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Attribution of Conduct to International Organisations

Faryma Bahrami
LLB (Hons), Dip LP

Submitted in fulfilment of the requirements for the Degree of LLM by Research

School of Law

College of Social Sciences

University of Glasgow

Abstract

In this global age of international co-operation where international organisations play an increasing role, it is imperative that we are able to hold them accountable for their actions. The focus of this research is in the area of attribution of conduct to international organisations which is the first step in the process of holding an international organisation accountable. Such a study is important in order to fully understand the grounds and criteria on which it is possible to attribute conduct to an international organisation for both direct and indirect acts. This dissertation identifies then expands on the way in which conduct can be attributed to an IO, whilst shedding light on problems which are encountered during the attribution of conduct process. The research method consisted of review of relevant literature; international and domestic court judgements; and of course various UN International Law Commission materials, including the Draft Articles on the Responsibility of International Organisations (DARIO). The main conclusions drawn from this study are that there is confusion in relation to the grounds on which conduct can be attributed to an IO and that DARIO is not currently interpreted in a manner reflective of practice. This often results in conduct being attributed to the wrong entity, or else to only one entity where in fact there should be concurrent attribution. This dissertation proffers wider interpretation of DARIO, in a manner reflective of practice.

Keywords:

Responsibility of International Organisations – Attribution of Conduct – ‘Effective Control’ – ‘Normative Control’ – ‘Derivative Responsibility’

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I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature.....

Name.....

Abbreviations

ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
DARIO	Draft Articles on the Responsibility of International Organisations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EJIL	European Journal of International Law
EU	European Union
EC	European Community
ECJ	European Court of Justice
EGC	General Court
ICJ	International Court of Justice
ILC	International Law Commission
IO	International Organisations
IMF	International Monetary Fund
KFOR	Kosovo Force
ME	Member Entity
MS	Member State
NC	National Contingent
PKF	Peacekeeping Force
PKO	Peacekeeping Operation
SG	United Nations Secretary General
SR	Special Rapporteur
SOFA	Status of Force Agreement
TCN	Troop Contributing Nation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	Charter of the United Nations
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
USG	United Nations Under-Secretary General for Peacekeeping Operations
WTO	World Trade Organisation

Key Terms

International organisation: ‘an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities’.¹

Rules of the organisation: ‘in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization’.²

Organ of an international organisation: ‘any person or entity which has that status in accordance with the rules of the organization’.²

Agent of an international organisation: ‘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’.³

Attribution of conduct: the process of determining to which entity a particular act or omission can be ascribed.

Circumvention of attribution of conduct: an attempt by an entity to avoid having its conduct attributed to it by arguing that the conduct is attributable to another entity.

¹ ILC, Report of the International Law Commission on the work of its 63rd session’ (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10 para 87 (DARIO) article 2(a) ² ibid article 2(b)

² ibid article 2(c)

³ ibid article 2(d)

1. Introduction

This dissertation is concerned with the process of attribution of conduct and the relationship between attribution of conduct and ‘derivative responsibility’, i.e. the responsibility of one entity for the conduct of another entity. The wider issue of responsibility is out with the scope of this paper.

The prevailing nature of international organisations (IOs) and the appetite for global cooperation has led to an increase in IO activity. These activities, at times, have undesirable consequences. A natural or legal person may suffer a wrong as a result of the activities.

Where the wrong is a result of one entity’s act or omission, it is clear who should or could be held accountable for the wrong. Where, on the other hand, there are dual or multiple actors, or layers of actor, the matter is not as clear cut. IOs are made up of natural persons who may function in the international organisation as a representative of their state. IOs tend not to have the resources or facilities to implement their own decisions and so rely on their member states or member IOs; they may also rely on private organisations and corporations. This means that where the decision of an IO is being implemented, there are often multiple layers of actor.

The task of establishing who can be held accountable for a wrongful act then becomes more complicated. We cannot identify the wrongful actor immediately to attempt to hold them accountable. Instead we must look to ascertain to whom conduct can be attributed and which conduct exactly it is that can be attributed to that actor. There may be occasions where a single actor or ‘omitting’ entity can be identified; whilst there may be other occasions where two or more actors are identified as playing a role. We must then decide what criteria is applicable to establish which acts we can attribute to each actor. Only after we have identified the role of each actor and attributed the relevant conduct to them, can we begin to hold the actors to account and attempt to engage their responsibility. Therefore attribution of conduct is the essential first step to holding an IO accountable and forms the focus of this dissertation. It must be highlighted at the outset that, attribution of conduct does not always lead to engagement of responsibility as will be discussed.

1.1 Background of the study

International organisations were created by states to allow them to pool their resources together to achieve a common purpose. However international relations have come a long way since the emergence of the first IOs in the late 1800s, such as the International Telegraph Union and the Universal Postal Union, which had specific aims and limited remits.¹ Over the years International Organisations have become more complex with effectively unlimited remits and have been given more complex roles to play in world affairs. States now transfer many of their decision making powers and functions to International Organisations, such as the United Nations ('UN') and the European Union ('EU'), who then make decisions and enforce them upon otherwise sovereign states. We have seen "the gradual emergence of a kind of superstructure over and above the society of states".²

In some instances this "superstructure" has resulted in a state having to choose between complying with the will of an international organisation or facing consequences such as sanctions. Occasionally complying with the decision of an IO can lead a State to breach other international obligations. For example States sometimes breach their international responsibilities under the European Convention on Human Rights by carrying out acts, such as asset freezes and travel bans, because of binding requirements placed on them by UN Security Council Resolutions.³ This can lead to complicated legal situations and is only one of the issues which demonstrates that "the continuous increase of the scope of activities of international organisations is likely to give new dimensions to the problems of responsibility of international organizations".⁴

The increased activities of IOs has naturally resulted in a greater IO presence in international relations. The role and indisputable influence of International Organisations in the modern world has resulted in new and complex situations for which clearly defined legal rules are

¹ See respectively

'International Telegraph Conference (Paris, 1865)'

<<http://www.itu.int/en/history/Pages/PlenipotentiaryConferences.aspx?conf=1&dms=S0201000001>> and

'About history' <<http://www.upu.int/en/the-upu/history/about-history.html>> accessed 06/03/14

² H Mosler (1974) 140 RdC 189 as quoted in Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford Monographs in International Law, OUP 2011) 1

³ See for example *Nada v Switzerland* App No 10593/08 (ECtHR 12 September 2012); and *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58

⁴ Abdullah El-Erian, 'First Report on relations between States and inter-governmental organizations' (1963) UN Doc A/CN.4/161 and Add.I; (1963) II YILC 159 at 184 para 172

required. To this end the International Law Commission of the United Nations ('ILC'), having just completed the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), decided at its fifty second session in 2000, to incorporate into its long term program of work the issue of "Responsibility of International Organizations". The ILC annexed the syllabus on the topic to its 2000 report which the General Assembly noted⁵ then requested the ILC to begin its work on the topic.⁶

The ILC worked on the topic from 2002 until 2011 and adopted, on second reading, Draft Articles on the Responsibility of International Organisations (DARIO).⁶ The DARIO cover many important and problematic areas. Two particularly problematic areas are those of attribution of conduct and establishment of responsibility. At first glance these may appear simple and clear concepts, however in practice there seems to be a problem regarding clarity of the rules of attribution of conduct. This, in turn, contributes to an issue of circumvention of attribution of conduct and evasion of responsibility; ultimately resulting in those who have had their rights breached being left with no remedy. The ILC in DARIO has attempted to draft rules suitable to the nature of IOs in an effort to provide clarity and alleviate problems. Some of the DARIO provisions have proved controversial, with article 7 arguably attracting the most attention.

1.2 Research aims, objectives and value

The overall aim of this research is to advance an understanding of the way in which conduct may be attributed to an international organisation and the entities through which it acts. In order to gain such an understanding, it is necessary to examine the ways in which an international organisation may come into existence and the way in which it may function. Consideration must be given to the situations in which an IO may act and to the entity through which it may act. The entity through which the IO acts may be a member state or IO; it may be an organ or agent of the international organisation; or it may be a private entity such as a private military security company. The study will consider the requirement for attribution of conduct and whether such a requirement applies where there is deemed to be

⁵ UNGA Res 55/152 (12 Dec 2000) UN Doc A/RES/55/152

⁶ UNGA Res 56/82 (12 December 2001) UN Doc A/RES/56/82

⁶ ILC, Report of the International Law Commission on the work of its 63rd session' (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10 para 87 (DARIO)

derivative responsibility. Brief consideration will also be given to the effect of the jurisdictional immunity enjoyed by certain IOs such as the United Nations.

More specifically, the objectives of this dissertation are to:

1. Identify the criteria which are or can be used for attribution of conduct.
2. Evaluate critically whether these criterion are adequate, with regard to practical situations.
3. Review and investigate practice; academic opinion; the opinion of the ILC and its Special Rapporteur on the topic of Responsibility of International Organisations; and of course DARIO with occasional reference and comparison to ARSIWA.
4. Determine whether the current criterion would benefit from modification and additional criteria.

1.3 Outline of thesis

Chapter one has provided a brief introduction to this work.

Chapter two of this work familiarises the reader with the concept of international legal personality, held by IOs, and the relationship between IOs and their members. The chapter also explores the way in which IOs function by means of their organs and agents, and considers the relatively uncontroversial manner in which such conduct (which is essentially direct IO conduct) is usually attributed.

Chapter three examines the criterion for attribution of conduct when the IO in effect acts indirectly by relying on member states and international organisations (collectively ‘member entities’ (ME) to carry out its will. The chapter will examine the criterion of ‘effective control’ to establish whether it is suitable and adequate for IOs and their diverse activities. The chapter will then consider whether it is possible for conduct to be attributed to more than one entity concurrently and if so, on what basis this can be done.

Chapter four then considers the difficulties faced when attempting to attribute conduct to an entity. These difficulties include differences in the understanding of the basis on which conduct can be attributed; the relationship between attribution of conduct and derivative

responsibility; and the problem presented by the jurisdictional immunity enjoyed by IOs such as the UN.

Chapter five will then present a conclusion of the suitability of the rules and put forth suggestions for possible ways in which the rules may be improved.

2. International Legal Personality and Attribution of Direct IO Conduct

Prior to examining the rules surrounding attribution of conduct to International Organisations (IOs), it is necessary to understand why the issue of attribution of conduct arises. This requires an examination of the conduct of an IO. The examination of the conduct of an IO must begin with looking at the establishment and purpose of the IO as an entity separate from its members. The connection between the powers and purposes of the IO and the ensuing relationship between the IO and its members will then be examined. The discussion will progress to consider how this relationship results in members implementing the decisions of the IO. Such decisions and implementations involve multiple actors and a discussion will follow as to how this multiple layer of actor increases the importance of attribution of conduct.

Once the conduct of an IO has been examined the focus will shift to the most basic situations of attribution of conduct to IOs. This requires us to reflect on the functioning of the IO. The IO creates subsidiary organs and distributes its obligations and powers amongst the organs. The IO may also engage the help of agents to reach its objectives. When these organs and agents act, to whom should their conduct be attributed? The work of the ILC in relation to attribution of the conduct of organs and agents will be reviewed, together with attribution in the situation where the organs and agents act *ultra vires*. The chapter will conclude by reviewing the relative clarity and adequacy of the ILC rules in this area of IO conduct, by way of precursor to discussion on the more complex areas of attribution.

2.1 International Legal Personality

IOs are comprised of other entities through which and for which the International Organisation acts.¹ This thesis focuses on IOs that are comprised of states, though they may also have non-state members such as other IOs,² in accordance with the definition of

¹ Jose E. Alvarez, *International Organisations as Law-makers* (OUP 2005) 4-9; Tarcisio Gazzini, "Personality of international organizations" in Jan Klabbers and Asa Wallendahl *Research handbook on the law of international organizations* (Research Handbooks in International Law series, Edward Elgar Publishing 2011) 36

² Eg the EU, an international organisation in its own right, is itself a member of the WTO amongst many other international organizations the list of which can be viewed at <http://ec.europa.eu/world/agreements/viewCollection.do?fileID=58598> (last accessed 11/08/2013), see also <http://www.un.org/en/members/intergovorg.shtml> (last accessed 11/08/2013) for a list of IOs which,

‘international organization’ provided in the ILC’s Draft Articles on the Responsibility of International Organizations (DARIO).³ Therefore IOs comprising of only non-state members are excluded from the scope of this work. Member states and member IOs (hereinafter collectively ‘member entities’ or ‘MEs’) create international organisations in order to, among other objectives, ensure that all entities are acting uniformly and consistently so as to achieve a common or collective goal in the most efficient manner.⁴

States and IOs create new IOs by way of constituent treaties. The constituent treaty will often contain the scope, remit and powers of the organisation. MEs may, from time to time, confer further powers onto an IO using a subsequent treaty in order to achieve a further task. They may achieve the same result even through subsequent practice, for example by inviting or allowing the IO to act in a particular area over which it otherwise has no powers.⁵ Constituent treaties *often* confer legal personality on an entity, sometimes explicitly but usually implicitly, through interpretation of the constituent instrument.⁶ The constituent instrument alone is not adequate for determining the full extent of the legal personality and powers of the IO, given the implicit terms of some such instruments. Instead the personality and powers must be considered alongside other international instruments such as the subsequent treaties.⁷

Absent of international legal personality, an IO may be viewed as a simple collective of its members, which would result in all of the IO’s conduct being attributed to the members. This is similar to domestic law where an unincorporated business is seen as a collection of its owners trading by use of the business name: whereas an incorporated business is clothed

though not members of the UN, play an important role in and contribute to the work of the UN as permanent observers.

³ ILC, ‘Report of the International Law Commission on the work of its 63rd session’ (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10 para 87 (DARIO) article 2(a)

⁴ Alvarez (n1) 17; Viljam Engstrom, ‘Reasoning on powers of organizations’ in Jan Klabbbers and Asa Wallendahl *Research handbook on the law of international organizations* (Research Handbooks in International Law series, Edward Elgar Publishing 2011) 56-58 & 61; Jan Klabbbers, ‘The changing image of international organizations’ in Jean-Marc Coicaud and Veijo Heiskanen, *The Legitimacy of International Organizations* (United Nations University Press 2001) 224.

⁵ See for example, Agreement between the President of FRY, Slobodan Milosevic, and EU and Russian special envoys, Martti Ahtisaari and Viktor Chernomyrdin, 3 June 1999, produced as annex 2 to UNSC Resolution 1244 (10 June 1999) UN Doc S/RES/1244

⁶ See generally *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 (Reparations); Nigel D White, *The law of international organisations* (2nd edition, Juris Publishing, Manchester University Press 2005) 32

⁷ Ingrid D Detter, *Law Making by International Organizations* (P.A. Norstedt & Söners Förlag, 1965) 33

by the corporate veil and seen as a distinct entity possessing legal personality, comprising of rights and responsibilities separate to that of its founders.

Further to this Alvarez argues that, international legal personality is essential for independent functioning and the exercise of international rights and responsibilities by IOs.⁸ Whilst Klabbbers, on the other hand, claims it is not a ‘threshold requirement, without which such rights and duties simply cannot exist’.⁹ The importance of international legal personality can be demonstrated by reference to the rationale of the International Court of Justice (‘ICJ’) in *Reparations*.¹⁰ In that case, the ICJ thought it necessary to first establish whether the UN had legal personality prior to providing an opinion on the issue of whether the UN had capacity to bring an action against a state, which incidentally was not a member state at that time. The UN had not asked the Court to provide an opinion on the matter of its legal personality; however the Court believed that determining this was an essential preliminary step. The implication being that the UN could not bring the action if it did not hold such personality. Nonetheless, the Court was of the view that this legal personality was not identical to that of a state’s but rather was limited to the extent required for the IO to carry out the functions required by its constituent instrument.¹¹ The Court’s reasoning implies that independent legal personality is required for an IO to be able to enforce its rights. IOs being fictional entities, comprised of members, must hold legal personality separate to that of their members otherwise they may be regarded as extensions of their members; resulting in the members being attributed with the IO’s conduct.¹² Any rights requiring to be enforced would be those of the members collectively and would have to be enforced by those members. Therefore, the author would argue that legal personality is a requirement without which, rights and responsibilities cannot exist for the IO directly.

Despite the similarity of the role of international and domestic legal personality, the formation of international legal personality is unlike the formation of domestic legal personality. The domestic laws of most states recognise a legal person once the statutory requirements have been satisfied and registration, with a designated government body, has been successful. There are no requirements or mechanisms for registration under

⁸ Alvarez (n 1) 129

⁹ Klabbbers (n4) 244

¹⁰ *Reparations* (n6)

¹¹ *ibid* 179

¹² Giorgio Gaja ‘First Report on Responsibility of International Organisations’ (26 March 2003) U.N. Doc. A/CN.4/532 para 27

international law. How then can one establish whether an entity holds international legal personality?

Whilst some argue that international legal personality is established by means of a constituent treaty, scholars such as Seyersted argue that IOs gain their personality from customary international law rather than constituent treaties.¹³ The way in which an IO gains its personality is relevant for ascertaining the power structures which in turn aids attribution of conduct. There are two main schools of thought on the creation of international legal personality: the ‘will’ theory and the ‘objective’ theory.¹⁴

The essence of the ‘will’ theory is that founding entities will, only if they so wish, bestow international legal personality upon an organisation and that by way of its constituent treaty.¹⁵ The theory falls short in explaining the situation with regard to IOs with no such explicit provision in their founding treaties, such as the EU prior to amendment of its own constituent instrument.¹⁶

The objective theory asserts that as soon as an entity meets the requisite objective standards for being an international organisation, it will be deemed to possess international legal personality.¹⁷ According to the theory, the will of the founding members is of secondary importance and plays more of a role in limiting the full personality given to the IO under international law.¹⁸ The objective theory puts forward that IOs have a will distinct from that of their member entities but that the extent of this distinction is likely to vary from organisation to organisation based on the extent of power conferred.¹⁹ The rationale of the ICJ in *Reparations* seemed to reflect the objective theory as it held that legal personality, while not expressly conferred on the UN by the UN Charter, had been implied by the UN's founders as international personality is ‘indispensable’ for the functionality of the UN. The

¹³ Finn Seyersted, ‘Objective International Personality of Intergovernmental Organizations: Do their Capacities Really Depend upon Their Constitutions?’ (1964) 34 *Nordisk Tidsskrift Int'l Ret* 1, 29

¹⁴ Jan Klabbbers, ‘Presumptive Personality: The European Union in International Law’ in Martti Koskenniemi, *International Law Aspects of the European Union* (Martinus Nijhoff Publishers, Kluwer Law International 1998) 233; Gazzini (n1) 34

¹⁵ Gazzini (n1) 34-35

¹⁶ EU, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 2007/C 306/01

¹⁷ For discussion on the “requisite objective standard”, see for example: White (n6) 30; Felice Morgenstern, *Legal Problems of International Organizations* (Grotius Publications 1986) 19-26; Alvarez (n1) 5-6.

¹⁸ Klabbbers (n4) 240-242; Gazzini (n1) 35-36

¹⁹ Klabbbers (n14) 241 and 243; Gazzini (n1) 35 and 37

ICJ can be regarded as stating that, whilst the members did not express an explicit will to create legal personality, the UN meets the requisite objective standards to be deemed to hold international legal personality. The objective theory, in allowing the will of states secondary status may possibly result in states being members of an international legal person they did not wish to create, regardless of whether the IO refrains from acting on the international stage.²⁰ Under the objective theory an IO may attempt to bind MEs to act in a certain area when in reality the member wished to retain national control over acting in that area. The ME may nonetheless be obliged to act in conformity with an agreement between the IO and third parties, or face the possibility of being punished, suspended or expelled by the IO.²¹ The exercise of such strict control over the ME should, in the author's view, result in the MEs conduct being viewed as that of the IO.

