

# The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations

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## **Abstract**

*The article aims to examine, in light of the codification work of the International Law Commission and of the most recent practice, some issues concerning the allocation of responsibility between an organisation and its troop-contributing states for the conduct taken in the course of a multinational operation (with a specific focus on UN operations). After explaining the general rule of attribution of conduct based on the status of the multinational force as an organ or an agent of the organisation, this article will examine the validity of special rules of attribution of conduct based on the notions of ‘effective control’ or ‘ultimate control’ over the acts of the multinational force. Finally, I will discuss the possibility of dual responsibility of both the organisation and the troop-contributing state concerned.*

**Keywords:** responsibility for internationally wrongful acts, multinational operations, United Nations, Draft Articles on the Responsibility of International Organisations, peacekeeping operations.

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In 2011, the United Nations (UN) International Law Commission (ILC) adopted sixty-six Draft Articles on the Responsibility of International Organisations, with the objective of establishing a legal framework regulating the internationally wrongful acts of international organisations and the consequences of those acts. One of the most recurrent criticisms directed at the Draft Articles relates to the lack of practice supporting the work of the ILC. It has been observed that this topic was not yet ripe for codification at the time as there were relatively few instances of claims raising the question of the responsibility of an international organisation.<sup>1</sup> Whatever the merits of this criticism are with regard to the work of the ILC, when it comes to the question of responsibility for acts committed in the course of multinational peace-support operations, it cannot be said that practice is lacking. To the contrary, a substantial amount of practice has developed over the years in relation to this issue. Already in 2003, the then UN legal counsel, Mr Hans Corell, observed that it was ‘in connection with peacekeeping operations where principles of international responsibility . . . have for the most part been developed in a fifty-year practice of the Organisation’.<sup>2</sup> In the last decade several domestic and international tribunals have had to address questions concerning responsibility for acts taken in the context of multinational operations. Comments and observations on the work carried out during this period by the ILC have further contributed to elucidating the position of states and international organisations on this matter.

The present paper will assess the issue of responsibility for conducts taken in the context of multinational operations, mainly focusing on the problem of determining who, between the troop-contributing states and the international organisation, must bear responsibility for the wrongful act. I will also consider whether, and under what circumstances, the same conduct may give rise to the responsibility of both subjects. In most cases, the allocation of responsibility between the organisation and the sending state will depend on the identification of the subject to which the wrongful conduct has to be attributed. Therefore, most of this article will be dedicated to an assessment of the rules on attribution in relation to conducts taken by multinational forces acting under the aegis of an international organisation. This paper will focus on the practice of the UN in this field. In this respect, a distinction will be drawn between UN peacekeeping operations (in which troop-contributing states retain only limited powers over their troops while the UN is given operational command and control – e.g., the UN Stabilisation Mission in the Democratic Republic of the Congo) and multinational operations merely authorised by the Security Council through its Chapter VII powers (in which the authorised forces remain under the command and control of

1 For such criticism, see José E. Alvarez, ‘Revisiting the ILC’s Draft Rules on International Organization Responsibility’, in *American Society of International Law Proceedings*, Vol. 105, 2011, p. 345; Gerhard 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.

2 Letter from the United Nations Legal Counsel, Mr Hans Corell, to the Director of the Codification Division, Mr Václav Mikulka, 3 February 2004, reported by Giorgio Gaja in the Second Report on the Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004, p. 16, n. 52.

the state, the UN power being limited to the possibility of withdrawing the authorisation or delimiting its scope – e.g., the International Security Assistance Force in Afghanistan). This article will first explain the general rule of attribution of a wrongful conduct based on the status of the multinational force as an organ or an agent of the organisation. Then, it will analyse the validity and scope of application of special rules of attribution based on the notions of ‘effective control’ or ‘ultimate control’ over the acts of the multinational force. Finally, it will discuss the possibility of dual attribution of the same conduct to both the organisation and the troop-contributing state concerned.

