

REASSESSING MULTIPLE ATTRIBUTION:
THE INTERNATIONAL LAW COMMISSION AND
THE *BEHRAMI* AND *SARAMATI* DECISION

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I. INTRODUCTION

United Nations peace support operations often involve complex and quickly-arranged relationships between contributing states and international organizations. If an internationally wrongful act¹ is committed during an operation, it can be difficult to determine which state party or international organization is to blame and who should be held legally responsible for it. The International Law Commission (“ILC”) of the United Nations (“UN”) is in the process of drafting international rules regarding the attribution of conduct for internationally wrongful acts committed by international organiza-

1. The ILC has defined “internationally wrongful act”: “There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributed to the international organization under international law; and (b) Constitutes a breach of an international obligation of that international organization.” Report of the International Law Commission on the Work of its Fifty-Fifth Session, U.N. GAOR, 58th Sess., Supp. No. 10, n.24, U.N. Doc. A/58/10 (2003) [hereinafter 2003 ILC Report].

tions or their member states and the distribution of responsibility for such conduct in its Draft Articles on the Responsibility of International Organizations (“Draft Articles” or “Responsibility of IOs”).² The Draft Articles and their Commentaries allow for the possibility of multiple attribution of conduct and the assignment of plural responsibility to several involved entities, thereby providing a potential solution to thorny questions of responsibility in UN peace support operations in which a single action may be committed by multiple entities acting at once.

The joined cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (“*Behrami/Saramati*”) represent a landmark 2007 decision of the European Court of Human Rights regarding the attribution of conduct and subsequent responsibility among implicated parties, and provide further insight into the current state of international law on this matter.³ Although in *Behrami/Saramati* the Court purports to apply the ILC’s Draft Articles, the decision seems to rule out the possibility of attribution to more than one entity, contradicting the multiple attribution concept recently set down as a rule in the Draft Articles themselves. While the reasoning in the decision creates several serious problems,⁴ this Note concentrates on the parts of the decision that raise questions about the effectiveness of the ILC’s Draft Articles rule on attribution of conduct to states and international organizations and possible plural responsibility.

The different understandings of international law that are expressed in the Draft Articles and in *Behrami/Saramati* have

2. Report of the International Law Commission on the Work of its Sixty-First Session, U.N. GAOR, 64th Sess., Supp. No. 10, U.N. Doc. A/64/10 (2009) [hereinafter 2009 ILC Report]. As of publication, the Draft Articles have been adopted on first reading and are being submitted to states and international organizations for comments and observations. The Draft Articles are available at <http://untreaty.un.org/ilc/reports/2009/2009report.htm>.

3. *Behrami v. France; Saramati v. France* (dec.), nos. 71412/01 and 78166/01, Eur. Ct. H.R. 2007 (joint admissibility decision), available at <http://cmiskp.echr.coe.int/tkp197/search.asp>.

4. See Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test*, 19 EUR. J. INT’L L. 509 (2008) (discussing several of the problems in the decision, including the proper test of attribution, the need to assess multiple attribution, and the extraterritorial effect of the European Convention on Human Rights).

widely divergent implications for international organizations that run operations along with state actors, in particular the UN. The multiple attribution rule in the Draft Articles allows for a possible finding of responsibility for both states and international organizations involved in an operation, while *Behrami/Saramati* implies that the international organization alone bears the weight of responsibility. While states may react to the former rule by being more hesitant to join international operations, the latter rule may encourage liability-free states to be careless during operations and may discourage the UN from running such operations. This Note argues that the *Behrami/Saramati* single attribution ruling was improperly decided in light of the ILC's present formulation of the rule on attribution and examines the implications of the *Behrami/Saramati* decision for both the ILC and UN peace support operations.

Section II provides background on the European Court of Human Rights case and the ILC's work on Responsibility of International Organizations. Section III analyzes the conflict between the international legal standards of attribution and responsibility as laid out in the ILC's Draft Articles and in *Behrami/Saramati*. This note then examines the implications of the two divergent rules in Section IV. Finally, Section V provides recommendations for the adoption of a consistent rule of multiple attribution.

II. LEGAL BACKGROUND: *BEHRAMI/SARAMATI* AND THE ILC DRAFT ARTICLES

A. *The European Court of Human Rights and Behrami/Saramati*

The European Convention on Human Rights ("Convention") is a treaty under which the Contracting States agree to "secure to everyone within their jurisdiction" certain fundamental human rights, such as the right to life, the right to liberty, and the right not to be tortured.⁵ If Contracting States violate any of the secured human rights in the Convention, the injured parties may bring claims against them at the European

5. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

Court of Human Rights (“European Court”).⁶ Over forty-seven European states have ratified the Convention, including France, Germany, and Norway, the states against whom claims were brought under the Convention in the *Behrami* and *Saramati* cases.

The two cases, which were joined in the European Court, concern activities involving states that had obligations as both Convention-Contracting States and Troop-Contributing Nations for the peace operation of the UN and the North Atlantic Treaty Organization (“NATO”) in Kosovo, an autonomous region of the Federal Republic of Yugoslavia (“Yugoslavia”), following the conflict there in 1998 and 1999.⁷ During the conflict, Yugoslavia committed human rights violations and ethnic cleansing in Kosovo, where tensions between Serb and Albanian populations were especially high.⁸ The international community called on Yugoslavia to halt the abuses and leave Kosovo,⁹ culminating in NATO military air strikes against the Yugoslavian government for failure to comply with these international demands.¹⁰ Immediately following the NATO air strikes, which took place from March to June of 1999, Yugoslavia, the Republic of Serbia, and the UN agreed that Yugoslavia would withdraw from Kosovo and that the UN would maintain an international security force in the area.¹¹

6. See European Court of Human Rights, *Information Document on the Court*, art. 19, Doc. No. 1762893 (Sept. 2006), available at www.echr.coe.int (“Any Contracting State . . . or individual claiming to be a victim of a violation of the Convention . . . may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State of one of the Convention rights.”). See generally THE EUROPEAN COURT OF HUMAN RIGHTS: SOME FACTS AND FIGURES, 1998-2008, Nov. 2008, available at www.echr.coe.int (presenting background on the European Court of Human Rights).

7. *Behrami/Saramati*, ¶ 2.

8. Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUM. RTS. L. REV. 151, 152 (2008).

9. See S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (demanding “that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe”).

10. NATO, The Kosovo Air Campaign, http://www.nato.int/issues/kosovo_air/index.html (last visited Oct. 21, 2009).

11. S.C. Res. 1244, U.N. Doc. S/RES/11244 (June 10, 1999).

On June 10, 1999, the UN Security Council passed Resolution 1244 establishing a security presence in Kosovo, the Kosovo Force (“KFOR”), and an interim administration, the United Nations Interim Administration Mission in Kosovo (“UNMIK”).¹² KFOR was to be composed of “‘Member States and relevant international institutions’, ‘under UN auspices’, with ‘substantial NATO participation’ but under ‘unified command and control.’”¹³ KFOR troops’ responsibilities included maintaining security, public safety, and order.¹⁴ The UN Secretary General established UNMIK to coordinate with KFOR and undertake certain civilian administrative tasks for Kosovo.¹⁵ In particular, UNMIK’s civilian role was intended “to promote the establishment of substantial autonomy and self-government in Kosovo by fostering the establishment of accountable civilian institutions in Kosovo.”¹⁶ The *Behrami* and *Saramati* cases before the European Court concerned questions of responsibility for activities carried out in furtherance of the KFOR and UNMIK peace support operation by the troops of states that were both Troop-Contributing Nations and Convention-Contracting States.

In *Behrami*, claims were brought against France for the failure of French-contributed KFOR troops in the Mitrovica area of Kosovo to clear mines dropped by NATO in 1999.¹⁷ On March 11, 2000, a group of children in Mitrovica came across several of these undetonated cluster bombs while playing. One of the bombs exploded, killing one of the children, Gadaf Behrami, and severely injuring another, Bekim Behrami, both sons of Akim Behrami.¹⁸ The French KFOR troops claimed that the mine-clearing operations had been the

12. *Id.*

13. *Behrami v. France; Saramati v. France* (dec.), nos. 71412/01 and 78166/01, ¶ 3, Eur. Ct. H.R. 2007 (joint admissibility decision) (citing S.C. Res. 1244), available at <http://cmiskp.echr.coe.int/tkp197/search.asp>.

14. S.C. Res. 1244, *supra* note 11, art. 9; see also HUMAN RIGHTS WATCH, FAILURE TO PROTECT: ANTI-MINORITY VIOLENCE IN KOSOVO (2004), available at <http://www.hrw.org/reports/2004/kosovo0704/4.htm> (presenting background on the establishment and role of KFOR).

15. S.C. Res. 1244, *supra* note 11.

16. HUMAN RIGHTS WATCH, *supra* note 14. See also S.C. Res. 1244, *supra* note 11, at 11 (b) (“promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo”).

17. *Behrami/Saramati*, ¶¶ 5, 7.

18. *Behrami/Saramati*, ¶ 5.

responsibility of UNMIK since July 5, 1999, raising a complicated question of responsibility and leaving the Court to determine whether NATO's KFOR, the UN's UNMIK, or France itself was accountable for the failure to clear the mines.¹⁹

In *Saramati*, a Kosovar man challenged his arrest and detention under UNMIK authority for suspected murder and illegal weapons possession, his re-arrest and detention under KFOR authority for suspected involvement with armed border groups, and his trial on these charges.²⁰ Mr. Saramati brought charges at the European Court against Germany because it was the lead Troop-Contributing Nation in charge of the sector in which he was first arrested,²¹ against Norway because a Norwegian officer was the Commander of KFOR ("COMKFOR") upon Saramati's first arrest and detention, and against France because a French officer was the COMKFOR during Saramati's second detention and trial.²² This case again raised complex questions regarding the determination of responsibility for actions taken by national troops acting under multiple international organizations.

The Court joined the two cases of *Behrami* and *Saramati* to address the common question of accountability under the Convention for actions taken by the military organs of Convention-Contracting States while involved in the UN and NATO peace support operation in Kosovo.²³ If the troops' actions were attributed to the states themselves then the Court would go on to determine liability; if only the international organizations were found responsible for the troops' actions then the Court would have no jurisdiction to find liability, since the UN and NATO were not Convention-Contracting Parties.²⁴

In its May 2, 2007, decision, the Court found that the troops' actions and inactions were attributable to the United Nations, not to the Convention-Contracting States.²⁵ The Court found that KFOR had been acting under UN Charter

19. *Behrami/Saramati*, ¶ 7.

20. *Behrami/Saramati*, ¶¶ 8-19.

21. Saramati later withdrew his case against Germany because he could not establish German involvement. *Behrami/Saramati*, ¶¶ 64-65.

22. *Behrami/Saramati*, ¶¶ 9-15.

