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### **Multiple Attribution of Conduct**

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# Multiple Attribution of Conduct

Francesco Messina<sup>1</sup>

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(20,220 words including footnotes)

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## Abstract

This paper investigates whether rules on attribution of conduct under the Articles on State Responsibility (ASR) and the Articles on the Responsibility of International Organization (ARIO) can be purposefully used to assess and adjudicate issues of shared responsibility. Obviously, co-authorship of an internationally wrongful act (or multiple attribution) is only one of the many potential situations of shared responsibility in international law. Both the ASR and the ARIO clearly recognize the possibility that one wrongful act may determine the responsibility of a plurality of international subjects at the same time. They also contain a clear recognition that states may act jointly, and so may international organizations, or states and international organizations. The paper argues that, despite the many difficulties in reconciling the ASR and ARIO framework with concepts of shared responsibility, in principle there is no logical or legal reason why a given conduct cannot be attributable to one or more states and/or one or more international organizations at the same time. Indeed, multiple attribution is the default position whenever more two or more subjects of international law act together.

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## 1. Introduction

Unlike individual responsibility under international criminal law, which directly concerns human beings, responsibility for internationally wrongful acts pertains to abstract collective legal entities such as states and international organisations.<sup>2</sup> Any court or tribunal having jurisdiction to adjudicate on the matter may find that a state or an international organisation (IO) has breached its international legal obligations and may require it to provide a remedy.<sup>3</sup> The fact that international law recognizes states and (certain) international organisations as the bearers of rights and duties means that they are ‘legal persons’ under international law.<sup>4</sup> But states and international organisations can only act through human beings, or at least through other collective entities (including private corporations) themselves acting through human beings.<sup>5</sup> Whenever issues of legal responsibility arise, many complex layers of abstract legal entities may exist, but there is ultimately no escape from the human element.

It follows that international law must address certain questions concerning the interaction between natural persons (human beings) and legal persons (collective entities bearing rights and duties). First, it is necessary to determine which acts or omissions can be deemed to be the acts or omissions of a state/IO. This is the classic question of ‘attribution of conduct’ in the context of international responsibility.<sup>6</sup> The aim of this paper is not to

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<sup>2</sup> It cannot be excluded that other collective entities (including corporations) may be deemed to bear international rights and obligations, and should consequently be deemed responsible for internationally wrongful acts when they breach such obligations. A system of responsibility of corporations at the international level is, however, still embryonic (if it exists at all), because of uncertainty both as to the obligations which would be applicable to them and as to their international legal personality. The focus of this paper on states and international organisations is mostly for reasons of space, and should not be taken as an expression of a view on this matter.

<sup>3</sup> See Article 1, International Law Commission, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’, annexed to United Nations General Assembly resolution 56/83, UN Doc. A/RES/56/83, 12 December 2001 (ASR hereinafter) and Article 3, International Law Commission, ‘Articles on the Responsibility of International Organizations’, annexed to United Nations General Assembly resolution 66/100, UN Doc. A/RES/66/100, 9 December 2011 (ARIO hereinafter).

<sup>4</sup> This is obvious as to states, but perhaps less obvious as to IOs. On the connection between legal personhood of IOs and responsibility, see e.g. P. Reuter, ‘Principes de droit international public’, 103 *Rec. des Cours* (1961) 425-683, at 589; P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed., London: Sweet & Maxwell, 2009), 523-526.

<sup>5</sup> See generally D. Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Florence: Lumachi, 1902), reprinted in D. Anzilotti, *Scritti di diritto internazionale pubblico*, vol. II part 1, (Padua: CEDAM, 1956), 1-148, at 121-148 and International Law Commission, ‘Third report on State responsibility, by Mr. Roberto Ago, Special Rapporteur’, *Yearbook...* 1971, vol. II(1), 199-274 (1971), 217.

<sup>6</sup> ‘Attribution of conduct’ is used here with reference to internationally wrongful acts only. In international law, the concepts of ‘act of a state’ and ‘act of an international organisation’ may vary depending on the set of rules under consideration. For instance, there is a clear distinction between those state organs that may create new obligations for a given state by signing or ratifying a treaty, and those persons (many more) that may engage the responsibility of that same state for a breach of the same treaty. See International Law Commission, ‘Commentaries to the Articles on State Responsibility’, *Yearbook...* 2001, vol. II, pp. 26-143, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (ASR COMMENTARIES hereinafter), 39 and Third Ago report, *Yearbook...* 1971, vol. II(1), 199-274 (1971), 234. See also L. Condorelli and C. Kress, ‘The Rules of Attribution: General Considerations’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility*

consider in general terms when conduct can be attributed to states and IOs, but to assess how rules of attribution work in the context of shared responsibility.<sup>7</sup> When more than one state or IO participate in the same conduct breaching an international obligation, international law must determine whether the attribution of an act or omission to one state/IO necessarily precludes the attribution of the same act or omission to another state/IO. Will it be possible to directly impute an internationally wrongful act to more than one collective entity at once (multiple attribution) or will attribution inevitably occur with relation to one collective entity at a time (exclusive attribution)? As attribution is a crucial step in the finding of international responsibility, the answer to this question determines how many subjects will be deemed directly responsible for the same conduct.

The thesis espoused here is that multiple attribution is possible. Indeed, when more than one subject of international law is involved in the same wrongful conduct, multiple attribution is the default answer to the question of attribution. Multiple attribution is construed here as a corollary of the framework of rules on attribution of conduct, because exclusive attribution only applies under certain exceptional circumstances concerning organs transferred to another state/IO. Nonetheless, it must be acknowledged that the opposite view is still current both in legal doctrine and in some judicial practice. According to Nollkaemper and Jacobs, for example, ‘conduct is in principle attributed to one actor only’ and ‘[d]ual attribution, if possible at all, is very rare’.<sup>8</sup> They cast the doctrine espoused here as a ‘minority opinion’ with ‘little practice to support it’.<sup>9</sup> As we shall see below, their view finds some support in some (but not all) recent pronouncements of the European Court of Human Rights. This paper seeks to rebut these positions by providing a critical analysis of multiple attribution and its exceptions in light of the codification efforts by the International Law Commission.

This question is essential to our understanding of the most basic aspects of shared responsibility. If it were accepted that multiple attribution is a ‘rare’ result of the application of attribution rules, the system of international responsibility would be fundamentally ill-equipped to deal with issues of shared responsibility. This is, indeed, one of the main points

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(Oxford: Oxford University Press, 2010) 221-236, at 222-223 for a more expansive view of the scope of ‘attribution of conduct’ rules.

<sup>7</sup> For the basic concepts concerning ‘shared responsibility’ see A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Concept Paper’, SHARES Research Paper 03 (2011), ACIL 2011-07, forthcoming in 33 *Michigan Journal of International Law* (2012), revised May 2012, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1916575](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916575).

<sup>8</sup> *ibid.*, 38.

<sup>9</sup> *ibid.*, 39.

made by Nollkaemper and Jacobs.<sup>10</sup> I am much more optimistic as to the flexibility and resilience of attribution of conduct rules as codified by the ILC. But why does this question matter in practice? Imagine that an entity acting on behalf of the United Kingdom and France – say, the Intergovernmental Commission overseeing the operation of the Channel’s tunnel pursuant to the Treaty of Canterbury<sup>11</sup> – breached an obligation owed to a third party under international law. Could the conduct in question be attributed both to the United Kingdom and to France?<sup>12</sup> Alternatively, consider the situation of someone who is unlawfully detained by a peacekeeping force whose soldiers are formally answering to a UN chain of command but who are also effectively receiving orders from their home country.<sup>13</sup> Could we say that the victim is being detained both by the United Nations and by the troop-contributing country at the same time? The answers to these questions are important because they will determine whether an injured party will be able to affirm that two (or more) subjects of international law are both responsible for the wrongdoing suffered, rather than just one – and, as a consequence, more avenues of redress may potentially be open to them.<sup>14</sup>

This paper seeks to address these question by first briefly introducing the basic framework of rules on attribution of conduct (part 2). This is necessary to then move on to consider how cases of potential multiple attribution of conduct may emerge in practice and how the principle of independent responsibility may be construed as confirming the possibility of multiple attribution, rather than denying it (part 3). Finally, we shall consider the most important exception to multiple attribution, which emerges from rules on the transfer of organs from one subject of international law to another (part 4).

## **2. The Concept of Attribution of Conduct**

### **A. Attribution of conduct as one element of the internationally wrongful act**

In the early Twentieth Century, Dionisio Anzilotti clarified that, in the context of responsibility for internationally wrongful acts, the question of attribution of conduct had to

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<sup>10</sup> *ibid.*, 48-55.

<sup>11</sup> Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, Canterbury, 12 February 1986, 1497 UNTS 325.

<sup>12</sup> See *Eurotunnel arbitration (The Channel Tunnel Group Ltd and France-Manche S.A. v. the Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française)*, 30 January 2007, at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1184](http://www.pca-cpa.org/showpage.asp?pag_id=1184), 132 ILR 1.

<sup>13</sup> See e.g. R. Murphy, *UN peacekeeping in Lebanon, Somalia and Kosovo: operational and legal issues in practice* (Cambridge: Cambridge University Press, 2007), 130.

<sup>14</sup> Which avenues of redress will actually be available depends on other aspects of shared responsibility not addressed in this paper, including issues of invocation, as well as on the practical results of the principle of independent responsibility, on which see below.

be solved by reference to law, not physiology, sociology or psychology. The malice, *culpa*, or intentions of the human beings acting on behalf of the state were wholly irrelevant to the attribution of conduct under international law.<sup>15</sup> As he put it, ‘the characteristic of legal attribution is that it is a *pure result of the law*, a will or an act are attributable to a given subject only because a legal provision says so’.<sup>16</sup> In this perspective, which has become the classic account adopted by the International Law Commission and the International Court of Justice,<sup>17</sup> the aim of rules on attribution of conduct is to determine precisely when we can say that a certain conduct which is *prima facie* in breach of an international obligation is the conduct of a state and/or of an international organization. As such, attribution of conduct is only one step in the line of argument required to determine that an internationally wrongful act has been committed by a state or IO: it is also necessary to show that an obligation owed by that state or IO has been breached by the conduct in question. In other words, an internationally wrongful act is an act which is both attributable to a state or an international organization and which constitutes a breach of an international obligation owed by that state or international organization.<sup>18</sup>

It is only with this ‘direct’ attribution of conduct that we are dealing in this paper, not with other cases of imputation of responsibility. This means that this paper addresses only some of the many potential situations of shared responsibility. In Nollkaemper’s theoretical framework, ‘shared responsibility’ may theoretically arise in at least three cases. First, there are cases of co-authorship of the same internationally wrongful act, which are those considered here.<sup>19</sup> Second, there are cases where separate acts determine a single injury, such

<sup>15</sup> Not everyone agrees with this separation of causality from attribution, especially when omissions are concerned: see e.g. G. Arangio-Ruiz, ‘State fault and the forms and degrees of international responsibility: questions of attribution and relevance’, in M. Virally (ed) *Le droit international au service de la paix, de la justice et du développement: mélanges* (Paris: Pedone, 1991) 25-41; B. Conforti, ‘Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations’, in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004) 129-137; O. De Frouville, ‘Attribution of Conduct to the State: Private Individuals’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 257-280, at 267.

<sup>16</sup> D. Anzilotti, *Corso di diritto internazionale*, vol. I, (4th ed., Padua: CEDAM, 1955), 222. See also A/CN.4/233 (1970), 189-190; *Yearbook...* 1971, vol. II(1), 199-274 (1971), 218 (my translation). I used the term ‘attribution’ rather than ‘imputation’ to translate the Italian verb ‘*imputare*’ because it more clearly reflects the Italian meaning in this context: see International Law Commission, ‘First report on State responsibility by Mr. James Crawford, Special Rapporteur’, A/CN.4/490, *Yearbook...* 1998, vol. II(1), 1-80, 1998, at 33.

<sup>17</sup> See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)*, 26 February 2007, ICJ Rep. 2007, 43 (*Bosnian Genocide* hereinafter).

<sup>18</sup> Article 2 ASR and Article 4 ARIO. See B. Stern, ‘The Elements of an Internationally Wrongful Act’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 193-220. In order to establish responsibility, none of the ‘circumstances precluding wrongfulness’ of Part One, Chapter V ASR must apply. This third condition leads some to speak of a ‘tripartite model’ of international responsibility: see Condorelli and Kress, above n. 6, 224.