### **General rule of attribution: the status of ‘organ’ or ‘agent’ of the organisation**

When an individual or an entity has the status of organ of a state, or agent or organ of an international organisation, such status is generally decisive for the purposes of attribution. This reflects a general rule according to which an entity – be it a state or an international organisation – must bear responsibility for the acts of its agents or organs. Both the Draft Articles on State Responsibility and the Draft Articles on the Responsibility of International Organisations refer to this rule as the main criterion for attribution. Indeed, Article 6 of the Draft Articles on the Responsibility of International Organisations, which corresponds to Article 4 of the Draft Articles on State responsibility, provides that ‘[t]he conduct of an organ or agent of an international organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law, whatever position the organ or agent holds in respect of the organisation.’ Article 2(c) identifies ‘organs’ of an international organisation 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 organisation” means an official or other person or entity, other than an organ, who is charged by the organisation with carrying out, or helping to carry out, one of its functions, and thus through whom the organisation acts’.

Unlike the missions merely authorised by the UN but carried out by national or multinational contingents, UN-led peacekeeping operations have the status of subsidiary organs of the UN established by the Security Council for the performance of its functions under the Charter.<sup>3</sup> Because of their characterisation as subsidiary organs of the UN, the first question to be analysed is whether, and to what extent, one may rely on the general rule set forth in the abovementioned Article 6 in order to establish the entity to which their conduct is to be attributed.

3 On the characterisation of UN peacekeeping forces as subsidiary organs of the UN see, for instance, Article 15 of the Draft Model Status-of-Force Agreement between the United Nations and host countries, which provides that ‘[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’. UN Doc. A/45/594, para. 15.

The same question may arise when the UN avails itself of private military companies (PMCs) to undertake some of the functions of peace operations.

With regard to UN peacekeeping forces, it might be argued that since these forces are given the status of subsidiary organs of the UN, their conduct must be attributed exclusively to the organisation on the basis of the general criterion of attribution set forth in Article 6. This view, which finds some support in legal literature,<sup>4</sup> was upheld by the European Court of Human Rights (ECtHR). In its decision in the *Behrami* case concerning the killing of a child and injury caused to another child by undetonated cluster bombs that had not been eliminated by the United Nations Interim Administration Mission in Kosovo (UNMIK), 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 UN.<sup>5</sup> When considering the issue of responsibility for acts committed by peacekeeping forces, the UN also generally gives relevance to the status of these forces as organs of the organisation. In a note recently sent to the ILC about its Draft Articles on the Responsibility of International Organisations, the UN observed that:

[It] has been the long-established position of the United Nations... 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 Organisation, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, ‘effective’.<sup>6</sup>

However, despite the longstanding position of the UN on this issue, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purposes of attribution. The fact that these forces are accorded the status of organs under the rules of the organisation does not prevent national contingents from acting at the same time as organs of their respective states and therefore does not exclude certain acts of a national contingent composing the multinational force from being attributed to its sending state. 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.’<sup>7</sup> It is this dual status as organs of both the UN and the sending state that justifies the application of a special rule of attribution which is

4 See for instance Finn Seyfersted, ‘United Nations Forces: Some Legal Problems’, in *British Yearbook of International Law*, Vol. 37, 1961, p. 429.

5 European Court of Human Rights (ECtHR), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Apps. No. 71412/01 and 78166/01, Decision (Grand Chamber), 2 May 2007, para. 143.

6 UN Doc. A/CN.4/637/Add.1, 17 February 2011, p. 13.

7 House of Lords, *Attorney General v. Nissan*, Judgment, 11 February 1969, *All England Law Reports*, 1969-I, p. 646. In the same vein, 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 organisation on the basis of the rule set forth

based not on the formal status of peacekeeping forces within the UN system, but rather on the entity which has effective control over the conduct of such forces. As the ILC's Commentary makes clear, for purposes of attribution, what matters is establishing which subject – the UN or the troop-contributing state – has effective control over the contingent in relation to a specific act.<sup>8</sup> In this respect, the general rule of attribution set out in Article 6, based on the formal status as an agent or as an organ of an international organisation, would only be applicable when troops are fully seconded to the UN by the sending state. Since in practice this never happens, Article 6 does not substantially find application in relation to the conduct of national contingents put at the disposal of the UN for peacekeeping missions.