23. See Larsen, *supra* note 4, at 510 (noting that the *Behrami/Saramati* cases particularly raised the question of accountability).

24. *Behrami/Saramati*, ¶ 144.

25. *Behrami/Saramati*, ¶¶ 141, 144.

Chapter VII power delegated to it by the Security Council, thus making its action of detention in *Saramati* attributable to the UN.²⁶ Because UNMIK was a subsidiary organ of the UN under Chapter VII, its inaction (failure to de-mine) in *Behrami* was also attributable to the UN.²⁷ Despite finding that “the troop-contributing nations had some authority over their troops (for reasons, inter alia, of safety, discipline, and accountability) and also certain obligations in their regard (for example, material provision),”²⁸ the Court came to the conclusion that the UN Security Council “retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO.”²⁹ As a result of this conclusion, the Court struck the *Behrami/Saramati* applications for incompatibility *ratione personae*, finding a lack of personal jurisdiction over the UN because it was not a party to the Convention.³⁰ In determining that the actions were attributable to the UN and ending its analysis there, “[t]he Court also seem[ed] to imply that those same acts and omissions [were] not attributable to the member states themselves.”³¹ The Court’s implication that international law allows for only single attribution of internationally wrongful acts creates a crucial point of conflict between *Behrami/Saramati* and the ILC’s Draft Articles.

B. *The ILC and the Draft Articles on the Responsibility of International Organizations*

The International Law Commission was created over sixty years ago by the United Nations for the purpose of promoting “the progressive development of international law and its codification.”³² The ILC has already codified several areas of inter-

26. *Behrami/Saramati*, ¶ 141.

27. *Behrami/Saramati*, ¶¶ 142-43.

28. Pierre Bodeau-Livinec et al., *Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway*, 102 AM. J. INT’L LAW 323, 325 (2008).

29. *Behrami/Saramati*, ¶ 140.

30. *Behrami/Saramati*, ¶¶ 152, 153.

31. Bodeau-Livinec et al., *supra* note 28, at 326.

32. Statute of the International Law Commission, G.A. Res. 174 (II), art. 1(1), U.N. Doc. A/519 (Nov. 21, 1947).

national law, on topics such as the Law of Treaties³³ and State Responsibility,³⁴ and is currently in the process of codifying international law on the Responsibility of International Organizations.

There are several stages in the ILC's codification process. After a subcommittee of the ILC drafts a set of articles, the text goes to the full Commission for a first reading in which the articles are reviewed and provisionally adopted.³⁵ The articles then go to the UN General Assembly for review and comment, after which the ILC proceeds with its second reading to make any necessary revisions before adopting a final draft of the articles.³⁶

Once the ILC has completed the second reading, the Commission presents the final version of the articles to the UN General Assembly with a recommendation on the type of action the General Assembly should take on these articles.³⁷ For instance, the ILC might recommend that the articles be adopted as a declaration or a convention, or that the General Assembly set up a conference to conclude a convention on the articles.³⁸ Only upon adoption do the articles themselves become legally binding as international law, but governments and courts may choose to look to a certain draft article as a formal expression of already existing customary international law and, therefore, a binding rule even before adoption.

The ILC's Draft Articles 3,³⁹ 4,⁴⁰ and 5⁴¹ on Responsibility of International Organizations set down the ILC's general con-

33. Codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

34. Codified in Int'l Law Comm'n [ILC], Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001) [hereinafter Articles on State Responsibility or State Responsibility].

35. See THE WORK OF THE INTERNATIONAL LAW COMMISSION, U.N. Sales No. E.04.V.6, §5(a) (2004) (providing an overview of the ILC's methods of work).

36. *Id.*

37. *Id.*

38. *Id.*

39. 2009 ILC Report, *supra* note 2. The text of Draft Article 3, as printed in the 2009 ILC Report, reads:

Article 3

Responsibility of an international organization for its internationally wrongful acts

ception of wrongful acts by international organizations and attribution for the wrongful conduct. Draft Article 6⁴² leaves open the possibility of attributing a single internationally wrongful act to more than one state or international organization, and the more recently adopted Draft Article 47⁴³ explicitly allows for plurality of responsibility.

Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

40. The text of Draft Article 4, as printed in the 2009 ILC Report, *supra* note 39, reads:

Article 4

Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) Is attributable to the international organization under international law; and
- (b) Constitutes a breach of an international obligation of that international organization.

41. The text of Draft Article 5, as printed in the 2009 ILC Report, *supra* note 2, reads:

Article 5

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. Rules of the organization shall apply to the determination of the functions of its organs and agents.

42. The text of Draft Article 6, as printed in the 2009 ILC Report, *supra* note 2, reads:

Article 6

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

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.

43. The text of Draft Article 47, as printed in the 2009 ILC Report, *supra* note 2, reads:

Article 47

Plurality of responsible States or international organizations

Draft Articles 3 and 4 were provisionally adopted as a single Draft Article 3 on first reading by the ILC in its 2003 Annual Report. Their content was only recently divided into Draft Articles 3 and 4 during the 2009 ILC session, in which the Commission decided to review all of the existing Draft Articles before sending them to states for comments.⁴⁴ Draft Articles 5 and 6 (formerly Draft Articles 4 and 5, respectively)⁴⁵ and their Commentaries were provisionally adopted on first reading in the 2004 Annual Report, three years before *Behrami/Saramati* was decided.⁴⁶ During the 2009 review of the Draft Articles, the Commission decided to retain the primary meaning of Draft Article 5 and its Commentary as written in 2004, but some of the wording was altered to eliminate confusion. The ILC retained the original 2004 wording of Draft Article 6, but the Commission responded to the contradictory attribution ruling in *Behrami/Saramati* by expanding the Draft Article's Commentary to clarify the ILC's understanding of the appropriate attribution test.⁴⁷ Draft Article 47 (formerly Draft Article 51) was presented to the ILC Drafting Committee in the summer of 2008, a year after the *Behrami/Saramati* decision

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

2. Subsidiary responsibility, as in the case of draft article 61, may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) Do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) Are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

44. 2009 ILC Report, *supra* note 2, ch. 4, ¶¶ 34, 46.

45. Some portions of this note refer to ILC and Court documents that rely on prior versions of the Draft Articles in which the previous numbering system applied. For the sake of clarity, I will refer to the articles by their current numbers.

46. Report of the International Law Commission on the Work of its Fifty-Sixth Session, U.N. GAOR, 59th Sess., Supp. No. 10, U.N. Doc. A/59/10 (2004) [hereinafter 2004 ILC Report].

47. 2009 ILC Report, *supra* note 2, ch. 4.C.2, at 67-69 ¶¶ 9-12.

was announced, and the ILC provisionally adopted it in the 2008 Annual Report.⁴⁸

At the 2009 meeting of the UN General Assembly, states and international organizations had the opportunity to comment on the text of the revised Draft Articles. Taking these comments into consideration, the Commission will proceed to a second reading of the provisional articles at a future session before adopting a final version of the Draft Articles.

While the ILC's 2009 Draft Annual Report addressed the implications of *Behrami/Saramati* on the test to determine attribution, the Commission did not comment on the decision's divergent implications for dual attribution or for Draft Article 47's plural responsibility rule.⁴⁹ The Commission's silence on *Behrami/Saramati*'s implications for multiple attribution of conduct and plural responsibility exacerbates the uncertainty created by the decision and leaves a gap in the Draft Article rules. The ILC should address further the discrepancies between its rule of multiple attribution of conduct and that of *Behrami/Saramati* because the two approaches have very different implications in practice.

III. THE CONFLICT BETWEEN THE DRAFT ARTICLES AND THE *BEHRAMI/SARAMATI* REASONING

In its *Behrami/Saramati* decision, the European Court of Human Rights relied heavily on the ILC's Draft Articles to frame its understanding of the attribution of conduct to international organizations. The issue of attribution is especially important in international peace support operations, where a state's military forces may be placed at the disposal of an international organization (in this case, the UN and NATO) and it is unclear if the state or the international organization is ultimately responsible for certain acts taken by the soldiers.⁵⁰ In some situations, both the state and international organization may be found to have committed the wrongful act and/or be

48. Report of the International Law Commission on the Work of its Sixtieth Session, art. 47, U.N. GAOR, 63rd Sess., U.N. Doc. No. A/63/10, 292-93 (2008) [hereinafter 2008 ILC Report].

49. 2009 ILC Report, *supra* note 2, ch. 4.C.2, at 140-41 (Draft Article 47 and its Commentary remain substantively the same as in the 2008 ILC Report).

50. Larsen, *supra* note 4, at 512.

found responsible for the act. To conduct an attribution analysis consistent with the ILC Draft Articles, a court must consider the Part Two Chapter II (“Chapter II”) Commentary, which provides for the possibility of multiple attribution of conduct, and the more recently adopted Draft Article 47, which provides for the possibility of multiple attribution of responsibility.⁵¹

A. *The Court’s Interpretation of Draft Articles 3, 4, 5, and 6*

In its determination of which party committed the actions and omissions in *Behrami* and *Saramati*, the European Court stated that it “has used the term ‘attribution’ in the same way as the ILC in Draft Article [4].”⁵² In the “Relevant Law and Practice” section of the opinion, the Court directly quoted Draft Articles 3, 4, and 6, as well as extensive sections of the 2004 ILC Commentary on Draft Article 6.⁵³ The court took for granted that these provisional articles were applicable law and even placed them in the same legal category as the UN Charter and the Articles on State Responsibility, the latter of which, although approved on its second reading, is still unsigned and has been accepted as customary international law, not treaty law. Although the Court depended on Articles 3 and 4 and the 2004 Commentary on Draft Article 6 to define its views on attribution, it ignored completely other relevant sections of the same Report, namely the 2004 Commentary to Chapter II.⁵⁴

To determine attribution of conduct by KFOR, the Court adopted the “effective control” test⁵⁵ as defined by the ILC

51. For a more detailed discussion on the differences between attribution of conduct and attribution of responsibility, see Section III.B.1.

52. *Behrami v. France; Saramati v. France* (dec.), nos. 71412/01 and 78166/01, ¶ 121, Eur. Ct. H.R. 2007 (joint admissibility decision), available at <http://cmiskp.echr.coe.int/tkp197/search.asp>.

53. *Id.*, ¶¶ 29-34.

54. Chapter II of the Draft Articles includes Draft Articles 5, 6, 7, and 8. The general Commentary to this chapter refers to the rules laid down in each of these four Draft Articles.

