Attribution of Conduct by State Armed Forces Participating in UN-authorised Operations: The Impact of *Behrami* and *Al-Jedda*

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Abstract

Missions authorised by the UN Security Council in which contributing States act under their own operational command and control have become an enduring part of the international landscape. In the course of such missions, questions have arisen as to who is responsible for the conduct of individual troops where they breach international obligations, including those under international human rights and humanitarian law. This in turn raises the question as to whether such conduct is attributable to the contributing State or organisation in which operational command and control vests, or to the UN itself as the authorising power. This issue was raised recently before the European Court of Human Rights in *Behrami* and before the House of Lords in *Al-Jedda*. *Behrami,* in particular, found that such conduct will frequently be attributable to the UN in such circumstances. These cases are critically examined to determine their validity. Alternative reasoning is explored based on the application of the law of responsibility of international organisations, as opposed to the internal, institutional laws of the UN as applied in *Behrami*.

Introduction

On several occasions the United Nations Security Council ('UNSC') has 'authorised' one or more willing Member States or other international organisations to use force to discharge a particular security mandate.[1] In carrying out such missions, the mandated States or other entities act under their own operational command.[2] As frequently occurs in warfare, allegations about the commission of some internationally wrongful act by mandated States or organisations have arisen in the course of such missions. The

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1 This may be compared to peacekeeping mandates where the States or organisations are asked to contribute to a UN-led mission which may have no or limited ability to use force.

2 Again, this may be compared to peacekeeping or similar missions where forces usually operate under UN operational command.

question arises as to who is ultimately responsible for the act. This in turn raises the issue as to whether the act is attributable to the Member States or international organisations discharging the mandate, or to the United Nations ('UN') itself.

The issue is one of extreme importance for international law and the international community. Its resolution determines who may be held responsible for breaches of international humanitarian and human rights law or other international obligations under these missions, and therefore whether and how victims can obtain redress. Since these types of missions appear to be a permanent part of the international landscape, the issue will continue to arise in legal proceedings in international and domestic tribunals.

The recent Grand Chamber of the European Court of Human Rights ('ECtHR') decision in *Behrami v France; Saramati v France, Germany and Norway*[3] ('*Behrami*') and the decision of the United Kingdom House of Lords ('HoL') in *R (on the application of Al-Jedda) v Secretary of State for Defence*[4] ('*Al-Jedda*') consider this issue in the context of UN mandates in Kosovo and Iraq.

This article first examines the context of and reasoning in these cases. Second, the reasoning in these cases is critically analysed to determine their validity and whether alternative reasoning should have been employed. Finally, the implications of the cases for the international community are examined.

1. Behrami

A. Background, Complaints and Responses

As is well known, a conflict between Kosovar Albanians and Serbian forces erupted within Kosovo in 1998 and 1999. This eventually led to North Atlantic Treaty Organization ('NATO') air strikes between March and June of 1999. Following the air campaign, an agreement was signed providing for the withdrawal of Serbian forces and the introduction of an international security force mandated by a UNSC Resolution ('UNSCR'). On 10 June 1999, the UNSC passed UNSCR 1244 establishing international security and civil presences in Kosovo and authorising the security presence with 'all necessary means to fulfil its responsibilities.'[5]

From June 1999, the Kosovo Force ('KFOR') became the 'international security presence' in Kosovo. As provided by UNSCR 1244, KFOR was led by NATO and consisted of troops contributed by NATO Member States (including France, Germany and Norway).[6] The UN Interim Administration in Kosovo ('UNMIK') became the 'international civil presence' in Kosovo. UNMIK was formed as an organ of the UN by the Secretary-General and was led by his Special Representative.[7]

3 *Behrami v France*; *Saramati v France, Germany and Norway*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) ('*Behrami*').

4 *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 ('*Al-Jedda*').

5 These facts are summarised in *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [2].

6 Russian forces also participated at a later date: see *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [3].

7 These facts are summarised in *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [3]–[4].

In March 2000, Bekir and Gadaf Behrami were playing in the hills near Mitrovica in Kosovo when they picked up an unexploded cluster munition dropped by NATO during the air campaign. It exploded, killing Gadaf and blinding Bekir. Their father, Agim, complained to the ECtHR on behalf of himself and his son that France (as the contributing nation to KFOR responsible for the area) had known about the unexploded cluster munitions and had failed to properly mark and clear them. It was alleged that this inaction by French troops amounted to a breach of article 2 of the European Convention on Human Rights ('ECHR') which protects the right to life.[8]

In April 2001, Ruzhdi Saramati was arrested by UNMIK police on suspicion of attempted murder and the illegal possession of a weapon. He was later released, but was re-arrested at a police station in Prizren (an area for which Germany was the responsible KFOR-contributing nation) on the orders of the Commander of KFOR (a Norwegian officer) because he was thought to have had involvement with certain armed groups. He applied to local courts for release on several occasions, but was denied on the basis that only KFOR (by this time, led by a French commander) were competent to so order. He was eventually convicted of attempted murder, but this was later quashed by local courts and sent for re-trial. Saramati alleged that his detention amounted to an unlawful deprivation of liberty by, variously, France, Norway and Germany[9] under article 5 of the ECHR.[10]

France, Norway and Germany (as well as other third party States) challenged the complaints on the basis that the applicants were not 'within their jurisdiction' under article 1 of the ECHR and that the complaints were therefore inadmissible. One of the key reasons advanced in support of this position was that the conduct of individual troop-contributing nations of KFOR (including France, Germany and Norway) was solely attributable either to NATO or the UN and that, for this reason, the ECtHR had no competency to examine the matter.[11] This became the central issue for the ECtHR in this particular decision, even though the court might potentially have decided the case on other grounds, such as the extra-territorial application of the ECHR.[12]

B. ECtHR's Decision as to Attribution

Having found that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within the mandate of UNMIK,[13] the ECtHR turned to the question of whether the conduct of the respondent States as part of KFOR and UNMIK could be attributed to the UN.

