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Attribution of Conduct in Peacekeeping Operations

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws program

15 higher education credits

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Term: Spring term 2024

Contents

Summary

This essay focuses on attribution of conduct in peacekeeping missions. The study attempts to explain how attribution is carried out according to international customary law, through legal dogmatic method. To investigate international customary law, I initially examined the ILC's instruments DARIO and ARSIWA, and their impact in this area. The study goes on to examine the significance of these instruments by looking at how they have been applied in case law. Since case law from international courts has been sparse, I have primarily examined the Dutch national decisions *Nuhanovic* and *Mothers of Srebrenica.* The *Behrami* case from the ECtHR has also been investigated.

The legal situation in this area has largely been found to be very unclear. In case law, attribution has been based both on DARIO and ARSIWA, and depending on which instrument the court has used, different conclusions have been reached. This essay argues that attribution of conduct to international organizations should be done using the effective control test in Article 7 DARIO. To attribute conduct to the troop-contributing state, Article 7 should be applied reciprocally. Generally, the court should regard the contingent as a state organ that is placed under the control of the international organization. Thus, the conduct of the troop contingent is almost always attributable to the international organization, but the effective control test should also be applied in relation to the state. If it is found that the state also exercises effective control over the troop contingent, the conduct should be attributed to the state as well.

Sammanfattning

Denna uppsats handlar om hänförbarhet av handlande under fredsbevarande insatser. Uppsatsen försöker redogöra för hur hänförbarhet går till enligt internationell sedvanerätt. Detta har gjorts genom att tillämpa rättsdogmatisk metod. För att utreda den internationella sedvanerätten har jag inledningsvis undersökt ILCs instrument DARIO och ARSIWA och dess betydelse på området. Sedan har jag undersökt dessa instruments betydelse genom att se hur dessa har tillämpats i praxis. Då praxis från internationella domstolar har varit sparsam har jag framför allt undersökt de nederländska nationella avgörandena *Nuhanovic* och *Mothers of Srebrenica*. Även rättsfallet *Behrami* från ECtHR har undersökts.

Rättsläget har funnits till stor del på detta rättsområde vara mycket oklart. Hänförbarhet har i praxis både grundats på DARIO och ARSIWA och beroende på vilket instrument rätten använt sig av kommit till skilda slutsatser. Denna uppsats argumenterar för att hänförbarhet i till internationella organisationer ska göras med hjälp av det effektiva kontroll-testet artikel 7 DARIO. För att hänföra ett handlande till den truppsändande staten ska artikel 7 DARIO tillämpas reciprokt. Rätten ska i det typiska fallet betrakta truppavdelningen som ett statligt organ, som är placerat i den internationella organisationens kontroll. Truppavdelningens handlande är alltså i princip alltid hänförbart till den internationella organisationen, men det effektiva kontrolltestet ska också göras i relation till staten. Om det finnes att staten också utövar effektiv kontroll över truppavdelningen ska handlandet hänföras även till staten.

Abbreviations

ARSIWA	Responsibility of States for Internationally Wrongful Acts
DARIO	Draft articles on the responsibility of international organizations
Dutchbat	Dutch Battalion
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ILC	International Law Commission
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
UN	United Nations
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNPROFOR	United Nations Protection Force

1 Introduction

1.1 Background

Since the end of the Second World War, some of the most horrific atrocities on the European continent have been taken place, during a series of conflicts collectively known as the Yugoslav Wars.[1] Following the Bosnian exit from Yugoslavia, an "ethnically rooted war" broke out in today's Bosnia and Herzegovina.[2] In the summer of 1995, the Bosnian Serb forces committed genocide on the male population in the city Srebrenica, resulting in estimated 7800 civilian Bosnian men and boys killed.[3] From this abominable event sprung two cases in Dutch national courts concerning the state responsibility of the Netherlands for the actions and omissions of the Dutch Battalion, a part of the peacekeeping missions in Bosnia, United Nations Protection Forces (UNPROFOR). *Nuhanovic* and the following *Mothers of Srebrenica* are two examples of the very sparse case law concerning attribution of conduct in peacekeeping operations.

There are currently 11 UN-lead ongoing peacekeeping operations worldwide.[4] The UN is reliant on troop-contributing states supplying the operations with troops and personnel, so while the troop-contributing states remain in control of their national armed forces, the operational authority is transferred to the UN. The commanders of the different national contingents report to the force commander, which is chosen by the UNSG and authorized by the UNSC, and are not allowed to accept instructions from their national authorities which are contrary to the mandate given.[5] This structure of command creates certain issues regarding the question of attribution of conduct. While the UN generally has operational command, the commanders of the troop-contributing states are usually closer the actual conduct.