A situation which may fall within the scope of application of the general rule of attribution relates to the use of PMCs in the context of a multinational operation.<sup>9</sup> When PMCs are contractually empowered by the rules of the organisation to exercise certain functions on its behalf, there is little doubt that they may be characterised as 'agents' within the meaning given to this term under Article 2 of the ILC's Draft Articles on the Responsibility of International Organisations. In this case, there is no need to show that the conduct of the PMC was in fact carried out under the 'effective control' of the organisation; the only element to be proved is that the PMC was performing one of the organisation's functions. Things are more complicated when there is no contractual link between the organisation and the PMC – namely when the PMC is entrusted with functions of the organisation on the basis of a *de facto* delegation of functions (as in the case in which, in an emergency situation, an organisation instructs a PMC to provide protection to its staff in the absence of any contractual link). In such cases, which admittedly can be considered to be exceptional, the question may be raised as to the degree of control which is required for the conduct of the PMC to be attributed to the organisation.<sup>10</sup> It seems that in this case, in most situations, one should apply by analogy Article 8 of the Draft Articles on State Responsibility.<sup>11</sup> This view finds support in the Commentary to Article 6 of the 2011 Draft Articles on the Responsibility of International Organisations, where it is observed that '[s]hould persons or groups of persons act under the instructions, or the direction or control,

in Article 6 of the Draft Articles on the Responsibility of International Organisations. See Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović*, 6 September 2013, para. 3.10.2.

- 8 Report of the International Law Commission on the work of its sixty-third session, UN Doc. A/66/10, 2011, pp. 87–88.
- 9 For an assessment of questions of attribution raised by the activity of PMCs, see Nigel D. White and Sorcha MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', in *The European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 965–988; Laura Magi, 'Sull'attribuzione ad una organizzazione internazionale dell'attività di società private che operano per suo conto', in *Rivista di Diritto Internazionale*, Vol. 93, No. 3, 2010, pp. 753–801.
- 10 On this issue, see Antonios Tzanakopoulos, 'Attribution of Conduct to International Organizations in Peacekeeping Operations', EJIL: Talk! Blog of the European Journal of International Law, 10 March 2009, available at: [www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/](http://www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/) (last visited in December 2013).
- 11 According to Article 8 of the Draft Articles on State Responsibility, '[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organisation, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2.'

of an international organisation, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2.<sup>12</sup> This means that it has to be proved that the PMC was acting under the instructions, or under the direction or control, of the organisation in order for the latter to be responsible for the acts of the former.

## Special rule of attribution: the criterion of ‘effective control’ and the doubtful validity of the ‘ultimate control’ test

### The criterion of effective control

In the case of UN peacekeeping operations, even though the organisation exercises command and control over the conduct of the troops, these national contingents are placed at its disposal by states. They are therefore organs of their respective states and of the organisation simultaneously, and the determination of the subject which must bear responsibility for the wrongful act committed in the course of the operation is generally assessed on the basis of Article 7 of the Draft Articles on the Responsibility of International Organisations. Under this provision, the conduct of an organ of a state that is placed at the disposal of an international organisation is to be attributed to that international organisation ‘if the organisation exercises effective control over that conduct’. The same 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 forces.<sup>13</sup> The main problem raised by this criterion of attribution relates to the determination of the meaning of ‘effective control’ within the context of this rule.

It might be argued 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 on state responsibility.<sup>14</sup> If one accepts this view, it should be concluded that, for the act of a

12 Report of the International Law Commission, above note 8, para. 109.

13 For an analysis of the relevant practice, see *ibid.*, pp. 88–91.

14 As is well known, an ‘effective control’ test was employed by the International Court of Justice (ICJ) in the *Nicaragua* and *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 ICJ, 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. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 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)*, Judgment, ICJ Reports 2007, paras. 399–400. For the view that, in providing the standard of effective control, the Draft Articles on the Responsibility of International Organisations ‘codified what was already a longstanding principle for the attribution of wrongdoing at international law’, as recognised, among others, by the International Court of Justice, see Tom 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 Contingents Serving as United Nations Peacekeepers’, in *Harvard International Law Review*, Vol. 51, 2010, p. 141. See also Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’, in

