UNIVERSITY OF AMSTERDAM

UvA-DARE (Digital Academic Repository)

Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control

Boutin, B.

Publication date
2017
Document Version
Final published version
Published in
Melbourne Journal of International Law

Link to publication

Citation for published version (APA):
Boutin, B. (2017). Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control. *Melbourne Journal of International Law*, *18*(2), 154–179. https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3152514/Boutin-unpaginated.pdf

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, P.O. Box 19185, 1000 GD Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (https://dare.uva.nl)

Download date:15 Oct 2026

ATTRIBUTION OF CONDUCT IN INTERNATIONAL MILITARY OPERATIONS: A CAUSAL ANALYSIS OF EFFECTIVE CONTROL

BÉRÉNICE BOUTIN*

While effective control, as formulated in art 7 of the International Law Commission Articles on the Responsibility of International Organizations*, has become recognised as the key criterion to attribute conduct in international military operations carried out under the lead of an international organisation, its precise contours remain elusive when applied to concrete scenarios. This article argues that attribution of conduct under the test of effective control can be analysed in causal terms and that such analysis is useful to attribute the conduct of military organs over which control is shared between contributing states and international organisations. In this interpretation, effective control is understood as a causally proximate form of control over a given conduct. Applied to the military context, the analysis clarifies how different forms of military control are relevant to different types of harmful conduct and how they translate in terms of legal control for the purpose of attribution. The article submits that, beyond operational control, control exercised at the organic or strategic levels can also be linked to certain types of harmful conduct, which provides conceptual grounds for attribution of conduct in complex military scenarios.*

CONTENTS

I Introduction 155
II Attribution of Conduct in International Military Operations: Developments and Shortcomings 157
A Initial Developments 157
B Crystallisation of the Test of Effective Control 160
1 Rationale for Application in International Military Operations 160
2 Substance of the Test 161
C Shortcomings of Established Interpretations 163
III A Causal Analysis of Effective Control 165
A The Causal Nature of Attribution of Conduct 165
1 Function of Attribution 165
2 Central Role of Control for Attribution 166
3 Causal Dimension 167
B Effective Control through the Lens of Causal Attribution 169
1 Effective Control as Causally Proximate Control 169
2 Effective Control by Omission 170
3 Degrees of Control, Plurality of Causes and Multiple Attribution 171
IV Effective Control and Forms of Military Control 171
A Effective Operational Control 172
B Effective Organic Control 174
C Effective Strategic Control 177
V Conclusions 178

* TMC Asser Institute, The Hague; b.boutin@asser.nl. This article is based on the doctoral thesis of the author, entitled *The Role of Control in Allocating International Responsibility in Collaborative Military Operations* (University of Amsterdam, 2015), drafted under the supervision of Professor André Nollkaemper as part of the SHARES Project on Shared Responsibility in International Law.

I INTRODUCTION

The role of causation in the law of international responsibility is controversial. The International Law Commission ('ILC'), which codified and developed principles on the responsibility of states and international organisations for internationally wrongful conduct, devised a system where international responsibility arises objectively out of the mere two conditions of breach and attribution of conduct.[1] International responsibility is objective in the sense that the existence of damage caused by the wrongful conduct is not required for the state or international organisation to bear the legal consequences attached to violations of international law.[2] Causation remains expressly relevant at the stage of reparation, which only extends to the injury caused,[3] but the notion seems otherwise absent at the stage of determination of international responsibility. This article takes a different approach, and argues that attribution of conduct in the law of international responsibility is inherently and intrinsically linked to the concept of causation. More specifically, it develops a causal analysis of attribution under the test of effective control in the context of international military operations with the aim of further clarifying grounds for attribution in complex military scenarios.

The issue of international responsibility for wrongful conduct committed during international military operations has been the source of sharp debates. In many operations, forces sent to maintain or enforce peace in conflict zones have committed various types of abuse, ranging from sexual abuse to wrongful targeting, mistreatment of detainees and failure to protect civilians. In terms of accountability, these alleged violations of international law raise complex issues of individual and collective responsibility, and, in practice, participants accused of having committed wrongful conduct have not always been willing to bear responsibility. This article focuses on issues pertaining to the allocation of international responsibility between participating states and international organisations.

Under the basic principles of international responsibility, a state or international organisation incurs responsibility for the conduct of a soldier if the conduct violates an international obligation by which the state or the international organisation is bound.[4] In the context of international military operations — defined as operations involving the use of military force undertaken by the armed forces of more than one state under the lead of an international organisation — one of the most contentious issues concerns attribution of conduct. Indeed, due to the particular status of international forces, which are placed under the operational control of an international organisation

---

1 International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (23 April – 1 June and 2 July – 10 August 2001) ch IV(E)(1) ('*ARS*') art 2; International Law Commission, *Report of the International Law Commission on the Work of its Sixty-Third Session*, UN GAOR, 66th sess, Supp No 10, UN Doc A/66/10 (26 April – 3 June and 4 July – 12 August 2011) ch V(E)(1) ('*ARIO*') art 4.

2 Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 9.

3 *ARS*, UN Doc A/56/10, art 31; *ARIO*, UN Doc A/66/10, art 31.

4 *ARS*, UN Doc A/56/10, art 2; *ARIO*, UN Doc A/66/10, art 4.

while remaining fully part of their national service, attribution of conduct is far from a straightforward operation. The test of effective control as formulated in art 7 of the ILC *Articles on the Responsibility of International Organizations* ('*ARIO*') has become relatively broadly accepted to attribute the conduct of international military forces, however its precise contours and modalities are still debated, and existing interpretations are sometimes unable to grasp concrete and complex scenarios. In this regard, this article postulates that the relationship between control in the military sense and control in the legal sense has not been sufficiently explored. Under mainstream interpretations, it is also unclear what effective control means in situations of failure to control. In order to overcome these shortcomings, this article develops a conceptual analysis of effective control in terms of causal control. Essentially, it is argued that the conduct of international forces should be attributed on the basis of the causally relevant form of control exercised by participants amongst which different elements of command and control are shared. This argument takes full account of the respective relevance of various elements of military control with regards to various types of harmful conduct, and entails that each conduct should be attributed to the state or international organisation which actually exercised a form of control causally linked to the conduct. Other scholars have already taken the stand that attribution is a causal operation, but the argument has rarely been developed further and applied to practical situations such as those arising in military operations.

Using causation as a conceptual framework can seem surprising in view of the inescapable difficulties associated with defining causation and assessing causal links for legal purposes.[5] This article does not seek to engage in a fundamental discussion of how to define and assess causation in international law, but maintains that the notion of causation is a useful conceptual tool to analyse responsibility in international military operations. The main research question explored is how the core concept of causation relates to attribution of conduct and in turns affects interpretations of control in the context of military operations. In terms of methodology, this article reconceptualises the framework for attribution in international military operations through the lens of causation. In order to do so, the article enquires into the fundamental relevance of the concepts of control and of causation for allocation of international responsibility in international military operations, and relates this to the notion of effective control over international armed forces.

Before engaging in this conceptual analysis, the article provides, in Part II, a background overview of the development of principles of attribution in the context of international military operations. The core of the argument is presented in Part III, which develops a reinterpretation of attribution under the criterion of effective control through the lens of causal control. It argues that effective control means control causally linked to the occurrence of the harmful conduct. Applied to the context of military operations in Part IV, this causal interpretation clarifies how elements of military control shared amongst participants can serve as grounds for attribution. In this analysis, full account is taken of how different forms of military control shared amongst participants

---

[5] For a thorough analysis, see HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985).

relate to the criteria of effective control. Further, interpreting effective control in terms of causal control allows one to grasp situations of effective control by omission, thereby addressing some of the problematic issues of established interpretations when confronted with military realities. Part V offers concluding remarks with regards to the broader implications of the argument developed, both for states and international organisations engaged in military operations, and for victims of wrongful acts during these operations.

II ATTRIBUTION OF CONDUCT IN INTERNATIONAL MILITARY OPERATIONS: DEVELOPMENTS AND SHORTCOMINGS

The topic of attribution of conduct in international military operations has been the subject of extensive debate. While a detailed account would be outside the scope of this article, the following Part presents a brief overview of the factual background and legal debates attached to attribution of conduct in international military operations. Grounds for attribution initially developed in reaction to the first peacekeeping operations, with the test of effective control progressively emerging as the most relevant criterion to attribute conduct of international troops. Some modalities of the test have become established, yet how they apply to certain complex scenarios such as omissions remains unclear, pointing to the limitations of existing interpretations.

