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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Effective control test at the interface between the law of international responsibility and the law of international organizations: Managing concerns over the attribution of UN peacekeepers' conduct to troop-contributing nations

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Abstract

On 27 June 2017, in the *Stichting Mothers of Srebrenica* case, The Hague Court of Appeal applied the effective control test in determining attribution and found that the Netherlands was responsible for the failure of the Dutch battalion (Dutchbat) acting as a part of the UN Protection Force (UNPROFOR) to protect civilians from the Srebrenica massacre in 1995. This judgment is of considerable significance because the court renounced the preventive approach to the effective control test, to which the Dutch courts had repeatedly declared their adherence, and reverted to the traditional (presumptive) approach. The preventive interpretation was originally proposed with a view to justifying much broader attribution to troop-contributing nations (TCNs). However, quite interestingly, the Court of Appeal reached the conclusion that the Dutchbat's conduct was attributable to the Netherlands without recourse to the preventive approach. The present study argues that the legal framework for the attribution of UN peacekeepers' conduct has developed in such a manner that the fair allocation of responsibility and the effectiveness of UN peacekeeping operations are in equilibrium. In that sense, the effective control test should be located at the interface between the law of international responsibility and the law of international organizations. It is illustrated that not only does the preventive interpretation fail to strike a fair balance between the institutional considerations and the need to provide remedies for victims of peacekeepers' misconduct, but also the presumptive approach may lead to effective remedies while having due regard for the institutional considerations.

Keywords: ability to prevent; attribution of conduct; effective control test; *Stichting Mothers of Srebrenica* case; UN peacekeeping operation

1. Introduction

Although the concept of 'effective control' has long played a significant role in determining the attribution of UN peacekeepers' conduct, it has not always been simple to identify its exact meaning. Unfortunately, the International Law Commission (ILC), in formulating the effective

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control test in the Articles on Responsibility of International Organizations (ARIO),[1] failed to totally dissipate the fog enveloping it.[2] Article 7 states:

> The conduct of an organ of a State ... that is placed at the disposal of an ... international organization shall be considered under international law an act of the ... organization if the organization exercises effective control over that conduct.

The provision plays a part in perpetuating the myth that the conduct of peacekeepers is attributable to the UN *only when* it exercises a certain (relatively high) level of control over the author of the conduct. In practice, however, the UN has been held responsible for wrongdoings committed by peacekeepers even though its control over them is rather formal and is, in fact, concomitant with the significant control retained by TCNs.[3]

In this respect, however, some eminent works have already elucidated how the effective control test actually works in determining attribution of conduct committed in the course of UN peacekeeping operations.[4] The effective control test discussed here consists of two distinct but successive legal operations: presumption and rebuttal. Where troops are put under UN operational authority,[5] for the purpose of peacekeeping operations, their conduct is presumed to be attributable to the UN.[6] 'This presumption may be rebutted, however, whenever national contingents operate under the direct instructions of their contributing state and thereby in fact fall outside the reach of the UN's effective control.'[7] The presumptive approach has been followed by domestic

[1]Responsibility of International Organizations, UN Doc. A/RES/66/100 (2011), annex.

[2]As rightly pointed out by Palchetti, 'neither Article 7 nor the International Law Commission (ILC)'s commentary attempted to give a precise definition of this concept': P. Palchetti, 'Attributing the Conduct of Dutchbat in Srebrenica: The 2014 Judgment of the District Court in the *Mothers of Srebrenica* Case', (2015) 62 *Netherlands International Law Review* 279, at 281. See also P. Jacob, 'Les définitions des notions d'"organe" et d'"agent" retenues par la CDI sont-elles opérationnelles?', (2013) 47 *Revue Belge de Droit International* 17, at 25; F. Messineo, 'Attribution of Conduct', in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014), 60, at 91; T. Dannenbaum, 'Dual Attribution in the Context of Military Operations', in A.S. Barros, C. Ryngaert and J. Wouters (eds.), *International Organizations and Member State Responsibility: Critical Perspectives* (2016), 114, at 117–9.

[3]As will be explained in more detail below, the effective control test discussed here fundamentally differs from its namesake for the attribution of private persons' conduct to states. For the latter, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 64–5, para. 115.

[4]For those which are precedent to (and positively referred to in) the ILC's work, see, e.g., J.P. Ritter, 'La protection diplomatique à l'égard d'une organisation internationale', (1962) 8 *Annuaire Francais de Droit International* 427, at 441–4; M. Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (1995), at 64–7. See also F. Seyersted, *United Nations Forces in the Law of Peace and War* (1966), at 92, 204–5. For more recent authorities, see, e.g., P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), 297, at 299–301; U. Häußler, 'Human Rights Accountability of International Organisations in the Lead of International Peace Missions', in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 215, at 243–51; N. Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M. Odello and R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 245, at 249; M. Bothe, 'Peacekeeping', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012), 1171, at 1184–5; T.D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', (2012) 42 *Netherlands Yearbook of International Law* 37, at 55; K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), at 111–20.

[5]The term 'UN operational authority' is defined as '[t]he authority transferred by the member states to the United Nations to use the operational capabilities of their national military contingents ... to undertake mandated missions and tasks'; with regard to peacekeeping operations, that authority 'is vested in the Secretary-General, under the authority of the Security Council', and 'involves the full authority to issue operational directives': UN Department of Peacekeeping Operations and Department of Field Support, 'Authority, Command and Control in United Nations Peacekeeping Operations', 15 February 2008, para. 7. See also Gill, *supra*, note 4 at 46–7.

[6]M. Zwanenburg, *Accountability of Peace Support Operations* (2005), at 100.

[7]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 et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (2013), 126, at 133.

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courts in the Netherlands,[8] and in Belgium.[9] In the Dutch case, *Nuhanović* v. *the State of the Netherlands*, the District Court in The Hague found that the Netherlands was not responsible for the failure of the Dutchbat acting as a part of the UNPROFOR to protect civilians from the Srebrenica massacre in 1995 because there was not sufficient evidence for concluding that 'Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands'.[10] The ILC observed in its 2009 report that the court's approach could be regarded as being 'in line with the way in which the criterion of effective control was intended'.[11]

However, the discourse has recently become more intricate because some authors have attempted to reinterpret the effective control test. Tom Dannenbaum, a trailblazer in this growing trend, criticizes the presumptive approach and argues that 'effective control' should be construed as an ability to prevent.[12] That initiative aims at the much broader attribution of peacekeepers' misconduct to TCNs, which enables victims to circumvent UN jurisdictional immunity before domestic courts, and thus seek effective remedies from TCNs. The preventive interpretation was immediately adopted by the appellate courts in the *Nuhanović* case which found that the Dutchbat's conduct was attributable to the Netherlands.[13] In 2014, the District Court in The Hague subsequently followed that reasoning in the *Stichting Mothers of Srebrenica* case, in which the responsibility of the Netherlands for the death of a much wider range of victims in the Srebrenica massacre was invoked.[14] On 27 June 2017, The Hague Court of Appeal also found that the Netherlands was responsible. However, interestingly, it reached that conclusion without recourse to the preventive approach.[15]

Against that background, the present study will first illustrate how the presumptive interpretation of the effective control test has been constructed. It argues that the legal framework for attribution of UN peacekeepers' conduct has developed in such a manner that the fair allocation of responsibility and the effectiveness of UN peacekeeping operations are in equilibrium. In that sense, the effective control test should be located at the interface between the law of international responsibility and the law of international organizations (IOs) (Section 2). Then the preventive approach will be critically assessed. Manipulating the effective control test as a tool exclusively for remedies with no regard to its institutional aspect seems to be unjustifiable. It will be illustrated that, as the 2017 *Stichting Mothers of Srebrenica* judgment hinted, the presumptive approach may lead to effective remedies while having due regard to the institutional considerations (Section 3).