55. Both the ILC and the International Court of Justice (in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) and the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz v. Serb. & Mont.*), 2007 I.C.J. 91 (Feb. 26) have adopted the “effective control” test to determine whether an organ is exercising the authority of its state, or international organization, or the author-

three years prior to the *Behrami/Saramati* decision in the 2004 Commentary to Draft Article 6.⁵⁶ Under the Draft Article 6 “effective control” test, a court must attribute conduct to an international organization or member states based on which entity has “effective control over the conduct in question.”⁵⁷ The ILC defined “effective control” as “the factual control that is exercised over the *specific conduct* taken by the organ or agent placed at the receiving organization’s disposal.”⁵⁸ According to the “effective control” test as defined in 2004, attribution should be assessed based on which entity exercises control over the exact conduct in question, not necessarily over the operation as a whole. The Court explained its understanding of the test’s purpose and framed its decision within this Draft Article 6 attribution test.⁵⁹ The accuracy of the Court’s interpretation of the “effective control” test will be discussed further below, but at this point it is important to note only that the Court treated Draft Article 6 as law it was bound to follow.

Despite the fact that the Court explicitly endorsed this Draft Article 6 definition of attribution, it failed to assess the possibility of multiple attribution of conduct as required by the Draft Articles’ full definition of attribution. The Chapter II introductory commentary, which applies to Draft Articles 5 through 8,⁶⁰ clearly states:

Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that

ity of the state, or international organization, to which it has been lent. Larsen, *supra* note 4, at 514.

56. See Bodeau-Livinec et al., *supra* note 28, at 327 (commenting on Draft Article 5, now renumbered Draft Article 6).

57. 2004 ILC Report, *supra* note 46, at 113 ¶ 7.

58. 2004 ILC Report *supra* note 46, at 111 ¶ 3 (emphasis added).

59. *Behrami v. France; Saramati v. France* (dec.), nos. 71412/01 and 78166/01, ¶ 32, Eur. Ct. H.R. 2007 (joint admissibility decision), available at <http://cmiskp.echr.coe.int/tkp197/search.asp> (“[I]t would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation.”).

60. The introductory commentary to Chapter II applies to all of the Chapter II articles. See *supra* note 49.

the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization.⁶¹

The *Behrami/Saramati* Court found the conduct in question to be attributable to the UN and stopped its assessment there, dismissing on that basis the claim against the states. The Court thus failed to carry out the additional multiple attribution analysis established in the Chapter II Commentary.

The ILC's Special Rapporteur for the Responsibility of International Organizations,⁶² Giorgio Gaja, clarified the ILC's view on multiple attribution analysis in his Second Report on Responsibility of International Organizations in April of 2004. First, he explicitly stated that "conduct does not necessarily have to be attributed exclusively to one subject only."⁶³ Gaja then provided examples of scenarios in which multiple attribution might occur, such as when two states create a joint organ and the conduct is attributable typically to both states, or when "conduct should be simultaneously attributed to an international organization and one or more of its members."⁶⁴ He noted as the "paradigmatic example" the bombing of Yugoslavia in 1999 by NATO and the subsequent international debate over whether the international organization itself or its member states were responsible for wrongful acts committed.⁶⁵ In such a situation, Gaja proposed as a solution "for the relevant conduct to be attributed both to NATO and to one or more of

61. 2004 ILC Report, *supra* note 46, at 101 ¶ 4. Substantively the same wording is repeated in the revised version of paragraph 4 of the introduction to Chapter II, found in the 2009 ILC Report, *supra* note 2, at 56.

62. The ILC appoints one of its Commissioners to be a Special Rapporteur for each topic under consideration. The Special Rapporteur is responsible for "preparing reports on the topic, participating in the consideration of the topic in plenary, contributing to the work of the Drafting Committee on the topic, and elaborating commentaries to draft articles." The reports of a Special Rapporteur "form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission." THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 35, § 3(d).

63. Giorgio Gaja, Special Rapporteur, Int'l Law Comm'n, *Second Report on Responsibility of International Organizations*, ¶ 6, U.N. Doc. A/CN.4/541 (April 2, 2004) [hereinafter Gaja's Second Report].

64. *Id.*

65. *Id.* ¶ 7.

its member States, for instance because those States contributed to planning the military action or to carrying it out.”⁶⁶ In its Commentary to Chapter II, which was adopted and published prior to the *Behrami/Saramati* decision, the ILC adopted Gaja’s proposed understanding of multiple attribution of conduct. It is even more puzzling that the Court failed to carry out the multiple attribution analysis when one notes the strong parallels between Gaja’s example and the events in *Behrami/Saramati*.

In its decision, “the Court nominally relied on the concept of ‘attribution’ as reflected in the ILC’s draft articles, but its reasoning—especially in relation to Saramati’s detention—is potentially inconsistent with the ILC’s own criteria for attribution.”⁶⁷ The Court claimed to follow the “effective control” test, as codified by the ILC and explained in the Commentary on Draft Article 6, to determine attribution of the wrongful conduct, but stalled its analysis upon finding attribution for the UN. In order to apply the law of the relevant Draft Articles as they existed in May of 2007, which the Court itself elevated to a legally binding position, the European Court should have examined the possibility of attribution of conduct not only to the UN but also to NATO and/or the Troop-Contributing Nations.

B. *Draft Article 47 in Light of Behrami/Saramati*

Although Draft Article 47, entitled “Plurality of responsible States or international organizations,” was adopted in 2008 after *Behrami/Saramati* had been decided, it makes even more apparent the Court’s divergence from international law as envisioned in the Draft Articles. Yet, courts have continued to follow *Behrami/Saramati*. Draft Article 47 states that multiple entities may be responsible for a single wrongful act, clarifying the ILC’s position on the extent of multiple attribution as acknowledged in the Commentary to Draft Article 6.⁶⁸ If wrongful conduct is attributable to one or more states and one or more international organizations (as envisioned in Chapter

66. *Id.*

67. Bodeau-Livinec et al., *supra* note 28, at 326.

68. 2008 ILC Report, *supra* note 48, at 292.

II), then responsibility “may be invoked” against each of them.⁶⁹

1. *Attribution of Conduct and Attribution of Responsibility*

Draft Article 47 highlights a subtle distinction between attribution of conduct and attribution of responsibility. Paragraph 1 reads: “Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization *may* be invoked in relation to that act.”⁷⁰ Typically, attribution of the responsibility for wrongful acts aligns with attribution of the conduct itself, but there are times when attribution of responsibility does not necessarily go hand-in-hand with attribution of conduct.⁷¹ Gaja’s Second Report notes the possibility that conduct may be attributable to one entity and yet both entities may be responsible for the wrongful nature of the act.⁷² The Report envisages a scenario in which an international organization is jointly responsible for conduct that is attributable solely to the state.⁷³ The reverse is also arguably possible, where a state may be jointly responsible for conduct attributed to an international organization. Even if an international organization has effective control over a state’s military unit, actions taken by the military unit within state control might breach an international obligation of the state, thereby constituting an internationally wrongful act by the state.

While the European Court would not have jurisdiction to determine the responsibility of the UN or NATO, as it correctly stated in *Behrami/Saramati*, its jurisdiction extends to considerations of the state’s possible joint responsibility. It follows that attribution of conduct to the international organization alone does not rule out the possibility of attribution of responsibility to both the international organization and the

69. Draft Article 47, *supra* note 2, ¶ 1. The revised version of this Draft Article and its commentary in the 2009 ILC Report is substantively the same as the original 2008 version.

70. *Id.* (emphasis added).

71. Gaja’s Second Report, *supra* note 63, ¶ 8.

72. *Id.*

73. *Id.*

state.⁷⁴ Even if conduct is attributable to only the international organization, there may be legal bases for attributing responsibility to the state as well, for instance where a state has breached its international obligation “by providing the organization with competence in relation to that obligation.”⁷⁵ In *Behrami/Saramati*, “[t]he Court, while considering that the impugned conduct—that is, Saramati’s detention and the alleged failure to de-mine—was attributable, in principle, to the United Nations, did not examine these other issues.”⁷⁶

2. *The European Court Ignored Plurality of Responsibility*

The Commentary to Draft Article 47 notes that there are many situations in which joint responsibility may be relevant. Some such situations are those noted in Draft Articles 13 to 17 (where a state’s act may also implicate the responsibility of an international organization) and Draft Articles 57 to 61 (where an international organization’s act may implicate the responsibility of a state), as well as mixed agreements in which the international organization and the state agree to joint responsibility ahead of time.⁷⁷ The ILC refers to these scenarios as “example[s],” indicating that courts must consider the possibility of multiple attribution of responsibility also in other scenarios in which both states and international organizations play a role in committing the wrongful conduct.

Special Rapporteur Gaja’s Sixth Report on the Responsibility of International Organizations reiterates that the examples laid out in the Draft Articles are only several of many instances in which both a state and an international organization may be responsible for the same act.⁷⁸ According to Gaja, whenever an international organization is responsible for

74. Bodeau-Livinec et al., *supra* note 28, at 330 (“It should also be recalled that, even if an act or omission were attributable only to one entity, there might be several legal bases for holding another entity responsible in relation to that act or omission. Thus, as recognized in the ILC’s draft articles, even if an act is attributable only to an international organization, a state might incur responsibility . . .”).

75. *Id.* (quoting Draft Article 28 and commentary).

76. *Id.*

77. 2009 ILC Report, *supra* note 2, at 140-41 ¶ 1.

78. Giorgio Gaja, Special Rapporteur, Int’l Law Comm’n, *Sixth Report on Responsibility of International Organizations*, ¶ 24, U.N. Doc. A/CN.4/597 (April 1, 2008) [hereinafter Gaja’s Sixth Report].

wrongful conduct, “another entity may also be responsible for the same act.”⁷⁹

Thus, in a situation like that of *Behrami/Saramati*, the Draft Articles require a court to assess first the possibility of attribution of conduct to each involved state and international organization, and second the possibility of responsibility for said conduct in regards to all of these entities. To comply with Draft Article 47, a court must entertain the possibility that the conduct and the responsibility are attributable to not just one but multiple entities. Even the Court in *Behrami/Saramati* was on notice of potential plural responsibility considerations because the Draft Articles are explicitly based on the Articles on State Responsibility, which were adopted well before 2007 and contained a plural responsibility provision.⁸⁰ To comply with the Draft Articles, the Court should have examined whether both the international organization (the UN and/or NATO) and the relevant state (France and/or Norway) breached their obligations to *Behrami* or *Saramati*. If so, then the conduct could be attributable to both the international organization and the state, and they both could be found responsible. Instead, the Court found only that the UN breached its obligation, but it did not determine whether or not the states also breached their obligations and were therefore jointly responsible.

3. *Meaning of the Court’s Failure to Determine Responsibility According to the Draft Articles*

Does the European Court’s omission of a multiple attribution analysis represent a failure to comply with existing international law? Was it evidence that the Draft Articles do not represent international law as understood by the Court in 2007? Or is it neither? The Court decided *Behrami/Saramati* before Draft Article 47 was written, and its decision not to analyze multiple attribution was based purely on Draft Article 6 and the Commentary to Draft Article 5 as they existed in 2007.