[1] Smith (2024).
[2] Lampe (2024).
[3] Smith (2024).
[4] United Nations Peacekeeping.
[5] United Nations s 64-68 (2003).

The victims of wrongful conduct by peacekeeping forces cannot bring claims against the UN as the UN charter grants the UN immunity from legal process in the member states.[6] This makes victims of wrongful conduct in connection with peacekeeping operations in need of remedy dependent on either the UN's internal justice system or to instead aim its claim on the troop-contributing state. According to Dannenbaum is the internal justice system of the UN deeply flawed, leaving the victim only with litigation aimed at the troop-contributing state.[7] However these cases are rare, and has therefore left a lot of uncertainties on how attribution of wrongful conduct to troop-contributing states works.

1.2 Purpose and research question

The purpose of this study is to outline the rules regarding the attribution of conduct to troop-contributing states in the context of peacekeeping operations. To do this, I will examine how ARSIWA and DARIO relate to each other and how the effective control test is to be interpreted. The research question this study aims to answer is:

What are the rules for attributing the conduct of peacekeeping operations to the troop-contributing states?

1.3 Delimitations

The purpose of this study is to examine attribution of conduct in the context of a typical peacekeeping operation. This study does not focus on neither attribution of contingents conduct *ultra vires*[8], nor attribution of conduct in the context of other types of military operations.

Since the legal operation of attributing conduct differs from the legal operation of assessing a certain conduct as wrongful, this essay will only focus on the previous operation.

[6] United Nations Charter art 105.
[7] Dannenbaum s 128-129 (2010).
[8] Beyond the powers.

1.4 Method and material

In this essay I will aim to answer the research question by determining *de lege lata*[9] using the legal dogmatic method. The method aims to analyze what constitutes current law in a certain aspect, in this case the rules on attribution of conduct in the context of peacekeeping operations, by interpreting the content of the legal sources that enjoy authority.[10] Article 38(1(a-c)) in the Statue of the International Court of Justice lists, without being hierarchical or exhaustive, what constitutes sources of international law: international conventions establishing rules expressly recognized by the contesting states, international customs and general principles of law recognized by civilized nations. Article 38(1(d)) points out judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law. Judicial decisions from national courts are relevant for determining *opinio juris*[11] and are often referenced to by international courts.[12]

The foundation of this essay will be based on the ILC's works, DARIO and ARSIWA. These instruments are generally believed to be corresponding to international customary law, therefore making a logical starting point when assessing rules of law.[13] Case law about attribution of conduct in the context of peacekeeping operations have been sparse. Consequently, I heavily relied on rulings from the Dutch national courts as the question of attribution in the relevant context have been treated in the leading cases *Nuhanovic* and *Mothers of Srebrenica*. Both cases concern the conduct of the Dutch Battalion, which was part of the UNPROFOR in Bosnia, and the internationally wrongful acts in connection to the genocide in Srebrenica. *Nuhanovic* and *Mothers of Srebrenica* are not the only but certainly the most influential cases concerning this subject. Another Dutch case related to the chosen subject is *Mustafić-Mujić*. Due to the limiting scope of this essay, have I neither described nor commentated is *Mustafić-Mujić*, as the case in the relevant aspects of this essay does not contribute to the interpretation of the law in any way that is

[9] The law as it exists.
[10] Hjertstedt s 167 (2019).
[11] An opinion of law.
[12] UN Secreteriat (2016).
[13] Bordin (2021); DARIO para 5 of general commentary.

not done in *Nuhanovic*.[14] Another case that also concerns the question of attribution in the relevant context is *Mukeshimana-Ngulinzira* from the Belgian court of appeal. This case has been left without mention due to the lack of an adequate English or Swedish translation. This case could be the subject of further research in this area.[15]

To clarify the ambiguities of the ILC's works and the leading cases mentioned above, I used legal literature of established scholars, as well as the commentary provided by the ILC to their works. These works are used as subsidiary means to determine the rules of law.

1.5 Previous Research

Previous research on attribution of conduct in the context of peacekeeping operations has been ample. Although previous studies have been conducted on the topic, few conclusions have been made. This subject's dependency on a limited numbers of decisions from national courts makes it difficult to draw any hard conclusions about how to assess attribution of conduct.

One of the most influential authors on this subject is Associate Professor Tom Dannenbaum from Tufts University and his attempt on creating a scholarly constructed interpretation of the effective control test. His interpretation was explicitly used in the *Nuhanovic* case.

