Amsterdam Center for International Law
University of Amsterdam

SHARES
RESEARCH PROJECT ON
SHARED RESPONSIBILITY IN INTERNATIONAL LAW

RESEARCH PAPER SERIES

SHARES Research Paper 32 (2014)

Attribution of Conduct

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Cite as: SHARES Research Paper 32 (2014)
available at www.sharesproject.nl

Forthcoming in: André Nollkaemper & Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014)

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499.

Chapter 3: Attribution of Conduct

Francesco Messineo[*]

1. Introduction

Do customary international law rules on the attribution of conduct allow for the determination of shared responsibility? Imagine that an entity acting on behalf of the United Kingdom (UK) and France – say, the Intergovernmental Commission overseeing the operation of the Channel's tunnel pursuant to the Treaty of Canterbury[1] – 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?[2] Alternatively, consider the situation of someone who is unlawfully detained by a peacekeeping force whose soldiers are formally answering to a United Nations (UN) chain of command, but who are also effectively receiving orders from their home country.[3] Could we say that the victim is being detained both by the UN and the troop-contributing country at the same time? The answers to these questions are important. If more than one entity is responsible, any injured parties may have more avenues of redress available to them, and they may be able to request cessation of the wrongful act from multiple entities.[4]

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[1] 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.

[2] 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)*, Partial Award, (2007) 132 ILR 1 (*Eurotunnel*).

[3] See e.g. R. Murphy, *UN peacekeeping in Lebanon, Somalia and Kosovo: operational and legal issues in practice* (Cambridge: CUP, 2007), p. 130.

[4] These issues are considered in Chapters 7 and 8 of this volume: see respectively P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition,' in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP,

The fact that international law recognises states and international organisations as the bearers of rights and duties means that they are 'legal persons' under international law.[5] Unlike individual responsibility under international criminal law, which directly concerns human beings, responsibility for internationally wrongful acts pertains to these abstract collective legal entities. However, 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.[6] It follows that international law must address certain questions concerning the interaction between these actors.[7]

The aim of this Chapter is to assess how rules of attribution of conduct work in the context of shared responsibility, and more specifically in cases where a single conduct is attributed to multiple international actors. This Chapter does not consider in detail the basic question of how attribution rules operate in general: that is, which acts or omissions can be deemed to be the acts or omissions of a state or international organisation.[8] Its focus is rather on the situation where more than one state or international organisation participates in the same conduct breaching an international obligation. In these cases, international law must determine whether the attribution of an act or omission to one state or international organisation necessarily precludes the attribution of the same act or omission to another state or international organisation. 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 in relation to one collective entity at a time (exclusive attribution)?

2014), pp. ___; A.M.H. Vermeer-Künzli, 'Invocation of Responsibility,' in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

[5] This is obvious as to states, but perhaps less obvious as to international organisations. On the connection between legal personhood of international organisations and responsibility, see e.g. P. Reuter, 'Principes de droit international public' (1961) 103 RCADI 425–683, at 589.

[6] 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), pp. 1–148, at pp. 121–148 and R. Ago, 'Third Report on State responsibility', ILC *Yearbook* 1971/II(1), 199–274, at 217.

[7] 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 *qua* subjects of international law. 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 that would be applicable to them and as to their international legal personality. The focus of this Chapter on states and international organisations should not be taken as an expression of a view on this matter.

[8] '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.

The thesis espoused here is that multiple attribution of conduct is possible. Customary international law on attribution of conduct enables the determination of shared responsibility.[9] As we shall see, when more than one subject of international law is involved in the same wrongful conduct, multiple attribution is quite often the default answer to the question of attribution. Exclusive attribution (i.e. attribution to only one of the subjects potentially responsible) only finds application in certain exceptional circumstances concerning organs transferred to another state or international organisation. Indeed, 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'.[10] Likewise, a given conduct may well 'belong' to more than one collective entity at once.[11] 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 organisation, all at the same time.

It must be acknowledged that in practice, the number of cases in which multiple attribution has been recognized has been limited.[12] Moreover, it has been affirmed by some that multiple attribution is, although possible, still a minority view, with little practice to support it.[13] As we shall see below, this view finds a degree of support in some (but not all) recent pronouncements of the European Court of Human Rights (ECtHR). However, this Chapter seeks to rebut these positions by providing a critical analysis of multiple attribution in light of the codification efforts by the International Law Commission (ILC). This is essential to our

[9] The term 'shared responsibility' is used here in the sense discussed in Chapter 1 of this volume, P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para. 173 (*Bosnian Genocide* case). See Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA), Article 58; Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2), (ARSIWA Commentary); Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO), Article 66; Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary). See also H. Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950), pp. 40–43; P.A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615–640, at 618–621.

[11] This can be explained in terms of layers of responsibility, or of spheres of influence, or even by analogy with quantum physics: 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), pp. 45–58, at pp. 57–58 (where reference is made to Bohr's theory of complementarity regarding the wave-particle duality).

[12] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438, at 383.

[13] Ibid., 383.

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.[14] I am much more optimistic as to the flexibility and resilience of attribution of conduct rules as codified by the ILC.

This Chapter will proceed in three steps. First, the basic framework of rules on attribution of conduct will be briefly recalled in the remainder of this introduction. This is necessary to then move on to consider how cases of potential multiple attribution of conduct may emerge in practice, and how the somewhat misnamed 'principle of independent responsibility' in fact confirms the possibility of multiple attribution, rather than denying it (section 2). Finally, we shall consider rules on the transfer of organs from one subject of international law to another. In the exceptional circumstances in which these rules apply, attribution will be to one subject of international law to the exclusion of other subjects (section 3).

Before proceeding any further, it must be clarified that this Chapter focuses on attribution of conduct (i.e. 'direct' responsibility), not on attribution of responsibility or other cases of 'indirect' responsibility.[15] In such cases, a state or international organisation is ultimately responsible or co-responsible for an internationally wrongful act, even if the conduct is not directly attributed to it. This is what the ILC described as the 'Responsibility of a State in connection with the act of another State',[16] the 'Responsibility of an International Organization in connection with the act of a State or another International Organization',[17] and the 'Responsibility of a State in connection with the act of an International Organization'.[18] By definition, these are all cases where there is no direct attribution. Furthermore, this Chapter does not deal with cases where separate acts of multiple actors result in a single injury, such as in the *Corfu Channel* case.[19] These are not relevant here because each act or omission

[14] Ibid., 398–421.
[15] See Chapter 4 of this volume, which will consider those cases where a state or international organisation is responsible or co-responsible for an internationally wrongful act, even if the conduct is not directly attributed to it: J.D. Fry, 'Attribution of Responsibility', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.
[16] Part One, Chapter IV ARSIWA, n. 10.
[17] Part Two, Chapter IV ARIO, n. 10.
[18] Part Five ARIO, n. 10.
[19] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Reports 1949, 4. See P.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, 2011), pp. 199–237, SHARES Research Paper 01 (2011), ACIL 2011–11, available at www.sharesproject.nl, at 6. See also ILC, J. Crawford, 'Third Report on State Responsibility', ILC *Yearbook* 2000/II(1), at para. 268.

contributing to the injury is attributed separately to its author, so there is no issue of multiple attribution of the *same* act or omission.

