

# United Nations Peacekeeping Operations: Determining Responsibility under International Law

Dr. Borhan Uddin Khan\* and Md. Mostafa Hosain\*\*

## 1. Introduction

One of the primary goals of establishing the United Nations (UN) was to protect future generations from the scourge of war and to ensure international peace and security. Since its establishment till date, UN has been playing diverse role in ensuring peace by ending conflicts and to that end, it has undertaken different mechanisms. The most common way to ensure peace and security is to deploy UN forces in particular conflicting zones. Such forces are deployed in UN mission under the heading of United Nations Peacekeeping Operations with the help of member States by taking force from its members. The importance of any peacekeeping operation can hardly be overemphasized and has been viewed by some as subsidiary organ of the UN.<sup>1</sup> The operations involve complex relationship between contributing States and international organisation respectively. When an internationally unlawful act occurs at the time of an operation, it is difficult to ascertain whether the State or the international organization is to blame.<sup>2</sup> Different jurisdictions encountered questions of attribution of UN force. In the case of *Attorney General v. Nissan*, the House of Lords was questioned in 1969 whether the UK had to pay compensation for acts committed by British personnel participating in the United Nations Peacekeeping Forces in Cyprus (UNFICYP).<sup>3</sup> Further, the House of Lords after ten years, in the case of *Oberlandesgericht Wien*, ruled on a similar claim brought against Austria over the conduct of an Austrian Contingent member operating in the UN Disengagement Observer Force.<sup>4</sup> The most crucial case was the recently filed one in the Southern District of New York Court

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\* Professor, Department of Law, University of Dhaka.

\*\* Assistant Professor, School of Law, BRAC University.



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<sup>1</sup> Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, ILC, *Report of the International Law Commission, Fifty-Sixth Session*, UN Doc A/59/10 (2004) 99 ('2004 Report') 112. See also, Christopher Leck, 'International Responsibility in UN Peacekeeping Operation: Command and Control Arrangements and Attribution of Conducts', 10 *Melbourne Journal of International Law* (2009) 362-364 <<http://classic.austlii.edu.au/au/journals/MelbJIL/2009/16.html#fn23>> accessed 1 July 2021.

<sup>2</sup> Caitlin A. Bell, 'Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decisions' (2009) 42 *International Law and Politics* 502.

<sup>3</sup> House of Lords, 11 February 1969, All ER 1969-I, 646.

<sup>4</sup> *Oberlandesgericht Wien, N.K. v. Austria* [26 February 1979] 77 *International Law Reports* 470.

where allegation against the UN was brought on the issue of cholera epidemic spreading in Haiti in 2010 by the presence of Nepalese peacekeepers in the United Nations Stabilisation Mission in Haiti (MINUSTAH).<sup>5</sup>

In 2011, the International Law Commission (ILC) came out with the Draft Articles on the Responsibility of International Organisations (Draft Articles 2011).<sup>6</sup> According to Article 7 of the Draft Articles 2011, the conduct of UN peacekeeping operation will be attributable to the UN if it exercises 'effective control' over it in particular time and circumstance.<sup>7</sup> In such case, the lending State will not be responsible. On the other hand, the European Court of Human Rights (ECtHR) in *Behrami and Behrami vs. France*,<sup>8</sup> and *Saramati vs. France, Germany and Norway* case,<sup>9</sup> by referring to the same Article of the Draft Articles 2011 said that a conduct of UN peacekeeping operation will always be attributable to UN if UN exercises 'ultimate control' over it. However, ILC rejected the ultimate control test and supported 'effective control' for attributing conduct of UN peacekeeping operation to UN under Article 7 of Draft Articles 2011.<sup>10</sup>

Another way is to look into the possibility of multiple or dual attribution under Article 7 of the Draft Articles 2011. The question arises because the commentary to the Draft Articles 2011 included a discourse on the possibility of dual or multiple attribution, despite the fact that courts have typically applied 'single attribution' and have not addressed 'multiple attribution' of the same action to different actors.<sup>11</sup> Scholars have diverse views on multiple attributions. Some believe that multiple attributions are possible<sup>12</sup> others reiterate that such attributions do not emerge in the present form of article 7 of the Draft Articles 2011.<sup>13</sup>

In the deployment of troops in peacekeeping operations many legal substantial questions arise, including, where will the jurisdiction lie if the deployed forces commit crime or who will be responsible for commission of crime by these forces. Is it the sending States or the UN? In this backdrop, this paper attempts to focus on international law discourse regarding the responsibility of the UN and the troops

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<sup>5</sup> District Court (Southern District of New York), *Georges et al. v. UN*, October 2013.