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8 These facts are summarised in *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [5]–[7], [61].

9 The Saramati complaint against Germany was later withdrawn on the basis of an insufficient nexus: see *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [64]–[66].

10 These facts are summarised in *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [8]–[17], [62].

11 The submissions of the respondents and third parties are summarised in *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [82]–[117].

12 See discussion in Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' 8 *Human Rights Law Review* 151 at 159.

13 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [123]–[126].

To answer this question, the ECtHR first examined the framework for the establishment of KFOR and UNMIK under Chapter VII of the UN Charter. The court noted that 'the UNSCR 1244, *inter alia*, recalled the UNSC's "primary responsibility" for the "maintenance of international peace and security"'[14] and that the UNSC had determined that a 'threat to international peace and security' existed in Kosovo.[15] UNSCR 1244 also referred expressly to Chapter VII of the UN Charter, which provides the basis for the UNSC's collective use of force.[16]

The ECtHR found that, in response to this threat, the UNSC had authorised 'Member States and relevant international organizations to establish the international security presence in Kosovo … with all necessary means to fulfil its responsibilities'.[17] UNSCR 1244 provided that the security presence would have 'substantial [NATO] participation' and had to be deployed 'under unified command and control'.[18] It noted that UNSCR 1244 did not specify the basis in Chapter VII under which it was acting, although there were a number of possible bases, including article 42[19] read in conjunction with article 48,[20] and the exercise of 'implied powers' under the UN Charter.[21]

According to the ECtHR, political realties have meant that the UNSC has to rely on willing Member States and other international organisations to perform the collective security role on behalf of the UNSC.[22] This is primarily because no 'Article 43 agreements' have been concluded between Member States and the UNSC for the former to contribute military forces for the purpose of maintaining international peace and security.[23]

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14 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [128]; see UNSC Resolution 1244 (1999) Preamble; see also *Charter of the United Nations* art 24.

15 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [128]; see UNSC Resolution 1244 (1999) Preamble; see also *Charter of the United Nations* art 39.

16 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [128]; see UNSC Resolution 1244 (1999) Preamble.

17 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [129].

18 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [129]; see UNSC Resolution 1244 (1999) annex 2 [4].

19 *Charter of the United Nations* art 42 states: 'the Security Council may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'.

20 *Charter of the United Nations* art 48 states: 'the action to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all of the Members of the United Nations or by some of them, as the Security Council may determine … [and] such decisions shall be carried out by the Member States directly and through their actions in appropriate international agencies of which they are members.'

21 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [130].

22 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [132] .

23 See *Charter of the United Nations* arts 43–45; *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [132] .

The ECtHR then examined the nature of the powers exercised by the UNSC in establishing KFOR and UNMIK. It found that the UNSC had 'delegated to willing organisations and Member States … the power to establish an international security presence [KFOR] as well as its operational command' and that 'troops in that force would operate … on the basis of UN delegated and not direct, command.'[24] The ECtHR also found that the UNSC was 'delegating civil administration powers to a UN subsidiary organ (UNMIK) established by the SG.'[25]

Although UNSCRs generally use the term 'authorise', the ECtHR found that the UNSC was in fact 'delegating' its security powers to KFOR. By 'delegation', the ECtHR meant the 'empowering by the [Security Council] of another entity to exercise its function'.[26] This could be contrasted with the act of '"authorising" an entity to carry out functions which it could not itself perform.'[27]

The court then considered the validity of this delegation of power by the UNSC. It held that, although the UNSC may delegate its security powers, such a delegation must be 'sufficiently limited to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter'.[28] The court here was referring to the primary responsibility of the UNSC under the UN Charter for the maintenance of international peace and security and the alleged incompatibility of such a responsibility with a complete abdication of such power to other entities. The sources relied upon by the court explain that to do so would undermine the 'centralised nature and institutional structure of the Charter in the context of international peace and security'.[29] It would also 'lack that degree of centralisation constitutionally necessary to designate a particular military action as a United Nations Operation.'[30] The court reasoned that the UNSC is only permitted to delegate its powers if it retains 'overall authority and control'[31] over the delegated powers. If it does not, its actions will be inconsistent with the UN Charter.

According to sources relied upon by the court, the UNSC will be exercising 'overall authority and control' over delegated security powers where, at a minimum, it explicitly recognises that force may be used; specifies clearly the extent, nature and objective of the military action; and includes a supervisory mechanism such as the duty to report at regular intervals.[32] However, it is not necessary for the UNSC to be exercising

24 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [129].

25 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [129].

26 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [43].

27 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [43].

28 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [132].

29 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) at 265.

30 Id at 266.

31 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [133].

32 Erika de Wet, above n29 at 268–269.

'operational command' over the forces because, as the court explained, 'the multilateral and complex nature of such security missions renders necessary some delegation of command.'[33] This view recognises that it is practically unworkable for the UNSC to exercise such command over delegated enforcement action, and that it is therefore permissible for Member States and international organisations to control the day-to-day military operations with UNSC oversight.

