

The Control Criterion between Responsibility of States and Responsibility of International Organizations

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Evolutions in the Law of International Organizations

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Niels Blokker

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Evolutions in the Law of International Organizations

Edited by

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General Introduction by

Niels Blokker



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The Control Criterion between Responsibility of States and Responsibility of International Organizations

Pietro Pustorino

1 The ILC's Drafts of 2001 and 2011 Compared: Positive and Negative Aspects of Uniform Rules on the Responsibility of States and International Organizations

An analysis of the legal rules and practice in the matter of the control exercised by States or by international organizations (IOs) over the conduct of other entities, be they individuals, States or organizations, presupposes that one briefly mentions the two complementary Drafts on international responsibility: the Draft Articles on the Responsibility of States for Internationally Wrongful Acts¹ and the Draft Articles on the Responsibility of International Organizations,² both approved by the International Law Commission (ILC) respectively in 2001 and 2011. It is common knowledge that the content of the two Drafts is very similar. In some cases the rules contained in DARIO merely reproduce, with some necessary adaptations, the corresponding rules set forth in DARS, so much so that one legal writer has alleged that the ILC adopted a 'copy and paste' approach.³ The reason for the analogous content would seem to lie in the ILC's attempt to lay down a body of uniform rules governing international responsibility, that apply in principle to all subjects of the international community.

The adoption of a set of rules on the responsibility of IOs would also seem to serve the need to limit recourse in practice to rules or criteria 'à la carte',⁴ which can give rise to a certain fragmentation of the law of IOs and even situations of *forum shopping* towards the courts of a country more likely to assess

¹ See A/RES/56/83, hereinafter DARS.

² See A/RES/66/100, hereinafter DARIO.

³ Christiane Ahlborn, "The Use of Analogies in Drafting the Articles on State Responsibility of International Organizations – An Appraisal of the 'Copy-Paste' Approach," *IOLR* 9 (2012): 53 *et seq.*

⁴ Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 1020.

that organizations are responsible on the basis of international rules of dubious existence.

However, one cannot neglect the fact that DARIO is based little on practice, which is actually very limited or in some cases even non-existent, and hence leans towards the aim to progressively develop international law, which, from the standpoint of the ILC's work, would be an exception to the primary and basic aim to codify international law. This approach can entail that practice in the matter of the responsibility of IOs, especially in relation to the criterion of control, may not be consistent with the rules drawn up by the ILC. The possible divergence between practice and the rules of DARIO, as occurred in the past for other Drafts drawn up by the ILC,⁵ would weaken not only the specific value of DARIO but also the general value of ILC work. Leaving aside those limits, we maintain that DARIO is pivotal for the reconstruction of some international rules or as an indicator of trends, some well established, others *in fieri*, in the field of the responsibility of IOs, and as such cited in some recent national and international case law.

2 **The Criterion of Control in the ILC's Drafts. Common Features of and Differences between Control Exercised by a State and that Exercised by an International Organization**

In the matter of international responsibility of States, Art. 6 DARS states that the conduct of an organ of a State placed at the disposal of another State shall be attributed to the latter State if the organ acts in the exercise of elements of the governmental authority of the State at whose disposal it is placed. On the basis of Art. 8 DARS, the conduct of a person or a group of persons shall be attributed to the State if those persons act in fact on the instructions of, or under the direction or control of that State, in carrying out the conduct.

In the matter of responsibility of IOs, Art. 7 DARIO states that the conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization shall be attributed to the latter organization if it exercises effective control over that conduct.

The ILC commentaries to the two Drafts clarify that in the various legal rules set out above, the test for attributing conduct to States or to IOs is chiefly based on the control exercised over the conduct at stake. The existence, in these different circumstances, of a common test for attributing conduct is particularly

5 For example, in relation to the Draft that subsequently was substantially incorporated in the Vienna Convention of 22 Aug. 1978 on Succession of States in respect of Treaties.

useful because, in practice, the responsibility of States may coexist with that of IOs and hence it is better to apply uniform rules in so far as it is possible.

From the standpoint of the general content of the rules cited above, we believe that the criterion of control is an 'overarching' one with respect to the other criteria mentioned, especially with specific reference to the criteria of instructions and of direction referred to in Art. 8 DARS. Any instructions given by a State or direction exercised by it over the conduct of a person or a group of persons are in fact functional to establishing the control exercised by the State over the conduct in question.