<sup>6</sup> *Draft Articles on Responsibility of International Organisations*, United Nations, International Law Commission, Report on the Work of its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011),

General Assembly, Official Records, 63rd Session, Supplement No. 10 (A/66/10).

<sup>7</sup> *ibid* 56-60.

<sup>8</sup> Decision of Grand Chamber [2 May 2007] Application no. 71412/01; para 59-60, 17

<sup>9</sup> Decision of Grand Chamber [2007] application no 78166/01; para 59-60, 17.

<sup>10</sup> Commentaries on article 7 of the ILC Draft Articles (2011) Adopted by the International Law Commission at its sixty-third session in 2011, paras 8 and 9, 54, 57-58.

<sup>11</sup> *ibid*, paras 10, 12, 13 and 14, 58-60.

<sup>12</sup> *ibid*, paras 4, 10, 12-14.

<sup>13</sup> Bell (n 2) 502.

sending States in the event of peace keeping operations. This paper analyses different dimensions involved in the operation in terms of the participation of the UN and the troop sending State. With the introduction in part 1, the subsequent part offers a general overview of UN peacekeeping operation. It discusses about the classification of UN peacekeeping operations and reflects on the control structure in the operation. Part 3 concentrates on the international responsibility arising from the conduct of UN peacekeeping operation. This part analyses the appropriateness of the 'effective control' test and the possibility of multiple attributions to different actors involved in peacekeeping operations in light of article 7 of the Draft Articles 2011 while the final part offers a conclusion.

## **2. The Development Discourse of UN Peacekeeping Operations: An Overview**

It was not until the 1956 Suez Crisis that the phrase 'peacekeeping' was coined. Before that, the first recognised operation was the UN Truce Supervision Organisation (UNTSO) created by the Security Council in June 1948 which was deployed to monitor and maintain the ceasefire during Arab-Israeli War.<sup>14</sup> When Egypt nationalized the Suez Canal, France and the United Kingdom met in secret with Israel and decided to invade Egypt. In such circumstance, restoration of peace and its maintenance was the most significant challenge. The idea of an armed UN peacekeeping force made up of soldiers chosen from Member States through voluntary contributions to secure a buffer zone between the conflicting parties was conceived by Lester Bowles Pearson, Canada's foreign minister.<sup>15</sup>

In 1960s and 1970s, the UN established short-term missions in the Dominican Republic, West New Guinea (West Irian) and Yemen. Later on, UN started longer term deployments in Cyprus, the Middle East and Lebanon. Since 1948, UN Peacekeepers have undertaken around 68 Field missions. Till date, there are approximately 96,877 personnel serving on 15 peace operations in four continents led by the UN Department of Peace Keeping Operation (DPKO). Since 1999, there has been a nine-fold growth. The United Nations has received military and police troops from 120 countries. More than 82,127 troops and military observers are currently serving, with approximately 12,930 police officers.<sup>16</sup>

Peacekeeping operation is different from peace enforcement operation. Enforcement operation is nonconsensual whereas peacekeeping operation is consensual.<sup>17</sup> Peace enforcement operations which are authorised by the UN Security

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<sup>14</sup> Jean E. Krasno, 'To End the Scourge of War: The Story of UN Peacekeeping' in Jean E. Krasno (ed.), *The United Nations: Confronting the Challenges of a Global Society* (Viva Books Private Limited 2005) 228.

<sup>15</sup> *ibid* 230.

<sup>16</sup> United Nations Peace Keeping. 'Data' <<https://peacekeeping.un.org/en/data>> accessed 10 June 2021.

