Attribution of Conduct in UN Peacekeeping Operations

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The paper explores the rules on attribution of conduct within United Nations (UN) peacekeeping operations. Although there is now a prevailing judicial practice of employing the effective control test, the content of this test is not sufficiently clear. A review of the so-far scarce judicial practice demonstrates that different courts interpret the test in different ways. This leads to uncertainty on how to apply the effective control test in future cases, the number of which will undoubtedly increase, as the number of peacekeeping operations in the world rises. In this paper, several judicial decisions dealing with the issue of attribution in the context of peacekeeping operations are analyzed and compared. The conclusion highlights some of the essential flaws of the current system, which should be dealt with in order to achieve a more unified approach to tackling the attribution issue.

Keywords: international responsibility, international peacekeeping, international organizations, United Nations.

1. Introduction

In parallel with the growth of the number of the UN peacekeeping operations in the world, there has been a growth of allegations of peacekeepers being involved in unlawful acts, primarily those of sexual exploitation and abuse. Although *The Code of Personal Conduct for Blue Helmets*[1] explicitly sets out the rules of behavior of the peacekeeping officers, one of them providing that peacekeepers should not "indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children," examples of disobedience of these rules are plenty. In the 1990s, sexual crimes by peacekeepers occurred in Bosnia, Mozambique, Cambodia, East Timor, and Liberia.[2] Some years later, the UNHCR and *Save the Children UK* reported on sexual violence in Guinea, Liberia, and Sierra Leone.[3] From 2014 to 2017, evidence on sexual abuse by French, Georgian, and Congolese soldiers stationed in the Central African Republic had emerged.[4] In 2018, shocking information on sexual exploitation came from Syria, where apparently women in refugee camps were forced to offer sexual favors for

[1] Ten Rules Code of Personal Conduct for Blue Helmets, https://conduct.unmissions.org/ten-rulescode-personal-conduct-blue-helmets (2 September 2019).

[2] R. Murphy, *An Assessment of UN Efforts to Address Sexual Misconduct By Peacekeeping Personnel*, International Peacekeeping, Vol. 13, No. 4, 2006, p. 531.

[3] Ibid.

[4] R. McCarrel, *The United Nations and Sexual Abuse, Why Peacekeeping Reform Has Failed*, Foreign Affairs, https://www.foreignaffairs.com/articles/2016-02-14/united-nations-and-sexual-abuse (02 September 2019); A. Essa, *UN Peacekeepers hit by new Allegations of Sex Abuse*, Al Jazeera News, 10 July 2017, https://www.aljazeera.com/news/2017/07/peacekeepers-hit-allegations-sex-abuse-170701133655238.html (2 September 2019); K. Sief, *Members of a UN peacekeeping force in the Central African Republic allegedly turned to sexual predation, betraying their duty to protect*, The Washington Post, 27 February 2016, http://www.washingtonpost.com/sf/world/2016/02/27/peacekeepers/?utm_term=.0f4b3f830e65 (2 September 2019).

aid from the United Nations in return.[5] Sexual abuses are among the most usual, but certainly not the only type of the UN peacekeeping officers' misconduct. Actions such as arbitrary arrest and detention have been reported many times as well.[6] In addition, instances of a failure of peacekeepers to provide a necessary protection, as it was the case with *Dutchbat* in Srebrenica, have raised much attention on the international scene.

Events in which peacekeepers were involved in some kind of unlawful behavior raise some important issues, ranging from those dealing with the prevention of abuses to those dealing with determining an internationally responsible subject and undertaking a remedial action.[7] In the present paper, we shall focus on the issue of international responsibility, more accurately on the issue of attribution of conduct of the members of peacekeeping missions. It will be analyzed under what circumstances are acts of peacekeepers attributed to international organizations under which they operate, and under what circumstances are they attributed to troop-contributing states.

The starting point of the analysis shall be the ILC Draft Articles on Responsibility of International Organizations of 2011 (DARIO).[8] Articles 6 to 9 deal with the issue of attribution of conduct. In the present paper, the specific focus will be laid on Article 7, which speaks of attribution of conduct of organs of a state placed at the disposal of an international organization and which, according to the DARIO Commentary, refers particularly to the peacekeepers.[9] Article 7 provides the application of the effective control test.[10]

The effective control test has been applied a number of times by national and international courts, although in certain judicial decisions, other standards of attribution have been employed as well. In spite of the fact that there is now a prevailing judicial practice supporting the application of the effective control test, there is still no unified reasoning on the issue of attribution among different judicial bodies.

In the present paper, different standards of attribution of conduct shall be elaborated and compared, with specific emphasis on the effective control test in the context of international organizations. The overview of the relevant judicial decisions shall be given with the aim of determining the logic of judicial reasoning in cases in which responsibility for certain conduct had to be allocated to either a state or an organization or to both of them jointly.

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[5] J. Ensor, *Women in Syria "forced to exchange sexual favors" for UN aid*, The Telegraph, 27 February 2018, https://www.telegraph.co.uk/news/2018/02/27/women-syria-forced-exchange-sexual-favours-un-aid/ (3 September 2019). See also: *Voices from Syria 2018*, United Nations Population Fund, December 2017, https://hno-syria.org/data/downloads/gbv.pdf (3 September 2019).

[6] See for instance, cases of *Al-Jedda* and *Mohammed*, *infra* 3.4.1., 3.4.4.

[7] See more on actions to address the peacekeepers' conduct at: https://peacekeeping.un.org/en/standards-of-conduct (5 September 2019).

[8] The legal significance of DARIO has been questioned by some scholars due to the fact that they, unlike the Draft Articles dealing with the responsibility of states (DARS), may not yet be reflecting customary international law. See: K. M. Larsen, *Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test*, European Journal of International Law, Vol. 19, 2008, p. 2018. Some critics maintain that the text of the Articles has no support in international practice. See: J. Alvarez, *Revisiting the ILC's Draft Rules on International Organization Responsibility*, ASIL Proceedings, Vol. 105, 2011, pp. 344-348.

