

International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution

Responsabilidade Internacional por Conduta das Forças de Paz da ONU: a questão da atribuição

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Abstract: The present paper aims at studying the international rules which have to be applied for the purposes of determining whether a certain conduct taken in the context of a UN peacekeeping operation must be attributed to troop-contributing states or to the UN. I will also consider whether, and under what circumstances, the same conduct may be attributed to both subjects. It argues that because of their dual status as organs of both the UN and the sending state, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purposes of attribution.

Keywords: International Law. International Responsibility. UN Peacekeeping.

Resumo: Realiza-se o estudo das normas internacionais que devem ser aplicadas para determinar se determinada conduta tomada no contexto de uma operação de *peacekeeping* da Organização das Nações Unidas deve ser atribuída aos Estados que contribuíram com tropas ou à própria Organização. Considera-se também se, e sob quais circunstâncias, a mesma conduta pode ser atribuída aos dois sujeitos. Defende-se que por conta de seu duplo *status* (como órgão da ONU e órgão do Estado emissor de tropas), o *status* formal das forças de *peacekeeping* dentro do sistema ONU dificilmente pode ser caracterizado como decisivo para os propósitos de atribuição de responsabilidade.

Palavras-chave: Direito Internacional. Responsabilidade Internacional. Forças de Paz.

1 Introduction

Resort to domestic courts to obtain reparation for damages occurred in the course of multinational peace operations is not a novelty of the last

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few years. Already in 1969 the House of Lords was called upon to adjudge whether the United Kingdom had to pay compensation for acts of the British forces participating in the United Nations Peace Keeping Forces in Cyprus (UNFICYP)¹. Ten years later the *Oberlandesgericht Wien* had to rule on a similar claim made against Austria in relation to the conduct of a member of the Austrian Contingent participating in the United Nations Disengagement Observer Force². It is true, however, that in the last decade there has been a significant increase in the number of cases submitted to domestic courts and dealing with claims for compensation for the damage caused by national contingents employed in the context of multinational peace operations. This situation probably reflects the more prominent role played by international organizations, particularly by the UN, after 1990 in the field of the maintenance of international peace and security. The expansion of the scope of activities of the UN in the last two decades may explain the larger number of cases which raise the question of the responsibility of that organization or of the states participating in peace operations. At the same time, there is nowadays a greater awareness of the need of designing ways to make international organizations more accountable³. While a few decades ago the legal regime governing the responsibility of international organizations (or of states acting within the framework of an international organization) was regarded as a rather obscure area of law, things have considerably changed. In this respect, the recent work of the ILC on the topic of the responsibility of international organizations has contributed to shedding some light on the matter.

Claims for reparation are sometimes brought directly against the organization. One may mention, for instance, the case recently filed before a United States court against the UN for its alleged responsibility for an epidemic of cholera that had broken out in Haiti in 2010 as a consequence of the presence of Nepalese peacekeepers who were members of

¹ House of Lords, *Attorney General v. Nissan*, 11 February 1969, All England Law Reports, 1969-I, p. 646.

² *Oberlandesgericht Wien, N.K. v. Austria*, 26 February 1979, International Law Reports, Vol. 77, p. 470.

³ See generally J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', 8 *International Organizations Law Review* (2011), p. 285 et seq.

the United Nations Stabilization Mission in Haiti (MINUSTAH)⁴. In most cases, however, such claims are directed against troop-contributing states, on the assumption that such states are to be held responsible for the conduct of their troops acting in the context of a multinational peace operation. The reason why these types of cases are generally submitted against the troop-contributing state, and not against the organization, is easy to explain. International organizations enjoy a sweeping immunity before domestic courts, as a string of recent cases testifies⁵. Individuals cannot bring complaints against them before international human rights tribunals or other monitoring bodies, as they are not parties to human rights conventions. In principle, there might be the possibility of resorting to internal mechanisms set up by the organization for the purposes of redressing individuals injured by conduct during a peace operation. However, with rare exceptions,⁶ mechanisms of this kind are generally lacking. In every Status of Force Agreement concluded by the UN with states hosting peacekeeping operations, it is provided that any dispute or claim of a private law character to which the UN peacekeeping operation is a party must be settled by a standing claims commission. In practice, no such commissions have ever been set up⁷. Thus, submitting the case against the

⁴ District Court (Southern District of New York), *Georges et al. v. UN*, October 2013. For an assessment of the responsibility of the UN see F. Mégret, 'La responsabilité des Nations Unies au temps du cholera?', 47 *Revue belge de droit international* (2013), p. 161 et seq.; J. Alvarez, 'The United Nations in the Time of Cholera', *AJIL Unbound*, available at <http://asil.org/remedies-harm-caused-un-peacekeepers>.

⁵ See, for instance, Court of Appeal of The Hague, *Mothers of Srebrenica v. Netherlands and the United Nations*, 30 March 2010, 49 *International Legal Materials* (2010), p. 1021 et seq.; Supreme Court of the Netherlands, *Mothers of Srebrenica Association et Al v. The Netherlands*, 13 April 2013, 51 *International Legal Materials* (2013), p. 1327 et seq.

⁶ For an analysis of a special and innovative mechanism set up in relation to the activity of the UN Mission in Kosovo (UNMIK), see P. Klein, 'Le panel consultatif des droits de l'homme (*Human Rights Advisory Panel*) de la MINUK: un'étape dans le processus de responsabilisation des Nations Unies?', in *Perspectives du droit international au 21e siècle - Liber Amicorum Christian Dominicé*, MartinusNijhoff: Leiden/Boston, 2012, p. 225 et seq.

⁷ For an examination of the position of the UN on this issue see T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State

troop-contributing state often constitutes for the injured individuals the only possible means for obtaining redress.

While claims of reparation are normally brought against the troop-contributing state, the question concerning the responsibility of the organization which promoted and conducted the operation resurfaces in most of these cases. This is so because the main argument usually advanced by the defendant states to rule out their responsibility is that the wrongful conduct at stake was not their own but the organization's. In other words, before addressing the substance of the claims brought by the plaintiffs, a judge is usually called upon to assess whether the conduct at stake is to be attributed to the organization or to the respondent state. Attribution is thus one of the core issues in these kinds of cases.

The present paper aims at studying the international rules which have to be applied for the purpose of determining whether a certain conduct taken in the context of a multinational operation must be attributed to troop-contributing states or to the international organization. I will also consider whether, and under what circumstances, the same conduct may be attributed to both subjects. The analysis will mainly rely on the interpretation of the rules of attribution set forth in the ILC's Articles on the responsibility of states, adopted in 2001, and in the Articles on the responsibility of international organizations adopted in 2011⁸. While the latter text has been criticized for not finding support in international practice,⁹ such criticism does not seem to be well founded as far as the question of attribution is concerned. The fact that a significant number of

Troop Contingents Serving as United Nations Peacekeepers', 51 *Harvard International Law Review* (2010), p. 141 et seq.

⁸ See 'Articles on the responsibility of states for internationally wrongful acts', annexed to UN General Assembly resolution 56/83, UN doc. A/RES/56/83, 12 December 2001, and 'Articles on the responsibility of international organizations', annexed to UN General Assembly resolution 66/100, UN doc. A/RES/66/100, 9 December 2011.

⁹ For such criticism see J. Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility', 105 *American Society of International Law Proceedings* (2011), p. 345; G. Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks', in U. Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press: Oxford, 2011, pp. 700-701.

cases have been brought against states for their participation in multinational operations has led to the development of a substantial amount of judicial practice in relation to this issue. The ILC gave due consideration to this practice when drafting the text on the responsibility of international organizations. Significantly, the European Court of Human Rights and a number of domestic courts took the ILC's work into account when determining the rules of attribution to be applied in relation to the conduct of troops of a state employed in a multinational peace operation¹⁰.