Once we have ascertained that the IO has independent legal personality and determined the extent of this personality, whether under the constitution or by objectively assessing its functionality, we can move to look at the distribution of powers across the IO and the IO's relationship with its members. These factors determine the way in which the IO's will is implemented and thus the nature and scope of its conduct.

2.2 Implementation of an IO's will

The constituent treaty usually contains the rules, structure and *modus operandi* of the IO. MEs, upon creating or joining an IO, agree to be bound by certain rules of the organisation.²² Members must respect the IO's international legal personality and allow the IO to function independently whilst following its decisions when requested, as they have conferred on the IO the power to make binding decisions.²³ Member entities do not give up their sovereign powers when acceding to a treaty but rather agree to limit their powers in accordance with the treaty.²⁴

²⁰ Klabbers (n 14) 240-242

²¹ For example see UN, Charter of the United Nations, 24 October 1945 (UNC) Article 6; Treaty establishing a Constitution for Europe [2004] OJ C 310/01 (signed but not ratified) Article I-59; See also White (n6) 118 - 121

²² See key terms

²³ Engstrom (n4) 64

²⁴ Dan Sarooshi *International Organizations and their Exercise of Sovereign Powers* (Oxford Monographs in international Law, OUP 2005) 69; White (n6) 108

International Organisations will usually make decisions, through their organs, in accordance with their internal rules²⁵ then call on MEs to implement those decisions. All IO decisions do not have equal weight and force. For example, EU Regulations are binding and automatically have legal force in all member states, whilst Directives allow member states discretion to achieve the EU's goal in a manner deemed appropriate by the individual state.²⁶ EU Decisions have binding direct effect on those member states to which they are addressed, whilst Recommendations and Opinions are not binding and so also lack direct effect.²⁷ Different IOs use different names for each type of instrument they use to implement their decisions. The instrument used by the IO will affect the way in which the will of the IO is implemented.

IOs utilise different instruments in order to control the MEs to the extent desired. The degree of leeway a Member state has in implementing the decision of an IO will have a bearing on whether it can do so without breaching any other international obligations.²⁸ Where the Member state has discretion in relation to implementing the binding measure, it will be attributed with conduct resulting from any steps which were not strictly necessary and have resulted in a wrong.²⁹ The situation should be different however in relation to direct effect binding measures and non-direct effect binding measures which leave no room for discretion when implementing.³⁰ The instrument or method by which the IO decides to implement its aims has a bearing on the question of to which entity conduct can be attributed.

Not all IOs have powers similar to the aforementioned EU powers:³¹ the ability to bind and control members varies on the basis of an IO's remit and extent of powers. Some

²⁵ See key terms

²⁶ 'Regulations, Directives and other acts' <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> Accessed 5/03/2014; for an example of an EU Regulation with direct effect see Commission Regulation (EU) No 715/2013 of 25 July 2013 establishing criteria determining when copper scrap ceases to be waste under Directive 2008/98/EC of the European Parliament and of the Council [2013] OJ L201/14

²⁷ 'Regulations, Directives and other acts' <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> Accessed 5/03/2014

²⁸ See for example Joined Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (Kadi I) at para 298-299; and Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council of the European Union* [2006] ECR II-04665 (OMPI) at para 99 – 103

²⁹ OMPI (n28) at para 99 – 103 and 107

³⁰ Case T-315/01 *Yassin Adullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005] ECR II-3649 ('Kadi CFI') para 258

³¹ See Jan Klabbbers 'The EU and International Law' (*IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law*, 23 November 2009)

organisations, such as the UN, have power to act in any area they deem necessary whilst others, such as the World Bank, are explicitly prohibited from playing a role in the political affairs of MEs.³² The UN is arguably the most powerful IO.³³ The UN's powers stem from the UN Charter³⁴ (UNC) which distributes power amongst the various UN organs. The most significant of the powers conferred by the Charter are to the UN Security Council (UNSC) and are contained in Chapter VII of the Charter, plausibly making the UNSC the most powerful IO organ.³⁵ Under Chapter VII the UNSC can, subject to satisfying voting requirements, take enforcement measures to maintain or restore international peace and security. The measures range from non-forceful sanctions to forceful military action.³⁶ The Council does not have to consult any other organs or bodies prior to taking action and is the sole entity to determine 'the existence of any threat to the peace, breach of the peace, or act of aggression'.³⁷

Under articles 25, 43 and 49 all member states are obliged to implement UNSC decisions both directly and indirectly via other IOs of which they are members (such as the EU), whilst under article 103 they must give preference to UN obligations over those imposed by other international treaties.³⁸ Binding decisions of the UNSC are termed Resolutions. The UNC gives the UNSC power to bind members. This would suggest that member states' conduct in pursuance of a UNSC Resolution should be attributed through the Council, a UN organ, to the UN. However, as will be seen in chapter three, this is unlikely to be the case and so the UNSC, is able to circumvent being attributed with conduct it compelled member states to effect. The UN usually issues a Presidential Statement when there is insufficient

http://ivrenc.info/index.php?title=The_EU_and_International_Law> Accessed 5/03/2014

³² International Bank Research and Development, Articles of Agreement (as amended effective 27 June 2012) Article IV Section 10

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0..contentMDK:20049557~menuPK:63000601~pagePK:34542~piPK:36600~theSitePK:29708,00.html> Accessed 5/03/2014

³³ See *Reparations* (n6) at 179 where Court refers to UN as "the supreme type of international organization" and states that it is in "possession of a large measure of international personality"; See also Sabine von Schorlemer, 'The United Nations' in Jan Klabbers and Asa Wallendahl Research handbook on the law of international organizations (Research Handbooks in International Law series, Edward Elgar Publishing 2011) 466- 471 and 475

³⁴ UNC (n21)

³⁵ For a discussion on this see Sabine von Schorlemer (n33) 475-476 and 480-483

³⁶ See UNC (n21) articles 41-42

³⁷ *ibid* Article 39

³⁸ *ibid* Article 103

consensus to pass a Resolution.³⁹ A Presidential Statement is not binding but intended to apply political pressure and signal the possibility of further action.⁴⁰ Presidential Statements allow states more opportunity to refrain from breaching other international obligations, making it more likely that any resulting conduct will be attributed solely to the implementing member state. The UN features prominently in the cases which will be analysed in the following chapters and so understanding the way in which the UN controls states is essential to later considering the question of attribution of conduct.

We have discussed the legal personality of the IO and the methods used to ensure decisions of the IO are acted out. Before we turn to consider the grounds on which conduct can be attributed to an IO, it is beneficial to understand the potential consequences of attribution to either the IO or ME. An understanding of this can be gained by looking at court jurisdiction over IOs. This will demonstrate that the task is not simply a technical one but rather one with imperative consequences, which necessarily must be borne in mind by practitioners and the international community when dealing with the matter.

2.3 Jurisdiction over conduct of IOs

Whether an entity can be cited before a court depends on whether the court has jurisdiction over that entity. Within the domestic legal sphere, the courts of a state generally have jurisdiction to hear cases relating to any natural or legal persons (other than IOs) domiciled or registered within the state territory and hold jurisdiction over the state itself. The international legal sphere however, does not always provide a forum for mandatory judgements on breach of international obligations and the subsequent enforcement of international law in the way that the domestic legal order provides for domestic legal issues.⁴¹ The lack of mandatory forum, means that states and IOs must recognise the legal forum before they can be cited to appear. The lack of mandatory compellability is in addition to the limits placed on the extent of an international court's jurisdiction; the International Court of Justice (ICJ), for instance, only has competence to hear state parties and cannot hear a case to which an IO or individual is party.⁴²

³⁹ Jeremy Matam Farrall, *United Nations sanctions and the rule of law* (Cambridge Studies in International and Comparative Law, CUP 2007) 21

⁴⁰ *ibid*

⁴¹ Karel Wellens, *Remedies against international organisations* (CUP 2002) p.38

⁴² UN, *Statute of the International Court of Justice, 18 April 1946*, (ICJ Statute) Chapter II article 34 (1)

This means that where conduct may be attributable to an IO the ICJ cannot hear the case. Conduct must have the potential of being attributable to an entity, over which the court has jurisdiction, before the case can be heard. This leaves a void in relation to IOs with jurisdictional immunity and states which have not recognised the jurisdiction of the court. The jurisdictional void was recognised by the founding States of the ECHR,⁴³ as were the possible ramifications of allowing states to be the judge of their own conduct, and dealt with by article 13 ECHR. Therefore, section II of the ECHR established the European Court of Human Rights (ECtHR) and defined its scope and function whilst article 34 provided individuals with the right to bring applications to the ECtHR against contracting states⁴⁴ that have violated their rights.

Over the years many parties have brought cases against states to the ECtHR and the European Court of Justice (ECJ).⁴⁵ Where these cases have involved the UN, the respondent state has argued that the conduct forming the subject of the action is not attributable to it but rather is attributable to the UN. One factor which makes this line of argument extremely attractive to states is that the UN enjoys immunity from suit pursuant to article 105 of the UNC and s.2 of the Convention on the Privileges and Immunities of the United Nations (CPIUN).⁴⁶ The UN General Assembly and UN Security Council are able to seek advisory opinions from the ICJ without having to then act in accordance with the opinion.⁴⁷ The UN also has 'capacity to bring an international claim' however it cannot be sued itself.⁴⁸ This immunity hardly seems just or acceptable from an organisation which has been put in place to create and maintain international order and respect for human rights & fundamental freedoms.⁴⁹

Whilst s.2 of the CPIUN gives the UN discretion to waive its immunity, the discretion rarely seems to be exercised. The Cholera outbreak in Haiti serves as an example. The incident,

⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

⁴⁴ The provision actually reads 'contracting parties', however at present only States are party to the ECHR. The EU, which is an international organisation, is in the process of acceding to the ECHR.

⁴⁵ The ECJ is a court of the EU and interprets EU law to ensure uniform application across member states. Individuals, groups and companies can bring claims concerning EU institutions before the ECJ.

⁴⁶ Wellens (n41) 88-89

⁴⁷ ICJ Statute (n42) Chapter IV

⁴⁸ Wellens (n41) 38

⁴⁹ UNC (n21) Preamble

which has resulted in the death of thousands, is alleged to have been caused by UN Peacekeepers who travelled to Haiti from Nepal.⁵⁰ A Boston group called Institute for Justice and Democracy in Haiti (IJDH) filed a class action on behalf of the victims and families of the deceased.⁵¹ The action is based on the standard clauses contained in part VIII ‘settlement of disputes’ of the Status of Forces Agreement (SOFA), signed by the UN and Haiti.⁵² The clauses provide that disputes of a private law nature should be heard by a standing claims commission yet no such commission has been established. This is despite a decision by the UN Secretary General, in the mid 1990s, holding that the standard clauses for settlement of disputes ‘should be retained so that the UN does not act as its own judge’.⁵³

The IJDH claims for compensation have been rejected by the UN as they are deemed not be to receivable in terms of section 29 of the CPIUN.⁵⁴ The UN could choose to waive its immunity under section 2 of CPIUN however to date it has not shown any willingness nor likelihood of taking such action. Therefore, notwithstanding action taken by the UN and other organisations in response to the outbreak, the victims and families of the deceased have been left without recompense or remedy. The reason immunity was originally granted to IOs was to ensure the independence and efficient functioning of the IO.⁵⁵ However increasingly this immunity seems to be allowing IOs to go beyond their remit or to exercise power in a disproportionate manner. Whether the IJDH will attempt to argue that conduct is attributable to the national state of the peacekeepers remains to be seen.

The effect of the UN’s immunity was strongly felt in the *Mothers of Srebrenica*⁵⁶ case. The suit was filed at the District Court of The Hague by 10 women residing in Sarajevo and ‘the

⁵⁰ See for example ‘Haiti cholera epidemic 'most likely' started at UN camp - top scientist’ (*BBC News*, 22/10/2012) <<http://www.bbc.co.uk/news/world-latin-america-20024400>> accessed 07/03/2014

⁵¹ See generally Institute of Justice and Democracy in Haiti <<http://www.ijdh.org/>>

⁵² ‘Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti’, available at <<http://www.ijdh.org/2004/07/archive/agreement-between-the-united-nations-and-the-government-of-haiti-concerning-the-status-of-the-united-nations-operation-inhaiti/>> accessed 07/03/2014

⁵³ Kristen E. Boon, ‘The Haiti Cholera Case Against the UN’ (*Opinio Juris*, 26/10/2012) <http://opiniojuris.org/2012/10/26/the-haiti-cholera-case-against-the-un/> accessed 07/03/2014

⁵⁴ See <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>; <http://www.ijdh.org/wpcontent/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>; <http://www.ijdh.org/wpcontent/uploads/2013/07/20130705164515.pdf>

⁵⁵ A. Reinisch, *International Organisations before national courts* (CUP 2000) 233.

⁵⁶ *Mothers of Srebrenica et al v. State of The Netherlands and the United Nations*, Case No. 295247/HA ZA 07-2973, District Court of The Hague, Judgment in the Incidental Proceedings, 10 July 2008 (*Mothers I*); *Mothers of Srebrenica et al v. State of the Netherlands and the United Nations*, Case No. 200.022.151/01, Court of Appeal of The Hague, Judgment in the First Civil Law Section, 30 March 2010 (*Mothers II*);

Mothers of Srebrenica', a Dutch association representing 6,000 survivors of the July 1995 attack on Srebrenica by Bosnian Serb forces, in relation to the killing of their relatives during the attack.⁵⁷ They sought compensation and acknowledgement of responsibility from the UN and the Netherlands. The District Court granted leave, in 1997, to proceed against the UN, which had failed to appear in proceeding.⁵⁸ This may have lent some hope to the matter however in 2008 the District Court held that the UN enjoyed immunity; thus the court had no jurisdiction to hear the case. This decision was upheld by the Court of Appeal of the Hague, despite it giving consideration to whether the grave nature of the incidents complained of, should mean that the rights of access to the courts under article 6 ECHR and article 14 of the Covenant on Civil and Political Rights should prevail over the UN's immunity on the grounds of legitimacy and proportionality.⁵⁹ The case was appealed to the Supreme Court which also ruled in favour of the absolute immunity of the UN, stating that the Court of Appeal erred by examining whether the UN's immunity could be overcome.⁶⁰ An appeal was then heard by the ECtHR, against the Netherlands in relation to violation the right of access to a court and a complaint made that 'grant of immunity to the United Nations would allow the Netherlands state to evade its liability towards the applicants by laying all the blame on the United Nations'.⁶¹ The ECtHR declared the application inadmissible.⁶² The ECtHR held that a violation of international law, even genocide, did not justify bringing the UN under the scope of national jurisdiction.⁶³ Given that an estimated 8,000 – 10,000 citizens were killed during the massacre,⁶⁴ it is disappointing and unjust that UN immunity is so absolute that the case cannot be heard. It is difficult to see how hearing the case would interfere with the present functioning and operations of the UN, albeit it may prompt the UN to act more carefully.

Such cases demonstrate the important consequences of the rules of attribution of conduct. Inference can be drawn in certain cases (as will be discussed) that the courts, particularly domestic courts, wish to avoid attribution to the UN so that they can provide a remedy to the

Mothers of Srebrenica et al. v. State of the Netherlands and the United Nations, Case No. 10/04437, Supreme Court of the Netherlands, Judgment, 13 April 2012. (*Mothers III*)

⁵⁷ *Mothers I* (n56) para 1 – 2.2

⁵⁸ *Mothers I* (n56) para 1

⁵⁹ *Mothers II* (n56) para 5.10

⁶⁰ *Mothers III* (n56) Para 4.3.4-4.3.6 2012

⁶¹ *Stichting Mothers of Srebrenica & Others v the Netherlands* App no 65542/12 (ECtHR, 11 June 2013) para 12-13

⁶² *Ibid* section D

⁶³ *Ibid* para 154 - 160

⁶⁴ *Mothers I* (n56) para 2.2

wronged individual.⁶⁵ The desire of the German Federal Court in *Solange I*⁶⁶ to ensure maintenance of fundamental rights, guaranteed by the German constitution, was particularly pronounced when it undertook to review the acts of the then EC without regard to legal jurisdiction. The court's judgement seemed to have acted as a catalyst for the EC, now EU, to enhance protection for fundamental rights which enhanced protection was noted in *Solange II*.⁶⁷ This suggests that whilst a court may not have jurisdiction over an IO, its jurisprudence can have effects on the practice of the IO. This effect has also been seen in relation to the UNSC 1267 Sanctions Regime, which has been amended a number of times after it attracted criticism from courts.⁶⁸

The limits and consequences of IO immunity must always be taken into account in order to better appreciate the argument, motivation and importance of attribution of conduct. With the foregoing in mind, focus can now be turned to analysis of the rules of attribution of conduct. Analysis will commence with the somewhat less controversial task of attribution of conduct carried out by the IO directly.

2.4 Attribution of international organisation direct conduct

According to customary international law, as reflected in ARSIWA⁶⁸ and in DARIO responsibility attaches to the perpetration of an internationally wrongful act.⁶⁹ An internationally wrongful act, in turn, is perpetrated when conduct attributable to a state or IO is in breach of that state's or IO's international obligations.⁷⁰ The two elements of the internationally wrongful act then are (1) attribution and (2) breach. Due to word limit constraints, this thesis will focus entirely on the first step: attribution of conduct. Attribution of conduct to an entity is an essential first step, which must be taken prior to consideration of the issue of responsibility.⁷¹ There are usually many acting entities when the will of an IO

⁶⁵ See for example *Abdelrazik v. Canada* (Foreign Affairs), 2009 FC 580; *Nada v Switzerland* App No 10593/08 (ECtHR 12 September 2012); and *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58 with which contrast *Agim Behrami and Bekir Behrami v. France* App. No. 71412/01, and *Ruzhdi Saramati v. France, Germany and Norway* App. No. 78166/01 (ECtHR 2 May 2007)

⁶⁶ Judgement of 29 May 1974, *Solange I*, BVerfGE, 37, 271

⁶⁷ See Judgement of 22 October 1986, *Solange II*, BVerfGE, 73, 339

⁶⁸ See pages 30-31

⁶⁹ ILC, 'Report of the International Law Commission on the work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 para 76 (ARSIWA)

⁶⁹ *ibid* article 1; DARIO (n3) article 3

⁷⁰ See Article 2 ARSIWA (n69) and Article 4 DARIO (n3)

⁷¹ Stefan Talmon "Responsibility of International Organizations: Does the European Community Require

is being implemented, '[t]he "normative" operation of attribution is thus required to bridge the gap between the physical actor and the subject of international law.'⁷² The question of to whom an act can be attributed is of fundamental importance to establishing the actor of a specific conduct.⁷³

Conduct can be attributed to the physical actor but also to an entity exercising control over the actor. This makes it important to consider the reason for the act, e.g. was the action in response to a binding or non-binding decision of an IO? IOs act both through their organs and through MEs as detailed above. This section will consider acts of organs and agents of the IO whilst the following chapters will discuss acts of MEs pursuant to IO decisions.

