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UN Peacekeeping Operations and Article 7 ARIO: The Missing Link

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Abstract
Peacekeeping operations conducted by international organizations raise difficult questions of international responsibility. In principle, breaches of international law committed by national contingents serving on such operations may be attributed either to the international organization leading the operation or to the State to which the personnel implicated in the wrongful conduct belongs. The ARIO suggests a seemingly simple solution to this dilemma: wrongful conduct should be attributed to the party exercising effective control over that conduct. The present note argues that this solution is misguided. It deliberately ignores the legal and institutional status of national contingents, does not reflect consistent international practice and may not serve the best interests of potential claimants. In the case of peacekeeping operations incorporated into the institutional structure of an international organization, a more appropriate solution to the dilemma of multiple attribution is to proceed on the basis of a rebuttable presumption that the wrongful acts committed by national contingents are attributable to the international organization and not to their contributing State.

Keywords
peacekeeping operations; international responsibility; attribution of conduct; effective control

Since no international organization currently enjoys the authority to establish its own armed forces by way of individual recruitment, international organizations conducting peace support operations must rely on military and civilian personnel made available to them by States. As Special Rapporteur Giorgio Gaja observed in his Second Report on the Responsibility of International Organizations, this practice considerably complicates the attribution of wrongful conduct committed by members of

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peace operations,[1] for their acts and omissions may in principle be imputed either to the troop-contributing States or to the international organization leading the operation, or perhaps to both. According to the Special Rapporteur, the key difficulty in this context is not whether the wrongful conduct could be imputed to a particular State or international organization at all, but rather to which of the implicated parties—the contributing State or the international organization conducting the operation—the conduct in question *should* be attributed.[2] Following in the footsteps of prevailing academic opinion, Special Rapporteur Gaja suggested that the matter ought to be resolved by attributing the wrongful conduct to the party which had effective control over the conduct in question.[3]

The ILC incorporated this rule of attribution in what is now Article 7 ARIO,[4] but added an important qualification to its operation. The Commentary to the ARIO distinguishes between State organs which are fully seconded to an international organization and State organs which to a certain extent still continue to act as organs of their home State during their secondment.[5] Whereas according to the Commentary the conduct of fully seconded organs is attributable only to the receiving organization and therefore falls under the general rule of attribution set out in Article 6 ARIO,[6] the conduct of not fully seconded organs, such as military contingents placed at the disposal of the United Nations for the purposes of a peacekeeping operation, is to be attributed either to the seconding State or to the receiving organization on the basis of the effective control test

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1) Second Report on Responsibility of International Organizations, U.N. Doc. A/CN.4/541 (Apr. 2, 2004), p. 17.

2) *Cf. ibid.*, p. 15.

3) *Ibid.*, p. 19.

4) Art. 7 ARIO provides as follows: '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.'

5) Articles on the Responsibility of International Organizations with Commentaries, in *Report of the International Law Commission, Sixty-third session*, U.N. Doc. A/66/10 (2011), p. 85.

6) Art. 6 ARIO in turn reads as follows: '1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization shall apply in the determination of the functions of its organs and agents.'

laid down in Article 7 ARIO.[7] The Commentary thus stipulates in quite categorical terms that the conduct of national contingents serving in peace operations must be attributed with reference to factual criteria alone. As Ramses Wessel and myself have argued in greater detail elsewhere,[8] this approach raises a number of concerns.