A *Initial Developments*

The question of responsibility for the wrongful conduct of soldiers operating under United Nations command emerged with the first military operations undertaken under the lead of the UN in the 1950s and 1960s.[6] During these first peacekeeping operations, practice first developed with regards to the exercise of military authority over national contingents. Indeed, as the UN relied on troops contributed by states, it was necessary for states to delegate part of the authority over their forces to the UN.

In the military context, control over troops is formalised through the notion of command and control, which refers to different elements of authority over the conduct of assigned military units.[7] Typically, states would transfer *operational control* over their troops to the UN, which consists of the authority to direct available forces for the purpose of accomplishing the objectives of the operation.[8] Other elements of command and control, considered non-delegable, were retained by states. These include authority with regards to training, discipline, personal matters, criminal jurisdiction and the withdrawal of forces.[9] This basic pattern of distribution of command and control was further refined

---

6 Finn Seyersted, 'United Nations Forces: Some Legal Problems' (1961) 37 *British Yearbook of International Law* 351, 404–12; R Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (Martinus Nijhoff, 1968) 229–41.

7 David S Alberts and Richard E Hayes, *Command Arrangements for Peace Operations* (CCRP Publication Series, 1995) 3–4; Blaise Cathcart, 'Command and Control in Military Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010) 235, 237.

8 Cathcart, above n 7, 235.

9 Terry D Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011) 42 *Netherlands Yearbook of International Law* 37, 46.

during subsequent operations and is now followed in all UN operations.[10] In the field, operational control over peacekeepers is exercised by a UN Force Commander, who assigns tasks to contributed troops, organised in national contingents headed by their respective National Contingent Commander acting on behalf of the UN.[11] Comparable command structures have been adopted in military operations undertaken under the lead of other international organisations such as the North Atlantic Treaty Organization ('NATO')[12] and the European Union,[13] although some specificities exist. For instance, in a number of NATO operations, national representatives of contributing states are able to oppose a 'red card' to certain sensitive missions, thereby sharing operational control with the NATO Commander.[14] In other cases, some sensitive operational decisions are taken at a higher level upon unanimous approval by NATO member states' representatives.[15]

In the field, the division and exercise of command and control is not always clear cut. This is notably because states are not signing blank cheques on the use of their armies, and occasionally accompany command and control delegations with caveats laying down 'restrictions on how and where there [sic] units will deploy and what tasks will not be supported by them'[16] for the duration of an operation. Furthermore, the experience of the first UN missions also revealed

---

10 United Nations Department of Peacekeeping Operations ('DPKO') and Department of Field Support ('DFS'), 'Authority, Command and Control in United Nations Peacekeeping Operations' (Policy No Ref. 2008.4, 15 February 2008); Jean-Marie Guéhenno and Jake Sherman, 'Command and Control Arrangements in United Nations Peacekeeping Operations' (Paper presented at International Forum for the Challenges of Peace Operations, New York, 9 November 2009) <http://www.operationspaix.net/DATA/DOCUMENT/4998~v~Command_and_Control_Arrangements_in_United_Nations_Peacekeeping_Operations.pdf>, archived at <https://perma.cc/RA9D-PGJ5>; Patrick C Cammaert and Ben Klappe, 'Authority, Command, and Control in United Nations-Led Peace Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010) 159.

11 UN DPKO and DFS, above n 10, [12], [42]–[48].

12 Tarcisio Gazzini, 'NATO's Role in the Collective Security System' (2003) 8 *Journal of Conflict and Security Law* 231, 249; Larry Wentz (ed), *Lessons from Bosnia: The IFOR Experience* (CCRP Publication Series, 1998) 38; North Atlantic Treaty Organization ('NATO') Standardization Agency, 'NATO Glossary of Terms and Definitions (English and French)' (Allied Administrative Publication No AAP-6, 2013) 2-F-7, 2-N-1, 2-O-3.

13 Council of the European Union, 'EU Military C2 Concept' (EU Council Doc No 11096/03, 26 July 2006) [14].

14 David Nauta, *The International Responsibility of NATO and its Personnel during Military Operations* (PhD Thesis, Radboud University Nijmegen, 2016) 88; Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, 2005) 48; John Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 *European Journal of International Law* 469, 486.

15 For instance, in Operation Allied Force, sensitive targets presenting a high risk of collateral damage required approval by the North Atlantic Council ('NAC'). See United States Department of Defense, 'Kosovo/Operation Allied Force: After-Action Report' (Report to Congress, United States Department of Defense, 31 January 2000) 24.

16 Ben F Klappe, 'International Peace Operations' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 635, 650. See also NATO Standardization Agency, above n 12, 2-C-2: Caveats are defined as 'any limitation, restriction or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan'.

that reality does not always match what was formally agreed. As one scholar observed, the UN command structures 'are straightforward in theory, but seldom so in practice',[17] as states have occasionally intervened in the operational management of their troops in contravention with the agreed distribution of command and control, thereby undermining the operational authority of the UN Force Commander.[18] For instance, during the 1993 UN Operation in Somalia II ('UNOSOM II'), '[t]he Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities'.[19]

At a time where grounds for, and limits of, the responsibility of international organisations were underdeveloped,[20] the first scholars to have analysed attribution of conduct in the context of peace operations took account of these practices and experiences when identifying grounds for attribution. Notably, Paul de Visscher expressed the view that, because peacekeepers are not fully integrated international forces — but instead are placed at the disposal of the UN while the states retain some control — and, since in reality, their conduct is not always under the control of the UN, effective control ('*la maîtrise effective*') over contingents is relevant to determine responsibility.[21] Similarly, Borhan Amrallah considered that responsibility for the conduct of peacekeepers would depend on whether the force was under the 'real'[22] control of the UN.

During the drafting process of the *ARIO*, the criterion of effective control was identified early on as being relevant for international military operations. In view of the formal distribution of command and control and the factual realities of its exercise, the ILC considered that 'the decisive question in relation to attribution of a given conduct appears to be who had effective control over the conduct in question'.[23] In its work on the accountability of international organisations, the International Law Association similarly identified effective control as the relevant test to attribute the conduct of organs put at the disposal of an organisation.[24]

---

17 Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 *Melbourne Journal of International Law* 346, 352.

18 Paul de Visscher, 'Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies' (1963) 23(3) *Annales de Droit et de Sciences Politiques* 133, 136.

19 *Report of the Commission of Inquiry Established Pursuant to Security Council* Resolution 885 (1993) *to Investigate Armed Attacks on UNOSOM II Personnel which Led to Casualties Among them*, UN Doc S/1994/653 (1 June 1994) [243].

20 See generally Clyde Eagleton, *Collected Courses of The Hague Academy of International Law: International Organisation and the Law of Responsibility* (Brill Nijhoff, 1950) vol 76.

21 de Visscher, above n 18, 136–7.

22 Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peace-Keeping Forces' (1976) 32 *Revue Egyptienne de Droit International* 57, 65.

23 Giorgio Gaja, Special Rapporteur, *Second Report on Responsibility of International Organizations*, UN GAOR, 55th sess, UN Doc A/CN.4/541 (2 April 2004) [40].

24 International Law Association, 'Accountability of International Organisations' (Report, Berlin Conference, 26 November 2004) 28.

B *Crystallisation of the Test of Effective Control*

The test of effective control, as formulated in *ARIO* art 7, has progressively crystallised as the key criterion to attribute the conduct of soldiers placed at the disposal of an international organisation. It is generally accepted that the applicability of the test stems from the specific status of international troops, which are partially delegated to an international organisation while their state also retains some control, and that the test entails a factual, specific and contextual assessment of control.

1 *Rationale for Application in International Military Operations*

In scholarship, it has become broadly accepted that effective control is the applicable test to attribute the acts of soldiers operating under the aegis of an international organisation.[25] The rationale behind the application of this test to international forces is that, since command and control over military organs is shared between the international organisation and the national state, the test of effective control is required to determine which of the subjects had control over a given conduct.[26] The key factor is that states transfer some elements of authority over their military organs (typically, operational control) while always retaining organic disciplinary authority, so that 'the umbilical cord between those troops and the state is not fully cut'.[27] As a result of this sharing of military control between two subjects of international law, troops qualify as partially delegated organs, acting in some respects under the control of the international organisation and in others under the control of their states. Depending on the circumstances of the harmful conduct considered, a peacekeeper can be seen as either under the control of the organisation, its state or both. This distinct status of international forces is the reason why the conduct of military organs put at the disposal of an organisation is attributed on the basis of the control concretely exercised over a specific conduct, as expressed in the notion of effective control.