IOs, as fictional legal entities, are entirely reliant on their organs and agents to carry out their functions.⁷⁴ Organs of IOs tend to exercise functions on an administrative level rather than a practical operational level: rather than implement their goals, organs generally make decisions and place obligations on their members to implement their goals.⁷⁵ Such administrative acts constitute 'normative' conduct or control.⁷⁶ The UNSC is an example of such an organ as its conduct is always normative, that is, it makes binding decisions which member states must implement.⁷⁷ For example the UNSC may issue a Resolution authorising MSs to establish an international security presence for the purpose of a Peace Keeping Operation (PKO).⁷⁸ MSs contribute troops towards the creation of a Peace Keeping Force (PKF) for the purpose of the PKO. Depending on the wording of the Resolution the

Special Treatment?" in Maurizio Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Leiden: Martinus Nijhoff, 2005) 409

⁷² Antonios Tzanakopoulos 'Attribution of Conduct to International Organizations in Peacekeeping Operations' (*EJIL Talk*, 10 March 2009) <http://www.ejiltalk.org/attribution-of-conduct-to-internationalorganizations-in-peacekeeping-operations/?pfstyle=wp> accessed 05/03/2014

⁷³ Damien Van Der Toorn, Attribution of Conduct by State Armed Forces Participating in UN-authorized Operations: The Impact of Behrami and Al-Jedda, 15 *Austl. Int'l L.J.* 9 2008, page 9 – 17 at page 10

⁷⁴ Frank Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations' (2010) 21 *EJIL* 75, 726

⁷⁵ Tzanakopoulos (n73)

⁷⁶ Tzanakopoulos (n73)

⁷⁷ UN Charter (n21) Chapter V, article 25

⁷⁸ See for example UNSC Resolution 1244 (10 June 1999) UN Doc S/RES/1244; see UN, *Handbook on United Nations: Multidimensional Peacekeeping Operations, Department of Peace Keeping Operations*, December 2003, pages 3-4 for the establishment of peacekeeping operations and pages 1-2 for a non exhaustive list of PKO functions. available at <http://www.peacekeepingbestpractices.unlb.org/Pbps/library/Handbook%20on%20UN%20PKOs.pdf> accessed 05/03/2014

PKF may be run by states or other IOs independently of the UN, possibly with a requirement to provide reports to the UN.⁸⁰

Nonetheless some organs do act on a practical operational level. The UN Department of Peacekeeping Operations (DPKO) is an example of such an organ.⁸¹ The DPKO is comprised of civilian, military and police personnel.⁸² The DPKO works with all relevant persons in order to implement UNSC mandates and also leads UN Peacekeeping Missions, when requested to do so by the UNSC.⁸³ According to the UN Secretariat:-

A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by member states under United Nations command although remaining in their national service are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the instructions of the force commander.⁸⁴

The UNSC and DPKO, like all organs and agents, comprise of natural persons and so the conduct which falls to be attributed is essentially the conduct of those natural persons.⁸⁵

In the case of states this attribution is automatic if the natural person is acting through an organ linked to the state.⁸⁶ The same principle applies to IOs: conduct is automatically attributed to an IO where there is an ‘organic’/institutional link.⁸⁷ That is to say, the actor is engaged by the IO to work as part of a certain organ.

This issue of attribution of conduct to organs and agents of an IO was considered by the ILC which concluded that the acts of an agent or organ of an IO, when carrying out functions entrusted to it by the IO, are attributable to that IO.⁸⁸ The ILC looked to practice,

⁸⁰ See for example UNSC Resolution 1483 (22 May 2003) UN Doc S/RES/148

⁸¹ For details of DPKO troops and volunteers on the ground, see

<https://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>

⁸² <https://www.un.org/en/peacekeeping/about>

⁸³ <https://www.un.org/en/peacekeeping/about/dpko/>

⁸⁴ ILC ‘Report of the International Law Commission on the Work of its 56th session (3 May to 4 June and 5 July to 6 August 2004) UN Doc A/59/10 (ILC 56th Session) 17

⁸⁵ Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford Monographs in International Law, OUP 2011) 17

⁸⁶ ARSIWA (n69) art 4

⁸⁷ DARIO (n3) Art 6

⁸⁸ *ibid* Art 6 (1)

international courts and legal literature and adopted article 6 DARIO.⁸⁹ Article 6(1) requires three conditions to be satisfied: (1) the IO is in fact an IO with distinct legal personality; (2) that the acting entity is in fact an organ or agent of that IO and (3) that the organ or agent is exercising the functions entrusted to it by the IO.⁹⁰

The first of these conditions was discussed above and so the discussion here will be limited to the second and third requirements. According to DARIO ‘organ’ means ‘any person or entity which has that status in accordance with the rules of the organization’.⁹¹ Therefore DARIO allows IOs to identify and define their own organs.⁹² If the acting entity does not constitute an organ of an IO in terms of article 2(c), it may be classed as an ‘agent’ in terms of article 2(d) DARIO.⁹³

DARIO defines ‘agent’ as meaning ‘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’.⁹⁴ This definition is a reflection of the ICJ’s understanding of ‘agent’ in the context of IOs.⁹⁵ The ICJ, in its advisory opinion in *Reparations*,⁹⁶ stated that it takes ‘the word “agent” in the most liberal sense’ as essentially meaning ‘any person through whom it [the IO] acts’.⁹⁷ In the context of DARIO and the ICJ’s opinion, ‘person’ means both natural and fictional legal persons.⁹⁸ The author would highlight that this objective, ‘liberal’ interpretation is significant as it prevents an IO using its internal rules and documents to deny an agency relationship, thus expanding the group of entities which may be regarded as agents.

One must bear in mind however, that according to the International Law Commission, a state organ must be fully seconded to the IO if the organ’s act is to be automatically attributable to the UN under article 6 DARIO.⁹⁹ This makes attribution to a Peace Keeping Force

⁸⁹ Tzanankopoulos, (n85) 19 and 20

⁹⁰ DARIO (n3) Art 6

⁹¹ Ibid Art 2(c)

⁹² 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 para 88 (DARIO Commentary) article 2 commentary paragraph 22

⁹³ ibid article 2 commentary para 27

⁹⁴ DARIO (n3) article 2(d)

⁹⁵ DARIO (n92) article 2 commentary para 23

⁹⁶ *Reparations* (n6)

⁹⁷ ibid p177 para c emphasis added

⁹⁸ DARIO Commentary (n92) article 2 commentary para 25

⁹⁹ ILC 56th Session (n84) 110

somewhat problematic, given statements such as those of the UN Secretariat quoted above and those of the DPKO stating that ‘[o]ur military and police personnel are first and foremost members of their own national services and are then seconded to work with the UN’.¹⁰⁰ Where there is such a clear distinction between the capacities of forces, with the national capacity being preferred to the IO capacity, it is difficult to say that the force is fully seconded to the IO. The fact that troop contributing nations (TCNs) retain control over discipline and jurisdiction in criminal matters makes it even more difficult to accept that they are placed at the full disposal of the UN.¹⁰¹

The retention of control and jurisdiction by TCNs arguably prevents national contingents from being fully seconded to the UN and so, according to the ILC, the NC as part of a UN peace keeping operation cannot be regarded as an organ of the IO.¹⁰² The rules of attribution are different in relation to organs which are not fully seconded to an IO.¹⁰³ Attribution in such a situation is somewhat more complicated as will be discussed in the next chapter. What can be stressed at this juncture is that the relationship between an IO and its member entities has to be clear in order to allow attribution to the correct entity.¹⁰⁴

The third criterion of article 6(1) must be read alongside article 6(2) according to which, the rules of the organisation play a non-exclusive role in establishing whether the organs and agents were carrying out functions of the IO.¹⁰⁵ Essentially the requirement seeks to prevent acts carried out, by organs and agents, in a private capacity from being attributable to the IO.¹⁰⁶ The organ or agent must be exercising functions conferred to it by the IO but this is without prejudice to *ultra vires* conduct which is dealt with by article 8.

Once entities have collectively created an international legal person and conferred powers on it, they cannot insist on their own individual understanding of the powers in the constituent treaty or decide, unilaterally, whether the organisation is acting *ultra vires*.¹⁰⁷

¹⁰⁰ <https://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml>

¹⁰¹ Giorgio Gaja, Special Rapporteur, Second Report on the Responsibility of International Organisations, U.N. Doc. A/CN.4/541 (Gaja Second Report) para 38

¹⁰² ILC 56th Session (n84) page 110

¹⁰³ *ibid* page 110

¹⁰⁴ Sarooshi (n24) 29; see also Engstrom (n4) 59

¹⁰⁵ DARIO Commentary (n92) article 6 commentary para (10)

¹⁰⁶ *ibid* article 6 commentary para (7)

¹⁰⁷ Detter (n7) 26; ; Enzo Cannizzaro and Paolo Palchetti, ‘*Ultra Vires* acts of International Organizations’ in Jan Klabbers and Asa Wallendahl *Research handbook on the law of international organizations (Research Handbooks in International Law series, Edward Elgar Publishing 2011) 370-371 and 376-377*

Interpretation and decision-making must be collective so that the IO (rather than individual members) interprets the constituent instrument to determine whether or not an act is *ultra vires* the constituent instrument.¹⁰⁸ An act can be *ultra vires* the power of a certain organ of the IO or of the power conferred to the IO as a whole.¹⁰⁹ Where an organ or agent of an IO acts *ultra vires* when dealing with third parties, the IO will nonetheless be attributed with the wrongful conduct regardless of the internal power limits.¹¹⁰ The constituent instrument is of limited importance to the functionality of the IO in its relationship with third entities as the limits of the constituent instrument cannot curtail the rights of third parties.¹¹¹ For example where the UN establishes a PKF as its organ (or agent) and charges it with clearing landmines, another activity, such as policing the local population, may be *ultra vires* the powers internally conferred to the UN. If the PKF purposely destroys civilian property to build a military base, such an act may be *ultra vires* the UN. In both situations, the UN may be attributed with the conduct and ultimately held responsible, again despite power limits, as it allowed a situation where its organ (or agent) was able to act in that manner.¹¹² These principles of attribution of *ultra vires* conduct are reflected in article 8 DARIO.¹¹¹ There may also be occasions where organs or agents act in a manner not directly relating to the IO or in furtherance of the functions conferred to them. If the acts are not automatically attributable to the IO, the IO could nonetheless acknowledge and adopt the conduct as its own. This situation is covered by article 9 of DARIO and as the Special Rapporteur states, could be viewed in terms of an agency and ratification relationship.¹¹² According to the commentary, attribution on the basis of article 9 reflects the ‘attitude’ of the IO in relation to the act and mirrors article 11 of ARSIWA.¹¹³ Article 9 allows an IO the possibility to acknowledge and adopt an act in part rather than in whole. On the occasions referred to above, relating to the actions of PKFs, however the UN seems to be taking responsibility for the conduct rather than adopting the conduct as its own, therefore it is not clear whether the UN is actually adopting the conduct in terms of article 9.

¹⁰⁸ Cannizzaro and Palchetti (n107) 371 and 383; and Sarooshi (n24) 70

¹⁰⁹ Gaja Second Report (n101) para 51

¹¹⁰ See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep. 151, 168; Cannizzaro and Palchetti (n76) 382; Inger Osterdahl, ‘Institutions and Organs’ in Jan Klabbers and Asa Wallendahl *Research handbook on the law of international organizations* (Research Handbooks in International Law series, Edward Elgar Publishing 2011)

173 ¹¹¹ Gaja Second report (n101) para 53; Cannizzaro and Palchetti (n107) 382 ¹¹² Gaja Second report (n101) para 53; Cannizzaro and Palchetti (n107) 382.

¹¹¹ DARIO (n3) art 8

¹¹² Gaja Second Report (n101) para 60

¹¹³ DARIO (n92) article 9 commentary paras 1-2

International organisations must have international legal personality to be recognised as more than a collective of their members. Once established they distribute their powers amongst organs and call on their members to implement their will. The involvement of multiple actors makes attribution of conduct an important first step in the process of establishing whether an internationally wrongful act was committed. Attribution of the conduct of organs and agents of an IO, whether *intra* or *ultra vires*, is relatively straightforward and uncontroversial. The matter becomes more complicated in respect of ME organs and agent which, whilst not fully seconded to the IO, seek to implement the will of the IO. The next chapter turns to examine attribution of conduct in such situations.

3. Attribution of Indirect IO Conduct

Chapter two discussed attribution of conduct to an international organisation in instances where the conduct in question is carried out by an organ or agent of the IO. The discussion showed that in such cases there is an automatic control link based on an ‘organic’ link.¹ However, as alluded to in the previous chapter, IOs are not limited to acting via their own organs and agents but may also act through their members. The previous chapter also discussed the situation where IOs make decisions which member entities (ME) are then obliged to implement. One is then faced with the question, to whom is the ME's conduct attributable? The task of attribution of conduct in such cases, where the IO is essentially acting indirectly, is very complex and controversial. This chapter will look to establish whether the conduct of state organs can be attributed to an IO as acts of an agent of that IO, i.e. whether state organs can be classed as IO agents with their conduct being attributed on that basis. The focus will then turn to consider the position when an IO exercises control over member entity (ME) organs and agents to determine on what basis conduct can be attributed to the IO. Finally, the chapter will discuss whether conduct can be attributed concurrently to both the IO and an ME.

An IO can be regarded as acting directly when it acts through its organs and agents, as discussed in the previous chapter. The previous chapter also highlighted that IOs, at times, act through their members by placing ‘strict’ obligations on the MEs to implement a decision taken by the Organisation, which the Organisation is unable to implement by itself. The IO can be said to be acting indirectly, via the ME in such a situation:

We can look to the UN Security Council (UNSC) for an illustration. The UNSC often adopts Resolutions requiring state military organs to form Peace Keeping Forces (PKFs). There are instances where the PKF is part of a UN run operation and there are instances where the PKF is part of a UN authorised operation. In UN authorised operations the Security Council authorises member states (MS) or IOs to take all steps the member entities consider necessary to maintain or restore peace, with or without conferring with the UN.² Control

¹ “Organic” in this context means relating to an organ of the entity.

² UN, *United Nations Peacekeeping Operations: Principles and Guidelines*, Department of Peace Keeping Operation, 18 January 2008, (UN PKO Principles) available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf accessed 06/03/14

remains entirely with the state in such a situation. The forces have discretion in deciding whether, and how, to take part; they continue to act on their own behalf. States have generally accepted this and have paid compensation for the actions of their troops.³ The US in the Korean war, for instance, agreed to pay compensation for mistakenly bombing targets in China and the former Soviet Union.⁴ UN authorised operations are excluded from the scope of this chapter.

This chapter is instead concerned with situations where the ME is obliged to act in accordance with the will of the IO, such as UN-run operations. In UN-run operations the UN Security Council will adopt a resolution and task the UN Secretary General with putting in place, and controlling, a military force comprising of member state troops; thus the UN acts via state organs.⁵ Notwithstanding this, the respective states retain control over disciplinary matters and have exclusive jurisdiction in criminal affairs, in UN run operations.⁶ Therefore the national contingent is never fully placed at the disposal of the UN. This is also the case where a state contributes non-military organs, such as police forces, to UN peacekeeping missions pursuant to a UN Resolution.⁷

Another situation where the UNSC can be said to be acting indirectly is where it adopts a Resolution requiring MEs to implement sanctions against states, IOs and individuals⁸ or a Resolution requiring states to physically protect nuclear facilities,⁹ usually such protection will be offered by the state military. The UNSC adopts Resolutions for the purpose of “maintaining international peace” which States are then obliged to implement. The UN 1267 Sanctions Regime is an example of such a situation. The UNSC on 15th October 1999 adopted Resolution 1267 (1999)¹⁰ which required all States to, amongst other things, freeze funds and assets of the Taliban of Afghanistan due to their support for Usama Bin Laden.¹¹

³ Giorgio Gaja ‘Second Report on responsibility of international organizations (2 Apr 2004) UN Doc A/CN.4/541 (Gaja Second Report) para 33

⁴ Gaja Second Report (n3) para 32

⁵ UN PKO Principles (n2)

⁶ Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) 38

⁷ See for example UN Security Council Resolution 2100 (25 April 2013) UN Doc S/RES/2100

⁸ See for example UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267

⁹ See for example UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540

¹⁰ UNSC Res 1267 (n8)

¹¹ UNSC Res 1267 (n8) para 4(b)

Resolution 1267 established a Security Council Committee, known as ‘the Sanctions Committee’, to ensure compliance with the Resolution and also to designate entities for the list. The Sanctions Committee was the only entity with the ability to designate those on the list and did not communicate reasons for designating to those listed or to States. Therefore the Sanctions Committee was in complete control of the list, leaving no margin of appreciation for States. A further Resolution¹² was adopted the following year, extending sanctions to Usama Bin Laden and individuals or entities associated with him, as designated by the Sanctions Committee. These resolutions were challenged before the courts, as will be discussed, resulting in Resolution 1373.¹³

The UNSC, in Resolution 1373, delegated Chapter VII powers to member States. Resolution 1373 delegates power to MSs to determine individuals who pose a threat to global peace and designate them onto the sanctions list. The Sanctions Committee maintains the list of designated person and receives requests from States to add or remove names as well as requests to derogate from freezing assets under Resolution 1452 (2002).¹⁴

The UNSC has continued to update and extend the sanctions regime via various Resolutions,¹⁵ resulting in sanctions being imposed on Usama bin Laden, Al-Qaeda, the Taliban and the persons, groups, undertakings and entities associated with them. These resolutions result in States freezing the funds and assets of nationals, thereby depriving them of their right to property under article 17 of the UDHR.¹⁶ Resolution 1730 (2006)¹⁷ established a body, separate to the Sanctions Committee to receive delisting requests.¹⁸ These changes are largely due to various criticism aimed at the sanctions regime by the courts, despite the lack of jurisdiction of the UN. The Sanctions Regime results in states breaching other international obligations; nonetheless MEs are obliged, by the UN Charter (UNC) which they have ratified, to give full effect to the terms of the Resolution.¹⁹

¹² UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333

¹³ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373

¹⁴ UNSC Res 1452 (20 December 2002) UN Doc S/RES/1452 (2002)

¹⁵ UNSC Resolutions: 1390 (16 January 2002) UN Doc S/RES/1390; 1455 (17 January 2003) UN Doc S/RES/1455; 1526 (30 January 2004) UN Doc S/RES/1526; 1617 (29 July 2005) UN Doc S/RES/1617; 1735 (22 December 2006) UN Doc S/RES/1735; 1822 (30 June 2008) UN Doc S/RES/1822; and 1904 (17 December 2009) UN Doc S/RES/1904.

¹⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

¹⁷ UNSC Res 1730 (19 December 2006) UN Doc S/Res/1730

¹⁸ The establishment of this body was confirmed in letter, S/2007/178, dated 30th March 2007 from the UN Secretary General to the UNSC.

¹⁹ For an analysis of the status of ECHR and whether it can be displaced see *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58 paras 26-39, 121-129, 138-140 and 150-152

These scenarios may result in a situation where the rights of a third party have been affected. A question then arises as to which entity can be held responsible for the wrongful act. Such a question can only be answered correctly after we deal with the initial issue of to whom the conduct complained of can be attributed. One must consider whether conduct can be attributed to the IO for binding MEs to carry out the conduct, thereby essentially acting through the ME; or whether conduct can be attributed to the ME for actually carrying out the act. One must look at whether conduct be attributed to both the IO and the ME. This chapter will seek to answer these initial issues of attribution of conduct.

First, we will consider whether conduct can be attributed to the organisation where the ME organ can be considered an agent of the IO.

3.1 Member State Organs as Agents of the IO

It will be recalled from the previous chapter that under article 6 of the Draft Articles on the Responsibility of International Organisations (DARIO),²⁰ conduct of agents of the IO are attributable to the IO.²¹ Article 2(d) of DARIO defines an agent of an IO as ‘officials and other entities through whom the IO acts when they have been charged by an organ of the organisation with carrying out or helping to carry out one of its functions’.²² The commentary to article 2(d) states that the definition of agent is based on the ICJ’s liberal understating of the term in its advisory opinion in *Reparations*²³ and that it ‘covers all entities through whom the organization acts’ not just natural persons.²⁴ When MEs implement an IO’s decisions, they are carrying out or helping to carry out the functions of the IO. MEs do this both through their organs and through other IOs of which they are members.

²⁰ 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 para 87 (DARIO)

²¹ *ibid* Article 6 reads ‘the conduct of an organ or agent of an international organisation in the performance or functions of that agent shall be considered an act of the organisation under international law whatever position the organ or agent holds in respect of the organisation.’