Associate Professor Aurel Sari, active at University of Exeter, is also frequently referenced in literature regarding attribution of conduct. His interpretation of the "presumptive approach" will be dealt with in this essay.

1.6 Outline

The essay will start with explaining the content of the ICL instruments DARIO and ARSIWA. Additionally, three of the most important cases concerning attribution of conduct during peacekeeping operations, *Behrami*, *Nuhanovic* and *Mothers of Srebrenica* will be presented. Afterwards, the questions

[14] The Netherlands v Mustafić et al. (2013).
[15] Mukeshimana-Ngulinzira and Others v. Belgium and Others (2018).

and ambiguities illuminated from the cases will be further investigated. Lastly, I will analyze the findings and aim to answer the posed research question.

2 Relevant law

2.1 ARSIWA

ARSIWA is a generally accepted codification of customary international law created by the ILC concerning state responsibility and the attribution of state responsibility.[16] Article 1 of ARSIWA establishes that States are responsible for their internationally wrongful acts and the rules of attribution of conduct are further regulated in chapter 2. Article 4(1) says that "[t]he conduct of any State organ shall be considered an act of that state" and Article 4(2) says that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State". If a state places one of its state organs at the disposal of another State, it triggers a special rule of attribution found in Article 6. The conduct of an organ placed at the disposal of another state is considered an act by the receiving state if the receiving state exercises elements of governmental authority over the organ.[17] A State is further responsible for conduct directed or controlled by that state. According to Article 8 shall "[t]he conduct of a person or group of persons 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 carrying out the conduct." The ICJ established in the *Nicaragua* and *Bosnian Genocide* cases that "direction or control" translates to having "effective control" meaning "complete dependance" and should be in respect to each operation undertaken.[18] In the *Nicaragua* case, the United States did not exercise effective control over the "Contras" since they were not proven to have "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law". This, although the United States participated in financing, organizing, training, supplying, and equipping the Contras who carried out the conduct, selected the military targets and planned the whole operation.[19] The

[16] Bordin (2021).
[17] ARSIWA art. 6 para 1 of commentary.
[18] Bosnia and Herzegovina v. Serbia and Montenegro para 400 (2007).
[19] Nicaragua v. United States of America para 115 (1986).

threshold for having "effective control" in the context of ARSIWA is clearly very high.[20]

2.2 DARIO

DARIO is a set of articles adopted by ILC to regulate the responsibility of international organizations for international wrongful acts. The rules in DARIO are in large extent based on limited practice and therefore not fully a codification of customary international law. Rather, the ILC argues, DARIO could be viewed more as "progressive development" rather than codification and the authority of the articles will be decided by the addressed party's reception.[21]

The attribution of conduct for international organizations are addressed by ILC in DARIO Chapter II. According to Article 6(1), is the "conduct of an organ or agent of an international organization in the performance of functions of that organ or agent (…) considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization." According to Article 6(2) is it the rules of the organization that decides the function of its organs. The commentary to article 7 says that a state organ can be fully seconded to the international organization and in those cases the rules of Article 6 apply, and the conduct of that organ is only attributable to the international organization.[22]

Article 7 in DARIO concerns state organs that have not been fully seconded to the international organization. The conduct of such an organ is attributable to the international organization "if the organization exercises effective control over that conduct".

The effective control test in DARIO Article 7 is not the same test crystalized in *Nicaragua*, and later confirmed in *Bosnian Genocide* to assess attribution

[20] Rose et al. s 82 (2023).
[21] DARIO para 5 of general commentary.
[22] DARIO art 7. para 1 of commentary.

of conduct of an organ directed or controlled by the state.[23] In that test, related to Article 8 in ARSIWA, the main concern is if a certain conduct is attributable to a state at all, which is not always the case as attribution through Article 8 ARSIWA is an exception from the general rule of non-attribution to non-state-actors. The effective control test proposed in DARIO concerns which entity, the state or the international organization the conduct is attributable to, making the control play a "different role" than the effective control test in Article 8 ARSIWA.[24] The criterion for attribution of conduct is in Article 7 based on "the factual control that is exercised over the specific conduct" and that account needs to be taken to the "full factual circumstances and particular context" according to the commentary.[25] It is also stated that the "[a]ttribution of conduct to the contributing State is clearly linked with the retention of some powers", such as control over disciplinary and criminal matters.[26]

[23] Nicaragua v. United States of America (1986); Bosnia and Herzegovina v. Serbia and Montenegro (2007).

[24] DARIO art 7. para 5 of commentary.

[25] DARIO art 7. para 4 of commentary.

[26] DARIO art 7. para 7 of commentary.