In the classic account adopted by the ILC and the International Court of Justice (ICJ or Court),[20] the aim of rules on attribution of conduct is to determine precisely when we can say that a certain conduct that is *prima facie* in breach of an international obligation is the conduct of a state and/or of an international organisation. General rules on attribution of conduct may be found both in the 2001 Articles on State Responsibility (ARSIWA) and in the 2011 Articles on the Responsibility of International Organizations (ARIO).[21] The ARSIWA contain eight relevant provisions (Articles 4 to 11), which are deemed to be reflective of customary international law.[22] 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 organisation to that state or international organisation. The system was designed to avoid loopholes and to separate 'state' or 'international organisation' 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 organisation; all *de jure* state and international organisation organs,[23] *de facto* state organs,[24] other agents exercising international organisation functions,[25] and other individuals or entities exercising governmental authority.[26] These are people and entities through which states and international organisations generally operate. So long as they are acting in their capacity (even if abusing their authority), their *ex ante facto* institutional link with the state or the international organisation renders their conduct an act of that state or international organisation 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

[20] See e.g. *Bosnian Genocide* case, n. 10, at para. 379.
[21] ARSIWA, n. 10; ARIO, n. 10.
[22] See the compilations of decisions edited by the UN Secretariat: UN Doc. A/62/62 and Corr.1 and Add.1 (2007); UN Doc. A/65/76 (2010).
[23] Article 4 ARSIWA and Article 6 ARIO, n. 10.
[24] Article 4(2) ARSIWA, as interpreted in *Bosnian Genocide* case, n. 10, at paras. 390–395. See ARSIWA Commentary, p. 42; see also I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford: Clarendon Press, 1983), p. 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. Alaimo (eds.), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti: problemi e spunti di riflessione* (Milan: Giuffré, 2006), pp. 3–24, at pp. 5–6.
[25] Articles 2(d) and 6 ARIO, n. 10.
[26] Article 5 ARSIWA, n. 10.

international organisations, whereas *ultra vires* conduct is attributed.[27]

The second set of rules on attribution is that concerning 'factual links'. Setting aside some special cases,[28] the most important type of factual link occurs when a person is acting under the instructions, direction, or control of a state or international organisation. 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 organisation regardless of the status of those individuals. This complex rule, enshrined in Article 8 of the ARSIWA, has been the subject of a decades-long judicial and doctrinal debate.[29] 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.[30] As to 'direction or control', the conflict between the ICJ in *Nicaragua* and the International Criminal Tribunal for the former Yugoslavia in *Tadić* as to the correct threshold of attribution underlying these words has been authoritatively solved in the *Bosnian Genocide* case, in favour of the *Nicaragua* test.[31] One of the greatest shortcomings of the ARIO is that they do not explicitly contain a rule analogous to Article 8 of the ARSIWA,[32] but the ILC explained that the definition of 'agent' in Article 2 of the ARIO is meant also to encompass this type of situation.[33]

The third and final general rule on attribution of conduct is that a state or an international organisation may adopt a certain conduct as its own after the conduct has taken place (*ex post*

[27] Article 7 ARSIWA and Article 8 ARIO, n. 10.
[28] Articles 9 and 10 ARSIWA, n. 10, respectively, on the absence and default of governmental authorities and successful insurrectional and separatist movements.
[29] See *inter alia* 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: Giuffré, 2006), pp. 25–52; A.J.J. De Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72 BYIL 255–292; C. Kress, 'L'organe de facto en droit international public: réflexions sur l'imputation à l'état de l'acte d'un particulier à la lumière des développements récents' (2001) 105 *Revue gén. de droit int. pub.* 93–144; and P. Palchetti, *L'organo di fatto dello stato nell'illecito internazionale* (Milan: Giuffré, 2007).
[30] For instance, the ARSIWA Commentary, p. 47, n. 10, speaks of general 'instructions' to carry out 'missions' abroad.
[31] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14, at paras. 75, 86, 109–110 and 115; *Prosecutor v. Tadić (Appeals Chamber)*, n. IT-94-1-A, 15 July 1999, 38 ILM 1518, at paras. 115–145; *Bosnian Genocide* case, n. 10, paras. 402–406.
[32] See F. Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*' (2011) 50 Mil L & L War Rev 321–346, at 325 and C. Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations An Appraisal of the "Copy-Paste Approach"' (2012) 9(1) IOLR 53–66.
[33] ARIO Commentary, n. 10, p. 86.

facto).[34] For the rule to be triggered, it is necessary that an institutionally-linked actor has issued a declaration or otherwise endorsed the conduct of a person or group of persons. This rule essentially concerns cases in which attribution would not, in principle, be an issue – and so may almost be deemed a 'procedural' rule. As this could perhaps be construed as a case of 'indirect' responsibility rather than one of 'direct' multiple attribution, it will not be further considered here.[35] 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.

2. Two types of multiple attribution

There are two types of situations where multiple attribution of conduct could theoretically arise. First, the act or omission of one person or entity may trigger attribution rules with regard to more than one subject at the same time, meaning, for instance, that the person or entity in question acts on behalf, or under the instructions, direction, or control, of more than one state or international organisation at the same time, or that it acts on behalf of one subject and under the instructions, direction, or control of another. We shall consider this type of situation in section 2.1. 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 international organisation. In this case, there are two or more actors whose joint conduct is attributed to two or more international subjects. We shall consider this type of situation in section 2.2.[36]

2.1 Conduct carried out by one person/entity acting on behalf of more than one state/international organisation at the same time

2.1.1 Possible simultaneous application of attribution rules

Let us start with the first, and most complex, set of situations. Given a certain conduct

[34] Article 11 ARSIWA and Article 9 ARIO, n. 10.
[35] But see Responsibility of international organizations: comments and observations received from international organizations, UN Doc. A/CN.4/545 (2004), pp. 27–28 (the agreements between the World Health Organization (WHO) and the Pan American Health Organization (PAHO) 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).
[36] 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 n. 19 and accompanying text.