Before entering into the merits of the problem of attribution, a few preliminary remarks have to be made in order to further clarify and delimit the scope of the present analysis.

In the first place, it is all too well known that it is difficult to classify in rigid terms the various types of multinational operations conducted under the aegis of an international organization. These operations may differ considerably one from another and such differences may have important implications as far as the question of attribution is concerned¹¹. For this reason, the present paper will limit its analysis to the problems of attribution arising in connection with the activities of UN peacekeeping operations. While certain variations may exist within the context of specific operations, they normally present some basic common features¹². In particular, peacekeeping missions are characterized by the fact that troop-contributing states normally retain only limited powers over their troops while the UN is given operational command and control. By contrast, this paper will not address questions of attribution concerning the conduct of UN-authorized missions (or UN-mandated peace enforcement operations), in which the authorized forces remain under the command and

¹⁰ See European Court of Human Rights (Grand Chamber), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007, and *Al-Jedda v. United Kingdom*, 7 July 2011; House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, 12 December 2007; Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović*, 6 September 2013.

¹¹ See generally T.D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', 42 *Netherlands Yearbook of International Law* (2011), p. 37 et seq.

¹² On this point, see Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008.

control of the state, the UN power being limited to the possibility of withdrawing the authorization or delimiting its scope. Much has been written about this issue, particularly after the decision rendered by the ECtHR in the *Behrami* and *Saramati* cases. As it is well known, the ECtHR found that, since the Security Council retained ‘ultimate authority and control’ over the activities of KFOR, the conduct of KFOR was to be attributed to the UN, and not to the troop-contributing state¹³. There is very little to be added to the widespread criticism addressed against the ‘ultimate authority and control’ test resorted to by the ECtHR, a test which ends up attributing to the organization the conduct of the troops even if they substantially remain under the complete control of the sending state¹⁴. It suffices here to note that, in its subsequent decisions, the ECtHR appears to have abandoned this test or, at least, to have narrowed down significantly its scope of application¹⁵.

Secondly, reference must be made to the possibility that in this context the question of attribution is governed by special rules whose content differs from the general rules of attribution set forth in Articles 4-11 of the Articles on state responsibility and Articles 6-9 of the Articles on the responsibility of international organizations. Both texts contain a provision on *lexspecialis* and therefore recognize the possibility of special rules of

¹³ ECtHR (Grand Chamber), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007, para 133.

¹⁴ See, among others, P. Klein, ‘Responsabilité pour les faits commis dans le cadre d’opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l’homme: quelques considérations critiques sur l’arrêt Behrami et Saramati’, 53 *Annuaire français de droit international* (2007), p. 55; L.A. Sicilianos, ‘Entre multilatéralisme et unilatéralisme: l’autorisation par le Conseil de sécurité de recourir à la force’, 339 *Recueil des Cours* (2009), p. 376; P. Palchetti, ‘Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: i casi Behrami e Saramati’, 90 *Rivista di diritto internazionale* (2007), pp. 689-690. In mild criticism, the ILC observed that ‘when applying the criterion of effective control, “operational” control would seem more significant than “ultimate” control, since the latter hardly implies a role in the act in question’. Report of the International Law Commission on the work of its sixty-third session, UN doc. A/66/10, p. 23.

¹⁵ See, in particular, ECtHR (Grand Chamber), *Al-Jedda v. United Kingdom*, 7 July 2011, paras. 84-85.

attribution applying to specific situations¹⁶. With regard to the responsibility of international organizations, special rules of attribution may include rules which apply to a particular category of organizations or to a particular organization¹⁷. Admittedly, when considering the practice concerning the attribution of the conduct of UN peacekeeping operations, it is hard to find elements supporting the view that the matter is governed by special rules of attribution. This the more so since some of the general rules contained in the 2011 Articles, particularly the one set forth in Article 7, have been drafted with mainly the situation of UN peacekeeping forces in mind. A brief examination of the ILC's Commentary to that provision is sufficient to confirm it¹⁸. Yet, the possibility that special rules govern the question of attribution with regard to peace operations possessing features similar to that of UN peacekeeping forces but operating under the aegis of a different organization cannot be ruled out. While practice in this respect is rather scarce, it may be interesting to investigate the conditions that are required for the determination of the existence of special rules of attribution. This issue will be briefly addressed later on in this paper¹⁹.

Finally, a few words must be said about the distinction between attribution of conduct and attribution of responsibility. While the present paper will only focus on the criteria for determining when a given conduct is attributable to a state or to an organization, or to both, under specific circumstances a state or an organization may be held responsible even if the conduct amounting to a breach of an obligation is not attributable to it. Situations of this kind may also arise in relation to the activity of multinational peace operations. Thus, the fact that, contrary to the view held by the ECtHR in its *Behrami* and *Saramati* decisions, acts of a na-

¹⁶ See, respectively, Article 55 of the 2001 text and Article 64 of the 2011 text (the latter provision is reproduced later, at paragraph 6 of this paper).

¹⁷ As the ILC's Commentary to Article 64 puts it, 'special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations.' Report of the International Law Commission, *supra*fn 14, p. 100.

¹⁸ Report of the International Law Commission, *supra*fn 14, pp. 85-91. See also A.N. Pronto, 'An Introduction to the Articles on the Responsibility of International Organizations', 36 *South African Yearbook of International Law* (2011), p. 119.

¹⁹ *Infra*, paragraph 6.

tional contingent in the context of a UN-authorized operation are to be attributed to the sending state does not exclude the possibility that the same act could also give rise to the responsibility of the organization. Article 17, para. 2, of the 2011 Articles provides that, under specific conditions, an organization has to bear responsibility for having authorized a state to commit an act that would be wrongful for that organization²⁰. Thus, if the Security Council authorizes states taking part to a multinational operation to take measures of extrajudicial detention which may be contrary to the basic requirements of human rights law or international humanitarian law, also the UN may be held responsible for any unlawful measures of this kind adopted by states in the course of the multinational operation. In this or other similar situations, the organization may therefore be held responsible together with the state to which the wrongful conduct is to be attributed. While this joint responsibility should enhance the possibility for the affected individuals to obtain reparation, in practice the absence of effective means of redress against international organizations renders the case that claims are brought simultaneously against the two subjects involved in the commission of the wrongful conduct extremely unlikely.

2 The Complex Legal Status and Command Structure of UN Peacekeeping Forces

A number of elements must be taken into account when addressing the question of attribution with regard to the conduct of UN peacekeeping forces. While each element contributes to determining who is responsible for the conduct of peacekeeping forces, some of them have been considered as more relevant. However, views diverge on the elements that should play a paramount role. This explains at least in part why different positions have been expressed over time on this matter.

²⁰ Article 17, para. 2, provides that “[a]n international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.”

The first element concerns the legal status of these forces under the rules of the organization. The UN has consistently recognized that forces placed at the disposal of the organization by member states and forming part of a peacekeeping force established by the Security Council or the General Assembly are subsidiary organs of the UN²¹. In the UN's view, the legal status of organs of the organization would have legal implications going beyond the question of attribution for the purposes of international responsibility. Thus, for instance, according to Article 15 of the Draft Model Status-of-Forces Agreement between the United Nations and host countries, '[t]he United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations'²².