[9] DARIO Commentary, Yearbook of the International Law Commission, Vol. II, Part II, 2011, p. 56.

[10] Draft Articles on the Responsibility of International Organizations, 2011, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (5 September 2019).

2. International Responsibility of International Organizations – an Issue of Attribution

Some authors rightly observe that the issue of the responsibility of international organizations has until a few decades ago been "a rather obscure area of law".[11] Recently, this issue has been addressed by the ILC DARIO. Two provisions are particularly relevant with regard to attribution.

First is Article 6, which states that "the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization",[12] even if that organ or agent exceeds the authority or contravenes instructions,[13] or if the organization acknowledges and adopts as its own the conduct which would otherwise not be attributable to it.[14] DARIO define "organs" and "agents" of an international organization, providing that an organ is "any person or entity which has that status in accordance with the rules of the organization" while an agent is "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts".[15] As the ILC Special Rapporteur Giorgio Gaja observed, "what is decisive is not whether an entity is formally defined as an "organ" but rather whether an entity acts in that capacity.[16]

If the UN peacekeepers are considered to be organs of the UN, the above rule on attribution applies, while the apportioning of responsibility for the wrongful acts to the UN becomes automatic. According to the UN Legal Counsel, peacekeeping forces can indeed be considered as organs of the UN. In his opinion, "as a subsidiary organ of the UN, an 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".[17] He further added that "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-à-vis* third States or individuals".[18] If, on the other hand, the UN Security Council has merely authorized the operation, which is then conducted under national or regional command, the responsibility lies exclusively with that state or a regional organization.[19] Legal position of peacekeepers as the subsidiary organs of the UN was also recognized in the Draft Model Status-of-Forces Agreement between the UN and the host countries.[20]

In cases in which a state organ is fully seconded to an international organization, that organ's

[11] P. Palchetti, *International Responsibility for Conduct of UN Peacekeeping Forces: the Question of Attribution*, Seqüência (Florianópolis), Vol. 70, No. 1, 2015, p. 20.
[12] Ibid.
[13] Art. 8 DARIO.
[14] Art. 9 DARIO.
[15] Art. 2 DARIO.
[16] G. Gaja, *Second Report on Responsibility of International Organizations*, Yearbook of the International Law Commission, Vol. II, Part I, 2004, p. 7.
[17] *Memorandum of the United Nations Legal Counsel, Mr. Hans Corell, of 3 February 2004 to the Director of the Codification Division, Mr. Václav Mikulka*, Yearbook of the International Law Commission, Vol. 2, Part I, 2004, p. 11.
[18] Ibid.
[19] Responsibility of International Organizations: Comments and Observations received from International Organizations, Document A/CN.4/637and Add. 1, http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_637.pdf&lang=ESX (8 September 2019).
[20] Comprehensive Review of the Whole Question of Peacekeeping Operations in all Their Aspects, Model Status-of-forces Agreement for Peace-keeping Operations, Report of the Secretary-General, UN. Doc. A/45/594, 1990, para. 15.

conduct will be attributable to the organization, that is, Article 6 DARIO will apply.[21] However, in practice it is quite rare that national contingents are fully seconded to an organization, which then establishes full control over them.[22] In most cases, peacekeepers have a dual organ status, being at the same time an organ of a state and an organization. In a division of powers between these two subjects, normally defined in an agreement, an organization establishes operational control[23] over the troops seconded by member states, while the troop-contributing states retain disciplinary and criminal jurisdiction over them.[24] Such division of powers implies that either one of them, as well as both of them jointly, might bear the responsibility for the peacekeepers' misconduct.[25] A criterion

for apportioning responsibility in situations in which state organs are not fully seconded by member states is set in Article 7 DARIO.

Article 7 stipulates that "the conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".[26] According to this provision, attribution will be judged in each case dependent on the established level of effective control. The rationale of Article 7 is clear: apportioning of responsibility in situations in which troops are not entirely seconded to an international organization cannot be automatic but rather depends on the actual control over them. Control means, *inter alia*, the possibility of preventing that misconduct.[27] Responsibility is thus apportioned to the subject that was in a position to prevent the occurrence of the misconduct and yet has failed to do so.

Some authors have criticized a sharp distinction between Articles 6 and 7 DARIO, that is, between fully and not fully seconded state organs.[28] They advocate the approach according to which the peacekeepers represent subsidiary organs of the UN and it is presumed that their conduct should be attributable to the Organization. This presumption rests on the fact that the contributing states transferred their authority to the UN, so that the national contingents could act exclusively on behalf of the UN.[29] The presumption may, however, be rebutted if national contingents "operate under the direct instructions of their contributing state" and "fall outside the reach of the UN's effective control".[30]

It is difficult to see how the application of Article 6 and the presumption of attribution to the UN could constitute a more convenient standard of attribution than the effective control standard pro-

[21] DARIO Commentary, p. 56.
[22] T. Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be apportioned for Violations of Human Rights by Member State Troop Contingents Serving as UN Peacekeepers*, Harvard Law Journal, Vol. 51, 2010, p. 148.
[23] Operational control is considered to be the authority to "assign specific tasks or missions to subordinate commanders, to deploy units within the area of operations, to reassign forces, or to retain or delegate elements of operational or tactical level command or control." T. D. Gill, *Legal Aspects of the Transfer of Authority in UN Peace Operations*, Netherlands Yearbook of International Law, Vol. 42, 2011, p. 46.
[24] DARIO Commentary, p. 56; Comprehensive Review of the Whole Question of Peacekeeping Operations in all Their Aspects, Report of the Secretary-General, UN Doc. A/49/681, 21 November 1994, p. 3.
[25] Condorelli observes that peacekeepers represent elements of governmental authority of both the UN and their own state, which leads to the existence of dual attribution of their conduct. See: L. Condorelli, *Le statut des forces de l'ONU et le droit international humanitaire*, Rivista di diritto internazionale, Vol. 78, 1995, pp. 893-897.
[26] Art. 7 DARIO.
[27] Dannenbaum 2010, p. 114.
[28] A. Sari & R. A. Wessel, *International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime*, in B. Van Vooren & S. Blockmans & J. Wouters (Eds.), The EU's Role in Global Governance: The Legal Dimension, Oxford University Press, 2013, pp. 126-141.
[29] Ibid. p. 11.
[30] Ibid. p. 12.