The above point would seem to be confirmed by the fact that the criterion of control is a general one and as such applicable to every type of conduct controlled by a State or international organization, be it political, military, economic, terrorist, *etc.* The 'ductility' of the criterion of control is confirmed in the Advisory Opinion of 1 Feb. 2011 adopted by the International Tribunal of the Law of the Sea on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, where it is said that the special rules on the responsibility of States sponsoring commercial activities carried out in the Seabed Area, based on the control exercised by such States over the conduct of private entities, are in line with customary international law rules.⁶

That said, it should be noted that States and IOs have quite different structures, competencies and ways of functioning and this can significantly affect how control is effectively exercised over private entities, other States or organizations. In fact, State control is still mainly based on the exercise of sovereign powers in its own territory or of quasi-sovereign powers exercised abroad, for example, in the case of military occupation of foreign countries. It follows that State control is generally 'exclusive' in the sense that the control exercised by a State excludes, even if only in principle, the existence of other forms of control exercised by other entities. Moreover, the control exercised by a State tends to be 'all-inclusive', in the sense that with regard, for example, to military operations set up and conducted directly by the State, it includes both political and military control considered as a whole. Indeed, that is perfectly consistent with the close link that exists within national legal systems between executive power and high-level military figures.

On the contrary, the control exercised by an international organization is not expressed through wielding sovereign power, which is absent,⁷ but operates in a functional way manifesting itself through control of a political nature and in

6 Section 182 of the Advisory Opinion.

7 Not even in cases of administration of territories by IOs is it possible to draw a complete analogy with the exercise of sovereign powers by a State.

some cases of an operational nature. It is not also infrequent when evaluating the activities of an international organization to detect a 'split' between types of control because an organization may, for example, maintain some forms of political control but decide to delegate Member States – or be forced to do so for lack of operational means – other forms of control, for example, military control. Consequently, it is not uncommon that the control exercised by an organization can exist 'side by side' with that of other organizations,⁸ States or even groups of private individuals. This situation normally occurs in the case of peacekeeping operations, in relation to which matters concerning the safety, discipline and accountability of national troops are reserved to the States that send the military contingents as, for example, happened in relation to the armed conflict in Afghanistan, with the opening of an investigation by the German Federal Prosecutor against two German soldiers responsible for the NATO air strike near Kunduz in Sept. 2009.⁹

Therefore, it is more difficult that control exercised by an organization will be exclusive in the sense clarified above. This means that it is quite natural that conduct in breach of international law might be attributed to both the organization and military contingents' sending States.¹⁰ This situation can easily occur in the cases of military missions set up by organizations¹¹ but carried out by States on the basis of international agreements whereby the latter make their military contingents available.¹² In addition, during the material carrying

8 For example, in relation to a given military mission, political control by the UN may coexist with parallel operational control by NATO or other regional IOs.

9 On 20 Apr. 2010 the Prosecutor closed the case on the grounds that none of the two soldiers had acted in violation of either international or national criminal law. For a comment, see Constantin von der Groeben, "German Federal Prosecutor Terminates Investigation Against German Soldiers With Respect to NATO Air Strike in Afghanistan," available at www.ejiltalk.org.

10 On this point, with regard to military operations under a UN mandate, see Luigi Condorelli, "Le statut de forces de l'ONU et le droit humanitaire," *RDI* 78 (1995): 893 *et seq.*, and, more recently, Luigi Condorelli "De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions des Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlandais," *QIL* 1 (2014): 13–14. Similarly, Michael Bothe, "Peacekeeping Operations," in *The Charter of the United Nations. A Commentary*, eds. Bruno Simma *et al.* (3rd edn. Oxford: OUP, 2012), 1185, who states that UN control over peacekeeping forces 'has not in all cases been exclusive'.

11 On this point see Andrea Spagnolo, "Imputazione di condotte lesive dei diritti umani nell'ambito delle operazioni militari delle Nazioni Unite e rimedi per le vittime," *DUDI* 7 (2013): 286 *et seq.*

12 In the UN context the agreements in question are drawn up on the basis of a model used as a legal standard: see UN Doc. A/46/185, 22 May 1991.

out of those missions, States tend to increase the level of control over national troops initially agreed with the organization.

Regarding the difficulties associated with establishing uniformity in the legal regulation of the control criterion, there is also the fact that the type of control exercised by one organization may significantly differ from that of other organizations. This is due to the different structures and functions that organizations may have. That diversity can arise not only when different activities undertaken by the organizations under examination are involved (for example, military or economic) but also in cases where the same type of activities are contemporaneously carried out by a number of organizations. To further complicate the overall picture depicted thus far is the fact, as has been observed,¹³ that the type of control exercised by a given organization can vary, at times significantly, depending on which of its numerous activities is effectively involved. This is easily perceivable if one considers the development of the rules and functioning of peacekeeping operations carried out under the auspices of the UN, which have seen their structure and functions radically change over the years and which are organized using models that vary according to the particular needs of the specific situation.

