Default State Attribution Rather than Dual Attribution in the Troop-Contributing Context

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By Osama Almughrali

1) Introduction

In Mustafic, a Dutch appellate court recently found that a Dutch peacekeeping battalion (Dutchbat) failed to prevent the death of individuals in the Srebrenika Massacre during the Bosnian War.\(^1\) Specifically, Dutchbat did not place several local employees onto the UN evacuation list, directly leading to their death in the subsequent massacre.\(^2\) By broadening the “effective control” test for attribution, the Dutch court found that the Peacekeeper’s failure could be attributed to both the Netherlands and the United Nations (UN).\(^3\) This so called “dual attribution” has been proposed in the peacekeeping context by academic writers but has not been previously supported by international case law, the International Law Commission (ILC),

\(^2\) Mustafic, supra at ¶ 2.29.
\(^3\) Id. at ¶ 5.9.
or state practice. This article argues that dual attribution is not currently supported by international law, and is unlikely to be established by treaty, or develop as customary international law. Instead, this note proposes a line of reasoning consistent with current law called Default State Attribution, which would be preferable to both the current application of law used by international tribunals and dual attribution. Under Default State Attribution, when a state contributes troops to another state or to an international organization (IO), the troops’ actions are still attributable to the troop contributing nation (TCN) unless they are attributable to the receiving IO or state. Thus, there would be neither dual attribution nor any gap in attribution, and the victims of internationally wrongful conduct would have recourse ascending up the linear chain of command to the clearest single source of control over the conduct. This solution would apply to attribution in the context of any contribution of personnel by a TCN to an IO.

2) An Overview of the Relevant International Law on Attribution

“Attribution” is the abstract legal steppingstone used to hold a state (or organization) responsible for the internationally wrongful act of an individual or group who
actually committed the act.\textsuperscript{4} Generally, where an internationally wrongful act or omission is caused by an organ of a state, that action is attributable to that state.\textsuperscript{5} Thus, international judicial decisions have long attributed the acts of a state’s organs to that state.\textsuperscript{6} This proposition is relatively intuitive, and past legal debate regarding attribution has instead centered on other topics, such as attributing acts carried out by non-state entities.\textsuperscript{7} However, there are limited circumstances where the acts of a state’s organs are not attributable to that state, but rather to another entity (specifically to another state or to an IO). Namely, this occurs when the state lends the organ to the other entity, thus acting as a TCN.\textsuperscript{8} Conceptualizing non-attribution of a state’s organ’s acts as an exception to the norm is a key facet of the solutions proposed in the later sections of this note. Additionally, there are unrelated areas of international law where conduct could be simultaneously attributable to multiple states or organizations,\textsuperscript{9} but it is important to avoid conflating these various circumstances.

\textsuperscript{4} JOHN GRANT, Encyclopaedic Dictionary of International Law, 51 (3rd, 2009).
\textsuperscript{6} Id. comment 3.
\textsuperscript{8} RSIWA, supra note 2, at art. 6.
The ILC codified the rules of state attribution in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (RSIWA).\textsuperscript{10} Specifically, if a state puts one of its organs “at the disposal of” another state (in other words, acts as a TCN), then a wrongful act by that organ is attributable to the receiving state and \textit{not} to the TCN.\textsuperscript{11} Importantly, the same is true when a TCN places its organs under the control of an IO, such as UN Peacekeeping missions. Thus, RSIWA addresses attribution to an IO in Article 57, and the article’s commentary clarifies that attribution to an IO precludes attribution to the TCN.\textsuperscript{12}

The ILC’s Draft Articles on the Responsibility of International Organizations (DARIO) further elaborate attribution to IO’s, although a few articles do address responsibility of states - namely those found in Part 5.\textsuperscript{13} In other words, RSIWA explains when states are liable while DARIO explains when IO’s are liable; and only a few DARIO articles speak to the responsibility of states. The theoretical possibility of attributing a single act to both an IO and a TCN (commonly called “dual attribution”) will be discussed below.

\textsuperscript{10} See RSIWA.
\textsuperscript{11} \textit{Id.} (RSIWA) at art. 6, comment 1.
\textsuperscript{12} \textit{Id.} (RSIWA) at art. 57, comment 3.
\textsuperscript{13} DARIO, \textit{supra} at General comment 2.
The standard for determining when an act is attributable to an IO is whether the organization exercised “effective control” over that act. Effective control is a factual issue and depends on the individual case and circumstances. Given the nature of this test, attribution in UN peacekeeping situations will typically lie with the UN simply because the UN is responsible for giving orders to contributed troops. The same standard is also used in other contexts of state attribution, such as attributing the conduct of non-state actors to a state, but in those circumstances, effective control is not the only potential test. There is in fact an ongoing debate as to whether effective control is the only standard, or if the “overall control” test supplied by Tadić applies instead, or if each applies to different situations. Fortunately, it is a relatively clear principle that for attribution to IO’s the appropriate test is effective control. Thus the effective control test is

