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Responsibility of the United Nations for peacekeeping operations: recent developments in dual attribution

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ABSTRACT

This article critically examines the existing practice on the topic of responsibility for the United Nations (UN) peacekeeping operations. Peacekeeping is a tool that has encountered many changes during the past few decades. It has developed into an instrument that can be authorized to use force beyond self-defense in a high-risk environment with limited consent by the Host State. This increased authorization to use force has also brought about an increased risk for potential wrongdoings by peacekeepers and has highlighted the issue of UN responsibility. It has long been the practice of the Organization to assume exclusive responsibility for peacekeeping operations. Yet, due to its broad immunities and other jurisdictional issues, this largely remains a theoretical concept. As a way around this stand-still, cases have been filed at national courts of troop-contributing States. In the recent judgment of *Mothers of Srebrenica,* the Supreme Court of The Netherlands had issued a ruling in which The Netherlands was found partially responsible for their actions. This brings to question the fairness of the current situation in which only one actor out of the two involved on a peacekeeping mission accepts its share of responsibility.

KEYWORDS: Responsibility, peacekeeping, United Nations, state responsibility, dual attribution, international organizations, international law, *Mothers of Srebrenica*.

POVZETEK

Članek analizira trenutno prakso na temo odgovornosti za mirovne operacije Združenih Narodov (ZN). Mirovne operacije so orodje, ki je v preteklih desetletjih doživelo veliko sprememb. Postale so instrument, ki je lahko avtoriziran za uporabo sile tudi v drugih slučajih kot le v samoobrambi, ki deluje v visoko riskantnem okolju, z omejenim soglasjem države gostiteljice. Povečana avtorizacija za uporabo sile s sabo prinese tudi večje tveganje za potencialna protipravna ravnanja s strani mirovnikov ter osvetli problem odgovornosti Združenih Narodov. Ustaljena praksa ZN na tem področju je, da sami prevzamejo vso odgovornost. Vendar zaradi širokih imunitet ter drugih težav povezanih z jurisdikcijo to ostaja predvsem teoretični pojem. Da bi zaobšli to pomanjkanje odgovornosti, so oškodovanci začeli vlagati tožbe tudi na sodišča držav članic, ki prispevajo svoje kontingente. V nedavni sodbi *Matere Srebrenice* je Vrhovno sodišče Nizozemske izdalo sodbo v kateri je spoznalo Nizozemsko delno odgovorno za njena dejanja na relevantni mirovni operaciji. Posledično se lahko vprašamo o pravičnosti trenutne situacije v kateri le en udeleženec od dveh, ki sodelujeta na mirovniški operaciji, prevzema svoj del odgovornosti.

KLJUČNE BESEDE: Odgovornost, mirovne operacije, Združeni Narodi, odgovornost držav, dvojna atribucija, mednarodne organizacije, mednarodno pravo, *Matere Srebrenice*.

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Introduction

> "Our first duty is to uncover, and confront, the full truth about what happened. For us who serve the United Nations, that truth is a hard one to face. We can say – and it is true – that great nations failed to respond adequately. We can say – and it is also true – that there should have been stronger military forces in place, and a stronger will to use them. We can say – and it is undeniable – that blame lies, first and foremost, with those who planned and carried out the massacre, or who assisted them, or who harboured and are harbouring them still. But we cannot evade our own share of responsibility".

The speech was delivered at the tenth anniversary of the Srebrenica massacre by the former United Nations (UN) Secretary-General Mr. Kofi Anan (2005). The tragic events which occurred in Bosnia and Herzegovina around the year 1995, have shed light not only on the primary responsibility of the perpetrators but also on the less obvious one of the UN and The Netherlands whose troop contingents were deployed in Srebrenica during these crucial times.

The UN has been criticized for its failure to respond appropriately on the mission, and afterward for its failure to accept its share of legal responsibility (McGreal, 2015).[2] It has long been the practice of the UN to only accept political responsibility for peacekeeping operations (Klein, 2016, p.1034). Most claims arising out of such missions are settled by diplomatic means via *ex-gratia* lump-sum payments (Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, p.572), whereas, for individual claimants, a standing claims commission is foreseen.[3] Some other possibilities do exist, but none satisfy the need for an impartial judicial mechanism that could issue a binding decision and give potential claimants the possibility of an enforceable right to reparations.

As a way around, recently claimants have started filing suits at national courts. The latter option was relatively recently made possible due to a

2 See also Staff and agencies, 'Netherlands and UN blamed over Srebrenica massacre' (2002) <https://www.theguardian.com/world/2002/apr/10/warcrimes> accessed 2 January 2020; C. McGreal, 'What's the point of peacekeepers when they don't keep the peace?' (2015) <https://www.theguardian.com/world/2015/sep/17/un-united-nations-peacekeepers-rwanda-bosnia> accessed 20 February 2020.

3 In practice local claims review boards have been established which have been criticized for their lack of impartiality. See Dannenbaum, 2010.

progressive interpretation of the law, introduced in 2011 by the International Law Commission (ILC) in the Draft articles on the responsibility of international organizations (ARIO). Especially relevant in this context is Article 7 ARIO, which in simple words, states that specific conduct should be attributed to the actor that holds effective control over it. This allowed not only for attribution to the State but also for attribution to both the contributing State and the UN at the same time – also called dual attribution (ILC, Second Report of the Special Rapporteur, Giorgio Gaja, 2004, p.4). An admittedly rare occurrence made practically non-existent due to the UN immunity and other obstacles in implementation. Consequently, in practice, dual attribution has started to mean singular attribution to the State.