2. The presumptive interpretation: Equilibrium between fair allocation of responsibility and the institutional considerations

In order to see how the UN has been held responsible for peacekeepers' conduct since the early days of peacekeeping operations, it may be sufficient to recall an agreement between the UN and

[8] *H.N. v. the State of the Netherlands*, Judgment of District Court in The Hague, 10 September 2008, Case no. 265615/HA ZA 06-1671, paras. 4.9–4.15.

[9] *Mukeshimana-Ngulinzira v. Belgian State*, Judgment of the Court of First Instance of Brussels, 8 December 2010, Case nos. 04/4807/A and 07/15547/A, para. 38.

[10] *H.N.*, *supra* note 8, paras. 4.14.1–4.14.5.

[11] Report of the International Law Commission on the Work of its 61st Session (4 May–5 June and 6 July–7 August 2009), 2009 YILC, Vol. II (Part 2), at 36.

[12] 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 Contingents Serving as United Nations Peacekeepers', (2010) 51(1) *Harvard International Law Journal* 113.

[13] *Nuhanović v. the State of the Netherlands*, Judgment of The Hague Court of Appeal, 5 July 2011, Case no. 200.020.174/01; *Nuhanović v. the State of the Netherlands*, Judgment of Supreme Court of the Netherlands, 6 September 2013, Case no. 12/03324.

[14] *Stichting Mothers of Srebrenica et al v. the State of the Netherlands and the United Nations*, Judgment of District Court in The Hague, 16 July 2014, Case no. 295247/HA ZA 07-2973.

[15] *Stichting Mothers of Srebrenica et al. v. the State of the Netherlands and the United Nations*, Judgment of The Hague Court of Appeal, 27 June 2017, Case nos. 200.158.313/01 and 200.160.317/01.

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Belgium on lump-sum payments for damages suffered by Belgian ressortissants in the Congo from the Opération des Nations Unies au Congo (ONUC).[16] Regarding this agreement, Roberto Ago, in his report on state responsibility, prepared in 1971 for the ILC, made the following insightful observation:

> Although the United Nations Force in the Congo consisted of national contingents, it was placed under a commanding officer appointed directly by the Organization and it acted in the Congo solely under the Organization's orders. Neither the Governments of the States which provided contingents nor the Government of the Congo were able to issue 'operational' orders to members of the Force ... Accordingly, it was to the United Nations that the Belgian Government applied for compensation for damage suffered by Belgian nationals at the hands of members of the Force; and the Organization accepted responsibility ... Neither Belgium nor the Organization seems even to have considered the possibility of claiming damages from the States providing the contingents.[17]

Given that Ago highlighted '[i]n this report we are concerned solely with the subject of State responsibility, and the only question which can be considered here, therefore, is the possible responsibility of a State',[18] the idea he sought to convey was that TCNs are *not* responsible for peacekeepers' conduct, instead of the UN being responsible for it. In this sense, the rule of the attribution of peacekeepers' conduct is *lex specialis* in relation to the general principle that the conduct of any state organ shall be considered an act of that state, as enshrined in Article 4 of the ILC's Draft Articles on State Responsibility (ASR).[19] Marten Zwanenburg, who started an extensive investigation of the relevant practice by examining the lump-sum agreement,[20] concluded that if the TCN and the UN agree to put the former's organ under the orders of the latter, 'there is a presumption that conduct of the organ is attributable to' the UN.[21] However, he carefully continued that the practice does not provide evidence for the conclusion that attribution of peacekeepers' conduct to the UN excludes attribution of the same conduct to TCNs. At the most, the practice 'justifies the conclusion that member state responsibility is secondary: in other words, that a claim must be addressed to the UN before it is addressed to member states'.[22] That precedence, if not exclusive, is key to understanding the precise content and scope of the effective control test, for such an arrangement seems to be unique in the law of international responsibility.

2.1 Locating the effective control test in the law of international responsibility

As aptly emphasized by Giorgio Gaja, the ILC's Special Rapporteur on the responsibility of international organizations, attribution of conduct is premised on 'the existence of a functional link between the agent and the organization'.[23] In other words, attribution is a legal operation of identifying the functional link of the subject of international law with the author of the conduct.

[16]Échange de lettres constituant un accord relatif au règlement de réclamations présentées contre l'Organisation des Nations Unies au Congo par des ressortissants belges [1965] 535 UNTS 197. The UN concluded almost identical agreements with Switzerland ([1966] 564 UNTS 193), Greece ([1966] 565 UNTS 3), Luxembourg ([1966] 585 UNTS 147), Italy ([1967] 588 UNTS 197) and Zambia, though the agreement with the last government is unpublished: K. Schmalenbach, 'Dispute Settlement (Article VIII Sections 29–30 General Convention)', in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (2016), 529, at 559.

[17]R. Ago, Third Report on State Responsibility, 1971 YILC, Vol. II (Part One), at 273.

[18]ibid., at 272.

[19]Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2001), annex.

[20]Zwanenburg, *supra* note 6, at 88–97.

[21]ibid., at 100.

[22]ibid., at 101–2.

[23]G. Gaja, Second Report on Responsibility of International Organizations, 2004 YILC, Vol. II (Part One), at 7.