Despite their status as organs of the UN, national contingents do not cease to act as organs of their respective states while they are assigned to the peacekeeping force. National contingents are not placed under the exclusive authority of the UN and to a certain extent remain in their national service. As was observed by Lord Morris of Borth-y-Gest in the judgment rendered by the House of Lords in the *Nissan* case, 'though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British soldiers continued, therefore, to be soldiers of Her Majesty'²³. Indeed, in the case of UN peacekeeping forces, the UN has operational command over the forces but some important command functions (such as the exercise of disciplinary powers and criminal jurisdiction over the forces, and the power to withdraw the troops and to discontinue their participation in the mission) 'remain the purview of their national authorities'²⁴. This latter point is normally specified in

²¹ See the view expressed on this point by the UN in its comments to the work of the ILC on the responsibility of international organizations, UN doc. A/CN.4/545, p. 17.

²² Draft Model Status-of-Forces Agreement between the United Nations and host countries, UN doc. A/45/594, para. 15.

²³ House of Lords, *Attorney General v. Nissan*, 11 February 1969, All England Law Reports, 1969-I, p. 646.

²⁴ Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Report of the Secretary-General, UN doc. A/49/681, 21 November 1994, p. 3.

the agreement that the UN concludes with contributing states. By establishing which powers are transferred to the organization and which are retained by the sending state, this agreement substantially testifies to the dual nature of a force as an organ of both the UN and the sending state.

A last element relates to the command and control structure of UN peacekeeping operations. Unlike UN-authorized operations, UN peacekeeping operations are conducted under the exclusive command and control of the UN. As the UN puts it in a comment sent to the ILC, '[m]embers of the military personnel placed by Member States under United Nations command [...] are considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the interests of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be'²⁵. However, the chain of command of UN peacekeeping force is more complex than it may appear at first glance. An important feature of this command structure is that, while national contingents are placed under the operational control of the UN force commander, they are not under UN command²⁶. The orders and instructions of the force commander must be transmitted to the contingent through the national contingent commander, which is appointed by the sending state²⁷. The role played by the national contingent commander is a very delicate one. It has been observed that, through the national contingent commander, the sending state can exercise, at least potentially, a form of control over its contingent and, in fact, can decide whether to agree with (or to decline) instructions given to its contingent by the UN force commander²⁸. The fact that the sending state is in a position that enables it, in fact, to interfere with the chain of command leading to the UN,

²⁵ UN doc. A/CN.4/545, p. 17.

²⁶ Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, p. 68.

²⁷ *Ibid.*

²⁸ *Infra*, paragraph 5 of the present paper.

may evidently have an impact in the overall assessment of the question of attribution.

3 Can Attribution be Based on the Status of Peacekeeping Forces as Organ of the UN?

When an individual or an entity has the status of organ of a state, or agent or organ of an international organization, such status is generally decisive for the purpose of attribution. This reflects a general rule according to which an entity – be it a state or an international organization – must bear responsibility for the acts of its agents or organs. Both the Articles on state responsibility and the Articles on the responsibility of international organizations refer to this rule as the main criterion for attribution. Indeed, Article 6 of the Articles on the responsibility of international organizations, which corresponds to Article 4 of the Articles on state responsibility, provides that ‘[t]he 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.’ Article 2(c) identifies ‘organs’ of an international organization as ‘any person or entity which has that status in accordance with the rules of the organization’. Article 2(d) further specifies that “‘agent of an international organization’ means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts’.

The UN has consistently held the view that, since UN peacekeeping forces have the status of UN organs, their conduct must be attributed to the organization on the basis of the general rule now set forth in Article 6 of the Articles on the responsibility of international organizations. This view was recently reiterated in a note sent to the ILC in the following terms: ‘It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are “transformed” into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ,

regardless of whether the control exercised over all aspects of the operation was, in fact, “effective”²⁹. The application of the general criterion of attribution set forth in Article 6 finds some support in legal literature³⁰. In the same vein, in its decision in the *Behrami and Saramati* cases, the ECtHR found it sufficient to refer to the status of UNMIK as ‘a subsidiary organ of the UN created under Chapter VII of the Charter’ to justify its finding that the acts of UNMIK were attributable exclusively to the UN³¹. It must be noted that, while relying on the status of organ of the UN to justify in general terms attribution of all conduct of the force to the organization, the UN did not exclude the possibility that, under certain circumstances, certain conduct of a national contingent has to be attributed to the sending state. In particular, referring to the control exercised by the sending state in matters of disciplinary and criminal prosecution, the UN observed that the retention of such powers is of no relevance for the purpose of attribution as long as it ‘does not interfere with the United Nations operational control’, thereby admitting that, if, to the contrary, the state interferes with the operational control of the UN, the conduct is to be attributed to state³². Similarly, according to a view recently advanced by an author, while the criterion set forth in Article 6 would in principle apply to peacekeeping forces, the conduct of national contingents should be attributed to the sending state if they in fact acted under the control of that state. In particular, it is said that the status as organ of the UN would create a presumption that their conduct is to be attributed to the organization but this presumption is rebuttable³³.

²⁹ UN doc. A/CN.4/637/Add.1, p. 13.

³⁰ See F. Seyersted, ‘United Nations Forces: Some Legal Problems’, 37 *British Yearbook of International Law* 1961, p. 429; A. Sari, ‘UN Peacekeeping Operations and Article 7 ARIO: The Missing Link’, 9 *International Organizations Law Review* (2012), p. 77 et seq.; A. Sari and R.A. Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, in B. Van Vooren, S. Blockmans and J. Wouters (eds) *The EU’s Role in Global Governance. The Legal Dimension*, Oxford, 2013, p. 126 et seq.

³¹ ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007, para. 143.

³² UN Doc. A/CN.4/637/Add.1, p. 14.

³³ A. Sari, ‘UN Peacekeeping Operations’, *supra* fn 30, pp. 82-83.

While it is understandable that for policy reasons – namely ‘for the sake of efficiency of military operations’³⁴ – the UN may wish to be regarded as the only entity that is responsible for the conduct of peacekeeping forces, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purpose of attribution. This view does not explain why one should only give relevance to the status as organ of the organization and disregard the fact that the force also continues to act as organ of the sending state³⁵. It is this dual institutional link that justifies the application of a special rule of attribution which is not based on the formal status of peacekeeping forces within the UN system, but rather on the effective control exercised over the conduct of such forces. Moreover, it is difficult to reconcile the application of the rule of attribution set forth in Article 6 with the idea that, if the national contingent acts under the instructions of the sending state, its conduct must be attributed to that state: either the decisive criterion is the status as organ or it is the control over the troops. Nor can one read Article 6 as a rule establishing a rebuttable presumption. If the status as organ of the organization is decisive, then all conduct taken in that capacity, including those which contravene instructions, are to be attributed to the organization.

Finally, the view which relies on the status as organ to justify attribution finds limited support in international practice. Significantly, in its decision in the *Nuhanović* case, the Supreme Court of the Netherlands expressly rejected the argument submitted by the Dutch government, according to which, since peacekeeping forces are subsidiary organs of the UN, their conduct must be attributed exclusively to the organization on the basis of the rule set forth in Article 6 of the Articles on the responsibility of international organizations³⁶.

³⁴ Report of the International Law Commission, *supra* fn 14, p. 90.

³⁵ The Commentary does not exclude that the conduct of an organ placed at the disposal of the organization can be attributed to the organization on the basis of the criterion set forth in Article 6 but limits this possibility to the case when an organ of a state is fully seconded to the organization. Report of the International Law Commission, *supra* fn 14, pp. 19-20. On this possibility see P. Jacob, ‘Les définitions des notions d’“organe” et d’“agent” retenues par la CDI sont-elles opérationnelles?’, 47 *Revue belge de droit international* (2013), pp. 24-25.

³⁶ *State of the Netherlands v. Nuhanović*, 6 September 2013, para. 3.10.2.