3 Case law

3.1 Behrami & Saramati

To put an end to the repression and violence during the Kosovo War at the end of ´ dissolution, NATO moved Kosovo Force (KFOR) into Kosovo to protect and establish basic law and order.[27]

In 1999, UNSC decided on "deployment in Kosovo, under United Nations auspices" and authorized "Member States and relevant international organizations to establish the international security presence in Kosovo". The operation was conducted with "substantial NATO participation" but under "unified command and control".[28] The UNSC Resolution 1244 constituted the establishment of KFOR lead by NATO, responsible for the delegated UNSC's security powers and the UN organ UNMIK for the civil administration powers.

In *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway,* the ECtHR discussed attribution of conduct for international organizations. The case of *Behrami and Behrami v. France* treats KFOR's omission to conduct mine clearing operations, which according to UNSC Resolution 1244, laid within UNMIK's responsibility. Although the French officer in charge were aware of the undetonated bombs, no mine clearing was made and an undetonated cluster bomb detonated, killing one child, and blinding another. The case of *Saramati v. France, Germany and Norway* regarded the extra-judicial detention of Saramati by KFOR, ordered by the Commander of KFOR, a Norwegian officer. In *Behrami*, the court concluded that the imprudent omission was attributable to UNMIK, an UN organ. In the ruling of *Saramati*, the judges noticed that the resolution referred to chapter VII in the UN charter about Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, affirming the UNSC primary responsibil-

[27] Nardulli et al. (2002), s 1-2.
[28] UNSC resolution 1244 (1999).

ity for maintaining peace. In other words, the UNSC were delegating the mandate to uphold peace and security, as well as the operational command to KFOR. The judges noted that the delegation of security powers must be adequately limited to be compatible with "the degree of centralization of UNSC collective security" the charter requires. The court then states that "the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated". That the UNSC in this case retained such ultimate control was according to the court based of five factors: chapter VII of the UN charter allowed for delegation; the security power was a delegable power; the deligation was explicit in Resolution 1244; the delegation was adequately limited; and that the commander of KFOR was required to report to UNSC so that UNSC could retain overall "authority and control". Therefore, the court decided, the conduct was attributable to the UN and not to KFOR.[29]

3.2 Nuhanovic

3.2.1 District Court

In the case of *Nuhanovic,* the District Court of the Hague (a Dutch court of first instance) had a restrictive view on what constitutes effective control.[30] The case concerns a civil claim against the State of the Netherlands for omission to provide sufficient protection to the claimants relatives during the Srebrenica genocide.[31] In the assessment, the court used an analogy to ARSIWA and applied the "command and control test" to attribute the omission to the UN and not the State.[32] The court further states that in the event of troop contributing to the UN, even actions of the troops made available to the UN due to "gross negligence or serious failure of supervision" must by principle be attributed to the UN.[33] However, instructions acted upon by the troops from the Dutch authorities to go against UN orders or backing out from the UN

[29] ECtHR (2007).
[30] de Rechtspraak, (2023).
[31] H. N. v. the State of the Netherlands para 3.1–3.3 (2008).
[32] H. N. v. the State of the Netherlands para 4.8 (2008).
[33] H. N. v. the State of the Netherlands para 4.13 (2008).

command structure would create a window of attribution to the State.[34] In this case, no such instruction or order were present and therefore the claim was denied.[35]

3.2.2 Court of Appeal

The Dutch court of second instance, the Court of Appeal in the Hague, rejected the reasoning of the district court. Referring to DARIO, and international law literature, the court confirmed that the attribution of the conduct of the seconded organ is decided by who has effective control of the conduct.[36] To determine which party is in effective control you must take the circumstances of the case into account. If there was a specific instruction either by the State or the UN, the court had to look at whether the conduct was a "execution of the specific instruction". If there were no such instruction issued by either part, effective control is decided by who had the ability to "prevent the conduct." This operation can result in both the UN and the State having effective control.[37]

In the case it was not disputed that the state maintained control over personnel matters, disciplinary actions and criminal proceedings. Neither was it disputed that the state held the power of withdrawing its contingent.[38] The court further stressed the particular circumstances of the case: Srebrenica had fallen and neither UNPROFOR nor Dutchbat could continue the mission. The decision to withdraw and evacuate the refugees was made by representatives of the UN and the Netherlands jointly and instructions that Dutchbat was not allowed to agree on separate treatment of the men came from the Dutch minister of defense. The commander of Dutchbat believed that he from a certain point, was under the command of the Dutch government and acted accordingly. Thus, the court concludes, was the state closely involved in the evacuation and its preparation. If the state had instructed Dutchbat to prevent the alleged conduct, it would have been executed. The state also held in power to

