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THE RESPONSIBILITY OF THE UNITED NATIONS AND THE GENOCIDE OF SREBRENICA

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INTRODUCTION

After the end of the Second World War, the role of international organisations became of fundamental importance not only for successful cooperation between States but also for tackling the challenges that arose in the global arena and that individual States were unable to face alone. Ever since, organisations have been increasingly finding themselves in positions that very often require intervention in the international decision-making sphere.

Among thousands of organisations, the role played by the United Nations is certainly of primary importance, especially when one considers the missions it carries out for the maintenance of peace and the promotion of human rights. Such actions and such decisions, however, need a system of laws. This is necessary on the one hand, to limit their scope of actions, and on the other, to establish compliance with norms deemed essential for the functioning of the international system that the United Nations have created.

Hence, an efficient system of accountability is required that not only could review the decisions of the United Nations but also sanction the violations of international obligations. The responsibility of the United Nations is still widely debated. In the existing case-law there is no precedent of the United Nations being held responsible for wrongful acts perpetrated by its organs in carrying out peacekeeping missions. This has led to the increasing need to implement an effective response to this lack of accountability. Not only to provide greater legitimacy to the operations but also to give credibility to the organisation.

To better address the issue of responsibility of the United Nations in peacekeeping operations, this thesis will examine the role it played in the events that led to one of the most heinous crimes committed since the Second World War: the genocide in Srebrenica. The decision to focus on this specific issue stems from the fact that it represents one of the most important peacekeeping operations of the 20th century, but also one of the most evident failures for the UN. In July 1995, eight thousand Bosniacs (Muslim Bosnian citizens) were killed by Bosnian Serb forces in Srebrenica. At that time, a Dutch battalion belonging to the United Nations Protection Force (UNPROFOR) was protecting the "safe area". The victims were even the result of the UNPROFOR wrongful acts allegedly attributable both to the UN and to the Dutch State, which were accused of having failed to prevent the massacre.

Despite the historical value, from a legal point of view, the UN and the Dutch State were sued in four fundamental judicial proceedings, both being accused of failing to prevent the massacre. Three of these were brought before the Dutch Court:

1. Judgment of the Dutch Court, *Association Mothers of Srebrenica et al. v. The Netherlands and the United Nations* (2012);

2. Judgment of the Dutch Court, *Hasan Nuhanović v. The Netherlands* (2013);

3. Judgment of the Dutch Court, *The* Mothers of Srebrenica v. The State of Netherlands *case* (2019).

The fourth proceeding concerns the appeal filed by the Srebrenica Mothers to the ECtHR for alleged violation of art. 6 of ECHR by the Dutch Supreme Court decision of granting the immunity, namely ECtHR judgment *Stichting Mothers of Srebrenica and Others v. The Netherlands* of 2013.

These judicial proceedings have highlighted some legal issues that are still being debated today. Firstly, the issue concerning one of the constitutive elements of the internationally wrongful act, i.e. the attribution of the conduct, which, taken in the context of peacekeeping operations, represents an abstract analytical exercise of no insignificant importance. Secondly, the question of the immunity of the United Nations before national Courts, which protects the organisation from any kind of legal interference by its member states.

The research questions of this thesis follow directly from those issues. The first question is whether the conduct of a military contingent, placed at the disposal of the UN for peacekeeping missions, is to be attributed to the UN or to the State to which the organ belongs.

The second question, that appeared in the *Nuhanović* case, is whether it is possible to have a dual attribution over the same conduct performed by an organ placed at the disposal of an international organisation.

Finally, the third question is whether international organisations are bound by human rights obligations. Specifically, the right in question concerns the individuals' access to justice. This will lead to analyse whether the right of access to the court constitutes a generally applicable human right and a counter limit to the functional absolute immunity held by United Nations before national courts.

To contextualize what happened and give a complete picture of the set of rules and legal theories that characterise the world of the International Organisation and the possibility of holding them responsible for allegedly Internationally Wrongful Acts, the dissertation will gradually proceed as follows.

The first chapter will analyse the origins and development of international organisations, focusing on the extent to which the importance of the role of international organisations has generated the need to create a system of international responsibility. The starting point is precisely the fact that International Organisations possess an independent legal personality. Being subjects of international law, they could even be held responsible under it.

The legal framework for the Responsibility of International Organisations is contained in the Draft articles on the Responsibility of International Organisations (DARIO) created by the ILC in 2011, where it sought to codify the existing set of rules in this field. Starting with the analysis of the DARIO, some main issues will be addressed. Firstly, the problems that arise from the non-respect of the 'principle of speciality' of International Organisations, caused by the adoption of several articles, *mutatis mutandis*, that took as a

source the Draft articles on Responsibility of States for Internationally Wrongful Acts (ASR), will be scrutinized. Then, the constitutive elements of the internationally wrongful act, i.e. the attribution and the material breach, will be considered. The last paragraph of the first chapter will be dedicated to the implementation of responsibility as envisaged by DARIO.

The second chapter, will focus on the most intricate element of the internationally wrongful act: attribution. The issue of attribution of conduct will be crucial to explain the theorized system that allows to determine not only the attribution of a wrongful act but also how, in the practice of the courts, it is applied. After analysing the existing draft articles on attribution and their possible interpretations, the effective control and its use will be discussed. To this end, the fact of taking into account the decisions of international courts relating to States is justified by two factors.

The first is that the rules and tests concerning attribution apply to States and are only afterwards extended and applied to International Organisations. An explicit example of this is the effective control test established by the ICJ in the Nicaragua case[1] and was subsequently included in the art. 7 DARIO that regulates the case of organs placed at the disposal of an International Organisations and refers precisely to the effective control test insofar as it is the instrument that allows determining the attribution to an International Organisation.

Secondly, the case law concerning International Organisations is very limited, if we do not consider the case of the European Court of Human Rights *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*.

This focus will help to understand the reasoning behind the Courts' decisions and lay the ground for the discussion of the cases that are the subject of this thesis. In the third chapter, the analysis will proceed following the work of the courts and the development of legal issues. In the first instance, the case of *the Mothers of Srebrenica vs The UN and the State of Netherlands* will be analysed, taking into account the reasons that led the Dutch Supreme Court to determine the immunity of the UN. On the same issue, the decision of the ECtHR in *Stichting Mothers of Srebrenica* will be considered, which will change its previous decision held in *Waite and Kennedy*, establishing the prevalence of the UN immunity over the rights of access of individuals to the Court.

The two elements of the International wrongful act relating to cases brought before Dutch Courts separately, will be considered. Firstly, the focus will be on attribution, dwelling on the pivotal role of the decision of the Dutch Supreme Court in the *Nuhanović* case and on the possibility of a dual attribution for the same conduct. This decision will open to the analysis of the attribution in the third and last case brought before the Dutch Court, *The*

[1] Judgment of the International Court of Justice *Nicaragua v. United states of America*; Judgment of the International Court of Justice *Bosnia and Herzegovina v. Serbia and Montenegro*

Mothers of Srebrenica et al. v. the Netherlands, concluded in July 2019. Besides, this analysis will serve as a legal and theoretical basis for considering possible alternative mechanisms in the fourth chapter.

The third chapter will close with the analysis of the Courts' findings regarding material breaches. This analysis, even though it relates to the misconduct of States, seeks to demonstrate that there are precise violations of international law that could be indirectly ascertained also in the event of the attribution of Dutchbat's conduct to the UN.

Finally, the fourth and final chapter will deal with the long-standing question of the balance between UN immunity and the right of access to the Court by individuals. The right of access to justice is particularly important, even though it is not considered to be enough to override immunity. As it will be shown, individuals cannot bring cases against International Organisations before domestic Courts, nor at international level. The only option seems to be to seek a remedy before national courts, but at the same time, these Courts, in turn, are bound by the recognition of immunity enjoyed by the UN.

For this reason, the friction between these two obligations and then the possible solutions that could allow the establishment of an accountability mechanism where individuals can claim such responsibility will be analysed. It will, first of all, take into account the existing available solutions within the UN, moving on to consider the theoretical developments that have characterised the recent doctrine. One of the most interesting developments is the theory that would allow the right of access to the court to be considered of *jus cogens* rank. Such an approach, even if widely criticized, would allow the national courts to reject the immunity of international organisations in the absence of an adequate alternative dispute settlement mechanism.

CHAPTER I. From the origins of the concept of State Responsibility to the International Organizations responsibility and their legal personality.

1.1 THE ORIGINS AND THE NOTION OF STATE RESPONSIBILITY

The core argument of this thesis is to question the responsibility of International Organisations. For this purpose, the aim of this paragraph is to retrace the steps that led to recent notion of responsibility in international law. The legal regime of State responsibility will be taken into account, at the beginning, because it is useful to understand the bases, parameters and general rules governing the vast field of responsibility. They apply to any entity of international law having legal personality and therefore capable of performing legally relevant acts. But, International Organisations are not States and therefore the same rules should not apply exactly and automatically.

When referring to responsibility in international law, it is necessary to consider several fundamental questions: where does responsibility stem from? What exactly are its constitutive elements? And what does the acknowledgement of responsibility trigger?

Each legal system, thus international law as well, is composed of three basic elements: rules, rights and remedies. It means that either when a right is infringed or when a rule is not complied with, this involves responsibility. Thus, when a State or an International Organisation[2] do not perform an international obligation arising from customary law, treaties or conventions, they are committing an internationally wrongful act. In that case, a new legal relationship will be established between the subject who committed the wrongful act and the subject that, instead, suffered the tort.

Some events that could trigger responsibility are, for instance: the violation of a positive right recognised by international law; an act or omission that violates the obligations recognised by international community; and the harm caused by the violation of any international obligation.

In order to fully understand the notion of responsibility and its development, it is wise to start from the analysis of legal literature at the beginning of the 20th century and the fundamental contribution from Anzilotti[3].

[2] Municipalities principle states that the conduct of an agent or an organ, directly or indirectly linked to the structure of the State provides that the same State is involved and is therefore accountable to its organs or agents.

[3] ANZILOTTI (1902).

Historically, the assessment of State responsibility has concerned the treatment of aliens in Courts' decisions. According to Anzilotti, the most important practical issue was, in fact, State responsibility for injuries to aliens[4]. Firstly, as said, the mistreatment of a foreign citizen was the most wide-spread issue among the international arbitral Courts. In other words, the legal nature of responsibility of the State was supported by practical evidences only in this field.

It not only affects the State, but also opens the discussion of comparison with internal tort law. Even though a specific codification of State responsibility for injury to foreigners does not exist, it has been the most wide-spread form of responsibility. For this reason, there was a largescale and efficient legal practice on this theme modelled on the internal one[5]. Moreover, it is useful to notice that the legal practice on injured aliens, and its analogy with national tort law, were very useful at the Anzilotti's time. This practice allowed for a broader framework, given the fact that on the subject of injured aliens there was much more practice and literature, as opposed to other areas of State responsibility, and therefore it was possible to rely on these practices in order to create a theoretical framework on the law of the State responsibility. This version of State responsibility reflected the common vision of time, which placed greater emphasis on sovereignty and the need to create standards of positive and systemic law.[6]

Here, for the sake of clarity, are given some examples that could trigger State responsibility for injury to aliens, such as unlawful expropriation, illegal detention, denial of justice and so on.

Moving on now to describe the general theory of Anzilotti and Ago, and then the works of the International Law Commission on the responsibility of the State and the International Organisations, it will be possible to consider and frame the large and complicated issue of responsibility.

1.1.1 The notion of State responsibility according to Anzilotti and the evolution of the Concept

Dionisio Anzilotti was an Italian lawyer and a judge sitting at the International Court for International Justice[7]. Anzilotti seeks here to create a new general theory, composed by general principles, which could frame and facilitate the assessment of responsibility in International law.

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[4] ANZILOTTI (1906).
[5] BORCHARD (1916: 177 ss.); ID. (1916: 249 ss.); ID. (1916:419);
[6] NOLTE (2002: 1083); ID. (2002: 1098).
[7] His main work, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, is an enormous scientific and valuable contribution given to the international law doctrine already in 1902.

Clearly, it is necessary to take into consideration the background and the fact that Anzilotti had lived before the first World War, when the use of force was not forbidden and the sovereignty of the State and its hard power were the primary source of international interests and obligations, thus no system of collective security existed.

According to Anzilotti, the idea that was behind practices of the Courts on private foreigners was that aliens must be protected by the hosting State, clearly in legal terms. This element consisted of a fundamental duty, an obligation, of a State with regards to another State. Exactly for this reason, Anzilotti argued that the violation of the obligation to protect foreign citizens, give rise to an international law responsibility[8].

Arguing about responsibility, Anzilotti's point of view is different: he took into consideration only some issues, i.e. fault, in order to explain the attribution of the act to the State that breaches an international obligation and not the foundation of responsibility itself. This choice reflected the intention of provide an objective conception of the internationally wrongful act. To do so, Anzilotti points out two necessary elements to envisage it: a material fact and an international legal rule. The former is a material wrongful act that, in turn, can consist of two different conducts: the positive one –namely an action – or a negative one – namely an omission. The latter involves the existence of a positive norm, with which the action or the omission of a State must be in contrast. It is clear, as Anzilotti explains, that between the material conduct and the juridical norm there should be a strong link. If this link lacks, it is not possible to envisage any responsibility, namely, if it is not possible to review a certain fact, the character of anti-juridical fact is not existing anymore, thus the responsibility fall[9].

The link between these two elements gives rise to the responsibility for the State which violated the norm and the relative right to reparation of the State which suffered the offence - given its reparative and not satisfactory nature.

The right at issue is bilateral, insofar it can only be asserted by the State that has been wronged against the other responsible State. In Anzilotti's view, the new right which stems from the violation is 'particular' because legal relationships are plausible only between two legal persons, which recognise each other. Anzilotti adds that precisely from the act of recognition stems either the duty for a State to abstain from any unlawful activities either the relative right of the other State to reject the offence.

The *neminem laedere* lays in the recognition, Anzilotti in his works argue that an offence is anti-juridical when it violates that particular mutually accepted norm[10]. Therefore, the responsibility needs the mutual recognition which represents its legal basis.

For this reason, as mentioned before, once a violation occurs, the violation itself triggers a new and relative legal relationship. As Anzilotti stated this

[8] ANZILOTTI (1902: 113).
[9] *Ibidem.*
[10] Ivi, p. 99.

new and relative legal relationship has its own nature and characters which are completely different from the violated norm[11].

It is time now to move on to consider another relevant aspect. When a wrongdoing or an anti-juridical fact triggers State responsibility? And, in turn, what is a lawful action that the injured State could bring under international law, in order to restore the infringed right?

Until the end of XIX century, the discussions about responsibility were various. Among the scholars of the time, such as Hall and Holtzendorff, was vivid the idea according to which each violation of fundamental rights of the State is at the same time a violation of general international law. Therefore, lacking among the community of the States a central organized authority, each State has the power to intervene to cease the violation, even if it is against a third State.

Take all the aforementioned into account, Anzilotti tries to dismiss these previous ideas from querying about two elements. The first one, as said before, concerns the fact that, instead of being a violation of a State's right, the violation of subjective right is the violation of the international law. Therefore, the main object of responsibility is not to assess the unlawful conduct committed in an abstract context, i.e. without taking into account the empirically observable case, but rather assessing that specific offense committed, which is required by law, against another State. From here, being a legal relationship that occurs only between the two States – the offender and the offended ones - he moves on to the second element, namely the power of the community of the States to restrain the violation of the international law. Although Anzilotti acknowledges that in the case in which the community of the States was legally organized in an international community commonly recognised, then it is possible only for that community to act against the State which committed the violation. Nevertheless, lacking in the international community, at the time of writing, such an organisation, giving to each State the possibility to intervene in whatever situation is too risky. Anzilotti states: "è un'astrazione troppo pericolosa parlare […] di un diritto senza soggetto. Nessuno stato può erigersi a giudice e vindice delle violazioni del diritto internazionale commesse dagli altri stati"[12].

Certainly, the main contribution given by Anzilotti concerns two exclusions from the State responsibility, namely the sanctions and mere interests, that make his work innovative and valuable. To examine this conception of responsibility, the paragraph will follow the same logic line drawn by the author in his book. Firstly, the exclusion of sanction will be stressed. Secondly, the mere interest will be taken into consideration insofar it gives more food for thoughts.

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[11] Ivi, p. 100.

[12] Ivi, p. 88. Anzilotti adds: "non è affatto nostro pensiero di escludere la possibilità e la legittimità di un'azione collettiva degli stati per la tutela del diritto internazionale (…), questa facoltà debba rimanere fuori dall'istituto della responsabilità internazionale e venir giudicata con criteri diversi".

The lawsuit from the offended State is based on the responsibility of the State that has committed the violation, with only one objective: to remedy to the damage. Anzilotti clearly expresses that the compensation could be only and exclusively reparative, but and never it could aim at punishing the offender State. Moving on to the interest, even though Anzilotti acknowledges that a general interest in enforcing international law could rise for each State at every time, he suggests paying close attention to consider the interests as a reasonable element of State responsibility. Not only because the recognition of the interests as an element of responsibility would represent a dangerous justification for a State which would be able to commit, in order to defend its interests, any kind of action, even a crime. But also, because it could include all the interests that do not directly concern the State at stake, and therefore do not affect their subjective right. Therefore, giving force of law even to actions considered to be of mere interest, such as military intervention or interference for purely political purposes, can debase and, even worse, make responsibility lose its meaning as an international legal concept. For this reason, Anzilotti excludes interests, arguing that only relationships governed by positive law, and therefore violations of norms created by mutual agreements, cause responsibility. Thus, it is not possible to recognise to any State, that was not offended in law but only in the interest, a legal responsibility. However, Anzilotti concludes that States could still exercise the power to intervene, because this relates to their political decision-making sphere, bearing constantly in mind that these instruments - interests - must remain outside the norms of international law.

The analogy that exists between the international legal relation expressed so far and the relationship triggered by the illicit fact in private law is undeniable. Both have an obligatory relation as their object. However, the author as well, advises not to confuse the two systems, specifying that an international legal device cannot be built based on theories and dynamics of the private internal law. The obvious distinction, expressed clearly already in Anzilotti's book, could be retraced where he argues about the grounds for the responsibility. The present thesis will limit itself only to enunciate them: the unjust violation of the rights of others and the imputability. Despite being a positivist, and as will be seen shortly, these theories will later be overcome, Anzilotti's work, and his conceptual division, have the merit of creating a formal structure of the act giving rise to responsibility. His practical conception of responsibility, simplified and reduced to the causal link, as well as the unification of the object and the purpose of responsibility, have had the extraordinary effect, for his time, of creating a reparatory machinery that was reliable and capable of empirical adjustment.

At the time of the first World War, scholars began to question other and more complex questions. Due to the repeated violation of international law during the war, the positivist paradigm began to be debated by Wilhelmine Germany. The violation of the positive law was no longer sufficient to cover cases of responsibility. Therefore, a new concept that included threats to peace and any other violation concerning the international community was

necessary. The natural starting point was therefore to match the individual positivistic interest of each State with the interest that each State, being part of an international community, has in enforcing the general principles of international law. The consequence was the possibility for each State to intervene, as a member of the international community, to restore the situation violated.

In the following years, several scholars resumed and faced the revolution begun by Lauterpacht. Among the most authoritative ones, need to mention the Italian jurist Roberto Ago, first Special Commissioner for the Draft articles on the responsibility of the State.

According to Ago, an international wrongful act can be such only if it is given a legal value to the wrongdoing of a State and this wrongful act is then punishable by law. Starting from this effective principle, Ago moves then two important critics to some of his predecessors. These critics will represent the definitive transition to a theory that is no longer positivist. To accept the concept of 'crime' and 'sanction' in cases of responsibility, Ago initially criticised Anzilotti's idea simply by introducing the idea of an organized community composed of all the sovereign national States. According to the theory of Anzilotti, an alleged international community would have had the task of inflicting to the responsible State a countermeasure of a purely reparative, and not punitive, character[13]. The second criticism instead, diametrically opposed to the idea expressed by Anzilotti, accuses Kelsen's theory (according to which the only natural consequence of an international violation is the sanction), of being purely abstract and vitiated by preconditions[14].

The creation of an objective method to evaluate the alleged violations of international law is clearly visible in the first part of the Draft on the responsibility of the State, which will be analysed in the following paragraph. Here Ago deals with creating a general theory of responsibility of the States which might have included its origins and its constituent elements.

1.2 THE IMPORTANCE OF THE DRAFT ARTICLES ON THE RESPONSIBILITY OF THE STATES AS A BASIS FOR RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

In order to understand the entire legal regime pertaining international responsibility, it is important to start from the analysis, of the Draft articles on the Responsibility of the States (ASR) codified by the International Law Commission (ILC), and follow the same logical and temporary path that the

[13] International Law Commission, *Yearbook*, 1976, Vol. II, p 39 ss.; ivi, p. 51.
[14] AGO (1929: 524 ss.).

ILC, with its Special Rapporteurs, followed, until to devise, on the second reading in 2001, the Draft.

Evoking the origins of the responsibility of States is crucial, as will be shown, in order to assess the responsibility of International Organisations, considering that the former will be applied *mutatis mutandis* to the latter. The decision was taken by the ILC and its Special Rapporteur Giorgio Gaja, who decided to use the Draft articles on the responsibility of States as a baseline. He justified this choice by underlying:

> "It would be unreasonable for the Commission to take a different approach on issues relating to International Organisations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to International Organisations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text"[15].

The issue related to the codification of rules concerning State responsibility started in the time between the two World Wars, at the Codification Conference of the League of Nations in 1930. Nevertheless, only in 1955 the ILC in charging of creating a Convention on the topic, appointed Garcia Amador as a Special Rapporteur. In the 1963, Roberto Ago became the new Special Rapporteur to the ILC and gave several important contributions to the work conducted by ILC.

Roberto Ago, as clearly understood in his first Report of 1969, although he seems to focus on the consequences of a violation rather than on the triggering act, gives an idea of responsibility which is completely new. In other words, it turns out that the starting point cannot be the consequences of the wrongful act, because responsibility cannot be limited only to the consequences of the breach and to the obligation to pay a certain redress, since the studies conducted up to that point focused mainly on the consequences triggered by the breach of international law and not on its constituent elements. For being in presence of the responsibility it is necessary to understand the origins, from where it derives, namely the constituent elements of the breach under international law.

This step was a real conceptual and doctrinal turning point. As seen earlier, the most important issue was at the time the finding of the constitutive elements. The first Special Rapporteur Garcia Amador, according to his traditional viewpoint, was convinced that the only constitutive element of the breach of international law was the 'injury', namely a material or moral

[15] Special Rapporteur Gaja, *First report on responsibility of International Organisations*, 26 March 2003, UN Doc. A/CN.4/532, par. 11.

damage[16]. At this point, the revolution came to the fore, the ILC with his second Special Rapporteur Roberto Ago deciding to give up the traditional element of the 'injury' proposed by Amador, and basing the entire regime of international responsibility on the 'wrongful act'. As a matter of fact, the first article on the definition of breach of an international law, introduced in 1973, confirmed in 1981 and later adopted in the final Draft of 2001, stated: "every internationally wrongful act of a State entails the international responsibility of that State"[17]. Even though some States were pushing in order to reintroduce the element of 'damage', thanks to the unique work of the fifth special rapporteur Crawford the first article remained unchanged. Crawford clearly stated that the damage was only an 'autonomous condition' for the internationally wrongful conduct.

The entire Draft on the responsibility of the State was adopted in 2001, including 4 parts, with the only scope to create rules of general application concerning State responsibility. The main purpose of all these rules was to frame responsibility, to identify the constitutive elements and the consequences of a breach. It is necessary here to mention three fundamental parts which, as will be seen, will also apply to the IOs.

Regarding the first part, the members of the Commissions, during the first reading in 1996, found themselves in front of some key questions. As seen before, part 1, as specified in art. 1, focuses on the responsibility that arises from the commitment of an international wrongful conduct without any kind of limitation, or distinction. Consequently, it is necessary to acquire awareness about the cases in which the responsibility arises. In reality, in art. 1, since there is no limitation whatsoever, it was impossible to make derive the extent of the violation and the origins of responsibility. Part I does not provide for the distinction between the violation of a treaty or a rule outside of it, nor the categorical distinction between the *ex delicto* and the *ex contracto* responsibility. This very generic approach can be retraced even in the former art. 19 ASR, where it is affirmed: "an act of a State which constitute a breach of international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached"[18]. Although there was a precise distinction in art. 19, namely that between 'crime' and 'delicts', it was impossible to take it into consideration considering that the entire part I of the Draft was and remained firmly general in its character.

The Principle of 'objective' responsibility represents the second important issue. According to articles 1 and 3 ASR, where every international wrongful conduct could trigger the responsibility of the State, the only two elements considered as prerequisites for responsibility are the *actus reus*, (namely the wrongful conduct) and the objective element, (the breach) There is no specific requirement for *mens rea* (i.e. 'intent'), nor for 'fault' even if on the first

[16] Special Rapporteur Arangio Ruiz, *Second report to the International Law Commission*, 22 June 1989, UN Doc. 4/426/ Add., 3 ss.
[17] Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, (ASR), art. 1.
[18] ASR, former art. 19.

reading art. 40 sets for the specific requirement of injury, damage or harm. It will be stressed later why it was decided to remove this complex issue. Excluding the 'fault' and the 'wrongful intent', the ILC intended to keep the responsibility of a State more neutral, in order to cover a wider range of possibilities. In order to avoid a possible breach of International law, the State was only required of a positive aspect, namely an international wrongful act and a negative aspect, that is not having acted with the intent of respecting or avoiding the infringement of any international obligations.

The distinction between those that Roberto Ago called substantive norms and general norms, namely 'primary' and 'secondary' rules is the third relevant issue of the first reading of 1996[19].

In 2002, due to the similarities and the assumption according to which IOs held legal personality, the ILC decided to open up and broaden the topic of international responsibility, focusing on International Organisations. What has been said so far implies something fundamental, first of all, that the International Organisation can be an international subject, in the second phase that an International Organisation can be responsible in international law. But how do we arrive at this conclusion? Precisely because they have legal personality under international law, and are therefore subjects of that law, International Organisations entail responsibility for their internationally wrongful acts.

1.3 IO LEGAL PERSONALITY AS A PREREQUISITE OF IO RESPONSIBILITY

In order to legally define an International Organisation, it is necessary to effectively understand where and how it acquires its legal personality. As for States, actors *par excellence* in international law, responsibility represents objective evidence of the personality itself, and it arises in cases where a legal person performs or fails to take preventive measures giving rise to an international wrongful act, namely when it breaches an obligation under international law. This also applies to IOs and this is where the Draft takes on its value.

One of the most difficult issues is certainly the relationship between the IO and its member States. The questions to which many scholars have tried to give an answer are certainly: if an IO commits a wrongful act, is the member State responsible for it? Is there a possibility of multiple responsibilities? A first and simplistic answer could be negative, since the IOs have their own legal personality and are accountable for their actions. Looking more closely

[19] AGO (1929: 415).

(which we will do much more specifically in the next chapters when we talk about attribution), the line that divides the sphere of competence and control of the IOs and their member states is sometimes so thin that it brings with it many problems with regard to their evaluation and judgment.

As mentioned above, the starting point must necessarily concern the fact that the IO's legal personality, its purpose and its functions, are established by States, or by any other international entity entitled to it, through international treaties or any other instrument valid under international law. Most existing IOs are established through the conclusion of international treaties.

To give a correct definition of them, it would be useful to read the writings of the ILC in the DARIO, art. 2 paragraph (a):

> "International Organisation" means an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities"[20].