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15 Id. at 71.
16 See id. at 67.
17 See Tadic, supra note 7; TRAPP supra at 43. See also Kjetil Mujezinović Larsen, Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test, http://ejil.oxfordjournals.org/content/19/3/509.full 1/15/12 (stating that “Following the ICJ’s judgment in the Genocide case, it appears that the application of the ‘overall control’ test is restricted only to the use to which it was originally put in the Tadić case.”).
18 This difference between the IO and state contexts is demonstrated by contrasting RSIWA Articles 6 and 8, which do not use the words “effective control”, with DARIO Article 7, which does. Compare DARIO, supra arts. 6 and 8 with RSIWA art. 7.
demonstrated in this context by state practice\textsuperscript{19} and by many judicial decisions.\textsuperscript{20}

However, at least one court decision utilized a different standard of attribution in the peacekeeping context. This was the European Court of Human Rights’ (ECtHR) \textit{Behrami} decision.\textsuperscript{21} Nonetheless, that decision did not elaborate on the source or reasoning for altering the test, and the ECtHR has been much criticized for it.\textsuperscript{22}

\textit{Behrami} is also a key case in that it indirectly foreclosed the possibility of dual attribution by the ECtHR. The third-party state submissions to the ECtHR varied in their legal reasoning but were effectively unanimous in advocating against dual attribution.\textsuperscript{23} Germany’s submission said that “[u]ltimate responsibility for Kosovo lay with the UN since effective control of Kosovo was exercised by” UN bodies,\textsuperscript{24} exactly reflecting the idea that only one entity would have effective control in the troop-contributing context. Poland additionally raised the concern that holding TCNs severally liable would harm

\textsuperscript{19} Hirsch, \textit{supra} note 14, at 71-73.
\textsuperscript{20} Id. at 73-76.
\textsuperscript{21} \textit{Behrami v France and Saramati v France, Germany and Norway}, Eur. Ct. H.R., App. Nos. 71412/01 and 78166/01, ¶133 (2007) (referring to “ultimate authority and control” as the test for attribution) [hereinafter \textit{Behrami}].
\textsuperscript{23} Id. at ¶¶ 82 – 117.
\textsuperscript{24} Id. at ¶ 104.
future peacekeeping efforts by discouraging states from participating.25

However, the Behrami court did not directly decide that dual attribution is not possible in the peacekeeping context. The court never reached that issue. Instead, Behrami was decided on jurisdictional grounds, essentially leading to the same result.26 The ECtHR first decided that the actions were attributable to the UN,27 and then the court determined that it was not competent to rule over decisions of the UN.28 Once conduct is attributable to the UN, the ECtHR’s inquiry must cease, and it would never reach the issue of additional attribution to the state.29

Thus the ECtHR decision was not based exclusively on the international law of attribution, but also on its own jurisdictional law. Fortunately, the solution proposed below would not be precluded by the Behrami decision because it would not require a court to rule over conduct that is also attributable to the UN.

It should also be mentioned that the effective control test originated in the context of attribution of non-state actor’s

25 Id. at ¶ 111.
27 Behrami at ¶¶ 141 and 143.
28 Behrami at ¶ 152.
29 Id.
actions in the International Court of Justice’s (ICJ) Nicaragua opinion.\textsuperscript{30} Thus the very same effective control test applies to different contexts, complicating any alteration of the test. For instance, on the one hand, courts may have an incentive to read effective control expansively to find attribution of non-state actors, and thus determine the existence of an international conflict, binding the states involved to the higher standards of International Humanitarian Law (IHL). On the other hand, given the important role of peacekeeping over the last half century,\textsuperscript{31} courts may want to limit attribution to encourage states to participate in those missions. Thus, any attempt to alter the effective control test must be cognizant of the wide-ranging implications of its modification.

3) Problems with the Dutch Appellate Decision

The errors made by the Dutch court in Mustafic are A) applying the effective control test to the troop-contributing state while failing to apply that test to the UN; B) expanding the scope of the effective control test; and C) permitting dual attribution. These errors are addressed in this order because each was a successive mistake that would not have occurred but


for the prior. In other words, dual attribution would not have been possible without expanding the effective control test, and expanding that test would not have occurred if the court had not tried to stretch the test to accommodate its application to the Netherlands.

A) Applying Effective Control to the Troop-contributing State

The first error in the Dutch appellate court’s decision is perhaps the least apparent. Under current international law, there is no need to ask whether a TCN had effective control over its own troops. This is because in peacekeeping operations:

[t]he national contingent remains an organ of the lending (or home) State, and even more importantly that State retains some jurisdiction (thus: control) over the contingent (most prominently criminal jurisdiction and disciplinary powers).... In accordance with [DARIO Article 5], the conduct of an organ of a State that is placed at the disposal of an international organization—but is not fully seconded to it—is only attributable to the organization if the latter exercises ‘effective control’ over that conduct. Otherwise (one would logically assume)
it is attributable to the lending State (automatically, as the conduct of its organ). It is to overcome this attribution to the State that effective control over the State organ must be shown to exist. 32

In other words, the acts of the contingent are automatically attributable to the TCN under the classic rule pertaining to organs of a state. 33 Attribution to the TCN does not require effective control, and in fact applies even if those organs were out of its control, for example, acting in excess of authority or in contravention of orders. 34 The only way that a TCN avoids attribution is through an exception outlined in RSIWA Articles 6 (if contributing to another state) and 57 (if contributing to an IO). 35 Those exceptions require that the receiving entity exercise the appropriate level of power over the contingent, which for an IO is effective control. 36 Thus, applying the effective control test to a TCN is incorrect; it should only be applied only to the receiving IO. If the IO did

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34 RSIWA at art. 7.
35 RSIWA at arts. 6 and 57.
36 See Section 2, overview.
not exercise effective control over the conduct, then the exception is not met and the TCN is attributable for the conduct. In short, attribution to the TCN is the default; to the IO the exception. Where the exception fails, the initial rule still stands.

