

The 'reciprocal' approach in article 7 ARIO: a reply to Pierre d'Argent

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1. *Introduction*

The enlightening contributions by Condorelli and d'Argent published in this review both serve to stimulate the debate on the possible 'dual attribution' of conduct in peacekeeping operations. The perspectives of the two authors are different, but they both provide some 'food for thought' as far as the interpretation of Article 7 of the Articles on the Responsibility of International Organizations (hereinafter ARIO) is concerned.

In this brief paper I would like to discuss one of the aspects dealt with in the papers in connection with the judgments rendered by the Dutch Courts in the *Nubanovic* saga, that is to say the 'reciprocal' approach followed by the Court of Appeal in the application of the 'effective control' standard. It is useful to recall that the appeal judges in The Hague assumed that the 'effective control' criterion enshrined in Article 7 ARIO applied not only to the 'hiring' international organization (hereinafter IO), but also to the troop-contributing States (hereinafter TCS)¹ as suggested by the International Law Commission (hereinafter ILC).² The District Court of The Hague confirmed this view in the recent

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¹ *Hasan Nubanovic v Netherlands*, Appeal judgment, LJN:BR5388, *ILDC* 1742 (NL 2011) (Court of Appeal, 5 July 2011) para 5.8.

² ILC, 'Report of the International Law Commission on the Work of its 63rd Session (26 April-3 June and 4 July-12 August 2011) UN doc A/66/10, 85, para 4.



judgment in the *Mothers of Srebrenica* case,³ in which the Netherlands was found to be responsible for the death of 300 men in Srebrenica.⁴

Pierre d'Argent, in his paper, criticises the 'reciprocal' approach followed by the Court of Appeal, arguing that the 'effective control' test should be applied only to the IO because: 'in the absence of effective control by the organization over the conduct of the State organ placed at its disposal, such conduct must be considered as an act of that State, and of that State only'.⁵ It derives from this critique that it is:

'superfluous to assess whether the State exercised effective control since the person placed at the disposal of the organization is its organ and that State responsibility for conduct of organs is not conditioned by the positive assessment of any effective control by the State over the conduct of its organ'.⁶

This proposition deserves some discussion as it deals with an important – if not fundamental – issue in the continuous quest for a feasible interpretation of Article 7 ARIO. In fact, the application or non-application of the 'reciprocal' approach can have a heavy weight on the attribution of conduct in peacekeeping operations.

I will deal with this issue in the next section, arguing that the non-application of the 'reciprocal' approach can result in a presumption in favour of the attribution to the TCS. In the third section I will then discuss some arguments in support of the judgment rendered by Court of Appeal in the *Nuhanovic* case, in order to draw some general conclusions in the last paragraph.

³ See *Stichting Mothers of Srebrenica et al v Netherlands*, Judgment (District Court, 16 July 2014) paras 4.33 – 4.35 available at <<http://uitspraken.rechtspraak.nl>>.

⁴ For an early comment see B Boutin, 'Dutch Court Holds the Netherlands Responsible for 300 Srebrenica Deaths, and Sets Limits to Future Claims' (2014) available at <www.sharesproject.nl>.

⁵ P d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) *Questions of International Law Zoom-in* 1, 26 available at <www.qil-qdi.org>.

⁶ *ibid.*



2. *Is there a presumption in favor of the attribution to the troop-contributing States?*

Pierre d'Argent argues that in the absence of effective control exercised by IOs, the conduct should be attributed to the TCS according to the 'default attribution rule'⁷ because the troops still remain *de jure* organs of their sending countries; hence, the conduct is to be attributed to the TCS according to Article 4 Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA).⁸ He applies this view to the decision of Major Franken relating to the separation of the *Nuhanovic* family, asserting that:

'deciding the case on the basis of Article 7 ARIO could have been more straightforward: as he was not "fully seconded" to the UN but only placed at its disposal, his decision must be legally deemed to remain a decision of the State of which he was an organ, unless it can be convincingly established that the UN (through its own agents and organs, or possibly through member States' organs "fully seconded" to it) had effective control over that specific conduct'.⁹

It follows that, in the absence of effective control over the impugned conduct by IOs, the nature of State's organs of the troops sent in a peacekeeping operation remains the only ground for attribution. In other words, the status of the troops as organs – or agents – of IOs 'withdraws' in favour of the status of the troops as organs of the TCS.