It is the purpose of this article to discuss the responsibility of the UN for peacekeeping operations through the lens of dual attribution. The research will be focused on the most recent developments brought about by The Netherlands Supreme Court judgment in *Mothers of Srebrenica* (2019). What are the practical implications of this newest judgment in the context of dual attribution? To answer this, section two will begin by discussing the basic concepts governing responsibility of the UN for peacekeeping operations. Section three will analyze the current law and practice on the topic. Section four will take the viewpoint of dual attribution and present some of its possible future consequences. Section five will conclude.

Basic Concepts

International Legal Personality of the UN

The United Nations is an international organization entrusted with the important task of maintaining international peace and security. In the international realm, organizations are established to fulfill a purpose that the creators of the organization cannot fulfill as successfully by themselves (Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, p.386). This is done through a separate legal personality of the international organization, which allows it to be an autonomous bearer of rights and duties (ibid.).

The UN legal personality is said to be implied from the UN Charter as a whole (United Nations Conference on International Organization, 1945, Vol. XIII p.710), which was confirmed by the International Court of Justice (ICJ) in its *Reparations for Injuries* Advisory Opinion (ICJ

Rep, 1949, pp.178, 179, 182). There it is stated that the UN has not been created merely to coordinate the activities of its members. Rather, it is entrusted with special tasks, that require the position of the members to be established as separate from the UN (ibid.). Moreover, relevant for this article is the question, whether the UN can file an international claim to obtain reparations for damages caused to the organization and its agents (ibid. pp.179, 180). The ICJ found that indeed it can (ibid. p.180). However, these rights exist with corresponding obligations and a possibility for the UN to have a claim filed against it (*Differences relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Rep 1999 p.89). Under certain conditions, this can lead to the international responsibility of the UN.

Furthermore, the UN can create subsidiary organs to fulfill any of its special tasks (UNSC Repertoire of Security Council Practice). These organs are an integral part of the UN and do not have a separate legal personality (ibid.). They only act in the name of or on behalf of the UN (ibid.). One such subsidiary organ is also a peacekeeping mission (ibid.). Responsibility for peacekeeping can be a tricky matter because of the structure of such operations. The UN does not have large enough permanent personnel or a UN army, which it could employ for a mission (Crawford, 2013, p.189). Rather, it must rely on its member States to contribute their national troop contingents, which serve under the authority of the UN for the time of the peacekeeping operation (UN Department of Peacekeeping Operations, 2008, p.68).

Defining Peacekeeping

Peacekeeping is a tool of the United Nations which can be difficult to define. It has no explicit basis in the UN Charter and has mostly been developed through practice (Bothe, 2012, p.1182; Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, pp. 1028, 1029). It has first been established in the 1950s as an antidote to the Security Council's inability to reach the threshold of unanimity required for the authorization of enforcement action (Bothe, 2012, p.1175; Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, pp. 1028, 1029.).

To obtain the necessary political will for intervention, it was crucial that peacekeeping missions would not employ force beyond self-defense (Bothe, 2012, p.1175). Furthermore, unlike enforcement action,

which is furthering a goal against a party, peacekeeping was to be impartial, working with the consent of the Host State (Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, pp. 1030). This has led to the development of three basic principles of early peacekeeping: consent by the Host State, use of force only in self-defense and impartiality of peacekeepers (UN Department of Peacekeeping Operations (DPKO), 2008). Together they were meant to ensure the required cooperation by the host State and the necessary political support from the Security Council (SC) to establish a successful mission (Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, p.1030).

In the 1950s, a fully functional mission was mostly composed of tasks, such as observing the political situation, maintaining the peace by helping to implement peace agreements or overseeing the withdrawal of belligerents (Bothe, 2012, p.1177). These types of peacekeeping missions have come to be known as first-generation peacekeeping or traditional peacekeeping (Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, pp.1035-1036). Since then, the nature of conflict situations has changed significantly (Bothe, 2012, pp.1181-1182; DPKO, 2008). As the conflicts became more complex, and have shifted from international to internal, or a combination of both, it became more difficult for a peacekeeping mission to obtain the consent of the Host State to deploy its troops (Higgins, Webb, Akande, Sivakumaran & Sloan, 2017, pp.1056-1061). Furthermore, the troops have often found themselves amid a rapidly worsening situation which called for a broader interpretation of the use of force, where self-defense would include defense of the mandate or defending a population against an imminent threat to their survival (ibid.). At times, the way peacekeepers positioned themselves in a conflict also brought to question their impartiality (ibid. pp.1067-1068). The broader authorization to use force potentially mandated to a peacekeeping operation today creates a greater possibility for peacekeepers to restore peace and security. Unfortunately, as a necessary parallel, that same authorization creates the possibility to cause greater harm (Blokker, 2015, p.329).

In the past few decades, UN peacekeeping has undergone significant changes in the structure of their missions and the duties they undertake. Most peacekeeping today is far from the impartial missions, not deploying force, based on the consent of the Host State. After 1990, the authorization of 'all necessary means' has become relatively common (Bothe, 2012, pp.1178-1179). Several names are referring to different

types of missions that use force beyond self-defense: including robust peacekeeping, peace enforcement, multidimensional peacekeeping, and second-generation peacekeeping (ibid.). In practice, the differences between the names are often blurred (UN Department of Peacekeeping Operations, 2008).

Though, important differences do exist with regional coalition forces. While all of the above peace operations are UN-led, the coalition of States is UN-authorized, with a leadership structure independent from the UN (ILC, Comments and observations received from international organizations, 2011, p.147). This contribution will deal specifically with peacekeeping operations, based on Chapter VII of the UN Charter authorized to use force beyond self-defense.