In short, the variables are numerous when it comes to applying the criterion of control over the conduct of States, organizations or private parties. And it is also for this reason that in our view the practice analyzed hereunder is not uniform.

3 **Formal Control and Substantive Control of States and International Organizations. Problematic Issues Regarding Military-Type Control**

It is by now undisputed that one must adopt a substantive and not merely formal approach for the purposes of establishing whether control is exercised by States or by IOs over the conduct of various entities. However, that does not mean that there is no place for a formal finding based on an *a priori* assessment of the legal relationship between the controlling and controlled entities. On the contrary, it constitutes the first step for conducting the subsequent inquiry for the purposes of establishing substantive control. That second line of inquiry serves to highlight either a correspondence or a divergence between the formal

13 Tom Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers," *HILJ* 51 (2010): 142 *et seq.*

and substantive levels of control in relation to the specific case. The absence of an examination regarding substantive control could thus lead to errors in the attribution of conduct and hence of international responsibility of States¹⁴ or IOs.

From this standpoint, one can criticize the Decision of 31 May 2007 of the Grand Chamber of the European Court of Human Rights (ECtHR) in the *Behrami v. France* and *Saramati v. France, Germany and Norway* cases,¹⁵ which would seem to rule out that KFOR conduct could be also attributed to the States that had made their military contingents available. In fact, the Court ruled that the conduct in question is to be attributed only to the UN, maintaining in particular that the Security Council 'retains ultimate authority and control' over KFOR.¹⁶ The Court did not even consider the issue of attribution of the conduct in question to NATO, to whom the UN had delegated the operational aspects of the international mission, even though it acknowledged that 'effective command of the relevant operational matters was retained by NATO'.¹⁷ In our view, the application of a control test based on substantive and not merely formal factors could have led the Court to attribute the conduct examined also to NATO and to the sending States.¹⁸

In relation to the specific control over military operations, which in practice constitutes the most important issue in the application of the criterion of control, the question arises as to whether it is necessary to establish control over 'every' single military operation carried out or it is sufficient to prove 'overall'

14 A merely formal assessment – based on the maintenance of links between the military contingent and the sending State – of the activities carried out by the UN peacekeeping force deployed in Cyprus (UNFICYP) would seem, for example, to have led the House of Lords (judgment of 11 Feb. 1969, *Attorney-General v. Nissan*) to rule that solely the United Kingdom was responsible for the actions of its soldiers within the framework of the said military operation. On that case see Jan Wouters and Pierre Schmitt, "Challenging Acts of Other United Nation's Organs, Subsidiary Organs, and Officials," in *Challenging Acts of International Organizations before National Courts*, ed. August Reinisch (Oxford: OUP, 2010), 94.

15 Applications No. 71412/01 and No. 78166/01.

16 Sections 134–135 and 140 of the Decision.

17 Sections 135, 138 and 140. For a criticism of that specific approach adopted by the Court, see Paolo Palchetti, "Azioni di forza istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati," *RDI* 90 (2007): 690, footnote 23.

18 For a comprehensive analysis of the jurisprudence of the ECtHR see Maria Canto Lopez, "Towards Dual or Multiple Attribution. The Strasbourg Court and the Liability of Contracting Parties' Troops Contributed to the United Nations," *IOLR* 10 (2014), 193 *et seq.*

control over military activities conducted as a whole. In this regard, there is a well known divergence of opinion in practice, even though the jurisdiction of the courts that have ruled in the matter is different. According to the settled case law of the International Court of Justice (ICJ), which appears to be in compliance with Art. 8 DARS analyzed above, it is necessary to establish specific control over every single military operation conducted in particular by private entities,¹⁹ whereas according to the case law of both the *ad hoc* International Criminal Tribunal for the Former Yugoslavia²⁰ and the ECtHR,²¹ it is sufficient to establish an overall control over the activities carried out by private entities.

Regarding the issue in question, we believe that it is correct to adopt the approach of control over every single military operation because the overall control test would excessively broaden the scope of international responsibility without adequate grounds or guarantees.²² Moreover, recourse to the overall control test contrasts with the need to conduct a substantive inquiry into the control exercised in any given situation. Indeed, an analysis of the control over a single military operation could well 'overturn' the results obtained from relying on an assessment of the overall control exercised over the general operation in question. That does not imply, as already pointed out above when discussing the relationship between formal and substantive control, that a finding as to overall control is irrelevant in a given case but simply that it must be adequately confirmed in light of the substantive control over the single military operations examined.