Summing up, there are some main characteristics and evidences of IOs which is useful to enumerate here. Three of the most important characteristics are certainly the permanent character of an organisation with organs and bodies; the legal personality and therefore the autonomous capacity, distinct from that of member States and finally its international nature.

All these elements give an important suggestion, namely the fact that, as indicated in the Commentary to the DARIO, IOs are governed by the 'principle of speciality' which means that they are created by States that give them powers and limits, and which identify their aim in order to carry out very specific tasks.

Among the most important elements of the practice (in other words, the evidence of International Organisation legal personality), it should be looked at three more manifestations: treaty making power, responsibility and immunity. Simply looking at the specifications of an IO, it can be seen the essential differences with the State.

While the personality of the States is defined as 'original', i.e. it does not derive from any other existing entity, that of the International Organization is instead defined as 'derived', i.e. it comes precisely from an international treaty – namely it is 'treaty-based' – and is created by another subject of law: this is confirmed by practice. The second difference is represented by the territory: only few organisations may exercise powers on a territory, typical element of State personality. The third and last one is the extension. The extension of the power depends on the powers that were given to it by States and that it exercises in practice. So, the personality of an IO is restricted.

[20] Draft articles on the responsibility of international organizations, 2011, (DARIO), art. 2 par. (a); International Law Commission, *Report on the Law of Treaties*, 1958, Yearbook Vol. II, p. 108.

In order to understand the organisation and structure of an IO, we must return to the analysis of the 1969 Vienna Convention[21]. In the Vienna Convention, it is possible to find an initial definition of the International Organisation, seen exclusively as an 'intergovernmental' organisation, i.e. an organisation formed by several member States whose fate and functions were decided by the organisation itself. However, this definition was provided only in the context covered by the 1969 Convention. It was not until 1986, with the Vienna Convention on the law of the treaties, that more specific additional elements of an International Organisation were introduced. For example, the Convention made it clear for the first time that any IO has the capacity to conclude an international treaty. Treaty-making power is an important recognition since it establishes that an IO can be an international entity capable of closing agreements and promoting the purpose for which it was created by concluding binding agreements as well. It follows from this that an IO, which has the prerequisite, is a subject of international law and must therefore also comply with its obligations and rules.

Besides, it is important to stress how does an IO acquire the international legal personality? And what are the foundation and the conditions of IOs personality?

First of all, it should be pointed out that the acquisition of personality may not only depend on the fact of possessing 'constituent instruments', i.e. the instruments specified by the States when they create a specific IO by treaty. As also defined in art. 104 of the Charter of the United Nations, "the organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes", insofar "the purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognise the organisation's legal personality under their internal laws"[22]. In other words, the 'constituent instruments' are the powers and functions that each State, in creating an IO, provides in the trade and grants them in order to create a new autonomous legal personality. In so doing, this also applies as a source for the IOs legal personality.

In order to try to explain the IOs legal personality from a legal point of view, many scholars and lawyers have tried to give a sufficiently comprehensive explanation.

In fact, in doctrine there are three different theories. What we have talked about so far, could be identified with the so-called 'will theory'. The theory draws its explanation from the name itself, that is, from the willingness of some States to create a new entity which could fulfill certain specific purposes, recognising it as a legal personality distinct from that of the States. This last theory, however, has suffered several criticisms. From a more abstract point of view, the mere act of including legal personality in a treaty is certainly not sufficient to guarantee the same legal personality. On the other hand, from a

[21] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969.
[22] DARIO, art. 2, par.7.

practical point of view, the recognition must be necessarily supported by some rights and duties to be conferred. So, lawyers began to argue that the recognition had only declarative effects. Therefore, although it is not enough for the personality of the IO, it is still necessary in order to maintain relations.

In this way, a second theory was born that, even if it seemed initially opposite, was complementary to the 'will theory': the objective theory was firmly held by Finn Seyersted[23]. According to it, once an IO has been created, it is not only necessary to pay attention to formal elements in order to derive an autonomous legal personality, but also to examine certain specific criteria, and "these necessary criteria do not include a convention"[24]. The criteria to which Seyersted refers are the possibility for the organs created to assume obligations on their own. A definition of the term 'organ of the organisation' is given by art. 2 DARIO subparagraph (c): "organ of an International Organisation, means any person or entity which has that status in accordance with the rules of the organisation"[25].

In order to better understand and summarize the complementarity of these two theories, it is useful to use here the words of Paul Reuter:

> "quand une organisation a reçu un minimum d'autonomie et une vocation assez stable et assez large pour prétendre à une action propre, il est normal de considérer, sauf stipulation contraire clairement indiquée par ses fondateurs, que ces derniers ont voulu l'habiliter à prendre part à la vie internationale"[26].

A paramount synthesis between these two theories was expressed by the International Court of Justice in 1949. In its advisory opinion, *Reparation for injuries suffered in the service of the United Nations*, also known as "Bernadotte case"[27], UN General assembly demanded to the Court the 'capacity to bring an international claim' against the State responsible, in order to obtain reparation for damage caused to the organisation.

Thus, in giving reasons for its conclusions (which later turned out to be affirmative), the Court had first to specify what was meant by the term 'capacity'; then to investigate in the Charter whether the member States, which had previously founded that organisation, had given it the right to make recourse against its own Members. In doing so the Court came to the conclusion that:

> [The UN personality] is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same

[23] SEYERSTED (1963: 47).
[24] GAUTIER (2000: 334 ss.).
[25] DARIO, art. 2.
[26] REUTER (1953: 118). Translation: "whenever an Organisation has been granted a minimum of autonomy and has been assigned goals stable and large enough to let it expect to act on its own, it is logical to assume, except if otherwise clearly expressed by its founding members, that these had the intention to entrust it to be a full member of the international community".
[27] The case concerns a claim of UN, as a consequence of the assassination in September 1948, in Jerusalem, of Count Folke Bernadotte, the UN Mediator in Palestine, and other members of the UN Mission to Palestine.

> as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims[28].

Consequently, autonomy is such as to frame its legal personality and thus it involves the capacity to bring a claim before an international Court. In seeking to do so, the Court makes it clear that the member States had created such an organisation, equipping it with organs and agents, "for harmonizing the actions of nations in the attainment of these common ends"[29], in such a way to perform some common ends such as the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character[30]. Therefore, the ICJ moves on to consider that the mere fact that in 1946 UN and its members signed the Convention on the privileges and immunities of the UN meant that all signatories had to have legal personality.

These details confirmed that the UN, not only enjoyed functions and rights specified in the founding treaty, but also the fact that it practiced these powers in the international reality, implied the undoubted international legal personality.

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. as being essential to the performance of its duties"[31].

And the ICJ concludes:

> "Having regard to the forgoing consideration, and to the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victims or by persons entitled through him"[32].

In conclusion, the ICJ specifies that it has an international personality distinct from that of the States and that, being such, UN is an actor capable of possessing international rights and duties, and therefore capable of bringing

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[28] Advisory Opinion of the International Court of Justice of 1949, *Reparation for Injuries Suffered in the Service of the United Nations (Reparation for Injuries)*, par. 179.
[29] Charter of United Nations, San Francisco, 24 October 1945, art. 1, par. 4.
[30] Ivi, art. 1.
[31] Advisory Opinion of the International Court of Justice, *Reparation for Injuries,* par. 182.
[32] Ivi, p. 184.

international claims. It must be clear that if this ability, on the one hand, confirms the possibility of bringing international claim, on the other hand it means that the same can also be brought before an international Court.

Having ascertained that an IO is an actor of international law having legal personality, it is clear that this same capacity must be regulated. Not only must we question the legally relevant actions that an IO can take, but also the role and powers of the organs and agents of an IO. As also indicated in art. 2 DARIO, the so-called 'rules of the organisation' can be all the acts that an IO can adopt in accordance with the constituent instrument established. These may be decisions, resolutions and other acts of the International Organisation.

It is interesting to note in this respect that the codification DARIO, again, does not take into consideration the principle of the speciality of the IOs. art. 2 DARIO in fact, refers to the 'rules of the organisation' as if it were talking about the internal law of the States. In other words, the rules adopted for the internal law of the States are applied *mutatis mutandis* to the 'rule of the organisations' without considering that the 'rules of the organisation' do not correspond to the internal law of the State.

For the purpose of attribution of conduct, decisions, resolutions and other acts of the organisation are relevant, whether they are regarded as binding or not, insofar as they attribute functions to organs or agents in accordance with the constituent instruments of the organisation. While the organs have been discussed previously, it is useful here to clarify the agents. As defined in the subparagraph (d) of art. 1 DARIO an

> "agent of an International Organisation means an official or other person or entity, other than an organ, who is charged by the organisation with carrying out, or helping to carry out, one of its functions, and thus through whom the organisation acts"[33].

It is difficult, however, if not impossible that an act performed by an IO could derogate from its constituent instruments, which lists in detail what an IO can do. It is, at the same time, not unbelievable to think that an IO could act outside of the power which was assigned upon it. We are speaking here about some extension of powers, called 'implied power' which, sometimes, are allowed and accepted with the justification of performing the functions for which the IO was created (this was called functional theory).

1.3.1 The Responsibility of International Organisaitions and the Draft articles on the Responsibility of International Organizations: similarities and dissimilarities with ASR

[33] DARIO, art. 1, par. (d).

So far it has been analysed the legal regime of State responsibility. This regime is useful to understand the bases, parameters and general rules governing the vast field of responsibility in international law. They apply to any entity of international law having legal personality and therefore capable of performing legally relevant acts. For this reason, some of the same rules apply to the International Organisations having their own legal personality. As said in the previous paragraph, the International Organisation is not a State and it is governed by the "principle of speciality" and therefore the same rules should not apply exactly and automatically. As a matter of fact, the ICJ, in the well-known case *Reparation for Injuries Suffered in the Service of the United Nations*, specified that once confirmed the legal personality of the IO, thus a subject of the international law, this entails the possibility to be held responsible for their internationally wrongful acts:

> "that is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims"[34].

art. 57 ASR already identified the rules in force of law "without prejudice to any question of the responsibility under international law of an International Organisation, or of any State for the conduct of an International Organisation"[35]. Given, furthermore, the ever-increasing number of International Organisations in the international arena, ASR were not appropriate insofar, as specified by art. 57 ASR, the Draft articles on State Responsibility did not even consider these new and peculiar international actors.

It was necessary to create a convention that would take into account the fact that the International Organisations could, therefore, be held responsible for actions or omissions performed and that open to the violation of an international standard. In other words, the wrongful conduct of an International Organisation would arise the international responsibility. The work of the ILC, which ended in 2011 with the drafting of a new Draft article on the responsibility of International Organisations, was true, directed to regulate this complex issue following the same structure and approach adopted for the Draft on State responsibility.

In 2002, the ILC appointed Professor Giorgio Gaja, as the Special Rapporteur on the topic. He immediately introduced its method, called 'Gaja Method'[36], namely, as stated above, to base the DARIO on the Draft article for States responsibility.

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[34] Advisory Opinion of the ICJ, *Reparation for Injuries*, par. 179.
[35] ASR, art. 57.
[36] PELLET (2013: 43).

For this reason, it is possible find some identical elements to the ASR within the DARIO. As far as similarities are concerned, *in primis* as for the responsibility of States, the principle generally accepted and reported in art. 3 DARIO, is that "every internationally wrongful act of an International Organisation entails the international responsibility of that organisation"[37]. The words used in art. 3 fully reflect the words used in art. 1 ASR, which indicates the uniqueness of the treatment of cases where there is a violation of international law, that is that whatever the actor involved, it ensures that responsibility arises.

Furthermore, a general accepted principle that characterises an internationally wrongful act of an International Organisation, which is a rule that remains the same as that previously adopted by the ILC for States, is that the conduct "consist[ing] of an action or omission" must be "(a) attributable to that organisation under international law; and (b) constitutes a breach of an international obligation of that organisation"[38]. Again, as in the case of States, damage does not represent a necessary element for international responsibility even if, in some specific cases, an internationally wrongful act requires the presence of material damage. This last requirement depends only on the content of the primary obligation.

And this connects us directly to the third element that is shared between States and International Organisations, namely the fact that the Draft on the Responsibility of International Organisations is based on the clear distinction between the 'primary rules' and the 'secondary rules', as for that about the States. The formers, as said before, concerning the obligation for International Organisations; the latter consider "the existence of a breach of an international obligation and its consequences for the responsible International Organisation" [39]. Therefore, it is clear that the Draft deals with secondary rules.

These are only three of the elements that were adopted *mutatis mutandis* from the ASR within the DARIO, even though the Secretariat of the United Nations pointed out at the time that the recognition of the "principle of speciality" was fundamental to the treatment of the responsibility of International Organisations' by stating

> "It is, therefore, of the essence that in transposing the full range of principles set forth in the articles on the responsibility of States for internationally wrongful acts mutatis mutandis to International Organisations, the International Law Commission should be guided by the specificities of the various International Organisations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures—in brief, their special character"[40].

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[37] DARIO, art. 3.
[38] DARIO, art. 4.
[39] DARIO Commentary, par. 3.
[40] International Law Commission, *Comments and observations received from international organizations, Responsibility of international organizations*, 17 February 2011, UN Doc. A/CN.4/637/Add.1, par. 1.

Nevertheless, the Special Rapporteur and the Commission decided to adopt a methodology focused on the role of the Draft articles on the responsibility of States, thereby motivating:

> "While the present draft articles are in many respects similar to the articles on State responsibility, they represent an autonomous text. Each issue has been considered from the specific perspective of the responsibility of International Organisations. Some provisions address questions that are peculiar to International Organisations. When in the study of the responsibility of International Organisations the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to International Organisations, this is based on appropriate reasons and not on a general presumption that the same principles apply" [41].

Several authoritative criticisms were pointed out, against the decision of the Special Rapporteur and the ILC, to base the new Draft on the one previously adopted for the responsibility of States[42].

As explained by the ICJ, in the same way in which the State possesses rights and duties deriving from the internal legal system, International Organisations base their work and their obligations and direct upon purposes and functions outlined in the treaty-based agreement[43]. It is precisely for this reason that International Organisations are governed by the principle of speciality, i.e. the principle according to which International Organisations exist as the result of common interest on the part of the founding States. To achieve the goal assigned by States, IOs are provided with certain powers and limits specified in the constituent agreement needed for the performance of their functions[44]. This is the reason why the rules applicable to State responsibility can in no way be used to the responsibility of International Organisations, but the principles can be applied to both

Nevertheless, it is also true that some rules of responsibility of International Organisations take partially into account the diversity of powers and functions of the IO, its specificity, albeit in a very limited way. Moreover, since the organisations are composed of member States, the Draft also had to regulate the cases of relations between an IO and its own members. In any case, the Draft does not deal with the specificity of IO in itself, but with the analysis and regulation of the responsibility of the IO in all its complexity and in all its facets, considering relations both with member States and with third States, as well as those with third International Organisations.

At this point it is relevant to focus on the responsibility of International Organisations and address and open up to some new peculiarities of IOs. One

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[41] DARIO General Commentary, par. 4.
[42] PELLET (2013).
[43] Advisory Opinion of the ICJ, *Reparation for Injuries*, par. 180.
[44] Advisory Opinion of the International Court of Justice of 8 July 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, at 78, par. 25.

of these is the IOs jurisdictional immunity - immunity from legal process and immunity from execution and enforcement - which opens up an important issue. It is sufficient here to point out that the immunity regime is an instrument adopted to protect and safeguard International Organisations, as well as States, from any desire for interference or interference on the part of the Member States, and therefore to safeguard the proper functioning of the organisation itself.

An example can be found in art. 105 of the UN Charter where, in paragraph 1 it is stated: "the organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes". The privileges and immunities are extended to all "representatives of the Members of United Nations and officials of the Organisation […] for the independent exercise of their functions"[45]. Often, therefore, immunity must be traced in treaties and conventions. An example is the General Convention on the Privileges and Immunities of the United Nations (13 February 1946) where at the art. 2 paragraph 2, a bit different from art. 105 of the UN Charter, is written:

> "the United Nations, its property and assets wherever located and by whomsoever hel, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution".

A second point, useful for the analysis that is being carried out, concerns the cases in which an International Organisation is effectively held responsible for an internationally wrongful act. The latter case does not automatically exclude the fact that other actors cannot be held responsible for the same situation.

Shared responsibility is defined as the breach of the obligation which may well affect more than one subject of international law or the international community as a whole. A classic example, also reported in the Commentary of the Draft in articles 14-18, is when conduct is "simultaneously attributed to an International Organisation and a State and which entails the international responsibility of both the organisation and the State".

All of the aforementioned cannot in any way disregard the fact of legal personalities, which is the cornerstone of the matter. Exactly because they possess legal personality, the IOs may be responsible for a breach of an obligation. The violation, in turn, could entail some consequences; i.e. the content of responsibility that will be addressed at the end of this chapter.

[45] Charter of United Nations, art. 105, par. 2.

1.4 ELEMENTS WHICH CHARACTERISE STATE AND IOS RESPONSIBILITY

Confirmed the international legal personality of the IO and therefore the possibility, as for States, to be responsible under international law due to a certain internationally wrongful conduct, we must now consider, as mentioned before, the elements necessary for the ascertainment of responsibility. art. 4 DARIO[46], in parallel with art. 2 ASR, focuses on the two elements that represent the necessary conditions for internationally wrongful conduct.

1.4.1 The subjective element

In this paragraph, few words will be spent in order to introduce the issue of attribution in case of responsibility of a State and IO, subsequently in the next chapter, the issue of attribution will be further taken into account, so as to provide a more complete and precise framework for this fundamental issue. In the meantime, it is necessary to mention that regarding IOs, the responsibility may consist of actions or omission. The novelty in the field of attribution consists in the possibility of verifying cases in which there is a dual or even multiple acts of conduct. This means that in some cases the attribution of conduct can be attributed to an IO but at the same time attribution can arise towards another State or IO. One could also envisage conduct being simultaneously attributed to two or more International Organisations, "for instance when they establish a joint organ and act through that organ"[47].

How to understand when a wrongful act is attributable to an International Organisation? We need to start from the very definition of IO, the international legal personality that each IO possesses. Being an IO, an entity regulated by international law, and therefore a real organised entity composed of human beings and groups, it involves that an IO can act solely and exclusively through its organs and agents. Having understood this, the spontaneous question that arises: what kind and which agent or organ is considered to act on behalf of an International Organisation? A first and fast answer, before analysing it much more in detail, is given by art. 6 DARIO paragraph 1 and 2

> "[1] The conduct of an organ or agent of an International Organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law, whatever position the organ or agent

[46] DARIO, art. 4.
[47] DARIO General Commentary, chapter II, par. 4.

> holds in respect of the organisation. [2] The rules of the organisation apply in the determination of the functions of its organs and agents"[48].

art. 6 DARIO is an article of fundamental importance for the thesis. It frames, in the attribution contest, the conduct of an organ or agent that is part of the structure of the IO attributable to the organization itself.

1.4.2 The Objective element

Chapter III DARIO plays a particularly important role in the Draft, since it deals with the notion of 'breach'. It gives the tools to determine how, once attribution is ascertained, the conduct of the IO constitutes a breach. It was also specified previously, but it is worth repeating, that a wrongful conduct arises when an IO acts in a way that does not comply with the rules of international law to which it is bound. Once this eventuality has been ascertained, a new legal relation arises between the IO that committed the violation and the injured State - or IO. In other words, responsibility. Chapter III plays a fundamental role in determining whether there is a breach, and the time and duration at which it occurred.

It is necessary to draw the attention to a rather relevant question that led to different discussions and that made the breach, the most debated topic. To understand this complex issue, it is important to take a step back on and look again at the first reading ASR in 1996. This parenthesis seems to be useful to assess the origins of the objective element that in 2011 were applied to the International organisations as well. The former art. 19 ASR, and its terminology, brought several critics and question marks on the possibility of accepting such a statement in the draft on the responsibility of State. The basis of the requirement for international responsibility of a State is the generic idea according to which to be in presence of State responsibility there must be a breach of an international obligation of a State by that State.

The controversial art. 19 dealt with the concept of 'international crime'. During the first reading, this article was accepted but many States tried to discard it. As a matter of fact, it was added a note in order to express the lack of consensus on this point and the use of the word 'crime'.

Some considerations should be addressed. First of all, there are some violations that affect the entire international community. Following this purely communitarian idea, art. 19 at the first reading indicates that the breach, in this case, concerns an obligation that should be respected in the interest of the international community as a whole. So, the distinction between 'crime' and 'delict' comes out. While the 'delict' consists in a simple violation of an international norm, the international 'crime' pertains instead to norms of

[48] DARIO, art. 6.

higher rank, the so-called peremptory norm. In other words, the breached rule in the case of 'crime' is of a different character than the rule of which the violation constitutes a simple 'delict'.

Secondly, it was clear that maintaining such an element in the draft would have brought an excessively high risk of interference and abuse for political reasons[49]. For this reason, the concept of 'crime' was gradually reduced to the inconsistency until the definitive elimination of art. 19 in the second reading. On the other hand, the concept of 'delict' has gained more and more importance. Therefore, despite the fact that in the first reading art. 19 ASR was kept in its entirety, when the Draft tried to meet and indicate the consequences expected in the case of 'crime' of a State, it remained vague, limited and full of deficiencies.

As a result, in the final Draft of 2001, art. 19 was eliminated and even in DARIO, no mention is made to the notion of 'crime'. Once faced with this problem, chapter III DARIO has gradually been structuring itself to the point of dealing with the first and natural question: when there is a breach of an international norm?

> "There is a breach of an international obligation by an International Organisation when an act of that International Organisation is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned"[50].

In order to introduce art. 10 DARIO, it should be clarified that a breach of an international obligation depends on what is the purpose and the interpretation given to that obligation and could only arise in the terms envisaged by it. This provision is stated by art. 10 DARIO which was used to explain the breach. This brief statement contains important implications for the concept of the breach, also expressed previously by the ICJ in these terms: "incompatibility with the obligations" of a State or an IO[51], acts 'contrary to' or 'inconsistent with' a given rule, and "failure to comply with its treaty obligations"[52].

By defining the breach as an act that is "not in conformity with what is required of it" not only represents the base of the objective element. The choice of this terminology entails a broader meaning of the breach, insofar the intentions of the ILC were those of not limiting the concept of international obligation, but enclosing in this definition any act or omission. For instance, the ILC in ASR includes any "passage of legislation, or specific administrative

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[49] For political reasons is intended the misuse of the international norms justified by political interests, such as sanctions, interference in internal politics of a recognised State or even military intervention.

[50] DARIO, art. 10.

[51] Judgment of the International Court of Justice of 24 May 1980, *United States Diplomatic and Consular Staff in Tehran*, p. 29, par. 56.

[52] Judgment of the International Court of Justice of 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, p. 64, par. 115; ivi, p. 98, par. 186.

action or other action in a given case, or even a threat of such action, [...] or a final judicial decision"[53], and in DARIO made one more principle clear, including any international obligation that may arise "towards its members under the rules of the organisation"[54]. Rules of the organisation are clearly included in international law, in the meaning of the article they are obligations under international law.

Moving on to the second part of the provision, it is relevant to stress the sentence "regardless of the origin and character". It means that an international obligation may have any kind of origin: it may come from customary law or by a treaty, or even from general principles applicable within the international legal system. As explained in the Commentary to the Articles, this norm has much elder origins. Already in 1976, the ICJ pronounced in these terms, taking up the works of Commission done up to that point, and for example in the Gabčíkovo-Nagymaros Project case was stated

> "it is well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect"[55].

As mentioned above, there is no distinction on whether the responsibility arises *ex contractu* or *ex delicto*. Not only the origin, which can be of any nature but also the character becomes irrelevant. It is to say that the entity of the violated obligation can be both a serious violation, for instance a violation of a peremptory norm, or a minor infringement.

Concerning the consequences of the internationally wrongful act, naturally, the violations of a peremptory norm are different, and much more serious, than those of a minor violation[56], being of a special nature. Nonetheless, the distinction is a matter within the competence of part III of the Draft, since it deals, precisely, with the consequences of the responsibility of an International Organisation. This last section, as also specified in the Commentary to ASR, then adapted to the DARIO, makes clear one thing: using the formula 'international obligation' all the possibilities are included, i.e. all the laws that "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order"[57].

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[53] ASR Commentary, Article12, par. 2.
[54] DARIO, art. 10, par. 2.
[55] Judgment of International Court of Justice of 25 September 1997, *Gabcikovo-Nagymaros Project*, p. 38, par. 47.
[56] ASR Commentary, art. 12, par. 7. The Commentary states that a violation of a peremptory norm recognises "both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts".
[57] Yearbook ILC 2001, vol. II (Part Two), p. 55; DARIO Commentary, art. 12, par. 3.

Once the breach has been defined and has indicated the general rule and scope, the DARIO, reproducing chapter III ASR, move on to deal with the various situations in which it applies, in particular, the temporal aspect. Articles 11, 12 and 13, deal with defining this aspect, considering three important corresponding aspects. The starting point is to understand if the international obligation was in force when the breach had occurred. In fact, as stated by art. 11 DARIO, in the absence of an obligation that foresees the determined conduct of an IO at the time the act occurs, that same act does not constitute a breach. In other words, the breach can occur only when, at that same time, there is an obligation that bound an IO.

It is important to stress here that even though the international standards are of a higher rank, such as peremptory norms, they are never retroactive. This fundamental passage was already confirmed in the past by art. 64 of the 1969 Vienna Convention. As also reported by the Commentary on the Draft articles on the State responsibility, art. 71 paragraph 2 (b) of the Vienna Convention provides that such a new peremptory norm

> "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm"[58].

Nevertheless, there may also be cases where the retroactivity of a rule is applied, but it represents an absolute rarity. As established by art. 64 DARIO, only the *lex specialis* may include such cases where responsibility may be assumed retrospectively.

The second situation concerns the extension in time of a breach (art. 12 DARIO), namely how long a wrongful act continues after it is started. The regulation of the duration of a wrongful act is usually established by the same obligations. art. 12 instead deals with some general rules and several related questions. For example, it is clearly expressed, but also difficult to assess, the distinction between breaches already completed and breaches which are continuing in the time. The substantial difference may be understood only by recalling the ASR Commentary on the same matter, considered that art. 12 DARIO corresponds exactly to art. 14 ASR. In ASR Commentary, it is stated that while the former occurs "at the moment when the act is performed", and therefore does not require the precise identification of when the violation occurs because it matches at the same time, the latter instead, "occupies the entire period during which the act continues and remains not in conformity with the international obligation"[59].

A clear example of this second case can occur when the breach remains "not in conformity" with the obligation for the entire period of the infringement.

[58] ASR Commentary, art. 13, par.5.
[59] ASR Commentary, art. 14, par. 3.

In conclusion, art. 13 ASR deals with the problem of determining when there is a breach of an obligation of composite nature, namely a series of acts aggregated. It attempts to improve and specify the foresee made in art. 15 ASR. Wrongful acts included in the following article not only violate the obligation at the moment when act is occurred but also give rise to continuing breaches. These acts are called composite, and therefore cannot in any way be an individual act, neither several isolated acts, but only "a series of acts or omissions defined in aggregate as wrongful"[60].

The most classic examples of this type of activity, which particularly concern this thesis work, are the obligations concerning genocide or other grave violations. The case of genocide, for example, as expressed in the ASR Commentary, is a clear example of a composite obligation, firstly, because it entails, a mental element, i.e. the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"; and secondly, because, as also provided by the Convention on the Prevention of Genocide, entails "an accumulation of acts of killing"[61]. In other words, the genocide starts when the two elements are envisaged and the crime extends "over the whole period during which any of the acts were committed, and any individual responsible for any of them with the relevant intent will have committed genocide"[62].