---

[25] See, eg, Caitlin A Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision' (2010) 42 *New York University Journal of International Law and Politics* 501, 524; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 *Harvard International Law Journal* 113, 140; Boris Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010) 515, 520; Leck, above n 17, 348; Cedric Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after *Behrami*' (2012) 45 *Israel Law Review* 151, 152; Annabelle Thibault, 'La responsabilité de l'OTAN dans les conflits armés' in Karine Bannelier and Cyrille Pison (eds), *Le recours à la force autorisé par le Conseil de Sécurité: droit et responsabilité* (Pedone, 2014) 229, 238; Nicholas Tsagourias, 'The Responsibility of International Organisations for Military Missions' in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff, 2011) vol 31, 245, 249.

[26] Amrallah, above n 22, 57; Ryngaert, above n 25, 153; Thibault, above n 25, 235. See also Luigi Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire' (1995) 78 *Rivista di Diritto Internazionale* 881, 886.

[27] Marten Zwanenburg, 'North Atlantic Treaty Organization-Led Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 639, 649.

The ILC similarly justifies *ARIO* art 7, which was explicitly drafted with account taken of peacekeeping experiences, and explicitly aimed at addressing attribution of conduct in military operations led by an international organisation.[28] It explained that peacekeepers are put at the disposal of another entity through the transfer of operational command, but are not 'fully seconded',[29] as it is simply impossible for a state to delegate the inherent organic authority it possesses over its armed forces. Since both entities are simultaneously vested with different forms of control over military organs, 'the seconded organ or agent still acts to a certain extent as organ of the seconding State',[30] and therefore attribution requires one to determine 'who has effective control over the conduct in question'.[31]

2 *Substance of the Test*

Pursuant to *ARIO* art 7, the conduct of an organ put at the disposal of an international organisation 'shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct'.[32] As explained by the ILC in its commentaries to the *ARIO*, effective control is assessed under three conditions: it must be 'factual',[33] exercised in respect of the 'specific conduct'[34] of a soldier and assessed by taking account of the 'full factual circumstances and particular context in which international organisations and their members operated'.[35] In short, the test of effective control as formulated in *ARIO* art 7 entails the determination of which entity was really in control of the harmful conduct.[36]

First, under the factual element, it must be determined whether control was concretely and actually exercised, beyond the formal delegation of operational

---

28 International Law Commission, *Report of the International Law Commission on the Work of its Sixty-Third Session*, UN GAOR, 66th sess, Supp No 10, UN Doc A/66/10 (26 April – 3 June and 4 July – 12 August 2011) ch V(E)(2) ('*ARIO Commentaries*') 87 [1] (commentary to art 7).

29 Ibid.

30 Ibid.

31 Ibid 89 [8].

32 *ARIO*, UN Doc A/66/10, art 7 is entitled 'Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization', and provides: '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.'

33 *ARIO Commentaries*, UN Doc A/66/10, 87–8 [4] (commentary to art 7).

34 Ibid.

35 Giorgio Gaja, *Eighth Report on Responsibility of International Organizations*, UN GAOR, 63rd sess, UN Doc A/CN.4/640 (14 March 2011) [34], quoting *Summary Record of the 16th Meeting*, UN GAOR, 6th Comm, 64th sess, 16th mtg, Agenda Item 81, UN Doc A/C.6/64/SR.16 (16 December 2009) [23]. See also *ARIO Commentaries*, UN Doc A/66/10, 87–8 [4] (commentary to art 7).

36 Effective control as formulated in *ARIO* art 7 has an autonomous meaning which differs from other uses of the term in international law. Effective control is also used in relation to the extraterritorial application of the *European Convention on Human Rights* and to attribute to states the conduct of non-state actors, but it is accepted that effective control in the sense of *ARIO* art 7 has a different threshold: See *ARIO Commentaries*, UN Doc A/66/10, 88 [5] (commentary to art 7). See also Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 *Melbourne Journal of International Law* 330, 354.

authority.[37] In this sense, factual control should not be understood by opposition to formal control. Indeed, the test of effective control does not completely discard formal aspects, but rather attempts to verify whether the formal delegation of control by the state to the international organisation was genuine or whether control was actually retained or resumed by the state.[38] It consists of comparing how control is formally distributed to how it is actually exercised.[39] The formal distribution of control is still relevant, as it is against this background, and not *ex nihilo*, that factual control is assessed. This can be illustrated in the cases of *Nuhanović v Netherlands* ('*Nuhanović*')[40] and *Netherlands v Mustafić-Mujić* ('*Mustafić*'),[41] where relatives of victims of the genocide of Srebrenica brought domestic claims against the Netherlands. It was argued that the State was responsible for the deaths of individuals that had been forcefully removed from a compound where the Dutch contingent to the UN Protection Force ('UNPROFOR') was located and where victims had sought refuge. The operation was formally under the control of the UN, however the Court found that the act of Dutch troops evicting individuals was within the control of the Netherlands. Indeed, it was established that the State had factually resumed authority over its troops at the time of the conduct, and in that context, was exercising control over it.[42]

Secondly, what matters is control over the conduct alleged as wrongful, rather than control over the mission in general. This condition reinforces the requirement that control must be exercised in the concrete situation at hand. The control of the lead organisation over the whole mission is not determinative for attribution, as control over certain conduct can be — formally and pursuant to command arrangements — exercised by the state. For instance, a state can transfer some operational control to the international organisation leading the operation while retaining operational control over some specific missions. This can be illustrated by a British case which concerned attribution of the wrongful detention of an individual by British forces part of the NATO-led International Security Assistance Force ('ISAF'). Although ISAF was, in general, under the operational control of NATO, detention operations by the United Kingdom were, pursuant to formal arrangements, carried out under the direct control of the UK and not NATO.[43] Therefore, the UK had effective control over the specific conduct.

---

37 *ARIO Commentaries*, UN Doc A/66/10, 87–8 [4] (commentary to art 7); Dannenbaum, above n 25, 155; Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 *European Journal of International Law* 509, 516; Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014) 60, 92.

38 Messineo, above n 37, 90. See also Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review* 397, 457.

39 Ryngaert, above n 25, 158. See also Zwanenburg, above n 27, 651.

40 *Netherlands v Nuhanović*, Hoge Raad [Supreme Court of the Netherlands], Case No 12/03324, 6 September 2013.

41 *Netherlands v Mustafić-Mujić*, Hoge Raad [Supreme Court of the Netherlands], Case No 12/03329, 6 September 2013.

42 *Netherlands v Nuhanović*, Hoge Raad [Supreme Court of the Netherlands], Case No 12/03324, 6 September 2013, [3.12.2].

43 *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014) [180].

This requirement of specificity does not mean that every claim of responsibility must always be broken down into a series of indivisible acts. Rather, the scope of the conduct to be attributed depends on the scope of the primary rule alleged as having been breached within a series of events.[44] For instance, in situations where international forces fail to protect civilians from abuse from armed groups, a number of claims can be envisaged. The general claim that troops, for instance, failed to prevent genocide requires assessing effective control over that general failure, while the claim that a specific contingent forcibly evicted civilians in danger requires demonstration that effective control was exercised over the specific conduct of evicting.

Finally, effective control must be assessed by taking full account of the particular circumstances and factual context. In military operations, this requirement is two-fold. First, it indicates that military aspects must, to a certain extent, be engaged with in order to apply the test of effective control. Accordingly, it is necessary to understand how control over the troops is shared and exercised and how some subtleties in the command structure — such as NATO's procedures for sensitive targets — should be taken into account.[45] Besides, the factual context in which the harmful conduct has occurred must be taken into account. Harmful conduct occurs in a variety of factual scenarios each involving particularities. It can occur during combat activities or consist in individual misconduct, be isolated or recurrent. Harmful conduct can occur in implementation of the order of a UN Force Commander or be the result of unclear instructions or poor training. These circumstances should be taken into account in assessing where effective control lies in relation to a given conduct.