The ECtHR found that the UNSC had retained 'ultimate authority and control' over KFOR's mission under UNSCR 1244.[34] The court identified several factors in reaching this conclusion. First, it pointed to the ability of the UNSC to delegate Chapter VII powers to Member States and relevant international organisations. Second, the specific power to use force to restore and maintain international peace and security was a 'delegable' power. Third, the delegation of power was not 'presumed or implicit' in UNSCR 1244, but was 'prior and explicit'. Fourth, UNSCR 1244 set 'sufficiently defined limits on the delegation by fixing the mandate with adequate precision' and 'set out the objectives to be obtained, the roles and responsibilities accorded and the means to be employed'. Fifth, the leadership of the military presence (KFOR) was required by UNSCR 1244 to report to the UNSC 'so as to allow it to exercise its overall authority and control'.[35] In this respect, the UNSC was to remain actively seized of the matter and the Secretary-General was to present the KFOR report to the UNSC.

The court confirmed that the UNSC had only delegated 'the power to establish, as well as the operational command of … KFOR' to NATO.[36] In turn, NATO achieved its operational command via the Commander of KFOR who was in direct command of individual troop-contributing nations.[37] The fact that individual troop-contributing nations retained disciplinary and criminal jurisdiction or certain other powers over their troops did not detract from NATO's operational command.[38] It was only necessary that NATO exercised 'effective', as opposed to 'exclusive', operational command.[39]

The court then proceeded to reason that, provided the UNSC retains 'ultimate authority and control' over a security mission and only delegates 'operational command', the conduct of those forces exercising the delegated security role will be attributable to the UN. No legal basis is given for this step in the court's reasoning. The ECtHR found

33 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [132].

34 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [134].

35 This is outlined in *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [134].

36 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [135].

37 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [133].

38 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [138]–[139].

39 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [138]–[139].

that the conduct of KFOR was attributable to the UN.[40] The court then concluded that the conduct of UNMIK, as a 'subsidiary organ', was also attributable to the UN.[41]

For these reasons, the court found, by majority, that the applicants were not within the jurisdiction of the respondent States and therefore the complaints were not admissible before the ECtHR.

2. Al-Jedda

A. Background, Complaints and Responses

As is equally well known, the United States, the United Kingdom and a number of other States launched a military intervention in Iraq commencing in March 2003. From 1 May 2003, the US and UK became occupying powers under international law. UNSCR 1483, adopted on 22 May 2003, recognised this situation and also established the UN Assistance Mission for Iraq ('UNAMI') to fulfil certain humanitarian functions. On 16 October 2003, the UNSC, acting under Chapter VII of the UN Charter, passed UNSCR 1511 which 'authorised' a multinational force under unified command to take all necessary measures to contribute to the security and stability of Iraq.[42]

The multinational force ('MNF') consisted of US, UK, and other foreign troops already present in Iraq, under the lead of the US and UK. The occupying powers passed certain laws during this period and paved the way for a transfer of sovereignty to an Iraqi government. On 8 June 2004, the UNSC passed UNSCR 1546 which endorsed the end of the occupation and formation of an Iraqi Government, and re-affirmed the authorisation of the MNF under Chapter VII of the UN Charter, subject to certain review conditions. A letter from the US Secretary of State to the UNSC annexed to UNSCR 1546 referred specifically to the MNF's role in interning individuals for 'imperative reasons of security'. On 27 June 2004, sovereignty was transferred to an Iraqi government and the occupation ceased.[43]

In October 2004, Al-Jedda, a dual British and Iraqi national, was detained by UK forces in Iraq on suspicion of being a member of a terrorist group, recruiting terrorists and smuggling weapons. He complained to UK courts under subsection 6(1) of the *Human Rights Act 1998* (UK) by which it is unlawful for a public authority (in this case, the UK military) to act in a way that is incompatible with a right under the ECHR. He alleged that his right to freedom and liberty had been breached under article 5 of the ECHR.[44]

On appeal to the HoL, the UK Secretary of State argued that Al-Jedda was not 'within the jurisdiction' of the UK as required by article 1 of the ECHR. Rather, relying

40 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [141].

41 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [143].

42 These facts are summarised in *Al-Jedda* [2007] UKHL 58 at [8]–[14].

43 These facts are summarised in *Al-Jedda* [2007] UKHL 58 at [16].

44 These facts are summarised in *Al-Jedda* [2007] UKHL 58 at [1]–[3] .

on *Behrami*, the conduct of UK forces in detaining Al-Jedda was attributable to the UN.[45] For this reason, the argument followed, the conduct was outside the scope of the ECHR and the *Human Rights Act 1998* (UK), and UK courts were not competent to consider the matter.

B. House of Lord's Decision on Attribution

By a four to one majority, the HoL distinguished *Behrami* on its facts and found that the conduct of UK forces was not attributable to the UN.

Lord Bingham drafted the lead judgment for the majority. He reviewed the legal framework for the existence of the MNF as set out above, including the relevant texts of UNSCRs 1511 and 1546, as well as *Behrami*. Lord Bingham concluded that the analogy between the situation of KFOR and UNMIK in Kosovo and the situation of the MNF in Iraq 'breaks down … at almost every point'.[46]

Several factors were of particular importance in reaching this conclusion. First, Lord Bingham notes that 'the UN did not dispatch the coalition forces to Iraq'.[47] Instead, the US and UK were occupying powers before they possessed any UN mandate. Following UNSCR 1483 and subsequent resolutions, the role of the UN itself (via UNAMI) was focused on humanitarian relief and reconstruction. The MNF was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. By contrast, the international civil and security forces in Kosovo were established at the 'express behest' of the UN and 'operated under its auspices'.[48]

Second, by UNSCRs 1511 and 1546, the UNSC gave the MNF:

> express authority to take steps to promote security and stability in Iraq, but … the Security Council was not *delegating* its power by empowering the UK to exercise its function [as occurred under UNSCR 1244 in establishing KFOR] but was *authorising* the UK to carry out functions it could not perform itself. [49]

Lord Bingham appears to be stating here that an 'authorisation' is a different conferral of power to a 'delegation', with the consequence that the UNSC is not assuming responsibility for the conduct of those forces that are 'authorised', although this is not explicitly stated.