1.5 THE LEGAL CONSEQUENCES OF AN INTERNATIONALLY WRONGFUL ACT

Having defined the heart of legal responsibility, i.e. the definition and the elements necessary for the IO to be responsible as a result of an internationally wrongful act, also the consequences of the supervening responsibility should be investigated.

With regards to the legal consequences that a responsible State/IO finds itself facing, there is usually a reference to a new legal relationship which arises upon the commission of an internationally wrongful act. This legal relationship constitutes the substance, or content, of the international responsibility of a State/IO and, in order to analyse it, it will be useful to take

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[60] DARIO, art. 13.

[61] Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, art. 1. The Convection adds a second element, i.e. physical element, which includes the following five acts, enumerated exhaustively: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group.

[62] Judgment of the International Court of Justice of 11 July 1996, Preliminary Objections, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, p. 617, par. 34.

again as a reference point the work that the ILC has done in the Draft articles on the Responsibility of International Organisation in 2011, and Draft articles on the Responsibility of State in 2001. Considered that the core argument of consequences is the rights of an Injured State/IO, it is necessary to focus, as the first fundamental step, on the 'injury' definition.

The first arduous task to define an 'injury' was dealt with by the ILC on the ASR first reading, precisely at the former art. 40 ASR, where an 'injured' State was defined as a State to whom the obligation is owed. The former art. 40 ASR defined the internationally wrongful act as 'consisting of damage'. This definition brought not only dangerous implications but above all was characterised by incorrectness. To say that the injury 'consists' of damage was certainly an error for several reasons. First of all, because the damage is not always the "gist of the injury"[63]. Secondly, because in international law there are certain cases in which there may be a loss, however, without any legal wrongdoing (*damnum sine iniuria*). This implied the need to create a much more inclusive and clear definition. In the second reading of 2001, the ILC decided to reconsider the whole issue. In his attempt to eliminate the abovementioned issues, the ILC found itself to deal with an additional terminological and interpretative problem brought by former art. 40. The formula used 'arising in consequence of' implied the consequent loss, which in turn was already covered by reparation. For this reason, the ILC decided to replace the above formula once again to make it even clearer, namely using the formula: 'caused by'. In other words, what the ILC does is nothing more than using an inclusive approach to the term 'injury' so that it could have incorporated all forms of damage, and therefore of the violation, as envisaged in part I and II ASR.

This reflects the logical process followed by the ILC, which has adopted the same terminology for IOs as well, in fact, as we read in art. 31 DARIO, dealing with reparation: "The responsible International Organisation is under an obligation to make full reparation for the injury caused by the internationally wrongful act"[64]. Adopting this new inclusive definition, the ILC did nothing more than follow the decisions taken by the ICJ in the Rainbow Warriors case, in which it is stated not only that the "damage is necessary to provide a basis for liability to make reparation"[65], but in which a direct causal link between the internationally wrongful act and the injury is established "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of an International Organisation"[66].

The concept of injury was codified in order to identify, in a non-exclusive way, most, if not all, of cases in which an IO, or even a State, was affected by a violation (internationally wrongful act). In doing so, the injured State/IO acquired full rights to enforce its injured interest (material or moral), invoking responsibility. For this reason, as previously mentioned, some elements such

[63] DARIO Commentary, art. 31.
[64] DARIO, art. 31.
[65] DARIO, art. 31, par. 2.
[66] *Ibidem.*

as the actual harm or damage or even the 'fault' are not considered as constitutive elements, namely prerequisite, of the responsibility.

The ILC intentions were also to expand the range of possibilities in which responsibility could arise. This is the reason why it was decided to codify the obligations owed to the international community as a whole and avoiding the formula "international crime", meaning a violation that affected the entire community of States. Precisely in this regard the ILC, in the new proposal dedicated to the consequences, not only foresees, with art. 28 DARIO, that the legal consequences can occur whenever there is an internationally wrongful act but also decided to add the art. 33 DARIO. The first paragraph reads as follow:

> "The obligations of the responsible International Organisation set out in this Part may be owed to one or more States, to one or more other organisations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach"[67].

In other words, the various forms of breach that can arise in relation to a single State, a group of States, an IO or the international community as a whole, were considered. This last situation, namely the breach related to the international community as a whole, is particularly significant insofar includes the serious breach of peremptory norms, i.e. an interest held by the entire community, which are the subject of a more detailed analysis which cannot be addressed here.

It could be at least interesting to note that the violations of a peremptory norm of general international law, committed by an IO, represents "a gross or systematic failure by the responsible International organisation to fulfill the obligation"[68]. If a serious breach does occur, it calls for the same consequences as in the case of States. The only particularity, as defined in art. 42 DARIO, is that "States and International Organisations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article"[69].

Moving back to the legal consequences, the one to start is the cessation. In art. 30 DARIO it is carefully stated the principle according to which a responsible IO is obliged to comply with two essential prerequisites to eliminate the consequences of a wrongful act. First of all, as a negative aspect, the wrongful act must cease immediately; secondly, the injuring IO must offer an "appropriate assurances and guarantees of non-repetition if circumstances so require "[70].

The second element, namely the second legal consequence that derives from an international wrongful act, is full reparation. The obligation to pay a reparation arises automatically as soon as an IO carries out an internationally

[67] DARIO, art. 33, par.1.
[68] DARIO, art. 41, par. 2.
[69] DARIO, art. 41.
[70] DARIO, art. 30, par. (b).

wrongful act. Moreover, it must be considered that the obligation to reparation rises directly from the breach. The ILC at art. 31 DARIO, codify the principle of 'full reparation', relying entirely on the definition and the conditions elaborated in the *Factory at Chorzów* case, emphasizing that the function of reparation is mainly to re-stabilize the situation previously violated. In the Factory at Chorzow case, it is read as follow: "it is an international law that the breach of engagement involves an obligation to make reparation in an adequate form". Then:

> "the essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[71].

There is an interesting issue to be discussed on this issue. The IO has no power to collect taxes or any financial autonomy. Notwithstanding their autonomous legal personality, the only way they can finance themselves is through Member State charges, i.e. the funds allocated to fulfil the functions for which the IO was created. The main issue here is that this peculiarity of International Organisations is not considered by the DARIO.

However, this is not a support of the thesis that the IOs should not be obliged to make full reparation for the injuries caused. The reparation, and this is valid for every legal system, must be a valid answer to the illegal acts and International Organisations cannot be excluded. However, International Organisations could not be able to make full reparation with their own resources. Besides, by imposing large financial charges as a consequence of a breach, there could be the risk to charge such a large amount to the IOs that would reduce their financial capacity, while useful in completing the functions for which they were created.

For this reason, as claimed by some scholars[72], considering the fact that States are certainly better equipped to deal with the consequences of internationally wrongful acts, it would have been appropriate to respect this peculiarity which corresponds, once again, to the principle of specialty proper of International Organisations[73].

To this end, as stated by authoritative doctrine[74], the ILC could certainly have foreseen financial assistance from the Member States in cases of full reparation. In no context is it expressed, or at least accepted, that those who commit a violation must also compulsorily make full reparation caused by the internationally wrongful act. Consideration should have been given to how the

[71] Judgment of the International Court of Justice of 23 September 1928, *Factory at Chorzów*, p. 47.
[72] PELLET (2013: 49ss.)
[73] Ivi, p. 53.
[74] PELLET (2013)

IO Member States would bear the burden of the consequences of the internationally wrongful act[75].

It is not a surprise that during the ILC session in 2007, Pellet (*ex officio*) proposed an additional draft article: "The member States of the responsible International Organisation shall provide the organisation with the means to effectively carry out its obligations arising under the present part"[76].

The final decision of the ILC was to keep the structure and form of the articles identical to that adopted for States, not taking into account, once again, the principle of speciality and missing the opportunity to try to settle such a thorny issue. art. 40 DARIO states as follow:

> "[1] The responsible International Organisation shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter: (2] The members of a responsible International Organisation shall take all the appropriate measures that may be required by the rules of the organisation in order to enable the organisation to fulfil its obligations under this Chapter:"[77]

In conclusion, two fundamental critics were addressed to the provision. The first concerns the use of "shall", that considered too soft. The second, instead, concerns the fact that the member State seems to be subordinated to the 'rules of the organisation'[78].

A further clarification must be made, which creates an interesting parallel with the provision adopted in the ASR where the State cannot use as justification the compliance of internal law, and that is that an IO can never use as justification the respect of internal rules of the organisation for not complying "with its obligations under this part"[79]. This can in no way affect the right of the injured State or IO to claim and receive full reparation. The terminology is used by the ILC to indicate the three forms, and therefore restitution, compensation and satisfaction, that an IO must respect after causing an injury. It must be clear that the above articles and those analysed so far, clearly refer to IO and State but that they do not deal in any way with regular cases of international responsibility of an International Organisation, although not excluded, which may hit directly to any person or entity other than a State or an International Organisation. A classic example may be that of breaches committed by peacekeeping forces and affecting individuals[80].

As far as part VI DARIO is concerned like art. 55 on the responsibility of States for internationally wrongful acts, art. 64 DARIO deals with *lex specialis*, i.e. it specifies that the draft does not apply in cases where the case is "governed by special rules of international law". To specify the reference

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[75] *Ibidem.*
[76] International Law Commission, *Report on the Work of its Fifty-Ninth Session*, in *General Assembly Official Records*, 2010, Supp. No. 10 (A/62/10), p. 184.
[77] DARIO, art. 40.
[78] PELLET (2013).
[79] ASR, art. 32
[80] Resolution of the United Nations General Assembly of 26 June 1998, 52/247.

to the special rules, art. 64 DARIO adds that these rules "may be contained in the rules of the organisation applicable to the relations between an International Organisation and its members"[81].

In the final part of the draft, two other issues already addressed in the analysis of the responsibility of State are to be found. The last issue concerns the fact that these drafts deal with the definition of the responsibility of States and IOs and it is equally obvious that in international law there may arise cases involving issues of individual responsibility or issues regulated by the United Nations Charter but which are not regulated in any way in the two drafts. Both in the first case, where it should be pointed out that the conduct of an individual could be attributable to a State or an IO but that this certainly does not imply that the individual can be investigated for the same conduct or crime committed, and in the second, or rather against the Charter of the United Nations, where, as also clarified by art. 103 of the same Charter

> "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail"[82].

In these two previous cases, it is said that the two draft articles analysed so far are 'without prejudice' to any question of the individual responsibility or the Chart of the United Nations.

Only one last aspect remains to be clarified which concerns a thornier issue. The issue, it is introduced here in brief, concerns specific cases in which, having ascertained the "international responsibility of individuals who have been instrumental to the wrongful act" and which "cannot be taken as implied", for instance, the case in which the conduct of an individual "has been instrumental to the serious breach of an obligation under a peremptory norm in the circumstances envisaged in art. 41"[83], the international criminal responsibility of individuals may arise. Nor are excluded cases in which an individual, acting on behalf of an International Organisation, causes damage to the victim of an international crime. In this specific case, "the responsible individual may have an obligation to make reparation"[84].

[81] DARIO, art. 64.
[82] Charter of the United Nations, art. 103.
[83] DARIO Commentary, art. 66, par. 2.
[84] DARIO, art. 66.

CHAPTER II. THE SUBJECTIVE ELEMENTS AND ITS DETERMINATION

2.1 ATTRIBUTION OF CONDUCT: THE NOTION AND ITS SET OF RULES

Attribution is the legal procedure used to identify whether a specific conduct -act or omission - carried out by an organ or an agent, or even by a private individual or a group, is directly attributable, under international law, to a State or an International Organisation. It is therefore important to avoid attribution remaining an abstract legal operation, in order to have an approach that allows to empirically observe and categorize a certain situation. The normative approach described in the first analysis does not necessarily exclude the 'factual', or empirical, analysis. Both are mutually useful.

It is interesting to note that the role of attribution is 'substantive' in the meaning as the special Rapporteur James Crawford stressed, "the rules of attribution play a key role in distinguishing the 'State sector' from the 'non-State sector' for responsibility"[85]. This means that it is necessary to have a general secondary rule on the attribution of conduct in order to make attributable, and therefore susceptible to responsibility, a 'State sector' that in practice has violated an applicable primary rule. This is not only because it is rare to find specific rules that indicate and regulate attribution on a case by case basis, but also because it is useful, if not necessary, that for all cases identified by applicable primary rules, there be a corresponding secondary rule on the attribution of conduct. Since this is not the case, general rules that regulate the matter of attribution become indispensable[86].

Nevertheless, the possibility that special rules of attribution may exist cannot be ruled out completely:

> "Admittedly, the legal solution to the question under discussion might be found in the body of law that is more directly relevant to the question, namely, international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is prima facie internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals

[85] Special Rapporteur Crawford, *First Report on State Responsibility*, 1998, in *ILC Yearbook*, Vol. II, No. 1, p. 33, par. 154.
[86] CONDORELLI, KRESS (2010: 222)

not having the status of State officials, but which are performed on behalf of a certain State"[87].

The International Criminal Tribunal for Former Yugoslavia (ICTY) ruled in this way in the *Tadić* case, showing how some special rules, such as those of international humanitarian law, can exist and, at the same time, contradict the general rules of international law. The ILC decided to complete the codification of existing secondary general rules on international responsibility in two steps. In 2001 and 2011 it codified two new drafts collecting the set of rules that regulate, in the first case, the responsibility of States, with the Draft articles on State Responsibility (ASR), and in the second that of International Organisations, with the Draft articles on the Responsibility of International Organisations (DARIO).

With regards to attribution of conduct, therefore, it is necessary to focus on a fundamental aspect, that is, determining whether a certain conduct, which turns out to be a violation of international law, is attributable to a IO or a State. This operation represents the subjective side of the concept of responsibility for internationally wrongful acts, which is added to another element indispensable for the responsibility of a State/IO to arise: the objective element, namely the fact that the conduct in question represents a breach of international obligations owed by a State or International Organisation[88]. Both elements, however, must be kept consciously separate from other elements that, as mentioned above, could appear superfluous and misleading, such as 'culpa' and 'intention' to commit certain wrongful acts[89].

To get to the core issue of the attribution, it is fundamental to begin by considering art. 4 ASR and art. 6 DARIO in order to understand their characteristic elements. As explained above, the responsibility of a State/IO is something that occurs when a certain conduct is in breach with its international obligations. Therefore, the attribution of conduct must necessarily consist of "an act or omission or a series of acts or omissions" and that these are considered "as the conduct of the IO (or State)"[90]. While concerning acts, fewer difficulties arise in assessing them, evaluating omissions instead, could be a hard task, thus it is useful to understand how they are interpreted. An example is the so-called 'cumulative effect' introduced by the ILC, which clearly states that a State can always be responsible "for the effects of the conduct of private parties if it failed to take necessary measures to prevent those effects"[91].

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[87] Judgment of the International Criminal Court for the former Yugoslavia Appeals Chamber of 14 July 1999, *Prosecutor v. Tadić, (Tadić case)*, par. 90.

[88] Moreover, one more element could be added speaking of Responsibility, i.e. the conduct should not be subject to the conditions "precluding wrongfulness". This ILC basic conception reflects international practice, more precisely the tripartite approach of the International Court of Justice. (ICJ Report, 1980, *United states Diplomatic and Consular Staff in Teheran*, at 4; ivi, p. 22 ss.; ivi, p. 56 ss.

[89] ASR, art. 2; DARIO art. 4; CRAWFORD, PELLET, OLLESON (2010: 193 ss.)

[90] DARIO, art. 4.

[91] ASR, Chapter II, par. 4.

In determining the organ of an International Organisation, which serves precisely to identify the subject that acts on behalf of that IO in case of a breach, it is necessary first to consider the practice of IO and its 'internal law', since IO's structure is governed by the "rule of the organisation" stated in the founding treaty. Nevertheless, the purpose of international law is not to determine or define the structure and composition of an International Organisation, nor to take into account the internal law of a State, but, in this context, to assess its international responsibility according to the rules of international law. Having said that, it is irrelevant for international law which organ of the IO performed a certain act, if that organ is part of the IO which is the only actor to have an international legal personality. In other words, as this is also made clear in the Commentary to the Draft articles on the Responsibility of International Organisations, the IO, as a subject of international law, could be held responsible for the conduct of all its agents and the organs - without any distinction between them[92].

art. 6 DARIO, in fact, recognises the International Organisations' ability to "establish which functions are entrusted to each organ or agent". The "rule of the organisation" remains irrelevant to the attribution of conduct[93]. According to art. 6:

> "an organ or agent of an International Organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law, whatever position the organ or agent holds in respect of the organisation"[94].

Regarding the definition of organs and agents, it is interesting to read the Commentary on the DARIO in paragraph 2 of art. 6, where a reference is made to the ICJ's initiative. It notes how the ICJ, when dealing with UN personnel, only considers the fact that a certain person had been conferred functions by an organ of the United Nations, and therefore not considering its official status. In its advisory opinion on Reparation for Injuries, the Court noted:

> "understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organisation with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts"[95]

Besides, the Court, ruling on privileges and immunities, stated: "the essence of the matter lies not in their administrative position but in the nature of their mission"[96].

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[92] DARIO Commentary, art. 6.
[93] DARIO Commentary, art. 6, par. 9.
[94] DARIO, art. 6.
[95] Advisory Opinion of the ICJ, *Reparation for Injuries*, par. 177.
[96] Advisory Opinion of the International Court of Justice of 1989*, Applicability of art. VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, par. 47.

Moving back to consider art. 4 DARIO, the attribution represents an essential condition for the responsibility of an International Organisation, and to do so Chapter II defines the circumstances under which it is possible to justify it. Justification of attribution could only exist if it regards the conduct of an organ or an agent who acts under the 'direction, instruction or control' of an IO. As seen before, it is useful to clarify that an IO is an autonomous and indivisible entity, which has legal personality, composed of organs and agents. Therefore, international law takes into consideration the acts performed by the agents and the organs that are part of an IOs, as same goes for States. It is necessary to stress the unity of such actors in the framework of international law. As mentioned above, even though in the rules of the organisations several organs exist, and each one of them could be responsible for its acts, International law takes into consideration all the organs and agents as a whole, namely it considers the IO as the only subject which has international legal personality and therefore the only subject that can be held responsible before international standards. This position is made clear in both Drafts[97].

This position was already fully affirmed regarding the practice of the State responsibility in international legal practice in the Moses case[98] and later even by the ICJ:

> "according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule […] is of a customary character"[99].

At this point, it is essential to outline the rules that exist in international law in cases relating to attribution issues in peacekeeping operations. This not only helps to understand the set of existing rules but also it is useful to justifies the fact of having to rely on the Courts' practices on the responsibility of States in order to analyse the object of interest of the thesis, i.e. the responsibility and attribution of IOs.

In peacekeeping operations, the question with which we must start determining attribution is to whom does the military contingent belong to, the State or the United Nations? Of course, we are talking about an International Organisation thus, in principle, the DARIO should apply. But as we have said, the State plays a central role since the organ that is placed at disposal of the UN is part of the 'machinery of the State' in which it continues to hold certain powers on disciplinary and criminal matters. According to the latter analysis the question of attribution should be interpreted in light of the ASR.

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[97] ASR, art. 4, par.1 ASR.

[98] ASR Commentary, art. 4, par. 3. "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority".

[99] Advisory Opinion of the International Court of Justice of 1999, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, at 62; ivi, p. 87 ss.

In order to give answers to these questions, it will be necessary to start from a separate analysis of the different existing rules that will allow to frame this complex system of international rules. Once this has been done, we will move on to the next chapter to analyse the decisions of the Dutch Courts in cases relating to the Mothers of Srebrenica, which will define what rules and approaches are best for framing and defining the attribution of an organ in cases of peacekeeping operations.

2.2 THE INSTITUTIONAL LINK AND THE EX-POST ANALYSIS

Looking at Chapter 2 DARIO, one can assume that the only purpose of the chapter is to identify the rules and characteristics useful to determine the conduct of an International Organisation and thus to define its attribution, an element that could trigger responsibility for an internationally wrongful act. The attribution is based on three main pillars. The first one concerns the "institutional link", and it deals with all the behaviors that are automatically attributed to the State/IO; the second pillar instead is called "factual link", and it refers to the link that is established between a State/IO and another private one that can be under instruction or direction and control of the former; finally, the third pillar refers to the behavior that a State/IO adopts after a third actor has put in place a specific behavior - found to be wrongful. The latter type of rules refers to *ex post facto*.

This first paragraph will focus on the first of the three pillars and will take into account the characteristics of the set of rules identified by the ILC in the works ASR 2001 and DARIO 2011. The "institutional links" are used to identify all those actors whose conduct is automatically attributed to State or an International Organisation, i.e. *de jure* State/IO organs - whether they are *de facto* organs or individuals, which exercise governmental authority or even agents exercising IO functions. In other words, the institutional link refers to organs "exercising elements of governmental authority", including also the conduct of organs placed at the disposal of a State/IO by another sending State. This last issue will be discussed in more detail in the last paragraph of this chapter.

The role of International Law, with regards to the abovementioned articles, is undoubtedly passive, i.e. as seen before it only takes into account the decisions taken internally by the State/IO. In other words, the structure that these actors have decided to give themselves. It could be helpful to reiterate here that only the State/IO, through internal laws or rules of the organisation, determine the identity and the status of a certain *de jure* organ or agent. Once the structure has been verified, international law can proceed to the analysis of the consequences of the decisions and actions of specific conducts performed by organs or agents of State/IO.

The process of assessing the attribution through the institutional link is probably the most straightforward. The Draft articles on the Responsibility of State identify persons and entities that are authorized to exercise 'governmental authority'. In this case, too, the DARIO cannot use the same terminology adopted in the case of States. For this reason, in order to identify the persons and entities that could act in the official capacity of the IOs, the ILC decided to adopt a different word, namely 'agent'. The article states that an agent of an IO is an official, or an external person or entity, (could be interpreted as a private individual as well) that carries out some functions on behalf of the IO[100]. The definition given by the ILC is based on a crucial passage of the ICJ advisory opinion on Reparation for Injuries which seeks to include in the definition of agent all the entities "through whom the organization act"[101].

> "[it] understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts[102].

In order not to create any kind of confusion or overlap with the definition of 'organ' the same Commentary to DARIO specifies that the agent concept "only covers persons or entities that do not come within the definition under subparagraph (c)"[103].

Going back to attribution, it is necessary to look at the connection, created by internal law through authorization, between the State/IOs and the person or entities that compose the organ in question. Having said this, as seen before, art. 4 ASR makes clear that:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State"[104].

According to this position, any organ of the State that commits a violation make arise responsibility for that State as a unique subject of international. The concept remains unchanged for International Organisations:

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[100] DARIO, art. 2, par. (d): further specifies that "agent of an International Organisation" means an official or other person or entity, other than an organ, who is charged by the organisation with carrying out, or helping to carry out, one of its functions, and thus through whom the organisation acts".
[101] DARIO Commentary, art. 2, par. 25.
[102] Advisory Opinion of the ICJ, *Reparation for Injuries*, par. 177.
[103] DARIO Commentary, art. 2, par. 27.
[104] ASR, art. 4.

> **"**The conduct of an organ or agent of an International Organisation in the performance of functions of that organ or agent shall be considered an act of that organisation under international law, whatever position the organ or agent holds in respect of the organisation"[105].

It is also true that in many situations the identification of the status of an organ by internal law is not sufficient to identify the subject who exercises the governmental authority. As also specified in the ASR Commentary, "in some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading"[106]. This clarification becomes useful when considering independent organs, which enjoy a special status, or persons who are not identified as State or IO organs by internal law. Although these organs, from the point of view of internal law, are distinct and separate from the official structures of the State or the IO, for international law it makes no difference, these subjects remain an IO/State organ, which is why their conduct is attributable to that IO or State. This 'expansionist tendency' is the result of an important interpretation by the ICJ, the judgment on the merits in Application of the Convention on the Prevention and Punishment of the Crime of Genocide.

> "persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow states to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious"[107].

And the Court adds, for further clarification, an expression that describes thoroughly the relationship between the individuals and State organs when there is no precise status under internal law. The Court states that the degree of control should be considered a "complete dependence"[108].

In art. 5 ASR, the ILC decided to go much further and try to predict as exhaustively as possible cases that could arise in the changing world of international law. art. 5 ASR in fact states:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under

[105] DARIO, art. 6, par. 1.
[106] ASR Commentary, art. 6, par. 11.
[107] Judgment of the International Court of Justice of 26 February 2007, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.
[108] Ivi, par. 386; ivi, par. 394

> international law, provided the person or entity is acting in that capacity in the particular instance".

Reading the Commentary to the Draft articles on the Responsibility of International Organisations it may be understood, adopting the same principle stated towards States, as the term 'agent' does not only include those who have an official status, but all 'agents', persons or entities, who, for example, perform actions on behalf or under mandate of a certain International Organisation. This vision was confirmed by the ICJ itself in its advisory opinion on Reparation for Injuries,

> "understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organisation with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts"[109].

And still in the advisory opinion on the Applicability of art. VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, much more recently, the Court states:

> "in practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials"[110].

It is equally important here to point out that the conduct of private individuals is not attributable to States or International Organisations, as outlined already in the 1923 *Tellini* case[111]. It follows that the criteria for determining the conduct are clearly specified by international law. Nevertheless, there is an important exception that should not be underestimated. In some specific cases, the conduct of a private individual could give rise to the responsibility of an IO. This is the case in which an IO fails to take all necessary measures to prevent the negative effects of the wrongful conduct of a private citizen or when a State or an IO has a factual control over a private organ. These articles state the conditions for this clearly, however issues could arise at the application level. That is, when and how does one understand whether the conduct of a private individual should be attributed to an IO.

The difference between these two cases is very clear up to this point, but while the case of private conduct gives rise directly to the responsibility of the

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[109] Advisory Opinion of the ICJ, *Reparation for Injuries*, par. 177.
[110] Advisory Opinion of the International Court of Justice, *Applicability of art. VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, p. 48; ivi, p. 177; ivi, p. 194.
[111] League of Nations, April 1924, 5th Year, No. 4, Official Journal, at 524: "the responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal".

individual involved (such as the French-Mexican Claims Commission in the *Cairo* case, where it is stated "the act had no connexion with the official function and was, in fact, merely the act of a private individual"[112]), there may be cases in which certain conducts of private individuals could be attribute to the IO or State. This situation will be analysed in the next paragraph.

Nevertheless, this hypothesis should be distinguished from cases of unauthorised conduct, or conducts that go against the indications or orders given. This circumstance will be discussed in more detail in the next section dedicated to *ultra vires* conduct, that even though are committed beyond the authority of the IO, are still in official capacity and cause the attribution to fall on the State/IO of which the organ or agent is acting on behalf of.

Before moving on to consider *ultra vires* conduct, it is necessary to mention the third pillar of attribution norms, that concerns the links that are established *ex post facto*. In other words, we are talking about conduct that a State or an IO can deem its own after the conduct has already taken place. This deals with the conduct that is "acknowledged and adopted" by a State/IO from a procedural point of view. art. 11 ASR, and art. 9 DARIO, affirmed that all cases that would not otherwise be attributable to the State/IO, due to acknowledgment or adoption

> "shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own"[113].

2.2.1 Ultra Vires conduct

One last case, among institutional link cases, occurs when the conduct of an organ is deemed attributable to a State or IO, i.e. when an organ or an agent acts as an entity empowered to exercise the elements of the governmental authority. According to art. 7 ASR:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions"[114].