performed by one person or entity, the application of one of the attribution rules in relation to one subject of international law does not *ipso facto* exclude the application of the same or another attribution rule in relation to the same or another subject of international law.[37] Anzilotti remarked back in 1902 that attribution of conduct is the result of an evaluation based on law.[38] 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'.[39] The ILC clarified that this legal evaluation, i.e. the operation of attribution of conduct rules, is a 'cumulative' process, meaning that the criteria are not mutually exclusive (that is, someone could be the organ of a state under Article 4, and at the same time acting under the instructions, direction, or control of that same state under Article 8).[40] But there is more. This legal process may apply at the same time with reference to more than one subject. Except for the rules on the transfer of organs considered in section 3, which constitute the only exception to this type of multiple attribution, nothing in the text of the ILC Articles prevents the 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 Table 1 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 and/or international organisations at the same time because of the contemporaneous application of two rules of attribution. While such simultaneous application may potentially involve more than two rules at the same time, the Table only considers permutations between two attribution rules at a time, thereby illustrating twenty-one cases of possible simultaneous application between the main rules on attribution of conduct of states and international organisations. Indeed, 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 and/or international organisations is instructed, directed, or controlled by another state and/or international organisation, or where a joint organ of two or more states and/or international organisations instructs, directs, or controls the act of another state's (or international organisation's) organ. These cases may potentially lead to the attribution to three or more subjects at once. 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

[37] See subsections 2.1.2, 2.1.3, and 2.1.4.
[38] Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale*, n. 6.
[39] D. Anzilotti, *Corso di diritto internazionale*, 4th ed., vol. I (Padua: CEDAM, 1955), p. 222.
[40] ARSIWA Commentary, n. 10, p. 39.

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 section 3 applies, attribution will be to only one subject. This important limiting factor is highlighted in the Table, but whenever the rule does not find application (for example, because the transfer of the organ was not complete, as we shall see below), attribution will be to both subjects of international law involved. Furthermore, it must be recognised that courts have at times had difficulty with recognizing the concept of multiple attribution. Nonetheless, in my view the overall balance of the available practice considered in this Chapter supports the possibility of multiple attribution. We will now consider certain examples identified in the Table.

2.1.2 Joint organs established *ad hoc*: *Eurotunnel*, *Hess*, and *Nauru*

Let us start by considering how attribution rules on state and/or international organisation 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 international organisations as their joint organ: for instance, the Coalition Provisional Authority that operated in Iraq between 2003 and 2004. Second, an organ of a state and/or international organisation may also act as an organ of another state and/or international organisation: for instance, organs of the Pan American Health Organization also act as organs of the World Health Organization by virtue of an agreement between the two international organisations.[41]

An older case concerning the European Convention on Human Rights (ECHR) exemplifies that it has not always been recognized that acts of joint organs could be attributed to all states involved. 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, given that the prison had been established in 1945 by the Allied *Kommandatura*,

[41] UN Doc. A/CN.4/545 (2004), n. 35, 27–28 ('[a]s a step towards integration, WHO and PAHO concluded an agreement in 1949 whereby the Pan American Sanitary Conference (…) and the Pan American Sanitary Bureau, would serve respectively as the Regional Committee and the Regional Office of the World Health Organization for the Americas. PAHO thus acts at the same time as a component of both the United Nations and the inter-American systems').

which was at the time a joint organ comprised of four Governors from the United States, the United Kingdom, the Soviet Union, and France, taking decisions on a consensual basis.[42] According to the European Commission, the consequent responsibility had to be deemed indivisible, because 'the responsibility for the prison (…) [was] exercised on a Four Power basis' and the United Kingdom acted 'only as a partner in the joint responsibility which it shares with the three other Powers'; therefore, such 'joint authority [could] not be divided into four separate jurisdictions'.[43]

However, it is now clear that in the case of a joint organ, attribution will plainly be to all subjects that established the joint organ. This was clarified by the ILC in the ARSIWA Commentaries.[44] For example, the Coalition Provisional Authority in Iraq could be seen as a joint organ of the coalition partners, so that any action or omission of that joint organ could be attributed directly to all coalition partners.[45] The rule was affirmed in the *Eurotunnel* arbitration award, which established that the Intergovernmental Commission (IGC) overseeing the Channel 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'.[46]

[42] *Hess v. the United Kingdom*, App. No. 6231/73 (ECtHR, 28 May 1975). To be precise, the question was couched in terms of 'jurisdiction' under Article 1 ECHR, which comprises both attribution issues and other issues.
[43] Ibid., at 74.
[44] ARSIWA Commentary, n. 10, p. 44 (the conduct of 'a single entity which is a joint organ of several States (…) is attributable to [all] States').
[45] 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), pp. 185–230.
[46] *Eurotunnel*, n. 2, para. 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 para. 395).

Table 1

Conduct of one actor to whom two rules of attribution apply at the same time*	**STATE ORGAN** **(DE JURE OR DE FACTO)** ***Article 4 ARSIWA***	**IO ORGAN** ***Article 6 ARIO***	**ENTITY EXERCISING GOVERNMENTAL AUTHORITY** ***Article 5 ARSIWA***	**AGENT OR ENTITY EXERCISING IO FUNCTIONS** ***Article 6 ARIO***	**ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY A STATE** ***Article 8 ARSIWA***	**ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY AN IO**
STATE ORGAN **(DE JURE OR DE FACTO)** ***Article 4 ARSIWA***	Joint organ established by two or more states; *or* organ of two or more states at once	Joint organ established by two or more states/IOs; *or* 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
IO ORGAN ***Article 6 ARIO***		Joint organ established by two or more IOs; *or* 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
ENTITY EXERCISING GOVERNMENTAL AUTHORITY ***Article 5 ARSIWA***			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
AGENT OR ENTITY EXERCISING IO FUNCTIONS ***Article 6 ARIO***				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
ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY A STATE ***Article 8 ARSIWA***					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.
ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY AN IO						Person or entity acting under the instructions, direction or control of two or more IOs

*** Note that multiple attribution does not arise if Article 6 ARSIWA or Article 7 ARIO apply (see section 3).**

Some support for the rule may also be found in the *Certain Phosphate Lands in Nauru* case before the ICJ.[47] 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.[48] Could Nauru 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'?[49] An aspect of this question concerned the attribution of the conduct of the Administering Authority, a joint organ of the United Kingdom, New Zealand, and Australia, to Australia. The Court held that Australia could indeed be sued independently. While the question of the nature and content of Australia's liability would be reserved for the merits, in the Court's view it was clear 'that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and [that] there [was] nothing in the character of that Agreement which debar[red] the Court from considering a claim of a breach of those obligations by Australia'.[50] In other words, the conduct of the joint organ was at least partly attributable to Australia as one of the states forming it.

In sum, both the *Eurotunnel* arbitration and the *Nauru* case constitute recent and consistent indications that the act of a joint organ may be attributable to each state (or international organisation) comprising that organ.[51] This is further confirmation of the theoretical assumptions underpinning the Table above; the rules on attribution of conduct apply cumulatively, and a certain entity may be purposefully constituted to jointly exercise governmental functions belonging to more than one state at a time, or institutional functions of more than one international organisation at a time.