C *Shortcomings of Established Interpretations*

The modalities of the test of effective control are to some extent established, yet their application to concrete situations occurring in military operations reveals that certain aspects of the test remain to be clarified. One of the shortfalls of mainstream interpretations of effective control is that they cannot easily address situations of failure to exercise control, for instance where no order was given. It used to be considered that only direct instructions contradicting UN orders could give a state effective control over the troops it contributed.[46] Under this interpretation, a state was considered to exercise effective control only if it expressly ordered its contingent 'to ignore UN orders or to go against them'.[47] Understanding effective control as limited to direct orders is problematic, as it does not always help to determine who had control over the conduct of military

---

44 International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (23 April – 1 June and 2 July – 10 August 2001) ch IV(E)(2) ('*ARS Commentaries*') 63 [1] (commentary to art 1).

45 Alain Pellet, 'L'imputabilité d'éventuels actes illicites: responsabilité de l'OTAN ou des États membres' in Christian Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International, 2002) 193.

46 Dannenbaum, above n 25, 153–4; Marko Milanović and Tatjana Papić, 'As Bad as It Gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267, 282.

47 *H N v Netherlands*, No 265615/HA ZA 06-1671 (District Court of The Hague, 10 September 2008) [4.14.1]; *M M M v Netherlands*, No 265618/HA ZA 06-1672 (District Court of The Hague, 10 September 2008) [4.16.1].

forces, which are 'hardly ever instructed to commit wrongful acts'.[48] While it is increasingly recognised that, in the context of collaborative military operations, a state or international organisation can exercise effective control over an act that it did not directly order,[49] what exactly entails 'effective control by omission' remains elusive. How can a state or international organisation be said to exercise control when it 'did nothing' and that this failure to control resulted in the commission of the harmful conduct by soldiers?

Another shortcoming of established interpretations of effective control concerns the relationship between legal and military understandings of control. Indeed, it is frequently argued that operational control is decisive for the attribution of conduct of international forces under the test of effective control.[50] As explained above, operational control is defined as the authority to direct operations in the field and is usually transferred by states when putting their soldiers at the disposal of an international organisation. For a large number of scholars, this form of authority provides the international organisation, to which it is vested, with the most relevant authority to control the conduct of military troops. Typically, mainstream scholarship deems that effective control rests where operational control is vested, unless a state actually exercises operational control over its troops despite the formal delegation. In other words, the element of 'control' in *ARIO* art 7 is equated to 'operational control', so that conduct is attributed to the entity exercising 'effective operational control'.[51] In this construction, only the operational level of command can provide effective control and other forms of command and control are deemed irrelevant.[52] By the same token, a number of scholars advocate for a presumption of attribution to the entity formally vested with operational control, which can be rebutted if operational control was in fact exercised by a state.[53] The problem of this conflation of effective control and operational control is that such an interpretation does not take full account of the respective relevance of the various forms and degrees of military control with regards to a variety of types of harmful conduct.[54] For instance, it can be questioned whether control at the operational level can be considered effective with regards to sexual abuse and other individual misconduct. Overall, confronting established principles and interpretations with the realities of military operations reveals that they need further refinement in order to clarify the grounds under which the wrongful conduct of soldiers can be attributed.

---

48 Alwyn V Freeman, *Collected Courses of The Hague Academy of International Law: Responsibility of States for Unlawful Acts of their Armed Forces* (Brill Nijhoff, 1955) vol 88, 290.

49 Dannenbaum, above n 25, 156; Zwanenburg, above n 27, 649–50; *Netherlands v Nuhanović*, No 12/03324 (Hoge Raad [Supreme Court of the Netherlands], 6 September 2013) [3.11.3].

50 See, eg, Bell, above n 25, 529; Kondoch, above n 25, 521; Larsen, above n 37, 523; Tsagourias, above n 25, 253; Zwanenburg, above n 14, 126.

51 Larsen, above n 37, 523; Milanović and Papić, above n 46, 289. See also International Law Association, above n 24, 28; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc S/2008/354 (12 June 2008) [16].

52 Tsagourias, above n 25, 255.

53 See, eg, Gill, above n 9, 55; Zwanenburg, above n 14, 102.

54 Leck, above n 17, 359; Dannenbaum, above n 25, 160–3.

III A Causal Analysis of Effective Control

In view of the shortcomings of mainstream interpretations, the following Part proposes a reinterpretation of effective control in the context of international military operations grounded in a conceptual analysis of attribution in causal terms.

A *The Causal Nature of Attribution of Conduct*

This section first identifies the function of attribution in international law, and analyses the operation of attribution in terms of causal control. In order to attach the harmful conduct of individuals to states or international organisations, principles of attribution explicitly or implicitly rely on certain fundamental concepts, amongst which prominently figures the concept of control. Behind the notion of control by a subject over the conduct of an individual lies an element of causation, which determines whether the control was sufficient to attribute the conduct.

1 *Function of Attribution*

In essence, the function of attribution is to attach the acts and omissions of individuals to states and international organisations. For a state or international organisation to be responsible under international law, conduct performed by an individual must be said to be an act of that state or international organisation. Yet, it is an 'elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group'.[55] Attribution is used to establish the link between international subjects on the one hand, and acts and omissions that are concretely perpetrated by individuals or other sub-legal entities on the other hand. Attribution of conduct to international subjects presents similarities with the domestic principle of agency, which is notably used to determine when an individual was acting on behalf of an organised corporate entity and thus engaged the responsibility of the principal. Similarly, attribution determines which international subject is to be considered the author of a given conduct,[56] by identifying 'which persons should be considered as acting on behalf of the State, ie what constitutes an "act of the State" for the purposes of State responsibility'.[57]

In military operations, the individual conduct to be attributed is committed by soldiers in the field. Rules of attribution must determine whether 'the link between the act causing the damage and official authorization or direction is close enough and precise enough to establish the quality of the act as a governmental act'.[58] Fundamentally, attribution assesses the link between the conduct of a soldier and a state or international organisation.

---

55 *ARS Commentaries*, UN Doc A/56/10, 71 [5] (commentary to art 2). See also Roberto Ago, *Collected Courses of The Hague Academy of International Law: Le Délit International* (Brill Nijhoff, 1939) vol 68, 415, 463.

56 Ago, above n 55, 450.

57 *ARS Commentaries*, UN Doc A/56/10, 71 [5] (commentary to art 2).

58 Freeman, above n 48, 310.

2 *Central Role of Control for Attribution*

Control has long been considered central to attribution, as the notion is particularly adapted to apprehend the link between a subject of international law and an individual's conduct that is required for attribution. Indeed, conduct can be linked to a state by determining that the state had control over the occurrence of the conduct perpetrated by an individual. A number of scholars have identified the fundamental role that control plays for attribution in international law. Writing on international responsibility for military activities, Charles Cheney Hyde considered that '[c]ontrol breeds responsibility',[59] and Amrallah submitted that '[t]he responsibility of a state in international law is measured by the actual degree of control which it may exercise'.[60] Addressing the basis for responsibility of the UN, Clyde Eagleton affirmed that '[r]esponsibility derives from control'.[61] Even with regards to rules of attribution based on organic links, the underlying rationale often revolves around the formal control or authority exercised over the organ or agent.

Control can be defined as '[t]he power to influence or direct people's behaviour or the course of events',[62] or the act of exercising influence upon the conduct of others.[63] The notion of control is linked to notions of power ('[t]he capacity or ability to direct or influence the behaviour of others or the course of events'[64]), authority ('[t]he power or right to give orders, make decisions, and enforce obedience'[65]) and influence ('[t]he capacity to have an effect on the … behaviour of someone or something'[66]). Grounded in this notion, attribution ensures that the entity held responsible for a conduct is the one which had influence over the occurrence of that conduct.[67] When relying on the notion of control, the responsibility of a subject can be engaged for conduct over which it had control, while limiting international responsibility to conduct related closely enough to a state or international organisation to be considered its own act, thereby fulfilling the function of attribution identified in the previous section. Conceptually, it is because a state or organisation controlled the conduct of an

---

59 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Little Brown and Company, 2nd ed, 1947) vol 2, 922.

60 Amrallah, above n 22, 66.

61 Eagleton, above n 20, 385.

62 *Oxford Living Dictionaries* <https://en.oxforddictionaries.com/definition/control>, archived at <https://perma.cc/8MSX-H2CR>.

63 The Cambridge Dictionary online defines 'control' as 'the act of controlling something or someone, or the power to do this': *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/control>, archived at <https://perma.cc/7K7Z-WQD9>; The Oxford English Dictionary defines 'control' as the ability to 'To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command': *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989).