vided by Article 7. If it is accepted that peacekeepers have dual institutional link with both the state and the organization, whereby states surely retain disciplinary and criminal jurisdiction but sometimes operational control as well,[31] it seems appropriate to apply the effective control test provided by Article 7.

In spite of the fact that the effective control test is "the most logical and reasonable standard for the purposes of attribution of conduct",[32] the question of determining a degree of that control, however, arises. Gaja noted in his Report that "what matters is not exclusiveness of control, but the extent of effective control",[33] which needs to be determined in each particular case.

3. Tests for Attribution of Conduct

3.1. Effective Control Test

The effective control test is not an invention of DARIO. The test is well-known in the context of state responsibility. Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARS) provide that "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[34] Not surprisingly, determining whether specific conduct is carried "under the direction or control of" a state may be

problematic. The Commentary to the DARS offers some guidelines in that respect. It provides that a "conduct will be attributable to the State only if the state had directed or controlled the specific operation and the conduct complained of was an integral part of that operation".[35] On the other hand, the conduct will not be attributable to the state if it was "only incidentally or peripherally associated with an operation and … escaped from the State's direction or control".[36] The same understanding of state control is present in the international jurisprudence. In the *Military and Paramilitary Activities in and against Nicaragua* the International Court of Justice was entrusted with the task of determining whether the acts of the Nicaraguan paramilitary group, the *contras*, were attributable to the United States. The Court concluded that the general support which was granted to the *contras* by the United States was not sufficient to treat the *contras* as acting on that state's behalf.[37] The Court further added that it would have to be proven that the United States had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[38]

The ICJ again employed the effective control test in the *Genocide* case, in which the Court tried to establish whether the massacres at Srebrenica were committed by persons or entities ranking as organs of the Federal Republic of Yugoslavia. The Court then found that "it has not been estab-

[31] R. Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?* Criminal Law Forum, Vol. 14, 2003, p. 174.
[32] Gill 2011, p. 53.
[33] Gaja 2004, p. 14.
[34] Art. 8, DARS with commentaries, 2001, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (8 September 2019).
[35] Ibid.
[36] Ibid.
[37] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, pp. 62 and 64-65, paras. 109, 115.
[38] Ibid.

lished that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres … were perpetrated".[39]

The effective control test in the context of state responsibility, naturally, differs from the same test in the context of international organizations. This distinction derives from the different relations between the relevant subjects in each of these cases. In the case of state responsibility, actions of individuals or entities are either attributable to a state or not. In the context of the placing of an organ or agent at the disposal of an international organization, however, control does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct has to be attributed.[40] In making the assessment of who is the responsible party, it is not necessary to check the existence of the effective control on the part of both the state and the organization; it suffices to check whether an organization exercised such control. If it is established that an organization lacked such control, it automatically means that the act should be attributed to a state.[41] Also, the possibility of dual responsibility inevitably derives from the application of the effective control test, as it is possible that both the UN and the troop-contributing state had effective control over the particular conduct. Surprisingly, the UN Secretariat did not acknowledge this possibility. By differentiating between the UN peacekeeping operations, which are under the full command and control of the UN, and actions authorized by the Security Council, but undertaken under the control of states or regional organizations, it failed to recognize situations in which troops receive

orders from the UN but, in addition, receive orders from their respective governments.[42] For instance, the report of the Commission of Inquiry, established in order to investigate armed attacks on the UN personnel in Somalia (UNOSOM II) revealed that "the Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command".[43] Similarly, it was established that certain decisions by the commander of the Belgian contingent of the UN Assistance Mission for Rwanda (UNAMIR) were taken under the control of Belgium and not of UNAMIR.[44]

The only scenario in which the UN admitted not having control over the peacekeepers, and consequently not bearing responsibility, is when they are acting outside of their official capacity. Article 8 DARIO states that *ultra vires* acts shall be attributable to an organization "if the organ or agent acts in an official capacity and within the overall functions of that organization".[45] Commentary to DARS Article 7 offers some guidelines when it comes to delineating unauthorized but still official conduct and private conduct. The former refers to "actions and omissions of organs purportedly or apparently carrying out their official functions", as opposed to "private actions or omissions of individuals who happen to be organs or agents of the State".[46] This characterization, according to

[39] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, para. 413.
[40] DARIO Commentary, p. 57.
[41] P. D'Argent, *State organs placed at the disposal of the UN, effective control, wrongful abstention and dual attribution of conduct*, Questions of International Law, Vol 1, 2014, pp. 17-31. See also: A. Spagnolo, *The „reciprocal" approach in article 7 ARIO: a Reply to Pirre d'Argent*, Questions of International Law, Vol 1, 2014, pp. 33-41.
[42] C. Leck, *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct*, Melbourne Journal of International Law, Vol. 16, 2009, p. 350.
[43] S/1994/653, paras. 243-244.
[44] *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, RG Nos. 04/4807/A and 07/15547/A, Judgment of 8 December 2010, Court of First Instance of Brussels.
[45] Art. 8 DARIO.
[46] DARS Commentary, p. 46.