Third, Lord Bingham states that it could not be realistically said that the US and UK forces were under the 'effective command and control of the UN' in Iraq, adding that the duty to report to the UNSC under UNSCRs 1511 and 1546 or the ability of the UNSC to revoke its authorisation were not determinative in this regard.[50]

Fourth, the US and UK never disclaimed responsibility for their conduct in Iraq, nor did the UN claim responsibility for such acts.[51]

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45 *Al-Jedda* [2007] UKHL 58 at [3].
46 *Al-Jedda* [2007] UKHL 58 at [24].
47 *Al-Jedda* [2007] UKHL 58 at [23].
48 *Al-Jedda* [2007] UKHL 58 at [24].
49 *Al-Jedda* [2007] UKHL 58 (emphasis added).
50 *Al-Jedda* [2007] UKHL 58 at [23]–[24].
51 *Al-Jedda* [2007] UKHL 58 at [23].

Lords Hale, Carswell and Brown reached the same conclusion as Lord Bingham.[52] Lord Brown disagreed with Lord Bingham that the UNSC in UNSCRs 1511 and 1546 was 'authorising' rather than 'delegating' its powers.[53] However, he found that the UNSC did not retain 'ultimate authority and control' over the MNF primarily on the basis that the mandate for KFOR and UNMIK in UNSCR 1244 was 'prior and explicit' and was made 'under UN auspices'.[54] By contrast, UNSCRs 1511 and 1546 were passed after the US and UK had begun occupying Iraq and merely 'gave recognition to those occupying forces as an existing security presence.'[55] The MNF was not deployed under 'UN auspices' and the UNAMI alone represented the UN's presence in Iraq.[56]

Only Lord Rodger was willing to find that the acts of the UK forces in Iraq were attributable to the UN.[57] Several factors were key to Lord Rodger's decision in this respect.

First, Lord Rodger agreed with the ECtHR's reasoning in *Behrami* that the UNSC had power to 'authorise' its Member States to restore and maintain international peace and security in the absence of article 43 agreements.[58] UNSCRs 1244 and 1546 were resolutions of this type.[59] Both resolutions 'authorised' Member States and international organisations to 'use all necessary means' under 'unified command' to contribute to the maintenance of security and stability.

Second, Lord Rodger found that, as with UNSCR 1244, the UNSC was 'delegating' its power in UNSCRs 1511 and 1546 to the MNF to restore and maintain international peace and security in Iraq.[60] He adopted the ECtHR's definition of 'delegation' as meaning the empowering of another entity to exercise the UNSC's functions.[61]

Third, Lord Rodger agreed with the ECtHR's finding in *Behrami* that the UNSC could only delegate its security powers within defined limits if it was to remain lawful. Member States had conferred power on the UNSC under the UN Charter to maintain international peace and security. The UNSC's delegation could not amount to a total 'transfer of responsibility' to another entity.[62] Such a mission would lack the 'degree of centralisation' necessary to designate a particular military action as a United Nations operation.[63] An abdication of responsibility would have occurred if the 'acts of delegate entity were *not* attributable to the UNSC'.[64]

52 *Al-Jedda* [2007] UKHL 58 at [124], [131], [149].
53 *Al-Jedda* [2007] UKHL 58 at [143].
54 *Al-Jedda* [2007] UKHL 58 at [145].
55 *Al-Jedda* [2007] UKHL 58 at [146].
56 *Al-Jedda* [2007] UKHL 58 at [147].
57 However, Lord Brown later indicated that he may change his mind on this issue in the future having read Lord Rodger's judgment.
58 *Al-Jedda* [2007] UKHL 58 at [69]–[70].
59 *Al-Jedda* [2007] UKHL 58 at [70]–[71].
60 *Al-Jedda* [2007] UKHL 58 at [91].
61 *Al-Jedda* [2007] UKHL 58 at [80]–[81].
62 *Al-Jedda* [2007] UKHL 58 at [82].
63 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [132] cited in *Al-Jedda* [2007] UKHL 58 at [82].
64 *Al-Jedda* [2007] UKHL 58 at [82].

Fourth, Lord Rodger accepted that the key question in determining the attribution of the conduct of the MNF to the UN was whether the UNSC had retained 'ultimate authority and control' over the mission so that only 'operational command' was delegated.[65] In this context, the same factors identified by the ECtHR in *Behrami* indicating that the UNSC had retained 'ultimate authority and control' over the mission in UNSCR 1244 were present in UNSCRs 1511 and 1546.[66]

Fifth, Lord Rodger did not consider the fact that UNSCR 1244 was adopted prior to the deployment of KFOR in Kosovo to be relevant to the ECtHR's decision in *Behrami*.[67] It was only relevant that the Resolution was adopted prior to the conduct forming the basis of the complaint. Similarly, Lord Roger did not consider that the inclusion of the words 'under UN auspices' in UNSCR 1244, but not UNSCRs 1511 and 1546, was legally significant.[68]

3. Criticism of Behrami and Al-Jedda

The question arises whether the decisions of the ECtHR in *Behrami* and the HoL in *Al-Jedda* were correctly decided. More particularly, the relevant question for present purposes is whether both courts applied the appropriate legal principles in determining the question of attribution or whether alternative reasoning ought to have been employed.

A. Behrami

The major ground on which the ECtHR's reasoning is open to challenge is that it does not address the fundamental question of how, under the *law of responsibility of international organisations*, the acts of KFOR are attributable to the UN. The *law of responsibility of international organisations* determines when the conduct of an international organisation will give rise to legal responsibility for a breach of its obligations towards other actors in the international system.[69] The question of attribution of conduct to an international organisation lies firmly in this area of law and answers must arise out of it. Instead, the court purely focused on the internal, institutional laws of the UN as a means of addressing the issue of attribution and largely ignored this fundamental category of laws which ought to have governed its decision.