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Gaja remarked that 'what is decisive is not whether an entity is formally defined as an "organ"'.[24] An organ's conduct is attributable only when it acts in that capacity.[25] It is true that whether the organ exercises legislative, executive, judicial, or any other functions does not matter[26] but it must be established that the organ exercises *some* function entrusted by the state or IO in order for its conduct to be attributable to the subject of international law. The formal characterization as an organ is not a necessary condition for attribution any more than a sufficient condition. Without such a characterization, conduct could be attributable if a functional link between its author and the state or IO is established.[27] Functions may be entrusted without legal basis. In this case, for conduct to be attributable to a state, it must be demonstrated that its author 'is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct'.[28] Here, control plays a significant role as an indicative factor in establishing the functional link. Although the ARIO itself has no specific provision on the conduct of private persons, its commentary expressly observes that the same holds true with regard to attribution of conduct to IOs.[29]

How is the effective control test located in that legal framework? First, it should be noted that in drafting Article 7 of the ARIO, Gaja consulted Article 6 of the ASR on the conduct of organs placed at the disposal of a state by another state rather than Article 8, which is generally regarded as codifying the effective control test that the International Court of Justice (ICJ) has developed for the purpose of attributing the conduct of private persons to states.[30] On the analogy of Article 6, he considered that the conduct of an organ placed at the disposal of an IO by a state is attributable to the IO if the organ is acting in the exercise of the IO's functions. While the commentary of Article 6 states that the organ must act under the receiving state's exclusive direction and control, Gaja pointed out that peacekeepers' conduct may be attributable to the UN even if TCNs retain certain control (typically over personnel, disciplinary and criminal matters).[31] Therefore, he concluded that 'what matters is not exclusiveness of control, but the extent of effective control'.[32] Likewise, Paolo Palchetti observed that:

> 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.[33]

The analogy with Article 6 rather than Article 8 of the ASR eloquently portrays the normative characteristics of the effective control test discussed here. The commentary on Article 7 of the ARIO also reveals the difference between the effective control test in the context of peacekeeping operations and the test with the same name developed by the ICJ:

[24]Ibid.

[25]*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62, at 88–9, para. 66.

[26]Art. 4(1) of the ASR.

[27]Art. 5 of the ASR and Arts. 2(d) and 6 of the ARIO.

[28]Art. 8 of the ASR.

[29]Report of the International Law Commission on the Work of its 63rd Session (26 April–3 June and 4 July–12 August 2011), 2011 YILC, Vol. II (Part 2), at 56.

[30]Report of the International Law Commission on the work of its 53rd session (23 April–1 June and 2 July–10 August 2001), 2001 YILC, Vol. II (Part 2), at 47–8.

[31]Gaja, *supra* note 23, at 14. He observed that '[i]t would be going too far to consider that the existence of disciplinary power and criminal jurisdiction on the part of the contributing State totally excludes forces being considered to be placed at the disposal of the United Nations', ibid., at 12.

[32]Ibid., at 14.

[33]P. Palchetti, 'International Responsibility for Conduct of UN Peace-keeping Forces: The Question of Attribution', in P. Palchetti et al., *Refining Human Rights Obligations in Conflict Situations* (2014), 1, at 18.

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> With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State. In the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It 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 the receiving organization—conduct has to be attributed.[34]

With regard to the conduct of private persons, the rule of non-attribution applies.[35] In this case, attribution is exceptional rather than presumed, and the actual exercise of control indicates the existence of a functional link.[36]

Contrariwise, peacekeeping forces are established as UN subsidiary organs, and there is no doubt that peacekeepers are entrusted with UN functions through legal documents such as Security Council resolutions. Therefore, there appears to be no need to refer to control with a view to establishing the functional link between each peacekeeper and the UN. Indeed, the European Court of Human Rights (ECtHR) in *Behrami and Saramati* concluded that the impugned inaction of the United Nations Mission in Kosovo (UNMIK) was attributable to the UN from the mere fact that UNMIK was a UN subsidiary organ.[37] Moreover, the UN Secretariat considered 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".[38]

Thus, it has consistently denied that the presumed attribution to the UN can be rebutted. Although the Secretariat has argued that its position corresponds with the long-established practice of the UN,[39] most member states have declared their preference for the presumptive interpretation over the Secretariat's approach.[40] Given that the effective control test is a special rule in relation to the principle that the conduct of any state organ is attributable to the state, that principle will remain valid to the extent that the UN's long-established practice is not accompanied by general recognition among the member states.[41]

[34]Report of the ILC (2011), *supra* note 29, at 57. See also C. Ekanayake and S. Harris Rimmer, 'Applying Effective Control to the Conduct of UN Forces: Connecting Factual Complexities with Legal Responsibility', (2018) 15 *International Organizations Law Review* 9, at 15–16, 23–4.

[35]O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), 257, at 261–4.

[36]Palchetti, *supra* note 33, at 17–18.

[37]*Behrami v. France and Saramati v. France, Germany and Norway*, Decision of the Grand Chamber of the ECtHR of 2 May 2007, Application nos. 71412/01 and 78166/01, para. 143.

[38]Responsibility of International Organizations: Comments and Observations Received from International Organizations, UN Doc. A/CN.4/637/Add.1 (2011), at 13–14.

[39]Ibid.

[40]See, e.g., UNGA Sixth Committee (58th Session), Summary Record of the 14th Meeting, UN Doc. A/C.6/58/SR.14 (2003), para. 46; UNGA Sixth Committee (59th Session), Summary Record of the 21st Meeting, UN Doc. A/C.6/59/SR.21 (2004), paras. 21, 32, 39; Summary Record of the 22nd Meeting, UN Doc. A/C.6/59/SR.22 (2004), paras. 6, 8, 62; Summary Record of the 23rd Meeting, UN Doc. A/C.6/59/SR.23 (2004), paras. 8, 22, 26, 39.

[41]Given that '[t]he transfer of responsibility from the State whose forces committed the wrongful act to the United Nations means that every member State of the organization is jointly responsible', the members may be regarded as (specially-)affected states: C. Yamada, 'Revisiting the International Law Commission's Draft Articles on State Responsibility', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 117, at 122.

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It is true that peacekeepers are functionally linked with the UN; however, they never cease to be members of the armed forces of their own countries, as indicated by the significance of the control retained by TCNs.[42] In this respect, Luigi Condorelli, an eminent scholar on the doctrine of attribution, is unquestionably correct in identifying the organizational status that ties peacekeepers concurrently to TCNs and the UN.[43] He contended that 'the peacekeepers, when they execute their mission, certainly represent the "elements of governmental authority" of the UN, but also those of their state'.[44] On the one hand, these findings naturally led him to espouse dual (concurrent) attribution to both the UN and each TCN.[45] On the other hand, as demonstrated by Zwanenburg, the relevant practice has shown the precedence (if not exclusiveness) of attribution to the UN.[46] The reason is that the special considerations of peacekeeping operations have not allowed for straightforward argumentation and have justified some modifications. In other words, the institutional fragility that is inherent to the UN and its operations necessitates a unique framework for attribution.

2.2 An institutional aspect of the effective control test

Paul De Visscher illustrated this point with great exactitude. According to him, nothing would be more dangerous for the UN's authority than shifting the responsibility for damage illegally caused in UN peacekeeping operations onto member states or TCNs.[47] He made a further clarification in his report submitted to *l'Institut de Droit international*:

> [I]f one admits that the Charter intended that the collective use of force for the purpose of the maintenance of peace should be placed under the control of the UN, one must conclude from it that the UN as such must assume the responsibility for such use of force. It is clear, in fact, if the responsibility for wrongful acts committed by UN forces were put onto participating states, they would be naturally inclined either to refuse all participation in peacekeeping operations or to demand the complete control of tactical and strategic levels over their contingents. The operations of UN forces, on which decisions should be made in the common interests, would thus degenerate into a multiplicity of military interventions, which would generate a state of anarchy that would be radically incompatible with the purposes and the principles of the UN.[48]

As aptly described by De Visscher, two interrelated but distinct policy considerations can be identified. First, as the Secretariat emphasized, the UN is always 'keen to maintain the integrity of

[42]Report of the ILC (2011), *supra* note 29, at 56. See also Palchetti, *supra* note 33, at 10–13.