some authors, takes the acts of human rights violations outside the scope of "official capacity", that is, outside the scope of responsibility of the UN and triggers the responsibility of a troop-contributing state.[47] The fact is, however, that it is often quite difficult to differentiate between the acts committed in the official capacity from those committed "off-duty". There are no clear indications on how acting in the official capacity should be assessed. That is why factual circumstances of each particular case should be taken into consideration, including the opinion on the issue of the Force Commander or Chief of Staff.[48]

3.2. Overall Control Test

In *Prosecutor v. Tadic*, the International Tribunal for the former Yugoslavia (ICTY) introduced a new standard of attribution, the overall control test.[49] In the focus of the Tribunal was determining individual criminal responsibility, and not the state responsibility. However, the Tribunal found it necessary to determine whether the acts committed by Dusko Tadic could be attributed to the FR Yugoslavia. Such attribution would imply that the conflict in question was of an international character and thus Article 2 of the Fourth Geneva Convention of 1949 should be applied. The Appeals Chamber was of the opinion that effective control test was inappropriate given the specific circumstances of the case. It found that the effective control test may be employed in situations in which private individuals act on the state's behalf.[50] However, if those individuals make up "an organized and hierarchically structured group such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels", "for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole … [was] under the overall control of the State".[51] Such control exists when a state has a role in "organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group".[52] This means that, according to the overall control test, the responsibility of a state exists even if that state gave no specific instructions for the commission of any of the enumerated acts.[53] Clearly, this test is stricter for a state in comparison to that of effective control.

The ICJ reflected on the overall control test when deciding the *Bosnian Genocide* case. The Court observed that the ICTY was not called upon to rule on questions of state responsibility, as "its jurisdiction is criminal and extends over persons only".[54] The ICJ further found that the Tribunal dealt with "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it".[55] Thus, the ICJ concluded that the application of the overall control test may have been appropriate for determining whether or not an armed conflict was international, but found that in the context of state responsibility it was "unpersuasive".[56]

[47] See Dannenbaum 2010, p. 158.
[48] DARIO Commentary, p. 61.
[49] *Prosecutor v. Tadic*, ICTY-94-1-A (1999), 38 ILM.
[50] Ibid. para. 129.
[51] Ibid. para. 120.
[52] Ibid. para. 137. See also S. Talmon, *The responsibility of outside powers for acts of secessionist entities*, International and Comparative Law Quarterly, Vol. 58, 2008, p. 506.
[53] Ibid.
[54] *Prosecutor v. Tadic*, para. 403.
[55] Ibid.
[56] Ibid. para. 404. For a scholarly critique of the overall control test see: G. Kajtár, *An Overall Critique of the Overall Control Test*, in Zs. Csapó (Ed.): Emlékkötet Herczegh Géza születésének 85. évfordulójára: A ius in bello fejlődése és mai problémái. *Pécs, 2013,* pp. 82-98. For a critical analysis of the standpoint of the ICJ see A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law, Vol. 18, No. 4, 2007, pp. 649-668.

3.3. Ultimate Authority and Control Test

The third test employed in international jurisprudence when determining the attribution of acts was the test of ultimate authority and control. In the *Behrami/Saramati* cases, the European Court of Human Rights (ECtHR) was asked to determine whether unlawful acts committed by the United Nations Mission in Kosovo (UNMIK) and the NATO military force in Kosovo (KFOR), both established by the UN Security Council Resolution 1244, constituted violations of the European Convention on Human Rights (ECHR) by the troop-contributing states. In the *Behrami* case, one boy was killed and another injured by undetonated cluster bombs that remained after the NATO bombing of Yugoslavia in 1999. It was submitted in the application to the Court that France violated Article 2 of the European Convention on Human Rights (ECHR) due to the fact that its KFOR troops failed to clear the unexploded bombs, although they knew of their existence.[57] France, on the other hand, claimed that it was UNMIK that was responsible for demining and, consequently, that the responsibility for what happened lies with the UN. In the *Saramati* case, a Kosovar was detained by the KFOR commander under suspicion of posing a security threat. The applicant claimed that his extra-judicial detention constituted a violation of Article 5 of the ECHR and brought a claim against Norway and France since the two KFOR commanders involved in his detention were of Norwegian and French nationality. The two states claimed that it was the UN that had authority over the commanders and is, therefore, the one the action should be brought against.

The ECtHR found in both cases that the acts in question should be attributed to the United Nations; however, it based its decisions on different arguments deriving from the different status of UNMIK and KFOR, respectively. While UNMIK was a subsidiary organ of the UN, and thus its actions were clearly attributable to the Organization, KFOR was not a subsidiary organ of the UN but instead a military force placed at the disposal of the Organization. It was, therefore, necessary to determine whether the UN exercised necessary control over KFOR and whether the UN could consequently be responsible for its actions.

In order to examine the Security Council control over KFOR, the ECtHR elaborated on the issue

of delegation of powers. The Court noted that the delegation of the Security Council powers is based on Chapter VII of the UN Charter and is established as the substitute for the Article 43 agreements, which were never concluded.[58] The Court found that the key question was "whether the UNSC retained ultimate authority and control so that operational command only was delegated".[59] The Court concluded that the UNSC did retain such ultimate authority and control, and it based its conclusion on four arguments. First, Chapter VII allowed the UNSC to delegate its powers to member states or regional organizations; second, the power to delegate is a delegable power; third, the delegation was explicit in the Resolution; fourth, the delegation was limited by the KFOR mandate, which was precisely defined in the Resolution; and fifth, the military presence was required by the Resolution to report to the UNSC in order to allow the SC to exercise overall authority and control.[60] The Court thus concluded that, although the UNSC delegated operational command to NATO, it retained ultimate authority and control over the security mission[61] and, for this reason, the impugned action is attributable to the UN.[62]

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[57] *Agim Behrami and Bekir Behrami v. France* (App. no. 71412/01) *Ruzhdi Saramati v. France, Germany and Norway* (App. no. 78166/01) ECtHR (2007) para. 61.
[58] *Behrami and Saramati*, para. 132-133.
[59] Ibid. para. 133.
[60] Ibid. para. 134.
[61] Ibid. para. 135.
[62] Ibid. para. 141.