64 *Oxford Living Dictionaries* <https://en.oxforddictionaries.com/definition/power>, archived at <https://perma.cc/823H-43FE>. See also André Nollkaemper, 'Power and Responsibility' (SHARES Research Paper No 42, Amsterdam Center for International Law, 2014) 1.

65 *Oxford Living Dictionaries* <https://en.oxforddictionaries.com/definition/authority>, archived at <https://perma.cc/E4U9-L6LN>.

66 *Oxford Living Dictionaries* <https://en.oxforddictionaries.com/definition/influence>, archived at <https://perma.cc/3477-L9P8>.

67 See also Gabrielle Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers' (2011) 16 *Journal of Conflict and Security Law* 473, 476.

individual that the conduct deserves to be attached to that state or organisation and to engage its responsibility. Control can be a ground for attribution, both when influence is actively exercised to direct individual conduct, and when control should have been exercised to prevent individual conduct.

3 *Causal Dimension*

The above analysis reveals that attribution of conduct can be seen as a causal operation determining whether control exercised by subjects of international law is causally linked to harmful conduct by individuals. In a general sense, causation designates the relationship of cause and effect between events.[68] To determine what can be seen as a cause of a particular event, tests of factual causation have been devised to identify each circumstance that was, in fact, causally connected to the event.[69] Traditionally, the 'but for' test is used to identify factual causes. Under this test, an event is a factual cause of another when, but for the former, the latter would not have occurred. It thereby identifies which events are necessary (but not necessarily sufficient) conditions of the occurrence of the harm.[70] In situations where there is a plurality of causes, more refined tests have been developed to allow for the identification of factual causes. Notably, under the 'NESS' test, a condition that is a necessary element of a sufficient set qualifies as a factual cause.[71]

Further, tests of legal causation have been developed to subjectively delimit which factual causes should be taken into account for the purpose of a legal enquiry. Tests of legal causation determine whether and when a causal link is sufficient to warrant legal consequences, thereby delimiting the scope of responsibility.[72] Terms such as 'proximate', 'adequate', 'direct' or 'efficient' are used to evoke the idea that a factual cause must be more or less closely related to an event in order to qualify as a legal cause to which law attaches consequences.[73] Tests of legal causation vary depending on the applicable law, but usually revolve around the idea of proximity and foreseeability. In this article, a proximate cause is defined as an event that was a direct and foreseeable cause of the occurrence of the harmful conduct.

The ILC has not endorsed the concept of causation and removed it as much as possible from the framework of determination of responsibility. Indeed, under the influence of Roberto Ago,[74] the ILC devised a system of objective

---

68 Angus Stevenson (ed), *Oxford Dictionary of English* (Oxford University Press, 3rd ed, 2010).

69 Tony Honoré, 'Causation in the Law' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (17 November 2010) [3.1] <https://plato.stanford.edu/entries/causation-law/>, archived at <https://perma.cc/2AVH-CJHC>.

70 Ibid.

71 Richard W Wright, 'Causation in Tort Law' (1985) 73 *California Law Review* 1737, 1790. For an in-depth discussion of causation in the law of international responsibility, with a focus on issues attached to the plurality of cumulative or concurrent causes, see Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 *European Journal of International Law* 471.

72 Plakokefalos, above n 71, 475.

73 Honoré, above n 69, [3.2].

74 Roberto Ago, *Third Report on State Responsibility*, UN Doc A/CN.4/246 (5 March, 7 April, 28 April and 18 May 1971) [73].

responsibility arising automatically from breach of international obligations where the existence of damage and a causal link with the conduct are not necessarily part of the conditions for responsibility.[75] Nevertheless, the concept of causation has remained relevant for international responsibility at two levels.[76] At the stage of the determination of the legal consequences of a wrongful act, it is well established that a causal link must be established between the injury and the conduct. The few scholars who have addressed causation in international responsibility have focused on this type of causation and the modalities under which a causal link is established for the purpose of reparation.[77] What is more, causation can also be seen as relevant at the stage of attribution of conduct. Indeed, although not explicit, the determination of a link between an international subject and concrete conduct for the purpose of attribution relies on the causal link between the control of the subject and the occurrence of the conduct. In essence, individual conduct is attributed to an entity if it was caused by the control of that entity. In military operations, attribution can be seen as grounded in the control of states and international organisations causing the harmful conduct of soldiers.

A few scholars have taken the view that attribution of conduct is rooted in causal concepts. Most prominently, Dionisio Anzilotti understood attribution in terms of the causal link between the wrongful act and the state, and considered the notion of attribution to be an expression of the concept of causation. In his view, an individual conduct is attributed to a state if there is a causal link between this individual conduct and the activities of the state.[78] Similarly, Rolando Quadri argued that the operation of attribution was a matter of causation. He explained that an event can only be considered an act of the state if there is a causal link between the event and the state.[79] In these interpretations, attribution is, 'in effect, a causal connection between the corporate entity of the state and the harm done'.[80] More recently, scholars addressing contemporary problems of responsibility have developed causal interpretations of attribution. For instance, Jean d'Aspremont took the view that 'attribution of conduct can be seen as another expression of — factual as well as normative — causality in the law of international responsibility, for it connects a human conduct with a violation of an international standard',[81] and that attribution aims at identifying

---

75 Pellet, above n 2, 9.

76 Jean d'Aspremont, 'The *Articles on the Responsibility of International Organizations*: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *International Organizations Law Review* 15, 21.

77 François Rigaux, 'International Responsibility and the Principle of Causality' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005) 81; Michael Straus, 'Causation as an Element of State Responsibility' (1984) 16 *Law and Policy in International Business* 893.

78 Dionisio Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers' (1906) 13(3) *Revue Générale de Droit International Public* 285, 286–7. See also Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9.

79 Rolando Quadri, *Collected Courses of The Hague Academy of International Law: Cours Général de Droit International Public* (Brill Nijhoff, 1964) vol 113, 454, 459.

80 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 543.

81 d'Aspremont, above n 76, 21.

'the causal link between the conduct and the violation'.[82] In the context of military operations, Alexander Orakhelashvili related responsibility to control and causation, explaining that participating states or organisations incur responsibility 'if they have a substantial degree of factual control over the contingent or the relevant situation allows for identifying a link of cause-and-effect between the entity and the wrongful act'.[83]

This article takes the view that the notion of causation is intrinsically part of the operation of attribution based on control, and that explicitly formulating this causal dimension is helpful to attribute conduct in complex scenarios. In this interpretation, harmful conduct is attributed to an entity if the control exercised by it caused the conduct to occur. Acknowledging the causal dimension of attribution is not aimed at discarding the legal nature of tests of attribution, but is useful to attribute conduct in complex situations, for instance, where the state or international organisation failed to exercise control.

Under this argument — that attribution has a causal dimension — rules of attribution are construed as embodying normative standards of causation. It is not asserted, against the ILC view, that the normative operation of attribution should be based 'on the mere recognition of a link of factual causality'.[84] Rather, principles of attribution are seen as providing the legal standard according to which a sufficient causal link between a state or international organisation and the occurrence of an individual conduct is established. Amongst the numerous factual causes of a conduct, rules of attribution can be seen as determining, in each situation, which causes are to be considered legally relevant.

B *Effective Control through the Lens of Causal Attribution*

Applying this analysis of attribution in terms of causal control to the criterion of effective control, this section argues that effective control should be understood as causally proximate control. Furthermore, it submits that interpreting effective control in terms of causal control allows one to grasp situations of effective control by omission as well as situations where more than one entity has effective control.

1 *Effective Control as Causally Proximate Control*

This article argues that, interpreted through the lens of causal attribution, effective control can be understood as control that qualifies as a proximate cause of the harmful conduct. Under this analysis, the ultimate question to ask for attribution of conduct in military operations is: which participant(s) actually exercised a form of control that was causally proximate to the harmful conduct?

Under the established interpretations presented above, the test of effective control ascertains actual control exercised over a given conduct, yet what 'effectively controlling conduct' means can be interpreted in various ways. Based on the conceptualisation of attribution in terms of causal control, this

---

82 Ibid.

83 Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 647, 654.

84 *ARS Commentaries*, UN Doc A/56/10, 81 [4] (introductory commentary to pt I, ch II).

article proposes to define effective control as control which caused the conduct to occur. In a context where various forms of control exercised by states and international organisations can influence different types of conduct, this interpretation aims to identify the causally relevant form of control over a given conduct. Overall, harmful conduct should be attributed to the entity or entities which actually exercised the causally relevant element of control, because acts and omissions in the exercise of control by this entity brought about the conduct of the individual.