The law governing attribution of conduct to international organisations is still in a state of development and is unlikely to represent customary international law.[70] However, the work of the International Law Commission ('ILC') in this area is strongly

65 *Al-Jedda* [2007] UKHL 58 at [84].
66 *Al-Jedda* [2007] UKHL 58 at [85]–[91].
67 *Al-Jedda* [2007] UKHL 58 at [59]–[62].
68 *Al-Jedda* [2007] UKHL 58 at [90].
69 See, eg, Chittharanjan Félix Amerasinghe, *Principles of the Institutional Law of International Organizations*, (2nd ed) (2005) at 399.
70 See also Kjetil M. Larsen, 'Attribution of Conduct in Peace Operations: The Ultimate Authority and Control Test (2008) 19 *European Journal of International Law* at 517–518.

indicative of the relevant principles.[71] It collates practice and academic commentary over a long period of time, particularly since the creation of the UN. Under the ILC's work, there are two potential bases by which the acts of KFOR might be attributable to the UN in the relevant circumstances. It is critical to note that attribution on the basis of 'overall authority and control' (the test adopted by the ECtHR) is not one of these bases.

(i) Agency

First, there is the 'General rule of attribution of conduct to an international organization'. This rule states that:

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 an act of that organization under international law whatever position the organ or agent holds in respect of the organization.
2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.
3. Rules of the organization shall apply to the determination of the functions of its organs and agents …[72]

It is necessary to consider whether the conduct of KFOR was attributable to the UN under such principles.

It is clear, as recognised by the ECtHR,[73] that KFOR was not established as a subsidiary organ of the UN. This only leaves an argument that KFOR was acting as an 'agent' of the UN or, at least, in a sufficiently connected capacity, so that its conduct could be considered to be that of the UN.

One possibility, in this context, is that the court's finding that the UNSC had, under UNSCR 1244, 'delegated' its Chapter VII power to restore and maintain international peace and security in Kosovo to KFOR gave rise to an agency or similar relationship. However, there is a strong argument that the UNSC was not 'delegating' its power to KFOR with the consequence that it became the delegate, or agent, of the UNSC.

First, the conclusion that the UNSC's actions in UNSCR 1244 amounted, in the legal sense, to a 'delegation' is open to challenge. Several commentators in fact literally characterise such actions by the UNSC as 'authorisations' in the sense of approving, permitting or sanctioning Member States to discharge a specific task in particular territory and to exempt those forces from the prohibition to use force within defined parameters. For instance, Simma has stated that the practice of authorising Member States to implement the decisions of the UNSC with their own forces 'relieve[s] the

71 United Nations International Law Commission, *Report on the Work of its Fifty-Sixth Session (3 May – 4 June and 5 July – 6 August 2004)* (2004) at arts 61–72 <http://untreaty.un.org/ilc/reports/2004/2004report.htm> accessed 18 January 2009. See also Giorgio Gaja, *Second Report on Responsibility of International Organizations* (April 2004) <http://untreaty.un.org/ilc/documentation/english/a_cn4_541.pdf> accessed 18 January 2009.

72 United Nations International Law Commission, above n71 at 103 (emphasis added).

73 *Behrami*, Eur Court HR (Grand Chamber), Decision as to Admissibility (application no's 71412/01; 78166/01) (2 May 2007) at [142]–[143].

acting States from the prohibition on the use of force and create[s] the same permissive effect as binding decisions.'[74] Amerasinghe has commented that a recommendation in the nature of an authorisation may 'create legal authority for the action taken pursuant to them'.[75] He also refers to Judge Lauterpacht's separate opinion in the *Voting Procedure Case*, in which he provides that authorisations for action 'perform a legitimizing function both for the UN itself and other states, and may also serve to delegitimize contrary action … thus a State implementing a recommendation would be protected from charges of illegality by other States'.[76]

Second, the legal consequence of characterising the UNSC's action as a 'delegation' is that KFOR was acting as a 'delegate' of the UN. This conclusion does not appear to be sustainable. In particular, forces of troop-contributing nations were not formally assigned or seconded to the UN so that they became a 'UN international force' and KFOR troops were not operating under UN operational command.[77] Also, it is highly unlikely that NATO or the UN would have agreed that KFOR was acting as an agent, formal representative or delegate of the UN.[78] Rather, KFOR stood outside the UN organisational framework. The forces acted as a 'NATO force', under the operational command of NATO, and followed NATO policies.

For these reasons, it is difficult to sustain the argument that the UNSC was 'delegating' its power in the sense of entrusting its own powers to KFOR as its delegate. A more reasonable interpretation of the UNSCR 1244 mandate is that the UNSC was granting permission for KFOR to act within certain parameters in its own independent capacity.

Such an interpretation does not undermine the primary responsibility of the UNSC for maintenance of international peace and security. Nothing in Chapter VII limits the manner in which the UNSC can authorise Member States to act. In particular, there is no suggestion that Member States must act as the agent or delegate of the UN in performing a specific mandate. It appears to be quite permissible for such Member States to act in their own capacities, provided they have the permission of the UNSC. Such authorisations are compatible with the UNSC's security role since it retains the power to determine a threat to international peace and security, expressly decides whether or not to authorise Member States to act in accordance with its own institutional procedures, provides parameters to this authorisation, performs a monitoring role over the mission and may revoke its authorisation at any time.

74 Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed) (1994) at 728.