4 The Criterion of Effective Control Under Article 7 of the Articles on the Responsibility of International Organizations

4.1 The Requirements That Must be met for Article 7 to Apply

Determining who must bear responsibility for wrongful acts committed in the course of UN peacekeeping operations is generally assessed on the basis of Article 7 of the Articles on the responsibility of international organizations. Under this provision, ‘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’. This test has been applied by a number of judgments of domestic courts dealing with the problem of attribution with respect to acts of UN peacekeeping forces³⁷.

Two conditions must be met for the conduct of a lent organ to be attributed to the receiving organization. First, the organ must be ‘placed at the disposal of the organization’. Secondly, the organization must exercise ‘effective control’ over the conduct of the organ placed at its disposal. While most commentators place emphasis almost exclusively on the latter condition, the former one is equally important for understanding the content and scope of application of the criterion of attribution set forth in Article 7.

³⁷ For an analysis of the relevant practice, see Report of the International Law Commission, *supra*fn 14, pp. 88-91. However, for the view that ‘the test adopted by the Commission constitutes progressive developments’, see B. Montejo, ‘The notion of “effective control” under the Articles on the responsibility of international organizations’, in M. Ragazzi (ed.), *Responsibility of international organizations. Essays in memory of Sir Ian Brownlie*, MartinusNijhoff: Leiden-Boston, 2013, p. 404. A more radical view is expressed by D. Shruga, ‘ILC Articles on responsibility of international organizations: The interplay between the practice and the rule (a view from the United Nations)’, *ibid.*, p. 205: ‘The interpretation by regional and national courts of “effective control”, as a test of attribution of conduct and responsibility and its apportionment between the troop-contributing state and the United Nations, has no direct legal effect on the United Nations – a non-party to any of these proceedings’.

The Commentary to Article 7 does not clarify the meaning of the words ‘placed at the disposal’. However, the ILC addressed this issue in the Commentary to Article 6 of the Articles on state responsibility, which corresponds to Article 7. The point made by the ILC in the context of Article 6 may equally be used to interpret Article 7³⁸. In a lengthy passage, which deserves to be quoted in full, the Commission observed: ‘The words “placed at the disposal of” in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State’³⁹. Thus, according to the Commission, for an organ of a state to be considered as placed at the disposal of another state, there must be a double link between the lent organ and the receiving state. On the one hand, there must be an ‘institutional link’: the organ must perform functions entrusted to it by the receiving state in conjunction with the machinery of that state. It is to be noted that the Commission does not require that the lent organ be given the status of organ of the receiving state. Whether the lent organ acquires that status or not is not relevant for the purpose of applying the criterion of attribution set forth in Article 6⁴⁰. On the other hand, the lent

³⁸ As the ILC noted in the Introduction to the Commentary to the Articles on the responsibility of international organizations, ‘[i]n so far as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles’. Report of the International Law Commission, *supra*fn 14, p. 70.

³⁹ *Yearbook of the International Law Commission*, 2001, Vol. Two, Part. II, p. 44.

⁴⁰ This point was addressed by the Special Rapporteur, Roberto Ago, in his Third report on state responsibility. Ago observed that, irrespective of whether the lent organ acquires the status of organ or not, ‘the basic conclusion is still the same: the acts or omissions

organ must act under the exclusive direction or control of the receiving state, ‘rather than on instruction from the sending state’. This must not be taken as meaning that the sending state cannot retain some powers over the lent organ⁴¹. It only means that, for a conduct of a lent organ to be attributed to the receiving state, the organ must have acted under the control of that state.

Since the requirement that the lent organ be ‘placed at the disposal’ of the receiving organization presupposes that the organization exercises a degree of factual control over that organ, one may ask why the text of Article 7 also contains a reference to the requirement of ‘effective control’. This latter requirement may appear to be superfluous⁴². While the Commentary does not address this issue, a possible explanation can be found in the views expressed by the Special Rapporteur, Giorgio Gaja, in his Second Report. Referring to the abovementioned passage of the ILC’s Commentary to Article 6, and in particular to the point where it is said that the lent organ must act under the exclusive direction and control of the receiving state, he observed that ‘[t]his point could be made more explicitly in the text, in order to provide guidance in relation to questions of attribution arising when national contingents are placed at an organization’s disposal and in similar cases’⁴³. To that end, the Special Rapporteur

of organs placed at the disposal of a state by other subjects of international law are attributable to that state if in fact these acts and omissions have been committed in the performance of functions of that state and under its genuine and exclusive authority’. *Yearbook of the International Law Commission*, 1971, Vol. Two, Part I, p. 199.

⁴¹ See G. Gaja, ‘Second report on the responsibility of international organizations’, *Yearbook of the International Law Commission*, 2004, Vol. Two, Part I, p. 14.

⁴² It must be noted that Article 6 is differently worded as it requires that ‘the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed’. According to the ILC, while differently worded, the approach is the same as in Article 7: the use of a different expression (‘effective control’ rather than ‘exercise of governmental authority’) is justified ‘because the reference to “the exercise of elements of governmental authority” is unsuitable to international organizations’. Report of the International Law Commission, *supra*fn 14, p. 86. On the solution retained by the ILC see however the critical remarks by F. Messineo, *Multiple Attribution of Conduct*, SHARES Research Paper No. 2012–11, p. 38.

⁴³ See G. Gaja, ‘Second report’, *supra*fn 41, p. 14.

proposed to include the notion of ‘effective control’ directly in the text of the provision.

If the reference to ‘effective control’ contained in Article 7 serves the purpose of rendering explicit what was already implicit in the requirement that the organ be ‘placed at the disposal’ of the organization, one may reasonably conclude that the conditions for attribution under Article 7 of the 2011 text are substantially the same as under Article 6 of the 2001 text. This means, in particular, that attribution under Article 7 would depend on the existence of both an ‘institutional’ and a ‘factual’ link between the lent organ and the receiving organization⁴⁴. This preliminary conclusion, however, is subject to a further investigation as to the degree of control required for an act of a lent organ to be attributed to the organization. Under Article 6 of the Articles on state responsibility, the test of control is relatively straightforward. As we have seen, it is required that, when performing the functions entrusted to it by the receiving state, the lent organ must act ‘under its exclusive direction and control, rather than on instructions from the sending State’. It must be asked whether the same test applies in the context of placing an organ at the disposal of an organization.

4.2 Does Effective Control Require Control of the Organization Over Every Single Act of the National Contingent?

Article 7 does not clarify the degree of control required to reach the threshold of ‘effective control’ and therefore to attribute the conduct of the lent organ to the organization. Several commentators hold the view that a very high threshold is required: the conduct of a lent organ can be attributed to the organization only if the organization exercised a control

⁴⁴ Similarly F. Salerno, ‘International responsibility for the conduct of “Blue Helmets”’: Exploring the organic link’, in M. Ragazzi (ed.), *Responsibility of international organizations*, *supra*fn 37, p. 424, who observes that, while Article 7 does not make any reference to the functions performed by the lent organs, ‘nothing prevents us from considering that the attribution of the conduct of organs placed at the disposal of the organization depends on the fact that they effectively exercise the “governmental” functions of the organization’.

over each specific conduct of that organ⁴⁵. Two distinct arguments are usually put forward to justify this view. The first is based on a textual element: by establishing that the receiving organization must ‘exercise effective control over that conduct’, Article 7 seems to require from the organization a control over every single act of the organ placed at its disposal by a state. The second argument is based on the view that the notion of effective control referred to in Article 7 has the same meaning as the notion used in the context of the law of state responsibility. As it is well known, an ‘effective control’ test was employed by the International Court of Justice in the *Nicaragua* and the *Genocide Convention* cases in order to determine whether the conduct of groups of individuals, who were not organs of a state and who were connected to the state only on the basis of a *de facto* link, was to be attributed to that state. According to the International Court of Justice, in order for the state to be legally responsible for the conduct of such individuals, it would have to be proved that the state had effective control over the operations during which the wrongful conduct occurred.⁴⁶ The same test was subsequently adopted by the ILC in Article 8 of the Articles on state responsibility⁴⁷.