One possible understanding is that *Behrami/Saramati* merely indicates that international law was unclear about the

79. *Id.*

80. The argument for knowledge of the Draft Article 47 by analogy to the Articles on State Responsibility will be discussed in more detail in Section III.C.2.

need to assess multiple attribution of responsibility in 2007. If this is the case, the ILC's adoption of plural responsibility in Draft Article 47 in 2008 reinforced the existing international rule on attribution, and it would have made it unlikely that other courts would follow the *Behrami/Saramati* rule. Another possible explanation is that *Behrami/Saramati* reflects an accurate depiction of international law and the Draft Articles do not, but this argument is unsustainable for reasons discussed below. A further possible understanding is that international law on this matter remains unclear and both views (that held by the Court and that held by the ILC) still have the potential to become law. However, the most plausible explanation for the decision is that the Court's rule contradicts international law, which was properly laid down by the ILC in the early Draft Articles and elaborated upon by Draft Article 47 in 2008.

In fact, the idea of plurality of responsibility is not new and the Court should have anticipated its relevance in *Behrami/Saramati* whether or not this concept was clear in the Chapter II Commentary. The ILC's Articles on State Responsibility, adopted by the ILC in 2001 and upon which the Draft Articles on the Responsibility of IOs are explicitly modeled,⁸¹ include a provision on the possibility of multiple attribution of responsibility. By reading the Articles on State Responsibility in conjunction with the early Draft Article Commentary on multiple attribution, it is fairly clear that the ILC understood international law at the time to include a possibility of plural responsibility.

C. *The Articles on State Responsibility: Shedding Light on the Meaning of the Draft Articles on the Responsibility of International Organizations*

The ILC has explicitly modeled the Draft Articles on the Responsibility of International Organizations on the Articles on State Responsibility, which were adopted on second reading by the ILC in 2001. The Articles on State Responsibility are a codification of international law regarding the responsibility of states for internationally wrongful acts. Although the

81. 2003 ILC Report, *supra* note 1, ¶ 44; *see, e.g.*, 2004 ILC Report, *supra* note 46, ¶ 65 ("The articles [5, 6, 7, and 8] corresponded to Chapter II of Part One of draft articles on Responsibility of States for internationally wrongful acts.").

UN General Assembly has not adopted these Articles, they are generally accepted as international law; the International Court of Justice, among other leading international legal institutions and governments, has cited a number of the Articles as binding expressions of international law.⁸²

As early as 1999, the UN Secretary-General acknowledged the implicit application of the Articles on State Responsibility to international organizations, noting in a report on peacekeeping operations that “the principle of State responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization).”⁸³ When the ILC first began the process of writing up the Draft Articles on the Responsibility of IOs in 2002 and 2003, the Working Group and Special Rapporteur Gaja chose to model the Draft Articles on the Articles on State Responsibility.⁸⁴ The imitation of the Articles on State Responsibility was to “be followed both in the general outline and in the wording . . . [as far as] . . . the study concerning particular issues relating to international organizations produce[d] results that did not differ from those reached by the Commission in its analysis of State responsibility.”⁸⁵ As a result, many of the rules in the Draft Articles are nearly parallel to those in the Articles on State Responsibility, including those relevant to *Behrami/Saramati*, Draft Articles 6 and 47.⁸⁶ Thus, the Articles on State Responsibility illuminate the intended meaning of the Draft Articles regarding multiple attribution.

82. See, e.g., Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 38-39 ¶ 47 (Sept. 25) (citing Article 17 on State Responsibility); *id.* at 39-40 ¶ 50 (citing Article 33 and Commentary).

83. The Secretary-General, *Report of the Secretary-General*, ¶ 6, U.N. Doc. A/51/389 (Sept. 20, 1996).

84. See 2003 ILC Report, *supra* note 1, ¶ 44 (“[T]he model of the draft articles on State responsibility should be followed both in the general outline and in the wording.”).

85. *Id.*

86. See, e.g., 2004 ILC Report, *supra* note 46, ¶ 65 (noting that Article 6 corresponded to Chapter II of Part One of the Draft Articles on State Responsibility).

1. *Article 6 on State Responsibility and Draft Article 6 on Responsibility of International Organizations*

Article 6 on State Responsibility⁸⁷ addresses situations in which an organ of a state is put at the disposal of another state for the purpose of temporarily acting in the service of and under the authority of the second state.⁸⁸ Draft Article 6 deals with the same situation as it regards international organizations. The Commentary to Article 6 on State Responsibility, like the Draft Articles' Chapter II Commentary on multiple attribution for international organizations, notes that conduct can be attributed to multiple states in certain situations.⁸⁹

The wordings of the two ILC instruments provide two distinct methodologies for determining attribution of conduct for organs placed at another entity's disposal. *Behrami/Saramati* references both of these methodologies, bringing to the surface a debate over what criterion is appropriate for measuring attribution of conduct. The test of attribution of conduct for State Responsibility is narrow: whether "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed," which the Commentary defines as under the "*exclusive direction and control*" of the receiving State "rather than on instructions from the sending State."⁹⁰ In contrast, the Responsibility of International Organizations test is one of whether "the organization exercises ef-

87. The text of Draft Article 6 on State Responsibility, as printed in the Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 56th Session, Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter 2001 ILC Report] reads:

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

88. *Id.* at 44 ¶ 1 (commentary to Draft Article 6 of State Responsibility).

89. *Id.* at 44 ¶ 3 ("Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter [namely, Article 47].").

90. *Id.* at 44 ¶ 2 (emphasis added).

fective control over that conduct.”⁹¹ Therefore, the State Responsibility attribution test is one of “exclusive direction and control,” while that of Responsibility of IOs is “effective control,” or “factual control” over “specific conduct.” Certainly the difference in wording exists in large part because the Article 6 references to “elements of government” cannot be applied directly to international organizations,⁹² but the Draft Articles’ adoption of a different test than the Commentary of Article 6 on State Responsibility indicates something more.

The Draft Articles’ test, as defined in the 2004 text and Commentary, calls for an investigation of control over the specific conduct, while that of State Responsibility requires a broader assessment of overall control of the activity. Gaja mentions the confusing linguistic divergence in his Second Report and suggests that “what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control.”⁹³ He notes, significantly, that “[t]his would also leave the way open for dual attribution of certain conducts.”⁹⁴ In the Commentary of Draft Article 6, the ILC refers to Article 6 on State Responsibility as a “similar approach, although it is differently worded.”⁹⁵ The 2004 Commentary goes on to quote the “exclusive direction and control” test as laid out in the Commentary to Article 6 on State Responsibility, without indicating whether the inclusion of this text in the Draft Articles is intended to distinguish between the two attribution tests or to incorporate the State Responsibility test into the Draft Articles test. The inclusion of a reference to the State Responsibility Commentary might mean that the “exclusive direction and control” attribution test applies not only to states but also to international organizations.⁹⁶ This argument is supported by Paragraph 5 of the Commentary to Draft Article 6, which de-

91. Draft Article 6 on the Responsibility of International Organizations, *supra* note 2.

92. 2004 ILC Report, *supra* note 46, at 111 ¶ 3 (emphasis added).

93. Gaja’s Second Report, *supra* note 63, ¶ 48.

94. *Id.*

95. 2004 ILC Report, *supra* note 46, at 111 ¶ 3.

96. See Larsen, *supra* note 4, at 516.

scribes the UN's authority over peacekeeping forces as one of "exclusive control."⁹⁷

If the Commentary to Draft Article 6 means that *Behrami/Saramati* should be understood in light of the State Responsibility "exclusive direction and control" test, as Larsen implies,⁹⁸ then there may be even greater contradiction between the Court's decision and the Draft Articles than that evidenced by the text of the Draft Articles alone. If attribution of conduct to international organizations is subject to both the "effective control" and the "exclusive direction and control" tests, then it is possible that the conduct in *Behrami/Saramati* was attributable to the UN under one test but not the other. In this case, the conduct must be attributable to another entity under the second test, thus requiring a multiple attribution analysis. For instance, despite UN claims of exclusive control over peacekeeping units, states may still retain effective control over the specific conduct of troops, and therefore the conduct may be attributable to both entities.⁹⁹ The ILC seems to anticipate this possibility in Paragraph 8 of the Commentary to Draft Article 6, at least in regards to UN peace support operations, by stating: "While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion."¹⁰⁰

Thus, Article 6 on State Responsibility provides further evidence of the need for an analysis of multiple attribution possibilities under a proper understanding of the Draft Articles, at least for conduct related to UN peace support operations like that at issue in *Behrami/Saramati*.

97. 2004 ILC Report, *supra* note 46, at 111 ¶ 5 ("The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force.").

98. *See* Larsen, *supra* note 4.

99. *Id.* at 516.

100. 2004 ILC Report, *supra* note 46, at 114 ¶ 8.

2. *Article 47 on State Responsibility and Draft Article 47 on Responsibility of International Organizations*

Draft Article 47 is closely modeled on Article 47 on State Responsibility, titled “Plurality of responsible States.”¹⁰¹ The text of Paragraphs 1 and 3 of Draft Article 47 is identical to the text of Paragraphs 1 and 2 of Article 47 on State Responsibility,¹⁰² except for the introduction of the term “international organization” into the former. Paragraph 2 of Draft Article 47 concerns the payment of reparations under the concept of subsidiary responsibility that may exist in relationships between states and international organizations but not between states, a difference between Responsibility of IOs and State Responsibility that is not relevant to this Note.

Aside from Paragraph 2 in Draft Article 47, the two articles are nearly identical. Thus, Article 47 on State Responsibility provides the international community with guidance for understanding the concept of multiple attribution of responsibility under the Draft Articles. Certainly since the publication of the 2003 ILC Report describing the ILC’s intentions to create parallel draft articles for international organizations,¹⁰³ and arguably starting well before this assertion,¹⁰⁴ the international community was on notice that Article 47 on State Re-

101. 2001 ILC Report, *supra* note 87, at 124.

102. The text of Draft Article 47 on State Responsibility, as printed in the 2001 ILC Report, *supra* note 87, reads:

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) is without prejudice to any right of recourse against the other responsible States.

103. *See supra* note 44 and accompanying text.

104. Draft Article 47 on State Responsibility was provisionally adopted on second reading as “Article 48: Invocation of responsibility against several States.” International Law Commission, State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, at 13, U.N. Doc. A/CN.4/L.600 (2000) (“Invocation of responsibility against several States”). *See also* 2000 ILC Report, Supplement No. 10 A/55/10, p. 46, ¶ 251 (establishing Article 46 *sexies* titled “Plurality of States responsible for the same internationally wrongful act”).

sponsibility likely defined the state of international law on multiple attribution for international organizations as well as for states.