²² *ibid* article 2(d)

²³ *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion), [1949] ICJ Rep 174 (Reparations)

²⁴ 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 para 88 (DARIO Commentary) article 2 commentary paras 23 -25

Therefore, it may be said that by responding to UN Resolutions and implementing measures which have been deemed necessary for the maintenance of international peace and security (which is a UNSC function in terms of the UN Charter (UNC)²⁵), the ME organ is helping the UNSC to carry out its function after being charged to do so. In terms of article 2(d), the ME organ in such a situation may be said to be acting as an agent of the UN. Subsequently, on the basis of article 6 of DARIO one may argue that the conduct of a state organ is attributable to the UN.²⁶ The possibility is not limited to the UN. The International Criminal Police Organisation (ICPO) may also be faced with such a possibility as it questioned whether a national officer lent to the ICPO-Interpol would qualify as an agent of the IO under article 6 DARIO or as an agent placed at the disposal of the IO under article 7 DARIO.²⁷

The conduct of EU member state organs may also be attributable to the EU as the EU almost always implements its decisions and international obligations via member state organs rather than through EU institutions.²⁸ The EC (now EU) in the *LAN* case,²⁹ for example, took the view that measures taken by member states in implementation of EU law within a particular field of tariff concessions (a field of exclusive community competence) should be attributed to it and was prepared to accept responsibility for such conduct.³⁰ However, article 4³¹ of the Articles on the Responsibility of states for Internationally Wrongful Acts (ARSIWA)³² seems to complicate the process of attribution of MS conduct to the IO.

²⁵ UN, Charter of the United Nations, 24 October 1945 article 24(1)

²⁶ Tzanakopoulos (n6) 21, 34-35

²⁷ ILC 'Responsibility of international organizations: Comments and observations received from Governments and international organizations during its Fifty-Seventh session (12 May 2005) UN Doc A/CN.4/556 page 25

²⁸ Declaration (No.19) on the implementation of Community law annexed to the Final Act of the Treaty on European Union, done at Maastricht on 7 February 1992: OJ C 191, 29 July 1992, 95.

²⁹ WTO, Panel Report, European Communities–Customs Classification of Certain Computer Equipment, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998

³⁰ Oral pleadings of the European Communities to the Panel on "European Communities - customs classification of certain computer equipment "; 12 June 1997, para. 6.

³¹ Article 4 reads "4.1. The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the State.

4.2. An organ includes any person or entity which has that status in accordance with the internal law of the state."

³² ILC, Report of the International Law Commission on the work of its 53rd Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 para76 (ARSIWA)

Article 4 renders the acts of state organs attributable to the state and may appear to prevent concurrent attribution to the Organisation. However given that DARIO does not preclude concurrent attribution, as discussed in the final section of this chapter, there is no reason why analysis must end with article 4 of ARSIWA. The ILC itself stated that article 4 of ARSIWA ‘is a departure point’³³ or a starting point. The fact that article 4 ARSIWA is simply a departure point is further supported by article 57 of ARSIWA which states that ARSIWA is without prejudice to the international responsibility of an IO or a state for the conduct an IO.³⁴ Whilst the provision makes reference to responsibility rather than attribution, its application to attribution of conduct is implied given the terms of articles 1 and 2 ARSIWA, which essentially provide that wrongful conduct has to be attributed to a state for its responsibility to be engaged.³⁵

As article 4 ARSIWA is a departure point, conduct can be attributed simultaneously under article 4 ARSIWA and article 6 DARIO. However, this position is not agreed by all. Talmon, (and Tzanakapoulos referring to Talmon)³⁶ for example, states that we cannot attribute acts of state organs to the IO as agents of the IO due to state organs being subjects of international law in their own right rather than private bodies or individuals.³⁷ Talmon uses articles 5 and 6 of ARSIWA to analyse whether conduct of the Coalition Provisional Authority in Iraq (CPA) can be attributed to the UNSC. He reaches the conclusion that it cannot be so attributed without any reference to DARIO, which existed and was being worked on by the ILC at that time.³⁸

Two points can be made about Talmon’s argument. Firstly, Talmon’s example can be excluded from the category of effective normative control. The relevant UNSC Resolution³⁹ does not bind the CPA to act, let alone bind it in a way in which it has no room for manoeuvre. Resolution 1483, simply authorises the CPA to continue acting and this cannot amount to

³³ ILC, Report of the International Law Commission on the work of its 53rd Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 para77 (ARSIWA Commentary) article 4 commentary para 2

³⁴ ARSIWA (n32) art 57

³⁵ ARSIWA (n32) arts 1 and 2

³⁶ Tzanakapoulos (n6)

³⁷ Stefan Talmon, ‘International Responsibility for Acts of the CPA’ in Shiner Williams (ed), *The Iraq War and International Law* (Hart Publishing 2008)

³⁸ Talmon (n37) 223

³⁹ Resolution 1483 (22 May 2003) UN Doc S/RES/1483

the CPA acting as an agent for the UNSC. Secondly Talmon states that attribution to the UNSC cannot take place under article 5 ARSIWA because the ‘delegateses [*sic*] are not public or private bodies but other subjects of international law’⁴⁰ they are instead state organs.⁴¹ Article 5 of ARSIWA deals with the attribution of conduct of persons and entities which are not state organs but which fundamentally, may be classed as agents of the state⁴² (They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies).⁴³ Attribution of state organ conduct is, instead, attributed by application of article 4 ARSIWA. Articles 4 and 5 of ARSIWA, are not reflected in the same form, *mutatis mutandis*, in DARIO. Instead DARIO deals with attribution of both organ and agent conduct, in the same provision: article 6 DARIO.⁴⁴ Therefore any argument based on the distinction made between attribution of organ conduct and attribution of agent conduct in ARSIWA is irrelevant and incorrect in respect of IOs as DARIO, which deals with IOs, makes no such distinction.⁴⁵ It is not clear why Talmon applied ARSIWA by analogy rather than simply applying DARIO.

Article 5 ARSIWA, which essentially deals with agents of a state, is irrelevant for our discussion on whether the conduct of state organs can be attributed to an IO as agents of that IO. It is not the agent of the state which is being regarded as an agent of the IO but rather the organ of a state is being regarded as the agent of an IO. What matters is whether state organs can fall under the definition of article 2(d) DARIO, which Talmon himself admits in an earlier work.⁴⁶ Talmon actually states, in an earlier work, that the authorities of MSs may be considered agents of the EC, under article 6 (then article 4) DARIO,⁴⁷ and that conduct could be attributed to an IO as conduct of its agent with the same conduct being attributed to an MS as conduct of its organ under article 4 ARSIWA.⁴⁸ Ultimately Talmon’s opposition to attribution of MS organ conduct seems to be based on the possibility of dual attribution of conduct rather than any term contained in ARSIWA or DARIO.⁴⁹ Regardless of whether

⁴⁰ Talmon (n37) 223

⁴¹ *ibid* 223

⁴² See DARIO (n20) article 6 commentary para 10 for the relevance of this to ARSIWA (n23) article 5.

⁴³ ARSIWA commentary (n33) article 5 commentary para 2

⁴⁴ Talmon himself acknowledges this in Stefan Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’ in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Koninklijke Brill NV 2005) 413

⁴⁵ See also DARIO (n19) page 18 commentary to article 6 para 5.

⁴⁶ Talmon (n44) 412-413

⁴⁷ Talmon *ibid* 412 - 413

⁴⁸ Talmon *ibid* 405-421, 413

⁴⁹ Talmon *ibid* 413-414

one deems dual attribution desirable, it does not prevent the possibility of attribution of MS organ conduct under article 6 DARIO to the Organisation, as an act of the IO's agent, nor does it conflict with article 4 ARSIWA.

Such a position is popular with the European Commission which suggested that there should be a rule attributing the conduct of a member state organ in implementation of a binding act of an international organisation to that organisation as the state organ would be acting as an organ of the international organisation.⁵⁰ The European commission is correct in relation to this point for the reasons discussed above however, 'agent' may be a more accurate term for the state organ and its relationship with the EU.⁵¹ The World Trade Organisation also believes that in such situations state organs 'act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general'.⁵²

Nonetheless, the international practice of the European Court of Human Rights (ECtHR) holds the act of MS civil organs implementing UNSC Resolutions as being attributable to the MS.⁵³ Of course, to the author's knowledge, there have been no occasions where parties have claimed in their legal pleadings that the conduct of an MS organ is attributable to an IO under article 6 on the basis that the MS organ acted as an agent of the IO. Therefore, it remains to be seen whether such a claim would be accepted by the courts but there is no immediate or apparent reason why such a claim should be dismissed if it can be shown that the MS organ was acting in the capacity of IO agent.

However, as such an argument is not conclusive, we must look to whether MS organ conduct can be attributed to an IO on another basis. We may turn to examine whether the act of an ME organ or agent can be attributed to the IO if the IO exercises 'effective control' over the

⁵⁰ Comments from states and IOs, ILC 'Responsibility of international organizations: Comments and observations received from Governments and international organizations during its Fifty-Sixth session (3 May to 4 June and 5 July to 6 August 2004) UN Doc A/C.4/545 pages 18-20

⁵¹ Tzanakopoulos (n6); See also PJ Kuijper & E Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 IntlOrgLRev 111

⁵² WTO Panel Report, Case WT/DS174/R European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs para 7.269

⁵³ Tzanakopoulos (n6) 36; see for example M & Co (1990) 64 DR144; *Nada v Switzerland* App No 10593/08 (ECtHR 12 September 2012); *Bosphorus (GC)* App No 45036/98 (2005) [153];

ME. The test of effective control was set by the International Court of Justice (ICJ) in the *Nicaragua* case.⁵⁴

3.2 Attribution of Member Entity Organ or Agent Conduct

The ICJ, in *Nicaragua* was faced with the issue of attributing the conduct of a rebel group within the territory of one state, to another state.⁵⁵ The ICJ held that for attribution of alleged indirect conduct the relevant test was one of ‘effective control’⁵⁶ which required the defendant state to have ‘directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state’.⁵⁷ Whilst the case related to states, there is no immediate reason why the test cannot equally apply to acts of International Organisations.

A similar question was faced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadić*,⁵⁸ which had to consider whether the acts of an armed force could be attributed to the Federal Republic of Yugoslavia (FRY) given the control exercised by the FRY over the group, in order to determine whether the conflict was international. The ICTY did not regard the test set in *Nicaragua* as appropriate and instead devised the ‘overall control’ test.⁵⁹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadić*, distinguished the ‘effective control’ test set out in *Nicaragua*. Instead, the ICTY formulated the test of ‘overall control’ to answer the legal question of whether the army of the Serbian Republic in Bosnia could in fact be linked to the Federal Republic of Yugoslavia (FRY) due to the high level of control exercised by the FRY over the Serbian army. Again this case did not involve IOs but could be applicable to situations involving IOs.

The ICJ then heard the *Bosnia Genocide* case,⁶⁰ in which it supported *Nicaragua* by applying the ‘effective control’ test and deemed the ‘overall control’ test set in *Tadić* inapplicable.⁶¹

⁵⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*)

⁵⁵ *ibid*

⁵⁶ See *ibid* para 105 - 115

⁵⁷ *ibid* para 115

⁵⁸ *Prosecutor v. Dusko Tadić* (Appeal Judgement) ICTY IT-94-1-A (15 July 1999)

⁵⁹ *ibid* para 115 and 120

⁶⁰ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgement) [2007] ICJ Rep 43 (*Bosnia Genocide*)

⁶¹ *ibid* paras 400-406

Thereafter, the UN International Law Commission (ILC), in an effort to reflect practice, incorporated the test set by *Nicaragua* in order to deal with the issue of attribution of ME conduct to an IO. The test was included in article 7 of the Draft Articles on Responsibility of International Organisations (DARIO):-

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.⁶²

Two elements are, therefore, required for attribution under article 7 DARIO: the organ or agent must (1) be placed at the disposal of the IO and (2) be under the effective control of the organisation. Article 7 goes somewhat further than *Nicaragua*, given the ‘disposal’ requirement. The test of ‘effective control’ will now be examined, followed by consideration of the impact of the ‘disposal’ requirement on the process of attribution of conduct.

3.2.1 The Test of ‘Effective Control’

When attempting to attribute conduct in terms of article 7 DARIO a fundamental question arises: what is ‘effective control’? There is no specific definition for ‘effective control’ in DARIO in the way there is for the term ‘international organisation’, for example. The inclusion of such a definition would have been quite beneficial to DARIO.⁶³ Nonetheless the term ‘effective control’ is explained, to some extent, in the commentary to DARIO:-

The criterion for attribution of conduct either to the contributing state or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.⁶⁴

⁶² DARIO (n20) Article 7. See also DARIO commentary (n23) Article 7 commentary paras 8-9

⁶³ See comment by Switzerland, ILC ‘Responsibility of International Organizations: Comments and Observations Received from Governments and International Organizations during its Sixty Third Session’ (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/CN.4/636/Add.1 part II B 3 page 11.

⁶⁴ DARIO Commentary (n24) article 7 commentary para 4

The criterion of ‘effective control’ in article 7 seems to require factual influence, or operational control,⁶⁵ over specific actions rather than a general global control.⁶⁶ Yet, there have been instances where the courts have referred to article 7 but have attributed conduct to an international organisation despite the IO’s lack of factual control over the specific conduct taken by the organ or agent. For instance in *Saramati*, whilst the UN did not exercise specific control over the decision of the Commander of KFOR to repeatedly detain Mr Saramati it was nonetheless attributed with the conduct by the ECtHR.⁶⁷

The *Behrami/Saramati*⁶⁸ (*Behrami*) judgement dealt with attribution of conduct. However the way in which the Court in *Behrami* dealt with attribution of conduct has been the subject of much criticism, including criticism by the UN ILC Special Rapporteur (SR) himself.⁶⁹

The SR argues that the basis upon which the Court in *Behrami* attributed conduct cannot easily be accepted ‘as a potentially universal rule’ and ‘as a matter of policy[...]is unconvincing’.⁷⁰

A brief analysis of the relevant matters in *Behrami* is required. The case concerned the explosion of an undetonated cluster bomb unit in Mitrovica, Kosovo, (when eight boys were playing with them in the hills) which resulted in the death of a boy and the serious impairment of another (*Behrami*) and also the wrongful detention of a man in Pristina, Kosovo.⁷¹ The Court had been asked to decide whether conduct of military troops, partaking in UN Peace-Keeping Operations (PKOs), was attributable to the relevant Troop Contributing Nations (TCNs).⁷² As touched upon above, the starting point for attribution of state organ conduct is article 4 of ARSIWA. The ECtHR did not start at article 4 ARISWA but instead began by looking at the Chapter VII basis for the PKO troops: UNMIK⁷³ and

⁶⁵ See Gaja Second Report (n3) footnote 4 and ILC ‘Report of the International Law Commission on the Work of its Forty Sixth Session’ (3 May-4 June and 5 July-6 August 2004) UN Doc A/59/10 (ILC Forty Sixth Session)

⁶⁶ ILC Forty Sixth Session (n65) 111 [3],113 [7]

⁶⁷ *Ruzhdi Saramati v. France, Germany and Norway* App. No. 78166/01 (ECtHR, 2 May 2007)

⁶⁸ *Agim Behrami and Bekir Behrami v. France* App. No. 71412/01, and *Ruzhdi Saramati v. France, Germany and Norway* App. No. 78166/01 (ECtHR 2 May 2007) (*Behrami*)

⁶⁹ Giorgio Gaja ‘Seventh Report on Responsibility of International Organisations’ (27 March 2009) UN Doc A/CN.4/610 (Gaja Seventh Report) para 30

⁷⁰ *ibid* para 30

⁷¹ *Behrami* (n68) paras 5-17

⁷² *ibid* para 73-81

⁷³ The UN Mission in Kosovo

KFOR^{74,75}. The significance of this is that the Court passed over the basic position that the act of the organ of a state is attributable to that state, as set out by article 4 and instead moved straight to attribution to an IO and compliance with internal rules. In relation to KFOR the Court stated that ‘the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO’.⁷⁶ It is not clear why, despite alluding to article 7 DARIO being relevant, the Court thought ‘ultimate control and authority’ or ‘effective command’ was relevant. The Court’s reasoning for holding that such control had been retained concerned issues of procedural correctness, clarity and expresses, and reporting requirements of the Resolution and mandate.⁷⁷

These factors, whilst important internal policy considerations, are not decisive when dealing with attribution of conduct and the treatment of third parties. They are not indicative of whether effective control is actually exercised on the ground, which is the basis on which conduct should be attributed.⁷⁸ The Court’s statement that ‘the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated’,⁷⁹ caused much discussion amongst scholars.⁸⁰ Whether delegation of operational command is even necessary or indicative that conduct should be attributed to an entity is questionable and the Court unnecessarily conflated the two issues leading to serious issues

⁷⁴ Kosovo Force

⁷⁵ *Behrami* (n68) para 128

⁷⁶ *ibid* 140; see also *ibid* 134

⁷⁷ See *ibid* 128-130

⁷⁸ See for example Alexander Breitegger, ‘Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Aljedda*’ (2009) 11 *Int’l Comm. L. Rev.* 155, 165; Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’ (2008) 8(1) *HRLR* 151, 164; Damien Van Der Toorn, ‘Attribution of Conduct by state Armed Forces Participating in UN-authorized Operations: The Impact of *Behrami* and *Al-Jedda*’ (2008) 15 *Austl. Int’l L.J.* 9, 18; P. Boudeau-Livinec, G. P. Buzzini & S. Villalpando, ‘International Decision: *Behrami & Behrami v. France; Saramati v. France, Germany & Norway*: ECHR judgment on applicability of European Convention on Human Rights to acts undertaken pursuant to UN Chapter VII operation in Kosovo’ (2008) 102 *AJIL* 323 at 328; Alexander Orakhelashvili, ‘International Decision R (on the application of *Al-Jedda*) (FC) v. Secretary of state for Defence’ (2008) 102 *Am. J. Int’l L.* 337, 341; Marko Milanovic, *Norm Conflict in International Law: Wither Human Rights?* (2009-2010) 20 *Duke J. Comp. & Int’l L.* 69, 85; Marko Milanovic & Tatjana Papic, ‘As Bad As It Gets: The European Court of Human Rights’ *Behrami* and *Saramati* Decision and General International Law’ (2008) 58 *International and Comparative Law Quarterly* 267, 282-287

⁷⁹ *Behrami* (n68) para 133

⁸⁰ See Orakhelashvili (n78) 343; Kristen E. Boon, ‘Regime Conflicts and the UN Security Council: Applying the Law of Responsibility’ (2010) 42 *Geo. Wash. Int’l L. Rev.* 814, 815; Sadia R. Sorathia, ‘*Behrami v. France*: An Unfortunate Step Backwards in the Protection of Human Rights’ (2011) 26 *Md. J. Int’l L.* 271, 286, 288, 294 and 295; Milanovic & Papic (n78) 84-85

for public policy.⁸¹ What is important is whether the commanding entity has effective control of the troops. Operational command is the type of authority generally held by NATO commanders and is not necessarily indicate effective control or otherwise. Many scholars, including the SR, rightly criticise the approach adopted by the ECtHR in *Behrami*.⁸²

The balance which has to be maintained when attributing conduct is a very delicate and one which has been the subject of much debate. Some believe, in the case of peacekeeping operations, ‘if the injured state demonstrated to the extent that it was able that a violation by peacekeeping troops was an infringement of their United Nations mandate, the conduct in question should be attributed to the contributing country.’⁸³ However, this cannot be the case given article 8 of DARIO, which attributes *ultra vires* conduct to the IO.⁸⁴

The ECtHR referred to article 7 DARIO (then article 5) but did not discuss it in its reasoning and instead, for reasons not entirely clear, applied the test of overall command and control.⁸⁵

The SR rejects the ECtHR’s reasoning by stating that it would lead to attribution to the UN of ‘conduct which the organization has not specifically authorized and of which it may have little knowledge or no knowledge at all’.⁸⁶ This implies that the UN usually authorises specific conduct and has knowledge of how decisions are implemented. Is the SR correct on this point: do IOs exercise control of specific acts and have knowledge of all conduct taken by MEs when implementing the IO’s will?