Establishment of a Peacekeeping Mission

The first step towards the creation of a peacekeeping mission is an authorization by the Security Council, which provides a mandate for a potential mission (Bothe, 2012, pp.1183-1185). As the UN does not have an army of its own, it is dependent on the voluntary contributions of troops by its member States (Crawford, 2013). Typically, the Council authorizes a peacekeeping operation with a resolution (Bothe, 2012, pp.1183-1185).[4] This provides a mandate, though, it does not create the operation in itself; it merely authorizes the Secretary-General to solicit troops and take other necessary steps to establish an operation (Bothe, 2012, pp.1183-1185; Siekmann, 1991, pp.28-29; DPKO, 2008).

A peacekeeping mission consists of two main components; the UN – exercising the overall political guidance and administrative support over a mission and contributed national contingents – serving as arms and legs of the organization. The relationship between the two parts; the UN and the troop-contributing State (TCS) is of a contractual nature (Bothe, 2012, pp.1183-1185). Usually, it is regulated by an agreement concluded between them, however, it can also be implied in their behavior (ibid.). In this regard, a Model Agreement has been issued by the UN, containing established practice of relations between the UN and the TCS (Model agreement between the United Nations and Member States contributing personnel and equipment to the United

4 The General Assembly (GA) is not excluded from this task. It has, though, not established a peacekeeping operation since 1963, therefore, it is likely that a custom has developed precluding it from starting new peacekeeping operations. Taking this into account, this article will only refer to the SC as the authorizer of peacekeeping operations.

Nations peace-keeping operations, 1991). The Model Agreement aims to be flexible enough to apply as long as the parties do not conclude an agreement of their own to be applied on a specific mission (Bothe, 2012, pp.1183-1185).

The Model Agreement contains the division of responsibilities between the troop-contributing State and the UN. It includes the transfer of national troop contingents under UN command and control, while the TCS retains control over disciplinary measures, personnel administration and criminal jurisdiction (organic control) (Model Agreement, 1991, p.3). The last is especially important, so the UN can fulfill its obligations towards the host State and make sure the peacekeeping troops are held responsible for their possible criminal actions (Bothe, 2012, pp.1183-1185). This duty is also one of customary international law (ibid.).

Command and Control Structure of a Mission

According to the Model Agreement (1991, p.3), the Secretary-General stands on top of the command structure as a representative of the UN and the chief administrative officer. He or she (hereafter she) reports and is responsible to the Security Council (ibid). Additionally, she is to establish a line of control stemming from her authority as the UN representative, and appoint the first person after her - a Head of Mission, who can also serve as her Special Representative (Bothe, 2012, pp.1183-1185). The Secretary-General and Head of Mission together with other staff are part of the special division of the UN Secretariat; the Department of Peacekeeping Operations (ibid.). They direct the overall operation and management of the mission, also called operational control (DPKO, 2008, pp.66-69). The line of command runs from the Security Council to the Secretary-General to the Head of Mission (ibid.).

The next in command after the Head of Mission is the Force Commander (ibid.). She is a juncture between the UN and the troop-contributing State (Dannenbaum, 2010, p.144). Individually hired by the UN and confirmed by the SC, she is the most senior military commander reporting to the Head of Mission (ibid.). A rung under the Force Commander, national troop contingents are supplied as indivisible units by the States with their own leadership – National Contingent Commanders (DPKO, 2008, pp.66-69). It is the role of the

National Contingent Commander to convey the orders she receives from the Force Commander to the national troops, which gives her full command and control on the field (ibid.).

The troop contingents form a somewhat independent part of the structure. Even after their deployment, they remain in the service of their national army and have some obligations towards their sending government (International Peace Academy, 1984, p.365). They are expected to respect the same basic principles of conduct, as in their army, and work within the mandate their government has accepted, based on the SC Resolution, before deploying troops (ibid.). In case they are given instructions that would conflict with these obligations, they should refer to their minister for defense (ibid.).

Moreover, a peacekeeping operation holds an exclusively international status (Model Agreement, 1991, p.3). This means, that it should receive guidance and orders from the UN only, and should be completely independent of influence by their sending State (DPKO, 2008, pp.66-69; International Peace Academy, 1984, p.365). National contingents must not accept or seek to receive instructions from their home government (DPKO, 2008, pp.66-69; International Peace Academy, 1984, p.365). Correspondingly, the contributing State must respect the international status of a mission and refrain from influencing their troops in any way (DPKO, 2008, pp.66-69; International Peace Academy, 1984, p.365). However, the TCS does retain the right to withdraw its troops from the mission (DPKO, 2008, pp.66-69).

It is clear from the described structure that there are at least two parts to a peacekeeping operation holding distinct control over it. One is the UN, exercising operational control over a mission through its Force Commander. The second is the TCS, holding control over its contributed troops through the National Contingent Commander. This divide in the overall structure has important consequences for determining responsibility on a peacekeeping mission. It is important to note that the command and control structure is more difficult to define in practice and does not always follow this line of orders.

Responsibility Developed Through Practice

As we have seen with the tool of peacekeeping so far, also the responsibility for it has largely been developed through practice. This segment

will start with the International Law Commission's Articles on the Responsibility of International Organizations as the authoritative source of law on the topic and conclude with discussing the more recent case law which helps shed some light on the current interpretation of the law.

Draft Articles on the Responsibility of International Organizations Legitimacy and Limitations

More recently, in 2011, the International Law Commission has undertaken to codify the rules governing the responsibility of international organizations in the Draft articles on the responsibility of international organizations (ARIO). In the ARIO, effective control is used as the key criterion for determining which actor can be held responsible for particular conduct on a peacekeeping operation (Second Report, 2004, p12).

> "What matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conduct" (ibid. p.14).