Article 47 on State Responsibility defines plurality of responsibility as the general principle that “each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.”¹⁰⁵ There can be situations in which one course of wrongful conduct is attributable to multiple states and each of these states is responsible for it.¹⁰⁶ As an example of multiple attribution of responsibility, the ILC refers to the *Corfu Channel* case,¹⁰⁷ decided on its merits by the International Court of Justice in 1949.¹⁰⁸ Relying in part on *Corfu Channel*, the ILC identifies the international rule that “the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.”¹⁰⁹ The ILC’s explanation in Article 47 on State Responsibility makes clear that if more than one state breaches an obligation owed to another party, all states in breach may be found responsible. A parallel Draft Article on Responsibility of International Organizations would take this concept as it stood in relation to states and apply it to international organizations.

The Court knew, or should have known, of the congruence between Responsibility of States and Responsibility of International Organizations. At the time of *Behrami/Saramati*, it had access to published UN documents on the matter (including the State Responsibility Commentaries) as a source of guidance in its interpretation of the Draft Article Commentary. In spite of this, *Behrami/Saramati* contradicts the explicit State Responsibility attribution model as well as that of the Draft Articles.

105. 2001 ILC Report, *supra* note 87, at 124 ¶ 1 (quoting the ILC Commentary to Article 47).

106. *Id.* at 124 ¶ 3.

107. *Id.* at 124 ¶ 8.

108. *Corfu Channel* (U.K. & N. Ir. v. Alb.) 1949 I.C.J. 4 (Apr. 9).

109. 2001 ILC Report, *supra* note 87, at 125 ¶ 8.

D. *Is it Possible to Reconcile Behrami/Saramati and the Draft Articles?*

While it appears from the details of both the Draft Articles and the Articles on State Responsibility that the Court only partially complied with the Draft Articles by failing to consider multiple attribution of conduct, it is not immediately clear that the omission contradicted the Draft Articles' rule on multiple attribution. First, *Behrami/Saramati* was decided before Draft Article 47's rule on multiple attribution of responsibility was drafted, and so the Court relied solely on soft ILC language acknowledging possible multiple attribution of conduct. Second, there was no guarantee that the ILC's project of shaping the Draft Articles in a manner parallel to those of State Responsibility would extend to a plural responsibility rule. Third, the ILC process is one of codification and progressive development; until a set of articles is adopted by the states in the General Assembly or is acknowledged as a rule of customary international law, courts are not obliged to treat ILC drafts as law, although in *Behrami/Saramati* the Court chose to treat the Draft Articles as law. Finally, the decision by the Court may reflect an exception to the Draft Articles rule with regard to UN Chapter VII activities because of their importance for "maintain[ing] or restor[ing] international peace and security."¹¹⁰

Relying solely on the ILC's comments on multiple attribution as stated in Draft Articles 4 through 6, one could conclude that multiple attribution analysis is merely optional. The ILC mentions, but does not fully address, the possible situations in which a wrongful act may be attributed to both an international organization and a state.¹¹¹ The ILC's Commentary provides that, "[a]lthough it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded."¹¹² Consideration of multiple attribution is "particularly relevant to UN peacekeeping operations since the troop-contributing states retain disciplinary powers and criminal jurisdiction over the members of their national cont-

110. U.N. Charter art. 39 ("The Security Council shall . . . decide what measures shall be taken . . . to maintain or restore international peace and security.").

111. Bodeau-Livinec et al., *supra* note 28, at 329.

112. 2004 ILC Report, at 101 ¶ 4.

ingents,” as well to “military operations authorized by the Security Council—at least to the extent that the Council exercises a sufficient degree of control over the acts carried out by the members of national contingents.”¹¹³ In light of the multiple attribution issues present in *Behrami/Saramati*, once the Court chose to apply Draft Articles 3, 4, and 6 and Article 6 on State Responsibility, it should have followed the Commentary to these particular articles by proceeding with a plural attribution analysis.

There are several possible reasons for the Court’s failure to address multiple attribution, but none satisfactorily explains the Court’s divergence from the Draft Articles, especially since the Court itself identified the Draft Articles as authoritative law on the matter. The Court may have believed that international law on multiple attribution was ambiguous or in flux on the matters to be covered in Draft Article 47, and therefore felt uncertain about the need to undertake a multiple responsibility analysis. This argument seems unlikely, though, because the Articles on State Responsibility already provide for multiple attribution of conduct (Article 6 Commentary) and plural responsibility (Article 47), both of which are more likely to come into play when international organizations, not just states, are involved.¹¹⁴ In addition, regardless of whether the ILC would copy the rest of the Articles on State Responsibility and adopt multiple responsibility in future Draft Articles, the Chapter II Commentary had already established the possibility of multiple attribution of conduct.

If the Court instead recognized the ILC’s rule of multiple attribution but simply did not consider it to be binding law because the Draft Articles had not, and still have not, been adopted by the UN General Assembly, then why would the Court refer to the Draft Articles as “relevant law”? While the Court did not specifically comment on the legal status of the Draft Articles to which it referred, it did include them in the same category as the UN Charter and used them as the legal

113. Bodeau-Livinec et al., *supra* note 28, at 329.

114. See Gaja’s Sixth Report, *supra* note 78, at 9 ¶ 24 (“The possibility of a plurality of responsible entities is even more likely when one of them is an international organization, given the existence of a variety of cases in which this may occur.”).

basis of its decision.¹¹⁵ Draft Articles 3 and 4 are generally accepted to be a reflection of customary international law, but “[D]raft Article [6] is a provision specific to the responsibility of international organizations, the customary character of which was not addressed by the Court.”¹¹⁶

Many scholars have commented on the legal meaning of Draft Article 6 as it specifically relates to UN peace support operations, expressing a dominant view that the element of operational command is the most appropriate criterion by which to determine attribution.¹¹⁷ Recalling the discussion of the possible relevance of both the “effective control” and “exclusive control” tests to Draft Article 6,¹¹⁸ scholars’ descriptions of operational command include references both to “exclusive control”¹¹⁹ and to authority over specific action that resembles “effective control.”¹²⁰ These academic views represent an understanding of the international law on attribution to international organizations (or at least to the UN in peace-keeping operations) that aligns generally with that expressed in Draft Article 6 and its Commentary. Before provisionally adopting Draft Article 6, the ILC also considered the views of the UN as expressed by the UN Secretariat in a letter to the ILC: “The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted *under United Nations command and control*, and thus has the legal status of a United Nations subsidiary organ,” and attribution of

115. Bodeau-Livinec et al., *supra* note 28, at 326.

116. *Id.*

117. See, e.g., Marko Milanovic & Tatjana Papic, *As Bad as It Gets: The European Court of Human Rights Behrami and Saramati Decision and General International Law*, 58 INT’L & COMP. L.Q. 267, 282-86 (2009); Bodeau-Livinec et al., *supra* note 26, at 328; Larsen, *supra* note 4, at 520-22; Sari, *supra* note 6, at 164.

118. See generally Section III.C.1, *supra*, suggesting that a proper understanding of the Draft Articles necessitates an analysis of multiple attribution possibilities.

119. Larsen, *supra* note 4, at 513 (quoting Borhan Amrallah, *The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces*, REVUE EGYPTIENNE DE DROIT INTERNATIONAL 57, at 65-66 (1976)).

120. *Id.* (quoting Daphna Shrager, *The United Nations as an Actor Bound by International Humanitarian Law*, in THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW 330 (Luigi Condorelli et al. eds., 1996)).

responsibility is based on “effective command and control.”¹²¹ Both the “effective control” and “exclusive control” tests appear to fit within the UN’s expressed view of existing international law on the matter of attribution of conduct.¹²² Lastly, Lord Bingham of Cornhill of the British House of Lords accepted the argument that the “governing principle [of attribution] is that expressed by the International Law Commission in [Draft Article 6],”¹²³ indicating a broader acceptance among the international community of Draft Article 6 as binding international law.

While embracing Draft Article 6’s “effective control” test as binding law, the Court did not use the “operational” control criterion to measure attribution. The ILC’s 2009 revisions to the Commentary explicitly address this inconsistency between *Behrami/Saramati* and the Draft Articles’ “effective control” test, thereby clarifying the proper method of evaluation of attribution under Draft Article 6.¹²⁴ Although the Court claimed to apply the ILC’s “effective control” test, it defined effective control as “ultimate authority and control” and not “operational control.”¹²⁵ In the revised Commentary, the Commission points out that a finding of “operational” control meets the requirements of the “effective control” test much better than “ultimate” control because it relates to the actual conduct in question.¹²⁶ In a less subtle formulation of the argument, the ILC states in the Commentary that the “European Court did not apply the criterion of effective control in the

121. Int’l Law Comm’n, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 18, U.N. Doc. A/CN.4/545 (June 25, 2004) (quoting United Nations Secretariat’s response to ILC’s request for feedback to the query: “[To what extent] the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.”) [hereinafter 2004 DARIO Comments and Observations] (emphasis added).

122. One could argue instead that the UN’s explicit acknowledgement of the “effective control” test for attribution of responsibility and not conduct indicates that it did not intend for the “effective control” test to be applied to attribution of responsibility. On the other hand, one could also argue that this is further evidence that the UN left open the possibility that both the “effective control” and “exclusive control” tests apply to a determination of attribution of conduct but not responsibility.

123. *R v. Secretary of State for Defence* [2007] UKHL 58, ¶ 5.

124. 2009 ILC Report, *supra* note 2, at 67.

125. *Id.*

126. *Id.*

way that had been envisaged by the Commission.”¹²⁷ In his Seventh Report, Special Rapporteur Gaja concludes forcefully that “had the Court applied the criterion of effective control set out by the Commission, it would have reached the different conclusion that the conduct of national contingents allocated to KFOR had to be attributed either to the sending State or to NATO.”¹²⁸ Although the 2009 reports of the ILC and Gaja determine that the Court misapplied the “effective control” test when determining attribution of conduct in *Behrami/Saramati*, they fail to resolve the issue of whether the case further misapplied the law by remaining silent on the decision’s multiple attribution implications.

At least one commentator has suggested that the Court properly understood the concept of multiple attribution in the Draft Articles but chose not to address it in this case, solely because of the distinct nature of UN Chapter VII undertakings. The Court may have wanted to create an exception to the rule of multiple attribution for UN Chapter VII peace-keeping operations because of the importance of these activities for the maintenance of peace within the international community. By refusing to regulate Convention-Contracting States’ actions within UN peace support operations, whether or not the actions also may have been attributable to the states themselves, the Court seems to have intended to limit interference with UN Chapter VII objectives.¹²⁹ The Court noted in *Behrami/Saramati* that:

[The] Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of [UN Chapter VII] missions, to the scrutiny of the court. To do so would be to interfere with the fulfilment [sic] of the UN’s key mission in this field, including, as argued by certain parties, with the effective con-

127. *Id.* at n.79.