Similarly, art. 8 DARIO, read in conjunction with art. 6 DARIO, identifying organs and agents as the actors entitled to exercise the functions of the International Organisation, specifies that they

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[112] United Nations Record of International Arbitral Awards, *Sales No. 1952, Vol. 3, Th. Gendrop (France) v. United Mexican States*, 7 June 1929, Vol. V, p. 516.
[113] DARIO, art. 9.
[114] ASR, art. 7.

> "shall be considered an act of that organisation under international law if the organ or agent acts in official capacity and within the overall functions of that organisation, even if the conduct exceeds the authority of that organ or agent or contravenes instructions"[115].

'Organs' and 'agents' are used here instead of 'persons' and 'entities' (as in art. 7 ASR) for obvious terminological reasons and in order to maintain the analogy with art. 6 DARIO. This last case, also identified as 'ultra vires' conduct, has been widely discussed and finally adopted with an important aim: that to guarantee clarity and security in international relations and to prevent IOs from justifying violations of international law simply by hiding behind the justification of having given a specific order which was not respected by the organ or agent which received such order. This idea was discussed and gradually took shape until it reached its definitive formulation in the *Cairo* case[116]. In this last case the Commission held:

> "that the two officers, even if they are deemed to have acted outside their competence […] and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status"[117].

In 'ultra vires conduct', the most pressing issue is certainly to determine whether the organ performs the conduct in an official capacity or not. In other words, the question is "whether they were acting with apparent authority"[118]. This thin line that separates the 'private' conduct from the 'official', could be summarized in observing if the State in question "knew or ought to have known of it and should have taken steps to prevent it"[119].

As far as the ultra vires conduct is concerned, just one final point needs to be made. art. 7 ASR refers only to the cases outlined in Articles 4, 5 and 6, since it refers, as seen, to cases where a person or an entity is empowered to exercise elements of the governmental authority. Similarly, art. 8 DARIO refers only to cases where an organ or agent is exercising an element in an official capacity. Unauthorized conduct and the evaluation of such conduct to assess its attribution will be addressed in the following paragraph.

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[115] DARIO, art. 8.
[116] Archivio del Ministero degli Affari esteri italiano, serie politica P, No. 43 - The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him.
[117] United Nations Record of International Arbitral Awards, *Sales No. 1952, Vol. 3, Th. Gendrop (France) v. United Mexican States*, 7 June 1929, Vol. V, p. 516.
[118] ASR Commentary, art. 7, par. 8.
[119] *Ibidem.*

2.3 THE CASE OF AN AGENTS OR AN ORGAN PLACED AT DISPOSAL OF AN INTERNATIONAL ORGANISATION: A COMPARISON OF CONTROL TESTS IN ASR AND DARIO

Although the IOs have their own legal personality, it would be misleading not to consider States as an essential part of the decision-making process, being the creators of a specific common end to achieve by the IO.

This relationship creates important issues that can be resolved through the rules of attribution. Who and to what extent is responsible for a specific act? The IO itself or its Member States?

The set of rules outlined by the ILC in ASR and DARIO helps to extrapolate a response in order to identify who is responsible for a given conduct, or even if that conduct is, at the same time, shared by two or more international legal entities. According to the same words of the then ILC's Special Rapporteur on the Draft articles on the responsibility of International Organisations, Giorgio Gaja, "what is decisive is not whether an entity is formally defined as an 'organ', but the existence of a functional link between the agent and the organisation"[49].

When talking about organs of an International Organisation it is helpful to look at the link that exists between the organisation and the organ. In this case (i.e. organs placed at disposal of an IO), it is also necessary, if not fundamental, to observe the functional link that exists between the organ that performed a certain action and the International Organisation.

If we take a step back and analyse art. 6 ASR, which deals with identifying and regulating the issue of organs placed at disposal of another State, we realise that the analogy with art. 7 DARIO is quite relative. Although the ILC intended to approve, *mutatis mutandis*, art. 7 DARIO following the guidelines of art. 6 ASR, it seems, because of the formula used, that there has been a different regulation of the same which has led, as we will see, to different interpretations.

It has been said that, as confirmed by the ILC, that there are three types of attribution: institutional, factual and *ex post.* These three types are used to understand to which subject is attributable the conduct and therefore who would potentially be responsible for it.

While for the institutional link cases there is no complexity in assessing the attribution, being, the definition and the structure of agents and organs, regulated by the IOs themselves, for the factual link cases instead it should be asked about the precise "direction and control" (therefore, about the effectiveness of the control of a given organ or agent over an individual or group of private individuals).

The application of art. 6 ASR, which regulates the conduct of an organ of a State placed at the disposal of another State, is limited to a specific situation[120]. This implies therefore cases in which doubts do not exist, since this organ is acting directly and exclusively on behalf of the receiving State to

[120] ASR, art. 6, par. 1.

which the organ was lent to and therefore attributable only and exclusively to the latter:

> "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed"[121].

In this case, the evaluation of the functional link becomes necessary. An organ that is part of the structure of a sending State, is placed at the disposal of another State for which "act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State"[122].

In other words, in its original conception, the functional link between this organ and the receiving State already existed in the act of the sending State, that is, in the fact of putting at the disposal of the receiving State a specific organ[123]. What matters here is primarily the institutional link and, subsequently, the assessment of whether there is a link between the receiving State and the organ of the sending State, that due to the transfer – namely the agreement - would become effective and enforceable.

In conclusion, structural link and functional link are both fundamental here. It is important to note that the evaluation of the functional link is not the same as that used for the interpretation of art. 8 ASR, i.e. for "private entities or individuals who have never had the status of an organ of the sending State". While art. 8 ASR refers to cases of direction and control of private individuals, where no type of institutional link is present, art. 6 ASR takes into consideration the organs that "possess the status of an organ of the sending State", namely established "with the machinery of the beneficiary State"[124].

One could think of questioning the attribution of certain conducts in cases in which they exceed the indications or authorizations of the receiving State. Nevertheless, once the presence of an institutional link has been confirmed, these cases are to be evaluated as *ultra vires* conduct.

It is good to remember here, considering that this will create an important difference with the provisions in DARIO, that art. 6 ASR was created to avoid multiple attributions. Of course, as also stated by the ILC in the context of States and IOs, there is the possibility of dual or multiple responsibilities. Nevertheless, multiple attributions can arise only and exclusively when an organ belongs to more than one subject at the same time. For this reason, it is natural to consider art. 6 ASR as an exception of the cases provided for the possibility of shared responsibility. Although, concerning International Organisations, this concept is not always true.

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[121] ASR, art. 6.
[122] ASR Commentary, art. 6, par. 2.
[123] It is a link that derives directly from the act of sending the State of "place at the disposal" of another State an organ that is part of its "machinery" (therefore, from an institutional point of view: i.e. institutional link).
[124] International Law Commission, *Yearbook*, 1974, Vol. 2, no. 1, p. 269; ivi, p. 287.

The questions related to the organs placed at the disposal of an IO represent the core issue of this thesis and is also one of the most complex ones. Talking about art. 7 DARIO the ILC not only uses separately both the two concepts (namely, the 'placed at disposal' and the effective control itself as envisaged by art. 8 ASR) but also opens the possibility of shared responsibility between IO and its Member States.

> "The conduct of an organ of a State or an organ or agent of an International Organisation that is placed at the disposal of another International Organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct"[125].

Some scholars argue that probably the provisions for the organs placed at the disposal of an IO serve to make clear some concepts: for instance, the possibility to attribute certain conducts also to States, that very often, in peacekeeping operations, continue to maintain control over military operations[126]. In other words, in military peacekeeping operations, the State that places at the disposal of the UN its own troop continues to retain a certain degree of power and control over disciplinary and criminal matters of the battalion. Nevertheless, it is necessary to draw attention to the main differences, which have distorted the evaluation of the attribution in cases of organs placed at the disposal of IO.

The main question concerns the rules of attribution and, in particular, the cases in which the conduct of the armed forces of certain countries is granted to the United Nations. Cases in which the control test plays a fundamental role in assessing who, between MSs and the United Nations, have effective control, as stated by art. 7 DARIO.

Now, however, let's take a step back and try to understand art. 7 DARIO and the possibility of assessing these cases in analogy with situations that, as seen above, are different in nature of the subjects under analysis.

The formula found in art. 7 DARIO codifies both elements that in art. 6 ASR were seen as the same thing, i.e. effective control and being at the disposal of.

In doing so, the ILC brings in art. 7 DARIO an element that, as said, was used (in ASR) for the practices of instruction, direction or control, in cases involving private actors (as we will see in the next paragraph). In this way, the analysis of the degree of control used for art. 8 ASR is transferred to art. 7 DARIO and, in doing so, an attempt is made to assess, on a case-by-case basis, who is held responsible over specific conduct. This analysis is very useful in the evaluation of the attribution for military operations and UN peacekeeping and, as will be seen, is fundamental in the approach adopted by Dutch Courts in the *Nuhanović* case. The same Commentary on art. 7 DARIO states:

[125] DARIO, art. 7.
[126] MESSINEO (2012).

> "the control that the contributing State retains over disciplinary and criminal matters […] may have consequences with regard to attribution of conduct […] [considered that] 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"[127].

To confirm the crucial difference with art. 6 ASR, the Commentary of DARIO states:

> "The criterion for attribution of conduct either to the contributing State or organisation or to the receiving organisation is based according to art. 7 on the factual control this is exercised over the specific conduct taken by the organ or agent placed at the receiving organisation's disposal"[128].

In doing so, the ILC manages to evoke the principle of effective control as stated in the *Nicaragua* case first and confirmed in the *Genocide* case afterwards which places the threshold of attribution at a very high level. Moreover, art. 7 DARIO overturns the conception of the principle of 'place at disposal', since with the terminology used it does not make the organ become, even temporarily, an organ belonging to the structure of the International Organisation, as provided for in the case of the States.

In these cases, it is necessary to analyse and determine, in each individual case, the factual link and therefore who possessed the control over that conduct. Giorgio Gaja himself explains:

> "It should also be indicated that what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control"[129].

In response to this, some scholars have argued that the criterion of effective control used here is completely misleading[130].

One final point needs to be made. art. 6 ASR was designed to avoid cases of dual or multiple responsibility, precisely because if an organ was transferred, and there was effective control through the fact that the organ was placed at the disposal of, the conduct of the latter was attributable only to the receiving State. The ILC, in the case of the IO, with art. 7 DARIO, distorts this concept. In assessing whether it is effective, therefore, it may be that over specific conduct, even the State that made the organ available, i.e. the military contingent, may be responsible because it continues to exercise power on criminal matters. This is the reason why the State may continue to exercise direct effective control over the contingent in question. This, therefore, opens

[127] DARIO Commentary, art. 7, par. 7.
[128] Ivi, par. 4.
[129] Special Rapporteur Gaja, *Second report on responsibility of International Organisations*, 2 April 2004, UN Doc. A/CN.4/541.
[130] MESSINEO (2014: 60 ss); LARSEN (2008: 518); International Labour Organisation Commentary, 2006, UN Doc. A/CN.4/568/Add.1, p. 14 ss.

to a possibility of mutual responsibility shared between the UN and its member states, which is not, in reality, impossible according to DARIO.

This possibility is considered because in International Organisations there is no transfer of the institutional link from the machinery of the State to that of the International Organisation. Also, if you consider that States are always careful to cede complete control of military organs to supranational organs, constantly trying to maintain control, then the multiple responsibilities could be the answer, as confirmed by Giorgio Gaja:

> "It was noted in one comment that this criterion was tailored for "military operations" and was "less adequate for deciding attribution in the case of other types of cooperation between International Organisations and states or other International Organisations". It may well be that outside military operations it may be more difficult to establish which entity has an effective control. However, this does not imply that the criterion set out in article 5 [then 7] is inadequate, but that in many cases its application will lead to the conclusion that conduct has to be attributed both to the lending State and to the receiving International Organisation"[131].

2.4 THE UTILITY OF A FACTUAL APPROACH

First of all, it is necessary to be precise on the structure of the present section which reflects situations that are completely different from each other and to which different rules apply. The previous section refers to the institutional link because it concerns the conduct carried out by organs or agents that exercise elements of governmental authority. This one instead refers to the factual link.

Taking into consideration all the aforementioned and considering that art. 7 DARIO gives the elements of the factual link analysis it is very useful to consider how they were created and what application was given to the degree of control analysis. It is, therefore, necessary to begin and draw attention to the practice adopted towards States for several reasons. First of all, because this practice was created and developed in the practice related to States. Secondly, because it has also been applied to IOs, as it will be seen in the next section.

In fact, the role of the effective control, as established by the ICJ in the *Nicaragua* case under the umbrella of art. 8 ASR (i.e. the need to use an effective control test relating to the specific case), it has been useful in order to assess the cases of organs placed at the disposal of an International Organisation.

Furthermore, DARIO has no provisions similar to that of art. 8 ASR. However, the principles of this provision apply *mutatis mutandis* to the attribution of conduct to IOs via the concept of an organ or an 'agent' defined

[131] Special Rapporteur Gaja, *Seventh report on responsibility of International Organisations,* 7 August 2009, UN Doc. A/CN.4/610.

by art. 2 paragraph d DARIO insofar an agent of an IO could be intended as a private individual as well.

art. 8 ASR codifies precisely the situation in which the conduct of individuals, or groups of them, who are not part of the State structure (or as seen in the International Organisation) (acting in private capacity), if under instructions, direction or control by a State or IO, are attributable to it. For this reason, for the first time in the Nicaragua case, in the use of this rule, the "effective control" test is enunciated. The degree of control that an IO could exercise over a non-governmental actor (who does not have an institutional link), in precisely the same way as factual.

It seems necessary to specify the interest in the practice of Courts about the "control" of States while dealing, in this thesis, with International Organisations. This is because in the absence of sufficient practices and legal cases relating to International Organisations it is important to analyse the art. 8 ASR (State practice), which speaks of direction and control. In addition, it makes assessable the effective control, which it is necessary in order to analyse any specific conduct and in order to establish its attribution.

In this context, the application of the principle of effectiveness has the objective of analysing and identifying, in a factual way, whether the State has given instructions, orders or directives to the individual, or group of individuals, in order to carry out specific conduct that could then turn out to be wrongful.

This analysis serves the purpose of the present research for one main reason, to understand how effective control has been used and what developments and interpretations have been given by the Courts. In order to be able to understand what is the best possible use of 'effective control' codified in art. 7 DARIO, it is necessary to consider the application and the interpretation given to it in the Court practice related to art. 8 ASR. Analysing these decisions, make possible to extend, the use done for the State, to the sector of organs placed at disposal of International Organisations, as provided for by the ILC in art. 7 DARIO, in which reference is deliberately made to 'effective control.

> "The conduct of an organ of a State or an organ or agent of an International Organisation that is placed at the disposal of another International Organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct"[132].

The Commentary also specifies that this test could be particularly useful in the context of UN multinational operations and the relationship between UN chains of command and Troop Contributing Nations (TCNs). We must be careful, however, do not confuse the two cases. In the context that will be analysed here (that is, the attribution of private persons' conduct to states), we are talking about control over certain actors that are not part of the State or the IO. In the second case described (which has been discussed in the previous

[132] DARIO, art. 7.

paragraph, that is, the case of organs placed at disposal of an International Organisation), we are referring to the "effective control" test that is applied, however, to organs that could act in an official capacity.

The logic may not require the application of the standards used for States in the cases provided in art. 8 ASR, since the reality, as seen, is completely different. Therefore, this may seem misleading, in the previous paragraph has been the decision of the ILC to extend the interpretation of the 'effectiveness' of control (also in the cases of organs placed at disposal of an International Organisations) analysed, since the issues related to organs place at disposal of, and the degree of control on this organ, represent the central argument of this thesis.

Moving back to art. 8 ASR, the first fundamental difference is that in this case organs or agents acting in official capacity are not taken into account, but some circumstances are considered in which the same organs or agents (institutionally linked) control an individual or groups of individuals (private individuals) who form the *longa manus* of the State without being integrated in the official organic structures of the State.

art. 8 ASR is stressed here for several reasons. First of all, because it defines the distinction between instructions, direction, and control, where the effectiveness of the conduct is seen as an essential point for analysing the degree of control. Secondly, focus on art. 8 ASR and its use in Court decisions, is of fundamental importance to understand the case of the Mothers of Srebrenica and the approach adopted by the Dutch Supreme Court which will be analysed in the next chapter.

A State/IO can give an "instruction" – a specific order or even just a general instruction about the result to be achieved leaving the actor, educated, a certain freedom of maneuver. We talk about direction and control instead, when a State/IO has a certain degree of control over the operations of a certain actor. In this context, the analysis of the degree of control becomes of fundamental importance, an operation that, from time to time, establishes who possesses the 'effective' direction and control and, therefore, to whom certain conduct must be attributed.

The starting point must be the ICJ decision on the issue of the 'contras' role in Nicaragua. The degree of control was taken into consideration for the first time in the case related to it, where the ICJ enunciated and applied the "effective control" test[133]. The interesting aspect of this question is that the Court, when applying this test, did not base its decisions on established practices of law, nor on the existing *opinio juris*, thus making the test subject to different interpretations. Having assessed the violation of international humanitarian law, it was necessary to determine whether the breach was attributable to the United States according to the principle of direction and control, or whether the 'contras' were instead acting autonomously. In the evaluations carried out, the ICJ held that the US was responsible only for the

[133] Judgment of the ICJ, *Nicaragua v. United states of America*.

"planning, direction and support"[134]. Nevertheless, the 'contras' had certain independence which made them autonomous and unrelated to the effective control of the foreign State (the US). If, on the one hand, it is true, as the Court confirms, that

> "the US provided to the contras such assistance as 'logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc"[135]

the military actions of the 'contras' were the result of the 'training, arming, equipping, financing, supplying or otherwise encouraging, supporting and aiding' by the US. As stated by the Court:

> "despite the heavy subsidies and other support provided to them by the United states, there is no clear evidence of the United states having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf"[136].

The ICJ affirmed, in the application of the 'effective control' test, that even though the US had supported the 'contras', this support was not sufficiently 'effective' to justify the full control of the US which, among other things, would have made the latter responsible for the wrongful conducts of the 'contras'. On top of that, the US was responsible for the violation of the prohibition of the use of force, art. 2 of the UN Charter.

> "All the forms of United states participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United states directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United states. For this conduct to give rise to legal responsibility of the United states, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed"[137].

Though the Court does not attribute the contras' conduct to the United States for violations of international law, it recognises the responsibility of the US for arming, training and equipping the contras. This is borne out by the passage of the Court's judgment, where the ICJ stated that:

> "[t]he Court does not consider that the assistance given by the United states to the contras warrants the conclusion that these forces are subject to the United states to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and

[134] Ivi, p. 51, par. 86.
[135] Ivi, par. 105.
[136] Ivi, p. 62, par. 109.
[137] Ivi, p. 64, par. 115.

> that the United states is not responsible for the acts of the contras, but for its own conduct vis-a-vis Nicaragua, including conduct related to the acts of the contras. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the contras, regarded by Nicaragua as imputable to the United states, but rather unlawful acts for which the United states may be responsible directly in connection with the activities of the contras. The lawfulness or otherwise of such acts of the United states is a question different from the violations of humanitarian law of which the contras may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them"[138].

The interesting aspect of this decision is that the Court assesses only the direct involvement of the US aimed at "training, arming, equipping, financing, [...] supporting"[139] the contras, acknowledging only the wrongful conduct of the US organs in carrying out these conducts.

This is one of the reasons that drive the Court to bring the control test to a high threshold, and therefore to evaluate as positive only those cases in which there is an effective instruction, direction, and control relative to specific wrongful conduct - such as, for example, if in the case in question the US had indeed ordered the 'contras' to act in that particular way that led to the violation of humanitarian law - and therefore not to a general situation of support or dependence.

As expressed in the separate opinion of Judge Shahabuddeen in the *Tadić* case, and supported by some critics, in reality, it is as if the Court did not even try to assess the question of attribution. The ICTY in doing so, in a case very different from the one analysed, decided to consider the test differently, adopting the concept of 'overall control'. In the *Tadić* case, the ICTY found itself dealing with the attribution of State responsibility for very special reasons since the Court dealt only with crimes committed by individuals.

The Court found itself determining whether the Prosecutor could have brought *Tadić* before the ICTY, since art. 2 of the Statute for committing grave breaches of the Fourth Geneva Convention deals only with international armed conflicts, while *Tadić* was not responsible under art. 2 because he acted in an internal conflict. In order to establish whether the conflict was international or not, the Court, in order to have jurisdiction, analysed the involvement of a foreign State, the Federal Republic of Serbia, in the Bosnian territory and then the alleged control of the former over the Bosnian Serb military. In defining an international conflict that takes place in the case in which two or more States are involved, or even when armed forces that 'belong' to another State are involved in a separate State, the Court, in ruling that they were in presence of an international conflict, examines the degree of control of the State.

Given that the international humanitarian law does not establish any criteria for determining the scope and the nature of such authority or control,

[138] Ivi, par. 116.
[139] *Ibidem*.

the only way to find applicable rules, according to the Appeal Chamber, was to take into account the norms on State responsibility in establishing when individuals may be regarded as acting as de facto State officials. For this reason, the Chamber decided to look at the rules outlined in the US v. Nicaragua case, partly revising them. Although the nature of these two cases is completely different the Court says:

> "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a de facto organ of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; (ii) where the court must instead determine whether individuals are acting as de facto State officials, thereby rendering the conflict international and thus setting the necessary precondition for the 'grave breaches 'regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international"[140].

Having defined the context in which to assess this case, the Court added:

> "to prevent states from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, states are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law"[141].

And it is exactly on this issue that the Tribunal, taking into consideration the degree of control, to ensure the imputability of the Federal Republic of Serbia, misconstrues the concept of "effective control" outlined by the ICJ in the Nicaragua case - not element of customary law[142]- in favour of a new more flexible test. The Tribunal justifies this decision by identifying two different degrees of control.

The first one may be used for acts performed by private individuals who have committed, in the exercise of State functions, a violation of international law in foreign territory. In this first case, what is taken into consideration is the specific instruction given to that organ. It could be identified by the effective control stated by the ICJ. The second typology, instead, is that of the overall control of an international actor over an agent or organ, and can be

[140] Judgment of the ICTY, *Tadić case*, par. 104.
[141] Ivi, par. 117.
[142] CASSESE (2007).

applied in all cases in which certain specific conducts are carried out by subjects who are part, hierarchically, of the State structure or the International Organisation.

The second test is called "overall control", and it is the one applied by ICTY to the *Tadić* case[143]. The concept of overall control tries to make the control test more flexible and less strict, enlarging the possibility to recognise a direct link between organ and actor, even in cases of coordination, helping, or planning of a certain activity, hence without considering the specific control for each operation[144].

Two tests have been faced which, however, use the same standards for State responsibility. According to some scholars, if we consider the two cases we have talked about separately it is possible to consider both as admissible, as also held by Antonio Cassese, based on the fact that the two Courts used a different interpretation "which assign to each test a different scope and purport"[145]. The scholar Hannah Tonkin clarifies that even though the case related to the possibility to attribute to the US the conduct performed by the 'contras' is determined by primary rules, whereas the case related to Tadić by secondary rules, there is no legal practice that could justify and exclude the possibility of applying both tests[146].

According to Cassese, the differences that open up the use of a different test are justified by the fact that in some cases, if a State supports paramilitary groups and at the top of that coordinates its actions, this means that a link certainly exists between the two actors and therefore must be considered as such. To resolve cases where "activity which contravenes both the instructions or directions given and the international obligations of the instructing State"[147] the ASR Commentary (paragraph 8) states: "Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it"[148]. In other words, an individual, or a group of individuals, which commit a breach of an international obligation, under the control of the State, even if it goes beyond the instruction or authorization, will be attributable to the State. Following this logic, once a link

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[143] There are also other cases in which overall control has been used, cases of which the ICTY also speaks in the Tadić case. For example, one of the best known is certainly the Judgment of the European Court of Human Rights of 8 July 2004, Application no. 48787/99, *Ilaşcu and others v. Moldova and Russia*. The court, in dealing with state jurisdiction, pursuant to art. 1 of the Convention, at paragraph 319 states: "This is because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime. In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them".

[144] Judgment of the ICTY, *Tadić case*, par. 120.

[145] CASSESE (2007).

[146] TONKIN (2011: 118).

[147] ASR Commentary, art. 8, par. 8.

[148] ASR, art. 8, par. 8.

is confirmed, any kind of action in breach of international obligations committed by a group that exceeds their authorization should be intended as an act committed by the State, which is thus responsible for that wrongful act.

Despite this interesting discussion among scholars of international law, the ICJ, in order to delineate a clear and definitive threshold of attribution, pronounced itself in the case of the Bosnian Genocide in favour of the standard identified in the *Nicaragua* judgment[149]. A clear outcome of this decision was that, when it comes to direction and control, this must, and can be, only "effective". According to the ILC, the ICTY's "mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law"[150].

To this end, the Court defines the overall control used by the ICTY as "unpersuasive" for two sets of reasons. First of all, as mentioned, "logic does not require the same test to be adopted in resolving the two issues, which are very different in nature"[151] and secondly the 'overall control' test overly broadens the scope of State responsibility because it goes beyond the three standards set out by the ILC in art. 8 of the Articles on State responsibility. In other words, for the ICJ, they are two distinct and separate legal issues and cannot in any way be mutually accepted. Furthermore, the ICJ, in responding to the question whether the Bosnian Serbs troops that perpetrated the genocide, were acting or not on behalf of the Federal Republic of Yugoslavia (FRY), applies the effective control test and therefore in compliance with art. 8 ASR and customary law, rejects the overall control introduced by the ICTY in the *Tadić* case.

The Court held that the General Ratko Mladić and other officers, authors of the Srebrenica genocide, were not *de jure* organs of the FRY, nor could they be equated with such organs on account of possible "complete dependence" on the FRY which is why the Federal Republic of Yugoslavia was not responsible[152]. Having rejected the possibility of having a different test to apply in cases of different legal nature, the ILC states, as if to emphasize the importance of effective control:

> "In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it"[153].

We have discussed the legal practice applied for the responsibility of the State because the creation and the application of these tests will be useful, as said, for the issues of attribution that arise in the context of International

[149] Judgment of the ICJ *Nicaragua v. United states of America*; Judgment of the ICJ *Bosnia and Herzegovina v. Serbia and Montenegro*, par. 402.
[150] ASR Commentary, art. 8, par. 5.
[151] Judgment of the ICTY, *Tadić case*, par. 405.
[152] Judgment of the ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, par. 386 ss.
[153] ASR Commentary, art. 8, par. 5.

Organisations in particular in events concerning the use of national military contingents by International Organisations, and precisely in UN peacekeeping operations where the conduct of the contingent of certain member States can be attributed to the IO rather than to the State or vice versa.

art. 5 and 7 DARIO, as said, cover the issue of effective control. For this reason, it will be necessary to draw attention to the degree of control in order to understand which actors ultimately retain the 'control'. Although the ICJ has focused only and exclusively on the use of effective control, international practice shows a tendency to overcome this restrictive conception, showing how, sometimes, the overall control could serve as a useful test to determine the actualization of a certain conduct. In recent international Court rulings on this subject, particularly the European Court of Human Rights (ECtHR) has been shown that overall control could play a key role in the assessment of attribution as will be seen in the next paragraph[154]. In fact, in the words of the Court, there is talk of the fact that the UN had "overall authority and control"[155] over the operations at issue as they fell within the UN mandate.

2.4.1 The "degree of control" as a tool to assess the authority shared between UN and its Member States

Most of the practice relating to art. 7 DARIO relates to UN military operations and thus to the conduct of the armed forces which is made available to the United Nations by the Member States.