<sup>19</sup> See A. Nollkaemper, ‘Issues of Shared Responsibility before the International Court of Justice’, in E. Rieter and H. de Waele, *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, (Leiden: Martinus Nijhoff),

as in the *Corfu Channel* case.<sup>20</sup> These are not relevant here because each act or omission contributing to the injury is attributed separately to its author, so there is no issue of multiple attribution of the *same* act or omission. Third, shared responsibility may also arise where rules on ‘indirect responsibility’ apply.<sup>21</sup> These are, by definition, those cases where there is no direct attribution. Indeed, a state or an IO may be ultimately responsible or co-responsible for an internationally wrongful act even if the conduct is not directly attributed to it. This is what the Articles on State Responsibility describe as the ‘Responsibility of a State in connection with the act of another State’.<sup>22</sup> Such form of responsibility arises when a state ‘aids or assists’,<sup>23</sup> ‘directs and controls’,<sup>24</sup> or ‘coerces’<sup>25</sup> another state in the commission of a wrongful act. The Articles on the Responsibility of International Organizations expand on these provisions and consider both the ‘Responsibility of an International Organization in connection with the act of a State or another International Organization’<sup>26</sup> and the ‘Responsibility of a State in connection with the act of an International Organisation’.<sup>27</sup> The exact scope of these rules is much debated in theory and practice, especially with relation to ‘piercing the veil’ of international organizations.<sup>28</sup> Despite their complexity, these situations

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199-237, SHARES Working Paper 1/2011, Amsterdam Center for International Law, April 2011, available at <http://www.sharesproject.nl/wp-content/uploads/2011/04/Nollkaemper-Shared-Responsibility-before-the-ICJ-2011.pdf>, at 6-8. See also International Law Commission, ‘Third report on State responsibility by Mr. James Crawford, Special Rapporteur’, A/CN.4/507 and Add.1, Add.2, Add.2/Corr.1, Add.2/Corr.2, Add.3 and Add.4, 2000, at [267].

<sup>20</sup> *Corfu Channel Case (United Kingdom v. Albania) (Merits)*, 9 April 1949, ICJ Rep. 1949, 4. See also Third Crawford Report, above n. 19, [268]. Two British ships were damaged by mines in the Corfu Channel in October 1946, and dozens of sailors lost their lives; after the incident and some diplomatic correspondence, the UK swept the canal, including within Albanian territorial waters. The Court found that Albania was internationally responsible for the incident of October, but also that Albanian territorial sovereignty had been violated by the sweeping of the canal. As to Albanian responsibility, the issue was that the mines were not laid by Albania, but (probably) by Yugoslavia: the Court found Albania responsible for its omission. This means that Yugoslavia and Albania ‘committed separate wrongful acts, resulting in damage to a British ship’: Nollkaemper, above n. 19, 6.

<sup>21</sup> The terms ‘direct’ and ‘indirect’ responsibility have been used since the early classics of international law (who employed it, for example, to distinguish between the responsibility of the sovereign for his or her acts and the responsibility of the sovereign for acts of his or her citizens). As the terms are employed here, the distinction goes back at least to C. De Visscher, ‘La responsabilité des États’, in *Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium* vol. 2, (Lugduni Batavorum: Brill, 1924) 86-119, at 91-93. For a contemporary construction of rules on indirect responsibility, see e.g. C. Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 281-290, at 283-289; Nollkaemper, above n. 19.

<sup>22</sup> Part One, Chapter IV ASR.

<sup>23</sup> Article 16 ASR.

<sup>24</sup> Article 17 ASR.

<sup>25</sup> Article 18 ASR.

<sup>26</sup> Part Two, Chapter IV ARIIO, whose content is *mutatis mutandis* analogous to Part One, Chapter IV ASR, except for the special provisions of Article 17 ARIIO on the ‘Circumvention of international obligations through decisions and authorizations addressed to members’ and Article 18 DARIO on IOs which are members of other IOs.

<sup>27</sup> Part Five ARIIO, whose content is again *mutatis mutandis* analogous to Part One, Chapter IV ASR, except for the special provisions of Article 61 on the ‘Circumvention of international obligations of a State member of an international organization’ and Article 62 on the ‘Responsibility of a State member of an international organization for the internationally wrongful act of that organization’.

<sup>28</sup> The literature on ‘piercing the veil’ is ever expanding. For some references to the key cases and terms of the debate, see ARIIO Commentaries to Part Two, Chapter IV and Part Five (esp. Articles 61 and 62). See also e.g. C. Brölmann, *The Institutional Veil in Public International Law* (Oxford: Hart Publishing, 2007); R. Higgins, ‘The Legal Consequences

have something in common: we may describe them as cases of responsibility for the conduct of another. In all these instances, a state or an IO is responsible because of its aiding, assisting, directing and controlling, or coercing another state or IO in the performance of an internationally wrongful act, or for other reasons of connection such as membership of an IO or the attempt to eschew one's international obligations by getting another subject to breach them. These are all important examples of shared responsibility in international law, but they fall outside the remit of the present paper. From the point of view of rules on attribution of conduct, the wrongful conduct remains attributed to the aided, assisted, directed and controlled, or coerced state / IO, and it is not attributed 'directly' to the aiding, assisting, directing and controlling, or coercing state or IO.<sup>29</sup> This very subtle distinction may have important consequences when considering questions of reparation, invocation of responsibility, or distribution of liability. In this paper, I will use the term 'attribution of conduct' to mean only the 'direct' attribution of a certain conduct to a state/IO, and 'imputation of responsibility' to encompass both cases of 'direct' attribution and cases of 'indirect responsibility'.

## **B. Institutional links, factual links, and adoption of conduct**

General rules on attribution of conduct may be found both in the 2001 Articles on State Responsibility (ASR) and in the 2011 Articles on the Responsibility of International Organizations (ARIO). The ASR contain eight relevant provisions (Articles 4 to 11), which are usually deemed to be reflective of customary international law.<sup>30</sup> The ARIO only contain four such provisions (Articles 6 to 9). The purpose of these rules is to attribute the conduct of every individual or entity acting on behalf of a state or an international organization to that state or IO. The system was designed to avoid loopholes and to separate 'state' / 'IO' conduct from 'private' conduct.

Overall, attribution of conduct rests on three basic pillars. The first, and most important, set of rules concerns 'institutional links'. These concern those actors whose conduct is automatically attributed to a state or an international organization: all *de jure* state and IO

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for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties', 66 *Ann. Inst. Droit Int.* (1995-I) 249-469.

<sup>29</sup> The risk of confusion between attribution and indirect responsibility was highlighted by Ago in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) (Separate Opinion Judge Ago)*, 27 June 1986, ICJ Rep. 1986, 181, at [18].

<sup>30</sup> See the compilations of decisions edited by the UN Secretariat: A/62/62 and Corr.1 and Add.1 (2007); A/65/76 (2010).



organs,<sup>31</sup> *de facto* state organs,<sup>32</sup> other agents exercising IO functions,<sup>33</sup> and other individuals or entities exercising governmental authority.<sup>34</sup> In order for their conduct to be attributed, they must possess the relevant status before the conduct is carried out. Tautological as it may seem, the point is that organs and other such agents are those people through whom states and international organizations generally operate. So long as they are acting in their capacity (and even if abusing their authority), their *ex ante facto* institutional link with the state or the international organization renders their conduct an act of that state or international organization for the purposes of international responsibility. In this respect, it should be noted that off-duty, or private, conduct is never attributed to states or IOs, whereas *ultra vires* conduct is attributed.<sup>35</sup>

The second set of rules on attribution is that concerning ‘factual links’. Setting aside some special cases,<sup>36</sup> the most important type of factual link occurs when a person is acting under the instructions, direction or control of a state/IO. If an institutionally-linked agent (usually an organ) instructs, directs or controls the conduct of another (private) person or group of persons at the time the conduct is carried out, that conduct will be attributable to that state or international organization regardless of the status of those individuals. This complex rule, enshrined in Article 8 ASR, has been the object of a decades-long long judicial and doctrinal debate which cannot be exhaustively addressed here. Its application revolves around at least two focal points: ‘instructions’ and ‘direction or control’. Instructions must be understood as comprising both specific orders and more general ‘directives’ that leave some discretion to the actor as to how to accomplish a certain result.<sup>37</sup> As to ‘direction or control’, the conflict between the ICJ in *Nicaragua* and the ICTY in *Tadić* as to the correct threshold of attribution underlying these words has been authoritatively solved by *Bosnian Genocide* in favour of the *Nicaragua* decision.<sup>38</sup> One clear element arising from the outcome of this judicial dialogue is that the ‘direction or control’ must be ‘effective’, meaning that it must

<sup>31</sup> Article 4 ASR and Article 6 ARIO.

<sup>32</sup> Article 4(2) ASR, as interpreted in *Bosnian Genocide*, [390-395]. See ASR Commentaries, 42; see also I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford: Clarendon Press, 1983), 136; P. Palchetti, ‘Comportamento di organi di fatto e illecito internazionale nel Progetto di articoli sulla responsabilità internazionale degli Stati’, in M. Spinedi, A. Gianelli and M.L. Alaïmo (eds), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti: problemi e spunti di riflessione* (Milan: Giuffrè, 2006) 3-24, at 5-6.

<sup>33</sup> Articles 2(d) and 6 ARIO.

<sup>34</sup> Article 5 ASR.

<sup>35</sup> Article 7 ASR and Article 8 ARIO.

<sup>36</sup> Articles 9 and 10 ASR, respectively on the absence and default of governmental authorities and successful insurrectional and separatist movements.

<sup>37</sup> For instance, the ASR Commentaries, at 47, speak of general ‘instructions’ to carry out ‘missions’ abroad.

<sup>38</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, 27 June 1986, ICJ Rep. 1986, 14 (hereinafter *Nicaragua*), at [75], [86], [109-110] and [115]; *Prosecutor v. Tadić (Appeals Chamber)*, n. IT-94-1-A, 15 July 1999, 38 ILM 1518, at [115]-[145]; *Bosnian Genocide*, [402]-[406].

relate to the specific conduct under consideration and not generically to a whole group of actors, for example in the context of military or para-military operations.<sup>39</sup> Much less clear is the actual threshold of necessary control for conduct to be attributed. An often overlooked part of *Nicaragua* can be construed as authority for the proposition that ‘planning, direction, and support’ triggers the rule in Article 8 ASR,<sup>40</sup> but it is unclear whether this is a *minimum* threshold of ‘direction or control’ or just an instance of its application. A factual analysis will be necessary in each case to establish whether a state or IO was exercising sufficient control over the conduct under consideration, and some discretion is left to the deciding authority as to how to tackle this issue in practice. Significantly, the rule is meant to allow for attribution of conduct in those cases where those carrying out the conduct are actually state organs, but it is very difficult to prove the existence of an institutional link (for example, with relation to spies).<sup>41</sup>

One of the greatest shortcomings of the Articles on the Responsibility of International Organizations is that they do not explicitly contain a rule analogous to Article 8 ASR.<sup>42</sup> Although the International Law Commission sensibly explained that the definition of ‘agent’ in Article 2 ARIO is meant to encompass also this type of situation,<sup>43</sup> the use of a comprehensive term conflating institutional links and factual links of attribution creates unnecessary confusion. Institutional links must be understood separately from factual links because different rules apply to institutionally linked actors (whose every on-duty act is attributed, even if *ultra vires*) compared to factually linked actors (whose conduct going clearly beyond the instructions received is not attributed). Furthermore, in order for conduct to be attributed under the factual link rule, institutionally linked actors must instruct, direct or control private persons, so that a conflation of the two types of links leads to inextricable

<sup>39</sup> *Nicaragua*, [115] and *Bosnian Genocide*, [399-400].

<sup>40</sup> *Nicaragua*, [86]. This paragraph refers to the attribution of conduct of the ‘Unilaterally Controlled Latino Assets’, not the *contras*. While the famous ‘effective control’ statement (i.e. [115]) deals with the *contras* and explains that, insofar as military groups are concerned, control must not be generic, but specifically linked to the conduct (i.e. ‘effective’), the statement in [86] is, in my view, the most relevant part of the judgment concerning the *threshold* of control triggering attribution. In that regard, see I. Brownlie, ‘Issues of State Responsibility before the International Court of Justice’, in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing, 2004) 11-18, at 16 and G. Bartolini, ‘Il concetto di “controllo” sulle attività di individui quale presupposto della responsabilità dello Stato’, in M. Spinedi, A. Gianelli and M.L. Alaimo (eds), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti: problemi e spunti di riflessione* (Milan: Giuffrè, 2006) 25-52, at 26-27.