128. Giorgio Gaja, Special Rapporteur, Int’l Law Comm’n, *Seventh Report on Responsibility of International Organizations*, ¶ 26, U.N. Doc. A/CN.4/610 (Mar. 27, 2009) [hereinafter Gaja’s Seventh Report].

129. *See* Larsen, *supra* note 4, at 528 (noting that “the Court argues that the UN Security Council is the primary actor for the protection of international peace and security, and that the Court cannot interfere with the Security Council’s decision.”).

duct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.¹³⁰

If the Court's decision was based on its belief that an exception to the multiple attribution rule exists for UN Chapter VII operations, then *Behrami/Saramati* seems to be based on policy considerations rather than an application of the relevant legal authorities. This reading of the decision raises questions about whether such a policy should be encouraged in other courts' human rights cases. If followed, the decision may provide a tool by which international courts can justify decisions to ignore parts of the Draft Articles. If courts begin to ignore the Draft Articles, this may violate international law as codified by the Responsibility of IOs, or it may indicate that the Draft Articles (not yet adopted by the General Assembly) do not accurately represent current international law.

The UN Secretariat seems to disagree with the Court's view that activities carried out by UN peace support operations should be held to a single attribution rule. In its comments, the Secretariat envisions the possibility of attribution of responsibility to the state or the international organization in Chapter VII peace support operations, depending on the outcome of an "effective control" test:

In authorized chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised.¹³¹

This formulation allows for the possibility of multiple attribution of responsibility in cases where the "effective control" test

130. *Behrami and Saramati v. France* (dec.), nos. 71412/01 and 78166/01, ¶ 149, Eur. Ct. H.R. 2007 (joint admissibility decision), available at <http://cmiskp.echr.coe.int/tkp197/search.asp>.

131. 2004 DARIO Comments and Observations, *supra* note 121, at 18 (comments by UN Secretary-General).

leads to a determination of multiple attribution of conduct¹³² or attribution of responsibility to a broader group than those parties to whom conduct is attributed.¹³³

It is impossible to reconcile the implied position of the Court on multiple attribution and the Draft Articles, especially in light of the 2009 ILC Report. If the ILC remains silent on the decision's implications for multiple attribution, the Draft Articles may fail to align with state practice as regards plural responsibility. More importantly, *Behrami/Saramati's* divergence from ILC law establishes a perverse precedent of single attribution of conduct that makes it impossible to assign liability for internationally wrongful acts to all of the entities that necessarily must be involved in any effort to deter such acts. If other courts follow the decision, they will encourage the creation of an international rule that arbitrarily places responsibility on one entity or the other. Such a rule will make it very difficult to deter wrongful acts. To resolve these concerns, on its second reading of the Draft Articles the ILC should address *Behrami/Saramati's* multiple attribution implications and the possible effects on peace support operations.

IV. IMPLICATIONS OF THE ADOPTION OF MULTIPLE OR SINGLE ATTRIBUTION

A. *Human Rights Ramifications*

The practical impact of the European Court's implicit rejection of the ILC's principle of multiple attribution of conduct in *Behrami/Saramati* is that the obligations of France, Germany, and Norway under the Convention are unenforceable in the Court for acts done in a UN peace support operation and within the UN's effective control.¹³⁴ By excluding the possibility that the conduct may be attributable to both the UN and the Troop-Contributing Nations, the Court has created a loophole in which Convention-Contracting States acting under UN authority are not held accountable for their Convention obligations. The effect of the Court's rejection of

132. See Section III.A, *supra*, and accompanying footnotes.

133. *Id.*

134. See Bodeau-Livinec et al., *supra* note 26, at 326 (“[T]he Court decided that it would not scrutinize acts and omissions of a state party to the Convention that are covered by Security Council resolutions and occur prior to, or in the course of, operations under Chapter VII of the UN Charter.”).

Behrami's and Saramati's applications is that the Court has limited its own ability to hear claims against Convention-Contracting States when the relevant actions were carried out in the name of a UN peace support operation.

Some commentators say this decision has created broader ramifications by leaving a void in human rights protections.¹³⁵ Aurel Sari argues that the decision permits European states to avoid their heightened human rights obligations under the Convention in regards to their troops that are engaged in UN Chapter VII operations.¹³⁶ Even worse, this decision could be cited as precedent by other courts or other regional human rights bodies in denying review of human rights violations by states' troops acting under UN authority. Up until now, regional human rights courts have not assessed the possible responsibility of the UN for human rights violations during international operations because the UN falls outside of their jurisdiction. If these courts begin to extend jurisdiction to the UN and refuse to recognize a multiple attribution rule, as the European Court of Human Rights has done, they may place liability fully on the UN. Sole UN responsibility would affect all UN Member States.

In addition, if *Behrami/Saramati* is followed widely, it may encourage states to give up effective control of their peace units to the UN in order to avoid state responsibility for internationally wrongful acts or omissions committed by their troops.¹³⁷ While this could make it easier to coordinate UN peace support operations, it would also reduce the effectiveness of human rights protection instruments and diminish accountability for wrongful actions taken by state military units.

135. See, e.g., Sari, *supra* note 6, at 168 ("The risk that *Behrami* and *Saramati* could create a void in the protection of ECHR rights is compounded by the ECHR's rejection of the applicants' submissions based on the *Bosphorus* case."); Milanovic & Papić, *supra* note 112, at 295 (noting "the real-life implications that *Behrami* has for the protection of human rights in Kosovo").

136. Sari, *supra* note 6, at 167-68.

137. Sari, *supra* note 8, at 169 ("ECHR States may transfer operational command over their armed forces to an international organization and avoid responsibility for any breaches of the ECHR their forces may commit in a third country whilst acting under international command for the reason that those breaches were carried out in an international capacity and therefore did not bring the aggrieved individuals within the jurisdiction of the respondent States.").

B. Behrami/Saramati as a Controversial Precedent

The *Behrami/Saramati* decision sets a controversial precedent because of its implied rejection of the principle of multiple attribution of responsibility for internationally wrongful acts. Whether this decision reflects a rejection of the rule as applied only to UN Chapter VII operations or signals a complete rejection of the rule altogether, it indicates a rift between existing international law and international law as codified by the ILC in the Draft Articles.

The decision may represent an exception to the principle of multiple attribution that applies only to UN Chapter VII operations. The UN seems to discourage this understanding of the case,¹³⁸ however, presumably not wanting states to neglect certain important international obligations (such as human rights obligations) by hiding behind a screen of UN Chapter VII authority. In 2008, the UN Secretary-General commented on the issue of attribution of responsibility for UNMIK activities, stating that “the international responsibility of the United Nations will be limited in the extent of its effective operational control.”¹³⁹ With this statement, the Secretary-General not only embraced the “operational” control test but also confirmed the ILC’s view that states can be found responsible for Chapter VII activities over which they, and not the UN, have effective control. However, if the European Court and other courts continue to apply the principle of single attribution and states continue to rely on it, state practice of a single attribution rule may become so widespread that it would lead the ILC to consider including an exception for UN Chapter VII operations in its rule on the multiple attribution of responsibility.

Assuming the ILC wants the UN General Assembly to adopt the Draft Articles as law, the Draft Articles must reflect existing international law. If a rift develops between the Commission’s Chapter II Commentary and Draft Article 47 on the one hand and international judicial opinions in regards to peace support operations on the other, the ILC will need to either redraft the Article before the second reading or insert

138. The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 16, delivered to the Security Council, U.N. Doc. S/2008/354 (June 12, 2008).

139. *Id.*

an in-depth explanation of the multiple attribution rule in the Commentary. In order for the ILC to determine the state of international law on this matter and its own course of action, it must look beyond *Behrami/Saramati* to the reactions by other courts, states, and international organizations.

1. *Judicial Response to Behrami/Saramati*

a. *The European Court Continues to Follow Behrami/Saramati Reasoning*

In determining the influence of *Behrami/Saramati* on judicial practice, it is logical to start with an analysis of the decision's relevance within the European Court itself. Pierre Bodeau-Livinec, Gionata P. Buzzini, and Santiago Villalpando provide a succinct summary of the Court's reliance on *Behrami/Saramati* in its cases through early 2008:

Notwithstanding the potential drawbacks of such a judicial approach, the Court's reasoning in the *Behrami* and *Saramati* cases has already been adopted in a number of other judicial decisions. In *Kasumaj v. Greece* and *Gajić v. Germany*, dealing with issues of property occupied or used by contingents of KFOR in Kosovo, the European Court declared the applications inadmissible on the mere ground that (quoting from *Kasumaj*) "KFOR actions were in principle attributable to the UN." In *Berić v. Bosnia and Herzegovina*, the Court extended this reasoning "to the acceptance of an international civil administration in its territory by a respondent State" and considered that the impugned action by the high representative in Bosnia and Herzegovina "was, in principle, 'attributable' to the UN."¹⁴⁰

All three of these European Court decisions¹⁴¹—*Kasumaj*,¹⁴² *Gajić*,¹⁴³ and *Berić*¹⁴⁴—were concluded in the six months following the *Behrami/Saramati* decision and refer to

140. Bodeau-Livinec et al., *supra* note 28, at 330-31.

141. The ILC referenced all three of these European Court of Human Rights decisions and their parallel reasoning in 2009 ILC Report, *supra* note 2, at 68.

142. *Kasumaj v. Greece* (dec.), no. 6974/05, Eur. Ct. H.R. 2007, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=6974/05&sessionId=34502383&skin=hudoc-en>.

the case as precedent for attributing conduct to the UN alone. For instance, in *Gajić* the Court relies entirely on the reasoning in *Behrami/Saramati* to find incompetence *ratione personae* of the Court, after determining that the relevant actions of KFOR were attributable to the UN.¹⁴⁵

In *Berić*, after determining that the UN had properly established a Chapter VII peace support operation, the Court relied on Draft Article 6 and *Behrami/Saramati* to declare that the key question was whether or not the UN exerted “effective control” over the operation.¹⁴⁶ It then found that “the High Representative was exercising lawfully delegated UN [Security Council] Chapter VII powers, so that the impugned action was, in principle, ‘attributable’ to the UN within the meaning of [Draft Article 4].”¹⁴⁷

After finding the conduct attributable to the UN, the *Berić* Court acknowledged the question of multiple attribution to the states but shot down this possibility by reference to *Behrami/Saramati* as precedent on this matter.¹⁴⁸ The *Behrami/Saramati* reasoning that was quoted in *Berić* includes strong references to the Court’s desire not to interfere with UN Chapter VII operations. Paragraph 148, which the *Berić* decision reiterates, notes the “imperative nature” of the UN’s objective to maintain international peace and security, and declares that “the UN [Security Council] has primary responsibility . . . to fulfil this objective.”¹⁴⁹ The decision goes on to quote a por-

143. *Gajić v. Germany* (dec.), no. 31446/02, Eur. Ct. H.R. 2007, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=31446/02&sessionid=34504598&skin=hudoc-en>.