<sup>17</sup> Examples of peacekeeping operations include 'Operation Desert Storm' in Iraq, stabilisation forces in

Council and conducted by coalition of states or regional organisations, the relationship between UN and the conduct of the mission is more tenuous compare to generally attribute conduct of the UN missions. In such operations, the United Nations serves largely as a legitimizing authority by establishing a legal foundation for the operation and determining the overarching objectives through a broad mandate. At both the operational and tactical levels, the mission is entrusted to regional organizations and/or participant states. As a result, attributing action of either the designated regional organization or participating States to the UN only on the basis of the supply of a legal foundation for operation in the form of a mandate does not correspond to the reality of decision-making or command control.<sup>18</sup> Generally, peacekeeping operation is formed by the Security Council with the adoption of a Resolution. The Council makes this decision after receiving a report from the Secretary-General explaining the proposed mission's mandate, functions, composition, and deployment. In exceptional circumstances, the General Assembly also contributes in the formation of the operation.<sup>19</sup>

Although UN Charter makes no reference to peacekeeping operation, the legal basis of these operations are chapters VI and VII of the UN Charter.<sup>20</sup> The peacekeeping bodies have the status, privileges, and immunities guaranteed by Article 105 of the UN Charter and the 1946 United Nations Convention on the Privileges and Immunities of the United Nations. The General Assembly Resolution 76(I) of 7 December 1946, which approved certain privileges and immunities, provides further protection.<sup>21</sup> The UN Legal Counsel affirmed in 1995 that military troops from sending countries enjoy privileges and immunities under customary law. Civilian contractors, on the other hand, are not granted such privileges, even if they are designated as "experts on mission," which refers to people assigned to undertake certain activities or tasks for the UN but excludes commercial functions.<sup>22</sup>

All UN peacekeeping operations rely on the voluntary commitment of troops and equipment by participating member states, who delegate aspects of power and control to the Department of Peacekeeping Operations (DPKO) for the duration of the

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post-conflict Bosnia (SFOR and IFOR), Kosovo (KFOR), Iraq (MNFI), and the post-invasion phase in Afghanistan (ISAF), all of which were carried out under UN mandate by regional organizations or arrangements, or coalitions of States acting under the overall authority of the Security Council. See, Terry D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' 42 *Netherlands Yearbook of International Law* (2011).

<sup>18</sup> *ibid.*

<sup>19</sup> Dieter Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 *International Review of the Red Cross* 613, 627.

<sup>20</sup> Chapter VI relates peaceful settlement of dispute and conflict resolution while chapter VII related with the Security Council's power and authority for purpose of maintenance of peace and security.

<sup>21</sup> Fleck (n 19) 618.

<sup>22</sup> *ibid* 619.

operation.<sup>23</sup> Examples of peacekeeping operations include operations in Congo (MONUSCO), Ivory Coast (UNOCI), Haiti (MINUSTAH) etc. The operation's mandate is normally carried out impartially and in recognition of the United Nations' unique and principal role in maintaining world peace and encouraging conflict resolution. For the period of their engagement in the operation, the States providing forces to a specific mission hand over a portion of their control over the troops and other established formations to the UN.

The common practice is that through a formal agreement or a memorandum of understanding, all or part of the operational level command or control is transferred to UN secretary general (UNSG) acting through the under secretary general of peacekeeping operation who is in charge of DPKO.<sup>24</sup> This usually entails, placing the committed forces of the mission under certain degree of UN command, while leaving the remainder to the state, which includes the right to withdraw from the mission, exclusive criminal jurisdiction over the committed forces, and the management of discipline within the contributed forces.<sup>25</sup> In operations, the normal practice is that the Troops Contributing Country (TCC) appoints a contingent commander to exercise tactical command and control over the contingent for the operation and will act as representative in the field. The UN force commander exercises operational level command/control over the forces as a whole and can assign specific operational task and mission to their respective contingents making up the force for fulfillment of the mission objectives.<sup>26</sup>

Before looking into the responsibility aspect, it is pertinent to refer the dynamics of command and control structure in the peacekeeping operation. The authority vested in particular persons (or bodies) to direct the actions and exercise authority over the armed forces is referred to as command and control. For the purpose of direction, coordination and control of military forces, command is generally conducted by a specific member of the armed forces functioning under the duties and overall direction of the competent national or international governmental or administrative authority. Control refers to a commander's control over a portion of the activities of subordinate organizations or other organizations that are not ordinarily under his command, including the duty for carrying out instructions or directives to achieve certain goals.<sup>27</sup> Full command implies the totalities of the command authority

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<sup>23</sup> *United Nations Peacekeeping Operations: Principles and Guidelines* (Capstone Doctrine), UNDPKO, (January 2008) 17-28 <[https://peacekeeping.un.org/sites/default/files/peacekeeping/en/capstone\\_eng.pdf](https://peacekeeping.un.org/sites/default/files/peacekeeping/en/capstone_eng.pdf)> accessed 21 June 2021.