<sup>41</sup> See International Law Commission, ‘Summary records of the Twenty-Sixth session, meetings 1258-1260 on Draft Article 8’, *Yearbook...* 1974, vol. I, 32-47 (1974), 39.

<sup>42</sup> I had taken the view that this was an ‘unfortunate’ departure from the ASR in F. Messineo, ‘Things Could Only Get Better: *Al-Jedda* beyond *Behrami*’, 50 *Mil. L. & L. War Rev.* (2011) 321-346, at 325. See also C. Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the “Copy-Paste Approach”’, forthcoming in *International Organizations Law Review* (2012) (on file with author).

<sup>43</sup> International Law Commission, ‘Commentaries on the Draft Articles on the Responsibility of International Organizations’, *Report of the International Law Commission to the General Assembly*, A/66/10, available at <http://untreaty.un.org/ilc/reports/2011/2011report.htm>, 69-172 (ARIO Commentaries hereinafter), at 86.

circularities. If one is unsure whether an agent is a factually or institutionally linked agent, it will not be possible to know whether the conduct of a private person she is controlling would be attributed or not.

The third and final general rule on attribution of conduct is that a state or an international organization may adopt a certain conduct as its own after the conduct has taken place (*ex post facto*).<sup>44</sup> Again, for the rule to be triggered it is necessary that an institutionally linked actor issues a declaration or otherwise endorses the conduct of a person or group of persons. This rule essentially concerns cases in which attribution will not be an issue – and so may almost be deemed a ‘procedural’ rule. As this may perhaps be construed as a case of ‘indirect’ responsibility rather than one of ‘direct’ multiple attribution, it will not be further considered here.<sup>45</sup> However, it should be noted that some perplexities may arise as to the nature of the ‘acknowledgment’ if the conduct in question is also attributable to another subject of international law.

### 3. Multiple Attribution as the Default Rule

#### A. Conduct carried out by one person/entity acting on behalf of more than one state/IO at the same time

##### i. Possible interactions between attribution rules

There are two types of situation where multiple attribution of conduct could theoretically arise. First, the act or omission of *one person or entity* may trigger more than one attribution rule at the same time, meaning that the person or entity in question would be deemed to act on behalf of more than one state or IO at the same time. Second, a certain act or omission may be jointly carried out by *two or more persons or entities* each of which is acting on behalf of a separate state or IO. In the first type of situations (considered in this part), the conduct of one actor is attributed to more than one subject of international law at the same time. In the second type (considered in part 3.B below), there are two or more actors whose joint conduct is attributed to two or more international subjects.<sup>46</sup>

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<sup>44</sup> Article 11 ASR and Article 9 ARIO.

<sup>45</sup> But see A/CN.4/545 (2004), 27-28 (the agreements between the World Health Organization and the Pan American Health Organization integrating PAHO’s organs into the WHO are cast as a form of previous ‘acknowledgment’ by the WHO of PAHO’s conduct as its own).

<sup>46</sup> The related situation where multiple international subjects engage in separate conducts independently leading to prohibited outcomes is one of potential shared responsibility, but not one of multiple attribution: see above, note 20 and accompanying text.

Let us start with the first, and most complex, set of situations. The operation of attribution of conduct rules is, in the words of the ASR Commentaries, ‘cumulative’.<sup>47</sup> Given a certain conduct performed by one person or entity, the application of one of the attribution rules with relation to one subject of international law does not *ipso facto* exclude the application of the same or another attribution rule with relation to the same or another subject of international law. Except for the rules on the transfer of organs considered below (part 4), which constitute the only exception to this type of multiple attribution, nothing in the text of the ILC articles prevents such contemporaneous application of the rules to more than one subject of international law. This leads to a number of possible interactions between rules of attribution of conduct, some examples of which are considered in the table below.

The table shows those situations in which the conduct of *one* actor could be deemed to be the conduct of two or more states/IOs at the same time because of the contemporaneous application of two rules of attribution. It considers only permutations between two attribution rules at a time and illustrates the 21 most important cases of possible interaction between the main rules on attribution of conduct of states and IOs. Obviously, extra layers of complexity may arise where three or more rules apply at once: for instance, when a joint organ of two or more states/IOs is instructed, directed or controlled by another state/IO, attribution may potentially be to three or more subjects at once. Indeed, the table does not account for all the cases potentially arising from the existence of joint organs, for instance where a joint organ of two or more states/IOs instructs, directs or controls the act of a another state’s (or IO’s) organ. Rather than listing all possible cases, the aim of the table is simply to illustrate that this type of multiple attribution is conceptually possible and wholly consistent with the framework of attribution rules as codified by the ILC.

However, this does not mean that all the cases considered in the table are equally well established in theory and practice, nor that all situations mentioned therein will always entail multiple attribution. First, if the rule on transferred organs considered in part 4 below applies, attribution will be to only one subject. This important limiting factor is highlighted in the table. Furthermore, it must be recognized that courts have at times had difficulty with implementing the concept of multiple attribution in practice. Nonetheless, in my view the overall balance of the available practice considered below supports the possibility of multiple attribution.

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<sup>47</sup> ASR COMMENTARIES, 39.

<b>Conduct of one actor to whom two rules of attribution apply at the same time*</b>	<b>STATE ORGAN (DE JURE OR DE FACTO) Article 4 ASR</b>	<b>IO ORGAN Article 6 ARIO</b>	<b>ENTITY EXERCISING GOVERNMENTAL AUTHORITY Article 5 ASR</b>	<b>AGENT OR ENTITY EXERCISING IO FUNCTIONS Article 6 ARIO</b>	<b>ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY A STATE Article 8 ASR</b>	<b>ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY AN IO</b>
<b>STATE ORGAN (DE JURE OR DE FACTO) Article 4 ASR</b>	Joint organ established by two or more states; <i>or</i> organ of two or more states at once	Joint organ established by two or more states/IOs; <i>or</i> organ of two or more states/IOs at once	A state organ is entrusted with exercising the governmental authority of another state	A state organ is entrusted with IO functions	A state organ is directed, instructed or controlled by another state	A state organ is directed, instructed or controlled by an IO
<b>IO ORGAN Article 6 ARIO</b>		Joint organ established by two or more IOs; <i>or</i> organ of two or more states/IOs at once	An IO organ is entrusted by a state to exercise governmental authority	An IO organ is called to exercise functions of another IO	An IO organ is directed, instructed or controlled by a state	An IO organ is directed, instructed, or controlled by another IO
<b>ENTITY EXERCISING GOVERNMENTAL AUTHORITY Article 5 ASR</b>			Entity (not an organ) is exercising the governmental authority of more than one state at the same time	Entity (not an organ) is exercising the governmental authority of a state and the functions of an IO at the same time	Entity (not an organ) is exercising the governmental authority of a state and acting under the direction, instruction or control of another state	Entity (not an organ) is exercising the governmental authority of a state and acting under the direction, instruction or control of an IO
<b>AGENT OR ENTITY EXERCISING IO FUNCTIONS Article 6 ARIO</b>				An agent or entity is exercising the functions of two or more IOs at the same time	Agent or entity exercising the functions of an IO and acting under the direction, instruction or control of a state	Agent or entity exercising the functions of an IO and being instructed, directed or controlled by another IO
<b>ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY A STATE Article 8 ASR</b>					Person or entity acting under the instructions, direction or control of more than one state at the same time	Person or entity acting under the instructions, direction or control of (one or more) state and (one or more) IO.
<b>ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY AN IO</b>						Person or entity acting under the instructions, direction or control of two or more IOs

\* Note that, if Article 6 ASR or Article 7 ARIO apply, multiple attribution does not arise (see below, part 4).

## ii. Joint organs established *ad hoc*: *Eurotunnel*, *Hess* and *Nauru*

Let us start by considering how rules on state/IO organs may potentially interact with each other. Two types of cases clearly emerge from practice. First, an entity or person may be established *ad hoc* by two or more states and/or IOs as their joint organ – for instance, the British-French Intergovernmental Commission overseeing the operation of the Channel's tunnel which was mentioned above;<sup>48</sup> second, an organ of a state/IO may sometimes act also as an organ of another state/IO – for instance, customs officials of EU member states, who are state organs of the member states also acting on behalf of the EU when imposing custom duties.

In the case of a joint organ, attribution will plainly be to all subjects which established the joint organ. This was clarified by the ILC in the ASR Commentaries.<sup>49</sup> For example, the Coalition Provisional Authority in Iraq could be seen as a joint organ of the coalition partners, so that any joint action or omission could be attributed directly to all coalition partners.<sup>50</sup> The rule was recently reaffirmed in the *Eurotunnel* arbitration award, which established that the Intergovernmental Commission (IGC) overseeing the tunnel fixed link was indeed a joint organ of France and the United Kingdom and that 'if a breach of the Concession Agreement [had] resulted from action taken by the IGC both States would be responsible accordingly'.<sup>51</sup>

Although the rule is now established, an older case concerning the European Convention on Human Rights exemplifies some of the difficulties arising with its application. In the *Hess* case, one of the questions was whether the detention of a Nazi war criminal in the Spandau prison following the Nuremberg trials could be attributed to the United Kingdom.<sup>52</sup>

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<sup>48</sup> See above note 11 and accompanying text.

<sup>49</sup> ASR COMMENTARIES, 44 (the conduct of 'a single entity which is a joint organ of several States ... is attributable to [all] States').

<sup>50</sup> See generally S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in P. Shiner and A. Williams (eds), *The Iraq War and International Law* (Oxford: Hart Publishing, 2008) 185-230.

<sup>51</sup> *Eurotunnel arbitration*, above n. 12, [179] (the Tribunal went on to consider certain omissions of the IGC as well as the states concerned as being in breach of the Concession agreement: see [395]).

<sup>52</sup> *Hess v. United Kingdom*, n. 6231/73, 28 May 1975, 2 DR 72. To be precise, the question was couched in terms of 'jurisdiction' under Article 1 ECHR which comprises both attribution issues and other issues. Two other similar cases concerning the indivisibility of responsibility of the Four

Located in (the British sector of) Berlin, the prison was run jointly by the United States, the United Kingdom, the Soviet Union and France. The European Commission noted that the prison had been established in 1945 by the Allied *Kommandatura*, which was at the time a joint organ comprised of four Governors of the four countries, taking decisions on a consensual basis. This led the Commission to the conclusion that the consequent responsibility must be deemed indivisible, because ‘the responsibility for the prison ... [was] exercised on a Four Power basis’ and the UK acted ‘only as a partner in the joint responsibility which it shares with the three other Powers’: such ‘joint authority [could] not be divided into four separate jurisdictions’.<sup>53</sup>

However, the International Court of Justice took a different view in the *Nauru* case.<sup>54</sup> The dispute was about the missed rehabilitation of certain phosphate lands in Nauru in colonial times. The United Nations had granted a Trusteeship jointly to the United Kingdom, New Zealand and Australia over the territory of Nauru and constituted them into an ‘Administering Authority’ which was in practice run by Australia on behalf of the three countries.<sup>55</sup> One of the issues was whether Nauru could bring a case against Australia when such a claim, in Australia’s view, was ‘in substance, not a claim against Australia itself but a claim against the Administering Authority in relation to Nauru’.<sup>56</sup> One side of this problem was that of establishing the ‘indispensable parties’ to a dispute before the Court.<sup>57</sup> This was a procedural, rather than a substantive, matter, and it does not concern

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Powers for Germany and Berlin are mentioned in the First Crawford Report, above n. 16, at 46 fn. 300.

<sup>53</sup> *Hess v. United Kingdom*, above, at 74. See B. Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge: Cambridge University Press, 2008), 372: according to him this case shows that ‘accountability may have evaporated by virtue of a recognition that multilateral military arrangements involve the assumption of “communal” responsibilities that are indivisible and cannot imputed to one Contracting party’.

<sup>54</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections)*, 26 June 1992, ICJ Rep. 1992, 240. See Third Crawford report, above n. 19, [270-271].

<sup>55</sup> *Certain Phosphate Lands in Nauru*, [41]-[47]. The territory had been a Trusteeship also under the League of Nations system.

<sup>56</sup> *ibid.*, [39].