The ultimate authority and control test introduced a rather innovative approach in determining the attribution of conduct. In opposition to the effective control test, which requires the subject in question to issue specific instructions, and the overall control test, which is less strict than the effective control test but nevertheless requires a certain degree of control over a conduct, the ultimate authority and control test does not require any actual control over the conduct but merely seeks to determine whether the delegation of power from one subject to another was validly performed. If so, acts or omissions by the subject, to which the power to act was delegated, are attributable to the one delegating the power.

The approach taken by the ECtHR in the *Behrami/Saramati* cases was not in accordance with the standard of attribution later adopted in DARIO. Although the said cases antedated DARIO, the effective control test was already then an established test of attribution in the context of state responsibility and was in that respect a part of customary international law.[63] Moreover, even prior to DARIO, the effective control test has been recognized in the context of responsibility of international organizations.[64] The ECtHR decision, which provided an attribution of conduct to the organization even though the troops were under factual control of a troop-contributing state, was widely criticized.[65] The criticism was reflected in the post-*Behrami* judicial practice, including the practice of the ECtHR itself, which departed from the ultimate authority and control test.

3.4. Relevant Cases in the National and European Jurisprudence

3.4.1. The Al-Jedda Case

Shortly after *Behrami*, the UK House of Lords decided the case of *Al-Jedda*. Al-Jedda, who held dual nationality of the UK and Iraq, was detained in Iraq by the UK forces for the alleged participation in terrorist activities. The UK forces operated under MNF-I, a multi-national force autho

rized by the Security Council.[66] Al-Jedda challenged the lawfulness of his detention before the UK courts, claiming that his right to liberty, guaranteed under the ECHR, was violated.[67] Both the Divisional Court in its judgment of 2005 and the Court of Appeal in its judgment of 2006 held that the Multinational force was authorized by the UN Security Council Resolution 1546 to take "all necessary measures" to contribute to the maintenance of peace and security in Iraq. Since the UN Member states are obliged to carry out Security Council decisions[68] and the obligations under the

[63] C. Ryngaert, *Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after Behrami*, Israel Law Review, Vol. 45, No. 1, 2012, p. 158.
[64] 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, Report of the Secretary-General, United Nations General Assembly, 51st Session, A/51/389 (20 September 1996).
[65] See for instance: Larsen 2008, p. 520; A. Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, Human Rights Law Review, Vol. 8, 2008, pp. 151-170; F. Messineo, *The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights*, Netherlands International Law Review, Vol. LVI, 2009, pp. 35-62; K. E. Boon, *Are Control Tests fit for the Future? The Slippage Problem in Attribution Doctrines*, Melbourne Journal of International Law, Vol. 15, No. 2, 2014, p. 357.
[66] SC Res 1511 (2003); SC Res 1546 (2004).
[67] Art. 5(1) ECHR.
[68] Art. 25 UN Charter.

UN Charter prevail over all the other states' obligations,[69] the UK's obligation took precedence over its obligation under the Convention.[70] The applicant appealed to the House of Lords. Before this Court, the Secretary of State raised a new argument, claiming that detention was attributable to the United Nations and was, therefore, outside of the scope of the Convention. The House of Lords had to determine whether in this particular case, the UK or the UN bore responsibility for unlawful detention. The House of Lords emphasized different circumstances in the *Al-Jedda* case in comparison to those in *Behrami/Saramati*. According to Lord Bingham, "the international security and civil presence in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN".[71] On the contrary, in Iraq, "the multinational force was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN".[72] Given the said differences between the two cases, the House of Lords found that the standard from *Behrami* was inapplicable in the present case and, consequently, the disputed acts should be attributed to the UK. By reasoning this way, the House of Lords actually embraced the effective control test.

The approach of the House of Lords was confirmed by the ECtHR. The Court, though, did refer to the ultimate control test, obviously to justify its application in the *Behrami* case. However, by distinguishing the factual situation in the two cases, the Court applied the effective control test in *Al-Jedda*.[73] It was actually an odd mixture of attribution tests in the Court's argumentation since the Court opined that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations".[74]

3.4.2. The Mukeshimana Case

Another instance of the application of the effective control test was the *Mukeshimana* case, heard before the Belgian first instance court. The case dealt with the 1994 Rwandan massacre and the

apportioning of responsibility between the UN and Belgium for not preventing the massacre. The UN mission, MINUAR, was, namely, composed of Belgian troops.

Some of the Rwandan refugees found shelter in a MINUAR encampment, the so-called ETO (*Ecole Technique Officielle*). However, the Belgian troops decided to withdraw the Blue Helmets from the MINUAR, leaving refugees unprotected. It was found that Belgian commanders could not have been ignorant of the war crimes committed on a large scale in Rwanda before the evacuation of the ETO, as well as that the mere presence of the Belgian troops would guarantee the Rwandan refugees safety.[75]

In deciding the case, the Belgian court found that peacekeepers' acts were attributable to Belgium

[69] Art. 103 UN Charter.
[70] *R. (on the application of Al-Jedda) v. Secretary of State for Defence* [2005] EWHC 1809 (Admin); [2006] EWCA Civ 327.
[71] *R. (on the Application of Al-Jedda) v. Secretary of State for Defence*, 2007, UKHL 58, para. 24.
[72] Ibid.
[73] An analysis of the Court's decision see in: M. Milanovic, *European Court decides Al-Skeini and Al-Jedda*, EJIL: Talk!, https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/ (3 November 2019).
[74] *Al-Jedda v. the United Kingdom* (App. no. 27021/08) ECtHR (2011) para 84.
[75] *Mukeshimana-Nguilinzira and ors. v. Belgium and ors.*, Brussels Court of First Instance, ILDC 1604 (BE 2010), 8 December 2010, in C. Ryngaert & I. F. Dekker & R. A. Wessel & J. Wouters (Eds.): Judicial Decisions on the Law of International Organizations, Oxford University Press, 2016, p. 339.

and not to the UN, as peacekeepers were *de facto* under Belgian command and control.[76] Regardless of the fact that actions took place under the UN mission, the Court observed who exercised actual control over the troops. Thus, the Court employed the effective control test from Article 7 DARIO.