member of a peacekeeping force to be attributed to the UN, it would have to be demonstrated that this specific act was taken under the instructions or the direction and control of the UN. The application of such a test would significantly complicate attribution, as in many cases, it would be extremely difficult to prove the existence of an 'effective control' of this kind. However, it does not seem that Article 7 requires such a high level of control for the purposes of attribution of acts of lent organs. As the Commentary to this provision makes clear, the notion of 'effective control' within the context of the responsibility of international organisations does not play the same role as in the context of the law on state responsibility. Indeed, 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 organisation, but rather to which entity – the contributing state or organisation or the receiving organisation – conduct has to be attributed'.<sup>15</sup> While the ILC does not say it expressly, the fact that it stresses the different meaning of the notion of effective control in the context of the placing of an organ at the disposal of the organisation seems to imply that, unlike the rules on state responsibility, the attribution of a certain conduct to the organisation under Article 7 does not necessarily depend on the proof that the conduct was taken on the instruction of, or under the specific control of, the organisation. This suggests, at least indirectly, that a lower degree of control may also be sufficient to justify attribution to the organisation.<sup>16</sup>

If specific instructions or direction over each specific conduct is not a necessary requirement, it remains to be seen what other elements can be taken into account for the purposes of determining the entity which could be regarded as exercising effective control under the meaning of Article 7. The ILC's Commentary does not provide clear indications on this issue. A question which may be raised in this respect is whether the manner in which the transfer of powers was formally arranged between the organisation and the troop-contributing state is relevant for the purposes of attribution. 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 authority'.<sup>17</sup> It can be held that,

*Melbourne Journal of International Law*, Vol. 10, 2009, pp. 348–349. On the relationship between the notion of effective control used by the ICJ and that employed in Article 7, see the observations of Francesco Messineo, *Multiple Attribution of Conduct*, SHARES Research Paper No. 2012–11, pp. 32–33.

15 Report of the International Law Commission, above note 8, p. 88.

16 This interpretation of the ILC Commentary finds support in the following observation of the ILC's Special Rapporteur, Giorgio Gaja: 'In order to settle the issue of where the effective control lies, one needs to consider the "full factual circumstances and particular context in which international organizations and their members operated", as was stressed by the UK in a statement. This implies that, with regard to a United Nations peacekeeping force, while *in principle* the conduct of the force should be attributed to the United Nations, effective control of a particular conduct may belong to the contributing State rather than to the United Nations' (emphasis added). Giorgio Gaja, Eighth Report on the Responsibility of International Organisations, UN Doc. A/CN.4/640, p. 13.

17 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. This document defines the notion of



depending on the manner in which the transfer of authority over the forces is arranged, a presumption may arise that a certain conduct is attributable to the organisation rather than to the contributing state. Indeed, if the force was performing certain functions under the formal authority of the organisation, and not of the contributing states, it can be presumed that its conduct is attributable to the organisation. In other words, the formal transfer of powers giving authority to the organisation generates a presumption that the conduct is to be attributed to the organisation, without the need to demonstrate that the conduct was the result of specific instructions or of effective control over the specific conduct. Such a presumption should not be confused with the status of a subsidiary organ of the organisation. What matters here is not the status of the force under the rules of the organisation but the agreement between the organisation 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 relation to a given conduct. Obviously, this presumption may be rebutted. It may happen that a force, while acting under the formal authority of the organisation, has undertaken a certain conduct because of the instructions given to it by the contributing state. In such circumstances, the act must evidently be attributed to the state and not to the organisation.

The recent judgment of the Hague Court of Appeal in the *Nuhanović* case appears to support the view that, for purposes of attribution, account must be taken of a combination of legal and factual elements.<sup>18</sup> The Court of Appeal found that the criterion for determining whether the conduct of 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 Draft Articles on the Responsibility of International Organisations. According to the Court, when applying this criterion,

significance should be given [not only] to the question whether that conduct constituted the execution 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 concerned.<sup>19</sup>

The Court of Appeal refers here to those powers which each contributing state formally retains over its troops. The Court makes the point that, for purposes of attribution, relevance must be given not only to effective control but also to the

‘operational command’ as ‘the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole)’: *ibid.*, p. 2.

18 This aspect was duly stressed by André Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, in *Journal of International Criminal Justice*, Vol. 9, 2011, pp. 1143–1157. See also the judgement of 6 September 2013, by which the Supreme Court of the Netherlands dismissed the appeal in cassation submitted by the State of the Netherlands and substantially confirmed the legal findings and conclusion of the Court of Appeal.