<sup>57</sup> See Nollkaemper, above n. 19, 20-21. In the *Monetary Gold* decision, the Court had refused to decide a case brought by Italy against the Allies because a separate question on the responsibility of Albania, preliminary to the question under dispute, could not be addressed without Albania’s consent to the Court’s jurisdiction. See *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Question)*, 15 June 1954, ICJ Rep. 1954, 19, at 32 and *Certain Phosphate Lands in Nauru*, [55].

us here. The other side of the problem was whether the conduct of the Administering Authority of Nauru, which could be deemed a joint organ of the UK, New Zealand and Australia, would give rise to the independent responsibility of Australia – in other words, whether the conduct of the Authority could be attributed to Australia separately from the other two countries. The court held that Australia could indeed be sued independently:

It is ... contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. In this connection, Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits; but it is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible in *limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.<sup>58</sup>

In sum, both the *Eurotunnel arbitration* and *Nauru* constitute recent and consistent authority for the proposition that the act of a joint organ may be attributable to each state (or international organization) comprising that organ.<sup>59</sup>

### iii. Organs belonging to more than one state/IO: the EU as a case-study

Rules on state/IO organs may also interact with each other when there is no *ad hoc* joint organ. As we said above, an organ of a state or IO may at times also act as an organ of another state/IO (or more). In this case, its on-duty (and even if *ultra vires*) conduct would be attributed to both states/IOs, unless the rules on transferred organs considered below in part 4 apply. For example, consider the position of customs officials of member states of the

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<sup>58</sup> *Certain Phosphate Lands in Nauru*, [48].

<sup>59</sup> See Nollkaemper, above n. 19, 7-8.



EU, who act simultaneously as organs of their state and of the EU. Can their conduct be attributed to both the EU and the member state under international law?

The literature on the responsibility of Member states for acts arising from the EU legal order is vast,<sup>60</sup> but the question addressed here is quite narrow. We are not interested in ‘piercing the veil’ issues, nor in assessing whether member states are responsible for decisions of the EU or vice versa. We are most certainly not considering all potential cases of indirect responsibility of either member states or the EU for aiding/abetting, coercing each other or even circumventing their international obligations through each other.<sup>61</sup> The question here is whether the implementation of EU acts by member states can be directly attributed to both the EU and the member state concerned or whether it must be attributed exclusively either to the EU or to a member state. Because the customs union is a matter of exclusive EU competence where binding EU directives and regulations apply,<sup>62</sup> the acts and omissions of customs officials at the borders of EU member states constitute a perfect example of this problem.<sup>63</sup>

In its comments to the International Law Commission during the drafting of the ARIO, the European Commission took the view that when implementing a binding act of the European Union (EU), organs of member

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<sup>60</sup> See e.g. P. Eeckhout, ‘The EU and its Member States in the WTO - Issues of Responsibility’, in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (New York: Oxford University Press, 2006) 449-464; F. Hoffmeister, ‘Litigating against the European Union and its Member States - Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’, 21 *Eur. J. Int’l L.* (2010) 723-747; P.J. Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’, 7 *Int’l Org. L. Rev.* (2010) 9-33; E. Paasivirta, ‘Responsibility of a Member state of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations’, 7 *Int’l Org. L. Rev.* (2010) 49-61; E. Steinberger, ‘The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member States’ Membership of the WTO’, 17 *Eur. J. Int’l L.* (2006) 837-862; S. Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’, in M. Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden: Martinus Nijhoff, 2005) 405-421; J.W. van Rossem, ‘Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community’, 40 *Neth. Y.B. Int’l L.* (2009) 183-227.

<sup>61</sup> See above para. 2.A.

<sup>62</sup> See Article 3(1)(a) and Articles 28-33 of the Treaty on the Functioning of the European Union; see also Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as subsequently amended, and Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code).

<sup>63</sup> The fundamental assumption made here is that attribution of conduct in this context does not constitute a *lex specialis* for the purposes of Article 64 ARIO, i.e. that the rules in ARIO would fully apply here. But see Hoffmeister, above n. 60, for the contrary view.

states act as *de facto* organs of the EU so that ‘the conduct of the organ of a member State would be attributed [to the EU]’.<sup>64</sup> This position was essentially based on a number of WTO panel reports which had accepted the EU’s own contention to that effect.<sup>65</sup> In fact, the European Commission had called for a specific rule to be added to the ARIIO stating that acts of member states implementing binding rules of regional organisations should only be attributed to the IO in question.<sup>66</sup> In refuting this view, Special Rapporteur Gaja relied on the European Court of Human Rights in *Bosphorus*<sup>67</sup> and on the European Court of Justice in *Kadi*<sup>68</sup> as authorities which ‘examined the implementation of a binding act that left no discretion’ and ‘clearly [did] not lend support to the proposal of considering that conduct implementing an act of an international organization should be attributed to that organization’.<sup>69</sup> Indeed, the WTO panel reports relied upon by the European Commission could perhaps be taken as simply reflecting the procedural issues specific to those cases in which the EU was the only respondent also on behalf of its member states (and even with relation to measures adopted only by member states). As the panel made clear in *Biotech*, this acceptance of responsibility by the EU was what mattered:

It is important to note that even though the member State safeguard measures were introduced by the relevant member States and are applicable only in the territory of the member States concerned, the European Communities as a whole is the responding party in respect of the member State safeguard measures. This is a *direct consequence* of the fact that the Complaining Parties have *directed their complaints against the European Communities, and not individual EC member States*. The European Communities *never contested* that, for the purposes of this dispute, the challenged member State measures are attributable to it under international law and hence can be considered EC measures.<sup>70</sup>

Cast in these terms, this was perhaps a procedural question of acceptance of

<sup>64</sup> A/CN.4/610 (2009), 12.

<sup>65</sup> See Panel Report, *European Communities – Geographic Indications*, WT/DS174/R, 15 March 2005, [7.98] and [7.725]; see also Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, 16 June 2006 and Appellate Body Report, WT/DS315/AB/R, 13 November 2006; Panel Report, *European Communities – Biotech*, WT/DS 291/R, 29 September 2006, [7.101].

<sup>66</sup> Hoffmeister, above n. 60, 728-729.

<sup>67</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland (Merits)* (GC), n. 45036/98, 30 June 2005, (2006) 42 EHRR 1, at [153].

<sup>68</sup> *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, nos. C-402/05 P and C-415/05 P, 3 September 2008, [2008] 3 CMLR 41, at [314].

<sup>69</sup> A/CN.4/610 (2009), 13.

<sup>70</sup> Panel Report, *European Communities – Biotech*, WT/DS 291/R, 29 September 2006, [7.101] (emphasis added).

attribution under Article 9 ARIO rather than a statement in support of exclusive attribution.<sup>71</sup> Furthermore, an older WTO case in which a challenge was proposed by the US against both the European Communities and two of its member states could be deemed a better authority in this regard, because the question of multiple attribution was specifically raised and (ambiguously) solved in support of potential dual attribution.<sup>72</sup>

Be that as it may, it seems that both the European Commission and the Special Rapporteur took the question from an odd angle. If according to EU law certain organs of member states are assigned certain functions of the EU – namely the implementation of EU measures under Article 291(1) of the Treaty on the Functioning of the EU – each act of implementation becomes a situation in which the organs of the state are *de jure*, and not *de facto*, organs of the EU for the purposes of Article 5 ARIO. They are also, at the same time, organs of their member states. Let us assume that the rules on transferred organs which we shall analyse in Part 4 do not apply in this context, because state organs implementing EU binding acts are not ‘transferred’ to the EU when implementing EU acts.<sup>73</sup> The result is a plain situation of dual attribution where Article 4 ASR and Article 5 ARIO apply at the same time: there is no need to choose between attribution to the EU and attribution to the member state – and the authority of *Bosphorous* and *Kadi* is not necessary here.

#### **iv. Other cases: state/IO functions and instructions, direction or control**

So far, we have only discussed the interaction between rules of attribution concerning organs, but the table above contains many more examples of potential multiple attribution engaging the other attribution rules. These other rules cannot be analysed here in detail, but two potential objections underlying the proposed system of multiple attribution must be addressed.

First, the model suggests that it is possible for an entity to exercise at the same time the governmental authority of two or more states under the

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<sup>71</sup> See Kuijper, above n. 60, 20.

<sup>72</sup> Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, 22 June 1998, [8.16] as interpreted by Hoffmeister, above n. 60, 732 (but the author then reaches the conclusion that the subsequent WTO reports mentioned above overruled this approach).

<sup>73</sup> See *ibid.*, 727. But see also Kuijper, above n. 60, 16.

terms of Article 5 ASR. How can this situation arise? In the ASR Commentaries, the threshold for the application of Article 5 is that of being ‘empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority’.<sup>74</sup> Examples of situations triggering the rule are ‘parastatal’ entities such as ‘former State corporations’ which have been ‘privatized but retain certain public or regulatory functions’.<sup>75</sup> In turn, the concept of ‘governmental authority’ is not clearly defined. The Commentaries acknowledge that ‘beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions’.<sup>76</sup> Given the nature of this enquiry, the question is whether it possible to reach the conclusion that a certain entity is acting at the same time in the exercise of the governmental authority of two or more states. Although there is little judicial practice confirming this, it seems that nothing in principle prevents a situation such as this from arising. For example, a private military and security company (PMSC) could be entrusted by a joint organ with certain governmental functions. If the Coalition Provisional Authority in Iraq, rather than the US government, had contracted those companies which were providing services at Abu Ghraib prison,<sup>77</sup> the question would have arisen whether the conduct of the PMSC could be attributed to all coalition partners – and an affirmative answer would have been likely.<sup>78</sup> Similarly, a PMSC could be exercising at the same time the functions of an IO and elements of the governmental authority of a state, for instance if contracted by a state to contribute to a UN peacekeeping operation.<sup>79</sup>

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<sup>74</sup> *ibid.*

<sup>75</sup> ASR COMMENTARIES, 42.

<sup>76</sup> ASR COMMENTARIES, 43.

<sup>77</sup> See the U.S. Court of Appeal (D.C. Circuit) judgment in *Saleh v. Titan Corp.*, 11 September 2009, 580 F.3d 1.

<sup>78</sup> On responsibility of PMSCs generally, see among many others F. Francioni and N. Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford: Oxford University Press, 2011); C. Hoppe, ‘Passing the Buck: State Responsibility for Private Military Companies’, 19 *Eur. J. Int’l L.* (2008) 989-1014; C. Lehnardt, ‘Private military companies and state responsibility’, in S. Chesterman and C. Lehnardt (eds), *From mercenaries to market: the rise and regulation of private military companies* (Oxford: Oxford University Press, 2007) 139-157.

<sup>79</sup> On the use of PMSCs by the UN, see the report of the UN Secretary-General on outsourcing practices, A/59/227 (2004) and O. Bures, ‘Private military companies: A second best peacekeeping option?’, 12 *Int’l Peacekeeping* (2005) 533-546; C. Lehnardt, ‘Peacekeeping’, in S. Chesterman and A. Fisher (eds), *Private security, public order: the outsourcing of public services and its limits* (Oxford: Oxford University Press, 2009) 205-221, at 207-208.

The second potential objection arises from the suggestion in the table that it is possible for a person or entity to be at the same time under the instructions, direction or control of two or more states/IOs. At first sight, this may seem to imply that ‘effective’ control can be ‘effective’ with relation to more than one subject of international law at the same time – but this is a red herring. As briefly noted above, the rule in Article 8 ASR is split into at least two components, ‘instruction’ and ‘direction or control’. The complex question of what ‘effective control’ means and what degree of control triggers the ‘direction or control’ threshold only applies to the second of these two elements of Article 8. The rule on ‘instructions’, including general directives which leave some discretion as to how they are carried out, can lead to multiple attribution. It is perfectly possible for someone to have received general instructions to carry out a certain conduct by a state/IO and then to be under the more specific ‘effective’ control of another state/IO when carrying out the orders. Double attribution would ensue.

Finally, a general point must be made concerning these cases. All attribution of conduct rules, especially as interpreted in the *Bosnian Genocide* case,<sup>80</sup> must rely on the existence of institutionally linked actors (organs), who are either acting themselves or instructing, directing or controlling the acts of others (in the case of factual links).<sup>81</sup> It follows that, once it is established that joint organs may exist and indeed give rise to multiple attribution of conduct, as we have discussed above, the fact that joint organs may also give rise to joint factual links of instruction, direction or control is a necessary logical consequence. So if the Intergovernmental Commission overseeing the Channel Tunnel Fixed Link instructed, directed or controlled a private actor, multiple attribution of conduct to France and the UK would ensue by operation of Article 8 ASR combined with (two instances of) Article 4 ASR. The ASR Commentaries seem to explicitly

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<sup>80</sup> Above n. 17.