More precisely, this article submits that elements of control which are proximate causes of the conduct constitute the ground on which the conduct should be attributed. Considering that rules of attribution can be seen as embodying standards of causation, it is argued that the standard of effective control, as formulated in *ARIO* art 7, incorporates a legal standard of causation delimiting which forms or degrees of control qualify as causes for the purpose of attribution. In causal terms, a factual cause qualifies as a 'proximate cause' when it is closely or directly related to an event.[85] By requiring actual control over specific conduct, the standard of effective control seems to express that proximate control would qualify as legal cause of individual conduct and thus be a ground for attribution. In other words, attribution under the test of effective control requires identifying which form of control was a proximate cause of the conduct of the individual.

2 *Effective Control by Omission*

Understanding effective control in causal terms allows one to understand what effective control entails when no positive act of control over the conduct was carried out. From this perspective, control can be assessed in negative terms, whereby responsibility can originate from a failure to exercise control. Indeed, the failure of an entity to use its authority and exercise control can be causally linked to the occurrence of harmful conduct. When a lack of control constitutes the proximate cause of the conduct of a soldier, effective control can be identified by analysing which form of control was causally relevant.

In order to address situations of omissions, Tom Dannenbaum proposed an analysis according to which '"effective control" must be understood to mean "control most likely to be effective in preventing the wrong in question"'.[86] Under this test, conduct that was not ordered should be attributed to the entity which 'was positioned to have acted differently in a way that would have prevented the impugned conduct'.[87] Relating effective control to the ability to prevent the harmful conduct has its merits but needs to be refined to constitute a clearer criterion. This article suggests going further by relying on the causal dimension. In the absence of positive acts of control, conduct should be attributed to the entity which, by failing to use the elements of control it possessed, caused the conduct to occur. The causal analysis allows one to understand how conduct can be attributed in the case of control by omission: if the individual conduct was caused by the failure of a state or international

---

85 Honoré, above n 69, [3.2].
86 Dannenbaum, above n 25, 114.
87 Ibid 157.

organisation to exercise its authority, the conduct will be attributed to the entity which, by omission, brought about the conduct. The findings in the *Nuhanović* and *Mustafić* cases can be interpreted in that sense. The Court of Appeal — the holdings of which were confirmed by the Supreme Court[88] — found that the state 'would have had the power to prevent the alleged conduct' and that 'in case the Dutch Government would have given the instruction to Dutchbat not to allow [the victims] to leave the compound or to take [them] along respectively, such an instruction would have been executed'.[89] By considering that, if the State had exercised control, the wrongful conduct would not have occurred, the Court implied that the conduct of the contingent was causally related to the failure of the state to exercise the operational control it had retrieved during the contingent's withdrawal.[90] In all situations where the harmful conduct is not causally linked to a positive exercise of control, effective control can be assessed by identifying the form of military control, the lack of exercise of which caused the harmful conduct.

3 *Degrees of Control, Plurality of Causes, and Multiple Attribution*

Under this interpretation of effective control, in terms of causal control, conduct can be attached to several subjects, each exercising some degree of effective control over the conduct. Indeed, in a number of situations, failures at various levels combine to produce the harmful conduct of soldiers. For instance, unclear orders from the UN, in addition to deficient training provided by the state, may result in soldiers indiscriminately shooting at civilians. In other cases, several entities can concurrently exercise the same relevant element of control, such as in situations where operational authority is — formally or factually — shared between the lead entity and the contributing states. This article argues that conduct can be attributed to each and every state or international organisation exercising an element of control that qualifies as a proximate cause of the conduct, which results in the possibility of multiple attribution.[91]

IV EFFECTIVE CONTROL AND FORMS OF MILITARY CONTROL

In international military operations, control over the conduct of troops is usually shared between the lead entity vested with operational control and the

---

88 *Netherlands v Nuhanović*, No 12/03324 (Hoge Raad [Supreme Court of the Netherlands], 6 September 2013) [4]; *Netherlands v Mustafić-Mujić*, No 12/03329 (Hoge Raad [Supreme Court of the Netherlands], 6 September 2013).

89 *Nuhanović v Netherlands*, No 200.020.174/01 (Gerechtshof 's-Gravenhage [The Hague Court of Appeal], 5 July 2011) [5.18]; *Mustafić-Mujić v Netherlands*, No 200.020.173/01 (Gerechtshof's-Gravenhage [The Hague Court of Appeal], 5 July 2011) [5.18].

90 Bérénice 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 *Leiden Journal of International Law* 521, 531.

91 Identifying degrees of control for the purpose of attribution does not mean that only part of the conduct would be attributed to each of the controlling parties, as the respective degrees of control over the conduct are not opposable to third parties in order to diffuse responsibility at the stage of attribution: see Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014) 208, 239. However, the relative degree of control possessed by multiple responsible parties can be relevant at a later stage for the internal apportionment of responsibility amongst them.

contributing states retaining organic authority. Besides, states occasionally retain some elements of operational control or make use of powers that they had formally delegated. In this context, assessing effective control requires looking further than operational control. Indeed, various elements of authority can be linked to different types of harmful acts while being unrelated to the occurrence of other types of conduct. As expressed by the ILC, '[a]ttribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect',[92] which, in other words, means that the organic command retained by states can be causally linked to the occurrence of certain offences.

Some types of conduct are completely outside of the reach of operational control and should not be attributed on the basis of this form of authority. Accordingly, this article proposes to attribute harmful conduct that is outside of the ambit of operational control on the basis of other forms of control, namely organic control or strategic control. By taking into consideration the full scope of forms of control in relation to a given conduct, the actual degree of control exercised over that conduct by each party can be ascertained. Pursuant to this analysis, military forms of control exercised over international forces can be translated into legal control for the purpose of attribution. Considering that different types of conduct can be causally linked to different elements of military control, this article submits that the conduct of soldiers should be attributed to the state and/or international organisation which exercised a causally proximate element of control over the conduct of the soldier. Apart from operational control, the exercise by states of elements of organic command is relevant as it can qualify as the proximate cause of certain types of harmful conduct. Furthermore, this article submits that certain harmful acts can be causally linked to the exercise of control at the strategic level.

A *Effective Operational Control*

Operational control is often the most direct form of authority over a number of types of harmful conduct committed by soldiers. Conduct causally linked to operational control includes many of the wrongful acts occurring during missions in the field, such as wrongful targeting or wrongful detention. Exercise of operational control constitutes the proximate cause of many (but not all) combat-related misconduct and thus usually amounts to effective control over such type of conduct for the purpose of attribution.

Where the direction of the forces on the ground by a Force Commander leads to the commission of a wrongful act, operational control is the relevant form of control. In the most straightforward situation, a Force Commander can explicitly order their forces to carry out conduct that is internationally wrongful. Acts and omissions of international forces resulting from such orders are attached to the entity vested with operational control. For instance, the order to conduct an air strike against a civilian object will be wrongful. As noted earlier, however, most wrongful acts are not directly ordered. More often, wrongful conduct in the field

---

[92] *ARIO Commentaries*, UN Doc A/66/10, 88–9 [7] (commentary to art 7).

results from unclear orders or rules of engagement.[93] This leads to situations where troops do not know 'whether to act or not to act'[94] and thus can also constitute the cause of wrongful acts or omissions by soldiers, such as misuse of firearms or failures to protect. In practice, wrongful shootings during patrols have sometimes 'occurred because of the ambiguous nature of the superior's order'.[95] For instance, it was reported that Canadian troops, operating in Somalia in 1993, fatally fired at individuals after receiving the instruction to '[g]et them'.[96] Finally, a number of wrongful courses of conduct occur because of a lack of operational orders with regard to a specific situation, such as a threat to civilians. This is particularly relevant in the context of obligations of due diligence. If an international organisation vested with operational control has knowledge that abuse is taking place, and has the means and mandate to react but fails to do so, failure to exercise operational control will be the cause of the contingent's failure to protect.