[34] H. N. v. the State of the Netherlands para 4.14.1 (2008).
[35] H. N v. the State of the Netherlands para 4.16 (2008).
[36] Nuhanovic v. the State of the Netherlands para 5.8 (2011).
[37] Nuhanovic v. the State of the Netherlands para 5.9 (2011).
[38] Nuhanovic v. the State of the Netherlands para 5.10 (2011).

take disciplinary action against the conduct contrary to the instructions by the Deputy Commander of UNPROFOR's headquarters to protect the refugees as much as possible. This meant that the Netherlands was in effective control of the conduct of Dutchbat, and therefore attributable to the State.[39]

3.2.3 Supreme Court

The Supreme Court also relied on DARIO to interpret applicable international customary law and confirmed that effective control is the appropriate standard with which to assess the attribution of the conduct. How the test should work is answered by referring the DARIO commentary. It should be based on "the factual control over the specific conduct in which all factual circumstances and the special context of the case must be taken into account". The Supreme Court did not examine who had the power to prevent the conduct, however they stated that the Court of Appeal did not handle the law incorrectly and thereby implies that the power-to-prevent test should be made.[40]

3.3 Mothers of Srebrenica

In the case of Mothers of Srebrenica v. the Netherlands, the Supreme Court of the Netherlands took a different approach in the matter of attribution of conduct than in *Nuhanovic*. The case concerned state responsibility for the conduct of Dutchbat during the same genocide in Srebrenica as the *Nuhanovic* case, and this time the complaining part was an organization of surviving wives and mothers of the murdered men. To avoid attributing the conduct to the State, the Supreme Court assumed that Dutchbat was an organ of the UN and not the State.[41] This meant that the effective control-test the Supreme Court then proceeded to use was the one mention above crystalized in *Nicaragua* and *Bosnian Genocide* making for a much stricter interpretation of the level of control needed to attribute the conduct to the State.[42] They completely overruled the power-to-prevent test invented by the Court of Appeal and later

[39] Nuhanovic v. the State of the Netherlands para 5.18-5.20 (2011).
[40] The State of the Netherlands v. Nuhanovic para 3.11.3 (2013).
[41] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.3.3 (2019).
[42] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.5.2 (2019).

approved of the Supreme Court in the *Nuhanovic* case a few years prior. Instead, the Supreme Court referred to the commentary to ARSIWA and demanded "[actual participation of and directions given by that State]" and "factual control of the specific conduct" considering all factual circumstances and special context.[43] The explanation for the abandonment of the use of Article 7 DARIO used in *Nuhanovic* is that the present case, unlike *Nuhanovic,* does not concern attribution of conduct to an international organization.[44] The court thus demanded a stricter degree of control to attribute the conduct of Dutchbat to The Netherlands compared to in the *Nuhanovic* case. The opinion of the court was that Dutchbat were acting as peacekeepers up until a certain point and that all their conduct up to that point was attributable to the UN only. Even instructions from the minister of defense that casualties had to be avoided and that personal safety had top priority, was assessed not constituting such effective control, as they were of general nature and not specific for operational acts.[45]

The point where attribution shifted to the state was decided in the Court of Appeal and not discussed further in the Supreme Court. When Srebrenica had fallen, the UN unitedly decided with the state at the highest level to evacuate the refugees from the "mini safe area" the refugees previously had been moved to.[46] The point in which effective control set in was when Dutchbat started preparing to leave the new mini safe areas. The state had from that point participated in the decision making at the highest level and exercised effective control in relation to the humanitarian aid and the evacuation of refugees.[47] It should also be mentioned that the events in *Nuhanovic* took place in the period described above in this paragraph.

[43] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.5.3 - 3.5.4 (2019).

[44] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.3.5 (2019).

[45] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.5.5 (2019).

[46] The Association MOTHERS OF SREBRENICA v. THE STATE OF THE NETHERLANDS para 24.1 (2017).

[47] The Association MOTHERS OF SREBRENICA v. THE STATE OF THE NETHERLANDS para 32.2 (2017).

Regarding to *ultra vires* conduct by Dutchbat, the Supreme Court referred to Article 8 of DARIO, stating that *ultra vires* conduct by an organ of an international organization is by principle attributable to that international organization.[48]

As a result of the reasoning above, the Supreme Court came to the conclusion that Dutchbat's conduct, was not to be attributed to The Netherlands until the certain moment when The Netherlands decided to withdraw from UNPROFOR.[49]

[48] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.6.1 (2019).
[49] The State of the Netherlands v. Stichting Mothers of Srebrenica para 5.1 (2019).