<sup>81</sup> ASR COMMENTARIES, 38.

recognize that someone might be operating under the joint instructions of two states at a time.<sup>82</sup>

**B. Conduct jointly carried out by two or more persons/entities acting on behalf of different states/IOs**

All the cases of multiple attribution we analysed so far concern conduct carried out by one person or entity acting on behalf of more than one subject of international law at the same time. We must now consider the other case of multiple attribution of conduct, arising when the same conduct is carried out jointly by two or more actors each of whom is acting on behalf of a different state/IO. Consider, for instance, two soldiers belonging to different coalition partners in Iraq jointly patrolling a certain area in a tank at the beginning of the conflict in 2003. If civilians were unlawfully harmed by the tank, could the conduct in breach of international law be attributable to both states?

The answer to this question is affirmative. In this case, the question is not one of interaction between rules of attribution of conduct concerning one actor, but of the simple application of the rules with relation to each subject of international law concerned. Each of the two soldiers in the example is plainly a state organ under Article 4 ASR, and nothing in the text of the rules (nor in the authorities from which they are derived) seems to suggest that cooperation between different subjects of international law cannot lead to multiple attribution in cases like this.

The complexity, however, arises when trying to define what is the relevant conduct, i.e. the *one* act or omission which is carried out jointly and which constitutes an internationally wrongful act. It is difficult to understand what precisely is ‘joint’ conduct of two or more actors. In many cases, one could well reach the conclusion that there is not ‘one’ conduct in breach of international law, but ‘two’ (or more) conducts each independently attributable only to one of the two states – a situation somewhat similar to *Corfu Channel* (the difference being that the time, place and obligation breached would be the same, rather than different).<sup>83</sup>

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<sup>82</sup> ASR COMMENTARIES, 44.

<sup>83</sup> Above note 20.

For instance, if the two soldiers mentioned above were jointly patrolling a street in Baghdad on foot, and they unlawfully killed a civilian together, it would be entirely possible to conceptualise the event as two separate internationally wrongful acts rather than one internationally wrongful act attributable to two states. As we shall presently see, the principle of independent responsibility operates in such a way that the final result would be identical (both states would be responsible), but the fact remains that in some scenarios there will indeed be one indivisible conduct which is attributable to two state organs acting together.

Courts have sometimes had some difficulty with this type of situation, especially in the context of invocation of responsibility. For instance, the European Court of Human Rights declared Saddam Hussein's 2006 application against 21 European states inadmissible, among other reasons, because the applicant had not specified which of the coalition partners was responsible for the alleged violations of his human rights.<sup>84</sup> Although the Court employed the language of Article 1 ECHR (i.e. the language of 'jurisdiction'), the point was also that there was not sufficient evidence of attribution of conduct:

The Court considers these jurisdiction arguments to be based on submissions which are not substantiated. While the applicant referred to certain UN documents, press releases and academic publications, these referred, without more, to coalition partners acting together. The applicant did not address each respondent State's role and responsibilities or the division of labour/power between them and the US. He did not refer to the fact or extent of the military responsibility of each Division for the zones assigned to them. He did not detail the relevant command structures between the US and non-US forces except to refer to the overall Commander of coalition forces who was at all relevant times a US General. Finally, and importantly, he did not indicate which respondent State (other than the US) had any (and, if so, what) influence or involvement in his impugned arrest, detention and handover. Despite the formal handover of authority to the Iraqi authorities in June 2004 and elections in January 2005, the applicant simply maintained, without more, that those forces remained de facto in power in Iraq.<sup>85</sup>

This should be taken as an important practical warning concerning multiple attribution of conduct. The Court implicitly said that when invoking the

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<sup>84</sup> *Hussein v. Albania and others (Admissibility)*, n. 23276/04, 14 March 2006, (2006) 42 EHRR SE16.

<sup>85</sup> *ibid.*, 224-225.

multiple responsibility of several actors, the claimant must be able to prove that a link of attribution exists with each of them, that is that they must have genuinely acted together. Although Hussein's claim was rejected, the judgment should not necessarily be read as preventing future collective claims based on the joint exercise of power.

### **C. The principle of independent responsibility**

The main textual argument in favour of multiple attribution is that both the Articles on State Responsibility and those on the Responsibility of International Organization clearly recognize the possibility that one wrongful act may determine the responsibility of a plurality of international subjects at the same time. Crucially, however, such plurality is reduced to bilateral relationships where issues of invocation of responsibility are concerned.<sup>86</sup> The 'principle of independent responsibility'<sup>87</sup> is enshrined in Article 47(1) ASR:

Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

And Article 48(1) ARIO clarifies how the rule works when IOs are involved:

Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

These rules establish the independence of each bilateral legal relationship between each injured state/IO and each responsible state/IO. They are also a clear recognition that states may act jointly, and so may international organizations, or states and international organizations. In this case, they would each be separately responsible for the same wrongful act of which they are 'co-authors'.

This principle of independent responsibility has been taken by some as proof that attribution of conduct should, in principle, be exclusive.<sup>88</sup> The fact that the system of international responsibility was designed with

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<sup>86</sup> See generally Third Crawford report, above n.19, [263]-[283].

<sup>87</sup> ASR COMMENTARIES, 124.

<sup>88</sup> See above, note 8.



bilateral relations and obligations in mind would make it ill-equipped to deal with the multiple attribution of conduct to more than one actor at once. In my view, questions of invocation should be considered wholly separately from questions of attribution of conduct. While it is true that international responsibility has often been understood as a bilateral affair, the system of international responsibility is evolving from one in which individual (bilateral) causes of action (*à la* Brownlie) were the focus of discussions on responsibility (at least among Anglo-American lawyers),<sup>89</sup> to a ‘general law of wrongs’ in international law.<sup>90</sup> In this Copernican revolution, collective action in breach of obligations would be best understood in terms of joint ‘violations’ of the ‘rules’, rather than separate breaches of bilateral obligations. But even if one adopted a strictly ‘bilateral’ approach, precisely the fact that invocation of responsibility remains possible towards each of the parties to whom conduct is attributed constitutes proof that the same conduct *can* be attributed to multiple parties. In other words, the underdevelopment of the system of invocation of responsibility when multiple actors are concerned does not impinge on the basic framework of attribution, which permits multiple attribution.

If the thesis adopted here is correct, then one may wonder what is the origin of the contrary idea that attribution should be exclusively to one subject of international law at a time. It would be interesting to investigate whether this might perhaps be a fallacy deriving from domestic law analogies. For instance, both in English and French law the concept of ‘control’ is used when disentangling cases of potential multiple attribution in order to find the *one* responsible party.<sup>91</sup> But the premise of domestic private law is completely different from that of international responsibility

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<sup>89</sup> Compare Brownlie, above n. 32, 189-192 with Reuter, above n. 4, 583-618.

<sup>90</sup> See generally J. Crawford, *The International Law Commission's Articles on State Responsibility: introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), 1-60.

<sup>91</sup> See e.g. *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd and McFarlane* (1946) 2 All ER 345 and H. Capitant, F. Terré and Y. Lequette, *Les grands arrêts de la jurisprudence civile, Tome 2. Obligations, Contrats spéciaux, Sûretés*, 12<sup>th</sup> edn, Paris: Dalloz, 2008, at 463-465.

for internationally wrongful acts, so such domestic law analogies are likely to be misleading.<sup>92</sup>

In international law, where questions of fault are dealt with in a completely different way (if at all), there is no logical or legal reason why a given conduct cannot be attributable to one or more states and/or one or more international organizations at the same time. International law has no difficulty with the fact that the same conduct can at the same time be seen as the act of an individual and that of a collective entity, this ‘duality of responsibility’ being a ‘constant feature of international law’.<sup>93</sup> Likewise, a given conduct may well ‘belong’ to more than one collective entity at once. This can be explained in terms of layers of responsibility, or of spheres of influence, or even by analogy with quantum physics.<sup>94</sup> Quite simply, the point is that the answer to the ‘whodunit’ question in international law often yields two or three results at once: someone can be wrongfully detained by an individual, two states and an International Organization all at the same time. As the ASR Commentaries put it:

In the application of [the] principle [of independent responsibility], ... the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them.<sup>95</sup>

Substantially the same concept was expressed by the Commentaries to ARIO:

Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to

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<sup>92</sup> See J. Crawford, ‘The System of International Responsibility’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 17-26, at 21-22 (international responsibility forms ‘a single system, without any precise comparator in national legal systems’); A. Pellet, ‘The Definition of Responsibility in International Law’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 3-16, at 13 (highlighting the similar view by Kelsen and Arangio-Ruiz); Reuter, above n. 4, 584-595 (on the ‘unity of the theory of responsibility’, which is nor criminal nor civil).

<sup>93</sup> *Bosnian Genocide*, [173]. See Article 58 ASR and Article 66 ARIO. See also H. Lauterpacht, *International law and human rights* (London: Stevens, 1950), 40-43; A. Nollkaemper, ‘Concurrence Between Individual Responsibility and State Responsibility in International Law’, 52 *Int. Comp. Law. Q.* (2003) 615-640, at 618-621.

<sup>94</sup> See A. Clapham, ‘The Subject of Subjects and the Attribution of Attribution’, in L. Boisson de Chazournes and M. Kohen (eds), *Liber Amicorum Vera Gowlland-Debbas* (Leiden: Martinus Nijhoff, 2010) 45-58, at 57-58 (where reference is made to Bohr’s theory of complementarity regarding the wave-particle duality).

<sup>95</sup> ASR COMMENTARIES, 124.

a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.<sup>96</sup>

This is unsurprising. As we saw above, Anzilotti remarked back in 1902 that attribution of conduct is the result of an evaluation based on law.<sup>97</sup> This legal process may apply at the same time with reference to more than one subject. As a default position, all the rules on attribution of conduct we have considered are susceptible to being applied contemporaneously to one or more subjects of international law, so that the same conduct may be deemed to have been performed by a state and an IO, more than one state, more than one IO, etc.. Furthermore, conduct might arise through the concurrent action or omissions of two or more persons acting each on behalf of one state/IO. However, there is one rule designed to prevent multiple attribution of conduct from occurring if certain requisites are met. This is the rule on transferred organs, which constitutes the exception to the default rule on multiple attribution. It is to this rule that we shall now turn.

#### **4. Exclusive Attribution of Transferred Organs as an Exception**

##### **A. Organs transferred to a state**

Suppose that, at the request of the receiving government, thirty Italian police officers working in Bologna are sent for a few months to San Marino to be employed in a special anti-fraud operation of the Sammarinese police. There, they participate in the activities of the local police. In particular, following the orders of a local judge, they carry out the seizure of some documents in the Sammarinese branch of a Swiss bank. Switzerland holds this act to be a violation of the obligations arising under a multi-lateral treaty signed *inter alia* by both Italy and San Marino. Can Switzerland claim that the seizure of the documents is attributable to Italy under international law? Could it claim it is attributable to San Marino? If one applied the rules on attribution that we considered above, and what we just said on multiple attribution, the answer would plainly be yes to both questions. Italian police

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<sup>96</sup> ARIO COMMENTARIES, 83.

<sup>97</sup> See above note 16.

officers are *de jure* organs of the Italian Republic (Article 4 ASR). In this instance, they are also acting under the instructions, direction or control of Sammarinese authorities (Article 8 ASR). This would be a textbook example of dual attribution, were it not for the operation of one rule we have not analysed so far: Article 6 ASR. This provides that

the conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

According to the Commentaries, this means that, in our example, if Italy actually puts its police officers at the disposal of San Marino and they exercise Sammarinese governmental authority, their conduct will be attributed only to San Marino, and not to Italy.<sup>98</sup> But, because this is an exception to the general rule allowing for dual attribution, it must be narrowly construed:

Article 6 deals with the *limited* and *precise* situation in which an organ of a State is *effectively* put at the disposal of another State so that the organ may temporarily act *for its benefit and under its authority*. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.<sup>99</sup>

Under the limited circumstances in which it applies, Article 6 ASR acts as a rule on the transfer of attribution (and thus, often, also responsibility) when organs are transferred. According to the Commentaries, the two key elements of this rule are ‘being placed at the disposal’ of the receiving state and exercising elements the governmental authority thereof ‘with the consent, under the authority of and for the purposes of the receiving State’.<sup>100</sup> Back in 1971, Special Rapporteur Ago had described in detail why this was to be an exceptional rule. In many cases, the transfer of an organ to another state was not actual, but only nominal, in that the lending state maintained authority over the lent organ:

the conduct of an organ lent by one State to another State is ..., attributable to the [lending] State if the loan is merely apparent or if the organ has not really been placed at the disposal of the second State,

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<sup>98</sup> ASR COMMENTARIES, 44.