Operational control is usually vested in and exercised by the international organisation leading the operation and, therefore, wrongful conduct causally linked to this form of control will often be attributed to the organisation. Attribution of conduct to the state on the ground of operational control can occur in two situations: when a state has formally retained certain elements of operational control and when a state has factually resumed the exercise of the elements of control it had transferred to the organisation. First, in situations where contributing states formally retain some elements of operational command, it can constitute a ground for attribution to the state. For instance, in Afghanistan, the UK conducted its detention operations independently from NATO and therefore exercised effective operational control over the conduct of the British contingent in the context of detentions.[97] In the case of NATO operations where, occasionally, some states formally retained the authority to refuse to implement certain orders on a case-by-case basis through the opposition of a red card,[98] it can arguably be considered that both the state and the organisation exercise effective operational control.[99]

Besides, if a state factually exercises operational control over its contingent, the control of that state will be the proximate cause of the ensuing conduct. Notably, if a state bypasses formal agreements and directly influences the

---

93 Peter Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5 *Journal of Conflict and Security Law* 45, 59.

94 Ibid 48.

95 Peter Rowe, 'Military Misconduct during International Armed Operations: "Bad Apples" or Systemic Failure?' (2008) 13 *Journal of Conflict and Security Law* 165, 177 ('Military Misconduct during International Armed Operations').

96 Government of Canada, *Report of the Somalia Commission of Inquiry* (1997) vol 5, 984–1004.

97 *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014) [180].

98 Zwanenburg, above n 14, 48.

99 By contrast, the approval of sensitive targets by the NAC does not amount to member states exercising operational control, for the decision of NAC remains attributed to NATO. In this respect, member states can bear derived (indirect) responsibility. See Torsten Stein, 'Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of Its Member States?' in Christian Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International, 2002) 181, 191.

conduct of its troops through contradictory orders, it exercises effective control over their conduct. Besides, in transitional periods during the withdrawal of their contingents, states usually resume part — or all — of the operational command over their contingents. In Rwanda, in 1994, and in Srebrenica, in 1995, Belgium and the Netherlands respectively resumed command over their troops after deciding to withdraw and thereby exercised direct control over the failure of their contingents to protect individuals under their care.[100] In the case of *Nuhanović*, the Court explained that the Dutch government was directly involved in the operations when the Dutch contingent was being evacuated and exercised control over its troops.[101] The conduct of Dutchbat was thus attributed to the Dutch State, which had effective operational control over the evacuation of the compound. This is not to say that conduct would always be attributable to a state on the ground that it could always hypothetically exercise control. Indeed, the failure of a state to exercise the operational control that it has delegated only becomes relevant when its causal link to the wrongful conduct is proximate enough, such as when a state is in the process of resuming control.

B *Effective Organic Control*

Organic control refers to various elements of authority relating to the preparation and maintenance of armed forces. It covers a diffuse range of non-operational matters related to the personal management of the troops, not only disciplinary authority and criminal jurisdiction, but also the authority to hire and train forces, pay salaries, ensure the maintenance and safety of troops and decide on promotions.[102] In the military sense, discipline not only concerns the authority to initiate and conduct ex post facto disciplinary or criminal procedures,[103] but also encompasses all means by which a state regulates its armed forces to ensure that they are disciplined; that is, well trained, obeying orders and adopting proper behaviour.[104] Such elements of authority are 'inherent manifestations of national sovereignty'[105] and are the exclusive prerogative of the national state of a contingent.[106] The organic control of a state 'equates to "ownership" of the force'[107] and embodies the specific non-severable

---

100 *Mukeshimana-Ngulinzira v Belgium*, RG No 04/4807/A, 07/15547/A (Court of First Instance of Brussels, 8 December 2010) [38] ('*ETO case*'); *Netherlands v Nuhanović*, No 12/03324 (Supreme Court of the Netherlands, 6 September 2013) [3.12.2].

101 *Netherlands v Nuhanović*, No 12/03324 (Supreme Court of the Netherlands, 6 September 2013) [3.12.2].

102 UN DPKO and DFS, above n 10, 3; NATO Standardization Agency, above n 12, 2-A-3; Department of Defence, Australian Government, 'Australian Defence Doctrine Publication (ADDP) 00.1: Command and Control' (Defence Publishing Service, 2009) 3–11 ('ADDP 00.1').

103 UN DPKO and DFS, above n 10, 3.

104 See generally Hilaire McCoubrey and Nigel D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth, 1996) 177.

105 Thomas Durell-Young, 'Command in Coalition Operations' in Thomas J Marshall, Phillip Kaiser and Jon Kessmeier (eds), *Problems and Solutions in Future Coalition Operations* (US Army War College, Strategic Studies Institute, 1997) 23, 32. See also Thibault, above n 25, 238.

106 Gill, above n 9, 46; NATO Standardization Agency, above n 12, 2-F-7; Council of the European Union, 'EU Military C2 Concept' (EU Council Doc No 11096/03, 26 July 2006) 7; ADDP 00.1, above n 102, 3–3.

107 ADDP 00.1, above n 102, 3–3.

link of military organs, which always 'remain in their own national service'.[108] In the view of the UN and some scholars, organic control of the state is irrelevant to the exercise of effective control.[109] This article argues that, while organic authority does not directly pertain to operational matters, it can be linked to the occurrence of some types of harmful conduct in the field.[110] Indeed, when soldiers commit wrongs due to disciplinary and training failures, the failure of the state to exercise organic control can be a ground for attribution.[111]

First, organic control is particularly relevant to individual misconduct, which is defined as harmful conduct committed by soldiers that lacks a direct link to the conduct of hostilities and usually constitutes crimes in domestic systems.[112] Examples from practice include sexual abuse and exploitation,[113] physical abuse and killings[114] and smuggling and bribery.[115] This article takes the position that elements of organic control allow the state to have significant influence over the occurrence of such misconduct, which 'fall clearly within the normal remit of national military discipline',[116] while an entity vested only with operational control 'is powerless in this realm'.[117] Military scholars have explained that misconduct such as sexual and physical abuse is causally related to the failure of the state to adequately train and discipline its troops, rather than to failures at the

---

108 *Attorney-General v Nissan* [1970] AC 179 (11 February 1969) 223.

109 International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN GAOR, 63rd sess, UN Doc A/CN.4/637/Add.1 (17 February 2011) 14 [4] (commentary to draft art 6); Tsagourias, above n 25, 255.

110 Rowe, 'Military Misconduct during International Armed Operations', above n 95, 178.

111 See also Zsuzsanna Deen-Racsmány, 'The Relevance of Disciplinary Authority and Criminal Jurisdiction to Locating Effective Control under the *ARIO*' (2016) 13 *International Organizations Law Review* 341.

112 Rowe, 'Military Misconduct during International Armed Operations', above n 96, 170; Marco Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15 *Journal of Conflict and Security Law* 347, 357.

113 See, eg, Graça Machel, *Report of the Special Representative of the Secretary-General on the Impact of Armed Conflict on Children on the Impact of Armed Conflict on Children*, UN GAOR, 51st sess, Agenda Item 108, UN Doc A/51/306 (26 August 1996); Prince Zeid Ra'ad Zeid Al-Hussein, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN GAOR, 59th sess, Agenda Item 77, UN Doc A/59/710 (24 March 2005) 8 [6]; UN Office of Internal Oversight Services ('OIOS'), *Investigation into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo*, UN GAOR, 61st sess, Agenda Items 127, 132 and 136, UN Doc A/61/841 (5 April 2007).

114 See, eg, Clyde H Farnsworth, 'Torture by Army Peacekeepers in Somalia Shocks Canada', *New York Times* (New York), 27 November 1994, 14; Duncan Campbell, 'US Troops Abused Civilians in Kosovo', *The Guardian* (London), 19 September 2000, 17; Kirk Johnson, 'Pretrial Hearing Starts for Soldier Accused of Murdering 16 Afghan Civilians', *New York Times* (New York), 6 November 2012, A16.

115 See, eg, UN OIOS, *Investigation into Allegations that United Nations Peacekeepers Engaged in the Exploitation of Natural Resources and the Trafficking of Weapons in the Mongbwalu Region in the Democratic Republic of the Congo*, Redacted Report of Investigation, ID Case No 0151/06 (2 July 2007); Martin Plaut, 'UN Troops "Traded Gold for Guns"', *BBC News* (online), 23 May 2007 <http://news.bbc.co.uk/2/hi/africa/6681457.stm>, archived at <https://perma.cc/EQJ8-YQ9J>.

116 McCoubrey and White, above n 104, 178.

117 Dannenbaum, above n 25, 161.

operational level.[118] The occurrence of this type of wrong points at 'a failure of the system under which discipline is maintained'[119] and therefore should be attributed to the national state exercising organic control.