The ARIO was created in light of the ILC's preceding work – Articles on the Responsibility of States for Internationally Wrongful Acts (ARS) (2001). Harmony between the two was sought where appropriate while leaving enough space to take into account the specific characteristics of international organizations (ILC, First Report of the Special Rapporteur, Giorgio Gaja, 2003, para.11; Second Report, 2004, p.5; ILC, Fifth Report of the Special Rapporteur (Fifth Report), Giorgio Gaja, 2007, p.6). Moreover, during the period leading up to the creation of ARIO, international organizations have shown some reluctancy in responding to the calls by the ILC for contributing materials concerning their responsibility (Fifth Report, 2007, p.7). This had caused some difficulties in ensuring the Articles are firmly rooted in practice (Schermers & Blokker, 2011, para 1590C; Second Report, 2004, p.2; Fifth Report, 2007, p.7). Special Rapporteur Gaja was aware of the issue and had acknowledged that "[a] wider knowledge of practice would clearly allow a better apprehension of questions relating to the international responsibility of international organizations" (Fifth Report, 2007, p.7). Some criticism of the ARIO had been pointed in the

same direction.[5] Most recently, in 2017, Comments and information received from Governments and international organizations show a similar situation, with most observations agreeing that the continued lack of relevant practice among States and organizations remains a barrier towards accrediting greater legal value to the ARIO by negotiating it in a treaty (Report of the Secretary-General 72/80, 2017).

Nevertheless, the ARIO remains an authoritative source of law on the topic of responsibility of international organizations. Several Articles are strongly rooted in customary international law, while some present its progressive development. The latter includes Article 7 ARIO, which is essential for peacekeeping operations, as it defines attribution of conduct per its progressive understanding. Furthermore, the ARIO has been taken note of by the General Assembly and was cited in many international courts and bodies, including the European Court of Human Rights (ECtHR), the General Court of the EU, the African Commission on Human and People's Rights, the Caribbean Court of Justice, as well as on all levels of Dutch national courts, national courts in Germany and the UK (Report of the Secretary-General 72/81, 2017, para.4). The ARIO is meant to serve as a compilation of general rules for international organizations, except in a case of a *lex specialis*.[6] It deals specifically with international organizations' responsibility, which arises after a breach of an obligation of conduct (ILC, Draft articles on the responsibility of international organizations, with commentaries (Commentary to the ARIO), 2011, p.46). The latter is also called a primary obligation (ibid.).

Though primary obligations are excluded from the ARIO, the application of Draft Articles is essentially dependent on them. Based on Article 4 ARIO, an international organization will be held responsible for a certain action if (a) the act is attributed to the organization and (b) is a breach of an organization's obligation. The (b) condition refers to primary norms defined outside the ARIO.[7] This theoretical division between primary norms and rules of responsibility, also named secondary norms has been criticized for not having a clear conceptual basis

5 Additionally, ARIO had been criticized for not being broad enough to encompass the special characteristics of international organizations and for reflecting the ARS too much. See also Schermers & Blokker, 2011, paras.1590A-1590C; Akande, 2014, pp.265-266.

6 Special rules can be found in the rules of the organization, as long as they are not used to circumvent the obligations which are related to the legal consequences of an internationally wrongful act (Article 17 ARIO).

7 The difficulties in defining primary norms was stated as one of the factors limiting a greater implementation of the ARIO (Klein, 2016, p.1035).

(Nollkaemper, Jacobs, 2011, p.84). Instead, it appears to be rooted in pragmatic reasons (ibid pp.84-85). Crawford confirms:

> "the distinction between primary obligations and secondary rules of responsibility is to some extent a functional one, related to the development of international law, and not to any logical necessity" (Crawford, 2002, pp.874, 879).

Furthermore, the separation is not an exact science. There are areas where the ARIO still deals in part with primary norms as they are interconnected with the secondary ones (Nollkaemper, Jacobs, 2011, pp.81-88). At this point, it is merely relevant to note, that primary norms are one of the conditions for establishing the responsibility of the UN. Rather than attempting to define primary norms, which is beyond the scope of this research, this contribution will focus on the secondary norms, which govern the responsibility and its implementation.

Content - Attribution

Based on Article 3 ARIO, "[e]very internationally wrongful act of an international organization entails the international responsibility of that organization". The following Article 4 ARIO lists a crucial condition for such responsibility to occur – the attribution of a certain act to the organization.[8] The manner in which a certain act is determined attributable will prove to be vital in opening the possibility of dual attribution.

The ARIO separates two situations in which certain conduct is attributed in two different ways. The first is enshrined under Article 6; it concerns attribution when an organ is fully seconded to an international organization (Commentary to the ARIO, 2011, p.56). The Article states that all activities conducted by an organ of an international organization will be attributed to that organization.[9] It is designed to be applied to organs of international organizations and to organs that are fully seconded to international organizations by their states or by other international organizations (Commentary to the ARIO, 2011, p.56). Theoretically, this Article could also apply to state seconded troops

8 Act always includes both the possibility of a positive act and an omission.

9 Under the condition that the organ is acting "in the performance of functions of that organ or agent" (Article 6 ARIO).

to the UN for a peacekeeping operation. However, the application of Article 6 is limited by the following Article 7.

The second option, under Article 7, describes the attribution of conduct in a situation where an organ is not fully seconded to an international organization (ibid. p.56). Based on the Commentary to the ARIO, this Article was tailored to circumstances when an organ of a State is placed under the command and control of an international organization, while the State retains a certain influence over their contributed organ (ibid. p.57). Furthermore, it was explicitly stated that this also occurs "in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation" (ibid. p.56).