It is submitted that the SR’s position ignores the actual practice of IOs. IO’s tend not to have *factual* effective control but rather usually exercise effective control through legal channels.⁸⁷ Once an organisation legally binds an ME to carry out, or refrain from carrying out, a certain act it will have exercised the totality of its power to control, save of course the possibility of penalties and other ‘punishments’ for non-compliance. The EU for instance,

⁸¹ See Milanovic (n78) 85; Orakhelashvili (n78) at 341; Sorathia (n80) at 271, 283, 287, 288, 292

⁸² See for example: Milanovic & Tatjana Papis (n78) 75-76; Sari (n78); Van Der Toorn (n78); Breitegger (n78); Kjetil Mujezinovic Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test" (2008) 19 EJIL 509, 511; Giorgio Gaja, Special Rapporteur, Second Report on the Responsibility of International Organisations, U.N. Doc. A/CN.4/541 (Gaja Second Report) para 26

⁸³ UN General Assembly ‘Summery Record of the 16th Meeting’ (26 Dec 2003) UN Doc A/C.6/58/SR.16 Mr Ramadam, Egypt para 2

⁸⁴ DARIO (n24) article 8

⁸⁵ *Behrami* (n68) paras 30 and 133-135

⁸⁶ Gaja Seventh Report (n69) page 12 para 30

⁸⁷ Tzanakopoulos (n6) 40; Talmon (n44) 414 See also comments by the ICPO-interpol A/CN.4/556 (n18) 17

creates laws which are implemented through MS institutions rather than EU institutions without further EU input or control.⁸⁸ Therefore the EU, in such a situation, does not oversee every action nor does it necessarily have knowledge of each act or omission.

3.2.2 'Effective Normative Control'

IOs exercise their functions through soft powers and rarely have the ability to exercise factual control. From certain comments of the UN International Law Commission and SR, it is clear that Article 7 was drafted with military forces in mind as it is considered that IOs can exercise factual effective control over the forces.⁸⁹ One must then ask: do IOs in fact exercise factual effective control over military personnel?

There are many states, Canada being one example, which never permit foreign commanders to have authority over their forces.⁹⁰ During UN run military operations, the state remains in factual control as the UN uses states' National officers as part of its Force Commander's personnel to issue directives to national contingents in order to overcome restrictive national laws and policies.⁹¹ It is the state's National Commander who issues specific orders to military contingents. The UN Under Secretary-General for Peacekeeping Operations (USG) appears to act as a liaison between the UN and the implementing state. The USG communicates the decision of the UNSC to the National Commander and the national contingents only implement the decision once it has been communicated to them by their National Commander. For instance the commission established to investigate armed attacks on the UN Operations in Somalia II ('UNSOM II') personnel, found that Peacekeeping Force ('PKF') members constantly sought instructions from their national commander so could not be regarded as under the effective control of the UN Force Commander and placed the safety and success of the whole operation in danger.⁹² The result is that the UN cannot issue orders in relation to specific tasks or watch over specific actions and so it cannot exercise 'factual control...over the specific conduct'.⁹³ The presumption in DARIO, that IOs exercise

⁸⁸ Declaration (No.19) (n28)

⁸⁹ See generally: Gaja Second Report (n3) pg14-23; ILC Forty Sixth Session (n65) pg110-115

⁹⁰ Murphy, Ray. "UN Peacekeeping in Lebanon, Somalia and Kosovo", UN Peacekeeping in Lebanon, Somalia and Kosovo (1st edn, CUP 2007) 106

⁹¹ J.M. Boyd, UN Peacekeeping Operations: A Military and Political Appraisal (New York: Praeger 1971) 150; Sadia Sorathia (n80) at 277

⁹² UNSC 'Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM 11 Personnel' (1 June 1994) UN Doc S/1994/653, paras. 243-244

⁹³ DARIO (n24) article commentary para 4

effective factual control over PKFs, cannot be seen in the practice of IOs and PKOs. Is the control exercised in such situations fundamentally dissimilar to other instances of IO control over MS organs?

The lines of control in implementation of a Resolution establishing a peacekeeping operation, on close examination, are not in essence different to those present when implementing the 1267 Sanctions Regime, for instance. State organs do not take specific instructions from the UN but implement the UNSC Resolutions in accordance with the instructions of the state legislature. In either case the state organs act pursuant to a decision of the UN, only once the decision has been communicated to them by a representative of their national state. The state is bound to implement the decisions of the IO, due to the 'normative' power of the IO. Where the exercise of such a power obliges an MS to strictly implement the IO's will, leaving no room for manoeuvre, the IO can be said to be exercising effective *normative* control over the MS.⁹⁴ In other words, an ME is under the effective normative control of an IO when it is obliged to carry out (or refrain from carrying out) a task exactly in accordance with the will of the IO, without any amendments or derogations, rather than freely choosing to act. If effective control is interpreted broadly, to encompass normative control which is the most common type of IO control, indirect IO conduct could be attributed by means of article 7 DARIO. Without such an interpretation, article 7 DARIO serves a very limited (if any) function and also goes against the 'general application' nature of DARIO, which applies to a great variety of IOs.

One can find support for such an interpretation can be found by returning to the definition or test set out in *Nicaragua* and by looking at the commentary to article 15 DARIO.⁹⁵ The ICJ in *Nicaragua*, as discussed above, held that there can be effective control if an entity is shown to have 'directed' another entity to carry out a certain act; whilst the commentary to article 15 DARIO states:-

The adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act.⁹⁶

⁹⁴ Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed) *Challenging Acts of International Organizations Before National Courts* (OUP 2010) 59

⁹⁵ DARIO Commentary (n24)

⁹⁶ DARIO Commentary (n24) article 15 commentary para 4.

Therefore binding decisions may amount to ‘direction’ which in turn can be indicative of the exercise of normative control. Thus if the Organisation exercises normative control by strictly directing an ME to act in a certain way its control can amount to effective control. It is effectively and factually in control as the ME has no choice but to comply.⁹⁷ In the case of the EU for instance, if a member state does not fulfil its obligations under EU law, the European Commission (Commission) has authority to bring ‘infringement proceedings’ and an action before the CJEU.⁹⁸

The SR even acknowledges that, in the case of some IOs, normative control can equate to effective control, albeit when considering derivative responsibility.⁹⁹ The commentary does not clarify why normative control can amount to effective control for the purpose of derivative responsibility but not for attribution of conduct. The author’s position is that there is no basis for such a distinction. The SR’s contention that such interpretation goes against article 4 ARSIWA¹⁰⁰ is without merit, as article 4 is merely a departing point as established above. By allowing normative control to equate to effective control under article 15 but refuting such a possibility in relation to article 7, two interpretations of the same term result, causing inconsistency. So then, what would be effect of admitting ‘normative control’ and how ‘normative control’ been dealt with given the lack of explicit reference?

3.2.3 Consequences of ‘Normative Control’ and Practice of the Courts

Allowing DARIO to reflect the actual practice of IOs, by admitting the concept of normative control, would allow the Courts more discretion in attributing conduct and possibly allow more logical reasoning and decisions. For example in *Behrami*, if the ECtHR had interpreted effective control as including normative control it could have reached its decision by

⁹⁷ Of course the ME is able to defy the IO and suffer the consequences but this is always the case, even in instances of duress or where military organs are in the field.

⁹⁸ Treaty on Functioning of the European Union, article 258. See http://ec.europa.eu/eu_law/infringements/infringements_en.htm; Also see, for example, Case 61/94, Commission v. Germany (Dairy Agreement) [1996] ECR I-3989 and Case 13/00 Commission v. Ireland [2002] ECR I-2943

⁹⁹ Giorgio Gaja ‘Third Report on Responsibility of International Organisations’ (13 May 2005) UN Doc A/CN.4/553, 16 para 35

¹⁰⁰ ARSIWA (n32) article 4

applying just one test rather than an amalgamation of ‘effective control’, ‘operational control’, and ‘overall command and control’. The ICJ could have pointed to the UNSC Resolution obliging the MSs to act and could have attributed the UN with the failure to ensure safeguards in Saramati and the failure to ensure marking and demining in Behrami by issuing the necessary orders. These failures would be attributable to the UN because the military forces were acting as a result of the UN’s exercise of effective normative control.

Exclusion of normative control results in DARIO conflicting with the practice of the EU, ECJ and the WTO, which have been seen to interpret effective control as inclusive of normative control. In *Krohn*,¹⁰¹ the European Commission had instructed member state organs to refuse certain licences.¹⁰² The ECJ held that the refusal of the (German) Federal Office for the Organization of Agricultural Markets to issue import licences to the applicant ‘was attributable in the circumstances not to the Federal Office but to the Commission’.¹⁰³ The implication is that the conduct is attributable to the Commission because of the control exercised and direction given by the Commission to the Federal Office. In another case the WTO Panel noted that the EC (now EU), had never contested the argument that the complained of acts, carried out by member states, were attributable to it and could be regarded as EC measures; and in fact the EC alone defended the action before the Panel.¹⁰⁴ Again the implication was that the then EC agreed that its exercise of normative control over members meant their conduct should be attributed to the EC.

However, this view is not shared by all. *Abdelrazik*,¹⁰⁵ concerned a Sudanese-Canadian dual-national designated on the UN 1267 Sanctions List who was trying to return to Canada from Sudan. The Canadian Federal Court held that UN Resolution 1822 (2008), which applied at that time, left enough room for Canada to assist Abdelrazik. The judge, implicitly, held that the conduct was not attributable to the UN but to Canada as UN Resolution 1822 (2008), interpreted correctly, allowed Canada to provide a new passport to Abdelrazik and assist his return, purchasing new airplane tickets for him if necessary. The Court, in its reasoning stated that it viewed ‘the 1267 Committee regime as a denial of basic legal

¹⁰¹ Case 175/84 *Krohn & Co. Import-Export (GmbH & Co. KG) v. Commission of the European Communities* [1986] ECR 753

¹⁰² *ibid* 116 para 1

¹⁰³ *ibid* 116 para 2

¹⁰⁴ WTO Panel Reports, *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R/WT/DS292/R/WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, para 7.10.1

¹⁰⁵ *Abdelrazik v. Canada* (Foreign Affairs), 2009 FC 580

remedies and as untenable under the principles of international human rights'.¹⁰⁶ This statement by the Court, combined with the Court's awareness of the UN's jurisdictional immunity, suggests that the Court purposely denied normative control so that it could order restoration of Abelrazik's rights. It could not have made such an order if conduct had been attributed solely to the UN. A similar decision was arrived at by the ECtHR in *Nada*.¹⁰⁷ The ECtHR held that even where the language of a UN resolution appears to leave no room for discretion, states remain obliged to give effect to the human rights of their citizens and therefore held the wrongful conduct was attributable to Switzerland.¹⁰⁸

*Kadi*¹⁰⁹ was also a case involving the UN 1267 Sanctions List. In *Kadi* the members of the UN who are also members of the EU, used the EU to implement UN Resolutions. The Council of the EU adopted, *inter alia*, Council Regulation 881/2002 which obliged states to implement financial sanctions and travel bans on natural and legal persons designated by the UN sanctions Committee. Mr Kadi was designated on the sanctions list and sought to have his name removed. Mr Kadi first lodged an action, in 2001, at the Registry of the Court of First Instance ('CFI') (now the General Court) against the Council of the European Union and Commission of European Communities (the institutions) for the annulment of Regulation No 467/2001 and 2062/2001, which – together with other Regulations – implemented the Sanctions Regime in the EU legal order. The CFI, in 2005, ruled that the sanctions imposed by the contested regulations were done so in strict implementation of a UNSC Resolution by virtue of the EC Treaty, notwithstanding the fact that the institutions argued that they were bound by the UNC.¹¹⁰ The CFI recognised the normative control of the UNSC and held that the listing could not be reviewed as it was in strict implementation of a binding UNSC Resolution which left no room for manoeuvre.¹¹¹ Therefore Mr Kadi had to remain on the Sanctions List.

The judgement was overturned by the Court of Justice of the European Union (CJEU) which held the EU measures were separate to the UNSC measures and proceeded to review the EU measures in light of fundamental EU rights, finding that Mr Kadi's rights had been breached

¹⁰⁶ *ibid* para 51

¹⁰⁷ *Nada v Switzerland* App No 10593/08 (ECtHR 12 September 2012)

¹⁰⁸ *ibid* paras 120 -123

¹⁰⁹ Case T-315/01 Yassin Adullah Kadi v. Council of the European Union and Commission of the European Communities, [2005] ECR II-3649 ('Kadi CFI')

¹¹⁰ *ibid* para 207

¹¹¹ *ibid* paras 219-222 and 225

and ordering the measures to be annulled in respect of Kadi.¹¹² The CJEU's judgement was confirmed on two further occasions.¹¹³ The Courts essentially recognised the effective normative control of the EU over the member states, which practically implemented the measures, but stopped short of recognising the effective normative control of the UNSC over member states and over the EU as an 'international organizations of which they [the member states] are member'.¹¹⁴ This meant the Courts were able to order restoration of Kadi's ECHR rights, which they would not have been able to do had they confirmed the CFI decision that the measures were attributable to the UN.

The reasoning of the courts in the preceding three cases with the exception of the first *Kadi* case, shows a lack of recognition of effective normative control (although in the *Kadi* appeals there is implicit recognition of EU normative control) despite the states and EU having no choice but to strictly implement the relevant Resolutions stemming from Resolution 1267 (1999). The result is that states are forced to breach their UN Charter obligations in order to respect the respective courts' decisions. Nonetheless the lack of recognition may have more to do with the court's desire to ensure an effective remedy than with true rejection of 'normative control'. In the *Kadi* appeal cases, the exercise of normative control by the EU, over which the respective courts had jurisdiction, was recognised. This suggests protection of fundamental rights may have an influence on the way in which the courts attribute conduct.

The reasoning in the previous three cases can be contrasted somewhat with *Bosphorus*.¹¹⁵ In that case the ECtHR, found the Republic of Ireland responsible for conduct taken in implementation of an EC Regulation which in turn sought to implement a UNSC Resolution. However, the ECtHR recognised that Ireland was strictly bound by the relevant measures with no room for manoeuvre. The Court's basis for establishing responsibility was article 1

¹¹² Joined Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (Kadi I)

¹¹³ Case T85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECHR II-5177 (Sep. 30, 2010) (Kadi II) and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission & the Council of the European Union v Yassin Abdullah Kadi* ECR I-0000 (Jul. 18, 2013) (Kadi III)

¹¹⁴ UN Charter (n25) article 48

¹¹⁵ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* App No 45036/98 (ECtHR 30 June 2005)

of the European Convention on Human Rights¹¹⁶ (ECHR).¹¹⁷ The ECHR is a treaty ratified and acceded to by the 47 members of the Council of Europe and does not speak of international law more generally.¹¹⁸ Such an agreement cannot serve to curtail the rights of third parties under general international law. Moreover, article 1 ECHR does not deal with attribution of conduct or preclude concurrent engagement of responsibility generally.¹¹⁹ This is similar to the UN model contribution agreement in relation to which the ILC stated:-

The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing state or organization and the receiving organization [in the case of article 1 ECHR, we can say: the position agreed between the contracting parties] and could thus not have the effect of depriving a third party of any right that that party may have towards the state or organization which is responsible under the general rules.¹²⁰

In *Bosphorus* the court found that the:-

impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted the compliance by the Irish state with its legal obligations flowing from community law and, in particular, article 8 of regulation (EEC) number NO.999/93.¹²¹

The Court held that the Regulation would not have permitted any other course of action, including payment of compensation.¹²² Therefore the Court seemed to be implying that the MS was under the normative control of the EC, as it had no room for manoeuvre even to pay compensation. Yet, the Court did not deal with this issue but simply held that the state was responsible for conduct taken to implement the Regulation. As Tzanakopoulos states, the court could put forward a stronger argument to avoid reviewing UNSC acts by saying that

¹¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

¹¹⁷ *Bosphorus* (n114) 153. The Court in holding that it is agreed that responsibility pertains to the state under article 1 refers to *United Communist Party of Turkey and Others v. Turkey* App No 19392/92 (*ECtHR* 30 January 1998) pp. 17-18, § 29; however this paragraph of the *Turkey* judgement does not explicitly deal with responsibility.

¹¹⁸ <http://www.conventions.coe.int./Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=02/01/2014&CL=ENG>

¹¹⁹ See ECHR (n115) article 1

¹²⁰ DARIO Commentary (n23) article 7 commentary para 3

¹²¹ *Bosphorus* (n114) para 148

¹²² *ibid* 43 para 147, 44 para 148

the acts complained of are attributable to the international organisation and that they cannot legally exercise jurisdiction over that organisation.¹²³ Instead by purporting to review the conduct without actually doing so, the Court is ‘lending legitimacy to the decision having successfully withstood (even incidental) judicial review’.¹²⁴

An interesting point in the Court's *ratio decidendi* in *Bosphorus* was that the state was responsible for the relevant conduct even if the act was necessary for compliance with an international legal obligation [EC obligation in this case];¹²⁵ and ‘that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party’.¹²⁶ The suggestion being that the EC (now EU) could have been held as responsible for the alleged wrongful conduct had it been a contracting party to the ECHR. This ratio is interesting because the EU is currently negotiating accession to the ECHR, on the basis of article 6 paragraph 2 of the Treaty of Lisbon¹²⁷ and article 59 paragraph 2 of the ECHR as amended by Protocol No 14.¹²⁸

One is left wondering therefore, whether the issue would be decided differently by the ECtHR if a case similar to *Bosphorus* was to arise once the EU accedes to the ECHR. The Court's ratio suggests that it would be decided differently, leading to the EU being held responsible either solely or perhaps concurrently with the state. Although this is still ignoring the initial step of attribution of conduct, it suggests that normative control can amount to effective control. The fact that the ECtHR recognised that the Republic of Ireland was obliged to strictly implement the terms of the EC Regulation, suggests recognition of effective normative control rather than denial of it.

If effective control under article 7 was interpreted in a practical manner to include normative control (and the court dealt with attribution of conduct explicitly) it may have been able to attribute conduct to the EC (now EU) under article 7. Of course we must bear in mind that attribution does not necessarily lead to engagement of responsibility. In this case, even if the Court had explicitly attributed conduct to the EC (now EU) and Ireland, the fact that the

¹²³ Tzanakopoulos (n6) 44

¹²⁴ *ibid* 44

¹²⁵ *Bosphorus* (n114) 153

¹²⁶ *ibid* 152 emphasis added

¹²⁷ <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-common-provisions/8-article-6.html>

¹²⁸ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm>; for more information on EU accession to the ECHR see <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>

EC (now EU) is not party to the ECHR would have meant there was no breach of its international obligations and so its responsibility would still not have been engaged. This is an area in which the possibility of evasion of attribution of conduct is very likely as one entity makes an authorisation or binding decision but another entity implements the said authorisation or decision, thereby increasing the need for recognition of effective normative control. This increases the necessity of having clear rules which reflect practice. It has been established that the first requirement of article 7 DARIO, ‘effective control’, is not reflective of the practice of IOs; but it could be if it was interpreted in a wider manner, consistent with the definition provided in *Nicaragua* and the commentary to article 15 DARIO. The second requirement of article 7 DARIO is that the organ or agent is placed at the ‘disposal’ of the IO. What is the effect of this requirement and is it beneficial?

3.2.4 Placed at the ‘Disposal’ of the IO

The other criterion of article 7 is placement at the ‘disposal’ of an IO. This criterion seems to relate solely to the situation of state military organs being placed at the disposal of an IO for a peacekeeping operation.¹²⁹ Where state military forces act in implementation of binding UN resolutions and under UN command, they are often considered as being placed at its disposal; however they remain part of the relevant state organ.¹³⁰ If one looks closely, there is not necessarily a difference in terms of ‘disposal’ between an MS organ implementing a peacekeeping resolution and, for instance, an MS organ implementing a resolution requiring sanctions. It is submitted that the main difference is one of geography. Peacekeeping operations are conducted outside the state of nationality whilst sanctions are usually implemented within the state.

