Al-Jedda* and *Nuhanovic* as well. Even in the *Behrami & Saramati* case the court did not base its determination of the attribution element based on territorial control, but instead looked to the "ultimate authority and control" of the entire operation based on the intimate involvement in the UN in establishing and regulating the civil and security forces in Kosovo.

With the possibility that the "effective control" standard of draft article 7 should be applied based on territory eliminated, the prevailing standard will be based on some level of control, whether that be strategic (ultimate), operational, or preventative. Elimination of this theory is not only supported by the judicial decisions, but its absence in the discussion concerning draft article 7 in any of the works of the ILC.

\(^67\) See *id.* at ¶¶ 74-75.
Concerning the "ultimate authority and control" test from Behrami & Saramati, it is likely this will not be the prevailing standard of attribution under draft article 7 as the case law and weight of the DARIO increases. First, the "ultimate authority and control" standard was vehemently rejected by the ILC and numerous scholars with specific citation to the case giving its birth.\(^{68}\) Second, this test if applied as the standard for determining "effective control" over conduct would produce grossly unjust results. Victims of human rights abuses at the hands of UN peacekeepers would in many cases be without remedy for the harm done to them. The lack of remedy rests not only with the scapegoating by states to blame the UN, but the absolute immunity under Article 105 of the UN Charter the organization possesses in all domestic courts.\(^{69}\) Additionally, the UN is beyond the jurisdiction of international courts because it is not a party to treaties forming many of the courts, and the ICJ only hears cases between states. Furthermore, while the UN generally accepts responsibility for the actions of UN peacekeepers as a matter of political policy,

\(^{68}\) DARIO, supra note 1 at ¶¶ 110, FN 115.

\(^{69}\) U.N. Charter art. 105.
it does not do so in situations in which the conduct goes against orders or policy of the UN.\textsuperscript{70}

The "ultimate authority and control" test may be the preferred method of states, but it certainly is not of the UN as the UN counsel also rejected this as a standard for determining "effective control."\textsuperscript{71} Under an "ultimate authority and control" regime, the UN would be found responsible for all conduct by UN peacekeepers and security assistance forces authorized and regulated by the UNSC such as KFOR. It has the effect of absolving states from responsibility of monitoring their troop contingents, and ensuring compliance with obligations of the state. Also, by implementing a standard in which states do not have to be concerned about potential attribution states will not have the incentive to exercise their administrative control over the troop contingents to deter and help prevent any wrongful conduct from occurring.

A standard of "effective control" based on factual operational control over the specifically challenged conduct ensures the proper alignment of incentives for states to use

\textsuperscript{70} See DARIO, supra note 1 at art. 7, ¶ 6.

\textsuperscript{71} See id. at ¶ 10. (noting that after the Behrami ruling, the UN Secretary-General rejected the notion of "ultimate authority and control" and instead made clear that the responsibility of the UN would be limited to the effective operational control it actually possesses).
their administrative control to prevent wrongful conduct. It also focuses more precisely on the entity that may have ordered the conduct, or due to its negligence and lack of implementing disciplined leadership was in the best position to prevent the conduct. As noted by the ILC, a standard looking to the factual control over the conduct in question directly implies a role in the commission of the act, whether that role was direct or indirect from dereliction.\textsuperscript{72}

While there is extremely limited practice regarding the application of "effective control" as is intended in draft article 7 of the DARIO, there is an abundance of state practice and ICJ jurisprudence regarding the control analysis of article 8 of the ASR.\textsuperscript{73} Article 8 of the ASR states:

\begin{quote}
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.\textsuperscript{74}
\end{quote}

The parallel article to draft article 7 in the ASR is actually article 6 based on the context of attribution as it pertains to

\textsuperscript{72} Id.


\textsuperscript{74} Id.
organs placed at disposal to a state or IO. However, as articulated by the ILC, there is a different standard in applying both of the articles due to the nature of IOs not having traditional governmental authority.

But, the jurisprudence and commentary surrounding the application of article 8 of the ASR is directly in line with the "effective control" concept of draft article 7. In fact, "effective control" has been held by the ICJ to be the standard of application for article 8 of the ASR. Based on the alignment of standards and need to look elsewhere for a clearer understanding of what is meant by "effective control," the same mode of analysis should be used for draft article 7 of the DARIO.

75 See Jose Alvarez, Memorandum to Advisory Committee, U.S. State Department, encl. 1, 5.

76 See DARIO, supra note 1 at art. 7, ¶ 4.

77 Kjetil Mujezinovic Larsen, Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test, 19(3) E.J.I.L. 514 (2008) (drawing analogy between draft article 7 "effective control" and that of the ICJ's "effective control" test applied to article 8 of the ASR).


79 See DARIO supra note 1 at art. 7, ¶ 5 (stating that control plays a different role when looking to organs or agents placed at the disposal of an IO than it does in apply article 8 of ASR; however, the only difference the ILC cites is that under ASR the result is whether conduct is attributable to at all to a state, and under the DARIO the answer is which entity, the IO or state,
In the Paramilitary Activities case, the ICJ found general control and even a large amount of dependency to be insufficient to attribute actions to the state.\(^{80}\) Instead, the State must have "effective control of the . . . operations in the course of which the alleged violations were committed."\(^{81}\)

The standard of effective operational control in this context was not challenged until the International Criminal Tribunal for the former Yugoslavia (ICTY) made its decision in Tadic.\(^{82}\) In that case, the tribunal rejected the notion of effective operational control and stated the attribution should be determined by an overall control test.\(^{83}\) However, this was a criminal case in which the tribunal was trying to establish the existence of a non-international armed conflict. To do so, it needed to be able to attribute the actions of the Bosnia Serb militias to Serbia.