At first glance, there is very little difference between the situation applicable under Article 6, and that applicable under Article 7. Article 6 requires that an organ that is placed at the disposal of an international organization is 'fully seconded' to that organization, while Article 7 necessitates the organ is 'not fully seconded'. Under Article 6, the fully seconded organ is fully incorporated into the system of the international organization and becomes an organ thereof. It can be assumed that under Article 7, the contributed organ does not become an organ of the international organization, as otherwise, the applicable situation would be practically the same as that under Article 6. Instead, the contributed organ under Article 7 appears to be stuck somewhere in between as 'not fully seconded'. Article 7 ARIO states:

> "[t]he conduct of an organ of a State [...] that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over the conduct."

The determining factor for attribution of conduct on a peacekeeping operation is therefore effective control. Based on the International Law Commission, an in-depth factual examination of the conduct in question is necessary to determine which actor holds effective control (Commentary to the ARIO, 2011, p.57). This reasoning leaves open the possibility that in the uncommon case when the contributing state exercises effective control over their troops, it can be responsible for it. Furthermore, in the Second Report on the responsibility of inter-

national organizations, the Special Rapporteur added, that it can be foreseen, under this Article, that certain conduct would be attributed to the contributing State and the organization simultaneously – an admittedly rare occurrence of dual attribution (2004, pp.10, 4).

What is more, it is argued by Dannenbaum, that to fully enact the intent of the ARIO under Article 7, when interpreting effective control, it is essential to consider "the entity that is best positioned to act effectively and within the law to prevent the abuse in question" (2010, p.157). Although mentioned in the Commentary to the ARIO, it is unclear whether the latter addition presents a legitimate expansion of the criterion of effective control (Commentary to the ARIO, 2011, p.59; Crawford, 2013, pp.209-210). Through case law, several different theories have been developed on what constitutes effective control.

Divergent Case Law

Many important cases have already dealt with the topic of responsibility of the UN. Yet the so-called test of effective control appears an elusive term. In 2007, the ECtHR determined in the notorious case of *Behrami v. France and Saramati v. France, Germany and Norway* (2007) that merely retention of 'ultimate authority and control' is sufficient to attribute all conduct to the UN. This decision was largely criticized because it did not apply the criterion in the ARIO. Moreover, because it determined that not even operational control needs to be retained by the UN for the Organization to still remain responsible.[10] Consequently, all conduct was attributed to the UN and the case was rejected because of a lack of jurisdiction of the ECtHR.

For the claimants, this meant no access to reparations. Moreover, a continued application of this reasoning could lead to the troubling conclusion that the contributing State and other actors authorized by the UN on a peacekeeping operation can almost never be held responsible for their actions as long as they work under the shield of the UN (Milanovic & Papic, 2009). Fortunately, in 2011, in *Al-Jedda v The United Kingdom* (2011) the ECtHR had somewhat distanced itself from this reasoning by separating the two cases on facts and stating that the UN "had neither effective control nor ultimate authority or control over the acts or omissions of [contributed] troops and that the

10 See also ECtHR decisions in *Beric and others v Bosnia and Herzegovina (2007); Kasumaj v Greece (2007)*; *Gajic v Germany (2007)*.

[conduct] was not, therefore, attributable to the United Nations" (*Al-Jedda*, 2011, para.84). This allowed the ECtHR to avoid the reasoning in *Behrami*, without rejecting it explicitly (Milanovic, 2011).

In the region of the Former Yugoslavia, the tragic situation in Srebrenica had resulted in many cases both at the ECtHR and the Dutch national courts. In 2008, the case of *H. N. v The Netherlands* (*Nuhanovic)*(2008) was decided at the District Court of The Hague.[11] The claim concerns the conduct by Dutchbat as part of a UN-led mission UNPROFOR deployed in Bosnia and Herzegovina in 1995 (*Nuhanovic*, District Court, 2008, paras.2.3-2.7). It was brought by Mr. Nuhanovic who worked as an interpreter and was employed as local staff for the UNPROFOR (*Nuhanovic*, Appellate Court, 2011, para.2.28). On 11 July 1995, after consultations between two of the highest-ranking Dutch military officials and a UNPROFOR general, it was understood that the mission in Srebrenica had failed, and no further violence was sensible (ibid. para.5.11). A mutual decision was made that the refugees who have settled in and outside the UN compound in Potocari will be evacuated (ibid. paras.5.11-5.12). It was implied that following the evacuation, Dutchbat will leave too (ibid. para.5.17). With this, a transitional period began (ibid.). At this time the Netherlands Government had also exercised a certain type of control over their contingent as it pertained to the preparations for the withdrawal of Dutch troops (ibid. paras.5.18-5.19.).

Supposedly in an attempt to avoid the reasoning in *Behrami and Saramati* the claimant first argued that Bosnian national law should be applicable (*Nuhanovic*, District Court, 2008). But because this is a matter between two international actors, the District Court in the Hague determined the law of State responsibility (ARS) to be applicable. It applied the Articles by analogy to the situation at hand and found that "acts and omissions [conducted on a peacekeeping mission] should be attributed strictly, as a matter of principle, to the United Nations" (*Nuhanovic,* District Court, 2008, para.4.11). In 2011, this was overturned by the Appellate and later confirmed by the Supreme Court which rightfully aligned their reasoning with the ILC test of effective control.

The Appellate Court found that what is decisive is not which actor exercised command and control in the abstract structural sense,

11 See also *M. M.-M., D. M. and A. M. v The Netherlands*, District Court in The Hague (2008).

but rather, who exercised effective control in certain concrete circumstances (*Nuhanovic,* Appellate Court, 2011, para5.7). Furthermore, it stated:

> "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, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned" (Nuhanovic, Appellate Court, 2011, para.5.9).