Regardless of geographical location, states retain control (especially disciplinary control) over their contingents to a large degree and only allow them to take orders from their National Commanders. Within the territory of the state, organs usually implement the will of the organisation pursuant to domestic legislation passed by the state legislature, be it legislation giving direct effect to decisions or legislation which implements a specific

¹²⁹ Tzanakopoulos (n6) 38; see also ILC Forty Sixth Session (n64) 110 [1]-[2], 111-15 [5]-[9] and Gaja Second Report (n3) 15-23 [32] –[49]

¹³⁰ *Attorney-General v Nissan* - [1969] 1 All ER 629, pages 646 and 647, Lord Morris of Borth-Y-Gest and Lord Pearce, respectively.

decision.¹³¹ In each situation the state organ implements the will of the IO only after receiving the necessary order from the state or state representative. Therefore being placed in the field with the IO is not necessarily an indication of true disposal or of effective control. If however ‘disposal’ is interpreted broadly as meaning the entity being made available to implement the will of the IO, rather than being placed in the same geographical location, article 7 would allow attribution any time there is effective control.

The EU is illustrative of this. In the case of direct effect, EU Regulations, discussed in the previous chapter, the state organs will implement the terms of the Regulation just as they would implement the terms of national legislation: without further express provision by the state.¹³² The organs, in such situations, will have a very small margin within which to comply with other international obligations. The EU could be described as almost acting in place of national Government when creating such legislation with the state organs acting in the way they would if they were EU organs.¹³³ In the case of such direct effect instruments, the state organ will implement the will of the organisation directly without any action on the part of the state; therefore resulting in a seemingly shorter chain of control than in the case of peacekeeping operations, putting them closer to EU control. Nonetheless, DARIO does not seem to understand ‘disposal’ as relating to control. It seems to require that the ME organs or ME agents be in the same location as the IO organs, thus limiting the scope of article 7. Again, this goes against the general nature of DARIO, which is intended to apply to all IOs. Limiting the scope of article 7 (which is the main way in which ME conduct can be attributed to the IO) renders it irrelevant and of no use to the majority of IOs. Surely, articles with such limited scope were not the motivation for drafting DARIO and not a desired aim. The limitation is unnecessary and fails to reflect practice.

Attribution of indirect IO conduct is much more complex than attribution of direct IO conduct. The rules contained in DARIO have the potential to deal with the problem of attribution of ME organ conduct however they fall short due to a reluctance on the part of the SR and ILC to recognise indirect IO conduct through ME organs where those organs are

¹³¹ Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 263

¹³² ‘The direct effect of European law’ (Europa 22/09/10) <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_en.htm> accessed 10/03/14

¹³³ See comments from states and IOs ILC Fifty-Sixth Session (n50) pages 18-20 and Para 32 Gaja Seventh Report (n69) as footnoted in that report of 15 March 2005 (WT/DS174/R), para 7.725; Dimopoulos (n130) 260

not engaged in a Peacekeeping Operation (PKO); as well as a reluctance to acknowledge that the IO exercises similar control over all their organs. The rules of attribution, in relation to attribution of conduct are unclear, as can be seen from the inconsistency of the above cases, and fall short in circumstances where MS organs are used to implement the will of the Organisation within state boundaries. The discussion will now move to consider whether it is possible to attribute conduct concurrently to more than one entity.

3.3 Concurrent Attribution of Conduct

When an entity carries out an act or omits to carry out an act the conduct is attributable to that entity. This concept is straight forward when an entity acts independently and of its own accord. However, when an entity acts jointly with or under the command of another entity, attributing conduct becomes more complex. In such instances conduct might not be solely attributable to the acting entity. Attribution to other entities is not prevented by DARIO, ARSIWA or any other international rule.¹³⁴

Nonetheless, whether there can be dual or multiple attribution not only depends on the circumstances of the case but may also depend on the basis on which conduct is attributed. As touched upon above, where the conduct of a state organ is attributable to an IO, under article 6 DARIO as the act of an agent of that IO the conduct may also be attributed to the state under article 4 ARSIWA. Whether this would also be the case where the state organs acts under the effective control of the IO is slightly more complicated.

The complication is based on the way in which one interprets ‘effective control’. Now, depending on the way in which one interprets ‘effective control’, it may or may not be possible to have concurrent attribution. As mentioned above a control link does not have to be shown for attribution to the state, however if a control link can be shown, it may suggest a lack of effective control by an IO, particularly if one views effective control as equating to exclusive control. If one must have exclusive control in order to exercise effective control, then where the IO and MS both exercise some control over the organ or agent, conduct must be attributed exclusively to the state as the state cannot be considered as placed at the IO’s disposal nor can it be considered as under the exclusive effective control of the IO. However,

¹³⁴ Gaja Second Report (n3) para 6; ILC ‘Report of the International Law Commission on the Work of its 56th session (3 May to 4 June and 5 July to 6 August 2004) UN Doc A/59/10 page 101 para 4

as discussed above, states rarely relinquish control entirely which means that IOs rarely exercise exclusive control. Therefore interpreting effective control as exclusive control is somewhat problematic as it would mean that conduct would almost always be attributed to the state, regardless of the facts if situation.

However, if we do not view effective control and exclusive control as intertwined, then attribution does not necessarily have to be exclusive. Two or more entities could be attributed with the same conduct or one could be attributed with the conduct complained of whilst the other could be attributed with omitting to take preventative measures.¹³⁵ Consideration would then have to be given to whether the omission constitutes a breach of the omitting entity's international obligations.

Dual or multiple attribution is especially suitable (though rarely contemplated) in instances of joint operations as more than one entity has an influence on the conduct of troops. The ECtHR in *Behrami*, appeared to have resolved that attribution of the complained of conduct to the UN meant that conduct should not be attributed to any other entity. The Court was rightly criticised for failing to, at least, discuss the possibility of concurrent attribution of conduct.¹³⁶ Attribution of conduct to the UN, should not have necessarily meant conduct could not also be attributed to NATO or one of the troop contributing nations ('TCN'). *Behrami* concerned the UN Mission in Kosovo ('UNMIK') and the NATO led Kosovo Force ('KFOR') (which lacked independent legal personality) over which the UN did not exercise 'operational command'.¹³⁷ KFOR was to operate under NATO command yet MSs retained a great degree of control. The 'operational command and control' exercised by NATO and the degree of control retained by MSs, discussed above, provided a reasonable basis upon which to attribute conduct to those entities. KFOR took orders from both NATO and the TCNs and the Court should have considered attributing conduct to them jointly, with or without concurrent attribution to the UN.

The wrongful conduct could have been attributed to two or more of the entities, if for example, the orders received by the Commander of KFOR ('COMKFOR') from both NATO and the MS coincided, resulting in the omission to demine or in the wrongful detention. Of

¹³⁵ Gaja Second Report (n3) page 3 and 4 para 7

¹³⁶ See for example Breitegger (n78) at 172; Larcen (n82) 523; Boudeau-Livinec, Buzzini & Villalpando (n78) 328

¹³⁷ *Behrami* (n68) 133

course, this may make it unclear whether COMKFOR and the relevant MS were still linked under article 4 ARSIWA or whether NATO had effective control under article 7 DARIO. The result may be that both an organic and control link exists (if control does not have to be exclusive) and consequently conduct can be attributed to both entities. The possibility also existed that one of the entities could have been attributed with the acts complained of whilst the others could have been attributed with the failure to prevent the conduct, with consideration then being given to whether such failure amounted to a breach of the respective entities' international obligations.¹³⁸

Had the Court attributed conduct currently to the TCNs, it could have subsequently declared jurisdiction over the TCNs alone as it had no jurisdiction over the UN or NATO. The court could have then engaged the TCN's responsibility which would have avoided the applicants being left with no recourse or remedy. The failure of the Court to consider these possibilities enabled Norway and France to circumvent having wrongful conduct attributed to them and their responsibility being engaged. This sets a worrying precedent for those seeking redress for violations of human rights during UN military operations. As stated by Mexico in a response to the ILC:-

dual or multiple attribution of conduct is essential in order to ensure that attribution is not diluted among the various members of the organization and that the question of international responsibility is not evaded. In light of potential human rights violations, it is very important to avoid such evasion of responsibility. Dual or multiple attribution is the correct approach in order to combat such evasion.¹³⁹

The possibility of dual attribution of acts and omissions giving rise to wrongful conduct is supported by the SR who states:-

[O]ne could also consider that the infringing acts are attributed to either the state or the United Nations, while omission, if any, of the required preventive measures is attributed to the other subject.¹⁴⁰

However, the SR also states:-

¹³⁸ See for example Velásquez Rodríguez Case Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrHR), 29 July 1988, at para. 172

¹³⁹ ILC Sixty-Third Session (n63) Add.1 page 1

¹⁴⁰ Gaja Second Report (n3) page 20 para 42

[t]he fact that a member state may be bound towards an international organization to conduct itself in a certain manner does not imply that under international law conduct should be attributed to the organization and not to the state.¹⁴¹

According to the SR, we can attribute a wrongful act to the state organ whilst attributing omission to prevent the wrongful act to the UN. If this is possible in relation to state military organs that act as PKFs, it should also be possible in relation to other state organs which act as implementing apparatus of the IO. In the case that an IO concludes a treaty obliging members to act in a certain way, surely we can attribute the breach of obligation to the member whilst attributing to the IO the omission to prevent the breach or the omission to ensure compliance with the obligation. This possibility may arise in the case of so called ‘mixed agreements’.

‘Mixed agreements’ are those to which both the EU and MSs are party. The EU has exclusive competence to act in certain areas¹⁴² and shared competence with MSs to act in other areas.¹⁴³ Where the EU and MSs share competence, the consent of both the EU and MSs is required for the conclusion of relevant international agreements.¹⁴⁴ The resulting agreements, to which both the EU and MSs are party, have become known as mixed agreements.¹⁴⁵ The agreement may distinguish between EU and MS’s respective areas of competence; or there may be no such distinction.¹⁴⁶ In mixed agreements where there is no distinction between competencies, the SR states that responsibility is attributable both to the EU and MSs and the question of attribution is irrelevant.¹⁴⁷ The author would disagree with this view; the question of attribution remains relevant to responsibility as set out by article 4 DARIO. The EU can be attributed with the omission to ensure MS compliance with the agreement as undertaken by the EU in the agreement.

¹⁴¹ *ibid* para 13

¹⁴² Comments and observations received from ILC Fifty-Sixth Session (n50) page 18 and 19; See for example Article 3 of the Treaty on the Functioning of the EU

¹⁴³ Comments and observations received from ILC Fifty-Sixth Session (n50) page 18 and 19; See for example Article 4 of the Treaty on the Functioning of the EU

¹⁴⁴ ‘International agreements’

<http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/ai0034_en.htm> accessed 5/03/14

¹⁴⁵ Comments and observations received from ILC Fifty-Sixth Session (n50) page 19

¹⁴⁶ Gaja Second Report (n3) page 5 para 8

¹⁴⁷ *ibid*

The EU could not be held responsible for non-compliance in an area if it had not accepted competence in that area and had not given an undertaking to ensure compliance. Therefore attribution of responsibility to the EU necessarily follows attribution of conduct to the EU for omitting to perform undertakings given in the agreement. The EU accepted the obligation of ensuring compliance with the treaty¹⁴⁸, by member states, but did not so ensure compliance. Therefore it breached its obligation to ensure certain conduct on the part of MSs and failed to achieve the results required by the agreement. Whilst in such situations, attribution may be clear, the process of attributing conduct remains a necessary step.¹⁴⁹

Concurrent attribution is an important aspect of the process of attribution of conduct and should always be at least contemplated by an IO. The next chapter will discuss the ILC's articles on derivative responsibility. However, as seen from the cases above, the courts tend to be satisfied once conduct has been attributed to one entity and do not delve deeper to consider concurrent attribution or derivative responsibility. This means that it is even more important that attempts are made to examine the possibility of dual or multiple attribution of

¹⁴⁸ See also Sarooshi (n25) 101.

¹⁴⁹ Antonios Tzanakopoulos, 'Attribution of Conduct to International Organizations in Peacekeeping Operations' (*Ejiltalk*, 10 March 2009) < <http://www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/>> accessed 10/03/2014

conduct with the aim of ensuring conduct is attributed to all the relevant actors; hence making it possible to consider whether their responsibility can be engaged.

4. Problems of Attribution of Conduct

The previous chapter discussed the ways in which indirect IO conduct, conducted through ME organs, may be attributed. The chapter also analysed the concept of ‘effective control’ as inclusive of ‘normative control’. This chapter seeks to highlight and discuss the problems encountered during the process of attribution of conduct and the role of ‘derivative responsibility’. The chapter will commence by drawing attention to the misunderstandings surrounding the basis of attribution of conduct and the complications caused by conflation of attribution of conduct with attribution of responsibility. The discussion will then move on to consider the basis on which an IO’s responsibility may be engaged for the act of an ME and question whether it is correct to class these grounds as ‘derivative responsibility’ or whether, in fact, there must first be attribution of conduct to the IO. Finally, consideration will be given to the obstacle presented by the immunity from suit enjoyed by certain IOs.

4.1 Incorrect Bases of Attribution

We have seen in the previous chapters that under DARIO, there are two bases on which conduct can be attributed to an IO: ‘organic’ link or effective control, depending on the acting entity. Nonetheless, commentators and Courts attempt to attribute conduct on other grounds, leading to undesirable or unclear reasoning and precedent. One must consider then: what are these other (incorrect) grounds and what undesirable consequences follow?

4.1.1 Attribution on the Basis of Role Within the IO

There may be an attempt to attribute conduct to an entity based on the role it played within an IO, collectively with other members. One argument for instance, is that Troop Contributing Nations (TCNs) are able to negotiate details of Status of Force Agreements (SOFAs) and can contribute to the strategy of an operation which evidences that the peacekeeping force (PKF) is under joint control. Therefore there should be concurrent attribution of conduct.¹ Even the SR states that ‘one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member states, for

¹ Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009) 10 *Melbourne Journal of international Law*

instance because those states contributed to planning the military action or to carrying it out.’²

However, a member state or member IO cannot be attributed with conduct on the sole basis that they took part in negotiating and drafting a mandate. Attribution cannot be dependent on the role that an ME plays in decision making and planning within an IO organ, as this would go against the separate legal personality of the IO discussed in-depth in chapter two.³ Basing attribution of conduct on abstract negotiations ignores the terms of article 4 ARSIWA and article 6 and 7 DARIO. The test of effective control is not theoretical but rather practical and reflective of control over the actor; whilst the organic link is based on the entity being an organ or agent of the State or IO and *may* be displaced by virtue of article 6 or 7 DARIO. The negotiating entities cannot be attributed with conduct in the absence of one of these requirements being fulfilled simply based on playing a role in negotiations as part of the make-up of a separate legal entity. Nor can attribution be dependent on the role that an ME plays in decision making and planning *within* an IO organ, as this would go against the separate legal personality of the IO discussed in chapter 2; such a role would be different to the role played by an ME implementing the will of the IO *outwith* the IO.⁴

Unless there is an organic link, only the entity with practical effective control over the troops is the entity which has the ability to ensure rightful conduct or prevent wrongful action from taking place.⁵

4.1.2 Misunderstanding and Unnecessary Application of ‘Effective Control’

There seems to be a belief that attribution of the conduct of an organ of a state, to that state depends on the existence of ‘effective control’. An instance of attribution on the basis of ‘effective control’, which nonetheless arrived at the correct decision, arose in the *Nuhanović*⁶ case.

² Giorgio Gaja ‘Second Report on responsibility of international organizations (2 Apr 2004) UN Doc A/CN.4/541 (‘Gaja Second Report’) 3 and 4 para 7.

³ Giorgio Gaja ‘Fourth Report on Responsibility of International Organizations: Addendum (12 Apr 2006) UN Doc A/CN.4/564/Add.1 (hereinafter ‘Gaja Fourth Report Addendum’) UN Doc A/CN.4/564/Add.1 para 67

⁴ *ibid* para 67

⁵ Sadia R. Sorathia, ‘Behrami v. France: An Unfortunate Step Backwards in the Protection of Human Rights’ (2011) 26 Md. J. Int’l L. 271, 291

⁶ *Nuhanović vs. The State of the Netherlands* Case No: 265615/HA ZA 06-1671, District Court of The

The Dutch courts in *Nuhanović* were faced with the issue of attribution of conduct in a case involving the Dutch Battalion (Dutchbat) of the United Nations Protection Force (UNPROFOR).⁷ UNPROFOR was established by the UNSC in response to the fighting which followed the Republics of Slovenia and Croatia's declaration of independence from the Socialist Federal Republic of Yugoslavia (SFRY).⁸ The UNSC consequently extended UNPROFOR's mandate to Bosnia and Herzegovina by Resolution 758 of 8 June 1992.

Mr Nuhanović brought a case alleging that the conduct of Dutchbat led to his brother and parents being killed by Bosnian Serbs.⁹ Mr Nuhanović argued that the conduct of Dutchbat was attributable to the Netherlands whilst the Netherlands argued that it was attributable to the UN. The case was initially heard by the District Court of The Hague which decided that conduct was not attributable to the Netherlands but that rather, on the assumption that there was no exception to the 'rule of exclusive attribution', conduct was solely attributable to the UN.¹⁰

Mr Nuhanović later appealed to the Dutch Court of Appeal which overturned the decision.¹¹ The Court of Appeal addressed the issue of negative attribution, i.e. attribution of an omission. The Court considered the Dutch state was in a position to prevent the wrongful acts of Dutchbat in evicting Mr Nuhanović's family at a time by which it was reasonably evident that the family would be killed.¹² The Court also highlighted that the Dutch state held power to discipline Dutchbat and could have done so to prevent the acts complained of.¹³

The Court, on the basis of academic literature, assumed that although article 7 only refers to the receiving IO exercising effective control, it also implicitly applied to the sending state or IO exercising effective control.¹⁴ Tom Dannenbaum, one of the scholars cited by the Court,

Hague, 10 Sept 2008 (*Nuhanović I*); *Nuhanović vs The State of the Netherlands* Case No: 265618/ HA ZA 06-1672, Appeals Court of The Hague, 5 July 2011 (*Nuhanović II*); *Nuhanović vs The State of the Netherlands* Case No: 12/03324, Supreme Court of the Netherlands, 6 September 2013; (*Nuhanović III*)

⁷ *ibid*

⁸ *Nuhanović II* (n6) para 2.1

⁹ *ibid* para 2.29

¹⁰ *Nuhanović I* (n6) 4.8 and 4.15

¹¹ *Nuhanović II* (n6)

¹² *ibid* 6.7

¹³ *ibid* 5.18

¹⁴ *ibid* para 5.8

states that in his opinion this is the correct interpretation of the requirement of effective control; it should apply equally to the contributing state and receiving IO, and it requires a deeper interpretation which includes consideration of the capacity to prevent the wrongful act.¹⁵

While the Court's ultimate decision and resolve to determine 'effective control' rather than 'command and control' or 'ultimate authority and control' was correct, its reasoning that the test of effective control has to be applied to both the Dutch state and the UN is incorrect. The Court and Dannenbaum seem to ignore article 4 of ARSIWA which contains the usual rule on attribution of state organ conduct. The test of effective control is not relevant in the case concerning a state and its military contingents. The conduct of a military force is automatically attributable to the state of nationality without a need to show effective control by the state, on the basis of article 4 ARSIWA organic link. Had the Court given regard to article 4 ARSIWA it would have held that the conduct was attributable solely to the Dutch state unless it could be shown that the UN had exercised effective control. When determining attribution to a state, 'effective control' is relevant but, only to the extent of determining whether it is held by an IO thus providing a basis for moving beyond article 4 ARSIWA. The Court could have looked to Dutchbat's disobedience of the orders of the Deputy Commander of HQ UNPROFOR as evidence that the UN did not exercise effective control over Dutchbat.¹⁶ Accordingly, it could have held that the usual rule or presumption contained in article 4 ARSIWA was not surpassed and so conduct was attributable solely to the Netherlands. Though the Court, in this case, reached the correct decision, it did so using incorrect factors and reasoning which gives rise to policy concerns. There is a possibility that in a future case, if such reasoning is used an incorrect decision will be reached.