144. *Berić v. Bosnia and Herzegovina*, nos. 36357/04, 36360/04, 38346/04, 41705/04, 44790/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, Eur. Ct. H.R. 2007, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=36357/04&sessionid=34504998&skin=hudoc-en>.

145. *Gajić*, at 5-6.

146. *Berić*, ¶ 27.

147. *Id.* ¶ 28.

148. *Id.* ¶ 29 (“As to whether Bosnia and Herzegovina could nevertheless be held responsible for the impugned acts, the Court recalls the reasoning outlined in *Behrami and Behrami and Saramati* (cited above, §§ 146-49).”).

149. *Behrami and Saramati v. France* (dec.), nos. 71412/01 and 78166/01, ¶ 148, Eur. Ct. H.R. 2007 (joint admissibility decision), available at <http://>

tion of paragraph 149 of *Behrami/Saramati* in which the Court bows out of decisions that may affect a Chapter VII mission:

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations.¹⁵⁰

By quoting the selected portions of *Behrami/Saramati*, the *Berić* Court emphasized that the key factor in its determination of incompetence *ratione personae* is that the operation was under UN Chapter VII authority. This decision provides further support for the argument that *Behrami/Saramati* represents the Court's belief in a Chapter VII exception to the principle of multiple attribution, and not necessarily a general rejection of the principle.

Following the ILC's provisional adoption of Draft Article 47 and its explicit recognition of a rule of multiple attribution of responsibility, the Court has continued to apply its contradictory *Behrami/Saramati* decision. In December of 2008, the Court decided *Stephens v. Cyprus, Turkey, and the UN*,¹⁵¹ which relied on the controversial *Behrami/Saramati* reasoning. *Stephens* differs slightly from the preceding cases in that the Court first determined whether or not the conduct could be attributed to Cyprus and/or Turkey, rather than starting and stopping with an analysis of attribution to the UN. The Court "observe[d] that these States do not have effective control" over

/cmiskp.echr.coe.int/tkp197/search.asp (as quoted by the European Court of Human Rights in *Berić*).

150. *Id.* ¶ 149 (as quoted by the European Court of Human Rights in *Berić*).

151. *Stephens v. Cyprus, Turkey and the United Nations*, no. 45267/06, Eur. Ct. H.R. 2008, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=45267/06&sessionId=34506868&skin=hudoc-en>.

the disputed activities, finding that there was no “breach by the said States of their duty to take all the appropriate measures with regard to the applicant’s rights which are still within their power to take.”¹⁵² The Court then assessed the situation under *Behrami/Saramati*, noting that the implicated UN body, the UN Peacekeeping Force in Cyprus (“UNFICYP”), had control over the relevant activities. Because the UNFICYP was formed as a subsidiary organ under the UN Charter and acted under “exclusive control and command of the UN,” the Court found that it did not have jurisdiction because UNFICYP’s “actions and inactions are in principle attributable to the UN.”¹⁵³ While upholding the *Behrami/Saramati* reasoning in *Stephens*, the Court also expanded its method of analysis by applying both the “effective control” and “exclusive control” tests and addressing the state attribution claims first instead of not at all. It is unclear if these changes reflect an attempt by the Court to align its reasoning more closely with the Draft Articles or if they are simply a result of the particular fact pattern in the *Stephens* case.¹⁵⁴

As these recent cases demonstrate, the European Court continues to use the *Behrami/Saramati* reasoning in its decision-making for the purpose of denying multiple attribution, at least in cases regarding UN Chapter VII operations.

b. *Other Courts and Behrami/Saramati*

The European Court of Human Rights is a regional and subject-matter-specific international court. Its jurisdiction covers only its members and its decisions are binding only on the involved member states.¹⁵⁵ Yet the Court is a leading international authority on human rights law and its decisions are influential not only for its member countries but also for outside courts.

Several European courts not involved in the *Behrami/Saramati* case have relied on the decision in their own cases on multiple attribution. In December 2007, the United Kingdom’s House of Lords dismissed an application by Al-Jedda

152. *Id.* at “The Law.”

153. *Id.*

154. Such as the fact that *Stephens* explicitly named the U.N. as a defendant.

155. European Court of Human Rights, *supra* note 6.

claiming violations of the Convention by the United Kingdom troops in Iraq.¹⁵⁶ In *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* (“*Al-Jedda*”), Lord Rodger of Earlsferry referred extensively to *Behrami/Saramati*, stating that “the House must, of course, have regard to the way that the European Court has approached similar questions in the past.”¹⁵⁷ In noting that the disputed actions in *Al-Jedda* were delegated under a UN Chapter VII operation and therefore attributing them to the UN, Lord Rodger could “see no reason in the circumstances of the present case why, in the light of the decision of the Grand Chamber in *Behrami*, the European Court would hold otherwise.”¹⁵⁸ Lord Rodger of the House of Lords thus based his decision in *Al-Jedda* substantially upon the reasoning of the European Court in *Behrami/Saramati*.¹⁵⁹

In July 2008, a Dutch court similarly relied on *Behrami/Saramati* to deny the possibility of multiple attribution, this time in regards to actions and omissions that occurred under a peace support operation with Dutch troops and originating out of a UN Security Council Resolution. The case, *Mothers of Srebrenica et al. v. State of the Netherlands and UN*,¹⁶⁰ was decided in the District Court of The Hague. The Dutch court determined that, based on the importance of non-interference with UN Chapter VII operations as identified in *Behrami/Saramati*, “the contributing States [could] not be held liable before the Court for acts and omissions of their troops in missions covered by UN Security Council resolutions and which occurred prior to or in the course of such missions.”¹⁶¹ Guido den Dekker has interpreted the court’s European Court-inspired decision as exemplifying the idea that:

[T]he UN, which for its missions relies on the support of its member states, cannot effectively implement its responsibility to maintain international

156. [2007] UKHL 58, ¶ 1.

157. *Id.* ¶ 55.

158. *Id.* ¶ 91.

159. Bodeau-Livinec et al., *supra* note 28, at 331.

160. *Mothers of Srebrenica/Netherlands and United Nations*, District Court of the Hague, July 10, 2008, De Rechtspraak BD6795 (Neth.) (English translation available in De Rechtspraak at LJN BD6796).

161. Guido den Dekker, *Immunity of the United Nations before the Dutch Courts*, Hague Justice Portal, at 7 (July 28, 2008), available at <http://www.haguejusticeportal.net/eCache/DEF/9/569.html>.

peace and security if it runs the risk of being held liable before domestic courts for acts or omissions of the troops that operate in those missions under UN authorization and command.¹⁶²

Behrami-Saramati threatens to influence the jurisprudence of other regional courts of human rights, as well. While the Inter-American Court of Human Rights has cited the European Court's decisions in the past,¹⁶³ it also established in 1998 that the "sole requirement [for finding states responsible under human rights law] is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention."¹⁶⁴ The ILC established a stricter standard for finding state responsibility by applying the "effective control" test (and possibly the "exclusive control" test), and the European Court has established an even stricter standard, at least for Chapter VII operations. If the ILC reconsiders the specific issue of multiple attribution in the provisionally adopted Draft Articles, it may also take into account the influence of the Inter-American Court's lighter standard.

2. *International Commentary on Behrami/Saramati*

Behrami/Saramati raised questions on multiple attribution that, as of yet, remain unanswered, and they may be answered in several different ways. Aside from the case-specific commentaries of Bodeau-Livinec, Buzzini, and Villalpando and Larsen, several academics have commented on the more distant effects of the Court's decision.

Thomas Giegerich compares the different approaches of the European Court in the *Bosphorus*¹⁶⁵ and the *Behrami/Saramati* cases.¹⁶⁶ He argues that a full understanding of the 2005 *Bosphorus* decision calls for holding Convention-Contracting

162. *Id.*

163. *See, e.g.,* Case of Caesar v. Trinidad and Tobago, Inter-Am. Ct. H.R., ¶ 64 (Mar. 11, 2005) (citing Tyrer v. United Kingdom, no. 5856/72, Eur. Ct. H.R. 1978).

164. Paniagua-Morales et al. v. Guatemala, Inter-Am. Ct. H.R., ¶ 91 (Mar. 8, 1998) (as cited in Larsen, *supra* note 4, at 519).

165. *Bosphorus Airlines v. Ireland*, no. 45036/98, Eur. Ct. H.R. 2005.

166. Thomas Giegerich, *The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?*, 10:1 GERMAN L.J. 31, 55-57 (2009) (special edition), available at <http://www.germanlawjournal.com/>.

States responsible for their actions or omissions whether or not they were undertaken in pursuance of the States' UN Charter obligations.¹⁶⁷ The *Behrami/Saramati* decision instead declares that the UN Chapter VII obligations are "imperative" and therefore negate the states' Convention obligations altogether.¹⁶⁸ Giegerich believes the *Behrami/Saramati* decision has created a "fork in the road" for the Court, and he is "not sure which path [the Court] will follow—the *Bosphorus* path favoring human rights (liberty) or the *Behrami and Saramati* path favoring the war on terror (security)."¹⁶⁹ In addition to creating uncertainty in the Court, the case conflicts with the Draft Articles. This conflict must be resolved in order for the ILC to produce a comprehensive rule on multiple attribution of responsibility.

Guido den Dekker comments on the greater ramifications of *Behrami/Saramati* and sees the case creeping up in human rights questions in other jurisdictions. He argues that if *Behrami/Saramati* is followed in other courts, there will be more human rights violations for which courts will refuse to hold states accountable and be unable to hold the UN accountable.¹⁷⁰ Responsibility will not be determined by an actual analysis of attribution but instead by political concerns that any finding of responsibility would "constitute an impediment to the effective implementation of the duties of (future) international [UN] missions."¹⁷¹ He pleads that "[s]uch a fundamental principal question deserves a fundamental legal answer."¹⁷² Den Dekker fears that courts will use *Behrami/Saramati* to establish a gap in assigning responsibility for wrongful acts in UN peacekeeping missions. Guido den Dekker provides a strong reason for why the ILC must clarify a rule of multiple attribution in its Draft Articles to ensure an effective international liability system.

States have also weighed in on the question of multiple attribution. Denmark took a strong position on the implications of *Behrami/Saramati*. At a meeting of the UN General As-

167. *Id.*

168. *Id.*

169. *Id.* at 57.

170. den Dekker, *supra* note 161, at 9.