<sup>99</sup> *ibid.* (emphasis added).

<sup>100</sup> ASR COMMENTARIES, 44.

because in that case the organ will in fact still be acting under the control and in accordance with the instructions of the State to which it belongs.<sup>101</sup>

A case in point was *Attorney General v. Nissan* before the UK House of Lords in 1969.<sup>102</sup> British troops had requisitioned Mr Nissan's hotel in Nicosia during their participation in a truce mission at the request of the Cyprus government, which later became a UN peacekeeping operation. According to the British government, the troops were acting as agents of Cyprus first, and as agents of the United Nations later, and as such their conduct was not attributable to the UK. Their Lordships instead held that UK troops remained 'soldiers of Her Majesty' subject to UK command throughout the time, and their conduct should thus be attributed to the UK, not Cyprus nor, later, the UN.<sup>103</sup>

In fact, the rule in Article 6 would not prevent dual attribution in at least two cases. First, when organs are not fully transferred, and the sending state still partly controls the transferred organ, attribution will be to both states under Article 4 (for the sending state) and Article 8 ASR (inasmuch as it is controlled by the receiving state) respectively. Second, in certain cases lent organs would act as organs of two states at the same time:

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.<sup>104</sup>

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<sup>101</sup> *Yearbook*... 1971, vol. II(1), 199-274 (1971), 272. See also ASR COMMENTARIES, 44.

<sup>102</sup> *Attorney-General v. Nissan*, [1969] UKHL 3, [1970] 1 AC 179, 11 February 1969, 44 ILR 359.

<sup>103</sup> *Yearbook*... 1971, vol. II(1), 199-274 (1971), 271.

<sup>104</sup> *ibid.*, 268. A footnote by Ago here says: 'In spite of this formal situation, the person in question will in fact be acting only for one of the two States or at all events in different conditions for each of them. His situation should not be confused with that of a "joint" organ, defined as such by an agreement between two States. The actions of a joint organ are acts of each of the two States at the same time and may consequently involve the international responsibility of both of them'.

For article 6 to apply, not only has the transferred organ to be entrusted with governmental functions of the receiving state,<sup>105</sup> it also has to act ‘in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State’.<sup>106</sup> This echoes what was already said by Ago in his third report of 1971.<sup>107</sup>

A very interesting example of transferred organs concerns the Principality of Andorra.<sup>108</sup> Before a treaty of 1993 settled its status as a state (and now a member of the UN), Andorra was a *sui generis* entity proximate to statehood. Its territory has long been under the joint sovereignty of two co-princes: the President of the French Republic and the Spanish Bishop of Urgel.<sup>109</sup> In application of an ancient custom, France and Spain seconded some of their own judges to the *Tribunal de Corts* of the Principality. Drozd and Janousek were prosecuted by the Tribunal and sentenced to imprisonment for armed robbery; they then instituted proceedings against France and Spain before the European Court of Human Rights. The Court considered that one question to be decided was whether ‘the acts complained of by Mr. Drozd and Mr. Janousek [could] be attributed to France or Spain or both, even though they were not performed on the territory of those States’.<sup>110</sup> The answer was negative, because in the Court’s view this was what we would call a complete transfer of organs from France and Spain to Andorra:

Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.<sup>111</sup>

*Drozd and Janousek* and Article 6 ASR were relied upon as authorities by the British government before the High Court in the

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<sup>105</sup> *ibid.*, 45 (‘A [...] long-standing example of a situation to which Article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom’).

<sup>106</sup> *ibid.*, 44.

<sup>107</sup> *Yearbook*... 1971, vol. II(1), 199-274 (1971), 267.

<sup>108</sup> See *Drozd and Janousek v. France and Spain*, n. 12747/87, 26 June 1992, (1992) 14 EHRR 745.

<sup>109</sup> See J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford: Clarendon Press, 2006), 197.

<sup>110</sup> *Drozd*, [91].

<sup>111</sup> *ibid.*, [96].

*Al-Saadoon* case.<sup>112</sup> They argued that British troops in Iraq were put at the disposal of the Iraqi government in the sense of Article 6 ASR so that their conduct (the detention of Al-Saadoon and another person charged with war crimes and their imminent transfer to Iraqi authorities) would be attributable to Iraq rather than the United Kingdom, just as the conduct of French and Spanish judges operating in Andorra was only attributable to Andorra. The High Court correctly held the two situations distinguishable, because a complete transfer had not occurred. In the Court's view, 'Article [6] deals with a *limited situation* in which the organ is *acting under the exclusive direction and control of the state at whose disposal it is placed*'.<sup>113</sup> This was not the case in the circumstances under analysis. It was 'plainly' wrong to say 'that the British forces have no autonomous role in the matter of the claimants' detention or transfer into the custody of [Iraqi authorities]', because it was still 'in their power to refuse to transfer the claimants'.<sup>114</sup> The Court of Appeal disagreed on this point, and deemed that the British forces were acting as 'agents' of Iraqi courts.<sup>115</sup> However, the Court of Appeal did not reach this conclusion by applying the criterion of Article 6 ASR. It stated that the United Kingdom 'was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign state'<sup>116</sup> and therefore it was not exercising 'jurisdiction' for the purposes of Article 1 ECHR. Interestingly, the European Court of Human Rights, seized of the same matter, did not even address the question of attribution, taking it for granted that the detention and possible transfer of Al-Saadoon was attributable to the UK.<sup>117</sup>

The cases mentioned so far show that issues of attribution when organs are transferred are very complex to assess. The correct construction seems to be that of the High Court in *Al-Saadoon*, that is the recognition that

<sup>112</sup> See *R. (Al-Saadoon) v. Secretary of State for Defence*, 19 December 2008, [2008] EWHC 3098 (Admin), at [75]-[81], overruled on the point of attribution by *R. (Al-Saadoon) v. Secretary of State for Defence*, [2009] EWCA Civ 7, 21 January 2009, [2009] 3 WLR 957, at [32]-[40]. See also *Al-Saadoon and Mufdhi v. the United Kingdom (Admissibility)*, n. 61498/08, 30 June 2009, 49 EHRR SE11.

<sup>113</sup> *R. (Al-Saadoon) (High Court)*, [80] (emphasis added).

<sup>114</sup> *ibid.*, [79].

<sup>115</sup> *R. (Al-Saadoon) (Court of Appeal)*, [40].

<sup>116</sup> *ibid.*, [32].

<sup>117</sup> *Al-Saadoon and Mufdhi v. the United Kingdom (Merits) (Fourth Section)*, n. 61498/08, 2 March 2010, (2010) 51 EHRR 9, esp. at [84-89].

‘direction and control’ of the receiving state are necessary for a complete transfer of attribution to occur. However, it is important not to confuse this requirement of ‘direction and control’ with that of Article 8 ASR discussed above. The point of Article 6 ASR is not establishing *if* there can be attribution, but *how* to disentangle a situation of potential *dual* attribution. Article 6 ASR has nothing to do with a factual link of instructions, direction or effective control over non-state actors. The question is rather whether the receiving state has actually formed an institutional link with the transferred organ. The transfer of organs creates a situation where an institutional link is temporarily created with the receiving state and severed with the sending one. All on-duty conduct of transferred organs, even if *ultra vires*, will be attributed as if they were the receiving state’s organs only, and this is irrespective of a factual link of instructions, direction or control with each specific conduct considered.<sup>118</sup>

There is obviously an overlap here: we have seen in the discussion of the table above that multiple attribution may arise when an organ belongs to more than one subject of international law at a time. We have also discussed the example of member states’ customs officials implementing binding EU regulations and thus acting at the same time as an organ of their member state and of the EU.<sup>119</sup> In those cases, too, Article 6 might potentially have applied as an exception to multiple attribution, but we assumed above that it would not. This is because the threshold of ‘being put at the disposal’ of the EU is not nearly met: customs officials do not answer to EU organs, but remain fully in the line of command of their member state. There is not even an attempt at integrating them into the EU machinery as such – they simply exercise functions of the EU at the same time as exercising governmental

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<sup>118</sup> ASR COMMENTARIES, 44 (‘what is crucial for the purposes of Article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving state’). See also *Yearbook...* 1974, vol. I, 43-61 (1974), 55 (Ago ‘also wished to clear up a misunderstanding by defining the meaning of the words “act in accordance with its instructions”, to which there had been a number of reactions. He had not meant that the organ which committed the wrongful act must have acted, in the case in question, in accordance with instructions from the recipient State. What he had meant was that the organ must receive instructions from the recipient State only, which ruled out the possibility of its continuing to receive instructions from its home State’).

<sup>119</sup> See above, para. 3.A.iii.



functions of their member state: the default rule of multiple attribution applies, and the exception of Article 6 ASR is not triggered.

It should be added that the same rule in Article 6 ASR also applies by analogy to the rare situation of an organ or agent of an international organization transferred to a state for the exercise of governmental authority thereof. While this was clear in Ago's third report and in the ASR adopted on first reading,<sup>120</sup> the final version of ASR is not explicit on the point, although the Commentaries mention the issue.<sup>121</sup> The symmetric situation of organs put at the disposal of international organizations by both states and IOs is fully considered by the ARIO, as we shall presently see.

## **B. Organs transferred to an international organization**

### **i. 'Effective control' in Article 7 ARIO**

We have just seen that under Article 6 ASR, when states put their organs at the disposal of another state, the acts of the transferred or lent organs are attributed to the receiving state 'if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. We have also seen that it is probably correct to extend the application of this rule to organs transferred from international organizations to states, albeit a more specific provision in this respect would have been welcome. But what happens when organs are transferred from states or IOs to an international organization? In a textual departure from the Articles on State Responsibility, Article 7 ARIO provides that

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

It will be recalled that Article 6 ASR instead provides that:

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

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<sup>120</sup> *Yearbook*... 1974, vol. II, part 1, 269-290 (1974), 286 (text of Article 9 includes organs 'placed at the disposal of a State ... by an international organization').

<sup>121</sup> ASR COMMENTARIES, 45.

Despite this striking difference between the two formulations, the text of Article 7 ARIO ‘generally’ met with a ‘positive reaction’ by states.<sup>122</sup> Even the notorious *Behrami* case of the European Court of Human Rights paid initial lip-service to the first draft of the provision.<sup>123</sup> And the International Monetary Fund, otherwise quite critical of the work of the ILC on international organizations, endorsed the article.<sup>124</sup>

However, while there may be agreement on the formula ‘effective control over that conduct’, its exact meaning is not very clear. Is the word ‘control’ in Article 8 ASR, interpreted by the International Court of Justice in *Bosnian Genocide* as ‘effective control’,<sup>125</sup> the same ‘effective control’ under consideration here, that is the criterion to attribute conduct of organs transferred to international organizations? Or does ‘effective control’ have a different meaning in Article 7 ARIO? More generally, was it really a good idea to use the words ‘effective control’ in Article 7 ARIO? The drafting history of Article 6 ASR, on organs transferred to states, might shed some light on this problem.

<sup>122</sup> A/CN.4/610 (2009), 11 with reference to the equivalent Article in the 2009 draft of the ARIO: the Rapporteur notes the agreement of ‘Germany (A/C.6/59/SR.21, para. 21), Italy (ibid., para. 32), China (ibid., para. 39), the Islamic Republic of Iran (A/C.6/59/SR.22, para. 6), France (ibid., para. 8), New Zealand (A/C.6/59/SR.23, para. 8), the Russian Federation (ibid., para. 22), Mexico (ibid., para. 26), Greece (ibid., para. 39) and Romania (A/C.6/59/SR.25, para. 16)’. He adds that ‘Japan (A/C.6/59/SR.21, para. 55) required “clarification” of the standard and Belarus (A/C.6/59/SR.22, para. 44) a “clear definition of the term “effective control”’. Austria (ibid., para. 19) suggested a reference to the fact that the State organ was exercising one of the functions of the organization; this could be taken as implied, but may be specified in the commentary. The Republic of Korea (A/C.6/59/SR.23, paras. 16-17) proposed to take into consideration the criterion of overall control, that has been generally applied to the different issue of the attribution to a State of conduct by private persons’.