All the organs, in cases of the peacekeeping operation, become organs in the service of the UN, which holds the operational control. Hence, their conduct should be considered as actions performed on behalf of the UN and therefore attributable to the latter. In this regard, it seems necessary to report the formula "UN operational authority" by the UN Department of Peacekeeping operations:

> "The authority transferred by the member states to the United Nations to use the operational capabilities of their national military contingents […] to undertake mandated missions and tasks"[156].

Moreover, with reference to peacekeeping operations, it states that the authority

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[154] Judgment of the Grand Chamber of the European Court of Human Rights of 2 May 2007 (Admissibility), Application nos. 71412/01 and 78166/01, Behrami and Behrami v. France and Saramati v. France, Germany and Norway (*Behrami and Behrami case*).

[155] Ivi, par. 134

[156] UN Department of Peacekeeping Operations and Department of Field Support, *Authority, Command and Control in United Nations Peacekeeping Operations*, 15 February 2008, par. 7.

> "is vested in the Secretary-General, under the authority of the Security Council, […]; [and] involves the full authority to issue operational directives"[157].

Nevertheless, since the States still retain part of the powers and criminal jurisdiction over the members of the national contingent, a problem arises: is specific conduct to be attributed to the receiving organisation or the lending State? For this reason, it becomes necessary to evaluate how effective control operates and how the question of the attribution in UN peacekeeping operations is evaluated.

Before moving on to the Srebrenica case and its judgments, it is interesting to look at a case where International Court applied art. 7 DARIO and provided its interpretation. This includes the decision of ECtHR in May 2007, where the "ultimate authority and control" is used as a test to assess the attribution[158].

In this case, the killing of some Kosovar children by undetonated bombs and the unlawful arrest of an individual was considered. The main question was whether this conduct was attributable to the State to which the military contingent belonged, or whether it was attributable to the United Nations Interim Administration Mission in Kosovo (UNMIK), or ultimately to the NATO Kosovo Force (KFOR) forces, for failing to deactivate the area as mandated and for detaining persons suspected of criminal offences.

France, which was the country of the contingent that was in charge of control and de-mine the area in question, observed that its forces had been made available to NATO KFOR forces and that therefore, having neither no say in the matter, nor any kind of control over that conduct, it could in no way be held responsible for such actions.

Norway, for its part, pointed out that in exercising the detention function of war criminals, its contingent responded only and exclusively to the UN since they held the "overall authority and control"[159].

The Court confirmed the vision of both States, maintaining that for the first case (that is, the management of the orders of detention of the criminals), the competence fell within the mandate of NATO (KFOR), while for the question of de-mining that precise area, the only competence belonged to UNMIK, as provided for by the resolution of the UN[160].

That said, given that UNMIK "was a subsidiary organ of the UN created under Chapter VII"[161], the Court concluded that the actions of UNMIK were attributable to the UN, the organisation being in charge of the conduct in question[162].

Regarding the attribution, in the case of the death of some Kosovars as a result of un-removed bombs, the conclusion seems obvious. On the contrary, for the case of operations conducted under the NATO umbrella (KFOR

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[157] *Ibidem.*
[158] Judgment of the ECtHR, *Behrami and Behrami case.*
[159] Ivi, par. 87.
[160] Ivi, par. 127.
[161] Ivi, par. 143
[162] Ivi, par. 133.

operation), it is more complex to assess the attribution. In this context, the question that the Court asks itself is: Who "retained ultimate authority and control"? The Court answered that the only one with operational control was the Security Council.

In affirming this, the Court starts from the analysis of the Security Council Resolution 1244, specifying that the same council retains ultimate authority and control over KFOR. Therefore, the operational command was exclusively delegated. The Court makes it clear that although the troops had some control over the operations, they were acting on behalf of the Security Council and that the latter ultimately owned the "overall authority and control"[163]. In fact, according to the words of the Court:

> "Since KFOR was exercising lawfully delegated Chapter VII powers of the UNSC and since UNMIK was a subsidiary organ of the UN created under Chapter VII, the impugned action and inaction was, in principle, "attributable" to the UN which had a legal personality separate from that of its member states and was not a Contracting Party to the Convention"[164].

As can be seen in this case, the Court relies on the notion of "overall control", as stated by the ICTY, which seems to be more effective than the "effective control" desired by the ICJ, which probably could have led to a different conclusion.

While it is true that the Court does not explicitly provide the legal basis for its ultimate authority and control test, which raises many doubts about its application and has led to question both its validity and the setting and use of this formula, the latter is never pronounced or at least used by any Court and is not even mentioned by ASR or DARIO.

Nevertheless, this conclusion, although reached by different means, confirms the international standards in force. It is also confirmed by the UN itself, as can be seen from a note sent to the ILC about its Draft articles on the Responsibility of International Organisations.

> "forces placed at the disposal of the United Nations are 'transformed' into a United Nations subsidiary organ and, as such, entail the responsibility of the Organisation, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, 'effective"[165]

Once the ECtHR establishes that the acts and the omissions of KFOR and UNMIK were to be attributed to the United Nations, it moves on to determine whether it has the *ratione personae* competences to review the conduct imputable to the UN. To this end the Court held:

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[163] Ivi, par. 134.
[164] Ivi, par. 142.
[165] International Law Commission, *Comments and observations received from international organizations, Responsibility of international organizations*, 17 February 2011, UN Doc. A/CN.4/637/Add.1, p. 13.

> "Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations"[166].

And the ECtHR goes even further, recognising that the same reasoning applies to States that have voluntarily decided to place its troops at the disposal of the UN military missions. This reasoning is also valid for States as they also play a key role in enabling the United Nations to fulfil its mandate as the guarantor of peace and security[167].

This judgement makes evident two important mistakes made by the Court. The first concerns the fact that the Court should not have applied the law of international responsibility when declaring inadmissibility, but should have based its decision on the same reason as the complaints made, namely on the ground of the jurisdictional link between the applicants and the respondent States.

Besides, this decision, according to some authors, creates a precedent for the protection of human rights in peacekeeping operations. It not only puts the ECtHR in a subordinate position to the importance of UN peacekeeping missions but also prevents itself from judging even on the conduct authorized and controlled by sending State[168].

It is time to move on to describe and analyse the Srebrenica case. The two elements that were to ultimately give rise to the responsibility of the UN will be discussed (namely the breach of an obligation and the attribution). Then, the concept of immunity from the legal process will be examined, that covers any conduct and alleged crime committed by the UN Dutch Battalion for the part attributable to the United Nations. Moreover, the possibility of having a mutual responsibility between UN and its Members will be considered, by analysing the use that the Court make of the articles related to attribution, from *Nuhanović* case[169] to the very recent ruling of the Dutch Supreme Court. This can help to demonstrate how, in the absence of immunity from legal process, the two elements of responsibility, which are assessed and confirmed for the State (the Netherlands has been condemned for a responsibility equivalent to 10%) would be present for the UN Dutch Battalion conducts which were under UN operational authority.

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[166] Judgment of the ECtHR, *Beherami and Behrami* case, par. 149.
[167] Ivi, par. 149.
[168] SARI (2008: 151 ss.).
[169] Judgment of the Dutch Supreme Court of 6 September 2013, case 12/03329 and 12/03324, *Mustafic. and Nuhanović. v. the State of The Netherlands (Nuhanović case)*.

CHAPTER III. THE SREBRENICA GENOCIDE AND THE RESPONSIBILITY OF THE UNITED NATIONS

3.1 AN INTRODUCTION TO THE CASE OF SREBRENICA

This third chapter is entirely devoted to the case of the Srebrenica genocide and the issue of the wrongful acts performed by the Dutch military contingent (Dutchbat), which was placed at the disposal of the United Nations for its peacekeeping mission. The legal cases relating to Srebrenica will be analysed here in order to demonstrate not only the decisions made and the results achieved by the Courts but also the consequences and criticisms directed at a system that is still widely debated - the responsibility of the United Nations.

The most interesting aspect of this issue is certainly the fact that the Netherlands was held partly responsible for the acts performed by the Dutchbat. The Dutch Supreme Court in the judgment related to the *Mothers of Srebrenica v. The State of Netherlands* case (2019[170]), was able to identify the two constitutive elements of the internationally wrongful act during the "transition period"[171]. To achieve this important conclusion, the Dutch Court had to address the issue of attribution in cases of peacekeeping operations. Solely through the determination of attribution of certain acts to the State, it was, therefore, possible to analyse the resulting material breach. This decision follows others which stated on the matter:

1. Dutch Court judgment in the case *Association Mothers of Srebrenica et al. v. The Netherlands and the United Nations* (2012)[172];
2. ECtHR judgment in the case *Stichting Mothers of Srebrenica and Others v. The Netherlands* (2013)[173] ;
3. Dutch Court judgment in the case *Hasan Nuhanović v. The Netherlands* (2013)[174].

What happened during the days of the fall of Srebrenica and how did it happen? From the analysis of the facts, it will be already clear why first, the Mothers of Srebrenica, and later Nuhanović, considered there could be a

[170] Judgment of the Dutch Supreme Court of 19 July 2019, case ECLI:NL:HR:2019:1223, *The Mothers of Srebrenica Association et al. v. The Netherlands*.
[171] Transition period is the expression used by the Ducth Courts in order to specify the period that started after that the Netherlands and the UN jointly decided to evacuate Dutchbat and the Bosnian Muslim refugees from Srebrenica, on the night of 11 July 1995, following the fall of Srebrenica.
[172] Judgment of the Dutch Supreme Court, first division of 13 April 2012, case 10/04437, LJN: BW1999, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*.
[173] Judgment of the European Court of Human Rights (ECtHR) of 11 June 2013, Application Number 65542/12, *Stichting Mothers of Srebrenica and Others v. The Netherland*s (*Stitchting Mothers of Srebrenica*).
[174] Judgment of the Dutch Supreme Court, *Nuhanović.*

connection between the crimes committed by Bosnian Serbs in the enclave and the conduct of the Dutchbat.

Once the analysis of the facts has been done, we will move on to analyse the complaints made by the Mothers of Srebrenica against the UN and the Netherlands before the domestic Courts (2012).

Until 2013 all actions filed against the United Nations and the State of Netherlands were dismissed. This was since the UN, according to the Convention on the Privileges and Immunities of the United Nations[175], has always claimed immunity from the legal process before domestic Courts. This extended to the State, given that the case before the Courts was against the State and the United Nations together, the immunity of the United Nations and therefore the lack of jurisdiction of the Court in this case also extended to the State, making it impossible to identify Dutchbat's responsibility for the events in Srebrenica

Hence, 2013 represents the turning point, thanks to the decision of the Dutch Supreme Court in the *Nuhanović* case. In addition to opening the possibility of a dual attribution between the State and the UN for a single act, the Court found that the Netherlands was, in fact, responsible in connection with the acts committed during the period when the refugees found themselves evacuating the compound protected by UN forces.

Several clarifications need to be made before proceeding. First of all, in the cases we are going to discuss, the fact of the crime of genocide taking place is not questioned[176]. On the one hand, because the plaintiffs did not ask for the crime to be ascertained and on the other hand, because the charges consisted in civil actions for the damage suffered. As a consequence, the issue at stake was that of assessing the conduct of the Dutchbat in managing and preventing the crime of genocide committed by Bosnian Serbs.

We thus need to try and respond to the following question: did or did not the Dutchbat, being the only UNPROFOR battalion present in the enclave of Srebrenica with the aim of protecting the population, commit a breach, by failing to prevent human rights violations and the crime genocide in a town they pledged to protect?

To give an answer, we have to start with the analysis of what happened and then move on to the first question: to whom should Dutchbat's conduct be attributed? To the UN or to the State to which the military contingent belonged (the Netherlands)?

In the light of the findings of the Courts, pursuant to art. 6 and art. 8 DARIO, the acts performed by organs placed at disposal of UN in peacekeeping operations, are in principle attributable to the UN. Nevertheless,

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[175] Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, New York City.

[176] Judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) of 2 August 2001, case IT-98-33, *Prosecutor v. Krstic´ (Krstić Case)*; Judgment of the International Court of Justice of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

the UN enjoys immunity from the legal process and domestic Courts cannot rule on this issue.

In addition to the particular circumstances of the Srebrenica case (which could have led to the compensation for damages of the State of the Netherlands), the following chapter will be fundamental in order to assess not only the element of attribution (and therefore the fact that the conduct should in principle be attributed to the UN), but also the material breaches committed.

Once the subjective and objective elements of responsibility (as required by art. 4 DARIO) have been ascertained, how could the responsibility of the IO be implemented considering the absolute immunity? Can such an immunity prevail over serious violations of international law such as violations of human rights and even genocide?

The victims of Srebrenica were able to enjoy a form of reparation, but this came only from the State[177]. What about the connection with the crimes committed under the effective control of the United Nations? These questions will be addressed in chapter four.

3.2 FACT CHECKING: WHAT HAPPENED IN SREBRENICA?

The Srebrenica genocide was the culmination of a series of atrocities during the Yugoslav conflict, that began in 1992 and culminated in the Dayton Accords of February 1996.

In 1989, Slobodan Milošević was elected President of Serbia. He immediately proclaimed the intention to establish Greater Serbia as the sole heir to the glorious Yugoslav past. In order to do so, it was clear that a territorial expansion should have taken place, not only in the autonomous regions of Vojvodina and Kosovo, but also in Bosnia and Herzegovina. The aims were not long in coming. In January 1992, Karadžić's[178] followers proclaimed the Republic of the Serbian People (Republika Srpska) in Bosnia and Herzegovina, reaffirming their ties with the Yugoslav Federation. As soon as the international community recognised Bosnia as an independent State, the Republika Srpska declared war on Bosnian Muslims (so called 'Bosniacs').

In pursuing their goal of taking possession of the entire region, the Bosnian Serbs used ethnic cleansing in an attempt to create united Serbia. The peak of violence took place in Srebrenica, a Muslim enclave in the northeast of the country. According to the Bosnian Serbs, taking possession of the area was necessary to eliminate the Bosniacs physically[179].

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[177] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*

[178] Radovan Karadžić was the President of the Republika Srpska during the Bosnian War.

[179] PIRJIEVEC (2006).

The Serbian offensive started on July 6, 1995, from the South, leaving scorched earth wherever the troops passed. On 11 July 1995, they had arrived in Srebrenica where they forced the few and poorly equipped blue helmets to shelter in the nearby village of Potočari, a mini-safe area protected by 200 Dutch peacekeepers. During the retreat, almost 25.000 civilians living in Srebrenica followed the Dutch battalion, in the vain hope of being protected by them. Only 5.000 people managed to enter the base controlled by Dutch soldiers, while the rest camped around it[180].

Another 15.000 people moved towards Tuzla to seek shelter in the town 50 km away. Proceeding in a single line, the queue left after midnight between 11 and 12 July. At dawn on the 12th, the head of the queue was intercepted by Serbian troops who attacked and captured them. Few managed to reach the town of Tuzla, those who remained behind surrendered in the hope of being spared, but many of them were killed[181].

It was in the night of 11 July 1995 that the Dutchbat reached an agreement with Radko Mladić, the field commander of Bosnian Serb troops, on the evacuation of refugees from the compound (Potočari). In the afternoon, 50 vehicles supplied by the Bosnian Serbs arrived in the compound to transport civilians. Mladic reassured the Muslim population. The Bosnian Serbs gathered all the men in Potočari. Some of them were killed on the spot, all the others were deported to Bratunac.

On July 13, 1995, more than 12,000 Bosniacs were killed, for what is called in history as the genocide in Srebrenica, the worst since the Second World War. The Appeals Chamber of the ICTY recognised (in General Krstić's case), what has just been said, stating:

> "By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the 40,000 Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act"[182].

As said before, what is of interest here are not only the actions carried out by the Bosnian Serbs. It is essential to understand the role played by the

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[180] United Nations Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica*, 15 November 1999, U.N. Doc. A/54/549, par. 309.

[181] RIDGEWAY (1997: 79).

[182] Judgment of the ICTY, *Krstić,* par. 37.

Dutchbat, present in the Bosnian territory since 1991 with the sole aim of protecting the population threatened by the war.

The United Nations Protection Force (UNPROFOR), having had, at the beginning, the mandate to "ensure that the three 'United Nations Protected Areas' (UNPAs) in Croatia were demilitarized and that all persons residing in them were protected from fear of armed attack"[183], had then the mission to serve as a peacekeeping force in Bosnia and to deliver humanitarian assistance.

The Security Council, given the conditions in the city of Srebrenica as well as the surrounding area, decided to establish "security zones," "safe havens," and "protected areas" for the Bosnian population suffering at the hands of the military equipped Serbs. Having established a security zone, UNPROFOR assumed responsibility to protect these areas[184].

To this end, UNPROFOR commanders convinced the Bosniacs to sign an agreement and "give up their arms to UNPROFOR in return for the promise of a ceasefire [and] the insertion of a UNPROFOR company intro Srebrenica"[185]. The citizens of Srebrenica agreed to the request and handed over their weapons. Nearly 170 UNPROFOR troops from Canada established their presence in Srebrenica[186], that was finally declared, on 8 May 1993, a "demilitarized zone"[187].

Nevertheless, the attacks, the bombardments and the advancement of the Serbs continued relentlessly and without UNPROFOR doing anything, even though they acknowledged that the population was at great risk of a massacre[188]. It is emblematic to read one of the latest reports sent by the Dutch commander stationed in Srebrenica to his UNPROFOR commanders:

> "I am responsible for these people [yet] I am not able to defend these people; defend my own battalion; find suitable representatives among the civilians because the official authorities are for certain reasons not available; find representatives among the military authorities because they are trying to fight for a corridor to the Tuzla area, and will not show up anyway because of purely personal reasons; manage to force ARBiH troops to hand-over their weapons […] In my opinion there is one way out-negotiations today at the highest level; UNSG, highest national authorities and both Bosnian Serb and Bosnian Government"[189].

This is just one of the very long reports sent to the commanders, which described not only the disastrous and extremely dangerous situation but also

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[183] United Nations Protection Force, Former Yugoslavia, 31 August 1996, UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION.
[184] United Nations Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica*, 15 November 1999, U.N. Doc. A/54/549, p. 48.
[185] Ivi, par. 59.
[186] Ivi, par. 61.
[187] Ivi, par. 65.
[188] Ivi, par. 63.
[189] CANTURK (2007).

the impasse from which it seemed impossible to move. The repeated silence ended with a final UNPROFOR stalemate that led to Srebrenica being seized and within days, despite the control of UNPROFOR forces, to be conquered[190]. Some adds, as reported in the ECtHR judgment concerning the Mothers of Srebrenica, that if UNPROFOR had not disarmed the citizens of Srebrenica, at least they could have defended themselves[191].

It is impossible to predict what could have happened.

What is interesting here, however, is what happened during those days in July and how the situation evolved from a legal point of view.

The Mothers of Srebrenica, an association of 6000 women which had lost their loved ones during the siege, called for justice before the Dutch Courts on the grounds of the genocide, issuing criminal and civil charges.

3.3 THE CLAIMS OF THE ASSOCIATION MOTHERS OF SREBRENICA ET AL. V. THE NETHERLANDS AND THE UNITED NATIONS BEFORE THE DUTCH COURT

The decisions of the Dutch Courts help to assess the link between the UNPROFOR forces and the events in Srebrenica. The first case was brought by the Mothers of Srebrenica before a Dutch District Court, against the UN and the State of the Netherlands: *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*. They complained about the alleged responsibility on the side of the Netherlands and the UN in failing to prevent genocide.

According to the claimant, the UNPROFOR mission unfulfilled the mandate of peacekeeping, since it was its duty to monitor and protect the "safe areas" such as Srebrenica.

There is no doubt that this is a case of genocide, as ruled by both the ICTY and the ICJ[192]. Nevertheless, it was necessary for the Court before which the action was filed, to scrutinize whether the obligation to prevent genocide (art. 1 Genocide Convention) applied in such a specific case[193]. The mothers of Srebrenica complained against both the UN and the Netherlands on the grounds of violations of international and Dutch civil law.

Due to such a complaint, since no criminal issue was involved, the domestic Court could only have agreed by issuing a declaratory judgment in which it should have ruled that the State violated its obligation to prevent

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[190] *Ibidem.*

[191] Judgment of the ECtHR, *Stichting Mothers of Srebrenica.*

[192] Judgment of the ICTY, *Krstić case*, par. 37; Judgment of the ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, p. 43, par. 430.

[193] Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948.

genocide, or by confirming the responsibility of the State in tort[194], given the breach of the international obligations[195]. As we shall see later, the Court refused to rule on this issue as it did not consider it relevant to the resolution of the case[196].

Under the perspective of the Dutch Civil Law, the suit focused on the fact that the UNPROFOR agreed with the citizens present in Srebrenica that, in exchange for the surrender of all weapons, the UNPROFOR would have protected all those present in the "safe area". The Mothers of Srebrenica charged the Netherlands and the UN of committing a tort, since (after reaching such an agreement), they failed to reinforce the contingent in the enclave by sending insufficient weapons, "poorly trained and ill-prepared troops and failing to provide them with the necessary air support"[197].

As declared by some scholars[198], the Mothers of Srebrenica could have based their claims on some important principles of law, both of domestic and international law. In this regard, the most appropriate grounds seem to be: the gross negligence, insofar the Dutchbat acted wrongfully by not taking sufficiently into consideration the safety of the Bosniacs[199], the breach of duty to protect, insofar the UNPROFOR by disarming citizens, indirectly established the duty to protect those citizens, and the breach of the personal right to self-defence.

As for the 'gross negligence'[200], the Mothers of Srebrenica could have charged the Dutchbat before Dutch Courts, for its decision to create a 'safe-haven' and disarm the citizens of the enclave of Srebrenica. When a high risk to the safety of other people exists and nothing is done to protect them, the element of "carelessness" could be envisaged and not only concerning the Dutchbat disarming people; it plays a role also because the U.N. deployed only 2000 additional people instead of the requested 135,000[201].

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[194] The concept of "Tort law" is defined in The Free Dictionary as follow: "A body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor".

[195] RYNGAERT (2017: 458).

[196] Judgment of the Dutch District Court of 10 July 2008, case 2995247/HA ZA 07-2973, LJN: BD6796, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*, par. 4.164.

[197] Judgment of the Dutch Court of Appeal of 5 July 2011, case LJN: BRO133, *Mustafic. and Nuhanović. v. the State of The Netherlands.*

[198] HASANBASIC (2014: 415).

[199] Ivi, p. 433.

[200] The concept of "gross negligence" is defined in The Free Dictionary as follow: "Any voluntary, intentional, and conscious act or omission committed by an individual, with r eckless disregard for the consequences, esp. how they may affect another person's life or prop erty" (at https://www.thefreedictionary.com/)

[201] HASANBASIC (2014: 434).

As far as the breach of duty is concerned, the UNPROFOR troops reached the agreement and promised the people to protect them in exchange for disarmament. These commitments may have represented an indirect duty for UNPROFOR to protect the population. After considering what happened, the crime of genocide by the Bosnian Serbs[202], the Dutchbat allegedly violated their duty to protect the Bosniacs. Nevertheless, this issue is still debated today. It cannot be easily established whether there is a duty to protect for the UN, nor does this thesis want to analyse and focus on this issue.

Finally, the last basis for these complaints is that the Dutchabat, by disarming the citizens of Srebrenica, also deprived them of the possibility and their inherent right to self-defence[203]. These allegations, grounded in Dutch Civil law, must also be accompanied by alleged violations of international law.

These possible charges were based on the fact that the actions performed by the Dutchbat could be attributed to both, the State of Netherlands and the UN (according to the Draft articles on State Responsibility and the Draft articles on the Responsibility of International Organisations). Secondly, the rights of victims were recognised by the UN General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which had direct effect in the Netherlands by virtue of art. 93 of the Constitution for the Kingdom of the Netherlands.

By trying to answer to these charges, and the possibility to hold the Netherlands or the UN responsible for the acts of the Dutchbat, the Dutch Courts decided to dismiss the suit. The Dutch Courts decided to recognise and guarantee absolute immunity from the legal process of the UN, affirming their lack of jurisdiction. The immunity is a peculiarity of all International Organisations and therefore it also extends to the peacekeeping missions[204]. In conclusion: what is the extent of the immunities enjoyed by the UN before Dutch Courts?

3.4 THE UN IMMUNITY FROM THE LEGAL PROCESS IN THE DUTCH SUPREME COURT (2012) AND IN THE ECTHR JUDGMENT (2013)

The case, brought before the Dutch District Court, is based on the principle that the UN, being an International Organisation, has its independent legal

[202] Judgment of the ICTY, *Krstić case*; Judgment of the ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro.*
[203] Charter of the United Nations, San Francisco, 26 June 1945, art. 51.
[204] Judgment of the ECtHR, *Stichting Mothers of Srebrenica,* par. 141; ivi, p. 149; ivi, p.169.

personality. It follows that the UN may be liable for violations of international obligations.

As far as the events in Srebrenica and the role of the UN peacekeeping forces, they were, on the one hand, to be considered an official organ of the UN (as specified in Articles 6 and 8 DARIO on the attribution of conduct to the International Organisations). On the other hand, considering art. 7 DARIO, all the actions of the Dutchbat were in principle to be attributed to the International Organisation (the UN) only if it held effective control over that specific conduct. It seems relevant to remember the note sent by the UN to the ILC:

> "forces placed at the disposal of the United Nations are 'transformed' into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, 'effective'"[205].

As far as international practice is concerned, we have already mentioned the decision of the ECtHR in the *Behrami and Saramati* case in which, to justify the fact that UNMIK's actions were attributable to the UN, the Court refers to the status of the UNMIK as "a subsidiary organ of the UN created under Chapter VII of the Charter"[206]. It was also mentioned that, concerning the attribution of conduct to IOs, art. 6 DARIO is certainly the general rule. Accepting, in principle, that the IO is responsible for conduct of its organs, however, does not exclude a different circumstance, such as that of art. 7 DARIO. As stated above, the provision of art. 7 does not exclude the possibility that certain specific conducts of organs placed at the disposal of an International Organisation could be attributed to the sending State. It has been argued that, according to art. 7 DARIO, the State of origin to which the organ, placed at the disposal of an IO, belongs, continues to retain power in certain matters, such as disciplinary and criminal prosecution powers. Thus, when a State interferes with the UN operations and retains a certain degree of control, the specific conduct could be attributed to the State[207]. The Dutch Court in their attempt to frame the relationship between the Dutch battalion at the service of the UN and the events in Srebrenica) followed a gradual path that led to very important conclusions.

The Dutch Court did not assess the responsibility for such conduct but refrained from giving an answer, stating its lack of jurisdiction *vis-à-vis* the UN. This decision was rendered in the Court of first instance[208], upheld by the

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[205] International Law Commission, *Comments and observations received from international organizations, Responsibility of international organizations*, 17 February 2011, UN Doc. A/CN.4/637/Add.1, p. 13.

[206] Judgment of the ECtHR, *Behrami and Behrami case*, par. 143.

[207] International Law Commission, *Comments and observations received from international organizations, Responsibility of international organizations*, 17 February 2011, UN Doc. A/CN.4/637/Add.1, p. 14.

[208] Judgment of the Dutch District Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*.

Court of Appeal[209] and confirmed by the Supreme Court[210]. The Dutch Court granting immunity to the UN triggered several criticisms. For instance, as reported in the writ of summons in the Judgment of the 2012, according to the Mothers of Srebrenica[211]:

> "There is no higher norm in international law than the prohibition of genocide. This norm in any event takes precedence over the other norms at issue in this legal dispute. The enforcement of this norm is one of the main reasons for the existence of international law and for the most important International Organisation, the UN. This means that in cases of failure to prevent genocide, International Organisations are not entitled to immunity, or in any event the prohibition should prevail over such immunity. The view that the UN's immunity weighs more heavily in this instance would mean de facto that the UN has absolute power. For its power would not be subject to restrictions and this would also mean that the UN would not be accountable to anyone because it would not be subject to the rule of law: the principle that no-one is above the law and that power is curbed and regulated by the law. Immunity of so far-reaching a kind as envisaged by 10 the Court of Appeal is incompatible with the rule of law and furthermore undermines the credibility of the UN as the champion of human rights"[212].