To interpret the notion of effective control in Article 7 as requiring such a high threshold of control would significantly complicate attribution of an act to the organization, as in many cases it would be extremely

⁴⁵ For the view that, in providing the standard of effective control, the Articles on the responsibility of international organizations ‘codified what was already a longstanding principle for the attribution of wrongdoing at international law’, as recognized, among others, by the International Court of Justice, see T. Dannenbaum, ‘Translating the Standard of Effective Control’, *supra*fn 7, p. 141. See also Ch. Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’, 10 *Melbourne Journal of International Law* (2009), pp. 348-349.

⁴⁶ See International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, para. 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, paras. 399-400.

⁴⁷ Article 8 provides that ‘[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’

difficult to prove the existence of such an ‘effective control’. This could lead to the unreasonable result that in many cases the sending state could risk bearing responsibility for acts of its national contingent in the performance of functions of the organization. This would be so because attribution of the conduct to the state would not depend on proof that that state exercised effective control over the conduct at issue.⁴⁸ Once it is determined that the conduct of a national contingent cannot be attributed to the organization for lack of effective control, attribution to the sending state would be justified by the status of the contingent as organ of that state.

However, it does not seem that Article 7 requires such a high threshold of control for the purpose of attribution of the conduct of lent organs. As the Commentary to this provision makes clear, the notion of ‘effective control’ as used in Article 7 does not play the same role as in the context of the law on state responsibility. The ILC was careful to specify that control within the context of Article 7 does not concern ‘the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct is attributable’.⁴⁹ Thus, the ILC seems to be aware of the fact that, if one requires a high threshold of control for attributing the conduct of lent organs to the organization, the result would be that in most cases the conduct of such organs would have to be attributed to the sending states. While the ILC does not say so expressly, the fact that it stresses the different meaning of the notion of effective control in the context of placing an organ at the disposal of an organization seems to imply that, unlike under the rules on state responsibility, the attribution of a certain conduct to the organization under Article 7 does not necessarily depend on proof that the conduct took place on the instruction of, or under the specific control of, the organization. This sug-

⁴⁸ As rightly observed by P. d’Argent, ‘State organs placed at the disposal of the UN, effective control, wrongful abstention and dual attribution of conduct’, *QIL-Questions of International Law, Zoom-in 1* (2014), p. 26 (available at www.qil-qdi.org), ‘[i]t is indeed superfluous to assess whether the State exercised effective control since the person placed at the disposal of the organization is its organ and that State responsibility for conduct of organs is not conditioned by the positive assessment of any effective control by the State over the conduct of its organ’.

⁴⁹ Report of the International Law Commission, *supra*fn 14, p. 88.

gests, at least indirectly, that a lower degree of control may also be sufficient to justify attribution to the organization.

4.3 What Elements are to be Taken Into Account for the Purpose of Determining Whether The UN Exercises Effective Control Over the Conduct of National Contingents?

It is submitted that the degree of control required for an act of a lent organ to be attributed to a receiving organization is not different from the control required under Article 6 of the Articles on state responsibility. In this respect, the requirement of effective control under Article 7 has to be assessed in the light of the other requirement which is implicit in the fact that the lent organ has to be placed at the disposal of the organization, namely the existence of an 'institutional link' between the organ and the organization. Once there is proof of conduct by the organ in the performance of functions entrusted to it by the organization and in conjunction with the machinery of that organization, there is little reason for requiring a higher degree of control for justifying attribution to the organization. As the Commentary to Article 6 seems to suggest, when the lent organ acts in the exercise of the functions of the receiving organization, the condition of the exclusive direction and control of the organization may be presumed to be met unless it is demonstrated that the organ was acting on instructions from the sending state. This interpretation of the notion of effective control is not inconsistent with the views expressed by the ILC according to which '[t]he criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'.⁵⁰ Factual control over the specific conduct is certainly decisive for the purpose of attribution, but this does not mean that, in the absence of different instructions from the sending state, the existence of control by the organization cannot be simply presumed.

If one considers the question of attribution of acts of UN peacekeeping forces in the light of these elements, it becomes clear that the first point

⁵⁰ Report of the International Law Commission, *supra*fn 14, p. 87.

to be addressed is to determine whether the force was acting in the performance of functions entrusted to it by the UN. It seems that, in order to answer this question, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state. As we have seen, the agreement concluded by the UN with troop-contributing states normally provides that the UN has operational command over the forces while troop-contributing states retain the disciplinary powers and criminal jurisdiction over the forces, as well as the power to withdraw the troops. It can be held that, depending on the manner in which the transfer of authority over the forces is arranged, a presumption may arise that certain conduct is attributable to the organization rather than to the contributing state. Indeed, by identifying the functions that formally fall under the authority of the UN and those that remain within the troop-contributing state, these agreements provide a key indication as to the subject on whose behalf members of the force were supposed to exercise a certain function. If the force is supposed to perform certain functions on behalf and under the formal authority of the organization, and not of the contributing state, it can be presumed that its conduct took place under the exclusive direction and control of the organization and is therefore attributable to it. In other words, the formal transfer of powers giving authority to the organization entails a presumption that the conduct is to be attributed to the organization, without the need to demonstrate that the conduct was the result of specific instructions or effective control over the specific conduct. Such a presumption should not be confused with the status as subsidiary organ of the organization.⁵¹ What matters here is not so much the status of the force under the rules of the organization but the agreement between the organization and the sending state, as one may presume that the delimitation of the respective powers agreed upon by the two parties provides an indication as to which entity, in principle, has control over the troops in

⁵¹ See however A. Sari, 'UN Peacekeeping Operations', *supra*fn 30, p. 82, who, while recognizing the possibility of having recourse to a rebuttable presumption, places emphasis on the status of peacekeeping forces as organs of the UN and identifies the legal basis for attribution in Article 6, and not in Article 7.

relation to a given conduct⁵². Obviously, this presumption may be rebutted. It may happen that a force, while acting under the formal authority of the UN (for instance, because it is engaged in combat-related activities falling in principle under the operational control of the UN) has undertaken a certain conduct because of the instructions given to it by the contributing state. In such circumstances, the conduct must evidently be attributed to the state and not to the organization.⁵³

The recent judgment of the Court of Appeal of The Hague in the *Nuhanović* case appears to support the view that, for purpose of attribution, account must be taken of a combination of legal and factual elements⁵⁴. The Court of Appeal found that the criterion for determining whether the conduct of the Dutch troops in Srebrenica had to be attributed to the UN or to the Netherlands was the effective control test now set forth in Article 7 of the Articles on the responsibility of international organizations⁵⁵. According to the Court, when applying this criterion, ‘significance should be given [not only] to the question whether that conduct constituted the execution

⁵² This does not mean that the rules of the organization are irrelevant. They may serve to delimit and further identify the functions entrusted by the organization to the lent organ.