[47] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240 (*Nauru* case). See Crawford, 'Third Report', n. 19, paras. 270–271.
[48] Ibid., *Nauru* case, paras. 41–47. The territory had been a Trusteeship also under the League of Nations system.
[49] Ibid., para. 39.
[50] Ibid., para. 48.
[51] See Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', n. 19, 7–8.

2.1.3 Organs belonging to more than one state/international organisation: the case of the European Union

Attribution rules on state and/or international organisation 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 international organisation may at times also act as an organ of another state and/or international organisation (or more). In this case, its conduct would be attributed to both states and/or international organisations, unless the rules on transferred organs (to be considered in section 3) apply. For example, consider the position of customs officials of member states of the European Union (EU), who act simultaneously as organs of their state and of the EU. Can their acts be attributed simultaneously to 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,[52] 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*. Nor are we 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.[53] The narrow question considered in this example 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,[54] the acts and omissions of customs officials at the borders of EU member states constitute a

[52] See e.g. P. Eeckhout, 'The EU and it 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: OUP, 2006), pp. 449–464; M.D. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart Publishing, 2013), pp. 35–74, 295–312, and 359–360; 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), pp. 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' (2009) 40 NYIL 183–227.

[53] See Nollkaemper, 'Introduction', n. 9, as well as Chapter 4 in this volume, Fry, 'Attribution of Responsibility', n. 15.

[54] 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).

perfect example of this issue.[55]

In its comments to the ILC during the drafting of the ARIO, the European Commission took the view that when implementing a binding act of the EU, organs of member 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]'.[56] This position was essentially based on certain substantive points of (internal) EU law that were accepted by a number of World Trade Organization (WTO) panel reports.[57] In fact, the European Commission had called for a specific rule to be added to the ARIO stating that acts of member states implementing binding rules of regional organisations should only be attributed to the international organisation in question.[58] In refuting this view, Special Rapporteur Gaja relied on the decisions of the European Court of Human Rights in *Bosphorus*[59] and the European Court of Justice in *Kadi*[60] 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'.[61]

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 (even in 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, because the complaining parties had directed their complaints to the EU and it, in turn 'never contested that, for the purposes of this dispute, the challenged

[55] 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, n. 10, i.e. that the rules in ARIO would fully apply here. But see 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?' (2010) 21 EJIL 723–747, for the contrary view.
[56] G. Gaja, 'Seventh Report on Responsibility of International Organizations', UN Doc. A/CN.4/610 (2009), at p. 12.
[57] See Panel Report, *European Communities – Geographic Indications*, WT/DS174/R, 15 March 2005, para. 7.98 and para. 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, para. 7.101.
[58] Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', n. 55, at 728–729.
[59] Case 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland (Merits) (GC)*, [2006] 42 EHRR 1, at para. 153.
[60] Case 402/05 P and Case 415/05 P, *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] 3 CMLR 41, at para. 314.
[61] Gaja, 'Seventh Report', n. 56, p. 13.

member State measures [were] attributable to it under international law'.[62] Cast in these terms, this was more of a procedural acceptance of attribution under Article 9 of the ARIO than a statement against the possibility of multiple attribution of conduct.[63] By contrast, the question of multiple attribution had been specifically raised in another WTO case, previously brought by the United States against both the European Communities and two of its member states – *Customs Classification of Certain Computer Equipment*. The solution adopted therein was somewhat in favour of potential multiple attribution.[64]

Be that as it may, it seems that both the European Commission and the Special Rapporteur looked at 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 European Union – 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 of the ARIO. They are also, at the same time, organs of their member states. Let us assume that the rules on transferred organs that we shall analyse in section 3 do not apply in this context, because state organs implementing EU binding acts are not 'transferred' to the EU when implementing EU acts.[65] The result is that both Article 4 of the ARSIWA and Article 5 of the ARIO would 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. The same would hold true in other cases where the internal rules of an international organisation assign certain of its functions to organs of member states without any transfer of that organ from the state to the international organisation.

[62] Panel Report, *European Communities – Biotech*, WT/DS 291/R, 29 September 2006, para. 7.101 (emphasis added).
[63] See P.J. Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 IOLR 9–33, at 20.
[64] Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, 22 June 1998, para. 8.16 as interpreted by Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', n. 55, at 732 (but the author then reaches the conclusion that the subsequent WTO reports mentioned above overruled this approach).
[65] See ibid., at 727. But see also Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?', n. 63, at 16.

2.1.4 Other cases: state/international organisation functions and instructions, direction, or control

So far, we have only discussed the simultaneous application of 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 particular situations must be considered.

First, the framework proposed in the Table assumes that it is possible for an entity to exercise the governmental authority of two or more states at the same time under the terms of Article 5 of the ARSIWA. How can this situation arise? In the ARSIWA 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'.[66] Examples of situations triggering the rule are 'parastatal' entities, such as 'former State corporations' that have been 'privatized but retain certain public or regulatory functions': for example, a national railway that is authorised to levy fines to customers.[67] 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'.[68] Given the nature of this enquiry, the question is whether it is possible to reach the conclusion that a certain entity is acting in the exercise of the governmental authority of two or more states at the same time. 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 two or more states with certain governmental functions. If the United States (US) and the UK governments acting together, rather than the US government alone, had contracted those companies that were providing services at the Abu Ghraib prison,[69] the question would have arisen as to whether the conduct of the PMSC could be attributed to both – and an affirmative answer would have been likely.[70]

[66] Ibid.
[67] ARSIWA Commentary, n. 10, p. 42.
[68] ARSIWA Commentary, n. 10, p. 43.
[69] See the US Court of Appeal judgment in *Saleh v. Titan Corp.*, 580 F 3d 1 (D.C. Circuit 2009).
[70] On responsibility of PMSCs generally, see e.g. F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford: OUP, 2011); C. Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 EJIL 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: OUP, 2007), pp. 139–157.

Second, the Table assumes that it is possible for a person or entity to be under the instructions, direction, or control of two or more states and/or international organisations at the same time. At first sight, this may seem to imply that 'effective' control can be 'effective' in relation to more than one subject of international law at the same time. As briefly noted above, the rule in Article 8 of the ARSIWA 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. While it may be true that 'effective' control can only be exercised by one subject at a time, the rule on 'instructions' 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 and/or international organisation, and then to be under the more specific 'effective' control of another state and/or international organisation when carrying out the orders. It is also possible for someone to have received similar instructions from two or more states. Multiple attribution would ensue in all these cases. As an example, consider the conduct of the captain of a vessel who, following the combined instructions received by both Italian and Maltese authorities, disembarks a group of shipwrecked refugees in Libya. Having acted under the instructions of the authorities of both governments, his conduct would be attributed to both Italy and Malta, and could engage the responsibility of both countries for any breach of *non-refoulement* obligations under international law.