The distinction drawn by the ILC between fully and not fully seconded State organs is unconvincing. Any organ seconded by a State to an international organization must to some extent remain subject to the authority and control of its State of origin, otherwise it would cease to exist as one of its organs. In fact, seconded State organs only carry out tasks on behalf of the receiving organization because they are under the instructions of their home State to do so in the first place: by acting on behalf of the receiving organization, they continue to act on behalf of their sending State as well. In this sense, no State organ is ever fully seconded. The Commentary is therefore certainly correct in pointing out that national contingents placed at the disposal of an international organization to a certain extent still act as organs of their seconding States.[9] However, the Commentary is mistaken in suggesting that this is so because the seconding States retain an exclusive right to exercise criminal jurisdiction over their contingents and that this somehow sets military contingents apart from other seconded State organs. Receiving organizations such as the UN do not enjoy the competence to hold State agents or officials criminally accountable,[10] whether they are members of the armed forces or not, while seconding States normally retain the power under their domestic law to exercise at least some aspects of their criminal and administrative jurisdiction over all officials and agents, not just military personnel, they place at the disposal of another subject of international law. The difference between the secondment of armed forces and the secondment of other State organs is therefore one of degree, not one of principle. Since no rigid distinction can be drawn between fully and not fully seconded State organs, there is no

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7) ARIO Commentary, *supra* note 5, p. 85.

8) A. Sari & R. A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', forthcoming in S. Blockmans, B. van Vooren & J. Wouters (Eds), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford University Press, Oxford, 2013).

9) *Cf.* ARIO Commentary, *supra* note 5, p. 85 and Second Report, *supra* note 1, p. 18.

10) *See, e.g.*, *Criminal accountability of United Nations officials and experts on mission: Note by the Secretariat*, U.N. Doc. A/62/329 (Sept. 11, 2007), p. 8.

reason why national contingents serving in peace operations could not also fall within the scope of Article 6 ARIO.

By declaring the effective control test laid down in Article 7 ARIO to be the sole rule of attribution applicable to peace operations, the ARIO deliberately disregards the legal and institutional links that may exist between national contingents and the receiving organization in favour of attributing their wrongful conduct exclusively on the basis of factual criteria. This approach is difficult to justify both as a matter of principle and practice. First of all, it fails to give effect to the institutional law of the international organization concerned by discounting the formal status it may confer upon a seconded State organ. This is incompatible with Article 2(c) ARIO, which provides that the status of an organ of an international organization depends on the rules of the organization and not on whether the entity in question has been classified as fully or not fully seconded by the ILC or any other body. Second, as the Special Rapporteur himself acknowledged,[11] the UN has consistently regarded peacekeeping operations established by the General Assembly and the Security Council as subsidiary organs of the Organization.[12] National contingents forming part of UN peacekeeping operations therefore hold a dual institutional status as organs of their contributing State and as a component of a subsidiary organ of the UN.[13] As the UN Office of Legal Affairs made clear in its submissions to the ILC: 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization'.[14] The justification for this imputability does not derive from factual control, but from the legal and institutional status of UN peacekeeping operations.

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[11] Second Report, *supra* note 1, p. 17.

[12] See *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, (1962) ICJ Rep. 151, p. 177.

[13] E.g. F. Seyersted, 'United Nations Forces: Some Legal Problems', (1961) 37 *British Yearbook of International Law* pp. 351–475, p. 410. This point and its legal significance is sometimes overlooked: e.g. T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) *Harvard International Law Journal* pp. 113–192, p. 159.

[14] Interoffice memorandum to the Director of the Codification Division, Office of Legal Affairs, and Secretary of the International Law Commission regarding the topic Responsibility of International Organizations (Feb. 3, 2004), *United Nations Juridical Yearbook* p. 352.

This point may be illustrated with reference to Robert Ago's Third Report on State Responsibility submitted in 1971,[15] which draws a number of subtle distinctions between different types of secondments and merits quoting in full:

> "It may happen that the organ of one State is placed temporarily at the exclusive disposal of another State and ceases, in that case, to perform any activity on behalf of the State to which it belongs. On the other hand, it may be that if another State is given an opportunity to use the services of such an organ, its demands may not be so exacting as to prevent the organ from continuing to act simultaneously, though independently, as an organ of its own State. In such cases it will be necessary to ascertain in each particular instance on whose behalf and by whose authority a specific act or omission has been committed. It may be that a State at whose disposal a foreign State has placed a person belonging to its administration will appoint this person to a post in its service, so that at a given moment he will formally be an organ of two different States at the same time. If that were so, the acts or omissions committed by the person in question in performing a function of the recipient State would be acts of the recipient State just as if they were acts or omissions of its own organs. If, on the other hand, the person in question is not formally an organ of the recipient State, his actions will still be considered as acts of the recipient State but will be regarded rather as of the same nature as the acts or omissions of private persons in fact performing State functions, since the status of organ accorded under the legal order of the State of origin is not valid under the legal order of the recipient State. In any case, the basic conclusion is still the same: the acts or omissions of organs placed at the disposal of a State by other subjects of international law are attributable to that State if in fact these acts and omissions have been committed in the performance of functions of that State and under its genuine and exclusive authority."[16]

Unlike the Commentary to the ARIO, Ago's Third Report recognizes that seconded organs holding a dual institutional status entail special considerations because their conduct may be attributed either to the seconding State or to the receiving State (or to the receiving international organization, as the case may be) on the ground that they constitute formal organs of both parties. The critical factor which distinguishes seconded State organs formally incorporated into the institutional framework of the receiving State from seconded organs which are not so incorporated is therefore their dual institutional status. For Ago, the question whether the conduct of seconded organs possessing such a dual status should be

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15) Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/246 and Add.1-3 (Mar. 5, Apr. 7, Apr. 28 and May 18, 1971), in (1971) Volume II Part One Yearbook of the International Law Commission p. 199.

16) *Ibid.*, p. 268.

attributed to the seconding State or to the receiving State depends on whether they perform functions on behalf of the former or the latter. By contrast, he argues that the conduct of seconded organs which are not incorporated by the receiving State into its institutional structure should be attributed on the basis of the same principles that apply to the attribution of conduct carried out on its behalf by private persons, which presumably means applying a factual control test.

Regrettably, Ago's attempt to formulate a universal standard of attribution applicable to all types of secondments, whereby wrongful conduct is to be attributed to the receiving State 'if in fact [the relevant] acts and omissions have been committed in the performance of functions of that State and under its genuine and exclusive authority',[17] obscures the careful distinctions he drew earlier. If a seconded State organ acts under the genuine and exclusive authority of the receiving State as required by the second part of Ago's test, this necessarily implies that it is performing some function of that State, rendering the first element of the test redundant. Conversely, if a seconded State organ possessing a dual institutional status performs certain functions of the receiving State, in principle this should suffice to justify the attribution of its conduct to that State, as Ago himself suggested earlier. The requirement of acting under the receiving State's genuine and exclusive authority merely plays a secondary role for the purposes of verifying that the seconded organ was in fact exercising the functions of that State, but this is not the underlying reason justifying the attribution of the wrongful conduct. Applied to UN peacekeeping operations, the foregoing means that the formal incorporation of national contingents into the institutional structure of the UN as a component of one of its subsidiary organs in principle renders the contingents' conduct imputable to the UN. The fact that contributing States place their national contingents at the disposal of the UN by a transfer of authority, whereby they relinquish certain powers of control over their troops and at the same time enable the UN to assume those powers itself,[18] establishes a presumption that those national contingents do in fact perform functions on behalf

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[17] *Ibid*.

[18] See M. Bothe, 'Peacekeeeping', in B. Simma *et al*. (Eds), *The Charter of the United Nations: A Commentary*, Vol. 1 (2nd edn., Oxford University Press, Oxford, 2002) pp. 648–700, p. 691; *Out-of-area-Einsätze*, BVerfGE 90, Judgment of July 12, 1994, p. 286, pp. 351–353.

of the UN during the period of their assignment.[19] This presumption may be rebutted if the troops in question actually act under the control of their contributing States, that is outside the 'genuine and exclusive authority' of the UN, to use Ago's words. This is the case, for instance, when they act in direct contravention of orders issued by the UN Force Commander.[20]