<sup>24</sup> Gill (n 17) 67-69.

<sup>25</sup> Para 14 of commentary on Article 7 of Draft Articles 2011.

<sup>26</sup> For definition of operational and tactical command and control, see, Cathcart B, 'Command and control in military operations', in Terry D Gill and Dieter Fleck (eds.) *The Handbook of International Law of Military Operations*, (Oxford University Press 2010) 238.

<sup>27</sup> Gill (n 17) 45.

and covers all aspect of organisation and direction of forces and is only possessed and exercised at national level. Within the context of UN (mandated) operations, certain elements of command authorities are normally delegated for specific purpose for the duration of the operation.<sup>28</sup> The TCC always retains full command. Full commands also include strategic command. Although the UN Security Council decides mandate for the operation but considerable influence in formation of mandate is exercised by the TCCs.<sup>29</sup> Operational command (OPCOM) is vested in an individual or a body to delegate elements of the operational or tactical level command (TACOM) or control to subordinate commanders, to deploy within the area of operations, to detain or delegate elements of the operational or tactical level command (TACOM), or to detain or delegate elements of the operational or tactical level command (TACOM). The commander at the operational level deploys and employs forces to pursue and achieve the overall strategic objective of the operation as a whole, bridging the gap between strategy and tactics.<sup>30</sup>

### 3. Responsibility Determination under International Law

In order to trigger attribution, tracing the chain of how the peacekeeping operations function in the field is pivotal. The UN peacekeeping force's chain of command is more complicated than it appears. The UN force commander has operational control over the national contingents. However, they are not under UN command.<sup>31</sup> The reason is that orders and instructions of the force commander must be transmitted to the contingent through the national contingent commander and the later one is appointed by the sending State.<sup>32</sup> As a result, the sending State can exert influence over its contingent through the national contingent commander, deciding whether or not to concur with or disobey the UN force commander's commands to its contingent.<sup>33</sup> It is pertinent to clarify that among the UN, host country and troop sending State, the role of host State is minimal. According to state practice, there has never been a criminal case in which a host State claimed criminal jurisdiction over a member of a sending State's visiting forces, unless such authority was allowed under exceptional circumstances by a treaty between those States.<sup>34</sup>

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<sup>28</sup> *ibid* 46.

<sup>29</sup> *ibid*.

<sup>30</sup> *ibid* 47.

<sup>31</sup> Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) 68.

<sup>32</sup> *ibid*.

<sup>33</sup> Paolo Palchetti, 'International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution' (2015) 70 *Seqüência (Florianópolis)* 28.

<sup>34</sup> Ian Sinclair, 'The Law of Sovereign Immunity: Recent Developments' in *Collected Courses of the Hague Academy of International Law* (Vol 167, Brill Martinus Nijhoff, Leiden, 1980) 216–17.

It's vital to remember that immunity does not grant impunity to military or civilian members of a sending country's or international organization's troops. It also does not limit the accountability of that State<sup>35</sup> or international organisation.<sup>36</sup> Immunity has only one application in this context; it prevents the host state from taking direct action against members of a visiting force, while the sending state and/or international organization are held liable.<sup>37</sup> The accountability of international organisation is an admitted fact in international law. It states that a breach of an international obligation attributable to the international organisations entails the responsibility of that organisations and its liability for compensation is widely accepted.<sup>38</sup> Thus, the UN secretariat has stated:

As a subsidiary organ of the United Nations, an act of a peacekeeping force is in principle imputable to the organisation and if committed in violation of international obligations entails the international responsibility of the organisation and its liability in compensation.<sup>39</sup>