Although, it is clear, the case of *the Mothers of Srebrenica v. the State of the Netherlands and the UN* cannot be taken into consideration for the analysis of the elements of the responsibility, the Courts' reasoning is important for two fundamental reasons.

The first is: what value is given to the immunity of the UN? The alleged violation of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[213] represents a counter-limitation to the immunity of International Organisations? Does it open up the possibility for the Mothers of Srebrenica to rely only on the State as it is not covered by immunity?

The second reason, on the other hand, will serve as a benchmark for demonstrating that an alternative mechanism should be granted. Counter limiting the immunity and giving the right of access to a Court to the victims could provide the possibility to retrace the two elements of responsibility even for the UN, and in case of ascertained responsibility, complying with the right compensation for damages suffered. This debate is deferred to the next chapter, we will now focus on the motivations that brought the Courts to grant immunity to the UN.

As said, immunity is a necessary condition for the functioning of International Organisations: "such privileges and immunities are necessary for

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[209] Judgment of the Dutch Court of Appeal of 30 March 2010, case 200.022.151/01, LJN: BL8979, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*.
[210] Judgment of the Dutch Supreme Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations.*
[211] Ivi, par. 4.3.14.
[212] Ivi, par. 5.13.
[213] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

the fulfillment of its purposes"[214]. It represents a sort of shield against "unilateral interference by individual governments"[215]. It was according to this view that the Dutch Court declared their lack of jurisdiction.

The Mothers of Srebrenica decided to go before the ECtHR precisely by requesting the violation of art. 6 ECHR. Focusing on the decision of the ECtHR will be useful in order to understand the reasoning that is behind the decision that will characterise a new path, namely to deny the test established in *Waite and Kennedy* case and to give UN immunity a higher value than the protection of the human right of access to a Court. Before analysing the ECtHR ruling, we will look at the arguments put forward by the Dutch Court. This analysis served to understand on what basis the Dutch Court granted immunity to the UN, and on what basis the ECtHR then confirmed this decision as not in violation of art. 6 ECHR. Furthermore, it will be useful not only to understand why the UN cannot be held responsible for the conduct during the UNPROFOR mission but also as an introduction to the next chapter which will deal with the need to find appropriate alternative mechanisms.

In 2008, the District Court ruled its lack of jurisdiction following the letter sent by the UN in which there was an explicit invocation of immunity pursuant to art. 105 of the UN Charter. The Court also went so far as to dismiss the argument put forward by the Mothers of Srebrenica, according to which, immunity should be counter limited, and therefore declared incompatible with the right of access to the Court (as stated by art. 6 paragraph 1 ECHR)[216]. The Court, while recognising the counter limit as a right of individuals (as affirmed by the ECtHR in the *Waite and Kennedy* case[217]), at the same time argues that the ECtHR judgment does not apply in UN immunity cases[218].

The Court of Appeal in 2010 upheld the judgment of the District Court, ruling that "art. 105 of the Charter, does not allow any other interpretation than that the UN has been granted the most far-reaching immunity" [219]. Applying the required standards, the Court developed a very important conclusion, namely that immunity

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[214] Charter of the United Nations 1945, art. 105.

[215] Judgment of the ECtHR of 18 February 1999, case No. 26083/94, *Waite and Kennedy v. Germany, (Waite and Kennedy).*

[216] Judgment of the Dutch District Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*, par. 5.14; ivi, par. 5.16.

[217] Judgment of the European Court of Human Rights, *Waite and Kennedy*, par. 50: "a material factor in determining whether granting [the European Space Agency] immunity from German jurisdiction is permissible under the [ECHR] is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention"; ivi, par. 68: "Although ECtHR case law recognises that these rights can be restricted by immunity, this restriction needs to pursue a legitimate aim and has to be proportionate"; Judgment of the European Court of Human Rights of 21 November 2001, case no. 35763/97, *Al-Adsani v. the United Kingdom (Al-Adsani),* par. 52-67.

[218] Judgment of the Dutch District Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* par. 23.

[219] Judgment of the Dutch Court of Appeal, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* par. 4.2.

> "is closely connected to the public interest pertaining to keeping peace and safety in the world [and] that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for"[220].

This decision, in stark contrast to that of the District Court, indirectly extends the possibility of applying the criteria established in the *Waite and Kennedy* decision also in cases relating to the UN. In answering the question whether there are indeed alternative mechanisms that can guarantee the right of access to the Court to the Mothers of Srebrenica, the Court argues that, in recognising the UN immunity, there are several alternatives available, such as the access to the national Courts for the charges against the State and to the ICTY for the perpetrators of the genocide[221]. The reasoning of the Court of Appeal is not entirely convincing. The cases concerning the State and the perpetrators of the genocide are completely different in nature and structure. In other words, they are different cases against different subjects of law. To confirm this, it is interesting to consider the provisions of the General Convention on the Privileges and Immunities of the United Nations, which links the immunities of the UN with its obligation to establish alternative mechanisms[222]. It is the UN that has to answer for its wrongful acts.

In 2012, the Dutch Supreme Court dismissed the Court of Appeal's argumentation. This decision, based on the view of the special nature of the UN, represented not only the granting of the UN immunity as "absolute"[223] but also the resulting refuse to recognise the right of access to the Court as the *conditio sine qua non* for the recognition of immunity. The conclusions of the Supreme Court do not represent a *unicum* but follow the steps of jurisprudence that have been inaugurated in other previous cases such as the significant 2012 ICJ ruling on the *Jurisdictional Immunities of the State*[224]. In the same judgment of the Supreme Court, there was a clear reference to the ICJ's feeling that:

> "there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the Courts of one State may exercise jurisdiction in respect of another State. They

[220] Judgment of the Dutch Court of Appeal, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*, par. 5.7.
[221] Ivi, par. 5.11; ivi, par. 5.13.
[222] Convention on the Privileges and Immunities of the United Nations, 1946, art. VIII, Section 29. Several mechanisms are established by the UN and vis-à-vis the UN in the context of peacekeeping.
[223] Judgment of the Dutch Supreme Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* par. 4.3.4-4.3.6; Judgment of the ECtHR, *Behrami and Behrami case.*
[224] Judgment of the International Court of Justice of 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)*, (*Jurisdictional Immunities of the State)*; Judgment of the ECtHR, *Behrami and Behrami case.*

> do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful"[225].

On the 27 June of 2013, the ECtHR held that the Netherlands, by granting the United Nations immunity from domestic jurisdiction, did not violate the applicants' right of access to a Court, as guaranteed by art. 6 of the Convention. Even acknowledging that it is "undeniable that where immunity from jurisdiction is granted to any person, public or private, the right of access to Court, guaranteed by art. 6 (1) of the Convention is affected", the Court adds that what is provided for in art. 6(1) is not absolute but that "may be subject to limitations"[226]. The limitations, in any case, have to be assessed by the Court and cannot in any way restrict the right of individuals "in such a way or to such an extent that the very essence of the right is impaired"[227]. Besides, a limitation of the right provided for in art. 6, cannot be accepted if it "does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" [228]. While acknowledging this, the Court, therefore, affirms that the peacekeeping operations established under Chapter VII of the UN Charter, are "fundamental to the mission of UN" [229] and, for this reason, it is recalled the Court decision in *Behrami and Saramati* case, where it is stated:

> "to bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their Courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations"[230].

To that argument, the Court adds that since this is a civil law case[231], international law "does not support the position that civil claim should override immunity from suit for the sole reason that it is based on an allegation of particularly grave violation of a norm of international law, even a norm of *ius cogens*" [232]. The Court concludes that even though there is "the absence of an alternative remedy for the recognition of immunity", this "is [not] *ipso facto* constitutive of a violation of the right of access to a Court" [233]. Therefore, the Court refers to the ICJ judgment in *Jurisdictional Immunities of the State* in which "explicitly denied the existence of such a rule"[234]. The Court goes even further by moving back on to reconsider what it had previously ruled in the final judgments of *Waite and Kennedy*'s case, arguing that as far as IOs

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[225] Judgment of the ICJ, *Jurisdictional Immunities of the State*, par. 93.
[226] Judgment of ECtHR, *Stitching Mothers of* Srebrenica, par. 138.
[227] Ivi, par. 138 (b).
[228] *Ibidem.*
[229] Ivi, par. 154.
[230] *Ibidem.*
[231] Ivi, par. 158.
[232] *Ibidem.*
[233] Ivi, par. 164.
[234] Judgment of the ICJ, *Jurisdictional Immunities of the State*, par.101; Judgment of the ECtHR, *Stitching Mothers of Srebrenica*, par. 164.

are concerned those principles cannot be interpreted "in such absolute terms"[235]. Nevertheless, many scholars have criticised such a conclusion (which will be further analysed at the beginning of the next chapter) based on the impression that with this decision the UN immunity has a prominent value and importance than the violation of human rights[236].

Although the case seemed to be definitely closed, the *Nuhanović* case opened the possibility for the Mothers of Srebrenica, to bring suit against the State. Previously protected by the immunity of the UN (in the case in which States and the UN were jointly accused) essentially because the Netherlands continue to claim that it did not have "effective control" over the Dutchbat, there was now the chance to attribute the Dutchbat acts only to the State[237].

To understand this, it is necessary to consider the subjective element of the internationally wrongful acts, namely attribution.

3.5 DUAL ATTRIBUTION AND ITS APPLICATION

Considering that the opening of the *Nuhanović* case to dual attribution concerns a question strictly related to attribution, we will start with the analysis of the subjective element of responsibility, taking into consideration also the new case of *the Mothers of Srebrenica Association et al. v. The Netherlands* concluded before the Dutch Supreme Court in 2019, and then move on to analysing the objective element in the next paragraph, i.e. the material breach. It is thus necessary to go over how international law poses the question of the attribution of peacekeepers' conduct.

The case law under analysis is related to the UN peacekeeping operations, where national troops are placed at the disposal of the UN by its Member States. As already seen in the previous chapter, it is an arduous operation to retrace actors to which the control (UN or its member state) is attributed.

It was argued in the first chapter that this complex issue is regulated by the DARIO, which codify in articles 6, 7 and 8 the rules to define attribution. It was even analysed that art. 6 DARIO states that the conduct of an agent or an organ of an IO is in principle attributable to that organisation, as also confirmed by UN Legal Counsel and the UN Secretariat, which specified that: "as a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization"[238].

Nevertheless, art. 7 DARIO opens the possibility of analysing the degree of control using a 'factual' criterion, i.e. evaluating in each specific situation

[235] *Ibidem.*
[236] PAPA (2014); DANNENBAUM (2019); RYNGAERT, SPIJKERS (2019).
[237] Judgment of the Dutch Supreme Court, *Nuhanović.*
[238] Comments and observations on Responsibility of International Organisations received from International Organisations, UN Doc. A/CN.4/545, 25, at 28.

which actor holds the effective control so as to determine the attribution. This provision reflects the opinion according to which, even though an organ is placed at disposal of an IO, the sending State continues, even in peacekeeping operations, to maintain control over disciplinary and criminal matters. It should be noted, however, that art. 7 DARIO could be interpreted using the following approach: an organ transferred to the UN is an organ that continues to be part of the structure of the State and therefore remains controlled by it. The result is that this organ can never, even temporarily, become an organ of the IO. As stated in the provision, a factual link with the IO should be established in order to be able to prove that over certain specific conduct there was effective control by the International Organization.

Consequently, art. 8 DARIO, to be read in the light of art. 6 DARIO, confirms that *ultra vires* conduct must also be attributed to the organisation to which the agents or organs belong.

It is worth remembering the set of rules dedicated to the attribution in the ASR, insofar they represent the legal basis for assessing the attribution to the State with regards to the conduct of the State of the Netherlands. The issue concerning the choice of which rules should be taken into account (whether the DARIO or the ASR rules) was one of the most debated issues by the Dutch Courts. In principle, the attribution to the State, as demonstrated earlier, is governed by the Draft articles on State Responsibility. art. 4 ASR was adopted *mutatis mutandis* for the IOs in art. 6 DARIO and states that "the conduct of any State organ shall be considered an act of that State under international law"[239].

A second provision, relevant to the cases, is art. 8 ASR, on which the conclusion reached by the Dutch Supreme Court in *the Mothers of Srebrenica et all. v. the Netherlands case* is based. art. 8 ASR states that "the conduct of a group of persons shall be considered an act of a State under international law if the group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"[240]. The application of art. 8 ASR, which has been used in several past decisions concerning disputes of paramilitary troops or movements not belonging to anyone under international law[241], implies that Dutchbat is an independent organ that belongs to no one and that therefore anyorgan exercising effective control over it is thus responsible for the action.

From which perspective should we look at the issue of the attribution of the Dutchbat acts? Has the Dutchbat become a UN organ (so does art. 6 DARIO apply)? Or does it remain a State organ (art. 4 ASR)? If Dutchbat has become a UN organ, and it acts beyond its competences and against the instructions of the UN, can the application of art. 8 ASR be considered? Or should we ultimately consider only art. 7 DARIO and assess who has effective control over a specific conduct?

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[239] ASR, art. 4.
[240] ASR, art. 8.
[241] Judgment of the ICJ, *Nicaragua*.

3.5.1 The pivotal role of the Nuhanović case: the possibility of dual attribution

The *Nuhanović* case opened to a very important issue, namely the dual attribution of conduct[242].

Hasan Nuhanović was an interpreter of the Dutch battalion whose mother, father and brother were killed during the genocide of Srebrenica. The final decision taken by the Dutch Supreme Court in 2013 ruled that the Dutch State was responsible for the three deaths committed during the events that followed the fall of the enclave. The murders of Nuhanović's family members were carried out when the battalion of UNPROFOR (the Dutch contingent) decided to take refuge in the nearby compound of Potočari. *Nuhanovic* suit was based on the complaint that, despite UNPROFOR personnel had witnessed the atrocities of the Bosnian Serbs (killings and various mistreatments of refugees outside the compound), they did not take any necessary measures to prevent further deaths. On the contrary, they allowed other civilians to leave the compound. More than 200 Bosniacs, including Nuhanović's family members, were captured and killed by Serbian paramilitary troops besieging the mini safe area.[243]

To understand Dutchbat's involvement in the *Nuhanović* case, we need to take a step back and go deeper into the matter. Nuhanović, an inhabitant of Srebrenica, had been recruited by the Dutchbat as an interpreter, and as such, the UNPROFOR battalion could include him in the evacuation list. His family, not being part of the UN personnel, tried several times to seek refuge in the compound[244]. Nuhanović himself, aware of the situation outside the compound, tried several times to include his family members in the evacuation list so that he could save their lives[245]. Dutchbat decided to grant this measure only to Nuhanović's father, who for the sake of his wife and son decided to give it up. They were let to go out together with other refugees. All three of them were murdered by the Serbs. After most of the genocide was committed, the Dutchbat left the compound on July 21, 1995[246].

To address the issue, the Dutch Supreme Court must necessarily start from the analysis of the accusations brought by Nuhanović. The two charges brought consisted of: a) the Dutchbat acted wrongfully in refusing to add his parents to the evacuation list of local personnel; b) the Dutchbat wrongly expelled refugee-seekers, including Nuhanović's mother, father, and brother from the compound.

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[242] Judgment of the Dutch Supreme Court, *Nuhanović*.
[243] BILEFSKY, SIMONS (2014); CORCORAN (2014).
[244] Judgment of the Dutch Supreme Court, *Nuhanović,* par. 9.
[245] *Ibidem.*
[246] Ivi, par. 10.

The Court had to address two main issues: whether Dutchbat's conduct could be attributed to the State[247] (and not only to the UN), and whether Dutchbat's conduct was wrongful[248]. In other words, the two elements of responsibility, the subjective and the objective. In order to determine attribution, the Court necessarily had to use the assessment of the degree of control, using the effective control theory. In employing this theory, the Court decided to take into account not only the orders of the chains of command but also who could prevent wrongdoings, to correctly assess the attribution of that specific conduct[249]. In the Court's words, relevance should not only:

> "be given to the question whether [particular] conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned"[250].

The effective control theory affirms that when a State is placed at the disposal of an International Organisation (UN peacekeeping operations), it is essential to consider and therefore determine which actor has the effective control over the conduct of a given contingent. The innovation of the Court starts from here: the attribution can be determined for more than one subject[251].

The Court decided to adopt this approach primarily because only effective control, unlike others, gave the possibility of assessing which subject, between the State and the UN, exercised effective control over certain specific conduct. In other words, the Court affirmed that a dual attribution of responsibility is possible. The Court comes to this conclusion for a second main reason. The suit of the *Nuhanović* case was only against the State of the Netherlands, so the question on which the Court approached it was essentially whether the State had effective control over that conduct for which the Dutchbat was accused[252]. In this passage, it is evident why the Court decided to focus on a precise attribution standard, i.e. effective control[253], rejecting both the operational overall control standard used by the District Court[254], and the ultimate control as used in the *Behrami and Saramati* case by the ECtHR. By taking this decision, the Court of Appeal chooses not to consider the Dutch Battalion as a subsidiary organ of the UN and thus aligning its decisions with the ILC's provisions in the DARIO and precisely art. 7 DARIO.

Nevertheless, the Court had to focus on two further essential questions: who, between UN and State, retains the effective control over the execution of that specific instruction? And what, if there was no instruction?

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[247] *Ibidem.*
[248] *Ibidem.*
[249] Ivi, par. 11.
[250] Judgment of the Dutch Court of Appeal, *Nuhanović*, par. 5.9.
[251] Judgment of the Dutch Supreme Court, *Nuhanović*, par. 12.
[252] Ibidem; Judgment of the Dutch Court of Appeal, *Nuhanović*, par. 4.13.
[253] Ivi, par. 5.4.
[254] Ivi, par. 5.8.

The Court, in assessing the interpretation of attribution, not only focused on whether that act was an implementation of specific instructions but also on whether, "if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned"[255]. In other words, the action under analysis can be attributed to the State when the State had the power[256] to control Dutchbat's actions and, in this specific context, to prevent Nuhanović's relatives from being removed from the evacuation list. This possibility of attributing the conduct to the State is also stated by the DARIO in the Commentary to art. 7, where it is clarified:

> "[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"[257].

This is what the Court will call the legal power (or the normative control), i.e. the formal power of the Netherlands to prevent certain conduct and to make certain choices[258] which will be considered by the Court as another analysis, that of factual control. And the Court will succeed in attributing effective control to the State on the basis that after 11 July 1995, UNPROFOR's mission had failed, and the decision to evacuate the compound was taken mutually by UN General Bernard Janvier and representatives of the Dutch Government[259]. That is why the Court was able to attribute the conduct in question directly to the Netherlands instructions[260].

This approach has thus led to the final decision of the Court according to which, in the end, both could have effective control over Dutchbat and therefore the State of the Netherlands, detaining effective control, was responsible for the wrongful act of having failed to protect and prevent the concerned conduct. Furthermore, in the words of the Court, referring to art. 48 DARIO[261], "it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party"[262]. It was this

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[255] Ivi, par. 5.9.
[256] Although the Court decides not to use this formula due to the fact that the term power can take on different connotations, thus deciding to replace it with 'being able to prevent'.
[257] DARIO Commentary, art. 7 par. 7.
[258] Judgment of the Dutch Court of Appeal, *Nuhanović*, par. 5.10; ivi, par. 5.18.
[259] Ivi, par. 5.12.
[260] Ivi, par. 5.19.
[261] DARIO, art. 48: "Responsibility of an International Organisation and one or more States or International Organisations,
1. Where an International Organisation and one or more States or other International Organisations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.
2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.
3. Paragraphs 1 and 2: (a) do not permit any injured State or International Organisation to recover, by way of compensation, more than the damage it has suffered; (b) are without prejudice to any right of recourse that the State or International Organisation providing reparation may have against the other responsible States or International Organisations.
[262] Judgment of the Dutch Court of Appeal, *Nuhanović*, par. 5.9.

unique decision that allowed the Court to avoid considering the effective control of the UN to focus only on whether the State of Netherlands had effective control[263].

Moving into the details of the Dutch Supreme Court decision, however, it is interesting to note that the Court's approach, and the assessment of the attribution of conduct to the State, is based on art. 7 DARIO. The main question here is one: why did the Court use art. 7 DARIO and not art. 6 DARIO? As far as art. 6 DARIO is concerned, the Court makes one issue immediately clear: art. 6 DARIO, as understood by the ILC, deals with organs that are part of the IO structure, and in this context, the battalion of peacekeepers is not a UN organ but an organ placed at the disposal of the UN by its Member States. The Court considers it necessary to use art. 7 DARIO because this provision was created by the ILC to regulate the possibility that the sending State still maintains some form of control and/or power over the battalion, given that in cases of troops placed at the disposal of an IO, the State continues to retain disciplinary powers and criminal jurisdiction over its peacekeepers[264].

A second interesting part of the Court's decision, on which the allocation to the State of Netherlands is based, concerns the use of art. 8 ASR. To say that the effective control over specific conduct of an organ (in this case, the UN Dutch battalion), is not attributable to the UN, does not mean that this conduct is directly attributable to the State. This is why the Court used art. 8 ASR so as not to leave any doubt and to define its attribution to the Netherlands. Some authors, such as Spijkers[265], have pointed out that the Court's decision to use art. 8 ASR, although leading to the same conclusion, is misleading. art. 8 ASR was created by the ILC to define the attribution of the conduct of independent groups or persons, not formally part of the structure of a State, and exceptionally, to the State that had effective control over them[266].

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"[267].

A typical example is that of independent paramilitary movements acting on behalf of a State, which are not the battalion placed at the disposal of the UN. It is pointed out that, in order to arrive at the same conclusions and not to fall into any kind of legal error, it could have been based, as far as the attribution to the State is concerned, on art. 4 ASR which states:

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[263] *Ibidem.*
[264] DARIO Commentary, art. 7, par. 1; ivi, par. 4; ivi, par. 8.
[265] SPIJKERS (2014: 285).
[266] *Ibidem.*
[267] ASR, art. 8.

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State"[268].

In the final decision of the Dutch Supreme Court, the Dutchbat battalion action was to be attributed to the Netherlands and in the end, the State was found responsible under Bosnian civil law[269]. The most peculiar thing about the *Nuhanović* case concerns the approach used by the Dutch Supreme Court. It is based neither on art. 6 DARIO, which would suggest that the organ belongs to the UN, nor on art. 4 ASR, which would suggest that the organ belongs to the State.

By using the provision of Articles 7 DARIO and 8 ASR, the Court suggested that the question of attribution in the context of peacekeeping operations must be resolved in the light of the fact that the organ (Dutchbat) belongs to neither State nor UN. Therefore, the organ should be considered as autonomous and private and that whatever actor has control over a specific situation, the conduct is ultimately attributable to it. The innovation in the *Nuhanović* case, however, lies precisely in the fact that, while until then (as seen in *The Mothers of Srebrenica vs. The UN and the State of Netherland*), the UN enjoyed immunity and the Dutch State entrenched itself behind the justification of not having effective control over the conduct of UN battalion, the *Nuhanović* case opens up exactly this last possibility. The *Nuhanović* case represents a very important legal precedent and gives the legal basis to the Mothers of Srebrenica to bring a claim against the State of Netherlands for the wrongful conduct considered[270].

Besides, by attributing at least some acts to the Netherlands, the Dutch Court indirectly demonstrated how certain actions could equally be attributed to the UN. It is on this basis that some scholars have taken the position that the conduct of peacekeeping troops can always be attributed to both the sending State and the UN[271].

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[268] ASR, art. 4.
[269] Judgment of the Dutch Court of Appeal, *Nuhanović*, par. 6.20; ivi, par. 6.21.
[270] DANNENBAUM (2013).
[271] CONDORELLI (1995); CONDORELLI (1997).

3.5.2 The application of the dual attribution in the Mothers of Srebrenica et all. vs. The Netherlands case

The Dutch Supreme Court, in the *Nuhanović* case, refers to art. 48 DARIO and concludes that the same conduct can be attributed both to the Netherlands and to the UN. In the case concerning *Mothers of Srebrenica et al. v. the Netherlands*, the District Court followed the same approach of the Supreme Court in *Nuhanović*.

The most interesting topic in the District Court's final judgment is that, in order to assess the conduct and define its attribution, it only draws the attention to art. 7 DARIO and the effective control test[272]. This choice to rely solely on art. 7 DARIO (without ever mentioning art. 6 DARIO, nor at least the Draft articles on the State Responsibility, art. 4 and 8 ASR), suggests a clear view of the Court: to assess the attribution of Dutchbat's conduct neither as a UN organ (institutional link) nor as an organ of the sending Member State. The attribution of conduct of the organ placed at the disposal of the UN contingent (UNPROFOR) must be assessed only on the basis of the effective control[273]. Confirming this theory, the judgment of the Court relies on a misinterpretation of *ultra vires* conduct and art. 8 DARIO. In fact, according to the District Court, when a State places at the disposal of the UN a military contingent, this follows the orders of the latter. At the same time, in the case in which a battalion placed at the disposal of the UN no longer responds to the orders of UN commanders or acts beyond the authority or the given instruction, these actions are to be attributed to the sending State. According to the Court in such cases, there is a State interference in the management over the operational control of the mandate, since *ultra vires* conduct is to be configured with the powers that the State continues to preserve even when it places some organs at the disposal of the UN, i.e. training, preparations, selection and jurisdiction over criminal conduct of the troops sent. In other words, in these cases, the Court argues, it speaks of functions of State organs acting *ultra vires*[274].

This reasoning seems to be in stark contrast with the law of international responsibility and with what was codified in art. 8 DARIO. art. 8 itself specifies that even when conduct exceeds the authority of an organ or agent of an International Organisation, i.e. it is *ultra vires*, it must be considered an act of the organisation under international law[275].

The Court's approach, according to which the conduct of organs placed at disposal of the UN acting *ultra vires* becomes an act of the sending State, therefore, seems unconvincing. The ILC has been very precise in defining the

[272] Chapter 2 paragraph 2.3 of this thesis.
[273] Judgment of the Dutch District Court, *The Mothers of Srebrenica v. The Netherlands* par. 4.32; ivi, par. 4.37; ivi, par. 4.26; ivi, par. 4.58; ivi, par. 4.59; ivi, par. 4.80.
[274] Ivi, par. 4.57.
[275] DARIO, art. 8.

attribution in cases of *ultra vires* conduct. First, analysing art. 8 DARIO, in paragraph 2 of the Commentary, it is specified that this should be read in the context of art. 6 DARIO. This clearly indicates that all organs and agents falling under art. 8 DARIO "are persons and entities exercising functions of the organization"[276]. For this reason, the conduct of these organs, and ultra vires as well, must be considered as actions of that same organisation of which they are part[277].

The District Court comes to the conclusion that, due to the cooperation in the evacuation of the refugees, such conduct can be attributed to the Netherlands. What played a key role in this decision was the fact that

> "The previously normal situation in which a State puts its troops to work at the disposal of and under the orders of the un during a peacekeeping operation changed substantially when Srebrenica fell at the end of the afternoon of July 11th, 1995. After that a period of transition was entered into in which the State had a say in the actions of Dutchbat when providing humanitarian assistance to and preparing the evacuation of the refugees from the mini safe area"[278].