75 Amerasinghe, above n69 at 184–185.

76 Ibid.

77 See UNSC Resolution 1244 (1999) annex 2 [4] (emphasis added).

78 See, eg, a statement by the UN Secretariat that in authorised Chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation: United Nations International Law Commission, *Responsibility of International Organizations: Comments and observations received from international organizations* (25 June 2004) <http://untreaty.un.org/ilc/documentation/english/a_cn4_545.pdf> accessed 18 January 2009 at 17–18.

The ILC's explanation of the term 'agent' in its Commentary to the Articles further supports KFOR's characterisation other than as agent of the UN. In particular, the ILC states that:

> when an organ of a State is placed at the disposal of an international organization, the organ may be *fully seconded* to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. In these cases the general rule in article 4 would apply.[79]

This passage indicates that if forces are 'fully seconded' to the UN in the manner peacekeeping troops frequently are by contibuting States, they constitute organs or agents of the UN. Clearly, KFOR was not fully seconded in any way to the UN, but acted in an independent capacity.

In addition, there is academic commentary suggesting that the consent of both principal and agent is indispensable for the existence of an international agency[80] and that the agent must intend to act for the principal in order for the legal effects of its acts to be imputed to the latter.[81] Again, it is highly unlikely that NATO or the UNSC consented to the establishment of a 'relationship of agency', or intended that such a relationship be created.[82]

It is reasonable to conclude that no relationship of agency was established between KFOR and the UNSC by UNSCR 1244. Rather, KFOR was acting in an independent capacity to perform a certain task within the approved limits of the UNSC. Therefore, under this principle, the acts of KFOR would not be attributable to the UN under the law of international responsibility.

(ii) Effective Control

Another potential basis for attributing conduct of a Member State's forces to the UN is reflected in draft article 5 of the ILC's work. This was referred to by the ECtHR in *Behrami*, but did not figure in its reasoning. Article 5 states that:

> 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.[83]

According to the ILC, the criterion for attribution of conduct either to State forces or the UN is based on 'the factual control' that is exercised over the specific conduct taken by the organ placed at the receiving organisation's disposal.[84] Various sources establish that factual or effective control in the context of military operations equates to the exercise of operational command.

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79 United Nations International Law Commission, above n71 at 110.

80 Angelo Piero Sereni, 'Agency in International Law' (1940) 34 *American Journal of International Law* at 645.

81 Id at 652.

82 See UNSC Resolution 1244 (1999) annex 2 [4].

83 United Nations International Law Commission, above n71 at 109–115.

84 United Nations International Law Commission, above n71 at 111.

For example, Seyersted, writing in 1961, analyses the distribution of responsibility between the UN and US and other forces in Korea. In Korea, the US and other States were acting under a UNSC authorisation, and operational command was exercised by the US. He notes that, in this situation, claims against the forces were directed against the US (or other participating States) and that, although the US declined responsibility in some cases, the UN never assumed it.[85]

Amrallah, considering the topic in 1976, concluded that the UN would be responsible for unlawful activities carried out by the armed contingents put under its disposal by participating States 'as long as those activities are committed in the exercise of UN functions and under its real and exclusive operational control.'[86] Further, he concluded that 'the amount of operational control or authority which is exercised over a UN force can be a useful criterion to determine the responsibility of various parties involved in the peacekeeping operation other than the UN'.[87] Amrallah stated that international practice at that time suggested that 'international responsibility for activities carried out by forces differed from one operation to another according to the degree of operational control which was exercised by the UN'. Later, he adds that 'the UN should not be responsible for activities carried out by a Member State using its own organs and under its full organic jurisdiction and control, even if those activities were in application of a decision taken by the UN, as was the case in Korea'.[88]

Scobbie, writing in 1998, also examines the issue. He refers to article 9 of the ILC Draft Articles on State Responsibility which makes clear that attribution requires that the organs act under the 'authority, direction and control' of the State to which it has been seconded.[89] He argues that the UN had applied the substance of this principle in determining liability for the actions of UN forces.[90] According to Scobbie, the UN only accepted liability for forces under its 'exclusive command and control' and that 'if an operation under Chapter VII is conducted under national command and control, then responsibility for its activities rests with the participating States.'[91] For Scobbie, it is the location of 'operational command and control' that determines the issue of attribution in such circumstances.[92]

Shraga states that '[i]n enforcement actions carried out by States under the authorisation of the Security Council … operational command and control is vested in the State conducting the operation, and so is the international responsibility for the conduct of their troops'.[93]

85 Finn Seyersted, 'United Nations Forces: Some Legal Problems' (1961) 37 *British Year Book of International Law* 351 at 421–423.

86 B Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peace-keeping Forces' (1976) 32 *Revue Egyptienne de Droit International* at 65.

87 Id at 66.

88 Id at 74.

89 I Scobbie, 'International Organisations and International Relations' in R J Dupuy, *A Handbook on International Organizations* (2nd ed) (1998) at 891.

90 Ibid.

91 Ibid.

92 Ibid.

The Commentary to the ILC's Draft Articles on the Responsibility of International Organizations quotes the UN Secretary-General who stated that:

> the international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations … in joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested … responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.[94]

The fact that these sources concern UN-authorised missions in which contributing States retain operation command and control militates against any argument that the UNSC or the UN itself is a *sui generis* international organisation that should be governed by different legal principles when it comes to questions of its responsibility. Rather, these sources indicate that practice and academic writings underpinning principles of attribution of international organisations have largely been shaped by missions authorised by the UNSC.

If the principle of 'effective control' had been applied in *Behrami*, then the court would most likely have found that conduct of individual troop-contributing nations was attributable to NATO, not the UNSC.