This clear conceptualization provides for an either-or duality—either the TCN is attributable or the receiving entity is, but not both or neither. On the other hand, following the Dutch appellate court’s process of applying effective control to the TCN could lead to the problematic result that the conduct would not be attributable to any entity. In other words, as two discrete tests, each applied without considering the result of the other, it would be possible to find that the TCN did not possess effective control, and neither did the IO. This may sound unlikely, but the effective control test is typically a difficult one to satisfy.\(^{37}\) Thus, by attempting to expand the scope of attribution in the present case, the Dutch court may have had the unintended effect of reducing that scope in the future.

Some scholars do contend (or perhaps assume) that the effective control test should be applied to the TCN to determine

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its attribution.\footnote{Kjetil Mujezinović Larsen, Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test, \url{http://ejil.oxfordjournals.org/content/19/3/509.full} (“even if the UN claims exclusive command and control over the peacekeeping forces, specific conduct may still be attributable to the TCN if the state has effective control over that conduct.”). – quote located before footnote 35} However, the Dutch appellate court only supported its use of the test through an “[assumption] that the same criterion” found in DARIO Article 6 applies to TCNs.\footnote{Mustafic, supra, at ¶ 5.8.} However, as detailed above, the ILC only supports application of DARIO to states for the few articles specifically addressed to states, namely those in Part 5, which are not relevant to this context.\footnote{DARIO, supra, Part 5.} Therefore, making such an assumption is not based on the ILC’s findings of international law. Because this was the only evidence the Dutch Court offered, its use of the effective control test in this situation is unsupported.

Nonetheless, the effective control test does have its place in this case. Instead of applying it to the TCN, the court should have applied it to the receiving IO, here the UN. Even though the UN was not a party to this case, the question of attribution to that body is necessary to determine whether attribution could be attached to the Netherlands, which was the TCN. As detailed above, attribution to the Netherlands is derived from Dutchbat’s status as an organ of the Netherlands.\footnote{RSIWA, supra note 5.} However, the Netherlands would have avoided attribution if attribution to the UN existed.
It is not clear why courts have not applied this conceptualization in prior cases. One possible reason is that the parties to a case may assume that a troop contingent becomes an organ of the IO upon being contributed and placed under the command of the organization. After all, conduct of the organ of an IO is attributable to the organization much the way that conduct of a state’s organ is treated. However, if this were really the case, there would be no need for the effective control test at all – all conduct of the troops would be attributable to the IO. In some ways, this appears to be the current state of the application of the law under some decisions (though not Mustafic), where those courts seem to pretend to allow for the possibility of attribution to the TCN but instead find attribution to the UN as a matter of course.

Treating the contingent as an organ of the IO would additionally render DARIO Article 7 superfluous because lent organs would already be addressed in DARIO 6 as organs of the receiving IO. Furthermore, this contention contradicts the UN’s assertion that conduct of peacekeeping forces is not attributable if those acts involve “gross negligence or willful

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43 Compare DARIO art. 6, with RSIWA.
44 Behrami is a good example of this, where the ECtHR used a much more permissive test in order to find attribution to the UN and thus preclude attribution to France. Behrami, supra.
misconduct,”45 because DARIO Article 8 specifically includes attribution to an IO for conduct of its organs in contravention of orders or excess of authority.46 Finally, considering the peacekeepers to be an organ of the IO for purposes of attribution does not support the argument for attribution solely to the UN, but if anything, supports dual attribution in every case, directly contradicting statements of international courts, the states involved, and the UN. This is because the troops have not ceased to be organs of the TCN, especially given the temporary nature of the arrangement, the ability to call home, the remaining command structure, the state’s control over discipline, etc.47 In other words, lent contingents are still organs of the TCN and do not become organs of the receiving IO. Thus there is no satisfactory reason to apply effective control to the TCN, nor to avoid applying it to the receiving IO.

B) New, Overly Broad Definition of Effective Control

Additionally, the Dutch appellate court in Mustafic greatly expanded the definition of effective control to address not only affirmative orders, but to ask whether “the UN or the State had

46 DARIO at arts. 6, 8.
47 Dannenbaum at 148-151.
the power to prevent the conduct concerned."48 This inquiry into the ability of the parties to prevent the conduct comes directly from Tom Dannenbaum’s 2010 article in the Harvard International Law Journal, cited by the court.49 In that article, Dannenbaum proposes an insightful new five-part structure for attribution in the case of humanitarian abuses by UN peacekeeping forces, including dual attribution in some cases. Most significantly, Dannenbaum’s theoretical framework relies on his novel interpretation of the term effective control, loosely based on DARIO. The Commentary of Article 5 recommends finding attribution to a state when the state retains control over its forces “in the relevant respect.”50 Through this wording, Dannenbaum concludes that because the “relevant respect” is prevention, effective control is “most likely to be useful in preventing that conduct from occurring.”51 Taking this preventative inquiry one step further, Dannenbaum proposes that where multiple parties could have prevented the conduct, dual attribution is possible.