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- 19 Judgment of 27 Jun. 1986, *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America*, ICJ Reports 1986, 62–63 (Sections 109–110) and 64–65 (Section 115) in relation to the issue of attributing to the United States the activities carried out in Nicaragua by the *Contras* and held to be contrary to various rules of international humanitarian law. Similarly, Judgment of 26 Feb. 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ Reports 2007, 208–209 (Section 401), with reference to attributing the crime of genocide to the defendant State.
 - 20 Appeals Chamber, Judgment of 15 Jul. 1999, *Prosecutor v. Duško Tadić*, Sections 120, 122 and 137, in relation to attributing to the Federal Republic of Yugoslavia the activities carried out by the armed forces of the Serbian Republic of Bosnia-Herzegovina, in which the Tribunal applied the overall control test to the actions of military groups or paramilitary units organized on the basis of a hierarchical structure.
 - 21 Judgment of 18 Dec. 1996, *Loizidou v. Turkey*, Section 56; Judgment of 8 Jul. 2004, *Ilaşcu and Others v. Moldova and Russia*, Sections 315–316.
 - 22 This is the view expressed by the ICJ in the aforementioned judgment of 2007, *Bosnia and Herzegovina v. Serbia and Montenegro*, 210 (Section 406).

4 Examination of Practice: The Various Types of Control and Their Coordination

In analyzing the relevant practice on the application of the criterion of control, which mainly concerns cases of military operations conducted by States or IOs, it is worth mentioning at the outset that it is not uncommon for the various courts and tribunals to adopt different principles or rules for the attribution of the conduct being examined. In some circumstances a court, in the very same decision or within the same set of proceedings, applies distinct types of control both because the various forms are considered as complementary to one another or because they are held during the course of the legal proceedings to be more suited to resolving the specific dispute.

From the standpoint of the concrete application of the various types of control, it should be further noted that rarely is the use of such types ever accompanied by an in-depth examination of the political and military structure that the international organization is endowed with in relation to the concrete military operation or by a rigorous examination of the control exercised over the single harmful conduct. In this regard, it is emblematic that when there is a specific analysis of the actual carrying out of the military operations from the standpoint of the political and military control exercised over the contingents used, as happened in the *Srebrenica* case, the result is the 'overturning' of the formal approach regarding the attribution of the harmful conduct with the ensuing attribution of that conduct also to or solely to the sending States.

On the basis of practice, an initial distinction can be drawn between the application of general types of control that could occur in a given case (political, military, *etc.*) and special types that focus on a particular form of control. The first category covers types that establish exclusive control,²³ sometimes called ultimate authority control²⁴ or effective control,²⁵ at times labelled as

23 See the UN Secretary-General's Report of 20 Sept. 1996 on Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters. Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations, UN Doc. A/51/389, Section 17, in which it is stated that the UN's responsibility for the military operations conducted by United Nations Forces is based on the assumption that those operations are conducted 'under the exclusive command and control of the United Nations'.

24 On that test, used as aforesaid by the ECtHR in the *Behrami* and *Saramati* cases, see Kjetil Mujezinović Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test," *EJIL* 19 (2008): 509 *et seq.*

25 House of Lords, Judgment of 12 Dec. 2007, *R (on the application of Al-Jedda) (FC) v. The Secretary of State for Defence*, in particular, the opinion of Lord Bingham of Cornhill,

factual control.²⁶ Indeed, application of those general tests presupposes an overall examination of the various types of control that can be exercised in a given case. Consequently, bearing in mind the different jurisdiction of the courts concerned, recourse to the types in question assures, at least in principle, an assessment of all of the issues related to the attribution of the harmful conduct, without guaranteeing any 'safe haven' to certain entities (States or organizations), who could take advantage of the fact that some forms of control were not resorted to.

On the other hand the special types refer only to some very particular forms of control exercisable in a given case and hence do not rule out that the application of other types (general or special) lead to a finding of further international responsibility. Falling within this second category is the operational control test.²⁷

There are also cases in which the general and special forms of control have been appropriately coordinated with each other. In this regard, one can cite the position adopted by the UN Secretary-General in the Report of the United Nations Interim Mission in Kosovo of 12 Jun. 2008, clarifying that the international responsibility of the UN in Kosovo is 'limited to the extent of its effective operational control'. However, according to the Secretary-General, that control must be established through an examination of the effectiveness of that type of control.²⁸

The types of control under consideration here can thus be applied in conjunction with one another or as alternatives in national and international practice in order to establish the responsibility of States and IOs. More

Section 23, who refers to the test of the UN's 'effective command and control' over the operations of the British military forces engaged in Iraq following the UN Security Council's authorization for a multinational force to be deployed to that country: see Res. 1511, Section 13.