19 The Hague Court of Appeal, *Nuhanović v. Netherlands*, Appeal Judgment, 5 July 2011, ILDC 1742 (NL 2011), para. 5.9.



formal authority of the organisation or of the contributing state to exercise control over the acts concerned. 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'<sup>20</sup> – 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 concerned.<sup>21</sup> 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 the Court of Appeal relied on in order to justify its conclusion that the conduct concerned had to be attributed to the Netherlands.<sup>22</sup>

The manner in which the transfer of powers was arranged between the organisation and the troop-contributing state appears to be relevant for the attribution of responsibility for an *ultra vires* conduct taken in the context of the peacekeeping operation. No doubt, the fact that a certain conduct was taken by a peacekeeper exceeding his authority or contravening instructions does not exempt the sending state or the organisation from bearing responsibility. This principle is clearly stated in Article 8 of the Draft Articles on the Responsibility of International Organisations and in Article 7 of the Draft Articles on State Responsibility.<sup>23</sup> However, these provisions address, respectively, the situation of an organ of a state and of an organ or agent of an international organisation. They do not refer specifically to the case of an organ of a state which has been placed at the disposal of an international organisation. Given the dual status of peacekeepers, 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 when taking 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 organisation and of the state with respect to the exercise of this function. Here again, if a peacekeeper was performing functions

20 *Ibid.*, para. 5.18.

21 *Ibid.*

22 *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 peacekeeping force was considered to be attributable to Belgium since such conduct was taken 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*, RG No. 04/4807/A and 07/15547/A, Judgment, 8 December 2010, ILDC 1604 (BE 2010), para. 38.

23 Article 8 of the Draft Articles on the Responsibility of International Organisations 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 Draft 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'.

under the formal authority of the organisation (such as engaging in combat-related activities falling under the operational control of the UN), it creates a presumption that the *ultra vires* conduct must be attributed to the organisation.<sup>24</sup> This presumption can be rebutted if it is demonstrated that the peacekeeper had acted on the instructions of the sending state.

### The doubtful validity of the 'ultimate control' test

In multinational operations where the organisation only gives its authorisation to a military intervention in which the states retain full control over their national contingents, these contingents operate outside a chain of command leading to the organisation. They are not seconded to the UN, nor are they given the status of organ under the rules of the organisation. The only form of factual control exercised by the UN over the activity of these contingents is limited to receiving periodic reports. This form of control falls short of the 'effective control' which is required by Article 7 of the Draft Articles on the Responsibility of International Organisations for attributing their acts to the organisation. In the absence of any relevant formal or factual link with the organisation, the conduct of national contingents must be attributed exclusively to the sending state by virtue of their status as organs of such states, on the basis of the general rule of attribution codified in Article 4(1) of the Draft Articles on State Responsibility, according to which:

the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

The ECtHR took a different position on this issue in its *Saramati* decision. In this case, Mr Saramati submitted an application against Norway, Germany and France for their involvement in his allegedly unlawful arrest and detention. The applicant had been arrested and detained by troops of these three states participating in the Kosovo Force (KFOR) peace-support operation, a UN-authorized mission established by the Security Council's Resolution 1244 (1999) for the purposes of bringing peace and stability to Kosovo. According to the ECtHR, 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.<sup>25</sup> While the ECtHR did not explain in detail the meaning of the notion of 'ultimate authority and control', this concept appears to refer to the special powers assigned to the Security Council under Chapter VII of the UN Charter. Indeed, in order to demonstrate that the Security Council retained ultimate authority and control, the ECtHR attached relevance to elements such as the fact that Chapter VII of the Charter allows the Security Council

24 For a different view, see Tom Dannenbaum, above note 14, p. 159.

25 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, above note 5, paras. 133–141.

to delegate tasks to member states or the fact that Resolution 1244 (1999) ‘put sufficiently defined limits on the delegation by fixing the mandate with adequate precision’.<sup>26</sup> However, ‘delegation of powers’, no matter its meaning, is not an element which can justify attribution in the absence of a parallel transfer of effective control in the hands of the organisation. Nor can this ‘delegation of powers’ justify the conclusion that the sending states are exempted from any responsibility for the conduct of contingents acting under their full control.<sup>27</sup>