Such argumentation assigns importance to the analysis of facts to determine attribution based on effective control. What is more, the Court expands the test by accepting the relevance of the 'power to prevent' as suggested by Dannenbaum. Caution is advised regarding this expansion. Other cases determining effective control in different circumstances, like the two ICJ cases of *Nicaragua v. United States of America* (1986) and *Bosnia-Herzegovina v. Yugoslavia* (1996), are rooted in positive acts (Crawford, 2013, p.210). Additionally, the ILC has abstained in explicitly acknowledging this concept in its Commentary as a legitimate expansion of effective control (ibid.). Indeed, if one was to consider the mere possibility of the 'power to prevent' to be enough, then this possibility would always exist as the contributing State always retains organic control (ibid.). This would make the presumption of effective control by the UN effectively meaningless. Instead, attribution to both the State and the Organization, called dual attribution, could become the new presumption. The Appellate Court continues:

> "The Court adopt[ed] 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" (*Nuhanovic,* Appellate Court, 2011, para.5.7).

The aforementioned was confirmed by the Supreme Court.[12] In this

12 The Supreme Court added that Article 48(1) ARIO in combination with Article 7 ARIO allows for dual attribution of conduct (*Nuhanovic,* Supreme Court, 2013, paras.3.9.4, 3.9.2). It is worth noting that in the Commentary to the ARIO, Article 48 is explicitly said to be applicable in situations foreseen under Articles 14-18 ARIO. Considering this, applying Article 48 may not be appropriate in the context of peacekeeping. Besides, there are no explicit reasons as to why Article 7 ARIO alone would impede dual attribution. See also Direk, 2014.

case, dual attribution served as an opening to allow for attribution of conduct to The Netherlands within Article 7 ARIO.[13]

The newest ruling on the topic is from 2019 by the Supreme Court of The Netherlands in the case of *Mothers of Srebrenica et al v The Netherlands* (2019). The case concerns the same conflict as in *Nuhanovic* but from a slightly different and broader perspective. Here, 10 respondents and the foundation Mothers of Srebrenica[14] claim that Dutchbat did not do enough in protecting the refugees from the advances of the Bosnian-Serb army. Additionally, they claim that the State acted wrongfully by assisting with the separation of the male refugees from the others and facilitating their deportation. The claims refer to both the periods before and after 11 July 1995 at 23:00, which vaguely marks the fall of Srebrenica and the start of the so-called transition period.

Briefly, The District Court decided that indeed The Netherlands is liable for assisting with the deportation of male refugees (*Mothers of Srebrenica*, Supreme Court, 2019, para.2.2.3). It denied all other claims (ibid.). The Court of Appeal overturned this judgment and ruled instead that additionally, The Netherlands was liable for assisting with the separation of the male refugees and not giving them the option to remain in the compound (ibid. para.2.2.4). This, in the Court's opinion, diminished their 30% chance of survival (ibid.).

In determining effective control, The Court of Appeal has to a large degree adopted similar reasoning to the one in *Nuhanovic*. It started with asserting that ARIO together with the ARS are the relevant rules to establish effective control (*Mothers of Srebrenica et al v The Netherlands*, Appellate Court, 2017, para.11.2). As in *Nuhanovic*, it added that effective control is dependent on "all factual circumstances and the specific context of the case" (ibid. para.12.1). Furthermore:

> "[a]s the *command and control* over Dutchbat had been transferred to the UN, the UN exercised *effective control* over Dutchbat, in principle (ibid.). Whether in one or more specific instances the exceptional situation occurred that the State also exercised effective control over certain aspects of acts performed by Dutchbat is

13 See more under section 'DUAL ATTRIBUTION'.

14 The foundation represents 6000 surviving relatives of the victims of the Srebrenica massacre.

> something that the [foundation Mothers of Srebrenica] must argue stating sufficient grounds and must prove when contested" (*Mothers of Srebrenica*, Appellate Court, 2011, para.12.1).

This was not challenged and was reaffirmed by the Supreme court (2019, para.3.3.5). In addition, the Supreme Court stated that dual attribution is a non-disputed possibility (ibid.).

After this, the Supreme Court chose to focus on the Articles governing the responsibility of States as the correct source of law to determine possible attribution of conduct to The Netherlands (ibid. paras.3.3.5-3.6.1). The ARS demands much more active involvement of the State to establish attribution of conduct in this context. They offer two modes of attribution. To simplify, Article 4 ARS applies when attributing conduct by an organ of a State, whereas, Article 8 ARS applies when attributing conduct by a group of persons if it is actually acting under the effective control of the State. As it is undisputed between the parties that Dutchbat is an "organ" of the UN, the relevant Article for this case is Article 8 ARS (*Mothers of Srebrenica*, Supreme Court, para.3.3.3).

Effective control in the context of ARS is further elaborated in the Commentary to the ARS, stating that such control by the State must concern a specific operation and that the relevant conduct must present an essential part of that operation (2001, p.47). Further, it refers to the cases of *Nicaragua* and *Bosnian Genocide*, which support a very active participation of the State (ARS, 2001, p.47). General support regarding the whole operation is not attributable to the State. This is why all Dutchbat conduct which occurred before the transition period and some during, when the State only held 'organic control' by retaining disciplinary control and criminal jurisdiction, cannot be attributed to The Netherlands (*Mothers of Srebrenica*, Supreme Court, 2019, para.3.6.1). This raises the bar for attribution under ARS very high.