However, Dannenbaum’s interpretation is problematic in several respects. First, a simpler reading of the Commentary is that “relevant respect” refers to the conduct itself, not to

48 Mustafic at ¶ 5.9.
49 id. at ¶ 5.8.
50 DARIO at art. 7, comment 7.
51 Dannenbaum at 157.
prevention.\textsuperscript{52} This straightforward interpretation is substantiated by Comment 3 to Article 5 which bases attribution to the state “on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.”\textsuperscript{53} Furthermore, Dannenbaum uses that phrase entirely out of context – it is located in DARIO (not RSIWA) and comments on the article outlining when receiving IOs are responsible.\textsuperscript{54} The comments preceding and following it both discuss effective control.\textsuperscript{55} Thus what the ILC is actually saying is that to determine whether a receiving IO is attributable one should look to whether that IO had effective control over the conduct or whether the TCN retained control over that type of conduct.

What is more, unlike control tests or state-organ status (which bear similarity to principles of respondeat superior), a prevention inquiry gives no ready legal basis for attributing conduct. Unfortunately, Dannenbaum does not substantiate the legal underpinnings of his “prevention” inquiry. Why should an ability to prevent conduct alone give rise to attribution? What reasoning ties this inquiry to the TCN without applying equally to all states in a position to prevent the conduct? Whatever its

\textsuperscript{52} See DARIO at art. 3, comment 5.
\textsuperscript{53} Id.
\textsuperscript{54} DARIO art. 7 (“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”).
\textsuperscript{55} DARIO art. 7 comments 6, 8.
appeal, a prevention inquiry is not suited to attribution, but instead is suggestive of an expansive duty to protect. In short, Dannenbaum’s interpretation may be characterized as determining who could have prevented the conduct as opposed to current international law which looks to determine who controlled the conduct.

While Dannenbaum is free to propose whatever system he can imagine, the Dutch court cannot simply replace the effective control test with Dannenbaum’s prevention inquiry if it wishes to be faithful to international law. As Dannenbaum admits, his inquiry is a “proposed re-interpretation” and is thus not the current law.\(^5^6\) The prevention inquiry is a whole new test leading to divergent results. International law is largely consent based, so while states and IO’s could be said to have consented to the current system of attribution, writing a new one would require the formation of customary international law (CIL) or the signing of a treaty.

Furthermore, it is important to remember that the effective control test is not used exclusively for the troop-contributing context, but also for other aspects of state attribution.\(^5^7\) Therefore, any expansion of the definition would have collateral effects in other areas of the law. Such an expansion may be

\(^{5^6}\) Dannenbaum at 156.
desirable in one context yet disastrous in another. For example, under this new prevention-based definition of effective control, the conduct of a non-state actor would appear to be attributable to a state simply because the state could have prevented that conduct. This raises additional questions: How likely does it need to be that the state could have prevented the conduct? Is actual knowledge required? Is knowledge of the conduct and an ability to prevent it sufficient? By wholly redefining the effective control test the Mustafic court leaves it without context, and thus leaves behind more questions than solutions.

Finally, the prevention inquiry is also much more expansive than the current effective control test. From a causal perspective, it is almost inconceivable that a TCN would have been unable to prevent conduct by its troops. Simply not contributing the troops would have prevented the conduct. Thus, conduct of peacekeepers would virtually always be attributable to the TCN. 58 Moreover, it implicates a potentially unlimited number of attributable entities who could have in one way or another prevented the conduct. This complicates the administration of remedies, and highlights the excessive scope of this inquiry.

58 Although Dannenbaum points out situation within his structure where this would not be the case, the Mustafic court only implemented dual attribution in the case before it, and could not single-handedly impose Dannenbaum’s proposal on the entire international legal system. See Dannenbaum at PIN CITE.
Of course, Dannenbaum makes a good point that the ability to prevent the unlawful conduct is relevant to actual prevention of such conduct in the future. Therefore, although the Dutch court misread Dannenbaum’s proposal as a representation of the present law and misplaced its confidence in Dannenbaum as a primary source of that law, Dannenbaum’s work may be useful in future solutions. Such solutions would best be the result of treaty or customary law formation, and not the product of international courts.

C) Dual Attribution

The next error of the Dutch appellate court in the Mustafic case is using dual attribution in the troop-contributing context.\(^{59}\) As proponents of dual attribution of peacekeeper conduct are quick to point out, simultaneous attribution of a single act to both an IO and to a state is theoretically possible.\(^{60}\) However, the fact that dual attribution exists in other contexts does not mean it exists in this one.

\(^{59}\) Mustafic at –PIN CITE.
First, dual attribution to two states is outlined in RSIWA, but within carefully delineated boundaries. These circumstances are wholly separate from the question of placing an organ under another entity’s control. For state-to-state lending, conduct of one state’s organ is attributable to either the lending state or the receiving state, but not both. Organizations and states are bound by different rules, and here there are potentially divergent tests for receipt by a state and an IO. However, international law’s treatment of TCNs is identical in relieving attribution to the contributor once the conduct is attributable to the receiving entity, whether it is another state or an IO. Thus, the comments to RSIWA Article 57 say that where a state sends officials or organs to an IO “so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of these articles.” Such organs would thus fall right into the scope of DARIO. DARIO then seeks to determine “to which entity – the contributing State or organization or the receiving organization – conduct is attributable.”