⁵³ In its judgment of 16 July 2014 in the *Stichting Mothers of Srebrenica* case the District Court of The Hague applied this test to justify its conclusion that certain acts taken by Dutchbat in the period prior to the fall of Srebrenica had to be attributed to the Netherlands. In particular, it observed that ‘[w]hat is decisive here is that the State in giving Dutchbat this instruction interfered with the management of the operational implementation of the mandate by Dutchbat that it had already transferred to the UN’. District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.66. In the same judgment, the District Court also held the view that ‘in order to accept effective control there would be no requirement for the State in giving instructions to Dutchbat to have broken the structure of the chain of command at the UN or exercised independent operational authority to give orders.’ *Ibid.*, para. 4.46. However, this statement appears to refer to situations – such as the transitional period after the fall of Srebrenica – in which peacekeepers act under the formal authority of the sending state, or of both the UN and the sending state.

⁵⁴ This aspect was duly stressed by A. Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, 9 *Journal of International Criminal Justice* (2011), pp. 1143-1157.

⁵⁵ This ‘reciprocal’ reading of Article 7 has been criticized by P. d’Argent, ‘State organs’, *suprafn* 48, p. 26.

of a specific instruction, issued by the United Nations or the state, but also to the question whether, if there was no such specific instruction, the United Nations or the state had the power to prevent the conduct concerned⁵⁶. While this statement is not free from ambiguities and may be interpreted in different ways,⁵⁷ a possible interpretation is that, when mentioning ‘the power to prevent the conduct concerned’ the Court of Appeal intended to refer to those powers which each contributing state formally retains over its troops. The Court makes the point that, for purpose of attribution, relevance must be given not only to factual control but also to the formal authority of the organization or of the contributing state over the acts concerned⁵⁸. This appears to find confirmation in the reasoning followed by the Court of Appeal in order to justify its findings that the conduct concerned was to be attributed to the Netherlands. The Court relied heavily on the fact that, during the evacuation from Srebrenica, the Dutch government had control over Dutchbat ‘because this concerned the preparations for a total withdrawal of Dutchbat from Bosnia and Herzegovina’⁵⁹ – the power to withdraw the troops being a power belonging to the sending state. The Court also referred to the fact that the Dutch government ‘held it in its power to take disciplinary actions’ against the conduct con-

⁵⁶ Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, Oxford Reports on International Law in Domestic Courts 1742 (NL 2011), para. 5.9.

⁵⁷ One possible reading is that the Court of Appeal applied the test proposed by T. Dannenbaum, ‘Translating the Standard of Effective Control’, *supra*fn 7, p. 141, according to which “‘effective control,’ for the purpose of apportioning liability in situations of the kind addressed by Draft Article 5 [now Article 7], is held by the entity that is best positioned to act effectively and within the law to prevent’ a breach of international obligations. According to B. Boutin, ‘Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for “Effective Control” in the Context of Peacekeeping’, 25 *Leiden Journal of International Law* (2012), p. 531, ‘[w]hen asking whether the state had had ‘the power to prevent the alleged conduct’, the Court in effect determined that the conduct was *caused* by the state’.

⁵⁸ The District Court of The Hague took an even clearer stand on this point when it observed that ‘[s]ince the dispute is related to a UN peacekeeping operation to implement a UN mandate when attributing Dutchbat’s actions to the State it is important to know what powers the State still had and what powers it had transferred to the UN.’ District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.36.

⁵⁹ Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, para. 5.18.

cerned⁶⁰. The formal authority retained by the state over its troops during the evacuation period and the control it had actually exercised at that time were the two elements on which the Court of Appeal relied in order to justify its conclusion that the conduct in question had to be attributed to the Netherlands⁶¹.

4.4 Effective Control and *Ultra Vires* Acts

The manner in which the transfer of powers is arranged between the organization and the troop-contributing state appears to be relevant for the attribution of responsibility for an *ultra vires* conduct in the context of the peacekeeping operation. No doubt, the fact that certain conduct was carried out by peacekeepers exceeding their authority or contravening instructions does not exempt the sending state or the organization from bearing responsibility. This principle is clearly stated in Article 8 of the Articles on the responsibility of international organizations and in Article 7 of the Articles on state responsibility⁶². However, these provisions address, respectively, the situation of an organ or agent of an international organization and of an organ of a state. They do not refer specifically to the case of an organ of a state which has been placed at the disposal of an international organization or of another state. Given that peacekeepers are

⁶⁰ Ibid.

⁶¹ Ibid., paras. 5.18-5.20. See also the judgment of the Court of First Instance of Brussels, where the conduct of the Belgian contingent taking part in the United Nations Assistance Mission for Rwanda (UNAMIR) peacekeeping force was considered to be attributable to Belgium since such conduct took place at a time when the Belgian government had decided to withdraw from the peacekeeping operation: Court of First Instance of Brussels, *Mukeshimana-Ngulinzira and others v. Belgium and others*, 8 December 2010, Oxford Reports on International Law in Domestic Courts 1604 (BE 2010), para. 38.

⁶² Article 8 of the Articles on the responsibility of international organizations provides that '[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'. According to Article 7 of the Articles on state responsibility, '[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

placed under the authority of both the UN and the sending states, it seems that, in order to determine the entity to which the *ultra vires* conduct must be attributed, the capacity in which the person in question was acting during such conduct has to be established. For these purposes, account must primarily be taken of the functions the peacekeeper was performing when engaging in the wrongful conduct and of the respective powers of the organization and of the state with respect to the exercise of this function. Here again, if a peacekeeper was performing functions under the formal authority of the organization (such as engaging in combat-related activities falling under the operational control of the UN), it can be presumed that the *ultra vires* conduct must be attributed to the organization. This presumption can be rebutted if it is demonstrated that the peacekeeper had acted on the instructions of the sending state.

A different view was recently held by the District Court of The Hague in its judgment of 16 July 2014 in the *Stichting Mothers of Srebrenica* case. According to the District Court *ultra vires* conduct of peacekeeping troops must be attributed to the sending state, irrespective of whether this state had given any instruction or order relating to the *ultra vires* conduct. This would be so because that ‘state has a say over the mechanisms underlying said *ultra vires* actions’⁶³. In particular, the effective control of the sending state over such conduct would result from the fact that the state has a say in the ‘selection, training and the preparations for the mission of the troops placed at the disposal of the UN’, as well as from the fact that, by retaining control over disciplinary and criminal matters, the state has the power ‘to take measures to counter *ultra vires* actions on the part of its troops’⁶⁴. However, it is one thing to say that the conduct is to be attributed to the state when the state is aware of the fact that its troops are going to contravene the instructions of the UN and does nothing to prevent the *ultra vires* conduct. Indeed, one may argue that under certain circumstances lack of prevention may be regarded as amounting to a form of tacit instruction. It is a totally different matter to

⁶³ District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.57.

⁶⁴ *Ibid.*, para. 4.58. For a similar view, see T. Dannenbaum, ‘Translating the Standard of Effective Control’, *supra*fn 7, p. 159.

say that every *ultra vires* conduct must invariably be attributed to the state because it retains disciplinary powers or the power to exercise criminal jurisdiction over the troops. The retention of such powers does not imply that the state exercised factual control over the specific *ultra vires* conduct of peacekeepers. For the purpose of attributing *ultra vires* conduct, what is decisive is whether peacekeepers were ‘purportedly or apparently carrying out their official functions’,⁶⁵ and not whether the state (or the organization) was formally endowed with powers which, in principle, would have allowed it to prevent such conduct from occurring. It might be that the sending state is under an international obligation to punish peacekeepers who, by contravening instructions from the UN, committed breaches of human rights or humanitarian law. While lack of punishment may entail the international responsibility of the sending state, responsibility would arise as a consequence of the omission of state authorities, and not as a consequence of the wrongful conduct of peacekeepers.