<sup>123</sup> *Behrami v. France and Saramati v. France, Germany and Norway (Admissibility)* (GC), nn. 71412/01 and 78166/01, 2 May 2007, (2007) 45 EHRR SE10, at 93. On the decision generally, see among others C.A. Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision’, 42 *N.Y.U. J. Int’l L. & Pol.* (2010) 501-548; P. Klein, ‘Responsabilité pour les faits commis dans le cadre d’opérations de paix étendue du pouvoir de contrôle de la Cour européenne des droits de l’homme: quelques considérations critiques sur l’arrêt *Behrami* et *Saramati*’, 53 *A.F.D.I.* (2007) 43-64; Knoll, *The Legal Status of Territories Subject to Administration by International Organisations*, above n. 53, 367-381; P. Lagrange, ‘Responsabilité des Etats pour actes accomplis en application du Chapitre VII de la Charte des Nations Unies’, 112 *Revue gén. de droit int. pub.* (2008) 85-110; K.M. Larsen, ‘Attribution of conduct in peace operations: the “ultimate authority and control” test’, 19 *Eur. J. Int’l L.* (2008) 509-531; F. Messineo, ‘The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-authorized Forces and the Power of the Security Council to Displace Human Rights’, 56 *Neth. Int’l L. Rev.* (2009) 35-62, at 39-43; M. Milanović and T. Papić, ‘As Bad as It Gets: The European Court of Human Rights’s *Behrami* and *Saramati* Decision and General International Law’, 58 *Int. Comp. Law. Q.* (2009) 267-296; P. Palchetti, ‘Azioni di forze istituite o autorizzate delle Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: i casi *Behrami* e *Saramati*’, 90 *Riv. Dir. Int.* (2007) 681-704; A. Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: the *Behrami* and *Saramati* cases’, 8 *Hum. Rts. L. Rev.* (2008) 151-170.

<sup>124</sup> A/CN.4/556 (2005), 25.

<sup>125</sup> See above, section 1.C.

## ii. The drafting history of Article 6 ASR and ‘effective control’ in Article 7 ARIO

The question of organs transferred or lent to international organizations had already been addressed *en passant* by Ago in his third report on state responsibility, when he discussed what would later become Article 6 ASR.<sup>126</sup> Ago started by mentioning the role of the UN and troop contributing states in Korea (the 1950 UN operation under American unified command) and Congo (the 1961 operation under UN command),<sup>127</sup> and concluded that:

irrespective of whether an organ is “lent” or “transferred” by one State to another, by a State to an international organization or by an international organization to a State, only one principle can be applied: the beneficiary of the “loan” or “transfer” must be held responsible for any violations of international law committed by the organ placed at its disposal, when the acts of that organ are genuinely performed in the name and on behalf of the beneficiary and in accordance with orders issued by the beneficiary alone. As we have seen, if this principle had not been confirmed by international practice, it would have to be applied for reasons of legal logic, effectiveness and equity. In view of the increasing number of cases in which it may have to be applied in future especially in relations between States and international organizations, to formulate the principle more clearly will contribute to the progressive development of international law.<sup>128</sup>

In Ago’s view, therefore, the rule had to be the same for what has now become Article 6 ASR and what was to become Article 7 ARIO. According to him, in *both* cases what mattered was ‘effective control’. This is how he put it in French:

Le principal critère qui doit permettre de décider de l’attribution d’un fait à un État plutôt qu’à l’autre et d’établir sa responsabilité est celui du *contrôle effectif*.<sup>129</sup>

By this he meant that the transferred organ should not only be integrated into the organization of the receiving state (or its ‘machinery’, in Ago’s terminology),<sup>130</sup> but also clearly under the authority of the receiving state as

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<sup>126</sup> *Yearbook*... 1971, vol. II(1), 199-274 (1971), 268 and 271-274. This was then Article 9: I will use the term ‘Article 9 ASR-AGO’ to mean the version he initially proposed, and ‘Article 9 ASR96’ to mean the one adopted in first reading by the International Law Commission.

<sup>127</sup> *ibid.*, 272-273.

<sup>128</sup> *ibid.*, 273-274.

<sup>129</sup> English translation at *Yearbook*... 1974, vol. I, 43-61 (1974), 60 (‘The main criterion for deciding to attribute an act to one State rather than to another, and for determining a State’s responsibility, was that of effective control’).

<sup>130</sup> *Yearbook*... 1971, vol. II(1), 199-274 (1971), 267.

opposed to the sending one. He phrased this in his proposed Article 9 as follows:

The conduct of a person or group of persons having, under the legal order of a State or of an international organization, the status of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are *actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions*.<sup>131</sup>

But some in the Commission felt that the latter requirement (acting in accordance with instructions) would have implied that every single act of a transferred organ would also have to satisfy an additional requirement akin to that of today's Article 8 ASR on factual links. This was never Ago's intention:

The idea of instructions, which was also employed in the draft article, should not lead to confusion. By using that idea, he had meant to indicate that an organ was not really placed at the disposal of another State when it continued, even in the performance of its duties in the service of the recipient State, to order its conduct according to instructions it received from the lending State. Whatever the wording finally used, that situation should be excluded from the scope of Article 9. On the other hand, the responsibility of the lending State was not engaged when the organ lent simply exceeded the instructions it received from the beneficiary State.<sup>132</sup>

Consequently, the final version of the Article adopted by the ILC on first reading was free from every reference to 'instructions' and to being 'actually under the authority': the criterion of exercising the governmental authority of the receiving state was deemed sufficient. The adopted text was later to become Article 6 ASR with minimal substantive modification.<sup>133</sup> The Commentaries adopted by the ILC in 1974 clearly spoke of a 'functional link' being established 'with the machinery of the beneficiary State'.<sup>134</sup> As we saw above, this functional link derives from being 'placed at the disposal' of the receiving state and it is a link akin to that established by a state with its organs – that is, an institutional one:

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<sup>131</sup> Article 9 ASR-AGO, in *ibid.*, 274 (emphasis added).

<sup>132</sup> *Yearbook*... 1974, vol. I, 43-61 (1974), 60.

<sup>133</sup> Compare Article 9 ASR96 ('The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed') with Article 6 ASR adopted in 2001 ('The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'). Apart from the deletion of the reference to international organizations, the content is identical.

<sup>134</sup> *Yearbook*... 1974, vol. II, part 1, 269-290 (1974), 287-288.

[T]he organ in question acts in the exercise of functions appertaining to the State at whose disposal it has been placed, and under that State's authority, direction and control, and is required to obey any instructions it may receive from that State and not instructions from the State to which it belongs.<sup>135</sup>

Note the language is abstract: the status of transferred organ implies being required to obey any orders one *may receive*. This is a general requirement to obey orders – again, this wording merely describes the institutional, *ex ante* and general control of the receiving state over the transferred organ, not a specific factual relationship with every given conduct. That is why *ultra vires* conduct of a transferred organ is attributed to the receiving, not the sending state. And it was clear then that such institutional link was to be accompanied by a lack of interference from the sending government: the efficacy of control resided not in something akin to Article 8 ASR, but in the fact that the transfer between states was real, i.e. the organic link was severed with the sending state, however temporarily. In other words, the focus was on whose functions were being exercised, not the degree of control exercised. The discussion in 1974 constitutes therefore a crucial moment, because it is then that ‘effective control’ was first used in this context, and first defined as an exclusive institutional link with the receiving state. In other words, ‘effective control’ as Ago used it in 1971 added nothing more than the idea of exclusivity of the transfer of an organ – and the ILC was wise to phrase it in Article 6 ASR in terms of ‘being placed at the disposal’. ‘Effective control’ here had nothing at all to do with Article 8 ASR or factual links.

### iii. Why the wording of Article 7 ARIO is misleading

From the drafting history of Article 6 ASR we have learnt that in 1974 the ILC considered ‘effective control’ as a criterion to avoid dual attribution, and decided to replace it with that of ‘being at the disposal of’, which was meant to convey the same idea. Therefore, it is somewhat surprising to see that a similar question is arising today with reference to Article 7 ARIO. Why should the rule on organs transferred to IOs be phrased differently from that of organs transferred to states? And why should it be phrased in

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<sup>135</sup>

ibid., 288.

terms of both ‘being at the disposal of’ *and* ‘effective control’, if the two were interchangeable concepts back in 1971? Was this an elegant attempt by Special Rapporteur Gaja to bring the terminology of attribution of transferred organs back to Ago, in honour of the ‘Italian school’ of international responsibility?<sup>136</sup> Or was there more?

The term ‘effective control’ in Article 7 ARIO clearly owes its debt to the arguments that Ago put forward in 1971 in his Third report. As mentioned there,<sup>137</sup> one of the first authors to use a concept akin to that of ‘effective control’ in the same context was De Visscher. Writing in 1963 and commenting on the need to establish UN responsibility for UN operations such as that of 1961 in the Congo, De Visscher said that the question of concurrent attribution to the UN and member states could only be properly solved when a UN army would be established. In the meantime, the question depended on who had ‘*maîtrise effective*’ of the troops on the ground:

[L]a question reste notamment ouverte de savoir si la responsabilité de l’O. N. U., dans la mise en œuvre des mesures de sécurité collective, est exclusive de celle des États dont les contingents ont pris part à ces mesures. Personnellement nous ne le croyons pas car, dans l’état présent de la situation, le degré d’internationalisation des forces d’urgence des Nations Unies n’est pas tel que l’on puisse dire que la personnalité de l’O. N. U. ait entièrement absorbé celle des États qui participent à la mise en œuvre des mesures de sécurité collective. [...] A la différence des personnes physiques qui ont qualité d’organes ou d’agents des Nations Unies [...], les États membres qui placent des contingents à la disposition du Secrétaire général sont des sujets de l’ordre juridique international et ce fait doit être pris en considération dans la solution du problème qui nous occupe ici, *dans la mesure précisément où ces États ont conservé une certaine maîtrise de leurs contingents*. Pour éclaircir ce problème du concours de responsabilités, il conviendrait, au préalable, que l’Assemblée générale règle avec précision la question de la *maîtrise effective* des contingents appelés à participer à l’exécution des mesures de contrainte décrétées par le Conseil de Sécurité.<sup>138</sup>

<sup>136</sup> For a striking conceptualization of international responsibility as a topic the codification of which somewhat ‘belonged’ to the ‘Italian school of international law’, see G. Arangio-Ruiz, ‘Fine prematura del ruolo preminente di studiosi italiani nel progetto di codificazione della responsabilità degli Stati: specie a proposito di crimini internazionali e dei poteri del Consiglio di Sicurezza’, 81 *Riv. Dir. Int.* (1998) 110-129.

<sup>137</sup> *Yearbook*... 1971, vol. II(1), 199-274 (1971), 273.

<sup>138</sup> P. De Visscher, ‘Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l’organisation des Nations Unies’, 40 *Revue de droit int. et de droit comp.* (1963) 165-180, at 169. See also the differing remarks of B. Amrallah, ‘The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-Keeping Forces’, 32 *Revue égyptienne de*

But it is unclear why these remarks concerning UN operations could be universalised to all IO contexts. In the Commentaries to the Articles on the Responsibility of International Organizations, Gaja clearly attempts to link the ‘effective control’ test in what is now Article 7 ARIO to the formulation of Article 6 ASR, yet seeks to explain why he changed the latter’s formulation:

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. ... Article 6 of the articles on the responsibility of States for internationally wrongful acts *takes a similar approach*, although it is differently worded. According to the latter article, what is relevant is that “the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed”. ... At any event, the wording of Article 6 cannot be replicated here, because the reference to “the exercise of elements of governmental authority” is unsuitable to international organizations.<sup>139</sup>

But these justifications for departing from the text of Article 6 ASR are slightly unpersuasive. There *is* an equivalent for ‘exercise of elements of governmental authority’ in the context of IOs, as the ARIO now recognize in Article 2(d): the concept of ‘functions’ of the international organization. In fact, if the International Law Commission wanted to maintain an analogy *mutatis mutandis* between Article 6 ASR and Article 7 ARIO, the latter should have been phrased 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 organ or agent is acting in the exercise of the functions of the international organization at whose disposal it is placed’.

In sum, the Commentaries to the ARIO confirmed the intention to keep the analogy with Article 6 ASR and explained that the point was not establishing if there was attribution, but choosing between two subjects, if possible:

With regard to States, the existence of control has been mainly discussed

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*droit int.* (1976) 57-82, at 67-68 (Amrallah does not agree with De Visscher that concurrent responsibility of the UN and participating states is possible in the context of peacekeeping).