### ***3.1. Attribution to UN and Sending State***

The Draft Model Status of Forces Agreement 1990 between the United Nations and host countries, in article 15, envisages that the United Nations peacekeeping operation enjoys the status, privileges, and immunities of the United Nations.<sup>40</sup> In relation to this, Article 6 of the Draft Articles 2011 stipulates that the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, regardless of the position the organ or agent holds in respect of the organization. The peacekeeping operation as a whole is subject to the Secretary General's direction and control, which is overseen by the Security Council or the General Assembly, depending on the case.<sup>41</sup> The nature of the peacekeeping operation can be understood by examining the distribution of power between the UN and troop-contributing states. Normally, the UN has operational command of the forces, while troop-contributing countries retain disciplinary and criminal jurisdiction over the forces, as well as the

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<sup>35</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations, International Law Commission, Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, 56th Session, Supplement No. 10 (A/56/10).

<sup>36</sup> Draft Articles 2011 (n 6).

<sup>37</sup> Fleck (n 19) 616.

<sup>38</sup> UN document A/51/389, 4 and para 6.

<sup>39</sup> UN Secretariat, *Responsibility of International Organisation: Comments and Observation Received from International Organisations*, 56<sup>th</sup> session, UN/doc/A/cn.4/545.

<sup>40</sup> Draft Model Status-of-Forces Agreement between the United Nations and host countries, UN doc. A/45/594, para 15.

<sup>41</sup> UN doc. A/CN.4/545, 17.

ability to withdraw troops. Based on the circumstances, it is reasonable to assume that certain actions are the responsibility of the organization rather than the contributing State.<sup>42</sup>

In spite of holding the status as UN organs, national contingents continue to function as organs of their respective states and are not subject to the UN's sole authority. In the Nissan case, Lord Morris of Borth-y-Gest observed in the House of Lords judgment 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." As a result, the British soldiers remained Her Majesty's soldiers.<sup>43</sup> According to the Secretary General's report, the UN has operational command over UN peacekeeping forces, but some important command functions (such as the exercise of disciplinary powers and criminal jurisdiction over the forces, and the power to withdraw troops and discontinue their participation in the mission) "remain within the purview of their national authorities".<sup>44</sup> Again, if a state interferes with the UN's operational control, the behavior is to be attributed to the state.<sup>45</sup>

The solution is different in the case of a peacekeeping operation carried out directly by the UN under the DPKO. In such operations, the UN not only provides the mandate for the operation, but also exercises de jure OPCOM and/or control over the operation. In such case, also the factual circumstance will determine whether the conduct attributed in fact done under the effective control of the UN. If the act in question was not done under control of UN, the TCC will be liable for such acts on the basis of articles 4 and 8 of Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles 2001).<sup>46</sup> The effective control test is also helpful to determine the attribution of conduct in case of 'dual' or 'multiple operation' and also will be helpful to decide the joint liability in case of multiple attribution.

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<sup>42</sup> Palchetti (n 33) 39.

<sup>43</sup> House of Lords, *Attorney General v. Nissan* [11 February 1969] All ER 646.

<sup>44</sup> *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, Report of the Secretary-General, UN doc. A/49/681 (21 November 1994) 3.

<sup>45</sup> UN Doc. A/CN.4/637/Add.1 14, 30.

<sup>46</sup> According to Article 4 (1), the conduct of any State organ is considered an act of that State under international law, regardless of whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the State's organization, and whatever its character as an organ of the central Government or of a territorial unit of the State.

According to article 4 (2), an organ is any person or thing that has that status under the laws of the State.

According to Article 8, the behavior of a person or group of people is deemed an act of a State under international law if the person or group of people is acting on the orders of, or under the direction or control of, that State.

### ***3.2. From Effective Control to Ultimate Control***

In 2001, ILC adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts. However, these articles do not cover the responsibility of international organisations or of a State for the conduct of the international organisation. Article 57 of the Draft Articles 2001 says that State responsibility shall be without prejudice to the responsibility of international organisation or of state for the conduct of international organisation. Commentary on this article provides that these subject matters require separate treatment. As a result, and considering the importance of the topics for responsibility of international organisation, ILC adopted Draft Articles 2011. The Draft Articles 2011 almost follows the same principles and approaches of treatment of subject matter as in case of Draft Articles 2001. However, these articles also keep into account the specialty of international organisation.