The ‘ultimate control’ test referred to by the ECtHR does not appear to find support in the practice concerning authorised missions. As observed by the UN, by relying ‘solely on the grounds that the Security Council had “delegated” its powers’ to KFOR and ‘had “ultimate authority and control” over it, the Court disregarded the test of “effective command and control” which for over six decades has guided the United Nations and Member States in matters of attribution’.<sup>28</sup> The fact that the ‘ultimate control’ test differs considerably from the ‘effective control’ test advocated by the UN has also been stressed by the ILC in its Commentary to Article 7 of the Draft Articles on the Responsibility of International Organisations.<sup>29</sup> It may be noted that in its subsequent decisions, the ECtHR, while reaffirming this criterion of attribution, appears to have narrowed down its scope of application. In particular, the approach taken by the ECtHR in its 2011 judgment in the *Al-Jedda* case represents, in many respects, a welcome departure from the solution applied in *Behrami*. The case concerned actions taken by UK troops operating in Iraq within the Multi-National Force-Iraq (MNF-I) – a force whose presence in Iraq had been authorised by the Security Council. The ECtHR found that the applicants’ detention by British troops was to be attributed to the UK. While the Court referred to the ‘ultimate control’ test and although, with regard to that test, it justified its conclusion by distinguishing the facts of the case from those underlying the *Behrami* case, it is noteworthy that the Court also referred to the ‘effective control’ test.<sup>30</sup> The fact that the UK had full command and control over its forces and that this state of affairs had not changed as a result of the authorisation of the Security Council was an element which weighted heavily in the Court’s analysis of the question of attribution.<sup>31</sup> In its recent judgment in the *Nada* case, the ECtHR has further

26 *Ibid.*, para. 134.

27 For critical remarks concerning the criterion of attribution applied by the ECtHR, see, among others, Pierre 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*’, in *Annuaire Français de Droit International*, Vol. 53, 2007, p. 55; Linos-Alexander Sicilianos, ‘Entre multilatéralisme et unilatéralisme: l’autorisation par le Conseil de sécurité de recourir à la force’, in *Recueil des Cours*, Vol. 339, 2009, p. 376.

28 UN Doc. A/CN.4/637/Add.1, p. 12.

29 Report of the International Law Commission, above note 8, p. 89: ‘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’.

30 ECtHR, *Al Jeddah v. United Kingdom*, Application No. 27021/08, Judgment (Grand Chamber), 7 July 2011, para. 84.

31 It may be useful to note that in this judgment the Court also implied that dual attribution to the UN and the state is possible. See e.g. Marko Milanovic, ‘Al Skeini and Al Jeddah in Strasbourg’, in *The European Journal of International Law*, Vol. 23, No. 1, 2012, p. 136.

restricted the scope of application of ‘ultimate control’ as a criterion of attribution. While this case did not concern acts taken in the context of multinational peace support operations, it is noteworthy that the ECtHR expressly rejected the view advanced by the French government, according to which measures taken by member states of the UN to implement Security Council resolutions under Chapter VII of the Charter are invariably to be attributed to the UN. In particular, it excluded that the ‘ultimate control’ test applies to acts taken by member states to implement, at the national level, a Security Council resolution imposing restrictive measures against individuals.<sup>32</sup>

### **Responsibility of the organisation for actions taken by a state in the context of a multinational operation**

The fact that acts committed by a national contingent in the context of an authorised operation are to be attributed to the sending state does not exclude the possibility that the same acts could also give rise to the responsibility of the organisation. The Draft Articles on the Responsibility of International Organisations envisage a number of situations where an organisation may be held responsible in connection with a conduct of an organ of a state. The pertinent provisions are based on the distinction between attribution of conduct and attribution of responsibility. The idea is that, under certain situations, while the conduct is attributable to the state and will normally give rise to its international responsibility, the organisation also has to bear responsibility because of its contribution to the commission of the acts in question by the state. The possible impact of these provisions in the context of an authorised operation should not be underestimated. For example, Article 17(2) of the Draft Articles on the Responsibility of International Organisations provides that, under specific conditions, an organisation has to bear responsibility for having authorised a state to commit an act that would be wrongful if committed by that organisation.<sup>33</sup> Thus, if the Security Council authorises states taking part in a multinational operation to take measures of arbitrary detention contrary to the basic requirements of human rights law or international humanitarian law, the UN may also be held responsible for any such measure taken by states in the course of the operation. The rule set forth in Article 17 appears to be premised on the idea that, since the organisation, by its authorisation, exercised a form of ‘normative control’ over the state, it has to bear the consequence of its contribution to the wrongful act. In this respect, it may be suggested that this provision shares some common characteristics with the ‘ultimate control’ test applied by the ECtHR, as they both appear to rely exclusively on the ‘normative control’ exercised by the organisation,