4 Ambiguities

4.1 What rules should be applied?

4.1.1 DARIOs status as customary international law

In the *Behrami* case described above, the ECtHR refers to (the previous but in all relevant ways identical) DARIO as well as ARSIWA under the headline "[relevant law and practice]".[50] However, without giving an explanation, the court deviates from the effective control test and "considers the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated".[51] The approach the court used was not based on any preexisting case law nor commentaries to DARIO or ARSIWA but at the time had been advocated for in legal literature.[52] Today, this attitude seems to have been proven wrong. In *Nuhanovic,* the Supreme Court relies solely on DARIO being a codification of international customary law.[53] Even in *Mothers of Srebrenica,* the court refers to DARIO, recognizing its status as a codification, although the Supreme Court in the latter case made a different interpretation of its content.[54]

4.1.2 Article 6 or 7 of DARIO?

Criticism has been directed at the clear-cut distinction between fully seconded and only partly seconded state organs in the DARIO commentary described above in paragraph 2.1. The armed forces of a troop-contributing state do not lose its status as a state organ as the transferred power is often limited to some extent. However, as they are implemented in the UN infrastructure, the armed forces can achieve status as an UN organ as well, and thus holds dual organ status.[55] This is in line with the finding in *Nuhanovic,* where the Supreme Court decided that a certain conduct could be attributable to both the UN and

[50] ECtHR para 30-33 (2007).
[51] ECtHR para 133 (2007).
[52] Larsen s 521 (2008).
[53] The State of the Netherlands v. Nuhanovic para 3.13 (2013).
[54] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.2 (2019).
[55] Sari, Wessel s 131-132 (2013).

the troop-contributing state as the Netherlands kept control over the personnel's personal affairs, as well as the power to punish and discipline the personnel.[56] However, the critics argue, it is wrong of the ILC to create a clear-cut distinguishment between the fully seconded state organs whos' conduct fully is attributable to the international organization according to Article 6 in DARIO, and the only partly seconded organs to the international organization who's conduct needs to be assessed using the effective control test according to Article 7. If a state organ is fully seconded to the international organization, it ceases, by definition, to be a state organ. Therefore, state organs seconded to the UN must be able to fall under Article 6, even if some level of control is still exercised by the troop-contributing state.[57]

Given that the conduct during peace keeping operations can be attributable by using Article 6 DARIO, this opens the possibility of attributing conduct not only derived from factual control using Article 7, but also from the institutional status of the seconded organs. Sari argues that when the troop-contributing state places its contingent in the institutional structure of the UN, the contingent becomes a subsidiary organ of the UN. The transfer of power from the state to the UN creates a presumption that the conduct of the contingent is attributable to the UN. This presumption would be rebuttable if the contingent "actually act under the control of their contributing states".[58]

4.1.3 DARIO or ARSIWA?

According to the wording of both article 6 and 7 of DARIO, the articles deal with the legal operation of attributing conduct to international organizations, and not to states. Article 6 attributes the conduct of the organs and agents of the international organization to the international organization, while Article 7 attributes the conduct of state organs seconded to the international organizations to that international organization, and uses the effective control test to do that. As argued by D'Argent, Article 7 DARIO redistributes the attribution of the conduct which normally would be attributed to the state according to

[56] The State of the Netherlands v. Nuhanovic para 3.10.2 (2013).
[57] Sari, Wessel s 132 (2013).
[58] Sari (2012).

Article 4 ARSIWA. Consequently, it is only meaningful to assess if the international organization exercised effective control over the conduct. If that is the case, the conduct is attributable to the international organization. There is no use to apply the effective control test of Article 7 DARIO again to assess if the state had effective control over the conduct as that situation fall outside the scope of DARIO and should be assessed using Article 4 ARSIWA.[59]

In the *Nuhanovic* case, the Supreme Court attributed the conduct of Dutchbat seemingly using a reciprocal interpretation of Article 7 DARIO. Since the state was found, using the "power-to-prevent test", to have effective control over the conduct, the conduct was attributable to the state. This was according to the Supreme Court on "basis of the attribution rule of article 7 DARIO, which is applicable to this case, partly in view of what is provided in the attribution rule of [A]rticle 8 [ARSIWA]".[60] In the Court of Appeal decision, Article 7 is expressly treated as reciprocally applicable.[61] This is also in line with the commentary to DARIO as well as Article 1(2) of DARIO.[62]