26 Supreme Court of the Netherlands, Judgment of 6 Sept. 2013, *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Mustafić-Mujić and Others*, Section 3.11.3.

27 District Court of The Hague, Judgment of 10 Sept. 2008, *H.N. v. The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, Section 4.9, which uses the 'operational command and control' test in relation to the Srebrenica case to attribute solely to the UN the harmful conduct materially engaged in by the Dutch military contingent operating as part of UNPROFOR. On operational control, see also the Comprehensive review of the whole question of peace-keeping operations in all their aspects: Report of the Special Committee on peacekeeping operations, UN Doc. A/50/230, 22 Jun. 1995, Section 11.

28 See UN Doc. S/2008/354, Section 16, delimiting in particular the scope of the UN's responsibility in light of the new competencies and functions assumed by the European Union in Kosovo.

specifically, the types in question are at times applied cumulatively at case law level and contribute to lending support to a given solution on the attribution of the conduct being considered. It is in this sense that one can interpret the judgment of 7 Jul. 2011 of the Grand Chamber of the ECtHR in the *Al-Jedda v. The United Kingdom* case. In its judgment the Court considered that the Security Council 'had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force'²⁹ set up by the Council in order to take the necessary measures to contribute to the maintenance of security and stability in Iraq.

In other cases, the types of control for attributing responsibility are applied progressively in order to verify the results stemming from the initial application of one given type. In this sense one can interpret the judgment of 5 Jul. 2011 of The Hague Court of Appeal in the *Mustafić-Mujić and Others v. The State of the Netherlands* case. In its judgment the Court first and foremost pointed out that, in conformity with the agreement concluded between the UN and the Netherlands, the battalion made available by the Netherlands was to operate 'according to the UN command structure' and hence be placed 'under the ultimate authority and control of the Security Council'. That, according to the Court, effectively happened in the first phase of the military operation on the basis of Res. 743 of 1992, which provided for the creation of UNPROFOR and in which it was stipulated that this mission would be established under the 'authority' of the Security Council. However, the Court continued, the solution that can be deduced from the application of that test was not conclusive because one had to subsequently determine 'who actually was in possession of "effective control"' of the battalion.³⁰

There are even cases in which a court has 'changed tack' in the course of its application of the various control types regarding who to attribute the harmful conduct to. In this sense, at times international case law seems to abandon some forms of control, probably considered as being inadequate to resolve the case in hand, or in any event decides to better elaborate on how they are to be applied in concrete. And so, the ECtHR in its judgment of 23 Mar. 1995 (preliminary objections) in the *Loizidou v. Turkey* case stated that 'the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory'.³¹ Subsequently, in its judgment on the merits of 18 Dec. 1996, referred to above, the Court explained what is meant by effective

²⁹ Application No. 27021/08, Section 84.

³⁰ Section 5.7 of the judgment.

³¹ Application No. 15318/89, Section 62.

control, stating that the existence of a large number of troops engaged in active duties in Northern Cyprus implies that ‘her army exercises effective overall control over that part of the island.’³² In that way the Court ‘manipulated’ the effective control test in light of the specific circumstances of the case and probably with the aim of achieving what it had already set out to decide regarding the attribution of the harmful conduct. In fact, this manipulation made it easier to assess that Turkey had breached the European Convention on Human Rights.

5 The Practice that Distinguishes Cases Depending on the Nature of the Violation Committed

It is settled in practice that there is no limit to the search for factors from which one can deduce control exercised by a State or international organization. Therefore, control may be inferred from either acts of commission or omission. What counts is that the conduct stem from orders, instructions or other forms of control.