[43]L. Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire', (1995) 78 *Rivista di diritto internazionale* 881, at 888.

[44]Ibid., at 896 (translation by the author).

[45]Ibid., at 893–7. His view was recently restated: 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', (2014) *Questions of International Law* (Zoom-in 1) 3.

[46]Zwanenburg, *supra* note 6, at 101–2. Although Gaja observed in general terms that 'conduct does not necessarily have to be attributed exclusively to one subject only' (Gaja, *supra* note 23, at 4) and 'dual attribution of the same conduct cannot be excluded' (ibid., at 10), neither his report nor the ARIO commentary provides a conclusive answer on this point as far as UN peacekeeping operations are concerned (ibid., at 14; Report of the ILC (2011), *supra* note 29, at 56–60). It is true that the ECtHR implied that attribution to the UN may be compatible with attribution of the same conduct to TCNs (*Al-Jedda v. the United Kingdom*, Judgment of the Grand Chamber of the ECtHR of 7 July 2011, Application no. 27021/08, para. 80), but the findings concerned a UN-authorized operation (Palchetti, *supra* note 33, at 24).

[47]P. De Visscher, 'Observations sur le fondement et la mise en oeuvre du principe de la responsabilité de l'Organisation des Nations Unies', (1963) 40 *Revue de droit international et de droit comparé* 165, at 168.

[48]P. De Visscher, 'Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies', (1971, t. 1) 54 *Annuaire de l'Institut de Droit International* 1, at 56 (translation by the author).

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the United Nations operation vis-à-vis third parties'.[49] If TCNs were held responsible for peacekeepers' conduct despite lacking authority to give instructions on what to do on the ground, they would naturally seek to reassume the authority, which would lead to the disintegration of UN peacekeeping operations.[50] Second, the UN practice of assuming full responsibility for peacekeepers' conduct has been motivated by the necessity to ensure troop contributions from members for future operations (the viability and sustainability of the operations).[51] It should be noted that the rebuttal phase of the effective control test plays a significant role not only in allocating responsibility but also from the institutional perspective. If international law allowed for attribution to the UN of conduct which a TCN had ordered, the operational integrity would be seriously jeopardized since this would mean that member states would be able to do whatever they want without assuming any legal responsibility while participating in peacekeeping operations.

Thus, the effective control test has been located at the interface between the law of international responsibility and the law of international organizations. On the one hand, we are required to implement fair allocation of responsibility for internationally wrongful acts on the basis of whose functional link with the perpetrator matters. On the other hand, the effective control test is expected to play a role in ensuring the integrity and viability of UN peacekeeping operations.[52] From the latter perspective, attribution to TCNs should be exceptional. It is exactly on this point that the preventive interpretation diverges from the presumptive approach. Before moving on to scrutinizing the former, we need to address the issue of the attribution of peacekeepers' *ultra vires* conduct, because those two approaches are also in sharp contrast to one another in this respect.

2.3 Attribution of peacekeepers' ultra vires conduct to the UN

While attribution is premised on the existence of a functional link, that link has not been construed in a very strict manner. Conduct must be carried out in connection with some function, but it is not required that the conduct constitute faithful performance of the function or the verbatim implementation of instructions given in accordance with the organizational structure of the state or IO. Even when a peacekeeper acts in the absence of or against an order, their conduct is still attributable insofar as there is a certain connection between the conduct and the function entrusted to them.[53] For instance, through the lump-sum agreement with Belgium, the UN provided compensation to victims of such misdeeds as looting and theft.[54] It can be reasonably assumed that those wrongful acts were carried out against, or at least without, orders given via the UN chain of command. Some ONUC members plundered and set fire to property owned by a Belgian national. Once the facts of the case were ascertained, the UN acknowledged its responsibility and added the victim's name to the list of compensable claims.[55]

As demonstrated by Theodor Meron, attribution of conduct that exceeds the agent's authority or contravenes instructions is still justifiable under international law if the conduct has been carried out

[49]Comments and Observations, *supra* note 38, at 14.

[50]Palchetti, *supra* note 33, at 24.

[51]C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-support Operations: An Inquiry into the Application of the "Effective Control" Standard after Behrami', (2012) 45 *Israel Law Review* 151, at 164.

[52]In *Behrami and Saramati*, the ECtHR placed a high premium on the institutional interests in attributing the misconduct committed in the course of the UN-authorized operation in Kosovo to the UN (*Behrami and Saramati*, *supra* note 37, paras 132–41) to the point of being criticized for putting too much emphasis on them (see, e.g., A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', (2008) 8 *Human Rights Law Review* 151, at 164). It is true that the legality under the institutional law of the UN is a different legal issue from attribution, but the institutional considerations should not be disregarded.

[53]Gaja, *supra* note 23, at 15.

[54]J. Salmon, 'Les accords Spaak-U Thant du 20 février 1965', (1985) 11 *Annuaire Francais de Droit International* 468, at 478.

[55]*Manderlier v. United Nations and Belgium*, Court of First Instance of Brussels, Judgment of 11 May 1966, [1972] 45 ILR 446, at 446–7.

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in connection with the functions entrusted to its author in that the delegation contributes to the attempt or accomplishment of the conduct.[56] The same goes for the UN because it, just like states, organizes itself with natural persons and entrusts those persons with some functions in order to realize its own will and accomplish its purposes. By doing so, it enables the persons to carry out (or at least facilitate) certain activities which may constitute internationally wrongful acts and benefits from those activities. Contrariwise, private conduct that has nothing to do with the peacekeeper's function has not been regarded as attributable. The UN Office of Legal Affairs has stated that 'United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts',[57] and the position has been endorsed in the ARIO commentary.[58]

Therefore, on the one hand, peacekeepers' conduct is no longer attributable to the UN in circumstances such as where:

> [t]he Force Commander of UNOSOM II [United Nations Operation in Somalia II] was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command.[59]

On the other hand, misconduct that is committed by a peacekeeper against an order given via the UN chain of command is still attributable to the UN if the violation of the order is not directed by the TCN but done *on the peacekeeper's own initiative*.[60] This interpretation, however, is not shared by proponents of the preventive interpretation.