Article 1 of the Draft Articles 2011 lays down the scope and limit of international responsibility of international organisation. Articles 3, 4 and 5 declare general principles. Article 3 says that every internationally wrongful act of international organisation entails international responsibility of that organisation. According to Article 4, an international wrongful act occurs when the conduct consists of an action or omission that is traceable to the international organization under international law and represents a breach of international responsibility. It has been agreed that UN peacekeeping missions constitute UN subsidiary organs. Article 7 of the Draft Article 2011 states that a peacekeeping force's act can only be attributed to the UN if it has effective control over it at the time of the performance of a given operation. The following is the text of Article 7:

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

The ILC Draft Articles 2011 follow the test of effective control in case of organ placed at the disposal of international organisation. The effective control test is also necessary to attribute a conduct of UN peacekeeping operation to the UN. The same is the view of the UN Secretary General in case of joint operation.<sup>47</sup> According to the Commentary on the Draft Articles 2011, the UN insists on claiming sole command and control over peacekeeping forces for the purpose of military effectiveness. The attribution of behavior should be based on factual criteria as well.<sup>48</sup>

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<sup>47</sup> ILC Draft Articles 2011, para 9 of the Commentary on Article 7, 58.

<sup>48</sup> *ibid.*

It is important to note that effective control test has not been universally applied despite widespread support. Most notably, in its decision in the *Behrami*<sup>49</sup> and *Saramati*<sup>50</sup> cases, the European Court of Human Rights (ECtHR) used the "ultimate control approach." While the International Criminal Tribunal for the Former Yugoslavia (ICTY) used an "overall control standard" in its decision in the Tadić case, it was in a somewhat different context.<sup>51</sup> The ECtHR followed the ultimate control test in subsequent cases. In *Kasumaj vs. Greece*<sup>52</sup> and *Gejic vs. Germany*,<sup>53</sup> the ECtHR reiterated its view concerning the attribution to the UN of conduct taken by national contingence allocated to KFOR.

### 3.3. *Shifting to Effective Control*

The ultimate control test however, has not been accepted by the ILC. When applying the criteria of effective control, the commentary observes that 'operational control' appears to be more significant than 'ultimate control,' as the latter hardly implies a role in the act in question. As a result, it is not surprising that in his June 2008 report on the United Nations Interim Administration Mission in Kosovo, the United Nations Secretary General distanced himself from the 'ultimate command and control' criteria and stated that the United Nations' international responsibility will be limited to the extent of its 'effective operational control.'<sup>54</sup> However, the House of Lords majority decision in the Al-Jedda case, while following the same line as *Behrami* and *Saramati* but distinguishing the facts of the case, came to the conclusion that it could not realistically be said that US and UK forces were under such command and control of UN when they detained the appellant.<sup>55</sup>

Mr. Al-Jedda filed an application with the ECtHR following the House of Lords' decision. In *Al-Jedda vs. UK*, the Court cited several texts concerning attribution, including the article (identical to the current article 7) that the Commission had adopted at first reading and some paragraphs of the commentary, the Court considered that the UN Security Council had neither effective control nor ultimate authority over the acts and omissions of foreign troops within the multilateral framework.<sup>56</sup>

<sup>49</sup> *Behrami judgment* (n 8) para 59-60, 17.

<sup>50</sup> *Saramati judgment* (n 9) para 59-60, 17.

<sup>51</sup> Gill (n 17) 53.

<sup>52</sup> Decision of 5 July 2007 on admissibility of application no. 6974/05.

<sup>53</sup> Decision of the 28<sup>th</sup> August 2007 on admissibility of application no 31446/02.

<sup>54</sup> Para 10 of commentary on Article 7 of Draft Articles 2011 (n 6) 58.

<sup>55</sup> *ibid*, para 12, 59.

<sup>56</sup> Judgment of Grand Chamber (7 July 2011) para 56.