Finally, a general point must be made concerning all cases considered in the Table. All attribution of conduct rules, especially as interpreted in the *Bosnian Genocide* case,[71] must rely on the existence of institutionally-linked actors (organs), which are either acting themselves or instructing, directing, or controlling the acts of others (in the case of factual links).[72] 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. Therefore, for instance, 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 United Kingdom would ensue by operation of Article 8 of the ARSIWA combined with (two instances of) Article 4 of the ARSIWA. The

[71] *Bosnian Genocide* case, n. 10.
[72] ARSIWA Commentary, n. 10, p. 38.

ARSIWA Commentaries seem to explicitly recognise that someone might be operating under the joint instructions of two states at a time.[73]

2.2 Conduct jointly carried out by two or more persons/entities acting on behalf of different states/international organisations

All the cases of multiple attribution we have 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, which arises when the same conduct is carried out jointly by two or more actors, each of whom is acting on behalf of a different state and/or international organisation. This is, admittedly, a rare occurrence. 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. For the purposes of this example, let us assume that the tank was being operated jointly by the two soldiers and that a civilian was unlawfully killed by a weapon fired by the tank, so that we can identify one harmful conduct as the cause of the death. Could this conduct be attributable to both states?

The answer to this question is affirmative. In this case, the question is not one of simultaneous application of rules of attribution of conduct concerning one actor, but of the simple application of the rules in relation to each subject of international law concerned. Each of the two soldiers in the example is plainly a state organ under Article 4 of the ARSIWA, 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 the relevant conduct: i.e. the one act or omission that is carried out jointly and constitutes an internationally wrongful act. It is difficult to understand precisely what constitutes the 'joint' conduct of two or more actors. In many other cases, one could well reach the conclusion that there is not 'one' conduct in breach of international law, but 'two' (or more) courses of conduct that are each independently attributable to only one of the two states – a situation somewhat similar to

[73] ARSIWA Commentary, n. 10, p. 44.

Corfu Channel (the difference being that the time, place, and obligation breached would be the same, rather than different). 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 see, Article 47(1) of the ARSIWA operates in such a way that the final result would be identical (both states would be responsible), but in some scenarios there may be one indivisible conduct that is attributable to two state organs acting together without the previous establishment of a joint organ. As will be discussed in Chapters 7 and 8 of this volume, this may have consequences in terms of invocation of responsibility and the remedies available.

Courts have occasionally 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 twenty-one European states inadmissible because, among other reasons, the applicant had not specified which of the coalition partners was responsible for the alleged violations of his human rights.[74] Although the ECtHR employed the language of Article 1 of the ECHR (i.e. the concept of 'jurisdiction'), the point was also made that there was not sufficient evidence of attribution of conduct; Hussein had not demonstrated how the command structures operated, nor which of the respondent states had been involved in his arrest and detention.[75] This should be taken as an important practical warning concerning attempts to invoke responsibility based on multiple attribution of conduct. The ECtHR implicitly said that when invoking the 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 claims based on the joint exercise of power.

2.3 The principle of independent responsibility

The main textual argument in favour of multiple attribution is that both the ARSIWA and the ARIO clearly recognise the possibility that one wrongful act may implicate the responsibility

[74] Case 23276/04, *Hussein v. Albania and others (Admissibility)*, [2006] 42 EHRR SE16.
[75] Ibid., 224–225.

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.[76] The 'principle of independent responsibility'[77] is enshrined in Article 47(1) of the ARSIWA:

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

Article 48(1) of the ARIO clarifies how the rule works when international organisations 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 and/or international organisation and each responsible state and/or international organisation. They are also a clear recognition that states may act jointly, and so may international organisations, or states and international organisations. In this case, they would each be separately responsible for the same wrongful act of which they are 'co-authors'.[78]

This principle of independent responsibility has been linked by some authors to the principle of exclusive responsibility, that is: conduct is, in principle, only to be attributed to one actor.[79] In their view, the fact that the system of international responsibility was designed with 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, however, 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),[80] to one in which breaches are considered as 'violations' of 'the law' – something approaching a 'general law of wrongs' in

[76] See generally Crawford, 'Third Report', n. 19, paras. 263–283.
[77] ARSIWA Commentary, n. 10, p. 124.
[78] D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 4, p. ___; Vermeer-Künzli, 'Invocation of Responsibility', n. 4, p. ___.
[79] See Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 12.
[80] See Brownlie, *System of the Law of Nations: State Responsibility*, n. 24, pp. 189–192. Continental lawyers often begged to differ: see e.g. Reuter, 'Principes de droit international public', n. 5, 583–618.

international law.[81] 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[82] does not impinge upon the basic framework of attribution, which permits multiple attribution.

As the ARSIWA Commentaries put it, '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'.[83] Substantially the same concept was expressed by the Commentaries to the ARIO, according to which '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'.[84] As we have seen, states and international organisations may also act together by giving joint instructions to the same actor. Indeed, '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 a State rule out attribution of the same conduct to an international organization'.[85] This is unsurprising. As we recalled above, attribution of conduct is the result of an evaluation based on law, not on fault or causality issues, and attribution rules are structured in an open fashion.[86] All of them 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 international organisation, more than one state, more than one international organisation, etc. Furthermore, conduct might arise through the concurrent action or omissions of two or more persons acting each on behalf of one state and/or international organisation.

One may legitimately wonder about the origin of the contrary idea, whereby attribution is 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,

[81] See generally J. Crawford, *The International Law Commission's Articles on State Responsibility: introduction, text and commentaries* (Cambridge: CUP, 2002), pp. 1–60.
[82] This will be analysed in Chapter 8, Vermeer-Künzli, 'Invocation of Responsibility', n. 4.
[83] ARSIWA Commentary, n. 10, p. 124.
[84] ARIO Commentary, n. 10, p. 83.
[85] ARIO Commentary, n. 10, p. 83.
[86] See n. 17.

in both 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.[87] But the premise of domestic private law is completely different from that of international responsibility for internationally wrongful acts, and thus such domestic law analogies are likely to be misleading.[88]

3. Exclusive attribution of transferred organs

3.1 Organs transferred to a state

Multiple attribution does not occur in all circumstances where a single conduct could potentially be attributed to multiple international actors. The rule on transferred organs constitutes an exception to the rule on multiple attribution, in the sense that it is designed to prevent multiple attribution of conduct from occurring if certain requirements are met.

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 multilateral 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 about multiple attribution, the answer would plainly be yes to both questions. Italian police officers are *de jure* organs of the Italian Republic (Article 4 of the ARSIWA). In this instance, they are also acting under the instructions, direction, or control of the Sammarinese authorities

[87] 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*, 12th ed., (Paris: Dalloz, 2008), pp. 463–465.

[88] See J. Crawford, 'The System of International Responsibility', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), pp. 17–26, at pp. 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: OUP, 2010), pp. 3–16, at p. 13 (highlighting the similar view by Kelsen and Arangio-Ruiz); Reuter, 'Principes de droit international public', n. 5, 584–595 (on the 'unity of the theory of responsibility', which is neither criminal nor civil). *Contra*, see Brownlie, *System of the Law of Nations: State Responsibility*, n. 24, p. 23.