3. Oscillating between presumption and prevention

3.1 Rise of the preventive interpretation and its judicial reception in the Netherlands

It is arguable that the preventive approach is a scholarly initiative. When it was initially proposed in 2010, Dannenbaum appeared to be fully aware that his view was neither based on UN practices nor on judicial precedents.[61] Nevertheless, he asserted that this proposition has commensurate advantages. Among others, 'it matches liability to responsibility in a way that provides victims with the maximum recourse to adequate remedy within the confines of what is morally and legally sensible'.[62] The core of his argument is that '[r]ather than "overall operational control" as it has thus far been understood in the peacekeeping context, "effective control" must be understood to mean "control most likely to be effective in preventing the wrong in question"'.[63]

[56]T. Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials', (1957) 85 *British Yearbook of International Law* 85, at 105–14.

[57]United Nations Juridical Yearbook 1986, Memorandum to the Director, Office for Field Operational and External Support Activities, UN Doc. ST/LEG/SER.C/28, at 300.

[58]Report of the ILC (2011), *supra* note 29, at 61. The commentary refers to, as a clear example of an off-duty act, a case where a member of the United Nations Interim Force in Lebanon engaged in moving explosives to the territory of Israel. However, peacekeepers may take advantage of their functions in committing wrongdoings even when they are off-duty. It may happen that a peacekeeper commits a robbery on a day off with a weapon supplied for the purpose of a peacekeeping operation. Thus, as the commentary points out, '[o]ne would then have to examine whether the *ultra vires* conduct in question is related to the functions entrusted to the person concerned'.

[59]Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel which Led to Casualties among them, UN Doc. S/1994/653 (1994), para. 243. The ARIO commentary observes that it would be difficult to attribute UNOSOM II members' conduct to the UN in such a circumstance (Report of the ILC (2011), *supra* note 29, at 58).

[60]Palchetti, *supra* note 2, at 287–9.

[61]Dannenbaum observed that 'current international practice fails to consider the full complexity of the peacekeeper's context and, as a result, has developed a legal regime that does not properly and justly attribute responsibility': Dannenbaum, *supra* note 12, at 116.

[62]Ibid., at 158.

[63]Ibid., at 114.

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The preventive approach puts special emphasis on authority over personnel, disciplinary and criminal matters,[64] which has always been retained by TCNs.[65] Dannenbaum argued that the approach is 'most consistent with principles elaborated in the ILC Commentary'.[66] The allegedly relevant part of the commentary is as follows:

> Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct ... Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.[67]

However, extracting that part reflects a misunderstanding. The only practice that the commentary refers to in this context was the following statement by the UN Office of Legal Affairs with regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES):

> Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention.[68]

The obligations discussed here were those of the states parties to 'penalize trade in, or possession of, such specimens, or both' and 'to provide for the confiscation or return to the State of export of such specimens' under Article VIII(1) of the CITES. Therefore, the idea that the Office of Legal Affairs sought to convey was not that trade in or possession of such specimens by UN peacekeepers may be attributable to TCNs, but that a state may be responsible for its own failure to take appropriate measures such as penalization of the activities prohibited by the CITES. Thus, the legal question addressed there was who bears the primary obligations in the context of UN peacekeeping operations, rather than to whom the conduct is attributable.[69] Nevertheless, the reliance on the ILC commentary might not be essential for the preventive interpretation since it is proposed as a new approach to attribution of peacekeepers' misconduct.[70]

Arguably, as Dannenbaum pointed out, 'in many cases, human rights abuses occur at the foot-soldier level, having been ordered neither by the United Nations nor by the relevant state'.[71] It may happen that peacekeepers act beyond the scope of the authority granted them by UN commanders. In such a circumstance, conduct 'should be attributed solely to the troop-contributing state', since it 'is endowed with all of the competencies relevant to the prevention of *ultra vires* abuses'.[72] TCNs:

[64]Ibid., at 145–7.

[65]UN DPKO and DFS, *supra* note 5, para. 7.

[66]Dannenbaum, *supra* note 12, at 157.

[67]Report of the International Law Commission on the Work of its 56th Session (3 May–4 June and 5 July–6 August 2004), 2004 YILC, Vol. II (Part 2), at 51.

[68]*United Nations Juridical Yearbook 1994*, UN Doc. ST/LEG/SER.C/32, at 450.

[69]Z. Deen-Racsmány, 'The Relevance of Disciplinary Authority and Criminal Jurisdiction to Locating Effective Control under the ARIO', (2016) 13 *International Organizations Law Review* 341, at 352–5.

[70]Dannenbaum, *supra* note 12, at 158.

[71]Ibid., at 156.

[72]Ibid., at 158.

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> can select the right people for peacekeeping missions, train them well, promote them to positions of responsibility when they are ready, discipline them properly for acts that exceed the authority granted to them, and render them liable to criminal punishment when they commit crimes … By contrast, the United Nations has limited capacity to do anything at all.[73]

It may also happen that peacekeepers commit misconduct in the absence of specific UN orders while they act on an authorized discretion.[74] In this scenario, while the UN commander 'could have properly delimited the authorization so as to preclude human rights violations … [t]he arguments regarding the importance of domestic authority … apply here just as' in the scenario of *ultra vires* conduct.[75] Thus, 'both the United Nations and the troop-contributing state … have "effective control" over the individuals committing the violation', which leads to joint and several liability.[76]

Although it is apparent that the preventive approach diverges from the traditional view embodied in the ARIO, it has acquired some proponents or, at least, has rarely been squarely criticized.[77] Cedric Ryngaert, for instance, observed that '[t]he argument that ties liability to effective control and the capacity to prevent rights violations in the context of UN peace operations has been made most convincingly by Dannenbaum' and 'deserves support'.[78] The preventive approach gradually expanded its sphere of influence among international lawyers,[79] and it was not long before it was actually applied by domestic courts.

In 2011, The Hague Court of Appeal in the *Nuhanović* case unequivocally adopted the preventive interpretation[80] and held that 'the decisive criterion for attribution is not who exercised "command and control", but who actually was in possession of "effective control"'.[81] It continued as follows:

> The question whether the State had "effective control" over the conduct of Dutchbat … must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question *whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned*.[82]

[73] Ibid., at 164.

[74] Ibid., at 165–7.

[75] Ibid., at 167–8.

[76] Ibid., at 169.

[77] See, e.g., Palchatti, *supra* note 33, at 20, ft. 57. But see A. Nollkaemper, 'Dual Attribution Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', (2011) 9 *Journal of International Criminal Justice* 1143, at 1148.

[78] Ryngaert, *supra* note 51, at 155: Ryngaert continued that '[t]his is not too revolutionary an idea, as it was already implied by Seyersted in his 1966 monograph', ibid., at 156. Seyersted was quoted as arguing that 'if a Force is under national command, the Organization has no legal responsibility for it and does not represent it internationally' (Seyersted, *supra* note 4, at 411). However, he continued that '[t]hus, the United Nations Force in Korea was under the international responsibility of the United States and, to a lesser degree, of the other participating States. The responsibility for a Force established under the Uniting for Peace resolution would be divided between the State in command and the other participating States in a similar manner' (ibid., at 411–12). Therefore, given that he placed emphasis on the operational level of authority and control (ibid., at 411), it seems that Seyersted represented the traditional approach rather than foretold the preventive interpretation.