The Dutch Supreme Court however abounded this view as stated above in *Mothers of Srebrenica*, and decided that Article 7 DARIO was not to be used reciprocally.[63] Instead attribution of conduct to the State should be derived from Article 8 ARSIWA.[64] This notion has been criticized as Article 8 ARSIWA concerns the attribution of conduct of non-state actors to the state which should be separated from the question of state organs delegated to international organizations for peacekeeping operations.[65] However, as argued by other scholars, the wording of Article 8 ARSIWA does not exclude organs of an international organization, even if the commentary specifically concerns private armed groups. The fact that UN peace operations can be viewed as

[59] D'Argent (2014).
[60] The State of the Netherlands v. Nuhanovic para 3.13 (2013).
[61] Nuhanovic v. the State of the Netherlands para 5.8 (2011).
[62] DARIO art 7. para 4 of commentary.
[63] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.3.5 (2019).
[64] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.3.5 (2019).
[65] Boutin, Nedeski 321-322 (2019).

subsidiary organs to the UN gives merit to this interpretation of Article 8 ARSIWA.[66]

Dannenbaum, criticized the decision in *Mothers of Srebrenica* on the notion that peacekeeping troops was specifically held in mind while constructing Article 7 DARIO, stating that the Supreme Court to easily declared Dutchbat being an organ of the UN, according to Article 6 DARIO. The commentary to DARIO also mentions peacekeeping troops multiple times as an example of the scope of Article 7, making the Supreme Court's judgement deviate from ILC's intention with DARIO.[67]

4.2 Power-to-prevent test

The power-to-prevent test was first proposed by Dannenbaum as a way to interpret the "effective control" criteria for attributing the conduct of peacekeeping forces to the troop-contributing state. He argues that troop contingents in peacekeeping missions are not organs of the UN, but organs placed at the disposal of the UN by the troop contributing states. This leads to the relevant question being which entity had effective control over the specific conduct according to Article 7 DARIO.[68] Since attribution of conduct to the state is linked with the retention of some power, Dannenbaum argues that the relevant powers "are those most likely to be useful in preventing that conduct from occurring". This makes effective control held by the "entity that is best positioned to act effectively and within the law to prevent the abuse in question."[69] The judges of the Court of Appeal in *Nuhanovic* were explicitly influenced by Dannenbaum and used the power-to-prevent test to attribute the conduct of Dutchbat to the Netherlands.[70] This standard was as previously described approved of by the Supreme Court.[71] The Supreme Court, however, changed its interpretation in *Mothers of Srebrenica* and explicitly said that the use of the power-to-prevent test is faulty because the relevant instrument

[66] Ryngaert (2021).
[67] Dannenbaum (2019).
[68] Dannenbaum s 140-141 (2010).
[69] Dannenbaum s 157 (2010).
[70] Nuhanovic v. the State of the Netherlands para 5.8-5.9 (2011).
[71] The State of the Netherlands v. Nuhanovic para 3.11.3 (2013).

to fall back on is not Article 7 DARIO, but Article 8 ARSIWA, and thus requires "actual participation of and directions given by that State".[72]

Critics of the power-to-prevent test have argued that with the invention of the test, Dannenbaum deviates from the requirement of an "functional link" between the contingent and the state. The functional link is crucial in the legal operation of attributing conduct, as it is otherwise impossible to identify the state as the one with the obligation to prevent the conduct.[73] Further, if the power-to-prevent test was decisive in attribution, the troop-contributing state would in all cases be attributable to as they in every scenario have the power to "cut across orders", which would sway from the factual standard of Article 7 DARIO.[74]

4.3 The presumptive interpretation

The presumptive interpretation describes a two-phased legal operation consisting of presumption and rebuttal.[75] First, the court presumes that the conduct is attributable to the UN. The institutional law of the UN defines a subsidiary organ of the UN as an organ "established by a principal organ of the UN and operating under its authority and control". This institutional status of UN peacekeeping troops as subsidiary organs to the UN, creates a presumption of attributing the conduct of the peacekeeping troop to the UN.[76] Second, the court assesses if the presumption can be rebutted using the effective control test in Article 7 DARIO.[77] As discussed above, the Dutch Supreme Court has challenged the second step by instead of using the effective control test in Article 7 DARIO, applied the effective control test of Article 8 ARSIWA.[78]

[72] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.5.3 (2019).
[73] Okada (2019).
[74] D'Argent (2014).
[75] Okada (2019).
[76] Stephens v Cyprus, Turkey and the United Nations (2006).
[77] Sari, Wessel (2013).
[78] The State of the Netherlands v. Stichting Mothers of Srebrenica para 3.5.3 (2019).