61 RSIWA at arts. 16-19.
62 RSIWA at art. 6, Comment 1.
63 See DARIO General Commentary, Comment 4 (some questions are peculiar to international organizations), Comment 7 (“international organizations are quite different from states”).
64 Compare RSIWA at art. 6 with DARIO at art. 7.
65 RSIWA at art. 57, Comment 3.
66 Id. at art. 7, Comment 4.
Other wording in DARIO notes the fact that attribution to both a state and an IO is possible. However, Part Five of DARIO specifies the limited ways this can happen, such as aiding, directing or coercing the IO. What DARIO does not say is that both a TCN and the receiving IO could possess effective control over the same conduct. Some academic commentators conflate the concepts of dual attribution to a TCN with dual attribution in other contexts - namely those found in DARIO part 5. Again, there is no denying that dual attribution is possible and that it is used in some contexts, just not this one.

4) Alternate Solution/Re-conceptualization

I wholeheartedly agree with advocates of increased accountability of TCNs. However, the dual attribution solution promoted by numerous academics and the Dutch appellate court is unlikely to proliferate for several reasons. First, in order for

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67 DARIO at Part 5, Comment 2.
68 Id. at Part 5.
70 Dannenbaum makes a strong argument for the need of increased state attribution in order to prevent such conduct in the future. As Dannenbaum points out, it is the state, and not the UN, that is in the best position to prevent misconduct because the state chooses the troops, trains them, and maintains power over disciplinary matter. See Dannenbaum, supra note 26. See also Scott P Sheeran, Briefing Paper: Contemporary Issues in UN Peacekeeping and International Law, p10 available at http://www.idcr.org.uk/wp-content/uploads/2010/09/02_11.pdf (“The plethora of instances in which UN Peacekeepers are alleged to have committed human rights violations, from involvement in human trafficking to allegations of illegal detention and mistreatment in UNPKOs, makes this an urgent imperative.”).
dual attribution in the troop-contributing context to become international law it would have to arise out of treaty or develop as customary international law, but states are not likely to so consent. Second, it requires a complete reformation of the effective control test - one that is not likely to be adopted by courts and would have unknown consequences on other areas of state attribution. Third is the very reason reached by the ECtHR in Behrami - that even international courts find themselves unwilling to impugn the conduct of the UN.\textsuperscript{71} The solution I propose is one that falls squarely within current international law on state attribution.\textsuperscript{72} Thus, it does not require the formation of new international law and must only be argued before courts in order to be implemented. In other words, I do not find the Dutch Courts result undesirable, but only that its means are poorly supported.

A) The Need for Another Solution: Why Dual Attribution Will Not Arise in the Contributing State Context

Dual Attribution is not about to become the new standard in the peacekeeping context. This is primarily true because

\textsuperscript{71} Behrami, supra.

\textsuperscript{72} See section 1 on current International Law of Attribution.
academics are proposing a whole new scheme. Implementing a new system for state attribution is unlikely because new international law forms largely through state consent. States are not going to consent to increasing their own liability, unless it benefits them. In forming the current law, states had the incentive of holding one another accountable for the damage they caused. In other words, states were increasing liability for all because it was in their own interest. However, in this context, neither the TCN nor the state receiving the benefit of the peacekeepers has an incentive to increase the contributor’s liability. The TCN has no incentive to increase its own costs, and the beneficiary of the forces is not likely to repay the favor by espousing the claims of its own citizens against the peacekeepers – especially while it still has need of those peacekeepers. Of course, it can be argued that states have a general concern in promoting the interests of their citizens. Nonetheless, that concern is grossly outweighed by the harm caused to the benefiting state by seeming ungrateful or risking the loss of future aid by the international community. Additionally, states on each side of the issue may be concerned that increasing liability of the troop-contributor may reduce

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73 Dannenbaum makes this very clear, and his scheme is fairly complex, with five categories of attribution. Dannenbaum, supra note 26, at 158.
state’s willingness to contribute.\textsuperscript{74} What is more, the current international law of attribution took 40 years for the ILC to codify.\textsuperscript{75} Such contentious issues are not easy to suddenly alter.

Furthermore, courts are unlikely to follow the Dutch appellate decision. Aside from its lack of support under current international law (outlined above), the Dutch appellate court had to vastly expand the effective control test in order to get the Dutchbat conduct to fall within the control of the Netherlands.\textsuperscript{76} Any such expansion of the test will affect other areas of attribution where the same test is used. Using an ability-to-prevent analysis would lead to a drastic increase in the amount of attributable conduct, and one would expect many international courts to find this expansion unacceptable. Courts could instead avoid expanding the effective control test by relying on the reasoning (outlined above) that the troop conduct is attributable as an organ of the TCN. Additionally, as the ECtHR demonstrated in Behrami, courts are not likely to find conduct attributable to the UN to be within their competence.

B) How Default State Attribution Works

\textsuperscript{74} Recall Poland’s reasoning in the Behrami case. \textit{Behrami, supra} note 21, at ¶ 111.
\textsuperscript{75} \textsc{James Crawford}, \textsc{The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries} ix (2002).
\textsuperscript{76} \textit{Mustafic, supra}, on expanded definition of effective control.
Under Default State Attribution, the effective control test would still be used as currently supported by international law. The test would continue to be a strict, factual inquiry as to control of the conduct in question.\footnote{Mosche Hirsche, The Responsibility of International Organizations Towards Third Parties: Some Basic Principles 71 (1995).} However, if the IO is found not to possess effective control, attribution to the TCN would be established automatically without the need for any showing of effective control by the state. This is because, as described in Part 2, conduct of troops are attributable to the state as an organ of that state, without regard to the actual control exercised over those troops at the time of the transgression.