3.4.3. The Nuhanović Case

In the *Nuhanović* case, and the related *Mustafić* case heard before the Dutch courts, it was decided on the attribution of conduct of the so-called *Dutchbat* – the Dutch military contingent which formed part of UNPROFOR – the UN operation in Bosnia. The claim to the District Court of The Hague was brought by the former UN interpreter, Nuhanović, and the family of Rizo Mustafić. They claimed responsibility of the Netherlands for the failure of *Dutchbat* to provide shelter within its compound to Mustafić and Nuhanović's family, resulting in them being killed by the Bosnian Serb forces. The District Court dismissed their claim, stating that, although neither the UN nor the Netherlands exercised "effective overall control",[77] it was the UN that exercised operational command and control over the Dutch forces, which suffices for the attribution of acts to the UN.[78]

The Appeals Court reversed the first-instance decision. First, unlike the District Court, which excluded the possibility of dual attribution, it found that more than one party may exercise effective control in a particular case.[79] This was probably "the most important" and "potentially innovative" aspect of the judgment.[80] By applying Article 7 DARIO, the Court found that the Dutch forces exercised effective control and were thus in a position to prevent the occurrence of human rights violations but failed to do so.[81] The Supreme Court ruling upheld the Appeals Court decision, confirming that both the UN and the Dutch state were responsible for the acts of *Dutchbat*.[82]

In legal literature, there have been opposing standpoints with regard to the "power to prevent" standard, applied by the Appeals Court. The controversy of the said standard lies with the fact that its application broadens the application of the effective control test. The international law subject, be

it a state or an international organization, may be found responsible even if the conduct in question "occurred independent of any direct order, or even in contravention of orders from above".[83] This approach differentiates effective control in the context of international organizations from the same test in the context of state responsibility. Some authors, however, find the preventive interpretation of the test "a scholarly initiative", which, at the time of its introduction, "was neither based

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[76] Ibid.

[77] The "effective overall control" test, which nominally comprises both effective and overall control tests, yet in practice signifies the latter, was also employed by the ECtHR in determining whether Turkey exercised control over the policies and actions of the authorities of the Northern Cyprus. See *Loizidou v. Turkey* (App. No. 15318/89) ECtHR (1996).

[78] *Nuhanović v. State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, First Instance Judgment, Decision No. LJN: BF0181, Case No. 265615, ILDC 1092 (NL 2008), 10 September 2008, Netherlands; The Hague; District Court, para. 4.12.3., 4.9.

[79] Ibid. para. 5.9.

[80] A. Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*, Amsterdam Law School Research Paper No. 2011-29, via SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933719 (3 November 2019).

[81] *Hasan Nuhanović v. Netherlands*, Appeal judgment, LJN: BR5388, 5 July 2011, at 5.8. Similar approach has been advocated by Dannenbaum. See: Dannenbaum 2010, p. 158.

[82] *The State of Netherlands v. Hasan Nuhanovic*, 12/03324, Supreme Court, 06 September 2013.

[83] T. Dannenbaum, *Killing at Srebrenica, Effective Control and Power to Prevent Unlawful Conduct*, International and Comparative Law Quarterly, Vol. 61, No. 3, 2012, p. 722.

on UN practices nor on judicial precedents".[84] According to this line of reasoning, preventative interpretation of the effective control test was proposed in order to make available to the victims the necessary procedures to acquire adequate compensation, even though the availability of dispute settlement procedures and the issue of attribution are two different things.[85]

3.4.4. The Mothers of Srebrenica Case

The attribution of conduct for the acts of *Dutchbat* in Srebrenica was discussed in the *Mothers of Srebrenica* case as well. A Dutch foundation called Mothers of Srebrenica, representing surviving relatives of the victims of Bosnian Serbs in Srebrenica, instituted proceedings against both the UN and the state of Netherlands for the failure of *Dutchbat* to prevent events in the area which was supposed to be protected by the UN. As the Dutch Courts[86] and the ECtHR[87] confirmed that the UN enjoyed immunity and could not be prosecuted before the Dutch courts, the proceedings continued against the Netherlands.

The District Court decision in the present case came shortly after the Supreme Court decision in *Nuhanović*. The District Court applied Article 7 DARIO and adopted the effective control test.[88] The same test was later applied by the Appeals Court, which noted that in normal circumstances, such control is exercised by the UN, but in exceptional circumstances, a state may also have effective control over the troops placed at the disposal of the UN.[89] Both Courts discussed the issue of *ultra vires* acts of peacekeepers, and they had different views on the issue. While the first-instance Court accepted the applicant's assertion that *Dutchbat*'s acts should be attributed to the Netherlands on the grounds of the troops acting *ultra vires*,[90] the Appeals Court was of the opinion that, pursuant to Article 8 DARIO, all the acts performed "within the overall functions" of the UN should be attributed to the Organization, even if committed in contravention of instructions,[91] while only those acts which are completely outside of their capacity, meaning that they have nothing to do with the peacekeeping mission cannot be attributed to the UN.[92]

In spite of concluding that the acts cannot be attributed to the Netherlands on the basis of the *ultra vires* doctrine, the Court found that after the fall of Srebrenica, the UN and the Netherlands jointly decided to evacuate the population from the so-called "mini safe area", and, in that transitional period, the Dutch Government "participated in this decision-making process on the highest level" and had effective control over the peacekeepers' actions.[93]