While the manner in which the transfer of powers is arranged may create a presumption which also applies to attribution of *ultra vires* conduct, the agreement that the UN concludes with the troop-contributing state can hardly be regarded as decisive for the purpose of determining to whom the *ultra vires* conduct of peacekeeping troops must be attributed. Since Article 9 of the model contribution agreement excludes responsibility of the UN for injury arising from ‘gross negligence or wilful misconduct of the personnel provided by the Government’,⁶⁶ the view was advanced that, when the conduct resulted from gross negligence or occurred in wilful disregard of UN instructions, then the conduct must be attributed to the sending state and not to the UN⁶⁷. However, such an agreement can only apply in the relation between the organization and the sending state. It cannot exclude the application of the general rule set forth in Article 8 in the relation between these two subjects and any third party⁶⁸.

⁶⁵ Report of the International Law Commission, *supra*fn 14, p. 92.

⁶⁶ Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

⁶⁷ For this view, see T.D. Gill, ‘Legal Aspects of the Transfer of Authority’, *supra*fn 11, pp. 19-20.

⁶⁸ See also Report of the International Law Commission, *supra*fn 14, p. 87.

5 Is There Room for Dual Attribution of the Same Conduct to the UN and to the Troop-Contributing State?

In its Commentary to the Articles on the responsibility of international organizations, the ILC recognized the possibility that the same conduct may be simultaneously attributed to a state and to an international organization. According to the Commentary, ‘although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded’⁶⁹. While the Commentary does not say anything about the possibility of dual or multiple attribution in situations such as those characterizing UN peacekeeping operations, the work of the ILC seems to lend little support to this possibility. The ILC’s approach appears to be premised on the idea that, when an organ of a state is placed at the disposal of an international organization, it will have to be determined whether the conduct of such an organ must be attributed to the organization or, alternatively, to the contributing state. This having been said, it is true that the criterion of attribution set forth in Article 7 is not incompatible with the possibility of dual attribution⁷⁰. Interestingly, Special Rapporteur Gaja recognized that, with regard to the activities of organs placed at the disposal of an organization, ‘dual attribution of certain conducts’ cannot be ruled out⁷¹.

Admittedly, practice supporting dual attribution is scarce. Such a view is diametrically opposed to the one defended by the UN. ‘[K]een to maintain the integrity of the United Nations operation vis-à-vis third

⁶⁹ Report of the International Law Commission, *supra*fn 14, p. 83.

⁷⁰ See however P. d’Argent, ‘State organs’, *supra*fn 48, p. 31, who held the view that ‘Article 7 ARIO is a provision which is designed to help identify one responsible entity, not several, the very notion of effective control being exclusive rather than cumulative’. For a more nuanced view see F. Messineo, ‘Multiple attribution’, *supra*fn 42, pp. 41-12, who, while recognizing that in principle Article 7 is an exception to multiple attribution, admits the possibility of dual attribution when peace support operations are concerned.

⁷¹ See G. Gaja, ‘Second report’, *supra*fn 41, p. 14. See also N. Tsagourias, ‘The Responsibility of International Organizations for Military Missions’, in M. Odello and R. Piotrowicz (eds) *International Military Missions and International Law*, MartinusNijhoff: Leiden, 2011, p. 245 et seq.

parties',⁷² the UN strives to be considered as the sole actor responsible for the conduct of peacekeeping forces operating under its command and control. In this respect, recognition of dual attribution would increase the risk of sending states interfering with the UN chain of command. An implicit recognition of this possibility was contained in the ECtHR's judgment in the *Al-Jedda* case, which however concerned the conduct of a UN-authorized mission⁷³. A more explicit endorsement of this view was contained in the judgments rendered by the Dutch Court of Appeal and by the Supreme Court of the Netherlands in the *Nuhanović* case. The Court of Appeal admitted that the actions taken by a national contingent in the course of a peacekeeping operation might be simultaneously attributed to the sending state and to the UN. It observed that 'the Court adopts as a starting point that the possibility that more than one party has "effective control" is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party'⁷⁴. However, apart from recognizing this possibility, the Court of Appeal did not clarify the specific conditions which may justify dual or multiple attribution. Consequently, the contribution given by this judgment to the identification of cases of dual or multiple attribution is rather limited. Similarly, in its judgment of 6 September 2013 in the same case, the Supreme Court of the Netherlands limited itself to admitting that 'international law, in particular article 7 of the Draft Articles on the Responsibility of International Organizations in conjunction with article 48(1) of the same Draft Articles, does not exclude the possibility

⁷² UN Doc. A/CN.4/637/Add.1, p. 14.

⁷³ ECtHR (Grand Chamber), *Al Jedda v. United Kingdom*, 7 July 2011, para. 84. See M. Milanovic, 'Al Skeini and Al Jedda in Strasbourg', 23 *The European Journal of International Law* (2012), p. 136.

⁷⁴ Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, para. 5.9. As noted by L. Condorelli, 'De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlandais', *QIL-Questions of International Law*, Zoom-in 1 (2014), pp. 10-11 (available at www.qil-qdi.org), 'la Cour d'appel est sans doute allée bien vite en besogne quand elle a affiché la conviction que la possibilité [...] d'une double attribution (aux N.U. et à l'État d'envoi) des agissements des FMP serait 'generally accepted', alors qu'en vérité rares sont les auteurs qui l'admettent'.

of dual attribution of given conduct', without providing any further indication on this issue⁷⁵. Apart from the brief statements contained in these judgments, judicial practice appears to be substantially lacking.

Dual attribution of the conduct of UN peacekeeping forces found some support in legal literature. The most coherent and forceful argument in support of dual attribution is the one which relies on the role played by the national contingent commander within the command and control structure of UN peacekeeping operations. The basic premise of this argument is that the sending state cannot avoid responsibility since, through the national contingent commander, it exercises a form of control over each and every conduct of its contingent, irrespective of whether such conduct was prompted by an order coming from the UN force commander or not. Because of this control, it has been argued that the conduct of a peacekeeping force must be jointly attributed to the UN and to the contributing state – the UN for being the originator of the instructions, and the contributing state for having concurred in the instructions⁷⁶.

In placing emphasis on the control that the sending state, at least potentially, may exercise over its contingent, this view certainly raises an important point. However, one may doubt that this 'potential factual control' is sufficient to justify attribution. As noted above, in the case of UN peacekeeping operations attribution mainly depends on the fact that the national contingent was placed at the disposal of the UN and therefore acted in the exercise of functions entrusted to it by the organization. It is

⁷⁵ Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović*, 6 September 2013, para. 3.11.2. See also District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.34. The reference made by the Supreme Court and by the District Court to Article 48 of the Articles on the responsibility of international organizations does not appear to be a pertinent one as Article 48 concerns cases of joint responsibility for the same wrongful act, and not dual attribution of the same conduct. See L. Condorelli, 'De la responsabilité internationale', *supra* fn 74, p. 9, fn. 10.

⁷⁶ See the view expressed on this issue by Luigi Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire', 78 *Rivista di Diritto Internazionale* (1995), p. 893; and more recently Id., 'De la responsabilité internationale', *supra* fn 74, p. 1 et seq. See also Ch. Leck, 'International Responsibility in United Nations Peacekeeping Operations', *supra*fn 45, p. 1 et seq.

not so much the control, which may be presumed, but the functions actually exercised by the force that matter for the purpose of attribution. Thus, the conduct of a national contingent is to be attributed to the organization if the contingent was acting in the exercise of functions appertaining to the organization and under a chain of command leading to the UN. The fact that the national contingent commander agreed with the instructions of the UN force commander does not appear to be sufficient to justify the conclusion that the contingent was also acting under the effective control of the state. Significantly, this view appears to have been expressly upheld by the District Court of The Hague in its 2008 judgment in the *Nuhanović* case. According to the District Court, the fact that a state's authorities agree with the instructions from the UN does not amount to an interference with the UN command structure and therefore does not justify the attribution of the conduct to the state. The Court observed: 'If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution'⁷⁷. Admittedly, the decision of the District Court was later reversed by the Court of Appeal of The Hague. In particular, while the District Court had expressly excluded the possibility of dual attribution,⁷⁸ the Court of Appeal admitted that possibility. However, there are no elements in the Court of Appeal's decision which may suggest that it endorsed dual attribution in case of parallel instructions. As we have seen, attribution to the Netherlands of the conduct of Dutchbat was not based exclusively on factual control.