The Netherlands appealed to the Supreme Court of the Netherlands which handed down its Judgement on 6 September 2013.¹⁷ The Supreme Court agreed with the Court of Appeal on the issue of attribution.¹⁸ The Supreme Court's examination of attribution of conduct is very

¹⁵ Tom Dannenbaum, 'The Hague Court of Appeal on Dutchbat at Srebrenica Part 2: Attribution, Effective Control, and the Power to Prevent' (*EJIL Talk*, 10/11/2011) <<http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-2-attribution-effective-control-and-the-power-to-prevent-2/>> and Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeeper' (2010) 51 *Harv. Int'l L.J.* 113, 141

¹⁶ *Nuhanović II* (n6) para 5.18

¹⁷ *Nuhanović III* (n6)

¹⁸ *ibid* para 3.14; see also paras 3.10.2, 3.11.1-3.11.3, and 3.12.3.

thorough: the Court refers to DARIO¹⁹ and ARSIWA²⁰ then to the relevant provisions along with commentary.²¹ The Court is very diligent in its analysis and states that attribution of conduct by the Court of Appeal to the Netherlands under article 7 DARIO was ‘partly in view’ of article 8 ARSIWA.²² The view that the conduct of a state military organ can be attributed to a state on the basis of article 8 ARSIWA is supported by Larcen.²³ We therefore turn to the terms of article 8 ARSIWA which state:

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.

Immediately one notes that article 8 refers to persons rather than organs of a state. Given the meticulousness of the Supreme Court, it is surprising that after referring to both articles 8 and 4 ARSIWA,²⁴ the Court did not address the issue of whether Dutchbat (or the military contingents making up Dutchbat) was an organ of the Dutch state or simply a ‘group of persons’. The author’s view is that finding a military force to be a ‘group of persons’ rather than a state organ, as implied by the Dutch Supreme Court and by Larcen, is somewhat odd. A ‘group of persons’, would be more accurate when describing, for example, a rebel group such as the Contras in the *Nicaragua* case.²⁵ In fact the commentary to article 8 ARSIWA states:-

These [person or groups of persons] include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or *armed forces*, are employed as auxiliaries or are sent as

¹⁹ 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 para 87 (DARIO)

²⁰ ARSIWA is referred to as “DARS” by the Supreme Court.

²¹ See *Nuhanović III* (n6) paras 3.6.1 – 3.14 for the Court’s analysis of attribution.

²² *ibid* para 3.13

²³ Kjetil Mujezinovic Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’ (2008) 19 EJIL 509, 514-517

²⁴ *Nuhanović III* (n6) 3.8.1 and 3.8.2

²⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*)

“volunteers” to neighbouring countries, or who are instructed to carry out particular missions abroad.²⁶

Therefore according to the commentary to article 8, members of a state’s armed forces cannot fall within article 8. Had the Court determined the classification of Dutchbat, it may have found the military contingent to be an organ of the Dutch state, rendering article 8 DARIO irrelevant and the issue of effective control by the Netherlands equally irrelevant. One may speculate that the Supreme Court wished to avoid declaring that the lower Court had wrongly understood the criteria for attribution to a state, as ultimately (in this particular case), it did not affect the outcome. Nonetheless, the case will set an incorrect precedent for the grounds on which conduct can be attributed which is undesirable as it will lead to confusion and errors. The degree of awareness and clarity contained in this judgement of the Supreme Court of the Netherlands in relation to this complex area of international law, though perhaps not perfect, is a refreshing and welcome addition to jurisprudence in this area. Certainly, the Court’s approach of citing relevant law and discussing its application, rather than simply citing then largely ignoring may aid the journey to a common understanding of the rules of attribution; thus reducing the scope for evasion of attribution of conduct and subsequently the possibility of engagement of responsibility.

4.1.3 Conflation of Attribution of Conduct with Attribution of Responsibility

This incorrect basis for attribution of conduct, is not so much an incorrect application as it is disregard for attribution. Attribution of conduct and attribution of responsibility are at times, incorrectly, used interchangeably and thus conflated. For example, Grant states:

[i]n other words, the State personnel or organs could continue to be under the “operational control” of the State yet, for purposes of draft article 5, the international organization would hold international responsibility for their conduct.²⁷

What he refers to as ‘draft article 5’, now article 6 DARIO, relates to attribution of conduct and is silent on attribution of responsibility. As discussed in previous chapters, article 6

²⁶ ILC, ‘Report of the International Law Commission on the work of its 53rd Session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 para77 (ARSIWA Commentary) article 8 commentary para 2, emphasis added.

²⁷ Thomas D. Grant, ‘International Responsibility and the Admission of States to the United Nations’ (20082009) 30 Mich. J. Int’l L. 1095, 1140

deals with the question of to which entity conduct can be attributed, rather than with the question of whether the conduct is also wrongful thereby engaging responsibility. Therefore when discussing article 6 DARIO the reference should be to attribution of conduct not to engagement of responsibility.

Another example of this conflation can be seen where de Wet states:

[t]herefore, if one regards attribution of responsibility and delegation of powers as two sides of the same coin (which the [European] Court [of Human Rights] seemed to do [in the *Behrami* case]), the attribution of responsibility should reflect awareness of the fact that (the member states of) KFOR exercised effective control in Kosovo at the time that the alleged human rights violations occurred. This view suggests that responsibility for human rights violations should be attributed first and foremost to (the member states of) KFOR, as opposed to the United Nations.²⁸

The Court in *Behrami*, as mentioned in the previous chapter, did not reach the point of attributing responsibility or considering whether it would be engaged. The Court only considered attribution of conduct then declared itself to be incompetent *ratione personae* to consider the matter further yet de Wet incorrectly refers to attribution of responsibility in the foregoing statement. Sarvarian has also written, under a heading referring to attribution of conduct, in a manner which switches between the terms attribution of conduct and attribution of responsibility in relation to the same type of attribution.²⁹

This conflation highlights a misunderstanding of the DARIO articles and their effect, and can lead to inaccurate arguments. As, for responsibility to be engaged the act or omission must be in breach of an international obligation; whereas in the case of attribution of conduct, the wrongfulness of an act is not relevant. The relevance of this difference becomes apparent when the acting entity is an IO such as the UN, over which no court has jurisdiction as discussed in chapter two. However whilst attribution of conduct to the UN may not result in engagement of its responsibility, it may draw attention to the conduct and may result in the UN refraining from carrying out such conduct or amending the way in which it does so in future.

²⁸ Erika de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and Establishment and Functioning of Eulex' (2009) 103 Am. J. Int'l L. 83, 95

²⁹ Arman Sarvarian, 'Nada v. Switzerland: The Continuing Problem of Attribution of Conduct Taken Pursuant to Security Council Resolutions' (*EJIL* Talk, 25/09/12) <<http://www.ejiltalk.org/nada-v-switzerland-the-continuing-problem-of-attribution-of-conduct-taken-pursuant-to-security-council-resolutions/#more-5687>> accessed 14/03/14

This conflation, which arguably has the effect of distorting the need for attribution of conduct, can be seen to some extent in DARIO. Despite the terms of article 4 DARIO, making attribution of conduct the first step in the process of engaging responsibility, articles 14 – 17 DARIO apparently apply to situations where attribution of conduct is not needed. Instead, they are designed to deal with ‘derivative responsibility’: with the exception of ‘coercion’, responsibility ‘does not attach to the actor’s conduct per se, but rather it is dependent upon the commission of an internationally wrongful act by another actor’.³⁰ ‘Derivative responsibility’ as provided for in DARIO, is not necessarily an incorrect basis of attribution like the foregoing issues. Instead it can be readily interpreted as inclusive of attribution of conduct and as providing a bridge between attribution of conduct and engagement of responsibility.

4.2 Derivative Responsibility

According to the ILC Special Rapporteur, there is no need to attribute conduct to an IO where it aids or assists; directs or controls; coerces; or addresses a decision or authorisation to a state. Instead, we can go straight to holding the IO responsible under the rules provided by articles 14 -17 (‘the articles’).

The author would submit that in each of these situations, there is (at least implicit) attribution to the IO.³¹ The IO can be attributed with causing the ME to act in a certain way and any responsibility of the IO would be based on this act.³² The IO can be attributed with ‘depriving’ the ME of its ‘freedom to determine its own conduct’³³ in the case of articles 15, 16 and 17(1).

Article 15 holds an IO responsible for the act of an ME, if the IO directed or controlled the ME in the commission of the wrongful act in the knowledge that it was wrongful and the act would have been wrongful if committed by the IO directly. The commentary describes ‘direction and control’ as a kind not leaving ‘discretion’ for the ME.³⁴ In this situation the

³⁰ Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) 46

³¹ *ibid* 46

³² *ibid*

³³ *ibid* 50

³⁴ 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 para 88 (DARIO Commentary) article 15 commentary para 4

IO could be attributed with restricting the ME's freedom of choice by directing and controlling them so as to cause them to carry out an act which would have been wrongful if committed by the IO directly.

Article 16 holds an IO responsible for the act of an ME where the IO coerces the ME to carry out an act in the knowledge that the act is wrongful and the act would be an internationally wrongful act of the ME but for the IO's coercion. The commentary to article 16 explains that a binding decision by an IO can only amount to coercion in 'exceptional circumstances'³⁵ then refers to the parallel provision in ARSIWA, which states coercion requires '*force majeure*'.³⁶ A situation where an IO uses *force majeure* against an ME is difficult to contemplate. However, an example of an IO coercing an entity through a binding decision is given by the SR: an international financial organisation may impose stringent conditions on a vital loan to a state or IO and in so doing, coerce the borrowing entity to breach the obligations it has to another state or certain individuals.³⁷ In this situation the IO can be attributed with depriving the state or IO of their freedom of choice by coercing them into agreeing and implementing the wrongful terms of the loan.

Article 17(1) renders an IO responsible where it simply binds an ME to commit an act which would be internationally wrongful if committed by the IO directly, regardless of whether it is actually implemented or whether it is not wrongful for the implementing ME. In this situation the IO could be attributed with restricting the ME's freedom of choice by obliging them to commit an act which would have been wrongful for the IO to commit directly.

In the remaining provisions the IO can be attributed with the role it played in causing the MEs wrongful conduct. In the case of article 14 the IO can be attributed with any conduct it took is aiding or assisting in the commission of the wrongful act whilst in the case of 17(2) it can be attributed with recommending or authorising the ME to carry out a certain conduct, if the ME actually implemented the recommendation or authorisation. Of course, the IO cannot be attributed with any conduct that was not necessary by the terms of the

³⁵ *ibid* article 16 commentary para 4

³⁶ *ibid* article 16 commentary para 4

³⁷ Giorgio Gaja 'Third Report on Responsibility of International Organisations' (13 May 2005) UN Doc A/CN.4/553 (Gaja Third Report), 12 para 28

recommendation or authorisation. This is also the case in relation to article 17(1) and similarly was seen in the *Abdelrazik*³⁸ case discussed in chapter three. The Canadian Federal Court said Canada's failure to provide Mr Abdelrazik with a passport to allow his return to Canada was not a requirement of the relevant UN resolution and so the conduct was attributable to Canada alone.³⁹

However, as the IO acts envisaged by the articles may not in themselves constitute a breach of the IO's international obligations, the said articles provide a basis on which to hold them as being wrongful nonetheless. Essentially the articles do not remove the need for attribution of conduct but rather add to the grounds on which responsibility can be engaged by creating new primary norms, where conduct would otherwise not be wrongful for the IO.⁴⁰ This means that where the IO does not have an obligation to act, or does not have an obligation to refrain from acting, the articles place such an obligation on the IO. For instance a case similar to *Bosphorus*,⁴¹ which was discussed in chapter three, may arise once the EU becomes party to the ECHR. Any EU decision binding an MS to implement an act which constitutes a breach of the ECHR would then be attributable to the EU and would engage its responsibility under article 17(1) DARIO. If the state then implements the binding decision, which it would be obliged to do, then the wrongful act itself would be attributed to the state and its responsibility would also be engaged. Essentially, an IO cannot suddenly incur responsibility for the wrongful act of an entity which happens to be a member of the IO; the conduct described by the articles has to be attributable to the IO before its responsibility can be engaged.

In each situation, breaking down the relevant acts in the foregoing manner would avoid the illogical situation that the rule enunciated in article 4 DARIO is not in fact a rule but a simple possibility. Such a process also adds clarity to the process of attribution of conduct and engagement of responsibility.

Since there is, in fact, a need for attribution of conduct in the situations described in the articles, recognition of effective normative control would allow these situations to be dealt

³⁸ *Abdelrazik v. Canada (Foreign Affairs)*, 2009 FC 580, Canada: Federal Court, 4 June 2009

³⁹ See *ibid paras 125-129*

⁴⁰ Tzanakopoulos (n30) 50

⁴¹ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* App No 45036/98 (ECtHR 30 June 2005)

with under the rule in article 7 DARIO. The ILC itself seems to recognise effective normative control in respect of article 15 when it states:

“direction and control” could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members.⁴²

The SR was even more explicit in his third report, as he stated:

There may be cases in which the organization’s power to bind member States through its decisions is accompanied by elements that ensure enforcement of those decisions, so that normative control would correspond in substance to factual control.⁴³

If effective normative control is recognised and conduct attributed in such a situation is in breach of the IO’s international obligations, the articles would have the effect of limiting the engagement of the IO’s responsibility to situations where the conditions set by the articles are met. Where the attributed conduct is not in breach of the IO’s international obligations, the articles establish new primary norms to engage the IO’s responsibility as stated above. Recognition of effective normative control may also allow more general use to be made of the rule of responsibility set out in article 62(2) DARIO. Article 62(2) provides that the responsibility of the state in relation to article 62(1)⁴⁴ is subsidiary. If the international community recognises effective normative control by an IO over a state, it may be possible to engage the subsidiary responsibility of the state out with the terms of article 62(1). Where, for example, the IO binds the MS to act in a strict manner, conduct can be attributed to the IO for binding the MS and to the MS, on a subsidiary basis, for actually carrying out the act. In this case the subsidiary responsibility of an MS can be engaged without any consequences on the responsibility of the IO. In *Kadi* for instance, the CFI whilst attributing conduct to the UN and recognising the effective normative control of the UN over the MS and EU, could have engaged the subsidiary responsibility of the MS and EU (after attributing the relevant wrongful conduct to them). This would have provided Mr Kadi with a remedy without the need to review the UN’s conduct.

⁴² DARIO Commentary (n34) article 15 commentary para 4

⁴³ Gaja Third Report (n37) 16 para 35

⁴⁴ DARIO (n19) article 62(1) reads: ‘A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or
 (b) it has led the injured party to rely on its responsibility.’

There are two main reasons why derivative responsibility on the basis of the articles is not desirable. Firstly the IO may not be bound by many obligations, thus reducing the chance of conduct being wrongful for the IO. The UN for example is not party to any human rights treaties⁴⁵ and so any decision it takes binding its MEs to act in a way which infringes human rights (unless these are also considered *jus cogens*), cannot engage its responsibility under article 17. Secondly, once the courts find an entity to whom they can attribute conduct, they do not then turn their attention to derivative responsibility. In any event, IOs, such as the UN, will never have their responsibility engaged because the courts do not have jurisdiction to review acts of the UN to establish whether the acts are in contravention of the IO's obligations. The ability of the courts to exercise jurisdiction over IO's was discussed in chapter two. Yet, a brief review of the impact of the UN's immunity from suit on the cases discussed, but with awareness of the rules of attribution, is beneficial for completeness.

4.3 Effect of UN Immunity on Cases which are Heard

The immunity of the UN in many cases interferes with the process and purpose of attribution of conduct. The court in *Behrami*⁴⁶ failed to consider the possibility of dual attribution, and that combined with the effect of the UN's immunity resulted in Mr Behrami, his son and Mr Saramati all being left without remedy, rendering the whole procedure somewhat meaningless. The UN's immunity is having an ongoing impact on those who are listed on the UN 1267 Sanctions List. In *Kadi*⁴⁷ conduct was attributed to the EU, over which the ECJ has jurisdiction and in respect of which the ECJ can make order. A delisting request sent to the Ombudsman by Mr Kadi was successful and his name was finally removed from the

⁴⁵ Notwithstanding the fact that on 8th September 2000 the UN General Assembly passed Resolution 55/2000 'United Nations Millennium Declaration' and unilaterally resolved under paragraph 5 of the Resolution to '[t]o respect fully uphold the Universal Declaration of Human Rights'.

⁴⁶ *Agim Behrami and Bekir Behrami v. France* App. No. 71412/01, and *Ruzhdi Saramati v. France, Germany and Norway* App. No. 78166/01 (ECtHR2 May 2007) (*Behrami*)

⁴⁷ Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351

Sanctions list, prior to the Grand Chamber's judgement, after more than 10 years of being on the list. However the court did not attribute conduct to the UN, possibly due to importance placed by the ECJ on ensuring compliance with human rights and the awareness that attribution to the UN would have prevented further review. The UN's immunity seems to lead to a distorted application of the rules of attribution of conduct as can be seen from the fact that the appeal courts in Kadi were prepared to attribute conduct to the EU on the basis of normative control but not to the UN.

Whilst the case was a victory for Mr Kadi on an individual level, it was not a victory on a collective level as the Sanctions Regime continues to function at large and individuals are still denied certain human rights unless they are able to expend the huge amount of time and resources required to bring a challenge. There is also a concern that the UNSC will now attempt to make sanctions targets more vague and difficult to challenge.⁴⁸

Individuals can bring actions against states without, generally, facing problems of immunity. This simplifies matters to some extent but only at the first step which is raising the action in a court. Once the case reaches a court room – or written pleadings submitted prior to a hearing – individuals may be faced with the argument that the conduct complained of is not attributable to the state but to an IO, such as the UN as was the case in *Behrami*. Therefore in order to achieve fairness for parties affected by the actions of an IO and preserve the aim of the IO, it would be beneficial for the immunity of an IO to be limited to the degree that court involvement is necessary without amounting to undue interference.⁴⁹

The bases on which conduct can be attributed are not fully agreed. The independent legal personality of the IO would be ignored if conduct were to be attributed to the member entities, simply by virtue of their functions within the IO. Such a rationale blurs grounds on which conduct can be attributed and undermines the existence of the IO; thus it is undesirable. The task of attribution of conduct is made more uncertain by the, somewhat surprising, fact that attribution of conduct is conflated with the very different task of attribution or engagement of responsibility. This gives rise to practical issues of attribution of conduct and subsequent engagement of responsibility. The problem appears to be that

⁴⁸ See further Antonios Tzanakopoulos 'Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ' (*EJIL* Talk, 19/07/2013) <<http://www.ejiltalk.org/kadi-showdown/>> accessed 07/03/2014

⁴⁹ A. Reinisch, *International Organisations before national courts* (CUP 2000) 261-262

attribution of conduct is somewhat incidental to the many focus of most scholars' work and so the issue is given less attention than it perhaps merits.

DARIO deals with issues of responsibility by means of articles 14-17, however these articles are not particularly well suited to the needs of those who wish to litigate against an IO. Usually courts do not continue to consider derivative responsibility once they have attributed conduct to a single entity and therefore the courts never seem to reach a point in their reasoning where they are able to make use of these provisions. The need for these provisions would decline in any event if the concept of effective normative control is accepted, as attribution could then take place under article 7 DARIO. Article 14-17 could then be used to engage the responsibility of the IO, where the complained of conduct is not generally wrongful for the organisation. Recognition of normative control would also alleviate the need to depend on an IO acknowledging conduct under article 9 DARIO before being able to attribute conduct to the IO.