32 ECtHR, *Nada v. Switzerland*, Application No. 10593/08, Judgment (Grand Chamber), 12 September 2012, para. 120.

33 Article 17(2) provides that ‘[a]n international organisation incurs international responsibility if it circumvents one of its international obligations by authorising member States or international organisations to commit an act that would be internationally wrongful if committed by the former organisation and the act in question is committed because of that authorisation’.

rather than on a factual control. However, unlike the ‘ultimate control’ test, the possibility of holding an organisation responsible under Article 17 because of its authorisation is subject to a number of strict conditions. In particular, this provision specifies that the state must have committed the acts in question ‘because of that authorisation’. The ILC’s Commentary clarifies that ‘this condition requires a contextual analysis of the role that the authorisation actually plays in determining the conduct of the member State or international organisation’.<sup>34</sup> Moreover, as noted above, Article 17 concerns the attribution of responsibility and not the attribution of conduct: the fact that the organisation has to bear responsibility is without prejudice to the responsibility of the state to which the conduct concerned has to be attributed.<sup>35</sup>

Another situation which may give rise to the organisation’s responsibility in connection to an act of a state is when the organisation, by its support to the action taken by the state, may be regarded as facilitating the commission of a wrongful act. Indeed, under Article 14 of the Draft Articles on the Responsibility of International Organisations, an organisation is to be held responsible for the wrongful conduct of a state if it aided or assisted that state in the commission of such conduct. Interestingly, the UN appears to be aware of the possible legal consequences arising from the assistance rendered to other subjects. In one case, which admittedly did not concern an authorised operation, the Security Council modified the mandate of a peacekeeping mission – MONUC – in order to avoid the risk that, by assisting the armed forces of the Democratic Republic of the Congo, which in their fight against rebel groups had committed violations of human rights and international humanitarian law, ‘the United Nations would be perceived as implicated in the commission of the wrongful act’.<sup>36</sup>

## Dual or multiple attribution of the same conduct

Unlike the case in which the organisation bears responsibility for a conduct which is to be attributed exclusively to the state, it may well be that responsibility arises as a consequence of a conduct which is to be attributed simultaneously to the state and to the organisation. It may therefore be asked whether, in the context of peacekeeping operations, situations may arise in which the conduct of a contingent can be jointly attributed to the organisation and to the contributing state.

Having regard to the command and control structure of UN peacekeeping operations, the possibility of dual attribution has been advocated in connection with the role played by the national contingent commander. Since a contributing state, through the national contingent commander, can exercise 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 commander, it has been held that the conduct of a peacekeeping force must be jointly attributed to the UN and to the

34 Report of the International Law Commission, above note 8, p. 42.

35 See Article 19 of the Draft Articles on the Responsibility of International Organisations.

36 UN Doc. A/CN.4/637/Add.1, p. 18.

contributing state – the UN for being the originator of the instructions, and the contributing state for having concurred in the instructions.<sup>37</sup> It must be admitted, however, that there is little practice supporting this view. ‘[K]een to maintain the integrity of the United Nations operation vis-à-vis third parties’,<sup>38</sup> 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, the recognition of dual attribution would increase the risk of sending states interfering with the UN chain of command. Significantly, apart from the implicit recognition of this possibility contained in the ECtHR’s judgment in the *Al-Jedda* case<sup>39</sup> and the more explicit reference contained in the judgments rendered by Dutch courts in the *Nuhanović* case, judicial practice appears to be substantially lacking.