(Article 8 of the ARSIWA). This would be a textbook example of dual attribution, were it not for the operation of one rule we have not yet analysed: Article 6 of the ARSIWA. 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, if in our example 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.[89] However, because this is an exception to the general rule allowing for dual attribution, it must be narrowly construed. According to the ILC, there is a transfer of attribution from one state to another only in the 'limited' and 'precise situation' where organs of a state are 'effectively put at the disposal' of another, 'so that the organ may temporarily act for [the latter's] benefit'.[90]

Under the limited circumstances in which it applies, Article 6 of the ARSIWA 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'.[91] 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. These 'apparent' loans could not lead to a transfer of attribution, because 'the organ will in fact still be acting under the control and in accordance with the instructions of the State to which it belongs'.[92] A case of such an apparent loan was relevant in *Attorney General v. Nissan* before the UK House of Lords in 1969.[93] 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 UN later, and as such their conduct was not attributable to the United Kingdom. Their Lordships instead held that UK troops remained

[89] ARSIWA Commentary, n. 10, p. 44.
[90] Ibid. (emphasis added).
[91] ARSIWA Commentary, n. 10, p. 44.
[92] Ago, 'Third Report', n. 6, 199–274, 272. See also ARSIWA Commentary, n. 10, p. 44.
[93] *Attorney-General v. Nissan* [1969] UKHL 3; [1970] 1 AC 179; 11 February 1969, 44 ILR 359.

'soldiers of Her Majesty' subject to UK command throughout the time, and their conduct should thus be attributed to the United Kingdom.[94] Because the transfer of the organ had not been a complete one, the United Kingdom was still responsible:

> From the documents it appears further that, though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national States in respect of any criminal offences committed by them in Cyprus.[95]

In fact, Article 6 of the ARSIWA permits 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 of the ARSIWA (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. If a state lends one of its organs to another state, Ago argued, it may still happen that the latter's 'demands' are not 'so exacting as to prevent the organ from continuing to act simultaneously, though independently, as an organ of its own State'.[96] A case-by-case analysis would then be necessary to disentangle the question of whose authority is being exercised at any given time, if it is possible to do so. According to the ILC, for Article 6 of the ARSIWA to apply, not only has the transferred organ to be entrusted with governmental functions of the receiving state,[97] 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'.[98] If that is so, attribution becomes exclusive to the receiving state.

A very interesting example of transferred organs concerns the Principality of Andorra.[99] Before a treaty of 1993 settled its status as a state (it has been a member of the United Nations since July 1993), 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.[100] In application of an ancient custom,

[94] Ago, 'Third Report', n. 6, 199–274, 271.
[95] *Attorney-General v. Nissan*, n. 93, at 376.
[96] Ibid., 268.
[97] ARSIWA Commentary, n. 10, p. 45.
[98] Ibid., p. 44.
[99] See *Drozd and Janousek v. France and Spain*, App. No. 12747/87 (ECtHR, 26 June 1992) (*Drozd* case).
[100] See J. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006), p. 197.

France and Spain seconded some of their own judges to the *Tribunal de Corts* of the Principality. Mr. Drozd and Mr. 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 ECtHR 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'.[101] The answer was in the negative, because in the view of the ECtHR this was what we would call a complete transfer of organs from France and Spain to Andorra. While sitting in Andorran courts, the judges did not do so 'in their capacity as French or Spanish judges', but acted 'in an autonomous manner' and without any 'supervision' by France or Spain.[102]

Drozd and Janousek and Article 6 of the ARSIWA were relied upon as authorities by the British government before the High Court in the *Al-Saadoon* case.[103] The government argued that British troops in Iraq were put at the disposal of the Iraqi government in the sense of Article 6 of the ARSIWA 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*'.[104] 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'.[105] The Court of Appeal disagreed on this point, and deemed that the British forces were acting as 'agents' of Iraqi courts.[106] However, the Court of Appeal did not reach this conclusion by applying the criterion of Article 6 of the ARSIWA. It stated that the United

[101] *Drozd* case, n. 99, para. 91.
[102] Ibid., para. 96.
[103] See *R. (Al-Saadoon) v. Secretary of State for Defence (High Court)* [2008] EWHC 3098 (Admin), at paras. 75–81, overruled on the point of attribution by *R. (Al-Saadoon) v. Secretary of State for Defence (Court of Appeal)* [2009] EWCA Civ 7, [2009] 3 WLR 957, at paras. 32–40. See also Case 61498/08, *Al-Saadoon and Mufdhi v. the United Kingdom (Admissibility)*, [2009] 49 EHRR SE11; Case 61498/08, *Al-Saadoon and Mufdhi v. the United Kingdom (Merits) (Fourth Section)*, [2010] 51 EHRR 9.
[104] *R. (Al-Saadoon) v. Secretary of State for Defence (High Court)*, n. 103, para. 80 (emphasis added).
[105] Ibid., para. 79.
[106] *R. (Al-Saadoon) v. Secretary of State for Defence (Court of Appeal)*, n. 103, para. 40.

Kingdom 'was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign state'[107] and therefore it was not exercising 'jurisdiction' for the purposes of Article 1 of the 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 United Kingdom.[108]

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 'direction and control' by the receiving state's authorities 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 of the ARSIWA. The point of Article 6 of the ARSIWA is not to establish if there can be attribution, but how to disentangle a situation of potential dual attribution. Article 6 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.[109]

There is obviously an overlap here. We have seen in the discussion of Table 1 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 European Union.[110] In those cases, too, Article 6 of the ARSIWA might potentially have applied as an exception to multiple attribution, but we assumed that it would not. This is because the threshold of 'being put at the disposal' of the EU is not nearly met because customs officials do not answer to European Union 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

[107] Ibid., para. 32.
[108] *Al-Saadoon and Mufdhi v. the United Kingdom (Admissibility)*, n. 103, especially at paras. 84–89.
[109] ARSIWA Commentary, n. 10, p. 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 ILC *Yearbook* 1974/I, 43–61, 55.
[110] See section 2.1.3.

machinery as such: they simply exercise functions of the European Union at the same time as exercising governmental functions of their member state. The default rule of multiple attribution applies, and the exception of Article 6 of the ARSIWA is not triggered.

It should be added that the same rule in Article 6 of the ARSIWA also applies by analogy to the rare situation of an organ or agent of an international organisation transferred to a state for the exercise of governmental authority thereof. While this was clear in Ago's third report and in the ARSIWA adopted on first reading,[111] the final version of the ARSIWA is not explicit on the point, although the Commentaries mention the issue.[112] The symmetrical situation of organs put at the disposal of international organisations by both states and international organisations is fully considered by the ARIO, as we shall see.