Moreover, the 'power to prevent' as applied in *Nuhanovic*, is said to be based on an incorrect interpretation of the law (ibid. para.3.5.3). Article 8 ARS only acknowledges active control, which is evident by the Commentary, stating "actual participation of and direction given by the State" is needed for recognizing effective control by the State

(ibid.). True, 'the power to prevent' is not even widely accepted regarding attribution under Article 7 ARIO (Crawford, 2013, p.210). Therefore, it makes sense, that it is even less so when attributing conduct under Article 8 ARS, which is otherwise explicitly based on positive attribution and rooted in corresponding case law.

Yet, one could argue whether the aforementioned interpretation of the ARS is the most appropriate to apply in this context. Before this case, attribution of conduct of peacekeeping operations was rooted in Article 7 ARIO, which with the test of effective control, opened the door to the possibility of attribution also to the troop-contributing State. Attribution to the latter was done by interpreting the ARIO in the light of the ARS (*Nuhanovic*, Supreme Court, 2013, para,3.13; *Mothers of Srebrenica*, Appellate Court, 2011, paras.11.2, 15.2). This made sense because due to the position of Article 7 within the overall framework of international organizations, it was still apparent that normally the responsibility for peacekeeping operations falls with the UN. By placing priority on the ARS, the State takes on a more separate position. It is no longer discussed in the shadow of the UN but as an independent entity with a more obvious possibility of holding equal responsibility to the UN. Certainly, a State could be held equally responsible as the UN even before, but in the framework of the ARIO, it seemed like more of an exceptional occurrence.

It could be argued at this stage, that perhaps, the Supreme Court takes the responsibility of its state rather far and views it too independently from the responsibility of the UN for a peacekeeping operation as a whole. Although explicitly affirmed in the judgment, this reasoning impliedly questions the validity of the 'in principle' attribution to the UN. Regarding dual attribution, this is no longer a disputed topic. The court undoubtedly confirms its possibility but limits its role to opening the door for State responsibility. Certainly, dual attribution becomes a clearer possibility due to the somewhat more equal position of the contributing State and the UN.

However, it is important to keep in mind the particular context of the case. The only part where the State was found to hold effective control over their troops was during the transition period. The situation concerned a failed mission during which Dutchbat was in charge of assisting with the evacuation of about 5000 refugees, after which the contingents would repatriate. The Netherland was involved

as this was part of the concluding arrangements within the State's right to evacuate their troops. This is a highly fact-specific case and an unlikely situation that occurred in a short time-span. Hopefully, a case with similarly unfortunate circumstances will not occur again. This limits the applicability of the slightly different interpretation of the test of effective control which was applied here. Additionally, all cases of Dutch national courts have limited applicability within their national systems, which is unfortunate from the perspective of international law.

To conclude, the test of effective control has to a large degree been developed through practice. The ILC has foreseen Article 7 ARIO as the one to be applicable to conduct on peacekeeping operations. Effective control is to be determined by an analysis of all the relevant law, facts, and circumstances. In principle, this responsibility lies with the UN, unless certain specific situations arise to shift attribution in the direction of the State. The 'power to prevent' as argued by Dannenbaum is an extension of effective control with uncertain applicability and future. Additionally, the very high threshold of ARS under Article 8 as developed in *Nicaragua* and *Bosnian Genocide case*, perhaps raises the bar too high. Considering the position of the state troops which in normal circumstances ought to be completely incorporated within the chain of command of the UN, it makes more sense to apply ARIO in light of ARS than ARS in the light of ARIO, as was impliedly done by the Supreme Court judgment in *Mothers of Srebrenica*.

Moreover, such an interpretation of the test of effective control allows for dual attribution. This is essential as it opens the possibility for certain conduct, which was previously exclusively attributed to the UN, to possibly be attributed to the troop-contributing State also. At this stage, this is extremely important, as many obstacles are preventing the UN from being adjudicated and held responsible. The possibility of State responsibility opens a side door for claimants to attempt to obtain at least some reparations.

Dual Attribution

Dual attribution is a concept that means a certain conduct can be attributed to two actors simultaneously. On a peacekeeping operation, this would mean a certain conduct can be attributed to both the UN and the TCS at the same time. From the perspective of fairness, this

might seem like the ultimate ideal. A shift from the early case law in which all conduct was attributed to one actor – the UN, which more often than not meant no legal responsibility, to the possibility of attribution to both actors. Although the concept exists in theory, it has not yet taken place in practice.

A good way to understand dual attribution is by the sliding scales analogy (Nollkaemper, 2011, p.1157). It explains that on either extremity is the exclusive attribution to the UN or to the TCS (ibid.). Whereas anywhere in the middle lies dual attribution to both actors (ibid.). It can be imagined that on one side, where there is exclusive attribution to the UN, we would find the approach put forward by the UN, that all conduct is in principle attributed entirely to the UN.[15] On the other side, we might find a situation, where the State had issued orders which cut across UN command and control and were executed by their deployed troops, leading to attribution only to the TCS. In the middle, we are likely to find all other situations, where the test of effective control establishes whether and to what degree attribution and consequently responsibility will be shared among the two actors. In other words, where on the scales, the responsibility will settle; will it be more towards the UN exclusive responsibility, which indicates the UN held more broad control over the conduct or will it be more towards the exclusive control of the TCS, implying the reverse.

Until present, there are only cases discussing the part of the contributing States. Indeed, in *Nuhanovic*, immediately after acknowledging the possibility of dual attribution, the Court added that "[it] will only examine if the State exercised 'effective control' over the alleged conduct and will not answer the question whether the UN also had 'effective control'" (*Nuhanovic,* Appellate Court, 2011, para 5.7). The main obstacles in implementing the responsibility of the UN are its broad immunities and a lack of institutions capable of judging the organization.[16] To discuss these issues in detail would be beyond the scope of this research.