[79] R. Burke, 'Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets', (2012) 16 *Journal of International Peacekeeping* 1; N. Perova, 'Disentangling "Effective Control" Test for the Purpose of Attribution of the Conduct of UN Peacekeepers to the States and the United Nations', (2017) 86 *Nordic Journal of International Law* 30. Cf. Deen-Racsmány, *supra* note 69, at 355–64; B. Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control', (2017) 18 *Melbourne Journal of International Law* 154, at 170–1, 174–6; Ekanayake and Harris Rimmer, *supra* note 34, at 28–37.

[80] The court explicitly referred to the 2010 article by Dannenbaum: *Nuhanović* (Court of Appeal), *supra* note 13, para. 5.8.

[81] Ibid., para. 5.7.

[82] Ibid., para. 5.9 (emphasis added).

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Thus, it placed special emphasis on authority over personnel, disciplinary and criminal matters.[83]

It should be noted, however, that the court also highlighted the peculiarity of the case, in which the mission of Dutchbat to protect the safe area had already failed, and the only option left was evacuation.[84] In the process of evacuation, decisions were made by mutual agreement between the UN and the Dutch Government. Thus, '[t]he Dutch Government participated in that decision-making at the highest level'.[85] The court concluded from the above that '*[d]uring this transition period*, besides the UN, the Dutch Government in The Hague had control over Dutchbat as well', and 'it would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time'.[86]

Thus, in concluding that 'the State possessed "effective control" over the alleged conduct of Dutchbat ... and that this conduct can be attributed to the State',[87] while the court obviously aligned itself with Dannebaum, it also underlined the material (if not interruptive) involvement by the state with the UN command structure, which shows its reluctance to relinquish the presumptive approach. It is unclear how these angles are interrelated in the judgment; however, it seems that the court regarded both factors as essential in order for the Dutchbat's conduct to be attributable to the Netherlands.[88]

It was exactly and exclusively on this point that Dannenbaum disagreed with the Court of Appeal. In reviewing the judgment, he remarked that:

> [o]verall, despite the mysteriousness of the "transition period" on which it relies, the Court's application of the "power to prevent" interpretation to the unusual facts before it is plausible. However, the Court could have reached the same conclusion via a simpler application of that interpretation of "effective control".[89]

For him, the applicability of the preventive interpretation is not limited to the acts and omissions that took place during the transition period, but extends to those in ordinary situations.[90]

Not surprisingly, the Court of Appeal's application of the effective control test was challenged by the Netherlands,[91] but the Supreme Court upheld the Court of Appeal's findings on attribution. It verified that:

> [f]or the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently.[92]

[83]Ibid., para. 5.10.

[84]Ibid., para. 5.11.

[85]Ibid., para. 5.12.

[86]Ibid., para. 5.18 (emphasis added).

[87]Ibid., para. 5.20.

[88]B. Kondoch and M. Zwanenburg, 'International Responsibility and Military Operations', in T.D. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2015), 559 at 564–5.

[89]T. Dannenbaum, 'Killing at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', (2012) 61 *International and Comparative Law Quarterly* 713, at 726.

[90]Dannenbaum, *supra* note 2, at 127.

[91]Contrariwise, commentators have rarely criticized the judgment: O. Spijker, 'The Netherlands' and the United Nations' Legal Responsibility for Srebrenica Before the Dutch Courts', (2011) 50 *Military Law and the Law of War Review* 517, at 522–9; 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', (2012) 25 *Leiden Journal of International Law* 521, at 527–32. Interestingly, the ILC in its 2011 report did not go any further than summarizing the Court of Appeal's judgment along with the District Court's judgment: Report of the ILC (2011), *supra* note 29, at 59–60.

[92]*Nuhanović* (Supreme Court), *supra* note 13, para. 3.11.3.

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The Supreme Court also followed the hybrid approach, laying special emphasis on the peculiarity of the case,[93] and it concluded that '[t]he Court of Appeal's ruling that the State had effective control over the conduct ... does not reveal an incorrect interpretation or application of the law on the concept of effective control'.[94]

In the *Stichting Mothers of Srebrenica* case, the Dutch courts cast new light on the interpretation and application of the effective control test. While the District Court in The Hague, in identifying the content of the effective control test, aligned itself with The Hague Court of Appeal in *Nuhanović*,[95] it adhered more strongly to Dannenbaum's theory.[96] The District Court went further than the *Nuhanović* judgments by maintaining that when peacekeepers act against UN orders on their own initiative, the conduct is attributable to the TCN. In the court's opinion, it is 'because the State has a say over the mechanisms underlying' the *ultra vires* conduct, such as 'selection, training and the preparations for the mission of the troops placed at the disposal of the UN', and it also 'has a say about personnel matters and disciplinary punishments'.[97] There was no need to establish that the TCN gave some instruction or exerted specific influence regarding the *ultra vires* conduct in order for it to be attributable to the TCN.[98]

It is true that the court also stressed the peculiarity of this case. It held that since 'during the transitional period the State did have effective control over providing humanitarian assistance to and preparation of Dutchbat's evacuation of the refugees in the mini safe area',[99] the Dutchbat's conduct carried out within the temporal and spatial limitations 'may be attributable to the State'.[100] However, it continued that 'if and inasmuch as Dutchbat acted contrary to' UN orders, 'this *ultra vires* action must be attributable to the State'.[101] Then the court investigated whether acts and omissions of Dutchbat that took place beyond the temporal and spatial limitations were still attributable to the Netherlands on the ground that they constituted the violation of the order given via the UN chain of command,[102] and gave affirmative answers concerning some of them.[103]

While The Hague Court of Appeal also found the Netherlands responsible, it did not appear to endorse the preventive interpretation anymore. Rather, the court regarded the operational authority as decisive in determining who exercised effective control over the conduct in question and, in this sense, reverted to the traditional approach. Contrary to the lower court, the Court of Appeal interpreted Article 8 of the ARIO as expected by the ILC and stated that the *ultra vires* conduct was still attributable to the UN if the peacekeeper acted in their official capacity and within the overall functions of the UN.[104] It then observed that '[t]he control of the State over mechanisms such as recruitment, selection and preparation of the troops, and the control of the State over staff matters and disciplinary measures', on which the District Court based its findings, do not render the on-the-spot operational decisions that deviate from UN orders attributable to the state.

[93] Ibid., para. 3.12.2.

[94] Ibid., para. 3.12.3.

[95] *Stichting Mothers of Srebrenica* (District Court), *supra* note 14, para. 4.46.

[96] Dannenbaum, *supra* note 2, at 128–30.

[97] *Stichting Mothers of Srebrenica* (District Court), *supra* note 14, para. 4.57.

[98] Ibid., para. 4.58.

[99] Srebrenica and its surroundings were designated as a safe area by Security Council Resolution 819 (UN Doc. S/RES/819 (1993), para. 1): 'The mini safe area' consisted of the Dutchbat's compound, which was located near the city, and its surrounding areas. Over 20,000 people sought refuge in the mini safe area (*Stichting Mothers of Srebrenica* (District Court), *supra* note 14, para. 2.35).