Besides, organic command can also be relevant to certain combat-related wrongs committed during operations. In particular, the inappropriate reaction of soldiers to an equivocal order can be linked, not only to failures at the operational level, but also to a lack of adequate discipline in the contingent. Proper training should, for instance, ensure that a soldier knows 'the circumstances in which he can open fire or how he should treat civilian detainees'.[120] Indeed, orders are not given in a void and the level of discipline of a contingent influences the way in which it implements instructions.[121] Accordingly, when wrongs occur because of an ambiguous order, both operational control and organic command can be causally linked to the harmful conduct. As both elements of control are concurrent and proximate causes of the conduct, the conduct is attributed to both entities.

In the absence of orders, soldiers' inappropriate reactions can also be linked to their inadequate training. In such situations, the '[u]ncertainty over the most appropriate response by a soldier to a perceived threat'[122] to themselves or to civilians can result in either excessive use of force or inaction. For instance, the various acts of abuse committed by the Canadian contingent to the UN Operation in Somalia I ('UNOSOM I') during patrolling and detentions have been directly linked to an inadequate exercise of disciplinary authority by Canada.[123] Similarly, the conduct of soldiers blatantly disobeying orders is causally linked to disciplinary failures. On occasions, states have contributed ill-disciplined or 'grossly unqualified'[124] troops to international military missions. For instance, the Bulgarian contingent to the UN Transitional Authority in Cambodia ('UNTAC') was particularly untrained and undisciplined.[125] In all these situations, the failure of the national state to exercise organic control qualifies as a proximate cause of the conduct.

In the view of other scholars, such inappropriate conduct of peacekeepers during combat-related activities would qualify as ultra vires conduct and should be attributed on this basis.[126] This article, rather, argues that in the context of delegated military organs — over which control is shared — *ARIO* art 7 is relevant also with regards to conduct which contravenes or exceeds instructions, since *ARIO* art 8 would only apply to organs that are fully seconded.[127] Accordingly, the conduct of international forces acting beyond or against orders can be attributed to the state on the ground of organic control.

---

118 Rowe, 'Military Misconduct during International Armed Operations', above n 95, 166.
119 Ibid 178.
120 Ibid 177.
121 Ibid.
122 Ibid 175.
123 Dannenbaum, above n 25, 161.
124 Ibid 163.
125 Ibid.
126 See, eg, Paolo Palchetti, 'The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations' (2013) 95 *International Review of the Red Cross* 727, 735–6.
127 See Part II(B)(1).

C *Effective Strategic Control*

To a limited extent, control exercised at the strategic level, which includes the authority to define the goals and means of an operation,[128] can also enable a participant to directly influence certain types of conduct and therefore can constitute effective control for the purpose of attribution. Indeed, some wrongful conduct occurs without link to either operational or disciplinary failures and can rather be seen as rooted in the inadequate design, objectives, means and resources of an operation. Inadequate decisions at the strategic level can be causally linked to wrongful acts in the field and this article submits that strategic control can therefore be relevant for attribution.

In all Chapter VII[129] operations, political direction is exercised by the UN, which authorises military operations in order to accomplish particular goals defined in the mandate. In UN-led operations, the UN also decides on the strategic planning of the mission: it designates specific objectives and must plan and gather the force. Objectives mentioned in Security Council Resolutions are occasionally ambitious — such as the protection of civilians in conflicted areas — and can only be accomplished with corresponding means in terms of troops, assets and right to use force.[130] Indeed, '[n]either the best mandate, nor the best-led mission, is likely to succeed if the operation is not designed and resourced to support its objectives'.[131] By inadequately determining the mandate and means of operations, decisions of international organisations at the political and strategic level can be directly linked to the failure of troops to prevent human rights violations and protect civilians. Some combat-related wrongful conduct occurs neither because of a wrongful order nor due to a lack of discipline, but is caused by inadequate decisions at the strategic and political level. For instance, the Dutch troops stationed in Srebrenica lacked the operational means to protect the area that the UN had strategically declared as safe.[132] In the hypothesis that the conduct of Dutchbat would constitute a breach of the duty to prevent genocide, it can be argued that the decision of the UN to declare Srebrenica a safe area without providing the means to fulfil this mandate is causally linked to the failure of the soldiers in the field to protect civilians from massacres. Similarly, the UN Mission in the Democratic Republic of the Congo ('MONUC') did not intervene — despite having knowledge of assaults being carried out by rebels — because they were 'not equipped, trained or configured

---

128 UN DPKO and DFS, above n 10, 6; Council of the European Union, 'EU Military C2 Concept' (EU Council Doc No 11096/03, 26 July 2006) 5. See also James W Houck, 'The Command and Control of United Nations Forces in the Era of "Peace Enforcement"' (1993) 4 *Duke Journal of Comparative and International Law* 1, 23.

129 *Charter of the United Nations* ch VII.

130 Klappe, above n 16, 650.

131 Victoria Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (UN Office for the Coordination of Humanitarian Affairs, November 2009) 89.

132 Yasushi Akashi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate' (1995) 19 *Fordham International Law Journal* 312, 315; *Report of the Secretary-General Pursuant to General Assembly* Resolution 53/35*: The Fall of Srebrenica*, UN GAOR, 54th sess, Agenda Item 42, UN Doc A/54/549 (15 November 1999) 61 [263].

to intervene rapidly to assist those in need of such protection'.[133] In these scenarios, the most direct cause of the harmful conduct alleged as being wrongful lies in the exercise of strategic control. This article therefore argues that conduct could be attributed to the UN on the ground of effective control.

V CONCLUSIONS

This article explored conceptual grounds for attributing conduct in international military operations led by an international organisation. It argued that the notion of causation is not only relevant to the determination of responsibility, but arguably inescapable in complex scenarios involving several entities formally and factually sharing various forms of control. The causal analysis explains why operational control is a relevant form of control with regards to many combat-related wrongs, resulting in attribution of conduct to the entity effectively exercising this form of control over the conduct. Furthermore, and more singularly, the analysis indicates that other forms of control can also be relevant for attribution. While operational control is often relevant, it is important to identify how other elements of military control can also provide an entity with causally relevant control over certain types of harmful conduct. With regards to individual misconduct, such as sexual abuse, this article argued that the organic control of the state is the most directly relevant form of control and should be a ground for attribution. Further, the article contends that the organic control of the state is also causally relevant when the equivocal instructions of a Force Commander result in combat-related wrongs. In this scenario, deficiencies at the operational level (unclear order) combine with failures at the organic level (inadequately trained contingent), so that conduct can be attributed to both the contributing state on the ground of organic control and to the lead organisation on the ground of operational control. More controversially, the article further suggested that control exercised at the strategic level — at the stage of the design of the operation — can in some circumstances constitute effective control over failures to prevent the occurrence of wrongful conduct in the field.

The causal argument developed in this article, which could be perceived as essentially theoretical, has direct practical implications. Indeed, arguing that forms of control other than operational control can also be relevant for attribution of conduct deviates from mainstream interpretations and could lead to novel arguments in litigation. In view of the persistent immunity of international organisations, victims have sought, and sometimes obtained, remedies from troop-contributing states.[134] The arguments developed in this article could be used to bring further claims against contributing states, for instance, with regards to individual misconduct causally linked to disciplinary failures.

This potential expansion of the scope of responsibility should not dissuade states from participating in international military operations, as states abiding by fundamental international principles should be willing to bear responsibility in

---

133 *Eleventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, UN Doc S/2002/621 (5 June 2002) [71].

134 See *Stichting Mothers of Srebrenica v Netherlands*, where the Court, applying the findings of *Nuhanović* and *Mustafić* (which concerned the wrongful deaths of three victims) found the Dutch State responsible for the wrongful deaths of about 300 men: No 200.158.313/01, 200.160.317/01 (Gerechtshof den Haag [The Hague Court of Appeal], 27 June 2017).

situations where, as argued in this article, responsibility is grounded in tangible control over the occurrence of wrongs. Rather than escaping or limiting responsibility, what should matter from the point of view of states and international organisations participating in military operations is the need for legal certainty with regards to their responsibility. By engaging with various factual scenarios, this article was also aimed at clarifying the circumstances in which states and international organisations could bear responsibility for the conduct of international troops. Grounded in causally relevant forms of control, this framework for attribution should encourage states and international organisations to ensure compliance with international obligations in situations where they can actually do so. Effective control is, in that sense, relevant not only for responsibility, but also to prevent the occurrence of wrongful conduct in the first place.