The issue of attribution was also addressed in the District Court of Hague's and Court of Appeal's decisions regarding the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the Srebrenica massacre.<sup>57</sup> The Court of Appeal applied the criteria of "effective control" to the circumstance of the case. The Court reached to the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica.<sup>58</sup>

Thus, from the House of Lords' decision in the *Al- Jedda* and subsequent decision of ECtHR on same issue makes it clear that 'effective control' test is the viable test to attribute the conduct of UN peacekeeping force to United Nations. Draft Articles 2011 in its commentary also support the effective control test. Beside that UN also supports the effective operational control test. Majority of commentators, the courts' opinions as well as UN view is in favour of 'effective control' test for attribution of conduct of peacekeeping operation. There are compelling reasons to believe that the effective control approach is the most logical and reasonable standard for attribution of conduct in multinational peace operations. It is more in line with the realities of such operations and leaves less room for accountability gaps.<sup>59</sup>

### **3.4. Determining Multiple Attribution/Joint attribution**

Joint attribution is a possibility in situations where both the UN and the contributing State formally exercised their authority over the contingent and the disputed conduct was the result of instructions mutually agreed by the UN and the State.<sup>60</sup> According to some commentators, article 7 of the Draft Articles 2011 admits single attribution through 'effective control' test.<sup>61</sup> It offers single effective command control where the attribution would be either to the UN or to the TCCs by the same conduct. They claim that article 7 of the Draft Articles does not reflect the actual practice of control structure in UN peacekeeping operation.<sup>62</sup> Instead of claiming the command control, UN is approaching operational control basis responsibility. Even on operational command or control, there is no single effective operational command. In practice, the UN force commander decides operational command only after consulting the

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<sup>57</sup> Case no. 265615/haza06/1671 (10 September 2008) para 4.8.

<sup>58</sup> *ibid.*

<sup>59</sup> Gill (n 17) 53.

<sup>60</sup> *ibid* 49.

<sup>61</sup> Bell (n 2) 502.

<sup>62</sup> It has also been reflected in the commentary of the Draft Articles (2011). Panel of UN Peacekeeping Operations, Report of the Panel on UN Peace Operations, 2000, UN/DOC.A/55/305-S/2000/809 (21 August 2000).

contingent commanders who in turn take instruction from TCCs. In such situation, there is possibility of joint control leading to multiple attributions i.e., the UN and TCCs.<sup>63</sup>

The commentary to the Draft Article 2011 did not exclude dual and multiple attribution of conduct. It points out that attribution of a conduct to an international organisation does not wither away attribution of the same to a State. Similarly, the attribution to a state does not exclude possibility of attribution to an international organisation if it were involved. The commentary reflects that any conduct can simultaneously be attributed to two or more international organizations. Such can happen when they establish a joint organ and act through that organ.<sup>64</sup> Although in most of the cases, single attribution theory has been followed, but in no case, the courts have ever expressly doubted about the possibility of multiple attribution. According to the Draft Articles 2011 commentary, although it may not occur frequently in practice, dual or even multiple attribution of conduct cannot be ruled out.<sup>65</sup> Commentators do not deny the possibility of dual attribution as per the criterion of attribution set forth in Article 7.<sup>66</sup>

Profoundly, Special Rapporteur Giorgio Gaja acknowledged that ‘dual attribution of certain conducts’ cannot be ruled out.<sup>67</sup> The observation of the Dutch Court of Appeal and the Supreme Court of the Netherlands in the *Nuhanović* case is remarkable in the context of simultaneously attributing to the sending State and to the UN. It is widely accepted that more than one party may have ‘effective control.’ It is not impossible that the application of this criterion will result in the possibility of attribution to more than one party.<sup>68</sup> Article 17, para 2 of the Articles on Responsibility of International Organisations 2011 provides that an organisation has to bear responsibility under specific conditions for authorising a State to commit an act that would be wrongful for that organisation.

Thus, authorisation by Security Council, for example, to troops of multinational operation to take extrajudicial detention measures while deviating the basic requirements of human rights law or international humanitarian law will trigger the

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<sup>63</sup> *ibid.*

<sup>64</sup> Para 4 in Chapter II of the commentary to Draft Articles 2011 (n 6) 54.

<sup>65</sup> Report of the International Law Commission on the work of its sixty-third session, UN doc. A/66/10, 83.