Walking through an international court’s analysis of a claim against a troop-contributing state would require the following three steps: First, the court would ask whether the impugned conduct was perpetrated by an organ of the defendant state. An official contingent of the state’s troops would fit this criterion. Second, the court would ask whether the conduct could be attributable to the receiving IO (whether that IO is the UN or any other IO). This would require using the effective control test, and would be a purely factual inquiry.\footnote{Id.} If the answer is yes, then the inquiry would cease and the case would be dismissed because of the exception to state attribution. The claimants would then have to seek a remedy from the IO, or some
tribunal with jurisdiction over that organization. On the other hand, if the answer is no, the third step is to attribute the conduct to the state under the default rule regarding organs of a state.\footnote{RSIWA, supra, at art. 4, ¶ 1.}

One interesting result of relying on the strictness of the effective control test derives from the very fact that it is used in other contexts. Thus, courts would be cautioned not to expand the effective control test to find attribution to the UN for fear that the expansion could cause attribution of non-state actors to the state in other situations. States would in essence be caught in a Catch-22, between encouraging courts to find the UN had effective control in the present case while also encouraging the court not to be too expansive in interpreting effective control, and thus encompass non-state conduct in other situations. Opponents of this possibility might argue that it is unfair to the state, but really it is just a manner of keeping the state honest. States would be forced to avoid stretching the bounds of the effective control framework for fear of that expansion coming back around to harm them in another context.

C) Benefits of Default State Attribution Over Current Practice
Default State Attribution is preferable to automatic attribution to the IO (as the above discussion suggests is the current, unspoken standard) because of the added clarity it provides. Default State Attribution is clearer because it would lead courts to follow the effective control test as outlined in DARIO, by tracing the conduct up a linear chain to the source of control over the conduct. Conversely, current practice of international courts tends to find attribution to the IO regardless of the outcome that would be predicted under international law. In other words, Default State Attribution would reconcile results with the written law, while current practice says one thing, and does another.

Another advantage of Default State Attribution over current practice is that Default State Attribution will not lead to a given claimant being left without any remedy, as does the current system.

Additionally, one of the most notable effects of this conceptualization is that it would encourage states to cede more control over contributed peace-keeping troops to the UN. This is because states would not want to risk attribution by interfering with the UN’s effective control of the troops. Nothing could

80 DARIO, supra, note 9.
81 “[A]s a matter of practice, the conduct of UN peacekeeping forces has tended to be attributed to the UN only and UN immunities asserted” Scott P Sheeran, Briefing Paper: Contemporary Issues in UN Peacekeeping and International Law 7, available at http://www.idcr.org.uk/wp-content/uploads/2010/09/02_11.pdf.
82 See supra, note 74.
more clearly show that the UN was not in control of the conduct than if the order to engage in that conduct came from the contributing state. In fact, if the UN so much as verified the action by first conferring with the contributing state (as in Mustafic\(^83\)), there would be a risk of attribution to the state. States would thus be incentivized to avoid involvement in decision-making, let alone cutting across the command structure. This would have the overall effect of strengthening the UN’s control over peace-keeping forces.

Furthermore, under Default State Attribution, states could not simply avoid attribution by staying out of the decision-making process because of the possibility of *ultra vires* acts committed by the contributed troops. By definition, *ultra vires* conduct occurs outside of the command structure, so it would be difficult to find that the acts fell under the effective control of the IO. Thus, troop-contributing states would be encouraged to prevent troop misconduct by selecting troops with care, improving training and strengthening the disciplinary system. In effect, increased liability would encourage states to prevent misconduct more strictly, as was suggested by Dannenbaum.\(^84\) This

\(^{83}\) *Mustavic* at ¶ 5.12.

\(^{84}\) See Dannenbaum.
thus fulfils Dannenbaum’s goal of prevention of wrongful conduct.\textsuperscript{85}

Opponents of this conceptualization may make the same arguments as those made against dual attribution – namely Poland’s contention in the \textit{Behrami} case asserting that increasing liability of troop contributing states will discourage future contributions.\textsuperscript{86} However, unlike the expansive dual attribution used by the Dutch court in \textit{Mustafic}, Default State Attribution would not leave the contributing state open to attribution in all peacekeeping situations, but only those where the receiving IO did not exercise effective control. Therefore, any reduction in willingness to partake in peacekeeping missions by contributing states would be moderated by the state’s ability to cede more control over to the receiving IO and thus reduce the likelihood of attribution.

D) Benefits of Default State Attribution Over Dual Attribution

One of the notable problems of broad dual attribution in the troop-contributing context is the difficulty of holding some

\textsuperscript{85} Id.
\textsuperscript{86} \textit{Behrami} at ¶ 111.
IO’s responsible.87 If an international tribunal were to find the receiving IO and the contributing state severally liable under a dual attribution theory, it would only be likely to have jurisdiction over the state.88 Thus, the effect of dual attribution in most cases would be one of attribution to the state without concern for the effective control of the IO.89 States could then seek indemnity from the IO. At the very least, the state subject to dual attribution would have the leverage over the IO of refusing to participate in any more contributions to the IO unless the state were compensated in entirety. If this sort of indemnity of the state by the receiving IO were to become the norm, then the system would essentially revert to the current practice – and any preventative power of dual attribution would be nullified by the indemnity.