In such a scenario, the consequence is that the only organic link surviving would be the one that exists between the troops and their sending States. This necessarily implies that the quality of the troops as TCS' organs becomes exclusive and that the organic link that exists between the troops and the IO plays no role in the attribution; at this point, the very nature of the troops as organs of international organizations is challenged.¹⁰

⁷ *ibid.*

⁸ UNGA Res 56/83 Annex (28 January 2002) 2, art 4 Conduct of organs of a State.

⁹ d'Argent (n 5) 29.

¹⁰ According to Messineo, the application of such a strict interpretation of the 'effective control' standard 'would mean that organs transferred from States could never temporarily become organs or agents of an international organization, thereby creating an institutional link with the IO, because a factual link with the IO would need to be

I have doubts on this interpretation. The organic link between the troops and the international organization should not be severed because the IO does not exercise effective control. The troops are in fact placed in the military structure of the IO. This institutional dimension should be considered as it is in the context of Article 8 ARIO, which attributes to an international organization *ultra vires* acts of its organs or agents while acting in their 'official capacity and within the overall functions of the organization'.¹¹

The UN has always maintained the position that the command and control structure of the organization is the decisive factor in the attribution of conduct, thus assuming that, in principle, any conduct should be attributed to the UN.¹² In fact, it is undeniable that States' contingents are formally placed under the authority of the UN as the command and control structure is settled by the organization itself.¹³ In addition, the troops are normally considered organs of the organization, being formally incorporated into its institutional framework. This is the case of UN peacekeeping forces,¹⁴ but the same can be said for peacekeeping

established every time before attribution could be transferred'. F Messineo, 'Multiple Attribution of Conduct', *SHARES Research Paper 11* (2012) 41 available at <www.sharesproject.nl>.

¹¹ It has been argued that the rationale of art 8 ARIO is the institutional framework of the international organization, which is a relevant and decisive factor even if the organs or agents act in contravention of specific order: F Salerno, 'International Responsibility for the Conduct of 'Blue Helmets': Exploring the Organic Link', in M Ragazzi (ed), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 422. This is applicable also in the context of peacekeeping operations, as clarified in the ARIO Commentary, where the only exception is for the off-duty personnel of peacekeeping missions. Report of the International Law Commission UN doc A/66/10 (n 2), 95, para 10.

¹² 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 *Bebrami*' (2012) 45 *Israel L Rev* 160.

¹³ It is to be borne in mind that in fact a transfer of authority from the troop contributing state to the international organizations is in place, even if states retain some powers. This is uncontested and differentiates UN led operations from UN authorized operations. See PC Cammaert, B Klappe, 'Authority, Command and Control in United Nations-led Peace Operations', in T Gill, D Fleck (eds), *The Handbook of International Law of Military Operations* (OUP 2010) 260, para 6.15.

¹⁴ M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) 37. See also, *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* (Advisory opinion) [1962] ICJ Rep 151, 176.



missions established by other IOs, such as the EU.¹⁵ Hence, if a rebuttable presumption exists, it is in favour of the attribution to the IO, not to TCS.¹⁶

The critique of the 'reciprocal' approach overturns this construction. It is based on the assumption that the troops are still States' organs 'unless it can be convincingly established that the UN [...] had effective control over that specific conduct'. This appears to be a presumption of exclusive attribution to the lending States, which 'pops up' when the IOs do not exercise effective control.