Regardless of these limitations, dual attribution has had important

15 "[A]n act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation, entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-á-vis third States or individuals" (Yearbook of the International Law Commission, 2004, p.28).

16 See more at Blokker, 2015; N. Schrijver, 2013.

consequences concerning the responsibility for peacekeeping operations. It has opened the door for national Courts to examine the conduct of their government independently and due to the individual nature of attribution, this does not affect the possible responsibility of the UN (Nollkaemper, 2011, p.1154). Indeed, if there were no dual attribution, a Court would have a lot less options to examine the conduct of its national State; it would be limited to the sole situation of exclusive State responsibility. Referring to the sliding scales, this is an extreme example and a very uncommon one.

In its current practical implementation, dual attribution does not allow for attribution to both the State and the UN, rather, it only allows for State responsibility. This is a significant shift in practice in the context of peacekeeping. It shows a development from exclusive responsibility of the UN, which necessarily leads to a rejection of the case due to jurisdictional issues, towards the current exclusive responsibility of the State, while leaving the part concerning attribution to the UN unanswered.

Certainly, this is not ideal and does not reflect the actual structure of command and control on most peacekeeping operations. The presumed attribution to the UN is important as on peacekeeping operations the UN must hold the principal command. Had the Court omitted this part of its reasoning, a wrong impression might be given, that the TCS is the only one holding control and consequently responsibility for a peacekeeping mission.

For one thing, this might prompt the States to indeed start exercising more control over their contributed troops. The broader authorization to use force, deployment in dangerous environments, and risk of peacekeepers being seen as a party to a conflict are all reasons which might cause the States to want to maintain greater influence and oversight over their troops. Moreover, the 'power to prevent' in its abstract understanding would entail the States always retain the possibility of effective control (Crawford, 2013, p.210).

Furthermore, the impression of only state responsibility might put a strain on the basic concept of peacekeeping. Peacekeeping operations remain subsidiary organs of the UN conducted under the UN flag. With that, they hold many advantages. Normally, it gives the operations legitimacy, means they are impartial, independent and acts

as a sort of shield for individual states, protecting them from getting involved in the conflict. If states were to be seen as individual entities working within peacekeeping together with the UN, this might cause political issues for the contributing states, as they could be seen as interfering with the usually already complicated and risky environments where peacekeeping mission are typically deployed and possibly violating the sovereignty of the host state.

A more independent role of the States would bring to question, whether any real differences remain between peacekeeping and SC-authorized regional coalition forces. Essentially, if the States would hold full command and control over their troops even after their secondment to the UN, this would leave no room for the UN, and would effectively deem peacekeeping to be a sham. Realistically, effective control on a mission is never in the hands of only one actor. The TCS and the UN on a peacekeeping operation are at the core interconnected, as they are both essential for it. Therefore, logically, the attribution of conduct on a peacekeeping operation should be to a certain degree shared.

Moreover, considering the current implementation of responsibility is only at the national judiciaries, which deal with cases against their respective States, this can lead to a myriad of different judgments reaching different conclusions (Blokker, 2015, p.327). It would likely cause confusion and a lack of legal certainty for peacekeepers as well as potential claimants. To add, the TCS have very different legal systems. There is a possibility, that while based on the law of the Host State a crime has been committed, the TCS does not consider that same conduct a crime and might not prosecute it. A consequence can be a loss of legitimacy for the UN. Even if State responsibility provides some relief in the eyes of the victims, this is only a short-term solution. Eventually, the fragmentation of judicial solutions could cause the opposite; a situation where a remedy would depend on the quality of the judiciary of the home State of a certain troop contingent member. Considering most troops are still from developing countries, the legitimacy of peacekeeping operations is likely to plummet.

To add, it has been argued that because of a fear of taking on more responsibility, States might become more reluctant in contributing their troops (Blokker, 2015, p.327; Dannenbaum, 2010, p.185; *Nuhanovic,* Supreme Court, 2013, para.3.18.3.). Yet, it is not true, that in the face of these new developments, the TCS's have merely two options:

not to contribute troops at all, or to contribute poorly trained troops (Dannenbaum, 2010, p.185). In fact, there is a third possibility, where the States ensure their contributed troops are well prepared for a mission, to protect themselves from being held liable for any wrongful acts by their contributed troops (ibid. p.186). Ultimately, it is possible that States might be more reluctant to take part in a peacekeeping operation where they can be held responsible, yet there is likely to be a beneficial tradeoff; though the contributed troops might be lesser in quantity, they are likely to be highly qualified (Dannenbaum, 2010, p.185). This might work in favor of the missions' legitimacy.

Conclusion

The answer to the question, what are the practical implications of applying dual attribution in the context of peacekeeping operations, with two words, would be State responsibility. This appears counterintuitive as the title of the research is the responsibility of the UN and not that of the State. The truth is that based on the current practice in this field, the theoretical responsibility of the UN is only a step that leads to the factual reality of responsibility of a troop-contributing State.

Certainly, this is not in line with the command and control structure on a mission. Based on that, the UN would typically be responsible, sometimes together with the contributing State. It is in the concept of dual attribution, that we can find a reflection of the structure of a mission and responsibility which seems fairly divided. It is human to attempt to avoid responsibility or pass it on to someone else. The 'passing the buck' problem exists also amongst states and international organizations (Blokker, 2015, p.327). Yet, by individual states, accepting responsibility even when they could have opted for a different interpretation of the law and avoided it altogether, a certain pressure is exerted on the UN to act accordingly and accept its part of responsibility too. It would seem only fair for each to accept their own.[17]

17 "*Cuique suum tribuere*" – to render to each their own (Ulpian, Digest).

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