Consistent with what has been stated just now, it is worth noting that in national case law that has addressed the issue of the attribution of harmful conduct to States or IOs, there is a trend according to which what is relevant is not only the entity that ordered certain behavior but also the entity that had the power to prevent the harmful conduct that then actually occurred.³³

It is also worth stressing that in a given case the inquiry as to who is able to prevent the harmful event may be complementary or ancillary to the examination concerning the material execution of instructions or orders issued by the controlling entity. The ancillary nature of this specific inquiry is evident in the previously cited 2011 judgment of The Hague Court of Appeal in the *Srebrenica* case. According to the Court, in assessing the conduct of the Dutch military contingent by applying the effective control test, it was necessary not only to check ‘whether that conduct constituted the execution of a specific instruction, issued by the UN or the State’ but also ‘whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned’ (Sections 5.9 and 5.18). Although in the case before it the Court found that the Dutch contingent had acted on the instructions of its own government and at

32 Application No. 15318/89, Section 56.

33 The importance of this second line of inquiry had already been suitably pointed out in the literature: see Dannenbaum, “Translating,” 156–157, and, above all, Tom Dannenbaum, “Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct,” *ICLQ* 61 (2012): 713 *et seq.*

the same time had the power to prevent the commission of the harmful conduct, one can assert that if in certain circumstances it is not possible to conclusively prove that the conduct of a State or international organization stemmed from the execution of specific orders or instructions, a valid alternative would be to ascertain who could have prevented that same harmful conduct.

The same approach has been followed by the Belgian courts concerning Belgium's responsibility for the Kigali massacre in Rwanda, which was similar in many respects to that in Srebrenica.³⁴ In this regard, one can justifiably question whether that line of case law risks excessively broadening the scope for the attribution of harmful conduct because in the cases described above the attribution of the conduct to the sending State is quite automatic 'since there was always the possibility for that State to exercise control in a way that prevents the impugned conduct from occurring'.³⁵ From this perspective, we maintain that the said recent trend in practice concerning the entity that had the power to prevent the harmful event essentially pursues aims similar to those discernible in the already cited jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the ECtHR concerning overall control over harmful events and consists of an attempt to widen the cases of attribution of those events, considerably alleviating the burden of proof as to the existence of control. This practice could thus contribute to the reopening of the debate on the nature and content of the control exercised by States or IOs.

6 The Practice that Distinguishes Cases Depending on the Particular Phase in Which the Violation Occurs

An examination of the practice regarding the application of the criterion of control reveals another problematic aspect of particular interest. This aspect is highlighted by the Dutch case law regarding Srebrenica and the Belgian case law regarding Kigali: the 'special nature' of the time that the conduct in question

34 First Instance Court of Brussels, Judgment of 8 Dec. 2010, *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, which addressed the issue of whether the Belgian contingent in Kigali was able to impede 'la consommation de crimes de guerre ou d'y mettre fin'. In response to a spurious claim by the defendants that the UNAMIR mission was not offensive in nature, the Court held that 'cet argument tient mal dès lors que la simple présence passive des militaires garantissait déjà une sécurité aux réfugiés et que les contours de leur mission les autorisait à réagir en légitime défense si le cantonnement était attaqué': Section 48.

35 André Nollkaemper, "Dual Attribution. Liability of the Netherlands for Conduct of Dutchbat in Srebrenica," *JICJ* 9 (2011): 1148.

happened. In particular, the conduct occurred at a time when the international mission of UNPROFOR in the former Yugoslavia had totally and irremediably failed and at a time when UNAMIR was in extreme difficulty in Rwanda. These exceptional situations are said to have led to an unusual 'disconnection' between the UN and military contingents such as to 'revive' the role and importance of the States that had made their military contingents available.

In this regard the Hague Court of Appeal stated that 'the Court attaches importance to the fact that the context in which the alleged conduct of Dutchbat took place differs in a significant degree from the situation in which troops placed under the command of the UN normally operate'. The Court went to assert that '[a]fter 11 Jul. 1995, the mission to protect Srebrenica had failed. Srebrenica had fallen that day and it was out of the question that Dutchbat, or UNPROFOR in any other composition, would continue or resume the mission' (Section 5.11). According to the Court it followed that the decision to evacuate the Dutch military contingent could not but be made jointly by the UN and the Netherlands (Section 5.12). In the same case, without however examining the question in any great depth, the Dutch Supreme Court analogously referred to 'the special context of the case' (Sections 3.11.3–3.12.3). Similar considerations, even though not dwelt on at length, can be gleaned from the previously mentioned 2010 judgment of the First Instance Court of Brussels regarding the decision to evacuate the military contingent from the Kigali refugee camp, which according to the Court was unilaterally made by Belgium.

In light of the national case law cited above, it would seem in essence that the failure of a military operation undertaken by the UN (UNPROFOR) or a situation of particular difficulty (UNAMIR) should be a sort of warning signal to check whether control of the operation has changed hands. Or even better an occasion to investigate whether control has returned to the 'mother country': the State that supplied the military contingent.

From an analysis of this case law one can further deduce that in relation to a given military operation, the specific circumstances of the case can imply the use of different criteria for the attribution of the harmful conduct, depending in particular on whether the military operation in question is in its physiological or terminal stages.