This presumption apparently echoes the judgment rendered by the UK House of Lords in the *Nissan* case. In that case, it was affirmed that UK troops put at the disposal of the UN in the context of UNFICYP operation 'remain[ed] in their own national service';¹⁷ hence, their conduct was attributed to the UK. Several scholars harshly criticised the *Nissan* case as the House of Lords based its decision on the assumption that States exercise their exclusive authority over troops sent in UN peacekeeping operations.¹⁸ According to Hirsch, *Nissan* was wrong because it failed to apply the effective control test, which, in his view, could have suggested a different result in the determination of the entity to whom the impugned conduct had to be attributed.¹⁹

One should not go too far by saying that the paper by Pierre d'Argent shares the same rationale. Actually, his paper is based on the application of the effective control standard to the IO, while the House of Lords affirmed the sovereignty rights of the UK over its troops with-

¹⁵ For a discussion on the institutional status of the troops sent into EU military operations see A Sari, RA 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* (OUP 2013) 134-136.

¹⁶ See accordingly A Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9 Intl Organizations L Rev 83.

¹⁷ *Attorney Gen v Nissan*, [1970] AC 179 (HL 1969) (appeal taken from AC), Opinion of Lord Pearce, 209.

¹⁸ RCR Siekmann, *National Contingents in United Nations Peacekeeping Forces* (Springer 1991) 144.

¹⁹ M Hirsch, *The Responsibility of International Organizations towards Third Parties. Some Basic Principles* (Martinus Nijhoff 1995) 76. This Author affirmed that a correct application of the effective control standard would have pushed the House of Lords to attribute the conduct to the UN.

out making any inquiry into the degree of control exercised by the UN in Cyprus.²⁰

However, the ‘unilateral’ application of the effective control standard to the IOs leads to the same result of nullifying the organic link between the organization and the troops, thus endangering the unity of a peacekeeping operation and the authority of IOs in the command and control structure. This situation, as we will see in the next paragraph, does not reflect the complex institutional framework of peacekeeping operations.

3. *The necessity of a ‘reciprocal’ reading of article 7 ARIO*

Although the organic link between the troops and the IOs is a factor in the attribution of conduct in peacekeeping operations, it is accepted that TCS normally retain ‘full and exclusive strategic level command and control of their personnel and equipment’.²¹ This is not only because TCS normally exercise disciplinary powers and criminal jurisdiction over their troops:²² in peacekeeping operations, TCS exert a certain degree of influence over the conduct of the troops they lend to IOs.²³

Against this background, the presumption in favour of the attribution to the IOs can be challenged by a number of factors, which are very frequent in the practice of peacekeeping operations. I will try to summarise them outlining two possible scenarios: the ‘extreme’ and the ‘common’ one.

In the ‘extreme’ scenario, the troops on the ground receive directions and orders directly from their national authorities rather than the

²⁰ See accordingly A Di Blase, ‘Sulla responsabilità internazionale per attività dell’ONU’ (1974) 57 *Rivista di diritto internazionale* 265.

²¹ Cammaert, *Klappe* (n 13) 159, para. 6.16.

²² As noted by the International Law Commission in its Commentary to art 7 ARIO: Report of the International Law Commission UN doc A/66/10 (n 2), 87, para. 1.

²³ See, in this regard, T Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ (2010) 51 *Harvard Intl L J* 149-151 and all the references therein.



IOs.²⁴ This is particularly so in cases of 'cutting-across orders' – which are instructions given by national authorities to ignore or to go against orders provided by the IO – or in cases where TCS withdraw their troops from an international mission.

In this scenario, it is clear that the control exercised by the TCS over their troops discontinues the chain of command of the IO. An investigation into the conduct of TCS is therefore necessary to assess the exclusiveness of the control exercised over the troops and to rebut the presumption of exclusive attribution to the IO.

Nothing in this construction suggests that the conduct of national contingents is attributed to the States because of their nature as States' organs to the detriment of their nature as organs or agents of the IOs. In the *Nubanovic* case, there exists no *dictum* of the Dutch Courts in which the organic link between Dutchbat and the UN is considered to be severed. On the contrary, the Court explicitly mentioned in several passages that Dutchbat was still formally placed under the authority of the UN and that the individuals involved performed a 'double role' as organs of the Netherlands and of the UN.