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[84] Y. Okada, *Effective Control Test at the Interface between the Law of International Responsibility and the Law of International Organizations: Managing Concerns over the Attribution of UN Peacekeepers' Conduct to Troop-contributing Nations*, Leiden Journal of International Law, Vol. 32, 2019, p. 283.
[85] Ibid. p. 290.
[86] *Mothers of Srebrenica Association et al. v. The Netherlands and the United Nations*, the Hague District Court, 10 July 2008, ECLI:NL:RBSGR:2008:BD6795; The Hague Court of Appeal, 30 March 2010, ECLI:NL:GHSGR:2010:BL8979; Supreme Court of the Netherlands, 13 April 2012, ECLI:NL:HR:2012:BW1999.
[87] *Stichting Mothers of Srebrenica and Others v. the Netherlands* (App. no. 65542/12) ECtHR (2013)
[88] *Mothers of Srebrenica Association et al. v. The Netherlands*, The Hague District Court, 16 July 2014, ECLI:NL:RBDHA:2014:8748, paras. 4.32-4.34.
[89] *Mothers of Srebrenica*, Court of Appeal, para. 12.1.
[90] *Mothers of Srebrenica*, District Court, paras. 4.56-4.60.
[91] *Mothers of Srebrenica*, Court of Appeal, para. 15.2.
[92] C. Ryngaert & O. Spijkers, *The End of the Road: State Liability for Acts of UN Peacekeeping Contingents after the Dutch Supreme Court's Judgment in Mothers of Srebrenica*, Netherlands International Law Review, Vol. 66, 2019, p. 543.
[93] *Mothers of Srebrenica*, Court of Appeal, paras. 24.1-24.2.

The Court of Appeal held that the Netherlands acted wrongfully by facilitating the separation of the male refugees by the Bosnian Serbs and by not giving the male refugees, who were inside the compound, the choice of staying in the compound and thus denying them the 30% chance of not being exposed to the inhumane treatment and executions by the Bosnian Serbs. The 30% assessment is, of course, arbitrary, but the Court justifiably applied the 'loss of a chance' concept, according to which the outcome of the unfortunate events might have been different had *Dutchbat* acted differently.[94]

The Supreme Court reduced the responsibility of the Netherlands from 30% to 10%. The Court was of the opinion that "the chance that the male refugees, had they been offered the choice of remaining in the compound, could have escaped the Bosnian Serbs, was indeed small, but not negligible".[95] The Court, therefore, estimated that chance at 10%.

In determining the responsible party, the Supreme Court rejected the standard of the *Nuhanović* Court of Appeals case, according to which the responsibility lies with the one who was in a position to prevent the occurrence of acts in question and failed to do so. The Supreme Court referred to the peacekeepers as the organs of the UN[96] and based its discussion almost entirely on Article 8 DARIO, that is, on the *ultra vires* acts of *organs* of the organization. It is not clear why the Court relied on Article 8 DARIO, while in *Nuhanović,* it applied Article 7. The Court explained this difference in reasoning by stating that, in *Nuhanović,* it had to determine whether the acts of *Dutchbat* were attributable to the UN or the Netherlands, while in *Mothers of Srebrenica*, it was not an issue.[97] The argument of the Supreme Court seems odd, as in both the *Nuhanović* and the *Mothers of Srebrenica* case, the Netherlands was the respondent party, so the Court's reasoning on attribution should have logically been the same in both cases.[98] In any case, the Court applied the effective control test and determined that the Netherlands did not exercise effective control before the fall of Srebrenica, but it did so afterward, when it was decided to evacuate the Bosnian Muslims from the "mini safe area."[99]

In spite of the fact that the Supreme Court's decision was disappointing for the victims of the Srebrenica massacres, as it reduced the percentage of the state responsibility, calculating the degree of responsibility remains limited to the particular case and is not likely to set a standard for future similar cases.[100] What seems to be a more far-reaching implication of the *Srebrenica* cases is the fact that the Dutch courts paved the way for the responsibility of troop-contributing states in the UN peacekeeping missions. Some authors rightly observed that expanding the attribution to a state might have negative implications in sense that "there would be no incentive for the UN to introduce more comprehensive solutions such as, for instance, the establishment of a reparation fund or other mechanisms granting victims effective remedies", and, on the other hand, that "the states could be deterred from contributing troops to peacekeeping operations".[101]

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[94] G. Van Dijck, *When historic injustice meets Tort Law: the case of the Srebrenica genocide*, 2017, https://www.maastrichtuniversity.nl/blog/2017/07/when-historic-injustice-meets-tort-law-case-srebrenica-genocide (10 November 2019).

[95] *Mothers of Srebrenica*, Supreme Court, para. 4.7.9.

[96] *Mothers of Srebrenica*, Supreme Court, para. 3.3.3.

[97] Ibid. para. 3.3.5.

[98] Ryngaert & Spijkers 2019, p. 545.

[99] Ibid. para. 3.5., 5.1.

[100] T. Dannenbaum, A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands, https://www.ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands/ (7 December 2019).

[101] P. Palchetti, *Attributing the Conduct of Dutchbat in Srebrenica: The 2014 Judgment of the District Court in the Mothers of Srebrenica Case*, Netherlands International Law Review, Vol. 62, 2015, p. 294. See also: Spijkers, O.: Emerging Voices: Responsibility of the Netherlands for the Genocide in Srebrenica – The *Nuhanović* and *Mothers*

Perhaps the latter fear influenced the Supreme Court to take a more cautious approach in attributing acts to states than the Appeals Court did.