<sup>139</sup>

ARIO COMMENTARIES, 87-88 (emphasis added).

in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State. In the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct has to be attributed.<sup>140</sup>

This perhaps suggests that the ‘effective control’ test of Article 7 ARIO was not the same ‘control’ of Article 8 ASR, *Nicaragua* and *Bosnian Genocide*, but rather something similar to Ago’s original rendering of what later became Article 6 ASR, because the function of the threshold was said to be different. In this context, therefore, one should interpret ‘effective control’ as a criterion determining when exclusive (rather than multiple) attribution can occur: the transfer of attribution follows the transfer of the organ only if the original institutional link with the sending state (or IO) has been (temporarily) severed. This is what a *mutatis mutandis* application of Article 6 ASR would mean – and this is what, I have argued, the ILC should have adopted and clarified.<sup>141</sup>

Yet, there is an important obstacle to this construction of ‘effective control’ in Article 7 ARIO as being equivalent to Article 6 ASR: the text of Article 7 ARIO. The words ‘effective control *over that conduct*’ unequivocally suggest a factual link, not an institutional one. The ARIO Commentaries indeed explicitly recognize as much:

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.<sup>142</sup>

These words do evoke the threshold advanced in *Bosnian Genocide* and *Nicaragua*, even if they employ it for a different purpose. The literal interpretation of the words ‘effective control over that conduct’ would imply that, in order for a transfer of attribution to occur under Article 7 ARIO, we must analyse every single conduct and adopt the criterion of ‘control’ akin

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<sup>140</sup> *ibid.*, 88.

<sup>141</sup> Before the DARIO project commenced, similar views on the applicability of (what is now) Article 6 ASR to this situation were expressed by L. Condorelli, ‘Le statut des forces des Nations Unies et le droit international humanitaire’, 78 *Riv. Dir. Int.* (1995) 881-906.

<sup>142</sup> ARIO COMMENTARIES, 87-88.



to that in Article 8 ASR before establishing that attribution has transferred from a state to an IO. So a crucial difference would emerge between Article 6 ASR and Article 7 ARIO. While Article 6 ASR, before transferring attribution, requires the creation of an institutional link akin to that Article 4 or 5 ASR to be established with the receiving state (the exercise of functions of the receiving state), Article 7 ARIO would only require a factual link akin to Article 8 ASR, that is a link of control at the time of the conduct. This interpretation, which is certainly possible under the current formulation of Article 7 ARIO, would yield a quite striking result. It would mean that organs transferred from states could never temporarily become organs or agents of an international organization, thereby creating an institutional link with the IO, because a factual link with the IO would need to be established every time before attribution could be transferred. Of course, there could be good policy reasons for such a choice: for example, a preference for attribution of conduct (and thus responsibility) to states rather than IOs, given that states have usually more financial means at their disposal than IOs. Another possible reason for this difference could be that the premise behind Article 7 ARIO is precisely that states in fact never completely transfer their organs to international organisations, so that control would always be to a certain extent concurrent. But the intentions of the Commission did not seem to be these, at least initially – the difference between Article 7 ARIO and Article 6 ASR seems to have occurred more by accident than by design.

The complex relationship between Article 7 ARIO and Article 6 ASR we have just discussed leads to the conclusion that the rule in Article 7 ARIO should have been wholly analogous to Article 6 ASR. For the historical reasons just explained, I think that Article 7 ARIO was wrongly formulated, and that the criterion of ‘effective control’ in this context is misleading. According to some, it is also unsupported by state or IO practice.<sup>143</sup> It is important to reiterate that under the construction adopted

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<sup>143</sup> See e.g. Larsen, above n. 123, 518 and the comments by the International Labour Organization in A/CN.4/568/Add.1 (2006), 14-15 (according to ILO, Article 7 ARIO fails to distinguish between a ‘secondment’ and a ‘loan’ of a state official to an IO; in its view, attribution would only arise when a ‘secondment’ occurs).

here, ‘effective control over the conduct’ in Article 7 ARIO should not have the same meaning as the criterion to establish a factual link which bears a similar name in Article 8 ASR. The drafting history of the two provisions points in this direction – although admittedly the text of Article 7 ARIO does not.<sup>144</sup> The transfer of attribution from a state or an IO to an international organization should occur every time that the transferred organ is both functionally integrated in the receiving organization and has ceased to be so with regards to the sending state or IO.<sup>145</sup>

In any case, an important difference remains between states and international organizations. The concept of organ or agent of an IO is much more flexible than that of institutionally linked organ of a state, so it is easier to form such an institutional link with an international organization than with a state. It is also difficult to sever completely an institutional link with a sending state.<sup>146</sup> For this reason, it is very difficult to find cases in which such a situation actually occurs: in principle, states are usually quite jealous of their organs’ prerogatives and seek to maintain control over them, so that multiple attribution would ensue. Indeed, however one interprets Article 7 ARIO, both it and Article 6 ASR are exceptional rules. In his Seventh Report, Gaja underlined that multiple attribution may well ensue from the application of Article 7 ARIO:

It was noted in one comment that [the] criterion [if Article 7 ARIO] was tailored for “military operations” and was “less adequate for deciding attribution in the case of other types of cooperation between international organizations and States or other international organizations”. It may well be that outside military operations it may be more difficult to establish which entity has an effective control. However, this does not imply that

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<sup>144</sup> One may also argue that, when analysing ILC codification texts, the role of the drafting history should be taken in much higher regard than the VCLT allows for treaties.

<sup>145</sup> Departing from different premises, a wholly different interpretation of ‘effective control’ in Article 6 ARIO is advanced by 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’, 51 *Harv. Int’l L.J.* (2010) 113-192, who proposes interpreting ‘effective control’ as ‘control most likely to be effective in preventing the wrong in question’ (ibid., 192). His construction is, on his own admission, a largely *de lege ferenda* one (see ibid.), and his analysis fails to take into account the relationship between Article 6 ASR and Article 7 ARIO.

<sup>146</sup> The severing of the institutional link does not mean losing the status as organ, because the rule operates when a temporary ‘placement at the disposal’ occurs. If the transfer is permanent and the link completely severed, we are in the presence of a fully seconded organ: ARIO COMMENTARIES, 87 (‘When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ’s conduct would clearly be attributable only to the receiving organization [because] the general rule set out in Article 6 would apply’). However, these differences appear at times more theoretical than practical.

the criterion set out in Article [7] is inadequate, but that *in many cases its application will lead to the conclusion that conduct has to be attributed both to the lending State and to the receiving international organization*.<sup>147</sup>

Ago had reached a similar conclusion back in 1971, discussing the already mentioned *Nissan case*.<sup>148</sup> As we saw, at some point the UK operation in Cyprus became part of a UN force. Despite this, the Court maintained attribution to the UK because ‘the ... forces ... had not ceased to be British soldiers’.<sup>149</sup>

Most of the available practice on Article 7 is indeed from peace operations under UN auspices – either directly run by the UN (peacekeeping operations) or simply authorised by the UN Security Council but run by member states. As I have discussed elsewhere,<sup>150</sup> while in *Behrami* the European Court of Human Rights had wrongly applied an ‘ultimate authority and control’ test to this type of situation and had a priori excluded the possibility of dual attribution when peace support operations were concerned, both mistakes have recently been consigned to history by the subsequent Grand Chamber decision in *Al-Jedda*, which confirmed that dual attribution is possible.<sup>151</sup>

A similarly contradictory succession of authorities concerns the Netherlands, where the conduct of Dutchbat during UN peace support operations in Bosnia came before domestic Dutch courts. Successive Courts have reached opposite conclusions as to attribution of conduct. In 2008, the District Court in The Hague held that the conduct of the Dutch contingent in UNPROFOR (Dutchbat) at the time of the Srebrenica genocide should be attributed to the United Nations only, and not to the Netherlands. Interestingly, the Court first referred to Article 6 ASR and said it was

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<sup>147</sup> A/CN.4/610 (2009), 9 (emphasis added).

<sup>148</sup> See above, n. 102 and accompanying text.

<sup>149</sup> See *Yearbook*... 1971, vol. II(1), 199-274 (1971), 271-272 (fn420).

<sup>150</sup> Messineo, above n. 42.

<sup>151</sup> *Al-Jedda v. United Kingdom (GC)*, n. 27021/08, 7 July 2011, 30 BHRC 637, at [80] (‘The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force *became attributable to the United Nations or – more importantly, for the purpose of this case – ceased to be attributable to the troop-contributing nations*’; emphasis added).

applicable by analogy.<sup>152</sup> It then said that the Dutch contingent was ‘ranked within the UN command structure’,<sup>153</sup> and therefore its actions were attributable only to the UN.<sup>154</sup> As a consequence, ‘even gross negligence or serious failure of supervision on the part of the forces made available to the UN must in principle be attributed exclusively to this organization’.<sup>155</sup> A different conclusion on attribution would be warranted, the Court added, if the forces were found to act under the *sole* command of Dutch authorities ‘cutting across’ UN command.<sup>156</sup> This was a significant reversal of the ‘effective control’ rule in Article 7 ARIO. The Hague District Court held that in the case of ‘parallel instructions’ from both home and the UN, attribution would still be to the UN only, rather than both the state and the UN as the application of Article 6 ASR by analogy (ostensibly the basis of the court’s decision) would dictate. In the Court’s view, only a strong intervention of the lending state would determine attribution to the lending state, and attribution to the UN would be automatic in all other cases. In sum, the Court held that a strong presumption of UN attribution existed although such presumption was not quite as strong as that of the UN Secretariat, which is ready to accept UN attribution even ‘where the United Nations command and control structure [has] broken down’.<sup>157</sup> However, in early July 2011, the Dutch Court of Appeal reversed this decision. It found that Dutch peacekeepers were under the ‘effective control’ of authorities in The Hague, rather than the UN, and that attribution could potentially be to both the UN and the Netherlands.<sup>158</sup> It thus endorsed what is now Article 7 ARIO as a rule potentially, but not always, disentangling situations of dual

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<sup>152</sup> *Hasan Nuhanović v. The Netherlands*, LJN: BF0181, n. 265615 / HA ZA 06-1671 10 September 2008, at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BF0181&u\\_ljn=BF0181](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BF0181&u_ljn=BF0181), at [4.8].

<sup>153</sup> *ibid.*, [4.9].

<sup>154</sup> *ibid.*, [4.11].

<sup>155</sup> *ibid.*, [4.13].

<sup>156</sup> *ibid.*, [4.14.11].

<sup>157</sup> A/CN.4/637/Add.1 (2011), 13-14.

<sup>158</sup> *Hasan Nuhanović v. The Netherlands*, LJN: BR5388, LJN: R5388; ILDC 1742 (NL 2011), 5 July 2011, at [5.3]. See B. Boutin, ‘Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peacekeeping’, 25 *Leiden J. Int’l L.* (2012) 521-535; A. Nollkaemper, ‘Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica’, 9 *J. Int’l Crim. Just.* (2011) 1143-1157.

attribution – in the same way as Article 6 ASR is a rule which potentially, but not always, disentangles situations of dual attribution.

## **5. Concluding remarks**

One of the key cases of shared responsibility in international law arises when two or more states or international organisations act together. It has been argued here that according to the general rules on responsibility for internationally wrongful acts, the same conduct can be attributed to more than one subject of international law at the same time. In the framework proposed here, multiple attribution of conduct may arise in two sets of circumstances: either because the conduct is carried out by *one* person or entity to whom more than one rule of attribution applies, so that they are deemed to be acting on behalf of more than one state/IO at the same time; or because the conduct is carried out by *two or more* persons or entities *each* acting on behalf of a different state/IO. However, there are two important exceptions to multiple attribution of conduct: Article 6 ASR on the transfer of organs to states and Article 7 ARIO on the transfer of organs to international organizations. Despite the difference in text, the drafting history of codification efforts at the International Law Commission leads to the conclusion that these two rules should be interpreted as being wholly analogous. In order for the presumption of dual attribution to be rebutted, a transfer of organs from a state/IO to another state/IO would need to satisfy two requirements: first, that the transferred organ exercised functions of the receiving state/IO; second, that the sending state/IO did not maintain control over the conduct of the organ. In all other cases of incomplete transfers of organs, multiple attribution may well ensue. The resulting framework is one in which multiple attribution is the default rule, not the exception, when states or IOs act jointly.

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