First, KFOR was not 'placed at the disposal' of the UN. In support of this conclusion, the ILC's Special Rapporteur concluded that the UN would not be responsible for conduct taken by military forces in the course of interventions recommended or authorised by the UNSC. This is because the authorised forces could not be said to have been placed at the disposal of the UN. He added that this position was confirmed by the practice of allocating responsibility in Korea, and that the approach has been generally accepted by States whose forces were involved in operations authorised by the UNSC.[95] Second, even if it could be said that KFOR was placed at the disposal of the UN, NATO exercised operational command over the conduct of KFOR troops and therefore retained effective control.

It can be concluded, therefore, that the ECtHR's reasoning and conclusions in *Behrami* are highly questionable and that the above alternate reasoning ought to have been employed.

B. Al-Jedda

If it is accepted that the *Behrami* decision was incorrectly reasoned, then the HoL should, from a strict legal point of view, have disapproved the ECtHR's judgment and followed the above alternate reasoning. If such reasoning was followed in *Al-Jedda,* the HoL would have concluded that the UNSC gave the MNF permission to act, within certain

93 Daphna Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law' in Luigi Condorelli et al (eds), *The United Nations and International Humanitarian Law* (1996) at 330.

94 United Nations International Law Commission, above n71 at 114.

95 Giorgio Gaja, above n71 at 16.

parameters, in Iraq in its own independent capacity. The Lords would then have concluded that the MNF was not acting as an agent of the UNSC in Iraq.[96] In addition, the UN was not exercising 'effective control' over the MNF because the US retained operational command and control.[97] Therefore, the conduct of the MNF was not attributable to the UN. Instead, the question of attributions would have needed to have been determined under the law of State responsibility. This would have led to a finding that the conduct was either attributable to the UK or the US in their operational command capacity.

Instead of disapproving of the ECtHR's judgment, the majority of the HoL, perhaps for reasons of inter-court comity, chose to attempt to distinguish *Behrami* on its facts. This proved more difficult than first thought.

For instance, one distinction proffered by Lord Bingham was that the US and UK forces were already present in Iraq prior to the authorisation, which did not expressly state that the MNF was acting 'under UN auspices'.[98] Both these points are correct. However, it is difficult to see how this warrants a departure from the reasoning that the UNSC was 'delegating' its security powers to the MNF in Iraq and was obliged to exercise authority and control and was therefore accountable for the acts of its delegate.

Another difference was that the US and UK forces were not under the 'effective command and control of the UN' in Iraq.[99] The ECtHR in *Behrami* did not apply 'effective command and control' as the test of attribution, but rather, 'overall authority and control', so it is difficult to see how this is relevant.

A further distinction was that the US and UK never disclaimed responsibility for their conduct in Iraq, nor did the UN claim responsibility for such acts.[100] This was clearly the case in *Behrami* as well, and did not prevent the ECtHR finding that the acts of KFOR were attributable to the UN.

For these reasons, the minority opinion of Lord Rodgers is a more faithful application of the *Behrami* decision to the facts of *Al-Jedda*. However, as stated above, the *Behrami* decision is itself subject to considerable doubt and alternative reasoning should have been applied by the HoL.

4. Implications of the Decision

If the *Behrami* reasoning is followed by international tribunals and national courts, then any conduct of a force operating under a UNSC authorisation will be attributable to the UN where the UN retains 'overall authority and control' over forces. The criteria established by the ECtHR to determine the existence of overall authority and control are

96 See also the recent decision in *Munaf et al v Geren, Secretary of the Army*, et al 553 US (2008) at 7–8 where the US Supreme Court rejected the US Government's argument that the US forces were acting as the agents of the MNF in holding certain detainees in Iraq.

97 See again, *Munaf* 553 US (2008) at 7–8 where a central element of the Supreme Court's reasoning in finding in favour of jurisdiction was the recognition that the US had factual control over the conduct of its forces.

98 *Al-Jedda* [2007] UKHL 58 at [23]–[24].

99 *Al-Jedda* [2007] UKHL 58 at [23]–[24].

100 *Al-Jedda* [2007] UKHL 58 at [23].

commonly found in UN Chapter VII mandates, including the current International Security Assistance Force ('ISAF') mission in Afghanistan.[101]

This means that an individual who suffers loss or damage from conduct by State forces (that would otherwise amount to a breach of international humanitarian and human rights law) in the course of such a mission will not have a right of recourse under international law against those States, including through the ECtHR. Recourse by such an individual in international law would need to be pursued against the UN. The UN is bound by customary international law, including humanitarian law.[102] If such customary law was breached, the UN's international responsibility may be engaged, along with the duty to make reparations.[103] Unless the UN establishes a system akin to that which exists for peacekeeping operations to deal with complaints and issue compensation, individual victims would have no means of seeking redress. If such a system was introduced, the UN could incur significant liabilities that would further stretch its limited budget.[104]

In addition, international humanitarian and human rights law would be rendered inapplicable to States in such circumstances.[105] This would significantly detract from the scope of application and the efficacy of these bodies of law in the very situations in which they ought to govern the conduct of these activities. It may also diminish the emphasis that commanders of State forces place on observing international humanitarian law principles in the field.

If the *Behrami* reasoning is not followed in future decisions, then courts will need to examine whether the principle of effective control is applicable in the circumstances, to determine whether conduct is attributable to the UN. In most cases it will not be.[106] If an international organisation such as NATO is exercising effective control, then conduct will be attributable to the UN. If a State is exercising operational command, then the law of State responsibility will need to be applied to determine to whom the conduct is attributable.[107]

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101 UNSC Resolution 1776 (2007).