It can be seen that in both cases concerning the Srebrenica genocide, the *Nuhanović* case, and the *Mothers of Srebrenica* case, all courts dealt with Articles 4 and 8 DARS and Articles 6 and 7 DARIO; however, they interpreted, applied and combined these articles in different ways.[102]

3.4.5. The Mohammed Case

The case of Serdar Mohammed concerned Mohammed's prolonged detention in Afghanistan by the UK forces, which were a part of the UN-authorized and NATO-led *International Security and Assistance Forces in Afghanistan* (ISAF).[103] The case was decided before the British High Court, appeals Court, and the Supreme Court.

Contrary to the ISAF standard procedure, which allows for detention up to 96 hours, after which a detained person must be either released or placed in the custody of the Afghan authorities, the UK applied its own policy, according to which the detention beyond 96 hours could be authorized in certain circumstances. This resulted in Mohammed's 110-days-long detention without charge.

Mohammed claimed violation of the right to liberty under Article 5 of ECHR. The UK government denied its responsibility, alleging that it formed part of the UN-authorized military force, and, therefore, the UN should be found responsible. The High Court discussed two issues: first, whether the actions of ISAF in Afghanistan are attributable to the UN and, second, whether the responsibility for Mohammed's detention lies with ISAF, the UK, or both.[104] Similar to its argumentation in *Al-Jedda*, the Court said that the Security Council had both effective control and ultimate authority and control over ISAF.[105] The conduct of ISAF should, therefore, according to the Court, be attributed to the UN.[106] However, since the UK justified the prolonged detention with the application of its own national policy, which was different from the one of ISAF, the Court ultimately attributed the conduct to the UK.[107] Although the decision resembled the one in *Al-Jedda* and the Court invoked the effective control, some authors interpreted it as "a revival of *Behrami*".[108] In spite of the fact that in *Behrami* the conduct was attributed to the UN, while in *Mohammed* it was attributed to the UK, the line of reasoning in both cases was similar and the only reason the conduct was attributed to the state in the latter case was the existence of extraordinary conditions which did not exist in the former.[109]

The Court of Appeal reached the same decision as the first-instance Court and attributed the con-

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of Srebrenica Cases Compared, http://opiniojuris.org/2014/07/23/emerging-voices-responsibility-netherlands-genocide-srebrenica-nuhanovic-mothers-srebrenica-cases-compared/ (9 December 2019); P. De Visscher, Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies, *Annuaire de l'Institut de Droit International*, Vol. 54, No. 1, 1971, p. 56.

[102] Ryngaert & Spijkers 2019, p. 539.

[103] The deployment of ISAF to Afghanistan was authorized by the UN Security Council Resolution 1386 (2001) and was done with the consent of the Afghan government. See also Security Council Resolutions 1510 (2003) and 1890 (2009), by which ISAF's mandate was extended.

[104] *Mohammed v. Secretary of State for Defence*, [2015] EWCA Civ 843, para. 170.

[105] Ibid. para. 177-178.

[106] Ibid. para. 178.

[107] Ibid. para. 187.

[108] T. Dannenbaum, *Dual Attribution in the Context of Military Operations*, International Organizations Law Review, Vol. 12, 2015, p. 422.

[109] Ibid.

duct to the UK, but it used a different methodology. As much as this different methodology did not influence the final outcome of the case and the High Court decision was confirmed, it "reflects a deep uncertainty in the law concerning the attribution of conduct in the context of UN-authorized operations".[110]

The case was ultimately decided before the UK Supreme Court. This Court disagreed with the Appeals Court with regard to the lawfulness of the detention that exceeded 96 hours, to the extent that Mohammed was being detained for imperative reasons of security.[111] However, the Court found that the arrangements for his detention were not compatible with the requirements set out in ECHR Article 5; therefore, the UK was consequently found responsible for the breach of the Convention.[112]

4. Concluding remarks

The analysis of the so-far scarce, but growing judicial practice demonstrates that the application of the effective control has become an accepted standard in determining the responsible subject(s) for the acts committed within the peacekeeping operations. After the *Behrami/Saramati* cases, all courts have applied the effective control test. Yet, practically each of these courts used a different argumentation while applying it. This diversity in legal arguments clearly shows that the effective control test in the context of international organizations still significantly lacks clarity.

What seems to be undisputed is the following: first, troop-contributing states bear the responsibility for the peacekeepers' unlawful acts which fall outside of their official capacity and, second, for acts which fall within the official functions of the peacekeepers, the effective control test will apply in each particular case, since the UN usually, but not exclusively, exercises operational control over the peacekeepers' acts.

Assessing attribution on a case-by-case basis seems logical; however, in the absence of clear guidelines on how to interpret and apply the effective control test, different courts will use different lines of reasoning, all claiming to apply the same test. This will inevitably result in a divergent judicial practice, which will further have a negative effect on determining the meaning and the scope of the effective control test.

In overcoming these controversies, it would be helpful if the theoretical background to the effective control test were more precise. For instance, the issue of whether to adopt the preventive approach or not is an important one, as it significantly broadens the spectrum of responsibility of a particular subject. Yet, no consensus on this issue exists either among legal scholars or in practice.

In addition, the issue of attribution should be separated from the issue of liability and the possibility of seeking redress. In other words, the responsibility of a troop-contributing state should not be observed as a way to overcome the problem of the jurisdictional immunity of the organization but rather as a consequence of the effective control that the state had over the peacekeepers. As to the impossibility to seek redress due to the immunity of international organizations, it is a separate question that has to be dealt with. The organization, primarily the UN, should develop procedures for compensating the victims of the peacekeepers' misconduct. This is the least it can do when those who were sent to protect do harm instead.

[110] J. W. Rylatt, *Attribution of Conduct in UN-authorized International Military Operations: Serdar Mohammed before the Courts of England and Wales*, Military Law and the Law of War Review, Vol. 55, 2016-2017, p. 106.
[111] *Serdar Mohammed v. Ministry of Defence*, Judgment, UKSC 2, 2017, para. 39, 111 (1)(3).
[112] Ibid. para. 111(4)(5)(6).