171. *Id.*

172. *Id.*

sembly Sixth Committee in October 2007, Denmark, speaking on behalf of all Nordic countries, made a statement about the impact of *Behrami/Saramati* on the Draft Articles:

This does and must not mean that the UN should always be responsible for all acts performed during UN peacekeeping operations. In our view it is not clear to what extent the same result would be reached by the [European] Court of Human Rights with regard to acts performed during other peacekeeping operations under a chapter VII mandate. Decisive for the outcome would probably be the particular command and control structure and legal framework for each individual peacekeeping operation.¹⁷³

Denmark's view allows for the application of the principle of multiple attribution even to Chapter VII operations.

Behrami/Saramati continues to have a significant influence on international jurisprudence. Most courts and commentators have followed the *Behrami/Saramati* rule only so far as it represents an exception to the multiple attribution rule for UN Chapter VII operations. It remains unclear, however, whether the case represents a broadly-held view that an exception to the rule exists or simply a minority opinion.

V. IMPLICATIONS OF *BEHRAMI/SARAMATI* FOR THE UN

The development of a rule on multiple attribution is of great interest to the UN not only because UN peace support operations are directly affected by such a rule but also because the UN's ILC must draft articles that are coherent with the rule. The individual states in the UN have an interest in the development of an attribution rule whether or not they partake in UN peace support missions because all UN members will be responsible for paying damages whenever the UN is found liable for international wrongs.

173. Statement by Denmark on behalf of all Nordic countries on "Responsibility of International Organisations" at the UN General Assembly Sixth Committee (Oct. 29, 2007), available at <http://www.missionfnnewyork.um.dk/en/menu/statements/UNGA626thCommitteeJointNordicStatement.htm>.

A. *Effects on the UN System*

If the *Behrami/Saramati* interpretation becomes established law, it may reduce the manner in which the UN runs peace support operations, if it continues to run them at all. The *Behrami/Saramati* rule would limit the UN's willingness to carry out these operations for fear of being held solely responsible for wrongful acts conducted jointly with states and over which the UN may not have had effective control. While the European Court refused jurisdiction over the UN, there may be other courts (international, regional, or national) that are willing to find jurisdiction to determine the issue of responsibility for wrongful acts attributed to the UN.

The *Behrami/Saramati* rule against multiple attribution might also increase states' willingness to contribute to UN-led operations but remove themselves from the planning stage, leaving it all within the hands of the UN. This would then eliminate the possibility of state responsibility for wrongful conduct, even those acts committed by state troops. While increased state cooperation might appear to be advantageous in the short term, it would be shortsighted to assume the *Behrami/Saramati* rule is beneficial to UN operations. Greater state involvement coupled with less individual state culpability will only shift the liability burden to a wider swath of states because UN member states end up paying for any UN liabilities through their budget contributions. Sole attribution of conduct to the UN, and subsequent UN responsibility, would result in a diffuse group of member states, including the troop-contributing nation, being held responsible for paying for the UN's financial liability obligations.

B. *Response by the ILC and the Impact of the Case on the Draft Articles*

Behrami/Saramati conflicts with the most plausible interpretation of the principle of multiple attribution in Draft Articles 3, 4, and 6. In 2008, after the Court had decided *Behrami/Saramati*, the ILC reiterated its belief in the principle of multiple attribution in Draft Article 47. In light of the controversial rulings by the Court in *Behrami/Saramati* and *Berić*, and by the House of Lords in *Al-Jedda*, Special Rapporteur Gaja proposed that the ILC review the Draft Articles that had already been provisionally adopted before proceeding to a second read-

ing.¹⁷⁴ The Commission followed Gaja's unusual recommendation and reconsidered the Draft Articles, especially Draft Articles 3, 4, and 6, in 2009. Upon reconsideration, the ILC maintained its position on multiple attribution as originally laid out in the Chapter II Commentary and Draft Article 47 and also expressed its view that *Behrami/Saramati* misapplied the "effective control" test. However, the Commission did not comment on the European Court's implied rule of single attribution. The Commission's silence on this issue has left open the gap created by *Behrami/Saramati*. Later jurisprudence and commentary have not clarified which international rule on attribution is more widely accepted: *Behrami/Saramati*'s single attribution rule or the Draft Articles' multiple attribution rule.

In his Sixth Report, Gaja agreed that his next report would address *Behrami/Saramati* and "the question of the existence of special rules which may take into account the peculiar features of certain organizations,"¹⁷⁵ indicating the possibility that the ILC would find that international law admits an exception to the multiple attribution rule for UN Chapter VII operations. Gaja's Seventh Report does indeed address one of the issues raised by *Behrami/Saramati*, reaffirming the Draft Article 6 "effective control" test and stating that the Court misapplied the test by measuring "ultimate" instead of "operational" control.¹⁷⁶ For this reason, Gaja finds that "it would be difficult to accept . . . the criterion [applied in *Behrami/Saramati*] as a potentially universal rule."¹⁷⁷ Gaja also notes that a proper application of the test would have resulted in attribution of the conduct to the states or to NATO.¹⁷⁸ However, by acknowledging only the misapplication of the "effective control" test, Gaja's Seventh Report fails to address the issue of whether international law required the Court to examine the possibility of multiple attribution, regardless of the Court's understanding of the "effective control" test. While Gaja briefly reasserts the rule of multiple attribution,¹⁷⁹ his Report does not resolve

174. Gaja's Sixth Report, *supra* note 78, ¶¶ 2-3.

175. *Id.*

176. Gaja's Seventh Report, *supra* note 128, ¶¶ 26, 30.

177. *Id.*

178. *Id.* at n.38 (citing, among others, Bodeau-Livinec et al., *supra* note 26, at 328-29).

179. *Id.* ¶ 25 ("It may well be that outside military operations it may be more difficult to establish which entity has an effective control. However,

the meaning of this rule in light of the *Behrami/Saramati* decision. The ILC's revised 2009 Commentaries, which follow Gaja's Report closely, also do not specifically address the multiple attribution question raised by *Behrami/Saramati*.

A failure by the ILC to address discrepancies with the multiple attribution rule in the Draft Articles increases the risk that the Draft Articles will become obsolete before they are even adopted. States may refuse to adopt the Draft Articles if the principle of multiple attribution becomes a sticking point, and states can justify their refusal by pointing to the *Behrami/Saramati* line of cases. Moreover, in light of the ILC's recent explicit rejection of *Behrami/Saramati*'s understanding of the "effective control" test, some may view the Commission's silence on other aspects of the case to indicate acceptance of the Court's single attribution rule.

The ILC should try to resolve the divergent attribution trends arising in the wake of *Behrami/Saramati* by making a definitive statement on the case's single attribution rule. While the ILC is comfortable challenging the case's "ultimate control" test, the Commission leaves *Behrami/Saramati*'s single attribution implication in place as a viable precedent. The ILC could start addressing the issue by setting up a working group and requesting states and international organizations to submit their comments on the matter. Unless a number of states and international organizations challenge the multiple attribution rule, the ILC should elaborate on this rule in the second reading and explicitly challenge *Behrami/Saramati*'s single attribution rule, noting the legal and practical difficulties such a rule would create in assigning responsibility. A rule of multiple attribution is especially important in UN peace support operations because of the states' retention of control and prevention powers; however, the working group should consider the possibility that the Court, rightly or wrongly, may support a rule of multiple attribution and merely used *Behrami/Saramati* to carve out an exception for UN Chapter VII operations.

this does not imply that the criterion set out in article [6] is inadequate, but that in many cases its application will lead to the conclusion that conduct has to be attributed both to the lending State and to the receiving international organization.”).

The ILC has two roles: codification and progressive development of international law.¹⁸⁰ In order to assert a clear rule of attribution that is functional and assigns liability to the party best suited to prevent wrongful acts, the ILC may need to step into progressive development role. In doing so, the ILC may also strengthen itself. The ILC's ultimate goal in drafting a set of articles is for states to adopt these articles as an expression of binding international law. If states do not accept the Draft Articles because the current wording of Draft Articles 3, 4, 6, and 47 and their Commentaries fail to clearly define the multiple attribution rule, it may weaken the ILC as well as the international rules on responsibility of international organizations. The ILC will have an easier time getting its Draft Articles adopted in the General Assembly if it firmly establishes a rule of multiple attribution on which states and international organizations agree. The international community already seems to agree on multiple attribution, considering that no international organizations have submitted comments challenging such a rule.¹⁸¹ In light of concerns about a single attribution rule or a multiple attribution rule with an exception for UN Chapter VII operations, the ILC should adopt a clear, progressive rule on multiple attribution that encompasses UN Chapter VII operations and identifies the *Behrami/Saramati* decision as an improper application of the rule.

VI. CONCLUSION

A rule of multiple attribution for international organizations would allow for a more effective distribution of international responsibility among culpable entities than a rule of single attribution. The international community has already unanimously adopted dual attribution for State Responsibility, in large part because it assigns responsibility to the bodies most capable of preventing harms. Multiple attribution also represents a rule of liability that is more functional for the international community in the long term, if one believes that the international community wishes the UN to continue its peace support operations. Without the possibility of multiple attribution, the UN may become excessively vulnerable to lia-

180. Statute of the International Law Commission, *supra* note 32, art. 1(1).

181. See generally *Comments and Observations Received from International Organizations*, U.N. Doc. A/CN.4/609 (Mar. 13, 2009).

bility for actions outside of its control. Even if courts avoid placing actual responsibility on the UN by refusing to find jurisdiction over it, a judge-made single attribution rule may cause recipient states of peace support operations to vigorously oppose the entrance of UN missions because of the fear of impunity for any resultant damages.

While the European Court of Human Rights may not have intended its *Behrami/Saramati* decision to have such enormous implications on future operations by the UN and other international organizations, the Court's failure to address the issue of multiple attribution has created a dangerous trend. If the Court based its decision on a political interest in not placing responsibility on the states for their UN peacekeeping activities,¹⁸² it could have reached the same result without upending multiple attribution; the Court could have explicitly determined that the states did not have effective, or exclusive, control in the two cases and that conduct was therefore neither singly nor dually attributable to the states.¹⁸³ Such an analysis would have acknowledged the possibility of multiple attribution and still met the political objective of rejecting state responsibility for the conduct. Instead, the Court's refusal to consider multiple attribution has led to confusion, divergent attribution systems under State Responsibility and Responsibility of International Organizations, and judicial decisions that impede peacekeeping missions. It would be wise for both the UN and the ILC to reiterate their support for a rule permitting findings of multiple attribution and to elucidate the dangers of straying from such a rule.

182. See Larsen, *supra* note 4, at 528 ("One possible interpretation of the judgment, however, may be that the discussion on attribution was little more than a suitable pretext for reaching a decision that the Court considered it necessary to reach.").

183. It would be more difficult for an international court to come to such a conclusion today because the ILC recently clarified the "effective control" test in its 2009 Commentary. An ILC statement on multiple attribution would have a similar effect going forward.