Since the Court of Appeal ruled that in order to assess the effective control the burden of proof was "something that the Association et al. (the Mothers of Srebrenica) must argue"[279], the Mothers of Srebrenica decided to uphold the District Court's approach. The view of considering Dutchbat conducts as *ultra vires* was taken as a ground in Appeal to provide the evidence that Dutchbat conducts were attributable to the State and not only to the UN. The Court of Appeal rejected this ground based on art. 8 DARIO. The Court argued that given the fact that when the conduct of an organ takes place in official capacity (therefore also considered cases where the conduct does not reflect the orders and instructions received by the person who holds 'the overall functions', i.e. *ultra vires* conduct), the attribution of such conduct remains in the hands of the actor who holds the overall control on it[280].

For this reason, the Srebrenica Mothers' claim must be rejected. Considering the Dutchbat conducts as *ultra vires* and in violation of the UN instructions, it does not mean that they are not to be attributed to the UN which holds control over them (art. 8 DARIO). The Court makes clear that *ultra vires* acts are a completely different issue than the cases in which the contingent acts in private capacity. The latter case should not be considered in line with art. 8 DARIO[281]. In other words, *ultra vires* acts are attributed to the UN whereas all those acts that have no connection with the overall function of the

[276] DARIO Commentary, art. 8 par. 2.
[277] DARIO, art. 8.
[278] Judgment of the Dutch District Court, *The Mothers of Srebrenica v. The Netherlands,* par. 4.80.
[279] Ivi, par. 12.1.
[280] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica v. The Netherlands*, par. 15.2.
[281] Ivi, par. 15.3.

UN mission cannot be attributed to the organisation[282]. The conclusion of the Court of Appeal is unique

> "With the above the Court of Appeal ruled that the [military] operational acts of war performed by Dutchbat which are in dispute were performed without factual control of the State over specific acts, and within 'the official capacity' and 'within the overall functions' of these UN troops. Therefore, these acts performed by Dutchbat cannot be attributed to the State as wrongful acts, nor as acting ultra vires [. . .]"[283].

In order to reach the conclusion, the Court of Appeal starts from an interesting consideration. The acts performed by peacekeepers are to be attributed to the UN. This reasoning would suggest that the Court of Appeal has relied on art. 6 DARIO while considering art. 7 DARIO as an exceptional and particular circumstance. As can be seen from the judgment of the Court of Appeal, the argument to start from is of considering the troop-contributing State (Dutchbat), as an organ that has been transferred under the command and the control of the UN, and this means that the UN in principle exercises effective control over it[284]. This reasoning is what led the Court of Appeal to overturn the District Court's decision. The core assumption here was that when a battalion is placed at the disposal of the UN for peacekeeping missions, this is considered in any case an organ of the UN[285] (while, as seen, the District Court did not consider Dutchbat to be a UN organ). In the first Court of Appeal's view, the conduct during the fall of Srebrenica is attributable exclusively to the UN.

Nevertheless, the Court of Appeal, to address the main charge in the case, (i.e. the charges against the Netherlands and therefore when and if attributable to them), argues that what was said above is subject to a substantial change in interpretation if the 'transition period' is taken into account: such transition period started after the Netherlands and the UN jointly decided to evacuate Dutchbat and the Bosnian Muslim refugees from Srebrenica, on the night of 11 July 1995, following the fall of Srebrenica. In doing so, the Court of Appeal recognises that there may exist quite particular circumstances in which certain actions may be attributable to the sending State. This could happen because in such situations, the State, to which the contingent originally belonged, continues to have the power to exercise effective control over specific conducts[286].

In order to reach these conclusions, the Court of Appeal does not rely, as initially stated, on art. 6 DARIO, but only on art. 7 DARIO. In this regards as

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[282] That does not mean that such conduct can always be attributed instead to the troop-contributing State. Some conduct of individual soldiers cannot be attributed to either; the only option is to hold the individual soldier responsible.
[283] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 32.1.
[284] Ivi, par. 12.1.
[285] Ivi, par. 15.2.
[286] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 12.1.

claimed by some authors[287], in using only art. 7 DARIO (without considering art. 6), it is difficult to understand how an organ belonging to the State becomes an organ of the UN[288]. To better understand this passage, however, it is necessary to briefly contextualize what happened.

The Court poses itself a question: who took the initiative (the State or the UN) on 11 July 1995 to evacuate the refugees from the mini safe area, and to what extent the State exercised control over Dutchbat in this connection?

Observing the Court's reasoning, it can be noted that the hypothesis of considering the effective control of the organ in the hands of the State, in the specific situation of the transition period, is asserted. The Court starts by assessing ground 7 of the Mothers of Srebrenica, according to which "the State, after the fall of the safe area, took over control from the UN and initiated the evacuation of the refugees contrary to Gobillard's[289] order"[290].

First of all, let's start by evaluating what the general indications were, or rather if the UN was thinking about an evacuation of the mini safe area. In order to answer this question, the Court takes into consideration important passages of discussions that took place between 11 and 12 July 1995. The Court notes that the UN command centres, after several consultations, had already decided that there was no better alternative than evacuating the population of Srebrenica, defined "entirely unprotected and in wretched circumstances"[291].

For this reason, the Court notes that to safeguard the safety of the refugees it was decided to involve Dutchbat so as not to leave the population at the mercy of Bosnian Serbs and on 11 July, the possibility of evacuating the population was considered. As proof of this, the command of the UN instructed Colonel Karremans "to put himself forward to the Serbs to organise the evacuation of the refugees"[292].

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[287] RYNGAERT, SPIJKERS (2019).

[288] This criticism focuses on the interpretation of art. 7 DARIO, according to which the organ placed at disposal remains an organ of the sending State. When this organ is placed at disposal of UN, it is only temporary and the organ officially remains an organ of the sending State.

[289] UNPROFOR General Hervé Gobillard the commander of Sector Sarajevo. On the 11 July 1995, General Gobillard was acting as UNPROF commander in General Rupert Smith's absence.

[290] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands*; ivi, par. 23.8; Ivi, par. 2.45: "On 11 July 1995 at 6.45 p.m. Karremans received a fax from Gobilliard with the following contents (hereinafter also: Gobilliard's order): "a. Enter into local negotiations with BSA forces for immediate cease -fire. Giving up any weapons and military equipment is not authorised and is not point of discussion.
b. Concentrate your forces into the Potoc˘ari Camp, including withdrawal of your Ops. Take all reasonable measures to protect refugees and civilians in your care.
c. Provide medical assistance and assist local medical authorities.
d. Continue with all possible means to defend your forces and installation from attack. This is to include the use of close air support if necessary.
e. Be prepared to receive and coordinate delivery of medical and other relief supplies to refugees".

[291] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 23.1.

[292] Ivi, par. 23.2a.

On the same date, 11 July 1995, the decision to evacuate was taken. Nevertheless, the decision was not taken by the chains of command of the UN, but by an agreement reached by two members of the Dutch government: Van den Breemen and Van Baal, and the General of the UNPROFOR Bernard Janvier. As stated in the judgment, Van Baal talked about this conversation before the Parliamentary Committee of Inquiry:

> "Of course, we also discussed the idea to recapture the enclave by armed force. This suggestion came from Paris. General Janvier and General Van den Breemen did not think this was realistically possible whatsoever. Three options were discussed. In the first place the option whereby Dutchbat abandoned the enclave because the battalion could not execute its duties any longer. In the second place the option whereby Dutchbat puts up resistance by force of arms. In the third place the option whereby Dutchbat evacuates either together with the population or after the population. Having considered everything option 3 was chosen unanimously. […] Dutchbat and the population were to evacuate, either together or consecutively. That was agreed as such with General Janvier"[293].

It must be pointed out that the Court of Appeal rejected Ground 7 of the Mothers of Srebrenica complaints, since the control did not pass into the hands of the State, simply because the Dutchbat acted contrary to Gobilliard's order, but because the decision to evacuate the population and the Dutchbat "came about by mutual consultation between Janvier on behalf of the UN on the one side, and Van den Breemen and Van Baal on behalf of the State on the other"[294]. Gobillard's order was distinct from the agreement reached by Van Breemen and Van Baal on the evening of 11 July 1995 with Gobilliard's superior General Janvier, whose agreement entailed that the population would indeed be evacuated.

The Court's final consideration, among other things, shows that the possibility of evacuating the population was more real than ever. The UN was well aware that the situation was not sustainable. And as proof of this, the Court of Appeal quotes two documents of fundamental importance. The first is a report by General Karremans describing the situation on July 12, 1995. This description testifies that the decision to prepare an evacuation had not, in the evening before, been made by the UN.

> "He [Karremans] was informed [by Mladic´], during the negotiations on an immediate ceasefire with the Bosnian Serbs, that in the event of air strikes or close air support, the Bosnian Serbs would shoot and kill the entire compound in Potoc˘ari, including all Dutchbat personnel and refugees. Karremans also wrote that he was responsible for over 15,000 people within one square kilometre in an extremely vulnerable position ["sitting duck" – with a view of the Bosnian Serb arms], without being able to defend those people"[295].

[293] Ivi, par. 23.2c.
[294] Ivi, par. 23.8.
[295] Ivi, par. 23.6.

In support of this, the Court also quotes the letter written by Janvier to Mladić, dated 12 July 1995[296], stating that even considering "the grave humanitarian situation at that moment"[297] it is impossible to conclude that the UN wanted to keep the population in the mini safe area "longer than would be necessary for evacuation purposes"[298]. This means that the UN chains of command only wanted to stall in order to prepare themselves.

Besides, the Court of Appeal argues that although Dutchbat conduct was contrary to Gobillard's orders[299], "the assertion that the UN did not want to evacuate the population is not supported by Gobilliard's order, either", nor by UN Resolution 1004[300] (although not respected by either UN or Bosnian Serbs) which called for the status of Srebrenica to be respected, and for the status of a safe area to be restored. The Court adds:

> "In no way does it show that the UN was in the process of forging military plans to reoccupy the enclave – leaving aside the question whether this could have been done safely in the presence of the [too numerous] population"[301].

The agreement made by General Janvier and the Dutch government, not only represented the failure of the UN mission but also the central element to determine the attribution of the final decision to evacuate the population from the mini safe area[302]. Taking into consideration all the above mentioned and relying on the DARIO, the Court of Appeal stated that the attribution to the State was possible for two reasons. The first because there was a clear interference of the State in the evacuation's decision, and the second because the Dutchbat acted outside the official capacity and overall functions of the UN.

The same agreement reached by the Netherlands and UNPROFOR General Janvier, represents the beginning of the 'transition period', i.e. when Dutchbat acts, approximately at 11 p.m. of 11 July 1995, truly outside the competences of the UN and under the effective control of the Netherlands and the UN. It is here that the Court states: "to that extent, the State had effective control"[303].

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[296] Ivi, par. 23.7.
[297] Ivi, par. 2.44.
[298] Ivi, par. 23.7.
[299] See above note 284.
[300] Ivi, par. 2.48. On 12 July 1995, the Security Council adopted Resolution 1004 "Demanding withdrawal of the Bosnian Serb forces from the safe area of Srebrenica, Bosnia and Herzegovina", which included, inter alia, the following:
"1. Demands that the Bosnian Serb forces cease their offensive and withdraw from the safe area of Srebrenica immediately; (…) 6. Requests the Secretary -General to use all resources available to him to restore the status as defined by the Agreement of 18 April 1993 of the safe area of Srebrenica in accordance with the mandate of UNPROFOR, and calls on the parties to cooperate to that end". This Resolution was not complied with. The Bosnian Serbs did not heed the call to cease their offensive and withdraw from the safe area immediately, nor did the Resolution result in an order to Dutchbat to take in positions in and around Srebrenica or otherwise attempt to recapture Srebrenica by military intervention".
[301] Ivi, par. 23.5.
[302] Ivi, par. 24.1.
[303] Ivi, par. 24.1; ivi, par. 24.2.

To be precise, the Court specified in two passages that State control was limited to the "evacuation of the population and the withdrawal of Dutchbat"[304] and in relation to "the humanitarian aid and the evacuation of refugees in the mini safe area"[305].

The conclusion of the Court of Appeal tells us that in the analysis of the facts of Srebrenica (in the light of the articles of DARIO and precisely of art. 7), the conduct of the peacekeeping forces is to be attributed in principle to the UN as it holds overall control. Furthermore, according to the analysis of *ultra vires* acts, the actions, even if they are different from the instructions received or in contrast with the orders received, pursuant of art. 8 DARIO must necessarily be attributed to the actor who holds control, therefore the UN. The Court of Appeal makes clear that the Netherlands had no control over the missions, and that the two specific conducts can be attributed to the State only because of the completely exceptional circumstances in which the Dutchbat was during the 'Transition period'.

3.5.3 The Supreme Court Judgment Mothers of Srebrenica et al. vs. the Netherlands (2019)

This judgment of the Dutch Supreme Court dates back to July 2019. Although changing the approach regarding the attribution of Dutchbat's conduct, it reaches the same conclusions as the Court of Appeal. The Supreme Court judgment is no longer based on the grounds of art. 7 DARIO but solely on art. 8 ASR.

The Court makes clear that, in order to consider the effective control over the Dutchbat battalion exercised by the State of Netherlands, since in its opinion the Dutchbat was an organ transferred to the UN, it was up to the Mothers of Srebrenica to prove this quite exceptional possibility. It must be clear that in the approach of the Supreme Court, the Dutchbat was an organ to whom the State had transferred the operational command and control to the UN[306].

The Mothers of Srebrenica's charges were based on the failure by Dutchbat to prevent the wrongful conduct committed by the Bosnian Serbs which later led to the genocide. Power to prevent and failure to do so would represent wrongful conduct. This is usually attributed to the actor who has degree of control that allows him to prevent a breach. It has also been pointed out that in peacekeeping operations, according to art. 7 DARIO, the State could retain

[304] Ivi, par. 24.3.
[305] Ivi, par. 32.2.
[306] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 3.1.2.

a certain degree of control on specific matters that are particularly relevant to the attribution of wrongful conduct, i.e. troop selection and promotion, training, disciplinary authority, and criminal jurisdiction[307]. Despite these considerations, the Supreme Court appears to reject power-to-prevent standard of attribution in the Srebrenica case law, holding:

> "the argument that effective control can also be evident from the circumstance that the State was in such a position that it had the power to prevent the specific act or acts of Dutchbat […] is also based on an incorrect interpretation of the law. According to the Commentary (at 4) to art. 8 [Draft articles on the Responsibility of States for Internationally Wrongful Acts (ASR)], effective control only exists in the event of 'actual participation of and directions given by that State"[308].

The Dutch Supreme Court rejects the charge based on the power to prevent by the State, essentially on the ground of art. 8 DARIO, namely the fact that *ultra vires* acts of an IO's organs are attributable to that organisation. This decision to reject power to prevent standards, based on art. 8 DARIO, may be considered erroneous[309]. Taking art. 8 DARIO into consideration is like considering this situation in the light of art. 6 DARIO since art. 8, as specified in the Commentary[310], is to be read-only and exclusively in the light of art. 6 DARIO. Doing so, we lose the sense of peacekeeping operations.

art. 6 does not mention peacekeeping operations in any way while the Commentary to art. 7 DARIO, on the other hand, is explicit about both the difference between the articles and the place of peacekeeping:

> "art. 7 deals with the different [from art. 6] situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent"[311].

The Court, ignoring art. 7 DARIO and using art. 8 DARIO (which states that all conduct is attributable to the IO), fails to take into consideration what we have already mentioned, i.e. the fact that pursuant to art. 7 DARIO it is possible to argue that a certain degree of control remains to the State insofar it is the holder of certain and precise powers that cannot be transferred. Training, discipline, punishment, troop selection, and promotion are those

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[307] DANNENBAUM (2019).
[308] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 3.5.3.
[309] SCHRIJVER (2014).
[310] DARIO, art. 8, par. 2; It has to be read in the context of the other provisions relating to attribution, especially art. 6. It is to be understood that, in accordance with art. 6, organs and agents are persons and entities exercising functions of the organization.
[311] DARIO Commentary, art. 7, par.1.

matters that remain under the control of the Member State in every case, even in peacekeeping operations.

In the Supreme Court's approach, this hypothesis is completely disregarded. By not considering the possibility envisaged by art. 7 DARIO, it is indirectly excluding the possibility of attributing to the State those conducts of the organs that act in situations where it is possible to prevent wrongful conduct. The result is that in case a State fails to prevent wrongful acts, it could not be held responsible for it.

Confirming that, the Court argues that the conduct of those UN organs can be attributed to the State only in very exceptional cases, and considering the effective control over the specific wrongful conduct, not according to art. 7 DARIO but according to art. 8 ASR.

It is necessary also to refer here to the opinion of the Advocate General (AG), who provides advice to the Supreme Court. The AG, in its opinion, starts by taking into consideration the decision of the Supreme Court in the case of *Nuhanović*, and by drawing the attention on to the use of art. 7 DARIO in cases of peacekeeping operations[312].

> "When command and control over peacekeeping forces is transferred to the UN, the premise is that the UN, to the exclusion of the sending State, exercises command and control over the operational execution of the peacekeeping forces' mandate. That is also not in dispute in the present case. In principle, therefore, the operational actions of UN peacekeeping forces are not actions of the sending State"[313].

Although the AG confirms the use of art. 7 DARIO in cases of organs placed at the disposal of the UN, the AG bases its opinion on art. 6 DARIO, i.e. by considering the Dutchbat as an organ transferred to the UN:

> "the operational conduct of UN peacekeeping forces can only be attributed to the sending State […] if the State, through an active form of control that is directly aimed at a specific operation or operational conduct, obtains factual control over the relevant operation or operational conduct"[314].

The Supreme Court, in line with the AG's opinion, confirmed to base its findings on art. 8 ASR[315], namely the conduct directed or controlled by a State. As mentioned in the previous chapter, namely in relations to *Nicaragua*[316] and the *Genocide*[317] cases, art. 8 ASR refers to conduct performed by "a person or

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[312] AG Opinion in the Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 4.7; ivi, par. 4.8; ivi, par. 4.10; Judgment of the Dutch Supreme Court, *Nuhanović*, par. 3.11.3; DARIO Commentary, art. 7, par. 4.

[313] *Ibidem.*

[314] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 4.19.

[315] ASR, art. 8: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

[316] See above Chapter 2.

[317] See above Chapter 2.

group of persons' of a private nature, and not to organs that possess the qualities to be considered part of the 'machinery of the State' or IO"[318].

What is the Supreme Court's reasoning for basing the decision on art. 8 ASR? It has been said that the Court held that Dutchbat was an organ of the UN and that in no way could it be considered an organ of the State in the sense of art. 4 ASR[319]. For this reason, according to the Supreme Court, the only way in order to determine "whether Dutchbat's conduct took place under the direction or control of the State was within the meaning of art. 8 ASR"[320]. Determining whether the State had effective control in the light of art. 8 ASR was only possible because, as stated by the Court:

> "in the period starting from 23:00 on 11 July 1995, after Srebrenica had been conquered and after it was decided to evacuate the Bosnian Muslims who had fled to the mini safe area, the State did have effective control of Dutchbat's conduct", "conduct [which] can be attributed to the State for that reason"[321]

but not in all the other events that happened before this moment[322]. In other words, the conduct could be attributed to the sending State only because that State exercised an effective control (as that enunciated in the *Nicaragua* case) over a specific conduct that happened in a very exceptional circumstance.

Having made this clear, the Court also explains why it decided to focus solely and exclusively on art. 8 ASR, without taking art. 7 DARIO into account, as the same Court had done, for instance, in the *Nuhanović* case.

> "It should be noted that in these proceedings, unlike in the [Nuhanović case], the question of whether making Dutchbat available to the UN implies that Dutchbat's conduct can exclusively be attributed to the UN and not to the State, or that dual attribution (attribution to both the UN and the State) is possible, is not at issue. It was found in [Nuhanović] that the latter was the case. This is why the provisions in DARIO concerning the attribution of conduct to an International Organisation are not directly relevant in these proceedings"[323].

The Court's approach has been criticised for several reasons. First of all, it is pointed out that in the *Nuhanović* case, where the Dutch Court itself dealt only with the responsibility of the State and not that of the UN, art. 7 DARIO is used because it is considered to be the only provision that can be contemplated in such situations. In fact, it deals specifically with organ placed at disposal of International Organisations, even peacekeeping operations.

Since art. 7 DARIO seems to be useful for this context, the Court's reasoning does not seem to be entirely convincing[324].

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[318] ASR, art. 8.
[319] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 3.3.3.
[320] Ivi, par. 3.3.4.
[321] Ivi, par. 5.1.
[322] Ivi, par. 3.5.
[323] Ivi, par. 3.3.5.
[324] RYNGAERT, SPIJKERS (2019).

The Supreme Court has indeed changed the approach used in the case in question, yet also according to the Supreme Court's new theory, the State of the Netherlands is still responsible for the wrongful act of evicting the 350 men from the compound and thereby sending them to their deaths. We will see the part of the material breach in the next paragraph. However, one thing must be clarified: adopting the approach of the Dutch Supreme Court it is possible to attribute the wrongful conduct to the Netherlands only since the transition period represents a very rare case in which the State (Netherlands) began to exercise effective operational control, albeit alongside the UN[325].

The UN continues to invoke its immunity by exasperating the issue of lack of accountability. However, this case brought an important outcome, which is interesting to highlight here, namely the fact that by the analysis of the attribution to the State it is possible to determine two results. Firstly, that the attribution in peacekeeping operations could be dual, namely in part of the State and part of the International Organisation. In fact, this is already provided for by the DARIOs in art. 48[326].

Secondly, from the analysis of the effective control and from what is stated by DARIO, it emerged in the Court analysis that the conduct of Dutchbat could be attributed, in principle, to the UN if they were not protected by the immunity.

A further result is that this case gives the possibility of assessing the presence of precise wrongful acts, thanks to the fact that the State is not covered by immunity from the national legal process. This leads to important implications concerning the responsibility of the UN.

3.6 THE WRONGFULNESS OF THE CONDUCT ATTRIBUTED TO THE STATE OF NETHERLANDS AND STATE RESPONSIBILITY FOR DAMAGES

The Dutch Court has affirmed that, in principle, unless one considers the 'transition period', the UN possesses effective control over the conduct of the Dutchbat. Following this reasoning, it is useful and interesting to analyse the second constitutive element of the internationally wrongful act, the material breach. Thanks to the analysis of Dutchbat's conduct attributed to the State, it has been possible to demonstrate which rules Dutchbat violated.

Once the breaches have been determined, and the reason for the usefulness of this paragraph, it remains to be seen whether such breaches can also be

[325] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 3.5.3.

[326] DARIO, art. 48, par.1: "1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act".

identified for conduct potentially attributable to the UN. Could it indicate that in the absence of the shield of immunity, the UN could also be held responsible for the violations linked to the events in Srebrenica?

Starting again from the *Nuhanović* case, considering its pivotal role, we see that as far as the wrongful act is concerned, the Court establishes that consisted in the refusal of the Dutchbat to save Nuhanović relatives. In doing so, the Dutch Court decided to apply Bosnian private law, following the *lex loci commissi delicti* principle. In the Dutch Court's approach, the overall extent of Dutchbat responsibility vis-à-vis Srebrenica is not assessed[327].

By limiting its jurisdiction, the Court rules that Dutchbat's actions violated both the domestic Bosnian provisions of private law and international law[328]. The rules of international law violated were art. 6 of the International Covenant on Civil and Political Rights (ICCPR), and art. 2 of the ECHR. They were considered by the Court applicable because Bosnia had become part of both treaties and therefore these international obligations have direct effect within Bosnian law[329].Based on the foregoing, the Court ruled that:

> "the State, by ensuring that Muhamed left the compound and by not taking him along to a safe area, which resulted in the death of Muhamed, acted wrongfully towards Nuhanović, under the provisions of art. 154 Act on Obligations of Bosnia and Herzegovina as well as based on a violation of the right to life and the prohibition on inhuman treatment. Pursuant to art. 171 paragraph 1 Act on Obligations of Bosnia and Herzegovina, the State is liable for the conduct of the Dutchbat members, […] The liability of the State also results from the principle of 'effective control', as considered in the above. Pursuant to art. 155 Act on Obligations of Bosnia and Herzegovina, the State is liable for immaterial damage which Nuhanović has suffered consequently and will possibly yet suffer. […] Therefore, the State is also liable for the damage Nuhanović has suffered as a consequence of his father's death"[330].

Having assessed the question of attribution, and having established that during the transition period UNPROFOR's actions were attributable to both the UN and the Netherlands (dual attribution), perhaps extending this discourse to the other citizens present in the compound, one could envisage here the grounds for holding the UN responsible. Nevertheless, it is necessary to keep in mind that International Organisations are not subject to the internal laws of the State nor at least are they part of the international human rights conventions mentioned. To recognise the material breach of the IOs, a different kind of analysis should be applied that falls outside the jurisdiction of the Courts taken into considerations and that is outside the scope of this paragraph. What was said about *Nuhanović* also applies to the case of the Mothers of Srebrenica that, as seen, accuse the Netherlands of committing a wrongful act for refusing to protect citizens within the 'mini safe area'.

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[327] Judgment of the Dutch District Court, *Nuhanović*, par. 3.15.4.
[328] *Ibidem*; ivi, par. 3.15.5.
[329] Judgment of the Dutch District Court, *Nuhanović*, par. 3.16; ivi, par, 3.17.1; ivi, par. 3.17.13; ICCPR entered into force for Bosnia on 1 September 1993 while ECHR on 12 July 2002.
[330] Judgment of the Dutch Court of Appeal, *Nuhanović*, par. 6.20; ivi, par. 6.21.

First of all, the District Court, by using the jurisdictional analysis, stated that "by means of Dutchbat the State was only able to supervise observance of the human rights anchored in the ECHR and ICCPR vis-à-vis those persons who as of the fall of Srebrenica were in the compound"[331]. The deportation of the Bosniacs by Bosnian Serbs began on July 13, 1995, and as confirmed by the Court, at that time Dutchbat knew or ought to have known of what was going on and what the Muslim citizens would encounter. To avoid committing the crime of violating the right to life, Dutchbat, and thus indirectly the Netherlands should have ordered the contingent to safeguard the lives of these people, keeping them at the compound for a little longer.

This decision was upheld by the Dutch Court of Appeal that in its approach instead, extends the State responsibility to two acts. The Dutch Supreme Court ruled that:

> "the State acted wrongfully I. by facilitating the separation of the male refugees by the Bosnian Serbs on 13 July 1995 by letting the refugees go to the buses in groups and through 'the corridor', and II. by not offering the male refugees who were inside the compound on 13 July 1995 the choice to stay within the compound, thereby denying them the 30% chance of not being exposed to inhumane treatment and executions by the Bosnian Serbs"[332].

The conclusions of the Dutch Court of Appeal are clear. The Dutch State is responsible for having evacuated the Bosnian refugees while being aware of the serious risk to the refugees of being tortured, ill-treated or killed. In doing so it has violated its obligation to protect the rights to life and physical integrity as set out in Articles 2 and 3 of the ECHR and art. 7 of the ICCPR[333]. According to the Court, a breach is to be considered as a violation of the duty of care under Dutch tort law[334], which is a principle transposing all the standards from international conventions mentioned.

Finally, the case came before the Dutch Supreme Court which upheld the decisions of the Court of Appeal to base its assessment and analyse the Dutchbat battalion not only in light of art. 6: Burgerlijk Wetboek[335], which considers the right to life and physical integrity as principles relating to 'duty of care', but also, as seen above, the international obligations described in Articles 2 and 3 of the European Convention on Human Rights (ECHR). The Supreme Court, starting from the findings of the Court of Appeal, assesses the two acts according to which the same Court held the State responsible.