3.2 Organs transferred to an international organisation

3.2.1 'Effective control' in Article 7 ARIO

We have just seen that under Article 6 of the ARSIWA, 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 organisations to states, although a more specific provision in this respect would have been welcome. But what happens when organs are transferred from states or international organisations to an international organisation? In a textual departure from the ARSIWA, Article 7 of the 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 is recalled that Article 6 of the ARSIWA instead provides that:

[111] ILC *Yearbook* 1974/II(1), 269–290, 286 (text of Article 9 includes organs 'placed at the disposal of a State (…) by an international organization').
[112] ARSIWA Commentary, n. 10, p. 45.

> 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.

Despite this striking difference between the two formulations, the text of Article 7 of the ARIO 'generally' met with a 'positive reaction' by states.[113] Even the notorious *Behrami* case of the European Court of Human Rights paid initial lip-service to the first draft of the provision,[114] and the International Monetary Fund, otherwise quite critical of the work of the ILC on international organisations, endorsed the Article.[115]

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 of the ARSIWA, interpreted by the ICJ in *Bosnian Genocide* as 'effective control', the same 'effective control' under consideration here: that is, the criterion to attribute conduct of organs transferred to international organisations? Or does 'effective control' have a different meaning in Article 7 of the ARIO? More generally, was it really a good idea to use the words 'effective control' in Article 7 of the ARIO? The drafting history of Article 6 of the ARSIWA, on organs transferred to states, will shed some light on this problem.

3.2.2 The drafting history of Article 6 ARSIWA and 'effective control' in Article 7 ARIO

The question of organs transferred or lent to international organisations had already been addressed by Ago in his third report on state responsibility, when he discussed what would later become Article 6 of the ARSIWA.[116] Ago started by mentioning the role of the UN and troop-contributing states in Korea (the 1950 UN operation under American unified command) and the Congo (the 1961 operation under UN command),[117] and concluded that both in the context of states lending organs to other states, and in that of states lending organs to international organisations, the receiving state or organisation 'must be held responsible for any violations of international law committed by the organ placed at its disposal, when the

[113] Gaja, 'Seventh Report', n. 56, p. 11.
[114] Case 71412/01 and Case 78166/01, *Behrami v. France and Saramati v. France, Germany and Norway (Admissibility) (GC)*, [2007] 45 EHRR SE10, at 93.
[115] UN Doc. A/CN.4/556 (2005), 25.
[116] Ago, 'Third Report', n. 6, 199–274, at 268 and 271–274.
[117] Ibid., at 272–273.

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'.[118]

In Ago's view, therefore, the rule had to be the same for what has now become Article 6 of the ARSIWA and what was to become Article 7 of the ARIO. According to him, in both cases what mattered was 'effective control'.[119] By this he meant that the transferred organ should not only be integrated into the organisation of the receiving state (or its 'machinery', in Ago's terminology),[120] but also clearly under the authority of the receiving state as opposed to the sending one. The Commentaries adopted by the ILC in 1974 clearly spoke of a 'functional link' being established 'with the machinery of the beneficiary State'.[121] 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 – because 'the organ in question acts in the exercise of functions appertaining to the State at whose disposal it has been placed (…) and is required to obey any instructions it may receive from that State and not instructions from the State to which it belongs'.[122] It was clear then that such an institutional link was to be accompanied by a lack of interference from the sending government: the efficacy of control resided not in a factual link akin to Article 8 of the ARSIWA, but in the fact that the transfer between states was real, i.e. the organic link was severed with the sending state, however temporarily.

The discussion in 1974 therefore constituted a crucial moment, because it was 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 of the ARSIWA in terms of 'being placed at the disposal', rejecting Ago's initial formulation.[123] 'Effective control' here had nothing at all to do with Article 8 of the ARSIWA or factual links.

[118] Ibid., at 273–274.
[119] ILC *Yearbook* 1974/I, 43–61, 60.
[120] Ago, 'Third Report', n. 6, 199–274, 267.
[121] ILC *Yearbook* 1974/II(1), 269–290, 287–288.
[122] Ibid., 288.
[123] See Ago, 'Third Report', n. 6, 199–274, 274 and ILC *Yearbook* 1974/I, 43–61, 60.

3.2.3 Why the wording of Article 7 ARIO is misleading

In sum, 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 of the ARIO. Why should the rule on organs transferred to international organisations be phrased differently from that of organs transferred to states? And why should it be phrased in terms of both 'being at the disposal of' *and* 'effective control', if the two were interchangeable concepts back in 1971?

The term 'effective control' in Article 7 of the ARIO clearly owes its debt to the arguments that Ago put forward in 1971 in his third report.[124] In the Commentaries to the ARIO, Gaja clearly sought to link the 'effective control' test in what is now Article 7 of the ARIO to the formulation of Article 6 of the ARSIWA, and justified his proposed change of the latter's formulation by reference to the unsuitability of the language of 'governmental authority' in the context of international organisations.[125] But this is slightly unpersuasive. There is an equivalent for 'exercise of elements of governmental authority' in the context of international organisations, as the ARIO now recognise in Article 2(d): the concept of 'functions' of the international organisation. In fact, in order to maintain an analogy *mutatis mutandis* between Article 6 of the ARSIWA and Article 7 of the ARIO, the latter should have been drafted 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.'

The Commentaries to the ARIO nonetheless affirmed the intention to keep the analogy with Article 6 of the ARSIWA, and explained that the point was not establishing if there was attribution, but choosing between two subjects, if it was possible to do so.[126] This suggests that the 'effective control' test of Article 7 of the ARIO was not the same 'control' of Article 8 of the ARSIWA, *Nicaragua*, and *Bosnian Genocide*. In this context, one should interpret 'effective control' as a criterion determining when exclusive (rather than multiple)

[124] Ago, 'Third Report', n. 6, 199–274, 273.
[125] ARIO Commentary, n. 10, pp. 87–88.
[126] Ibid., p. 88.

attribution can occur: the transfer of attribution follows the transfer of the organ only if the original institutional link with the sending state (or international organisation) has been (temporarily) severed. This is what a *mutatis mutandis* application of Article 6 of the ARSIWA would mean, and this is what the ILC should have adopted and clarified.[127]

However, there is an important obstacle to this construction of 'effective control' in Article 7 of the ARIO as being equivalent to Article 6 of the ARSIWA: and that is the text of Article 7 of the ARIO. The words 'effective control *over that conduct*' unequivocally suggest a factual link, not an institutional one. The ARIO Commentaries indeed explicitly recognise as much by saying that the criterion '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'.[128] These words 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 of the ARIO, we must analyse every single conduct and adopt the criterion of 'control' akin to that in Article 8 of the ARSIWA before establishing that attribution has transferred from a state to an international organisation.