[100] Ibid., para. 4.87.

[101] Ibid., para. 4.89.

[102] Ibid., para. 4.93.

[103] Ibid., paras. 4.94–4.115.

[104] *Stichting Mothers of Srebrenica* (Court of Appeal), *supra* note 15, para. 15.2. Ryngaert observed that the Court of Appeal corrected the District Court's mistake. C. Ryngaert, 'Peacekeepers Facilitating Human Rights Violations: The Liability of the Dutch State in the *Mothers of Srebrenica* Cases', (2017) 64 *Netherlands International Law Review* 453, at 455–6.

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Then it emphasized that '[e]ssentially, the State had precisely NO controlling powers with regard to operational decisions after the transfer of the *command and control*'.[105]

The Court of Appeal, thus, focused on the Dutch government's participation in the decision-making on the evacuation and established that the relevant decision was agreed upon by the UNPROFOR Commander acting on behalf of the UN and Dutch military officers who were, in turn, acting on behalf of the Netherlands.[106] Therefore, it concluded that the state exercised effective control over Dutchbat's conduct after that decision, with which the transitional period commenced, and this was the case as far as the evacuation of the refugees in the mini safe area and the withdrawal of Dutchbat were concerned.[107]

It can be concluded from the above that the Court of Appeal found it unnecessary to have recourse to the preventive interpretation in justifying the attribution of Dutchbat's conduct to the Netherlands and, thus, rejoined the traditional approach, laying special emphasis on who had exercised the operational authority. Therefore, it is high time for these approaches to the effective control test to be assessed.

3.2 Assessing the presumptive and preventive approaches

First, it has already become clear that the preventive approach cannot be comprehended within the legal framework enshrined in the ASR and the ARIO. It does not share the same starting point: the functional rationale for attribution. Since what matters is who has the ability to prevent the misconduct in question,[108] the scope of conduct that is attributable to TCNs (or the UN) is not delimited by the (non-)existence of a functional link.[109] In military contexts, 'superiors (*i.e.* the State) can exert a considerably larger degree of control than in civilian structures. Combined with the right to exercise criminal jurisdiction, the State ... clearly has an exceptional influence over the conduct of its military personnel'.[110] Therefore, conduct is attributable to TCNs not only when troops of UN peacekeeping forces act against or in the absence of UN orders, but also when they act in their private capacity. Thus, the effective control test considerably (almost unlimitedly) broadens the scope of conduct that is attributable to TCNs,[111] and operates as a very inflexible rule.[112]

Second, the preventive approach to the effective control test also has a grave consequence for its institutional aspect. It would be fair to note that Dannenbaum is fully aware of it,[113] and has carefully taken institutional interests into account in elaborating his own scheme of liability. For instance, he contended that 'the human rights violations of peacekeepers perpetrated in the execution of a direct U.N. command should not be attributed to any party but the United Nations itself'; otherwise, TCNs would 'naturally claim that they need to be able to protect themselves from liability by ensuring that their troops do not do anything that might engage that liability'.[114]

[105] *Stichting Mothers of Srebrenica* (Court of Appeal), *supra* note 15, para. 15.3 (emphasis in original).

[106] Ibid., paras. 23.8–24.1.

[107] Ibid., paras. 24.2–25.

[108] It is said that the Court of Appeal's judgment in *Nuhanović* was based on 'the preventative rationale': Ryngaert, *supra* note 51, at 173.

[109] Under the current legal system, as Gaja insightfully implied, attribution is not premised on control itself, but the existence of a functional link. Control serves as an indicative factor in establishing the functional link: Gaja, *supra* note 23, at 7, fn. 28.

[110] Deen-Racsmány, *supra* note 69, at 366–7.

[111] Nollkaemper, *supra* note 77, at 1148; Palchetti, *supra* note 2, at 287–8; Deen-Racsmány, *supra* note 69, at 358–64.

[112] P. d'Argent, 'State Organs Placed at the Disposal of the UN, Effective control, Wrongful Abstention and Dual Attribution of Conduct', (2014) *Questions of International Law* (Zoom-in 1) 17, at 24–5, 27–8. However, it could be noted that Dannenbaum conceived that this inflexibility has an advantage in terms of protecting vulnerable victims: T. Dannenbaum, 'Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Ventures', in A. Nollkaemper and D. Jacobs (eds.), *Distribution of Responsibilities in International Law* (2015), 192, at 214–15.

[113] Dannenbaum, *supra* note 12, at 184–7.

[114] Ibid., at 178–9.

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However, given that a UN order, the execution of which will automatically constitute a wrongful act, should be a rarity,[115] his device has questionable practical relevance.[116]

Lastly, it should be noted that inquiring whether a state has been able to prevent harmful conduct from being committed is by no means new to the law of international responsibility. Such an investigation has been conducted in relation to the element of wrongfulness (especially to a breach of an obligation of due diligence), rather than to the other element of an internationally wrongful act, that is, attribution. Despite a linkage between the doctrine of attribution and the due diligence principle, 'which is rooted in legal history',[117] those are conceptually distinguished under the current legal system on state responsibility. This means that the legal operation of attribution is expected to play a different role from examining whether a state has failed to exercise its ability to prevent.[118] Identifying a functional link is one such role. While wrongfulness or a breach by a state of its obligation is the reason why damage suffered by *another person* should be relocated to the state, attribution is the legal operation of demarcating *the self* from others for the purpose of international responsibility. How can we identify the state as a person bearing the obligation to prevent harmful conduct without tracing a functional link?[119]

Therefore, the 2017 *Stichting Mothers of Srebrenica* judgment's return to the presumptive approach seems to be laudable. However, its conclusion was the opposite of that of the District Court in its *Nuhanović* judgment, which was also based on the presumptive interpretation. What accounts for this difference? While the latter judgment was based on the assumption that '[i]f ... Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution', and thus the peacekeepers' conduct remains attributable solely to the UN,[120] the Court of Appeal presupposed that it was not required to establish interruption by the TCN of the UN chain of command in order for the peacekeepers' conduct to be attributable to that state. Which path should be followed?

It is arguable that for the sake of the integrity and viability of peacekeeping operations, attribution to TCNs should be interpreted in as limited a fashion as possible. Nevertheless, as the preventive approach properly highlights, those institutional considerations should be in equilibrium with the need to provide remedies for victims of peacekeepers' misconduct. In this regard, two points may be made. First, as far as Dutchbat in the evacuation phase is concerned, attributing its conduct to the Netherlands would carry no risk to the operational integrity, since the attribution results from the fact that the Netherlands did reassume the operational authority and control. Although the state's control cannot be qualified as interruptive given the prior agreement between the UN and the Netherlands, it is not the case that the state is held responsible despite lacking authority to give instructions on what to do on the ground. Second, as to the viability and sustainability of UN peacekeeping operations, since decisions to contribute troops always depend on various international and domestic political factors,[121] whether (and how) attribution of legal

[115]Boutin, *supra* note 79, at 172–3.