From that same case law one can deduce on the contrary that in the absence of special situations apt to give rise to a total or partial interruption of the 'transmission channels' through which political and military control is exercised by the international organization over the military contingents supplied by the States, the general rule remains that of attribution of the relevant conduct solely to the international organization. This is confirmed in German case

law, in particular in the judgment of 9 Feb. 2012 of the German Administrative Court in the *Anonymous v. German Federal Government* case. In its judgment, rejecting an individual application complaining of a violation of some rules of international humanitarian law by the German military contingent deployed as part of ISAF in Afghanistan, the Court held that the actions of German armed forces operating within the NATO chain of command are to be attributed to the UN.³⁶ As if to say: if there are no elements interfering with the control exercised by the international organization, the general rule to be applied is that the acts of the military contingents made available by the States are to be attributed exclusively to the organization.

This approach is not persuasive. In our view, it is erroneous to maintain that the question of attribution of conduct to the organization or to the States that sent the military contingents becomes problematic solely in the exceptional circumstances that were a feature of the Srebrenica and Kigali cases. Also situations of 'normality' in the carrying out of a given military operation can give rise, in the event of harmful conduct, to cases of attribution in contrast with what is formally envisaged regarding the control exercised by the international entities involved in the operation. Moreover, it can happen even in the exceptional situations described in the Dutch and Belgian case law that there is no 'changing of the guard' at all as regards control over the military activities, which remains in the hands of the entity it is formally vested in.

Consequently, we maintain that cases like Srebrenica and Kigali constitute mere pointers, certainly very relevant ones, along with all of the other relevant factors in the specific case, for the courts when they are called upon to determine which entity exercised substantive control over the conduct actually carried out. It is not even possible to compile a list of the elements that 'interfere' with the normal control exercised by IOs. For example, a further important element of interference could be the fact that the military operation instituted and run by the international organization operates 'side by side' with other military operations instituted and run by other organizations or States and whose functions and goals may at times be analogous. This was the case in the above mentioned ISAF mission, which for a certain period of time exercised its own functions in parallel to the Enduring Freedom operation instituted and run by the United States. For that reason, in practice there were some instances of 'overlapping' between the activities conducted by the various military operations that posed delicate questions of attribution of the respective harmful

36 See Section 72 of the judgment, available at opil.ouplaw.com. Likewise in this case, as in the *Behrami* and *Saramati* ones, the Court does not pose the question as to whether the relevant conduct could be attributed to NATO.

conduct. The issue, although in general terms only, was tackled by the German Constitutional Court in the *Tornado* case, in which it stated that the close co-operation between ISAF and Enduring Freedom implies that possible violations of international law by the latter could be attributed to the former, even though the Court ruled out that in the case then before it such a situation had ever actually happened.³⁷

7 Conclusion

An overall examination of practice, in particular national and international case law regarding the application of the control criteria reveals, in our view, a variety of solutions that depend to a large extent on the specific circumstances of the case. An examination of this practice raises doubts as to whether the rule contained in Art. 7 DARIO corresponds to general international law and also could have effects on the application of Art. 8 DARS, which as mentioned before has already witnessed some inconsistent interpretation in international case law.

In particular, the analysis of the case law cited above, which concerns exclusively cases of control over military operations and hence is limited *ratione materiae*,³⁸ shows how the specific criterion adopted varies depending, above all, on four factors, which can come into play in conjunction with one another or alone: (1) the nature of the entity whose responsibility must be established (States or IOs); (2) the type of military operation examined (peacekeeping, peace-enforcement, UN Security Council authorizations for the use of force, unilateral action by States); (3) the nature of the infringement that occurred, for example, whether they are acts of commission or omission, in the latter case involving a failure by a State or organization, to exercise its power to prevent the harmful event; (4) the specific time at which the unlawful event occurred within the framework of military operations undertaken by IOs. In

37 See Judgment of 3 Jul. 2007, *Parliamentary Group of the PDS/Die Linke in the German Federal Parliament v. Federal Government*, Section 86, available at opil.ouplaw.com.

38 This means that one cannot exclude that the practice on the responsibility of IOs concerning matters other than military ones could suggest further forms of control. On the limited nature of the practice concerning the application of the criterion of control to the realm of IOs, see Blanca Montejo, "The Notion of 'Effective Control' under the Articles on the Responsibility of International Organizations," in *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, ed. Maurizio Ragazzi (Leiden: Martinus Nijhoff, 2013), 404.

this case with special reference to: (a) their normal functioning or possible elements of interference due to the definitive failure of the military operation; (b) their particular difficulties in functioning or even to the contemporaneous presence of other military operations in the same context.