In its Commentary on the Draft Articles on the Responsibility of International Organisations, the ILC recognised the possibility that the same conduct could be simultaneously attributed to a state and to an international organisation. According to the Commentary, ‘although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded’.<sup>40</sup> While the Commentary does not say anything about the possibility of dual or multiple attribution in situations such as the one characterising 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 organisation, it will have to be determined whether the conduct of such an organ must be attributed to the organisation or, alternatively, to the contributing state. Its view appears to be that, in the case of UN peacekeeping operations, the conduct of a national contingent is to be attributed to the organisation if, when taking the conduct at issue, the contingent was operating 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.’<sup>41</sup> Admittedly, the decision of the

37 See the views expressed on this issue by Luigi Condorelli, ‘Le statut des forces de l’ONU et le droit international humanitaire’, in *Rivista di Diritto Internazionale*, Vol. 78, 1995, p. 893; and by Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’, in *Melbourne Journal of International Law*, Vol. 10, 2009, p. 1.

38 UN Doc. A/CN.4/637/Add.1, p. 14.

39 See above note 31.

40 Report of the International Law Commission, above note 8, p. 81.

41 District Court of The Hague, *HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, First Instance Judgment, 10 September 2008, ILDC 1092 (NL 2008), para. 4.14.1.

District Court was later reversed by the Hague Court of Appeal. In particular, while the District Court had expressly excluded the possibility of dual attribution,<sup>42</sup> the Court of Appeal admitted that the actions taken by a national contingent in the course of a peacekeeping operation may 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’.<sup>43</sup> However, apart from recognising this possibility, the Court of Appeal did not clarify the specific conditions which may justify dual or multiple attribution. In this respect, 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 Organisations in conjunction with article 48 (1) of the same Draft Articles, does not exclude the possibility of dual attribution of given conduct’, without providing any further indication on this issue.<sup>44</sup>

While it seems excessive to link dual attribution to the role played by the national contingent commander within the UN command structure, I argue that dual attribution might be admitted in those cases where it is not clear whether the national contingent was acting under the authority of the sending state or of the organisation. 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 which were taken by mutual agreement between the organisation and the state. One may refer, for instance, to the situation described by the Hague Court of Appeal 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.<sup>45</sup> 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.

## Concluding remarks

The codification work of the ILC and an increasing amount of judicial practice have strongly contributed to clarifying the rules on responsibility that are applicable

42 *Ibid.*, para. 4.13.

43 *Nuhanović v. Netherlands*, above note 19, para. 5.9.

44 *State of the Netherlands v. Nuhanović*, above note 7, para. 3.11.2.

45 *Ibid.*, para. 5.18.



to multinational operations conducted under the aegis of an international organisation. Clearly, there are still certain difficulties in establishing the allocation of responsibility between the organisation and the troop-contributing states. The notion of 'effective control' requires further elucidation and there is still very little practice on dual or multiple attribution. However, the overall picture is one of progressive consolidation of a legal framework which provides sufficiently clear answers to the problem of allocation of responsibility.

In the end, the most troublesome issue relates to a different set of problems, namely that of the remedies that may be available for obtaining reparation. This problem is particularly acute when the responsibility of international organisations is at stake, as there are generally no effective remedies which can be sought by victims, particularly individuals, in their disputes with international organisations. On the one hand, in most cases, international tribunals cannot extend their jurisdiction over the conduct of international organisations; on the other, access to domestic tribunals is precluded by the rule of immunity.<sup>46</sup> It is also in the light of this consideration that certain interpretations of the law which attempt to minimise the role and responsibilities of sending states in the context of multinational operations – such as the one advanced by the ECtHR in its *Behrami* and *Saramati* decisions – appear particularly worrisome. Not only does the 'ultimate authority and control' test lead to the quite unreasonable result that a state which has effective control over a UN-authorized contingent does not bear responsibility for its actions; it also greatly limits the possibility that individuals will obtain judicial recognition of, and some form of reparation for, the wrongful acts of which they were victims. As we have seen, the recent judgment in the *Al-Jedda* case shows signs of a change in attitude. It is to be hoped that, in the future, the ECtHR will progressively abandon the notion of 'ultimate control' and will rely solely on the determination of the entity which has effective control for the purpose of attribution in this kind of situation.

46 One may refer, for instance, to the ECtHR's decision in the case *Mothers of Srebrenica*, where the ECtHR concluded that 'the grant of immunity to the UN served a legitimate purpose and was not disproportionate'. See ECtHR, *Stichting Mothers of Srebrenica and others v. the Netherlands*, Application No. 65542/12, Decision of 11 June 2012, para. 169.