5 Analysis and conclusion

5.1 Analysis

One of the main differences between the *Nuhanovic* case, and *Mothers of Srebrenica,* is the view on the contingent's status as an organ. In *Nuhanovic* the Supreme Court treats Dutchbat as an organ of the state, while in *Mothers of Srebrenica,* as an organ of the UN. It is clear from what is presented above that the ILCs intentions was to have peacekeeping operations be regarded as a state organ seconded to the UN according to Article 7 DARIO, and thereby having its conduct attributed using the effective control test in Article 7. Although the Supreme Court in *Mothers of Srebrenica* does not clarify its view on whether Dutchbat is a seconded state organ, or a UN organ, it is clear from the reasoning it presumes it being an organ of the UN according to Article 6 DARIO. As an example, they state that conduct *ultra vires* is attributable to the UN, suggesting Dutchbat being an organ of the UN. However, this reasoning is flawed. The fact that the state always holds the power to withdraw the contingent from the peacekeeping operation, withholds power over personnel matters and to punish wrongful conduct makes it clear that peacekeeping contingents maintains its status as state organs. This does not always mean that the state exercises effective control over the contingent, but it does mean that it is wrong to view the contingent as an organ of the international organization in the sense of Article 6 DARIO. The judgement in *Mothers of Srebrenica* seems faulty in this regard.

According to the wording, neither Article 6, nor 7 DARIO attributes conduct to states at all. If we, as argued above, regard peacekeeping contingents as state organs seconded to an international organization we should as a main rule attribute the conduct of that organ to the state according to Article 4 ARSIWA. Article 7 DARIO can then redistribute that conduct to the international organization, if the international organization exercises effective control over that conduct. This solution seems to be most in line with the wording of DARIO and ARSIWA, but would suggest an order where conduct is presumed to be attributable to the state and not the international organization.

This is not in line with current *opinio juris*. However, if we treat Article 7 DARIO as applicable reciprocally to both states and international organizations, it creates an order where the state is presumed to be attributable of the conduct of its state organs according to Article 4 ARSIWA. Article 7 DARIO rebuttes that presumption, as the UN in most cases should exercise effective control over the contingent, creating a situation where the conduct of peacekeeping operations in most cases are attributable to the UN. Since we have assumed Article 7 being applicable reciprocally, we must also test if the state also exercises effective control. This solution creates an order where almost all conduct is attributable to the UN, which is in line with current *opinio juris*, while, also attributing conduct to the state in cases when they exercise effective control.

The only time in the cases presented above that the effective control test in DARIO was used, was in the *Nuhanovic* case. In *Behrami,* the ECtHR used its own "ultimate authority and control test", and in *Mothers of Srebrenica,* the court used the effective control test from ARSIWA, crystalized in *Nicaragua* and *Bosnian Genocide*. In the *Nuhanovic* case, the Supreme Court used the power-to-prevent test, a scholarly initiative by Dannenbaum, to attribute the conduct of Dutchbat to the Netherlands. Since the Netherlands held the power to prevent the alleged conduct of Dutchbat, the conduct was attributable to the state. The Supreme Court held that it's not necessary for the state to have countermanded the command structure of the UN by giving instructions, nor to have exercised operational command independently. Instead, the decision should be based on the factual control over the specific conduct, in which all factual circumstances and the special context should be considered. In this case, the relevant decision was taken in mutual consultation with the UN, and the state was closely involved in the evacuation of Dutchbat and the refugees. If the State had been aware of the conduct, it could have prevented it. This reasoning seems to be in line with the commentary to DARIO, as the court stresses the importance of factual control. It is also very similar to the reasoning to why the conduct was attributable to the state after the certain point in the Court of Appeal decision in *Mothers of Srebrenica.* The critics of the power-to-prevent test argue that it deviates from the factual standard but

in the way it was used in *Nuhonovic*, that is obviously not the case. The standard applied seems to be in line with the commentary to DARIO and therefore makes a good example of how the effective control test in DARIO should be used.

5.2 Conclusion

In conclusion, the rules of attribution of conduct to international organizations in the context of peacekeeping missions are yet to be fully crystalized in international customary law. The applicable customary international law is largely unclear, but the results from the analysis, shed light on certain indications suggesting possible conclusions. DARIO has most certainly achieved status as international customary law and should be consulted when assessing attribution of conduct in the context of peacekeeping operations. Whether Article 6 or 7 DARIO should be used, remains to be clarified but the results of my analysis strongly favors the solution described above, with a reciprocal interpretation of Article 7 combined with Article 4 ARSIWA as the main rule when assessing attribution. The results further suggest that the Supreme Court interpreted the "effective control test" in the *Nuhanovic* case correctly.

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