In light of the said variables that can be detected in practice, it is not uncommon that the international responsibility of the various entities involved can be established on the basis of different types of control.

An examination of practice also permits one to assert that the formal approach to assessing control has definitely and correctly been substituted by a substantive approach. This means that cases of double or multiple attribution of harmful conduct in a given case can be viewed as the general rule and hence not exceptional at all. As very recently stated by the Hague District Court in the Judgment of 16 Jul. 2014 'the same act and/or acts might be attributed to both the States and the UN under what is called "*dual attribution*"'.³⁹

Finally, one must ask why there has been a greater willingness in national case law, especially Dutch and Belgian, to attribute responsibility to the States that send the military contingents deployed as part of missions undertaken by IOs. In our view the reason lies not just in a stricter application of the principles and criteria for the attribution of the conduct analyzed in this work. It could well stem from a desire to strike a fairer balance between general interests, consisting of the need for States and organizations to participate in military operations often aimed at reacting to violations of fundamental principles and values of the international community, and individual interests, consisting of the need to safeguard above all the right of private parties' access to justice. In fact, it is well known that private entities cannot bring suit before international courts with a view to establishing the responsibility of IOs. At the same time it is also difficult to obtain a finding of responsibility of organizations before national courts because of the application of the rules on the immunity of those organizations from jurisdiction. This is particularly true for the UN, which is progressively considered in practice as a 'special' organization in view particularly of its fundamental functions exercised by the Security Council under Ch. 7 of the UN Charter and hence subject to a regime of substantially absolute immunity. This is demonstrated by the *Srebrenica* case, where the decisions of both the lower courts⁴⁰ and the Dutch Supreme Court

39 See the case *The Mothers of Srebrenica and Others v. The State of the Netherlands, Ministry of General Affairs, and the United Nations*, Section 4.34.

40 In particular, see the Judgment of the Court of Appeal of 30 Mar. 2010, Sections 5.11–5.14, which in a totally unsatisfactory manner resolves the issue of the conflict between the right of the victims' relatives to have access to justice (based also on international rules

of 13 Apr. 2012 in the *Mothers of Srebrenica Association v. The State of the Netherlands and the United Nations* case⁴¹ recognized the UN's absolute immunity. This approach would seem to be further confirmed in the same case by the ECtHR.⁴²

It follows that domestic courts focus their attention more on establishing the responsibility of the States who send the military contingents involved in operations undertaken by the IOs as a means of affording 'subsidiary protection' to the individual right of access to justice. From this standpoint the case law analyzed in this work could have a significant and welcome impact in finally superseding the doctrine of act of State or act of government that still today can constitute a limit to establishing the responsibility of the national or foreign State for military operations.⁴³

like Art. 6 of the European Convention on Human Rights) and the UN's immunity by referring to the exercise of the right of access to justice against others than the UN such as the Netherlands and the individuals who committed the crimes. Moreover, the Court asserts (Section 5.10) that the UN's responsibility in the case was limited to the hypothesis of not having prevented the genocide and not the separate hypothesis of active involvement in the commission of the crime of genocide. Therefore, the Court left open a 'slight chance' for not recognizing UN immunity in the case of material commission of international crimes.

41 See Sections 4.3.1–4.3.14 of the Judgment. In particular, disregarding the Appeal Court's approach on the point, the Supreme Court recognized that the UN had absolute immunity by virtue of its 'special place in the international legal community' (Section 4.3.4) and 'regardless of the extreme seriousness of the accusations' (Section 4.3.14).

42 See the decision of 11 Jun. 2013 in the *Stichting Mothers of Srebrenica v. The Netherlands* case, Section 141 *et seq.*, which values the special importance of operations established by Security Council Resolutions under Ch. 7, to the point of asserting that the European Convention 'cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations' (Section 154).

43 In Italian case law see *Corte di Cassazione a S.U.*, Order No. 8157 of 5 Jun. 2002, *Presidenza del Consiglio dei Ministri v. Marković and Others*, in relation to claims for damages made against Italy for the bombing of Serbian radio and television during the NATO air strikes against Serbia in 1999, *RDI* 85 (2002): 802, Sections 2–4. On the application of the theory of act of government in French case law, with reference to the same conflict against Serbia, see *Conseil d'État*, Judgment No. 328757 of 23 Jul. 2010, *Société Touax et Société Touax Rom*, *RGDIP* 115 (2012): 1001 *et seq.*, with note by Jean Matringe.