On the other hand, Default State Attribution shares no several liability problems, because it always holds one, and only one, entity accountable. Furthermore, contributed-troop conduct is only attributed to the state where it cannot be attributed to the IO. This therefore reduces the indemnity problem because the parties would not anticipate attribution to the IO under international law.

88 See Behrami.
89 This is exactly what happened in Mustafic. See Mustafic.
Another significant benefit of Default State Attribution over dual attribution is that it leaves no gaps in available remedies - where a given victim of internationally wrongful conduct by peacekeepers could not attribute the conduct to either the state or the organization and would thus be left without recourse. As detailed above, this sort of gap is not possible under the best reading of current international law.\textsuperscript{90} Thus, Default State Attribution specifically excludes that possibility. On first glance, it would appear that dual attribution would also have the effect of eliminating gaps, by giving the claimant a second avenue of recourse, and in some cases, this would be true. However, under the Mustafic court’s process of expanding effective control and applying that test to the contributing state, the no-remedy gap is still a possibility.\textsuperscript{91} Even with a very broad definition, as two distinct tests, it is possible that neither entity had effective control.

Furthermore, it is worth noting that Default State Attribution, unlike dual attribution, would be applicable under the ECtHR’s Behrami jurisprudence. This is because at no point is the tribunal required to impugn the conduct of the IO (such as the UN). For a side-by-side comparison of the benefits of each system, see the accompanying table.

\textsuperscript{90} As outlined in Section 1.
\textsuperscript{91} See section 3.
E) Applying Default State Attribution to Past Cases

The effects of implementing Default State Attribution depend entirely on what system the court would have used instead. Therefore, a case-by-case comparison would be necessary to determine the overall impact Default State Attribution. Turning first to the Mustafic, the court differed from Default State Attribution in the three ways outlined in Part 2. Nonetheless, under Default State Attribution, the court would likely have arrived at the same result. Instead of determining that the Netherlands held effective control over the conduct, the Dutch Appellate court could have used the same evidence to find that the UN did not possess effective control. Each argument that outlined the control of the Netherlands could be turned on its head to show that the UN did not possess that aspect of control. However, the result under Default State Attribution is unclear in that the Dutch court relied upon the Netherland’s ability to prevent the conduct – something that does not fit into the current effective control inquiry. Nonetheless, the Netherlands’ influence over the situation would likely have led the court to the conclusion that the UN did not have effective control over the conduct. For example, the UN conferred with Dutch commanders in regards to the decision to
evacuate; it did not oversee the writing of the evacuation list; it did not instruct Dutchbat to send the victims away from the compound, etc.\textsuperscript{92} Thus, the result under Default State Attribution would likely have been to find attribution to the Netherlands (and only the Netherlands).

The ECtHR’s combined Behrami/Seramati decisions followed the more common, if unspoken, approach of automatically applying attribution to the receiving IO, without regard to the contributing state. The Behrami court diverged from Default State Attribution by using the wrong standard for that attribution. Instead of determining whether the UN had effective control, the ECtHR determined that the UN had “ultimate authority and control.”\textsuperscript{93} This difference is not simply an alternate choice of wording. The ECtHR reasoned that the UN was attributable because the mission itself was established by a UN Security Council resolution, and therefore the command structure ran up to the Security Council.\textsuperscript{94} This is quite different from the factual determination required by the effective control test in that it does not even address the specific wrongful conduct. Therefore, applying Default State Attribution (and thus current international law) to Behrami, the effective control test would be applied instead. Based in the court’s findings of facts,

\textsuperscript{92} Mustafic at 2.1-2.34.
\textsuperscript{93} Behrami at ¶ 133.
\textsuperscript{94} Id. at ¶ 134.
NATO’s Kosovo Force (KFOR) engaged in the conduct in the Seramati case (detention), while the UN Interim Administration Mission in Kosovo (UNMIK) was responsible for the conduct in the Behrami case (failure to demine).\textsuperscript{95} Therefore, under the effective control test, the Behrami result would have been identical as to UNMIK, while the Seramati result would have been opposite – at least by finding that the conduct was not attributable to the UN. Whether the complainants could have then convinced the ECtHR that KFOR had no separate legal identity, and the individual contributing states were responsible is unclear, and beyond the scope of this note.\textsuperscript{96}

5) Conclusion

Ultimately, Default State Attribution can be implemented seamlessly because it is already supported by international law. In this way, it could be said that Default State Attribution is not a change at all; it is just a conceptualization that will allow courts to more easily and reliably reach the result best supported by law. Numerous legal commentators have expressed their disagreement with the results of international courts in

\textsuperscript{95} Behrami, as used by this article refers to the combined Behrami and Seramati cases. In this paragraph, the article distinguishes for the first time between those cases.