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\(^{81}\) Id.

\(^{82}\) Prosecutor v. Tadic, Case No. IT-94-1-T (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

\(^{83}\) Id. at ¶ 145.
Subsequently, in the Genocide case the ICJ disregarded the ICTYs overall control test as incorrect.\textsuperscript{84} Additionally, it noted that the ICTY was charged with criminal prosecutions of individuals and was not charged with making distinctions of state responsibility.\textsuperscript{85}

In the Genocide case, the ICJ applied article 8 of the ASR to determine if conduct of military forces that were neither 
\textit{de jure} nor \textit{de facto} organs of the state, but under the control of the state could be attributed to the state.\textsuperscript{86} The importance of this distinction is that if the forces could be deemed a \textit{de facto} organ of the state then all actions of that force would be attributable to the state just as a \textit{de jure} organ despite the state potentially exercising no direct control. Concerning the article 8 standard, if it can be shown that the state had effective operational control over the specific wrongful conduct then it can be attributed to the state. The court also distinguishes "effective control" from acting under the directions of, which implies that "effective control" does not necessarily mean that the wrongful conduct was ordered by the


\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at ¶ 398.
state, but that the state exercised enough control that the conduct would not have occurred if the state sought to prevent it. This line of reasoning seems to be very much in line with the Nuhanovic ruling because it focuses not only on whether the wrongful conduct was ordered but was the control effective enough to have prevented it if not a result of direct orders.

Further the court notes that an "overall control" test broadens the scope of liability far beyond what is just because responsibility should not attach to parties having no role in the wrongful conduct.\footnote{See id. at ¶ 406.} This is in direct agreement with the ILC stance against the "ultimate authority and control" test of Behrami. Although phrased differently, the two tests really are one in the same. Therefore, the ICJs jurisprudence through analogy with the laws on state responsibility affirms that the "ultimate authority and control" test should not be used to determine attribution.

**B. Implications on United Nations Operations.**

The major concern in the development of the case law relating to draft article 7 is the future of UN peacekeeping operations. The question is whether states will continue to voluntarily give troop contingents to support UN peacekeeping operations if they may be subject to dual attribution with the
UN, or sole attribution under a strict level interpretation of effective operational control. Additionally, if the Nuhanovic rationale is followed more closely, there are few situations where it can be said that the state was not in a position to prevent the wrongful conduct from occurring.

As noted previously, the UN has a general policy of accepting responsibility for actions of UN peacekeepers based on the political realities of the situation. Clearly, the UN is concerned that if it does not voluntarily accept responsibility then member states will be less willing to cooperate in the formation of peacekeeping forces.

There are generally three types of situations in which an "effective control" argument could come in to play: (1) situations where the UNSC gives a general authorization to member states to take action such as in Libya; (2) UN creates a subsidiary civil administrative organ that is to work in conjunction with a security force authorized by the UNSC but not operationally controlled by the UN such as KFOR; and (3) a situation with the classic UN peacekeeper blue helmets. How will attribution come out in the future?

What is clear from Al-Jedda and the ILCs commentary is that the UN cannot be attributable for acts conducted by forces that were merely authorized by the UNSC to conduct a certain operation. This is a situation where, like noted in Al-Jedda,
the UN does not play an active role in conducting or so it has neither "ultimate authority and control" nor "effective control."

Concerning the second possible context, it is likely any future rulings will not find attribution to the UN. However, that does not foreclose attribution to an IO such as NATO as would have been the potential in Kosovo. This can be said with relative confidence based on the response from the ILC, scholars, and the UN to the *Behrami* ruling, and the distance the ECHR created from it in *Al-Jedda* by finding a means to distinguish the cases.

As such, most future applications will likely be found in the third context, which is most similar to the *Nuhanovic* case. In this context, the facts leave open the door for dual attribution in many, if not most cases. The ability to prevent wrongful conduct and continuous communication between the troop contingents and its domestic chain of command is most often the case.

**IV. CONCLUSION.**

First, "effective control" should be evaluated from a purely operational control standpoint. The qualifier that the control be "effective" dismisses the notion that attribution should lie with the IO or State that has "ultimate authority" over the entire scope of operations. When seeking attribution
for a specific human rights violation, it is the specific conduct that is relevant for analysis not the entire strategic framework of the operation. Looking to "effective control" which is the factual authority to direct and control the unit in operations, it additionally implies the entity in the best position to prevent any wrongful conduct. If wrongful conduct occurs, it is not related to the strategic objectives of a UN peacekeeping operation, but it is related to either illegal orders at the operational level or as a result of a troop contingent with a lack of good order and military discipline.

Secondly, it may not matter much in practice because the state may not be able to escape joint liability for the human rights violation. As the party that retains administrative control over troops, the state is responsible for training, leadership, personnel assignments, and instilling military discipline within a unit. If a human rights violation occurs, it is because the troops lack military discipline. That lack of military discipline is either shown by actions violating human rights without orders from the chain of command, or following what should be known as illegal orders.

Therefore, it is at least the opinion of this military professional that the "effective control" test of draft article 7 of the DARIO should be utilized to determine if the IO is also responsible for the conduct, not simply as a means for a state
to evade attribution for its inability to properly exercise the control it retains when providing troop contingents to the UN.