By treating factual control as the sole ground of attribution applicable to all types of peace operations led by international organizations, the ARIO not only fails to respect and give effect to the dual institutional status which national contingents incorporated into the institutional structure of a receiving international organization enjoy, but it also seems to misunderstand the purpose of the exclusive authority requirement. Special Rapporteur Gaja's suggestion that 'what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control' is symptomatic of this.[21] It is of course true that the UN never acquires exclusive authority over national contingents placed at its disposal, given that troop-contributing States always retain certain powers of control for themselves. For this reason, a test of exclusive authority would not present a meaningful standard for attributing the conduct of national contingents to the UN: it would set the bar far too high and would never be satisfied. However, the purpose of the exclusive authority requirement is not to serve as a rule of attribution. Rather, it constitutes a rebuttable presumption that results from the combined effect of the formal incorporation of national contingents into the institutional structure of the receiving organization and the transfer of authority by contributing States to that organization. Indeed, this explains the UN Secretary-General's statement that the 'international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations.'[22]

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19) E.g. S. R. Lüder, *Völkerrechtliche Verantwortlichkeit bei Teilnahme an "Peace-keeping"-Missionen der Vereinten Nationen* (Berliner Wissenschafts-Verlag, Berlin, 2004), pp. 102–105.

20) See Dannenbaum, *supra* note 13, p. 160.

21) Second Report, *supra* note 1, p. 23.

22) Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters: Report of the Secretary-General, U.N. Doc.

Finally, the Commentary's focus on factual control does not necessarily contribute to greater accountability. Article 7 ARIO requires a separate assessment of where effective control over a national contingent lies in each individual case involving wrongful acts committed by UN peacekeeping operations. Considering the complexity of the applicable command and control arrangements and that contributing States are likely to dispute the matter, this effectively shifts the burden of proof on the individual who has suffered damage or injury at the hands of UN operations. By contrast, a presumption in favour of attributing the conduct of UN peacekeeping operations to the UN on basis of their legal status provides greater legal certainty for prospective claimants, as it makes clear that their remedy lies with the UN. The downside of this approach is that the jurisdictional immunities enjoyed by the UN and its peacekeeping operations will prevent aggrieved individuals from having their claims against the UN adjudicated before national and international judicial bodies. However, the appropriate solution to this problem is to press the UN and other international organizations conducting peace operations to provide claimants with an effective alternative remedy by putting into place robust claims settlement procedures, and not to rely on Article 7 ARIO in the hope that it may avoid the immunity problem altogether by allocating responsibility to troop-contributing States. This would merely incentivize prospective claimants to minimize the role and responsibility of the international organization leading the operation, even at the cost of further muddying the waters.[23]

Accordingly, and contrary to what the Commentary to the ARIO suggests, the attribution of the wrongful conduct of national contingents serving in UN peacekeeping operations, as well as other operations enjoying a dual institutional status, should not be determined with reference to

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A/51/389 (Sept. 20, 1996), para. 17. The ARIO Commentary, *supra* note 5, p. 88, dismisses this statement with the following words: 'While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusivecommand and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.'

[23] A possible example for this is the *Mustafić-Mujić* case, where the appellants argued that the attribution of the tortious acts allegedly committed by Dutchbat against them was governed by domestic and not international law, in an attempt to avoid those acts from being imputed to the UN. See *Mustafić-Mujić et al v. The Netherlands*, Judgment (July 5, 2011), paras. 5.2 and 5.3 (available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0132&u_ljn=BR0132; accessed on Apr. 4, 2012).

the effective control test laid down in Article 7 ARIO.[24] The appropriate provision to apply in this case is Article 6 ARIO, as it gives effect to the dual institutional status of the troops placed at the disposal of the UN, reflects the actual practice of the UN and arguably serves the interests of accountability better than the effective control test.

[24] This is not to say that the effective control test is inappropriate for all peace support operations: it is the correct rule to apply in the case of national contingents serving in peace operations which do not form subsidiary organs of the international organization conducting the operation and therefore do not enjoy a dual institutional status. In addition, it may well be appropriate to apply the effective control test to rebut the presumption of attributability to the UN established under Article 6 ARIO.