\textsuperscript{96} The Behrami case has the added complication that one IO (NATO – through KFOR) was lending troops to a second (UN), and the claimants were attempting to attribute conduct to the states comprising the first IO. In essence, under Default State Attribution, the claimants would need to show that neither of the IO’s had effective control in order to reach the default – attribution to the contributing state.
relation to state attribution of peacekeeper conduct. However, most of those concerns could be resolved if the courts would simply apply the most accepted international law to the cases. In other words, many of the issues raised are not problems with the current state of the law, but in its application. Also, while any alteration of the law would be contentious and difficult to implement, Default State Attribution stands ready to be applied.

It is unclear why other commentators have struggled to promote effective control as the basis for attribution to a troop-contributing state rather than the contingent’s nature as an organ of the state. Even for proponents of dual attribution, it would seem far simpler to use the well-established principle attributing conduct of state organs than to convince courts to drastically expand the effective control test. Perhaps this solution has simply been overlooked.

In essence, the Default State Attribution conceptualization is a more moderate proposition than either dual attribution or automatic attribution to the receiving IO. It permits state attribution less frequently than dual attribution would, but more frequently than automatic attribution to the IO, or the use of a more permissive attribution test (i.e. Behrami).\(^97\) Thus, whatever the conceptualization lacks in its ability to increase

\(^{97}\) Cf. Behrami.
peacekeeping attribution to the state, it gains in not discouraging contributions from states for peacekeeping missions.

Furthermore, it is important to note that this solution is conceived for situations in which a state organ is contributed to an IO, which occurs most notably (though not exclusively) when troops are donated to the UN or NATO in the peacekeeping context. Default State Attribution would be applicable to any contribution of personnel to an IO, but would not be applicable to any area of international law where attribution were not derived from the acting party’s relation as an organ of a state. In other words, in order for the default to be state attribution, there must be a legal basis for such default attribution, which is satisfied in the contribution context by the nature of the contributed personnel as an organ of the state.

Finally, it is worth noting that although dual attribution of peacekeeper conduct is not supported by international law as such, dual attribution is possible under Part 5 of DARIO. In this situation, where a state “aids or assists” (art 58) or “directs and controls” (art 59) the conduct of an organization it is attributable along with the organization. Thus, although

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98 DARIO part 5.
99 Id. DARIO part 5.
a state may escape attribution of its conduct if the contributed troops were under the effective control of the IO, the state could still be liable if, for instance, it manipulated the organization.

Overall, proponents of dual attribution have the laudable goals of increasing responsiveness of states in peacekeeping missions to prevent future injury and remedy past injuries. Opponents of dual attribution have the praiseworthy intentions of promoting state contributions to peacekeeping missions and maintaining the carefully constructed rules of state attribution. Thus, I am not persuaded that either perspective is superior, or that either holds the sole solution to the problems at hand. In short, it is my hope that conceptualizing the current law under the Default State Attribution framework will bridge the difference in these opinions and form the modern standard of attribution in the troop-contributing context.
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<td><strong>Clarity of Law/Predictability</strong></td>
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<tr>
<td>Current Practice (attribute to IO)</td>
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<tr>
<td>Less Clarity – International courts pretend to apply effective control to IO; actual tests may differ; attribution to IO despite expected result under international law.</td>
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| Availability of Victim Redress |
| Current Practice (attribute to IO) | Default State Attribution | Dual Attribution |
| Worst – redress largely dependent on decision of IO (see Danenbaum on difficulties in redress from UN). | Best in Application – guarantees conduct attributable to one body. | Theoretically Best – academics claim 1 or 2 bodies always liable, BUT Mustovic application may leave gap if neither body had effective control. |

| Prevention of Wrongful Conduct |
| Current Practice (attribute to IO) | Default State Attribution | Dual Attribution |
| Less Prevention – state not incentivized to prevent because conduct rarely (if ever) attributable to state. | Significant Prevention of wrongful ultra vires conduct, little or none of other conduct. | Greatest Prevention – states often held liable thus encouraging more care in many situations (see Danenbaum). |

| Deter State Contributions |
| Current Practice (attribute to IO) | Default State Attribution | Dual Attribution |
| Best – encourages contributions by relieving states of liability. | May deter some contributions – states that may expect ultra vires action would have added cost of either reforming troops or contributing anyway and risking attribution. | May significantly deter state contributions – all contributing states will be faced with significant costs of either reforming troops or risking attribution of any conduct. |

| Collection Where Severally Liable |
| Current Practice (attribute to IO) | Default State Attribution | Dual Attribution |
| No several liability. | No several liability. | May be problem where dual attribution applies, but no court can exert jurisdiction over IO (see ECtHR lack of jurisdiction over UN in Behrami). |

| Encourage State to Cede Control to Organization |
| Current Practice (attribute to IO) | Default State Attribution | Dual Attribution |
| Some – in theory encourages states to cede control, but attribution to states rarely found. | Best – encourages state to cede control so as to maintain IO’s effective control. | Worst – may encourage state to interfere with IO’s commands for fear of incurring liability for troop conduct. |
1) Introduction

2) An Overview of the Relevant International Law on Attribution

3) Problems with the Dutch Appellate Decision
   A) Applying Effective Control to the Troop-contributing State
   B) New, Overly Broad Definition of Effective Control
   C) Dual Attribution

4) Alternate Solution/Re-conceptualization
   A) The Need for Another Solution: Why Dual Attribution Will Not Arise in the Contributing State Context
   B) How Default State Attribution Works
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5) Conclusion