[116]As admitted by Dannebaum, even a scenario in which a peacekeeper commits a wrongdoing while acting within their discretion as granted by the UN commander rarely comes about: Dannenbaum, *supra* note 12, at 165–6.

[117]J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', (2004) 36 *New York University Journal of International Law and Politics* 265, at 270–1.

[118]According to Dannenbaum, a threshold should be high in the case of attribution, whereas whether a state has met the obligation of 'preventive due diligence' may be assessed in a less strict manner. For him, the difference between these two norms appears to be a matter of degree: Dannenbaum, *supra* note 112, at 212–15.

[119]Report of the ILC (2001), *supra* note 30, at 38–9. But see G. Arangio-Ruiz, 'State Responsibility Revisited: The Factual Nature of the Attribution of the Conduct to the State', (2017) 100 *Rivista di diritto internazionale* (Supplement al n. 1/2017) 1.

[120]*H.N. v. the Netherlands*, *supra* note 8, para. 4.14.1.

[121]A.J. Bellamy and P.D. Williams, 'Explaining the National Politics of Peacekeeping Contributions', in A.J. Bellamy and P.D. Williams (eds.), *Providing Peacekeepers: The Politics, Challenges, and Future of United Nations Peacekeeping Contributions* (2013), 417. For Dutch participation in UN peacekeeping operations see N. van Willigen, 'A Dutch Return to UN Peacekeeping?', (2016) 26 *International Peacekeeping* 702.

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responsibility to TCNs makes a difference in troop contributions remains to be clarified.[122] Therefore, it would be going too far to argue that the effective control test excludes attribution to TCNs even when they take part in the decision-making process at the operational level.[123]

The relevance of the interpretation advanced here is not necessarily limited to extremely exceptional situations, such as that in which the relevant actors were placed in Srebrenica. As Palchetti observed:

> 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 commander.[124]

Where it is demonstrated that the relationship between the national contingent and its government has gone beyond a mere reporting mechanism and amounted to that of prior authorization to follow UN orders, it may no longer be reasonable to exclude attribution to that state even if the UN orders have been eventually followed and thus, the involvement by the TCN in the specific case falls short of interruption of the UN chain of command.[125]

4. Conclusion

While no one objects to attribution of UN peacekeepers' conduct being regulated by the effective control test, there are different approaches to it. Not only are those approaches based on disparate theoretical constructions, they may also lead us to diametrically opposite conclusions in practice. However, there seems to be no need to drastically reinterpret the effective control test in order to guarantee effective remedies for alleged victims. Attribution of peacekeepers' conduct to TCNs may be justified within the traditional legal framework that is based on the functional rationale. There always exists the normative basis for attribution to TCNs,[126] and what matters here is to what extent international law places (or should place) a premium on the institutional interests.

Besides, from a practical perspective, the preventive approach does not necessarily warrant adequate and effective compensation for victims of peacekeepers' misconduct. This does not seem to be unconnected with the fact that jurisprudence endorsing the preventive interpretation has been limited to Dutch jurisdictions thus far. UN peacekeepers 'come from nations large and small, rich and poor'.[127] The availability and effectiveness of procedures to seek redress and the likelihood that such procedures, if available, will end up providing adequate compensation would completely depend on which state the peacekeeper in question is from.[128] It is true that the availability of dispute settlement mechanisms is a different legal issue from attribution. However, Dannenbaum extensively examined (un)available procedures at the domestic and UN levels,[129] and then the preventive approach was proposed in order to overcome the procedural problem.[130]

[122]It might be noted that, however, what matters in terms of the customary law-making process is that the UN, in generating the practice of assuming full responsibility for peacekeepers' conduct, has consistently retained the perception that attribution to TCNs would have significant repercussions on troop contributions for future operations.

[123]Such involvement by TCNs as falls short of interruption of the UN chain of command does not negate attribution to the UN since the functional link between the peacekeeper and the UN is not broken: Palchetti, *supra* note 33, at 26.

[124]Ibid., at 11. See also Ekanayake and Harris Rimmer, *supra* note 34, at 15, 19–20.

[125]*Mukeshimana-Ngulinzira*, *supra* note 9, para. 38.

[126]Condorelli, *supra* note 45, at 10–13. See also Messineo, *supra* note 2, at 88–97.

[127]United Nations, *Troop and Police Contributors*, available at peacekeeping.un.org/en/troop-and-police-contributors.

[128]H. Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts as a Way to Avoid UN Reform?', (2015) 62 *Netherland International Law Review* 259, at 275.

[129]Dannenbaum, *supra* note 12, at 121–9.

[130]'[I]f the United Nations is properly attributed with full and exclusive responsibility for such wrongs, the inadequacy of its remedial mechanisms is not reason enough to attribute responsibility to another actor. However, the current situation

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Recent developments have illustrated that the attribution to TCNs is not a panacea. Although it is public knowledge that the 2010 outbreak of cholera in the Republic of Haiti was triggered by the Nepalese contingent of the Mission des Nations Unies pour la stabilisation en Haïti (MINUSTAH), the lawsuits were lodged against the UN before the US courts in New York.[131] That strategy appears to be more feasible in the eyes of the plaintiffs than seeking to hold Nepal responsible before Nepalese courts. To date, however, the merits of the claim have never been examined by the US courts due to the UN's jurisdictional immunity.[132] Therefore, the accountability gap regarding peacekeepers' abuses must be fulfilled by providing a fair and effective mode of settlement through which alleged victims are allowed to seek redress directly from the UN,[133] rather than by broadening attribution to TCNs.

emphasizes the importance of carefully considering how responsibility for peacekeepers' human rights abuses should be attributed' (ibid., at 128–9). See also Boutin, *supra* note 79, at 178.

[131]For a legal analysis of the event see Y. Okada, 'Interpretation of Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN: Legal Basis and Limits of a Human Rights-based Approach to the Haiti Cholera Case', (2018) 15 *International Organizations Law Review* 39. See also M. Buscemi, 'La codificazione della responsabilità delle organizzazioni internazionali alla prova dei fatti: Il caso della diffusione del colera ad Haiti', (2017) 100 *Rivista di diritto internazionale* 989.

[132]*Delama Georges v. United Nations*, 84 F. Supp. 3d 246 (SD NY, 9 January 2015); *Delama Georges v. United Nations*, 834 F. 3d 88 (2nd Cir, 18 August 2016).

[133]The UN is under the obligation to provide alternative means for dispute settlement as a counterpart of its immunity under Art. VIII Sec. 29 of the Convention on the Privileges and Immunities of the UN: Okada, *supra* note 131, at 47–8. It is sometimes contended that 'states might be held responsible for failing to pressure the organization to institute a robust and transparent claims review system': Dannenbaum, *supra* note 112, at 224.

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