Thus, a crucial difference was to emerge between Article 6 of the ARSIWA and Article 7 of the ARIO. While Article 6 of the ARSIWA, before transferring attribution, requires the creation of an institutional link akin to that of Articles 4 or 5 of the ARSIWA to be established with the receiving state (the exercise of functions of the receiving state), Article 7 of the ARIO would only require a factual link akin to Article 8 of the ARSIWA: 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 of the 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 organisation, thereby creating an institutional link with the international organisation, because a factual link with the international organisation 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 international organisations, given that states usually

[127] Before the ARIO project commenced, similar views on the applicability of (what is now) Article 6 ARSIWA to this situation were expressed by L. Condorelli, 'Le statut des forces des Nations Unies et le droit international humanitaire' (1995) 78 Riv Dir Int 881–906.
[128] ARIO Commentary, n. 10, pp. 87–88.

have more financial means at their disposal than international organisations. Another possible reason for this difference could be that the premise behind Article 7 of the ARIO is precisely that states in fact never completely transfer their organs to international organisations, so that control would always to a certain extent be concurrent. But the intentions of the Commission did not seem to be these, at least initially. The difference between Article 7 of the ARIO and Article 6 of the ARSIWA seems to have occurred more by accident than by design.

3.2.4 Article 7 ARIO in practice

The complex relationship between Article 7 of the ARIO and Article 6 of the ARSIWA that we have just discussed leads to the conclusion that Article 7 of the 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 international organisation practice.[129] It is important to reiterate that under the construction proposed here, 'effective control over the conduct' in Article 7 of the ARIO should not have the same meaning as the criterion to establish a factual link which bears a similar name in Article 8 of the ARSIWA. The drafting history of the two provisions points in this direction, although admittedly the text of Article 7 of the ARIO does not.[130] The transfer of attribution from a state or an international organisation to an international organisation should occur every time that the transferred organ is both functionally integrated in the receiving organisation and has ceased to be so with regard to the sending state or international organisation: if not, multiple attribution would ensue.

In any event, because of the rarity of situations in which states actually relinquish control over their organs, Article 7 of the ARIO is seldom triggered, regardless of how it is interpreted. In his seventh report, Gaja underlined that multiple attribution may well ensue from the fact that the threshold in Article 7 of the ARIO is difficult to establish. Indeed, certain types of state/international organisation cooperation may render it difficult to assess who has control precisely because the conduct in question should be attributed to all

[129] See e.g. K.M. Larsen, 'Attribution of conduct in peace operations: the "ultimate authority and control" test' (2008) 19 EJIL 509–531, at 518 and the comments by the International Labour Organization in UN Doc. A/CN.4/568/Add.1 (2006), 14–15 (according to the International Labour Organization, Article 7 ARIO fails to distinguish between a 'secondment' and a 'loan' of a state official to an international organisation; in its view, attribution would only arise when a 'secondment' occurs).

[130] 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 1969 Vienna Convention on the Law of Treaties allows for treaties.

cooperating actors.[131] Ago had reached a similar conclusion back in 1971, when discussing the *Nissan* case mentioned earlier.[132] 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 United Kingdom because 'the (…) forces (…) had not ceased to be British soldiers'.[133]

Most of the available practice on Article 7 of the ARIO is indeed from peace operations under UN auspices – either run directly by the United Nations (peacekeeping operations) or simply authorised by the UN Security Council but run by member states. As I have discussed elsewhere,[134] 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.[135]

A similarly contradictory succession of authorities concerns the Netherlands, where the conduct of United Nations Protection Force (UNPROFOR) (Dutchbat) during UN peace support operations in Bosnia came before 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 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 of the ARSIWA, and said it was applicable by analogy.[136] It then said that the Dutch contingent was 'ranked within the UN command structure',[137] and therefore its actions were attributable only to the United Nations.[138] 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'.[139] A different conclusion on attribution would be warranted, the Court added, if the forces were

[131] Gaja, 'Seventh Report', n. 56, p. 9.
[132] See n. 93 and accompanying text.
[133] See Ago, 'Third Report', n. 6, 199–274, 271–272 (note 420).
[134] Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*', n. 32.
[135] *Al-Jedda v. the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011), at para. 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).
[136] *Hasan Nuhanović v. The Netherlands*, LJN: BF0181, No. 265615/HA ZA 06-1671, 10 September 2008, at http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BF0181&u_ljn=BF0181, at para. 4.8.
[137] Ibid., para. 4.9.
[138] Ibid., para. 4.11.
[139] Ibid., para. 4.13.

found to act under the sole command of Dutch authorities 'cutting across' UN command.[140] This was a significant reversal of the 'effective control' rule in Article 7 of the ARIO. The Hague District Court held that in the case of 'parallel instructions' from both home and the United Nations, attribution would still be to the UN only, rather than to both the state and the UN, as the application of Article 6 of the ARSIWA 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'.[141] However, in July 2011, the Dutch Court of Appeal reversed this decision. It found that the 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 United Nations and the Netherlands.[142] In September 2013, the Dutch Supreme Court confirmed the Court of Appeal's decision, and reiterated that 'international law, in particular Article 7 DARIO in conjunction with Article 48(1) DARIO, does not exclude the possibility of dual attribution of given conduct'.[143] The Supreme Court also affirmed the Court of Appeal's legal finding that effective control could be exercised by two entities (a state and an international organisation) at the same time and with reference to the same conduct.[144]

The main result of *Al-Jedda* and the Dutch cases is that the rule on transferred organs in Article 7 should be reaffirmed, while acknowledging that its application is confined to those rare cases in which true transfers of organs have occurred – a unique situation in the context of military operations under UN auspices. In all other cases, multiple attribution may ensue.

[140] Ibid., para. 4.14.11.
[141] UN Doc. A/CN.4/637/Add.1 (2011), 13–14.
[142] *Hasan Nuhanović v. The Netherlands*, LJN: BR5388, LJN: R5388; ILDC 1742 (NL 2011), 5 July 2011, at para. 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' (2012) 25 LJIL 521–535; P.A. Nollkaemper, 'Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica' (2011) 9 J Int Crim Just (2011) 1143–1157.
[143] *Hasan Nuhanović v. The Netherlands*, Dutch Supreme Court case 12/03324, 6 September 2013, at para. 3.11.2; see also para. 3.9.4.
[144] See ibid., para. 3.11.2, read in conjunction with para. 3.5.2.

4. Concluding remarks

One of the key cases of shared responsibility in international law arises when two or more states or international organisations carry out together a single harmful conduct. 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 and/or international organisation 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 and/or international organisation. However, there are two important exceptions to multiple attribution of conduct: Article 6 of the ARSIWA, on the transfer of organs to states, and Article 7 of the ARIO, on the transfer of organs to international organisations. 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 analogous. In order for the presumption of dual attribution to be rebutted, a transfer of organs from a state and/or international organisation to another state and/or international organisation would need to satisfy two requirements. First, the transferred organ must have exercised functions of the receiving state and/or international organisation; and second, the sending state and/or international organisation must not have maintained 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 international organisations act jointly.