102 See United Nations Secretary General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law* (August 1999) <www.un.org/peace/st_sgb_1999_13.pdf> accessed 18 January 2009. Also, one of the purposes of the UN is to encourage respect for human rights (*Charter of the United Nations* art 1(2)), so it could be argued that the UN is also bound to observe human rights principles.

103 See United Nations International Law Commission, *Report on the Work of its Fifty-Ninth Session (7 May – 5 June and 9 July–10 August 2007)* (2007) at arts 31–45 <http://untreaty.un.org/ilc/reports/2007/2007report.htm> accessed 1 February 2009.

104 In such circumstances, the UN might consider clearly delineating who will be responsible in UN authorised missions. Divisions of responsibility could be included in the authorising resolution itself, or in participation agreements with the authorised States.

105 However, some responsibility might remain at an individual level. Members of State forces will still remain subject to the domestic criminal law of their State. In some cases, they may also be subject to the domestic law of the host State in which they are operating, though status of forces arrangements often will provide immunities against legal proceedings in the host State. Members of State forces will also remain subject to international criminal law, where applicable.

106 One circumstance where conduct might be attributed to the UN is where the UN acknowledges and accepts the conduct in question as its own: see United Nations International Law Commission, above n71 at art 7.

107 See UNGA Resolution 59/35 (2004).

Such an approach accords with practical reality, in that those with factual control over the conduct of forces (i.e. those with operational command) should be responsible for such conduct, rather than the UNSC that has no real control over specific events occurring on the ground. One can point to instances where common sense would dictate such an approach. To quote Lord Bingham in *Al-Jedda*, 'it has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US.'[108]

Nevertheless, each particular situation will need to be examined on its merits. For example, the potential for dual attribution to both the UN and a State cannot be ruled out in some circumstances. The ILC has stated that:

> 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 the same conduct cannot be attributed to a State, nor does vice versa attribution to a State rule out attribution of the same conduct to an international organization.[109]

However, the ILC does not specify in what circumstances this might occur.[110] There is also the potential for concurrent responsibility of the UN and mandated States in particular situations. For instance, the UN could incur accessorial responsibility where it 'aids or assists', 'directs or controls' or 'coerces' a State in the commission of an internationally wrongful act.[111] The UN could also be responsible if it 'authorises' a State to commit an act that would be internationally wrongful if committed by the UN.

Even where the UNSC is not *legally* responsible for the conduct of the forces it authorises, this does not mean that the UNSC is more broadly 'unaccountable'. The UNSC remains accountable in that it must act within the terms of the UN Charter and established UNSC practice. The UNSC is also subject to political scrutiny and international criticisms about the legitimacy of its actions.

Conclusion

In *Behrami*, the ECtHR found that the UNSC had 'delegated' certain of its security powers to KFOR. It further found that if the UNSC was to act consistently with its collective security role under the UN Charter, it had to retain overall authority and control over the delegation of power. The court then reasoned that, since the UNSC retained overall authority and control over KFOR, the acts of KFOR were attributable to the UN.

108 *Al-Jedda* [2007] UKHL 58 at [23].

109 United Nations International Law Commission, above n71 at 101.

110 An analogy in the law of State responsibility might be where the organ of one State acts on the joint instructions of its own and another State: see James Crawford, *The International Law Commission's Articles on State Responsibility* (2002) at 103.

111 See United Nations International Law Commission, above n103, arts 12–14 at 188–189. The UN would need to have had knowledge of the circumstances of the internationally wrongful act and the act would need to have been internationally wrongful if committed by the UN.

However, this reasoning fails to answer adequately the fundamental question in the case: how, under the *law of responsibility of international organisations*, the acts of KFOR were attributable to the UN. Attribution is directly governed by these legal principles. Therefore, answers to questions of attribution must be derived primarily from this body of law.

Under the ILC's work, there are two potential ways in which the conduct of KFOR might have been attributable to the UN. First, there was the possibility that KFOR was an agent of the UN. It is highly questionable that this was the case. The UNSC's actions are more reasonably characterised as permitting KFOR to perform a particular task and exempting it from the prohibition on the use of force, rather than a total transfer of the UNSC's own powers. KFOR acted in its own independent capacity, not as a delegate or agent of the UNSC.

Second, there was the possibility that the UN retained effective control (as opposed to overall authority and control) over KFOR. A substantial line of authority establishes that effective control equates to operational command over forces. The UNSC never retained operational control over KFOR and did not exercise effective control. Accordingly, the acts of KFOR were attributable either to NATO or to the individual State concerned.

The above reasoning should have been applied in *Al-Jedda*. If it had been, the HoL would have concluded that there was no agency created and no effective control by the UN. Acts of UK troops were attributable either to the US or to the UK under the law of state responsibility. In attempting to distinguish *Behrami*, the majority nevertheless incorrectly applied the flawed reasoning of the ECtHR.

If *Behrami* is followed in the future, it effectively means that the conduct of State forces acting under UN authorisation will be attributable to the UN where it exercises overall authority and control. Current operations such as ISAF in Afghanistan may fall within these parameters. Claims for compensation would need to be directed to the UN, though no mechanism for resolving such claims may exist.

If *Behrami* is disapproved, the existing law of responsibility of international organisations and State responsibility will need to be applied in each circumstance to determine to which entities conduct is attributable. In most cases in which the UN has authorised forces to operate under their own operational command, conduct will be attributable to the States themselves or the relevant international organisation exercising effective control. This position also means that those with factual control over conduct of forces (i.e. those with operational command) are responsible for such conduct, rather than the UNSC that has no real control over specific events occurring on the ground. However, each specific situation will need to be examined on its individual merits.

Overall, a cautious approach would suggest that State military forces operating under UN authorisations should not assume, merely on the basis of *Behrami*, that their conduct would be attributable to the UN.