Even if we consider a less peculiar scenario – the 'common' one – we have a complex machinery in which the IOs and the TCS cooperate in the decision-making process of a military operation.²⁵

This does not necessarily imply that national orders cut across the chain of command of the IO. National orders can be shared with the IO or adopted in the institutional framework of the organization.²⁶ Con-

²⁴ As it was in the *Mukeshimana-Ngulinzira* case before the *Tribunal de premiere instance de Bruxelles*: see *Mukeshimana-Ngulinzira and ors v Belgium and ors*, First instance judgment, RG No 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010) (Court of First Instance, 8 December 2010) para 37-38.

²⁵ See for instance G Bartolini, *Lo status del personale delle forze armate italiane operante in missioni all'estero e in contesti di cooperazione militare* (il Sirente 2012) 21-23. Ryngaert (n 12) 165: 'States have always retained a measure of control over and, even more, have micro-managed the troops they second to the UN, a situation which has been tolerated by the UN as long as the command structure is not impeded'.

²⁶ A German Administrative Tribunal discussed a similar scenario with regard to the conduct of a German vessel involved in the EU operation *Atalanta*. In that case, a national decision based on the EU/Kenya agreement on the transfer of suspected pirates was adopted in the framework of an EU military operation. See *Verwaltungsgericht Köln*, Judgment 11 November 2009, case no 25 K 4280/09 available at <www.justiz.nrw.de>; see also A Nollkaemper, 'German Court Finds the Transfer of

versely, orders stemming from an IO can be influenced by national caveats or adopted after intense consultations with the TCS.²⁷ To sum up: it is perfectly possible that the IO and the TCS mutually agree decisions and orders in a peacekeeping operation.

It follows that we would always – or, at least, often – have a certain degree of control exercised by the IO and the TCS over a specific conduct even if an order stems from one entity only. In this ‘common’ scenario, the control exercised over the troops is never exclusive as the conduct of TCS and IOs are necessarily interwoven.

It is therefore a matter of the degree of control rather than one of exclusiveness. Article 7 ARIO should be interpreted accordingly, so as to allow an investigation into the intensity of the control exercised by the IO *and* the TCS.²⁸ This proposition is supported by the ILC, according to which the exercise of exclusive control by the IOs is not even required by Article 7 ARIO because it ‘does not concern the issue whether a certain conduct is attributable at all to a State or an international organization’.²⁹

The *Nuhanovic* case is a paradigmatic example of such a practice. The State of the Netherlands was found to have both normative and factual control over the disputed conduct in a case in which the Netherlands and the UN were both engaged in a decision making process on the evacuation of the compound.³⁰

4. *Concluding remarks*

In conclusion, the ‘reciprocal’ approach is functional to avoid a presumption of exclusive attribution to the TCS, which would undermine the status of the troops as organs or agents of IOs. If a presumption ex-

Somali Pirates to Kenya to Be in Violation of Germany’s Obligations Under International Law’ (2011) available at <www.sharesproject.nl>.

²⁷ C Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009) 10 *Melbourne J Intl L* 14.

²⁸ See L Gradoni, ‘L’alto rappresentante per la Bosnia-Erzegovina davanti alla Corte europea dei diritti umani’ (2008) 91 *Rivista di diritto internazionale* 633-634.

²⁹ Report of the International Law Commission UN doc A/66/10 (n 2), 88, para 5.

³⁰ A Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, (2011) 9 *J Intl Criminal Justice* 1150.



ists, it should instead be in favour of the institutional framework of the IOs.

An inquiry into the exercise of effective control by the TCS is needed if one wishes to challenge this presumption, especially when national orders sever the chain of command of the IOs. It seems that this is necessary even when the chain of command is not discontinued, as IOs and TCS always share orders and decisions in the complex decision-making process of a peacekeeping operation.

The 'reciprocal' approach allows a more in depth investigation into, and a better understanding of, the *bricolage institutionnel*³¹ involved in a peacekeeping operation. That is why, I believe, Article 7 ARIO should be read as the Dutch courts (Court of Appeal and Supreme Court) correctly did in the *Nuhanovic* case.

³¹ A definition coined in J M Sorel, 'La responsabilité des Nations Unies dans les opérations de maintien de la paix' (2001) 3 Intl L Forum 138.