The fact that the ILC consider that in the cases of articles 14-17 DARIO, responsibility can be engaged without attribution of conduct may create confusion given the rule in article 4 DARIO. Whilst *prima facie* it may seem that attribution of conduct is unnecessary, on closer examination it is clear that there is in fact attribution. Recognising the presence of attribution of conduct is beneficial as it ensures consistency throughout DARIO, particularly with article 4 DARIO. A significant problem encountered whilst attributing conduct is that some IOs, such as the UN, have jurisdictional immunity. This means that courts cannot consider actions in which the UN would have been a respondent; and in cases where the UN is a third party, the courts must stop at the point of attributing conduct to the UN. They cannot move beyond that point to consider whether the UN's responsibility can be engaged.

5. Conclusion

This dissertation was concerned with identifying and analysing the rules of attribution of conduct in relation to international organisations and entities through which they act. The specific research objectives were to:-

1. Identify the criteria which are or can be used for attribution of conduct.
2. Evaluate critically whether these criterion are adequate, with regard to practical situations.
3. Review and investigate practice; academic opinion; the opinion of the ILC and its Special Rapporteur on the topic of Responsibility of International Organisations; and of course DARIO with occasional reference and comparison to ARSIWA.
4. Determine whether the current criterion would benefit from modification and additional criteria.

5.1 Summary of Research

The dissertation commenced by establishing the importance of legal personality for international organisations. The opinion of the ICJ in *Reparations*,¹ and the opinion of Alvarez² was cited in support of this position. The existence of international legal personality is essential to distinguish between an IO and the collection of states and other IOs of which it is comprised. This allows member entities to collectively make decisions and seek to implement them whilst protected by the separate legal personality of the IO.

IOs, as independent legal persons, act both through their organs and agents, and through member entities (MEs). The multiple layer of actor makes it necessary to determine to whom conduct can be attributed, where a third party complains in relation to an act or omission. This is because there must be an act, which constitutes a breach of the organisations international obligations, attributable to that IO before the IOs responsibility can be engaged. Where the acting entity is an organ or agent of the organisation, conduct is attributed automatically through an ‘organic’ or functional link between the IO and its organ; this is

¹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174

² Jose E. Alvarez, *International Organisations as Law-makers* (OUP 2005) 129

relatively straight forward. On the other hand where the IO acts through a member entity, conduct can be attributed to the IO in one of two ways: (1) as conduct of an agent of that IO (under article 6 DARIO), or (2) using the test of ‘effective control’ (under article 7 DARIO).

The definition of ‘agent’ in article 2(d) of DARIO does not exclude the organs of member entities. The definition of agent is ‘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’. When the state organ implements a binding decision of the IO, it has essentially been charged by the IO with carrying out one of the IO function and thus the IO acts through the state organ.

The terms of article 6 DARIO allows the conduct of IO agents to be attributed automatically to the organisation without a need to show a control link. Talmon, and Tzanakopoulos by reference to Talmon, contend that article 4 of ARSIWA prevents attribution of state organ conduct to an IO as conduct of an agent of that IO. Nonetheless as examined and analysed in chapter 2, article 4 does not prevent such attribution: article 4 is merely a ‘point of departure’. Talmon’s argument is based on application of ARSIWA to IOs rather than application of DARIO.³ In any event article 57 of ARSIWA states that ARSIWA is without prejudice to the international responsibility of international organisations. Therefore state organ conduct can be attributed to an IO as the conduct of its agent. This is supported by the practice of the EU and WTO as well as the jurisprudence of the ECJ in *Krohn*.⁴

Where conduct cannot be attributed in this manner, we can instead attribute conduct to the IO on the basis of an ‘effective control’ link. The test of ‘effective control’ was set by the ICJ in *Nicaragua* and subsequently incorporated into article 7 of DARIO by the ILC. Article 7 also requires the acting entity to be placed at the disposal of the IO. There is no specific definition of effective control in DARIO however it is described in the commentary as requiring *factual* control. The article is regarded as mainly applying to the case of state military organs placed at the disposal of the UN during a peace keeping operation (PKO). Yet it was demonstrated, by reference to the chain of command during such operation, that the UN does not necessarily exercise *factual* control in these situations. It was demonstrated

³ Stefan Talmon, ‘International Responsibility for Acts of the CPA’ in Shiner Williams (ed), *The Iraq War and International Law* (Hart Publishing 2008) 223

⁴ Case 175/84 *Krohn & Co. Import-Export (GmbH & Co. KG) v. Commission of the European Communities* [1986] ECR 753

that in both these situations, the state usually retains factual control over its organs, which only implement the will of the IO once it has been communicated to them by a representative of their national state. The reality is that IOs rarely exercise factual control but essentially function by exercising normative control.

The SR recognises that such control can amount to effective control when discussing derivative responsibility however seems to reject the theory in relation to attribution of conduct. The ILC commentary to article 15, which deals with derivative responsibility states that:

“direction and control” could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members.⁵

There is no reason why such a notion must be limited to situation of derivative responsibility. IO’s can readily be seen to be exercising normative control and where their normative control leaves the member entity with no room to manoeuvre, they can be said to be exercising effective normative control. This sits well with the ICJ’s description of effective control having been exercised by an IO when it has ‘directed or enforced the perpetration of the acts’.⁶ Denying or refusing to recognise the existence of such control does not affect its exercise by an IO. Instead a gap is left in which IOs are able to implement their will without having the conduct attributed to them or facing the possibility of having their responsibility engaged. This is especially the case so far as the United Nations Security Council (UNSC) and the imposition of sanctions against individuals is concerned and has led to court judgements where conduct is not attributed to the correct entity. Of course, conduct is not always attributable to just one entity. Often in practice, conduct is attributable to two or more entities. These entities do not have to be attributed with the same conduct. It is possible for one entity to be attributed with an act, whilst the other is attributed with the omission to prevent the wrongful act.

However whether acting in a certain manner or failing to act in a certain manner, constitutes a wrongful act of the IO so as to engage its responsibility is a separate matter which can only

⁵ ILC, ‘Report of the International Law Commission on the Work of its Sixty-Third Session’ (26 April-3 June and 4 July- 12 August 2011) UN Doc A/66/10 para 88 (DARIO Commentary) article 15 commentary para 4

⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*) para 115

be dealt with after attribution of conduct has taken place. This was recognised by the ECtHR in *Behrami* when it undertook the task of attribution of conduct before turning to review the act for the purpose of engaging responsibility.⁷

Whilst considering attribution of conduct, certain problems may be witnessed. There is, to some extent, a lack of understanding of the basis on which conduct can be attributed. Some, clearly ignoring the separate legal personality of the IO, argue that conduct can be attributed to an IO on the basis of its role in negotiating mandates. There is also a mistaken belief that conduct of a state organ can be attributed that state if it can be shown that the state exercised effective control over its own organs, as was seen from the *Nuhanović*⁸ case and the comments of Dannenbaum.⁹ However due to the criteria of article 4 ARSIWA and the organic link between a state and its organ, there is no need to show a control link when attributing state organ conduct to the state. Rather, an effective control link only requires to be shown in order to prove that an entity other than or in addition to the state can be attributed with the conduct. Misunderstandings at such high levels are regretful. It is particularly puzzling that a state military force may be regarded as a group of persons rather than as an organ of the state.

An IO may attempt to resist attribution of conduct where the acting entity acted *ultra vires* the powers conferred to it or the powers of the IO however, in terms of article 8 DARIO such conduct remains attributable to the IO. There are also times where attribution of conduct and attribution of responsibility are conflated and used interchangeably. This creates uncertainty and may lead to incorrect arguments and decisions. As mentioned above attribution of responsibility can only be dealt with after we have attributed conduct. However, article 14-17 of DARIO purportedly deal with situations in which responsibility can be engaged without the need for attribution of conduct. Such an assertion contradicts the rule enunciated in article 4 DARIO and is inaccurate in any event. The theory that

⁷ *Agim Behrami and Bekir Behrami v. France* App. No. 71412/01, and *Ruzhdi Saramati v. France, Germany and Norway* App. No. 78166/01 (ECtHR 2 May 2007)

⁸ *Nuhanović vs. The State of the Netherlands* Case No: 265615/HA ZA 06-1671, District Court of The Hague, 10 Sept 2008 (*Nuhanović I*); *Nuhanović vs The State of the Netherlands* Case No: 265618/ HA ZA 06-1672, Appeals Court of The Hague, 5 July 2011 (*Nuhanović II*); *Nuhanović vs The State of the Netherlands* Case No: 12/03324, Supreme Court of the Netherlands, 6 September 2013; (*Nuhanović III*)

⁹ Tom Dannenbaum, 'The Hague Court of Appeal on Dutchbat at Srebrenica Part 2: Attribution, Effective Control, and the Power to Prevent' (EJIL Talk, 10/11/2011) <<http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-2-attribution-effective-control-and-the-power-to-prevent-2/>> and Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeeper' (2010) 51 Harv. Int'l L.J. 113, 141

derivative responsibility does not depend on attribution of conduct results in courts and commentators failing to recognise that there is in fact an act which can be attributed to the IO in such situation. Even in the case of derivative responsibility there must be conduct which can be attributed to the IO, before its responsibility can be engaged, regardless of whether one chooses to observe and recognise such conduct.

The practice of the courts mentioned in the foregoing chapters demonstrates that they do not look to derivative responsibility once they have found an entity to which conduct can be attributed. The problem could be alleviated by accepting the notion of effective normative control. This could allow the IO to be attributed with its conduct of limiting the freedom of the ME and obliging it to strictly implement the IO's will. The rules in article 14-17 could then be engaged to make such conduct wrongful for the IO, if it is not already a breach of the IO's obligations or contrary to *jus cogens*. Such recognition would also allow more general use to be made of article 62(2) so that the responsibility of the State, for the wrongful act implemented by it pursuant to the will of the IO, could be subsidiary. This would be reflective of the true lines of control and purpose of the state's conduct. Such an approach would allow a systematic use of DARIO which could lead to more instances of dual or multiple attribution where appropriate.

Nonetheless in respect of the UN, which arguably has the largest number of member entities and correlating amount of power and activity, the process of attribution and subsequent engagement of responsibility achieves little as the UN enjoys immunity from suit. However, this is not to say the whole exercise is without merit. The process employed is capable of putting 'soft' pressure on the UN to amend the way in which it carries out its functions. A good example of this can be seen from the discussion of the 1267 Sanctions Regime in the foregoing chapters.

5.2 Research Objectives: Summary of Findings and Conclusions

5.2.1 Research Objective 1: Criteria used for Attribution of Conduct

The research has identified two main ways in which conduct should be attributed: on the basis of an ‘organic’ or functional link; or on the basis of ‘effective control’. The ‘effective control’ test was set by the ICJ in *Nicaragua*¹⁰ however there is no exact definition of ‘effective control’ in DARIO. Where the acting entity is an organ or agent of the IO, attribution is on the basis of an ‘organic’ or functional link. Where on the other hand the acting entity is a member entity of the IO, placed at the disposal of the IO with the IO exercising effective control over the entity, conduct can be attributed on the basis of article 7 DARIO. Yet in practice this is not clear. In practice, as highlighted by this dissertation, at times courts attribute conduct on unclear bases¹¹ and incorrect bases.¹²

Conduct can also be attributed to the IO where the IO adopts or acknowledges the conduct as its own¹³ and where the rules of the organisation provide for such attribution.¹⁴ Additionally, it is important to note that even *ultra vires* acts can be attributed to the IO.¹⁵ Finally, despite any concerns in relation to the implications,¹⁶ conduct can be attributed concurrently to two or more entities. The lack of clarity in relation to the criteria and basis of attribution is due in part to the lack of academic focus on the issue of attribution and in bigger part to the lack of consensus on or definition of ‘effective control’.

5.2.2 Research Objective 2: Adequacy of Criteria used for Attribution of Conduct

The adequacy of the criteria used to attribute conduct was evaluated and found to fall short of that required by practice. IOs, in practice, function almost entirely by exercising normative control over their members yet ‘effective control’ under article 7 is deemed to refer to ‘factual control’ rather than ‘global control’. When an IO charges the organ of a

¹⁰ *Nicaragua* (n6)

¹¹ *Agim Behrami and Bekir Behrami v. France* App. No. 71412/01, and *Ruzhdi Saramati v. France, Germany and Norway* App. No. 78166/01 (ECtHR2 May 2007)

¹² *Nuhanović vs The State of the Netherlands* Case No: 265618/ HA ZA 06-1672, Appeals Court of The Hague, 5 July 2011 (*Nuhanović II*); *Nuhanović vs The State of the Netherlands* Case No: 12/03324, Supreme Court of the Netherlands, 6 September 2013; (*Nuhanović III*)

¹³ ILC, ‘Report of the International Law Commission on the Work of its Sixty-Third Session’ (26 April-3 June and 4 July- 12 August 2011) UN Doc A/66/10 para 87 (DARIO) article 9

¹⁴ *ibid* article 64

¹⁵ *ibid* article 8

¹⁶ Stefan Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’ in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Koninklijke Brill NV 2005) 413-414

member state (MS) to carry out one of its functions, article 4 ARSIWA has been interpreted as preventing attribution under article 6 DARIO. This seems to be based on a somewhat weak argument as alluded to in chapter 3 (which ignores the without prejudice clause contained in article 57 and the fact that article 4 ARSIWA is merely a point of departure) and results in restriction of what would be in practice a useful basis of attribution.

Article 7 seems to have been drafted mainly to deal with the situation of military personnel placed at the disposal of the UN during peacekeeping operations (PKOs).¹⁷ However the UN is only on IO out of many. The ILC SR, initially resisted calls by the EU to draft ‘special rules’ pertaining to that organisation as the intention appears to be for DARIO to have general application (although eventually the ILC did incorporate a *lex specialis* provision, though this does not exactly reflect the requests of the EU).¹⁸ However the current interpretation of article 7 DARIO, goes against this intention. The current interpretation seems to render article 7 DARIO a clause which is special and of exclusive application to the UN during PKOs. The situation of other IOs acting through their members (and the situation of the UN acting through its members in other instances) has been left uncovered; save for when the IO adopts the conduct as its own¹⁹ or when the conduct falls under the *lex specialis* provision.²⁰ This renders DARIO inadequate in relation to the actual practice of IOs.

5.2.3 Research Objective 3: Practice, Opinion and DARIO

Review of the practice of IOs showed that they tend to function by exercising normative control over their members. Examination of the lines of control when IOs act through their member states revealed that state organs are never fully placed at the disposal of the IO nor is the IO truly given factual control over the state organ. The state organ only implements the will of the IO after receiving the necessary order from the state representative or pursuant to national legislation (which may be legislation giving direct effect to the decision of the IO). Nonetheless the ILC and SR view ME conduct as only being attributable to an IO where

¹⁷ See generally: Georgio Gaja, ‘Second Report on the Responsibility of International Organisations’, U.N. Doc. A/CN.4/541 (Gaja Second Report) pg14-23; and ILC ‘Report of the International Law Commission on the Work of its Forty Sixth Session’ (3 May-4 June and 5 July-6 August 2004) UN Doc A/59/10, 110-115

¹⁸ Gaja Second Report (n17) pg 6

¹⁹ DARIO (n13) article 9

²⁰ DARIO (n13) article 64 ¹⁵ Georgio Gaja ‘Third Report on Responsibility of International Organisations’ (13 May 2005) UN Doc A/CN.4/553, 16 para 35

the IO exercises ‘factual control’ over its members. A definition of ‘factual’ is not provided but in cases of derivative responsibility, the SR states that ‘normative control may amount to factual control’.²¹ It is not clear why this is possible when the issue relates to derivative responsibility but is supposedly not possible when the issue relates to attribution of conduct.

Academics have spent much time and thought on tackling attribution or engagement of IO responsibility. However much less seems to have been devoted to the issue of attribution of conduct and perhaps it is this which leads to conflation of attribution of conduct and attribution or engagement of responsibility; and also the view that attribution is not always necessary.²² The practice of the courts does not provide a clear or consistent picture of the way in which conduct can be attributed. The review of cases showed inconsistency in the way conduct was attributed to parties as well as unclear bases for attribution of conduct and at times a misunderstanding of the rules enunciated in DARIO and ARSIWA. The cases also demonstrated that each of the IOs and member entities attempt to convince the courts that conduct is attributable to the other; it is submitted that this is made more possible by the murkiness surrounding the grounds of attribution of conduct.

5.2.4 Research Objective 4: Necessity of Adding to or Modifying Current Criteria

The Draft Article on the Responsibility of International Organisations, presently seem to fall short of the requirements of practice. However modification of the text is not required to alleviate this short coming. Instead, DARIO would benefit from a wider and more practice orientated interpretation which should be included in the commentary. Such an interpretation would necessarily allow recognition of the type of control constantly exercised by IOs over their members. This is desperately required as at present large gaps have been left in the context of attribution of conduct, to the detriment of innocent third parties. Recognition of the normative control exercised by IOs over their members, combined at times with articles 14 -17 DARIO would allow the responsibility of IOs to be engaged whilst article 62(2) DARIO would allow subsidiary responsibility to be attributed to the acting entity, after the wrongful conduct has been attributed to it. The commentary to DARIO

²¹ Giorgio Gaja ‘Third Report on Responsibility of International Organisations’ (13 May 2005) UN Doc A/CN.4/553, 16 para 35

²² For conflation see for example Thomas D. Grant, ‘International Responsibility and the Admission of States to the United Nations’ (2008-2009) 30 *Mich. J. Int’l L.* 1095, 1140; Erica de Wet, ‘The Governance of Kosovo: Security Council Resolution 1244 and Establishment and Functioning of Eulex’ (2009) 103 *Am. J. Int’l L.* 83, 95

would also benefit from express confirmation that the organ of a state can constitute the agent of a state under article 6 DARIO. There is no reason why this should not be the case and in actual fact, this should prove a useful tool in litigation. One addition to DARIO which may be beneficial is the inclusion of an article in relation to concurrent attribution. Whilst such a possibility is implied in DARIO, it does not seem to be contemplated or considered by the courts. A provision expressly stating such a possibility in appropriate cases may result in more instances of such attribution; thus providing a third party with a greater chance of obtaining remedy and reducing the possibility of circumvention of attribution of conduct.

5.3 Final Thoughts

This thesis has examined the way in which conduct is attributed to international organisations and entities through which they act. The thesis has engaged in a critical examination of the current scholarship and practice in relation to attribution of conduct and where appropriate has sought to further advance the arguments. The thesis has found that state organs can be agents of an international organisation and thus the actions of a state organ can be attributed to an IO by means of article 6 DARIO. Article 7 DARIO is not currently interpreted in a manner reflective of practice, as an IO very seldom exercises factual control, rendering it of limited application. The recognition of ‘normative control’ as a form of ‘effective control’ is not only desirable but essential given the increasing role of international organisations. The lack of recognition of effective control, combined with inconsistent judicial reasoning and limited in-depth academic focus has made it more possible for international actors to seek to hide behind another thus circumventing attribution of conduct and in turn engagement of responsibility. Choosing to ignore the reality of effective normative control; the function of state organs as agents of an IO; the necessity of attribution of conduct and the possibility of concurrent attribution does not mean they are not important. Instead it means issues cannot be dealt with in an appropriate or satisfactory manner. Therefore it is important to extend notions of effective control to include normative control when looking to identify conduct with the aim of attributing the conduct to the correct entity.

‘Whether you can observe a thing or not depends on the theory which you use. It is the theory which decides what can be observed.’²³

²³ Albert Einstein Objecting to the placing of observables at the heart of the new quantum mechanics, during

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