While it seems excessive to link dual attribution to the role played by the national contingent commander within the UN command structure,⁷⁹ dual attribution might be admitted in those cases where it is

⁷⁷ District Court of The Hague, *HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, 10 September 2008, Oxford Reports on International Law in Domestic Courts 1092 (NL 2008), para. 4.14.1.

⁷⁸ *Ibid.*, para. 4.13.

⁷⁹ Significantly, in its 2014 judgment the District Court of The Hague held the view that 'the mere fact that Dutch military personnel were appointed to UNPROFOR does not mean per se that the State exercised effective control. Dutch officers worked in the UN chain of command whence operational implementation of the mandate was directed'. District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*,

not clear whether the national contingent was acting in the exercise of functions of the sending state or of the organization. In particular, a situation of this kind may arise where, with regard to the conduct concerned, both subjects were formally entitled to exercise their authority over the contingent and the conduct was in fact the result of instructions taken by mutual agreement between the organization and the state. One may refer, for instance, to the situation described by the Court of Appeal of The Hague with regard to the evacuation of Dutchbat from Srebrenica. As the Court put it, during the transition period following the fall of Srebrenica, it was hard to draw a clear distinction between the power of the Netherlands to withdraw Dutchbat from Bosnia and the power of the UN to decide about the evacuation of the UNPROFOR unit from Srebrenica.⁸⁰ Since during that period both the Netherlands and the UN appeared to be formally entitled to exercise their respective powers over Dutchbat, and since in fact they both exercised their actual control by issuing specific instructions, dual attribution might be regarded as justified.

6 State Organs Placed at the Disposal of an Organization, Effective Control and *Lex Specialis*

The general rules of attribution contained in Articles 6 to 9 of the Articles on the responsibility of international organizations apply only residually. They may be derogated from by special rules of attribution. According to Article 64 of the 2011 text, '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international respon-

16 July 2014, para. 4.50. It also observed that '[n]or does the fact that Dutch officers in the UN chain of command maintained contact with The Hague constitute grounds for assuming effective control.' Ibid. para. 4.52. It must be noted, however, that, according to the District Court, when the state interferes with the UN chain of command by giving instructions to the troops, the resulting conduct must be attributed to the state even if 'the instruction matches up with the immediately preceding general instruction of the UN'. Ibid., para. 4.66.

⁸⁰ Court of Appeal of The Hague, *Nuhanovićv. Netherlands*, 5 July 2011, para. 5.18. See also District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, paras. 4.80-4.85.

sibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'. Thus, one cannot rule out the possibility that the conditions for the attribution to an organization of the conduct of contingents placed at its disposal by states are governed by special rules whose content differs from the criterion of effective control provided under Article 7.

Special rules of attribution may be contained in the rules of the organization⁸¹. Examples of these kinds of rules are difficult to identify. In any case, such rules would only apply in the relation between the organization and its members or between the members and would not be opposable to third states or third organizations.

The UN has frequently referred to rules contained in agreements concluded with troop-contributing states in order to exclude its responsibility for certain categories of acts committed by peacekeeping forces⁸². Special rules of attribution may certainly be contained in treaties that the organization concludes with member states or with third states. However, as the ILC's Commentary specifies, treaties of this kind may govern 'only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules'⁸³.

It may be that special rules of attribution apply to a particular category of organizations or to a particular organization. Thus, for instance, the European Union constantly advocated the inclusion in the Articles on the responsibility of international organizations of a provision recognizing

⁸¹ Under Article 2(b), "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.

⁸² See, for instance, A/CN.4/637/Add.1, p. 12.

⁸³ Report of the International Law Commission, *supra*fn 14, p. 87.

that special rules apply to regional economic integration organizations⁸⁴. Exploring whether special rules of attribution apply to EU peacekeeping missions is beyond the scope of the present paper. It must be noted, however, that even those authors who most forcefully supported the view that special rules of responsibility apply to the EU are ready to admit that, when it comes to peacekeeping and police missions, ‘the European Union is in many ways a classical intergovernmental organization with problems similar to the UN’⁸⁵.

7 Propositions and Points for Discussion

- a) Because of their dual status as organs of both the UN and the sending state, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purpose of attribution. Such dual status justifies the application of a special rule of attribution, such as the one set forth in Article 7 of the Articles on responsibility of international organizations, which is based not on the formal status of peacekeeping forces within the UN system, but rather on the effective control exercised over such forces.
- b) Two conditions must be met for the conduct of a lent organ to be attributed to the receiving organization under Article 7. First, the organ must be ‘placed at the disposal of the organization’. Secondly, the organization must exercise ‘effective control’ over the conduct of the organ placed at its disposal. This means, firstly, that the lent organ must perform functions entrusted to it by the receiving organization in conjunction with the machinery of that

⁸⁴ Report of the International Law Commission, *supra*fn 14, p. 168.

⁸⁵ See E. Paasivirta and P.J. Kuijper, ‘Does One Size Fit All?: The European Community and the Responsibility of International Organizations’, 36 *Netherlands Yearbook of International Law* (2005), p. 174. The same conclusion is shared by G. Marhic, ‘Le régime de responsabilité des opérations de paix de l’Union européenne: quelles règles applicables?’, 47 *Revue belge de droit international* (2013), p. 137 et seq., and by A. Sari and R.A. Wessel, ‘International Responsibility for EU Military Operations’, *supra* fn 30, p. 126 et seq.

organization and, secondly, that that organ must act under the exclusive direction or control of the receiving organization, rather than on instruction from the sending state.

- c) The requirement of effective control under Article 7 must not be interpreted as meaning that the conduct of a lent organ can be attributed to the organization only if the organization was exercising a control over each specific conduct of that organ. A lower degree of control may be sufficient to justify attribution.
- d) When applying the criterion of attribution set forth in Article 7 to UN peacekeeping forces, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state. It is submitted that, if the force is supposed to perform certain functions on behalf and under the formal authority of the organization, and not of the contributing states, it can be presumed that its conduct was taken under the exclusive direction and control of the organization and is therefore attributable to it. This presumption may be rebutted if it is demonstrated that the force, while acting under the formal authority of the UN, has undertaken certain conduct because of the instructions given to it by the contributing state.
- e) If peacekeepers perform functions under the formal authority of the organization, this creates a presumption that all their conduct, including *ultra vires* conduct, must be attributed to the organization. This presumption can be rebutted if it is demonstrated that the peacekeepers had acted on the instructions of the sending state.
- f) While the purpose of the rule of attribution set forth in Article 7 is to establish whether the conduct of an organ of a state placed at the disposal of an organization must be attributed to the organization or, alternatively, to the contributing state, dual attribution of the same conduct to the UN and to the sending state might be admitted in those (rather exceptional) cases where it is not clear whether the national contingent was acting in the exercise of functions of the sending state or of the organization.

- g) Although the existence of the special rules governing the question of attribution with regard to the activities of military contingents placed at the disposal of the UN or of other international organizations cannot be ruled out, examples of such special rules are hard to find.

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