<sup>66</sup> Palchetti (n 33) 22, 45; F. Messineo ‘Multiple Attribution of Conduct’, *SHARES Research Paper* (2012–11) 41.

<sup>67</sup> Giorgio. Gaja, ‘Second Report on the Responsibility of International Organisations’, *Yearbook of the International Law Commission* 2.1 (2004) 14.

<sup>68</sup> *Nuhanović v Netherlands*, Court of Appeal of The Hague (5 July 2011) para. 5.9.

responsibility of UN as well.<sup>69</sup> It has been argued that the possibility of joint responsibility under such situations should assist the affected individuals to obtain reparation. But the scanty of effective means of redress against international organisations renders the case extremely unlikely.<sup>70</sup>

In practice, complaints are not forwarded against the UN for several reasons. First, the UN will not accept responsibility or provide compensation for acts not carried out under its direct authority. Second, unlike States, UN is not party to any human rights conventions nor subject to the jurisdiction of any regional or domestic court. Thus, the possibility of providing remedy by the UN is rhetoric for unlawful conduct in context of UN mandated operations where regional organisations or groups of States are involved. The European Court of Human Rights (ECtHR) concluded in the *Behrami/Saramati* instances that conduct allegedly in violation of the European Convention on Human Rights (ECHR) were not attributable to the State party to the ECHR and that the UN was not subject to its jurisdiction.<sup>71</sup> Had the Court applied the effective operational control approach, the States party to ECHR would have been legally accountable as the conduct would have been attributable to them rather than UN, on the basis of cumulative effect of Article 4 and 8 of the Draft Articles 2001.

#### 4. Conclusion

The UN peacekeeping operation has evolved into one of the most important weapons for establishing and maintaining peace. There have been many operations deployed in the conflicting parts which successively helped in bringing peace. The issue of determining responsibility is a key issue at the international level in order to comply with international law. Despite the fact that the UN Force Agreement with States hosting peacekeeping operations stipulates that any dispute or claim of a private law nature to which the UN peacekeeping operation is a party be resolved by a standing claims commission, no such commissions have been established in practice.<sup>72</sup> Another challenge in the peacekeeping operations is regulatory clarity. Uncertainty in the interpretation of various rules can obstruct the successful fulfillment of the

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<sup>69</sup> Palchetti (n 33) 26.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> For an examination of the position of the UN on this issue see, T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51(1) *Harvard International Law Review* 141.

mandate, so it's critical to avoid it.<sup>73</sup> Although the UN Safety Convention 1994 and its 2005 Optional Protocol focuses on criminal provisions for the prosecution of individual perpetrators, issues of State responsibility and the responsibility of the UN and other international organisations are not sufficiently addressed. The extent of applicability in strong forms of peace operations is ambiguous, and unfortunately, even when authorized by the Security Council, peace operations conducted by States or regional organizations are not explicitly covered.<sup>74</sup> As a result, the instruments should be rewritten to address the shortcomings while also encouraging ratification by states.

Prior to any operation, the responsibility of the state and international organizations should be clearly defined mentioning the procedures for resolving any allegations for improper acts made by peacekeepers.<sup>75</sup> Transparent procedures and appropriate forms of judicial control are essential in such a settlement forum. International organizations, for their part, should play an active and prompt role in making reparations for wrongdoings that come within their responsibility.<sup>76</sup> It was declared by majority judges in the ECtHR in *Behrami/Saramati* case that 'the UN is in principle responsible, but this regional court is unable to command the UN to comply with its judgment'.<sup>77</sup> Thus, available forum and procedural facility to deal with such situation is imminent.

In terms of responsibility under international law, the authors opine that multiple attributions, as are not prohibited, should be explicitly recognised for prospective situations. The 'effective control' test will be useful in determining whether an act was carried out under joint control or single control on a factual basis, allowing the UN and TCCs to be attributed to the conduct jointly or individually. The 'effective control' approach has the advantage of increasing the likelihood of fixing multiple attributions, lowering the chance of any actor escaping accountability for a wrongful conduct when they are proved to have exercised 'effective control'.

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<sup>73</sup> Fleck (n 19) 634.

<sup>74</sup> *ibid.*, 635

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.* 636.

<sup>77</sup> *Behrami/Saramati* (n 8, 9) 18.