The Court rules that concerning the evacuation of refugees from the compound, the State committed a material breach, as it allowed men refugees

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[331] Judgment of the Dutch District Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 4.161.
[332] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands.*
[333] Judgment of the Dutch District Court, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 4.176.
[334] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 38.7.
[335] The Burgerlijk Wetboek (or BW) is the Civil Code of the Netherlands.

to get out of the compound and into the hands of Bosnian Serbs. The Dutchbat should at least have offered the option of remaining in the compound "even though Dutchbat knew that the men would run a real risk of being exposed to inhumane treatment and being executed" [336]. On the other hand, concerning the 'Formation of the Sluice'[337], the Supreme Court decided to review the decision of the Court of Appeal on the basis of the standards dictated by the margin of appreciation[338]. The Supreme Court argues, unlike the Court of Appeal[339], that the Dutchbat, although it was aware of the risks that the Bosniacs would have run, did not act wrongfully towards the refugees because:

> "[g]iven the war situation in which decisions had to be taken under considerable pressure, and given the fact that decisions had to be taken based on a weighing of priorities, Dutchbat was reasonably entitled to opt to continue to cooperate in the evacuation by designating groups and forming a sluice, in order to—in any event—prevent chaos and accidents involving the most vulnerable people"[340].

Reducing the acts for which the State was retained responsible, the Dutch Supreme Court ruled:

> "issues a judicial declaration entailing that the State acted wrongfully by not offering the male refugees who were in the compound on 13 July 1995 the choice of remaining in the compound, thus depriving them of the 10% chance of not being exposed to inhumane treatment and execution by the Bosnian Serbs"[341].

While the Court of Appeal had previously limited the international liability of the State to 30% of the damage suffered (determined based on the possibility for the evil refugees to remain alive (30%), the Supreme Court lowered this percentage to 10%[342]. This percentage decided by the Dutch

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[336] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 4.6.6.
[337] The "Formation of Sluice" is one of the charges according to which the Dutchbat formed groups of refugees in a human chain towards the buses, forming in this way a kind of "sluice". The charge was based on the fact that during the walk through the "sluice", the Bosnian Serbs picked out and killed male refugees.
[338] The margin of appreciation standard was adopted for the first time in the Judgment of the European Court of Human Rights, Application No. 176/56, *Cyprus* case (Greece v United Kingdom); Yearbook of the European Convention 1958, at 176.
[339] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands*, par. 61.3; ivi, p. 61.5; The Court held Dutchbat responsible for facilitating the separation of men from women which led to their subsequent deaths. "Dutchbat knew or at least ought to have known of this risk".
[340] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 4.5.4.
[341] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands.*
[342] Ivi, par. 4.7.9.

Courts has been harshly criticised as being unreliable and entirely subjective[343].

However, it seems that what has been said can also be extended to the UN. General Janvier could probably have opposed the decision to evacuate the citizens of Srebrenica by not agreeing with the members of the Dutch Government. If it were possible to attribute this conduct to the UN, namely by lifting the immunity, the analysis could have led to the presence of the material breach. In that case, the implementation of responsibility should be inevitable. This conclusion stems precisely from the fact that the Dutch battalion is recognised both as an organ that acts under the command of the UN but that could be controlled by the State.

3.6.1 The obligation to prevent genocide

A separate discussion must be made for the charges delivered against the Netherlands, of having failed to prevent the genocide. Hypothetically, this charge could have been extended even to the UN. As already mentioned, this was the most severe accusation, but it is not disputed whether the genocide took place since this has already been widely discussed and ascertained by international case law[344]. The core issue here is to determine whether the Dutchbat played a role in it, namely whether it failed to prevent it from happening.

The Dutch Courts dismissed the claimants' application - which asked for a declaratory judgment establishing the allegations made against the State for breaching the obligation to prevent genocide - based on two fundamental observations. The first concerns the fact that the Genocide Convention is valid and applies only between States[345], moreover that the Convention does not contain any real explanation of how to prevent genocide. As a matter of fact, the Court of Appeal states as follows:

> "The obligation to 'prevent genocide' is not described exactly; for the prevention of genocide various (preventive and repressive) modes of action are conceivable. art. 1 does provide that the contracting parties undertake to prevent genocide, but does not indicate how they should do so. art. 5 of the Genocide Convention clarifies that further rules are required to that end: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, […]". Tangible, specific obligations to prevent are not included in

[343] RYNGAERT (2017: 461); OENEN (2010).
[344] Judgment of the ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, at 43, par. 430; Judgment of the ICTY, *Krstić case,* par. 37.
[345] Judgment of the Dutch District Court, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 4.164.

> the Convention. A 'best efforts obligation' "to take all measures to prevent genocide which were within its power" as the International Court of Justice ruled in the case of Bosnia and Herzegovina v. Serbia and Montenegro on 26 February 2007 (by which obligation all member states are bound), does not impose any specific obligations which may be enforced directly by a national Court in a dispute between a citizen and the State"[346].

This vision is also upheld by the Supreme Court which refers to a lack of precision of the Convention[347]. Taking into account all the aforementioned, the Supreme Court argued that

> "The text and the legislative history of the Genocide Convention offer no ground for the assumption that the Contracting States intended to assign direct effect to the obligation of effort defined in art. I of the Genocide Convention. Although art. I of the Genocide Convention does provide that the Contracting Parties undertake to prevent genocide, it does not determine the manner in which they will do so. The obligation of effort to prevent genocide defined in art. I of the Genocide Convention is formulated in general terms and does not entail unconditional and sufficiently precisely described obligations that can be applied directly as objective law in a dispute between an individual and the State" [348].

Nevertheless, only the Dutch District Court issued a declaratory judgment, using the word 'genocide'. The Court affirmed that, when Dutchbat evacuated the persons from the mini safe area "must have been aware of a serious risk of the male refugees being killed in a genocide"[349], and thus, that "the State is liable for the deportation of the able-bodied men who had been staying at the compound […] on account of unlawful acts"[350]. This decision will then be rejected by the Court of Appeal, which in its tort analysis will only consider the rights to life and physical integrity[351].

The reasoning of the Court that leads to rejecting the hypothesis and use of the Genocide Convention concerns the fact that when the Dutchbat began the evacuation, did not have enough information to believe that the refugees ran the risk of genocide. This information makes clear reference to the two elements specified by the Genocide Convention: the intent to destroy, in whole or in part, an ethnic group (in this case the Bosnian Muslims), and the empirically proven conduct of actions such as torture and killings. In other words, the Dutch Court could not determine the presence of these two elements.

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[346] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 34.4.
[347] RYNGAERT, SPIJKERS (2019).
[348] Judgment of the Dutch Supreme Court, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 3.7.3.
[349] Judgment of the Dutch District Court, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 4.328.
[350] Ivi, par. 4.332.
[351] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 34.1; Ivi, par. 50.1.

3.7 CONCLUDING REMARKS

The Srebrenica genocide cases analysed in this chapter revealed two particularly important legal outcomes.

The first concerns the innovative approach of the Dutch Court in the *Nuhanović* case. As previously mentioned, according to the Court's decision in the precedent case, *the Mothers of Srebrenica v. the UN and the State of Netherlands*, it was impossible to determine the attribution of Dutchbat's conduct because of the immunity enjoyed by the UN covered the State of Netherlands as well.

In the *Nuhanović* case, however, since the charges were only made against the State, the Dutch Court was able to, in its assessment of the effective control test (citing art. 7 DARIO and art. 8 ASR) and in its use of art. 48 DARIO, determine that the same conduct can be attributed to both the State and the UN. Such an approach, now accepted by a large part of the doctrine[352], not only represented an important legal precedent to the Mothers of Srebrenica to bring a claim against the State of Netherlands, but it also gives the possibility of assessing the issue of the attribution of Dutchbat's conduct.

As mentioned above, the main legal finding is that the State, in the period before the transition period, has never exercised effective control over the Dutchbat, so the answer, therefore, seems obvious. On the other hand, if we consider Articles 6 And 8 DARIO, the conduct of the organs, in principle, must be attributed to the organisation to which they belong and which they act on behalf of, even when they act outside the established orders, i.e. ultra vires, as they continue to be part of the structure of the organisations.

This is our second outcome that can be summarized in the judgment of the Dutch Court of Appeal in *Mothers of Srebrenica v. the State of the Netherlands and the United Nations* case. The Court of Appeal, in the analysis of the facts of Srebrenica (in the light of the DARIO articles), ruled that the conduct of the peacekeeping forces is, in principle, to be attributed to the UN as it holds overall control. Furthermore, according to the analysis of *ultra vires* acts, the actions, even if they are different from the instructions received or in contrast with the orders received, must necessarily be attributed to the actor who holds control, therefore the UN (art. 8 DARIO). The Court of Appeal made it clear that the Netherlands had no control over the missions or any operational control, and that the two specific conducts can be attributed to the State only because of the completely exceptional circumstances in which the Dutchbat found itself during the 'transition period'.

In the Supreme Court decision, as well as in the opinion of the AG, the fact that the Dutchbat was an organ transferred to and controlled by the UN is not

[352] MESSINEO (2012).

questioned. Nevertheless, the Court decided to implement a different decision than the Court of Appeal, i.e. taking art. 8 ASR as the ground of the analysis. In using art. 8 ASR, the Court suggests that Dutchbat should be viewed as an entity that did not belong to any subject, an autonomous organ whose membership should be determined on a case-by-case basis by analysing its effective control.

However, one thing must be clarified. The approach of the Dutch Supreme Court was acceptable only since the transition period represented a rare case in which the State (Netherlands) began to exercise effective operational control.

This is the only case in which the conduct of the Dutchbat could be attributed to the State. In all other situations that happened before the evacuation period, the Dutchbat conduct remains attributable to the UN.

Even if the conclusions of the Supreme Court are the same as those of the Court of Appeal, the lack of use of the DARIO articles seems to be unconvincing, insofar as art. 7 DARIO envisages situations of organs placed at the disposal of an IO. In the Commentary to art. 7 DARIO, there is a clear reference to situations in which a Member State places a military contingent at the disposal of the UN.

Having determined the presence of one of the two elements of the internationally wrongful act, the dual attribution also gave the possibility of assessing the presence of the material breach. These were determined because it was the State that was charged, making it possible to analyse the breaches of both domestic and international laws for which the Dutch legal system transposed the rules of the international treaty law. However, the IOs cannot be subject to those rules, (unless they are *jus cogens* rules). In principle, though, this analysis suggests that concerning certain violations of international law, the UN could also be held responsible for them.

The most important implication regarding the responsibility of the UN is the alleged obligation to provide an alternative legal mechanism. The core issue seems to be the need to find a solution to the lack of accountability that characterises International Organisations and primarily the UN. Is there a possibility of an alternative mechanism? Are there other opportunities for the victims of such violations to get justice for the injuries they suffered?

CHAPTER IV. THE POSSIBILITIES OF GUARANTEEING THE RIGHT OF ACCESS TO THE COURT FOR INDIVIDUALS

In the following chapter, the possibility of providing for alternative mechanisms will be explored. The analysis could, in cases where the UN is protected by immunity, not only guarantee the respect for the human right of access to a Court but also not leave a dangerous legal gap in the system of international accountability that would place the UN above the law. This draws attention to the need to guarantee an effective system that could counterbalance the immunity of IOs. To address this issue, we will have to start from the friction that exists between United Nations jurisdictional immunity from national courts and violation of human rights.

4.1 FRICTION BETWEEN UNITED NATIONS JURISDICTIONAL IMMUNITY AND VIOLATION OF HUMAN RIGHTS (RIGHT OF ACCESS TO A COURT)

As a starting point, it is necessary to bring our attention back to the possibility that the victims receive a real alternative remedy for the violations committed by military contingent during the peacekeeping mission, attributable to the United Nations.

While immunity represents a form of protection for International Organisations from unilateral State and national Courts interference[353], at the same time a peculiar human right exists that guarantees the right of access to the Court for individuals. As a result, respecting and guaranteeing the immunity of the United Nations would result in a possible denial of justice and a violation of international obligations (right of access to a Court)[354].

For this reason, the right of access to the Court seems to be a counterbalance to the same immunity possessed by international subjects. Accepting this statement would mean that the immunity of International Organisations is conditioned by the respect of the right of access to the Court of individuals. In other words, in the absence of alternative legal remedies that would guarantee access to the Courts for victims who have suffered an injury caused by the wrongful conduct of an IO. In the absence of such a system, we would find ourselves in the presence of a lack of accountability for international organisations and a violation of human rights.

The basis of right of access to the Court can be found in international treaty law. Several Conventions have established and codified this obligation.

[353] Judgment of the ECtHR, *Waite and Kennedy*, par. 63.
[354] FRANCIONI et al. (2008: 3 ss.); ID. (2008: 21 ss.).

Among the best known are art. 6 of the ECHR and art. 14 of the ICCPR. According to some scholars these Conventions are starting to be considered legal requirements for International Organisations[355].

Moving on to talk about the United Nations, the right of access to a Court has often been invoked by private parties demanding a fair trial for UN misconduct, and often before domestic Courts of Member States of the UN.

So, the question is, how can the recognition of immunity for the United Nations be balanced without violating the right of access to a Court?

Although according to some scholars and Court rulings[356], the immunity of the UN must be absolute, some elements and factors try to, somehow, counterbalance immunity. There are some limits established by the General Convention on Privileges and Immunities of the United Nations itself, (see the right and duty to waive immunity)[357]. Even in circumstances where a waiver is not granted by the Secretary-General, art. VIII Section 29 of the Convention, states the duty for alternative and appropriate modes of settlements to be established[358].

> "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party"[359].

Certain courts tried to maintain this approach. One of the most emblematic cases is certainly the judgment of the ECtHR in the *Waite and Kennedy* case[360]. In declaring the claim admissible, however, the Court also clarified that a factor to determine if "immunity from […] jurisdiction is permissible under the Convention is whether the applicants had available reasonable alternative means to protect effectively their rights under the Convention"[361]. Furthermore, it was affirmed that the right of access to a Court cannot be seen as an absolute right, and must necessarily be proportionate.

> "The Court recalls that the right of access to the Courts secured by art. 6 § 1 of the Convention is not absolute, but may be subject to limitations; […] It must be satisfied that the limitations applied do not restrict or reduce the access left

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[355] REINISCH (2008: 286).

[356] Judgment of the Dutch Supreme Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations.*

[357] Convention on the Privileges and Immunities of the United Nations, 1946, art. 2, Section 2. "The decision on whether immunity should be waived is taken, on a case-by-case basis, by the Secretary-General who has the 'right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice"; ivi, art. 5, Sections 20 and 23.

[358] Convention on the Privileges and Immunities of the United Nations, 1946, art. 8, Section 29; Advisory Opinion of the International Court of Justice of 29 April 1999, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, (Cumaraswamy)*, par. 50-61.

[359] Convention on the Privileges and Immunities of the United Nations, 1946, art. 8, Section 29.

[360] Judgment of the ECtHR, *Waite and Kennedy*.

[361] Judgment of the ECtHR. *Waite and Kennedy,* par. 68.

> to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art. 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"[362].

Despite the decision of the ECtHR is characterised by a lack of accuracy concerning instructions on how to apply the test of possible alternative means, it denotes a positive engagement in counterbalancing the IO's immunity from the legal process with the right of access to the Court. For some scholars [363], this decision seems to be an essential basis for the theory of counter-limits. In other words, it is argued that one should always apply the reasonable alternative means tests.

Besides, it must be taken into account that the ECtHR, with its decision in the *Waite and Kennedy* case, considers the reasonable alternative means as an important criterion to establish immunity. Nevertheless, it is assessed not as a necessary condition to evaluate and determine whether the immunity can be limited. The reasonable alternative means test used by the ECtHR[364], and the fact to provide an alternative mechanism is seen, by some scholars, only as a 'material factor' and not as a 'strict prerequisite' for the ascertainment of immunity[365].

It must be considered that the *Waite and Kennedy* case is articulated against an International Organisation different from the UN. This detail will be pointed out by the ECtHR in *Stichting Mothers of Srebrenica* case, which will relativize the need to apply the alternative means test. According to the Court, art. 6 of the ECHR cannot be considered absolute, and infact, there are circumstances in which it can be limited. An example of such circumstances is precisely when it comes to the UN, which has a different nature from other International Organisations (such as the one considered in the *Waite and Kennedy* case). The decision of the ECtHR, as seen, will dismiss the principle enshrined in *Waite and Kennedy* case, stating:

> "It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a Court. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule[366]. As regards International Organisations, this Court's judgments in *Waite and Kennedy* and *Beer and Regan* cannot be interpreted in such absolute terms either"[367].

The Court held that the lack of alternative remedies does not necessarily constitute a breach of art. 6 ECHR. Moreover, we must be precise in saying, as pointed out by many authors, that while in the *Waite and Kennedy* case the

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[362] Ivi, par.59.
[363] SCHMITT (2017: 260).
[364] Judgment of the ECtHR, *Waite and Kennedy*, par. 68.
[365] *Ibidem*; REINISCH (2008: 285 ss.).
[366] Judgment of the ICJ, *Jurisdictional Immunities of the State*, par. 101.
[367] Judgment of the ECtHR, *Stichting Mothers of Srebrenica*, par. 164.

normative conflict was between the immunity of the UN and the access to a Court, in the case of Srebrenica it was between UN's system of privileges and immunities and the human rights guaranteed by the Convention of the same Court, i.e. the ECHR.

The cases relating to Srebrenica, namely the case before Dutch Court the *Mothers of Srebrenica vs. the UN and the State of Netherlands* and the case before the ECtHR *Stichting Mothers of Srebrenica and Others v. The Netherland*s, have in fact stated that the UN enjoyed absolute immunity[368], as foreseen and ruled by Convention on Privileges and Immunities of the United Nations.

So, given that the Srebrenica case could even concern gross violations of human rights, can immunity be guaranteed or should it be balanced with other principles?

The decisions of the Dutch Court and the ECtHR, dismissed all the reasoning concerning the possibility of restricting immunity, thus guaranteeing the absolute immunity for the UN. This decision was delivered based on some important observations. The first is what was said in the previous chapter about the alleged violation of the obligation to prevent genocide. First of all, the Genocide Convention cannot be applied because it only applies to States, moreover the Dutch Court of Appeal states as follow:

> "The obligation to 'prevent genocide' is not described exactly; for the prevention of genocide various (preventive and repressive) modes of action are conceivable. art. 1 does provide that the contracting parties undertake to prevent genocide, but does not indicate how they should do so. art. 5 of the Genocide Convention clarifies that further rules are required to that end: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, […]". Tangible, specific obligations to prevent are not included in the Convention"[369].

This vision is also upheld by the Supreme Court which refers to a lack of precision in the obligation to prevent genocide of the Convention[370]. Secondly, as stated by Dutch Court of Appeal:

> "In the first place the Court of Appeal concludes that the Association et al. acknowledge that it was not the UN that committed genocide (cf inter alia statement of defence in the interlocutory claims of 6 February 2008, p. 29).

[368] Nevertheless, the Dutch Court of Appeal considers what is stated in the ECtHR decision in Waite and Kennedy, and applying the test states that alternative legal remedies were available for claimants, albeit not at the UN level. These were on the one side against the perpetrators of the genocide, therefore also a different charge (crime of genocide), and on the other side against the State, an entity different and separate from that of International Organisations; This aspect has been evidently overruled by the Dutch Supreme Court of the Netherlands in Mothers of Srebrenica et al. v. the State of the Netherlands and the United Nations, par. 4.3.6: 'immunity is absolute'.

[369] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands,* par. 34.4.

[370] RYNGAERT, SPIJKERS (2019).

> Neither can it be inferred from the arguments put forward by the Association that the UN knowingly assisted in committing the genocide. Essentially, the Association et al. blame the UN for failing to have prevented genocide. […] Besides, the Court of Appeal considers, as put forward before, that UN peacekeeping operations will usually occur in areas around the world where a hotspot has developed, and that a reproach that, although it did not commit crimes against humanity itself, the UN failed to act against it adequately, under the circumstances can be latched onto too easily, which could lead to misuse. The reproach that the UN failed to prevent genocide in Srebrenica and therefore was negligent is insufficient in principle to waive its immunity from prosecution. Neither is it deciding that in the present case it is not argued that there is a question of misuse in the sense referred to above. If invocation of UN immunity was only successful if misuse were proved in the case in hand, the immunity would be violated unacceptably" [371].

Although the UN's immunity before the domestic Court ruled by the ECtHR cannot be questioned, there remains a fundamental opinion and rules that support the thesis that an alternative mechanism must, in any case, be found. Besides, ensuring the absolute immunity of the UN, extending it to all its agents in organs, whose action is deemed necessary for the fulfilment of its purpose, inevitably runs counter to the human rights provisions we have just discussed if an adequate alternative remedy is not settled. Granting immunity, in the absence of an alternative mechanism, violates the right of the individual to have an effective remedy. It is no coincidence that the UN itself supports this thesis in its memorandum, stating that:

> "[i]n civil cases, the uniform practice is to maintain immunity, while offering, in accord with section 29 of the General Convention, alternative means of dispute settlement. In disputes with third parties, the alternative means of dispute settlement offered is usually negotiation, conciliation, mediation and/or arbitration […] This practice achieves two fundamental goals: it ensures the independence of the United Nations and its officials from national Court systems, but at the same time it eliminates the prospect of impunity, as the United Nations provides the appropriate mechanisms to resolve all complaints of a private law nature"[372].

This opens up an important issue, allows challenging UN acts even in case the immunity is recognised. For this reason, it is important to consider why it exists a need to counterbalance immunity.

The ECtHR decision gave the impression of sacrificing the right of access to the Convention which the Court itself should protect in favour of the interests of the United Nations.

That brings us back to the second reason. Guaranteeing absolute immunity opens up a significant gap in the accountability of the United Nations, which

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[371] Judgment of the Dutch Court of Appeal, *Association Mothers of Srebrenica et al. v. The State of The Netherlands and the United Nations*, para. 5.10.

[372] SCHMITT (2017: 242). It is possible to retrace the UN position in a memorandum of law presented to the US District SDNY in a case filed by Cynthia Brzak and Nashr Ishak – two employees of the UN High Commissioner for Refugees – against the UN, Kofi Annan, Wendy Chamberlin, Ruud Lubbers, et al.

could set a dangerous precedent. This decision does not seem convincing because an organisation like the United Nations, whose primary role is that of promoting and controlling the respect of human rights, should try to consider and protect any kind of human rights, including the right of access to the Court. This is a very valid point to start from; especially in the case of Srebrenica, the UN indirectly accepted responsibility. The United Nations created a commission of inquiry which gave rise to an investigative report. In this report, the Secretary-General bluntly acknowledged the failure of UNPROFOR's mission to protect Srebrenica by failing to adequately reinforce and protect Bosniacs from the advance and attack of Bosnian Serbs[373]. According to DARIO, it can be considered a form of satisfaction[374], but it is still not enough and even the UN never apologized for their omissions. The most surprising thing is that, although the UN has indirectly recognised its involvement in Srebrenica, it was denied to The Mothers of Srebrenica the access to the Court based on its immunity.

What has been said so far is linked to another reason that justifies the latest doctrinal developments in which an alternative to the absolute immunity of the United Nations can be found. In cases of peacekeeping operations, it seems necessary to assess the extent of the damage done and guarantee the victims their right to a trial.

Adopting the theory of counter-limits, and the view that the right of access to a Court should be guaranteed, makes the core issue; therefore, the judgment shifts from whether to apply the alternative means test at all to how to apply it. What has been said so far, therefore, leads us to consider how to evaluate the responsibility of the IOs and understand how it can be implemented[375]. This issue is becoming more and more crucial, especially given the implications of the Srebrenica decision on other more recent cases in which UN contingents have caused innumerable damages to the populations involved.

For instance, the case in 2008 when 150 male citizens of the Congo were killed by the Mai-Mai despite peacekeeping forces of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) were there, or the devastating cholera epidemic in Haiti which provoked more than 8000 deaths, caused by the United Nations Mission in Haiti (MINUSTAH), or the even more recent and serious case of sexual abuse committed by peacekeeping forces, these examples have brought to the fore

[373] United Nations Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica*, 15 November 1999, U.N. Doc. A/54/549, p. 106.

[374] DARIO, art. 37, par. 2: "1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.; 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".

[375] Judgment of the the ECtHR, *Waite and Kennedy*, para. 68.; SCHMITT (2017: 261); RYNGAERT (2010: 135).

the issue of the UN accountability for violations of international law committed and the need to provide victims with a just remedy.

It is unconvincing to continue to support and affirm the absolute immunity of the UN, especially in facing serious violations or inhumane treatment of human beings. That is why in the next paragraph we will ask ourselves what possible solutions might allow individuals to challenge UN acts.

4.2 THE POSSIBLE ALTERNATIVE MECHANISM. HOW TO CHALLENGE UN ACTS?

Given that UN immunity is generally still considered unconditional and absolute, except for an express waiver; since there are no examples in the case law that demonstrate how an alternative means test can be applied nor ever a Court lifted the immunity of the UN; it remains the need to find the proper balance between the immunity of International Organisations (which remains an important tool that allows UN to perform its missions independently from its Member States without the risk of interference) and the right of access to a Court.

This assumption would make possible to give an appropriate alternative mechanism that allows victims to challenge the UN for actions attributable to it. According to existing doctrine, one of the approaches that seem to be most appropriate is that domestic Courts should refrain from becoming themselves an appropriate forum for settling disputes between individuals and IOs, so as to respect the UN immunity before national Courts. In other words, national Courts have the sole task of verifying that the IO has complied with the obligation to provide an appropriate alternative mechanism so as not to impair, because of the immunity, the essence of the victims' right of access to a Court.

There are examples of some Courts that have supported the thesis that the UN is bound to set up an alternative dispute settlement body that could provide to the victims an appropriate forum. One of these examples relates to the decision of the Brussels Court of First Instance in *Manderlier*, where it was upheld that the UN was bound to establish an alternative Court[376].

In January of 1962, a Belgian citizen's property in the Congo was burnt by troops of the UN Force situated there. The consequence of this action was that the owner filed a claim for compensation for the loss against the UN. The UN Secretary-General accepted civil liability for damages caused by the UN forces and closed an agreement with the Belgian Government on the due

[376] Judgment of the Brussels Court of First Instance of 11 May 1966, *Manderlier v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Etrangères),* Journal des Tribunaux 721.

financial amount[377]. The UN and Belgium reached an agreement that was enacted in a Belgian law of 7 May 1965[378]. The plaintiff considered the amount too low and brought an action before the Belgian Courts against both the UN and the Belgian State. The charge was that the UN was bound to provide for appropriate methods of settlement for disputes of a private law character in accordance with art. VIII, section 29.

Since no appropriate methods of settlement had been established, the plaintiff argued that the tribunal could not grant immunity to the UN, because this would have been in breach of the right of access to a Court (art. 6 of the ECHR). In response, the UN stated that the agreement reached with the Belgian government was, in fact, an appropriate method of settlement, provided for by art. VIII, section 29.

The domestic Court, while rejecting this thesis and declaring that that Agreement did not constitute an appropriate method of settlement, ruled "that immunity of the UN was unconditional and had been so since the conclusion of the Convention in 1946"[379] except for an express by the UN itself. At the same time, however, the Court commented on this decision, adding an interesting observation. The UN is bound, in any case, to set up Courts for disputes arising from private law claims:

> "However, it is an undisputed fact that it has not set up any court with a general and unlimited jurisdiction. In fact, no independent and impartial international court has been set up, before which the plaintiff could bring the defendant to have the claim decided which he has brought before the present Court"[380].

This conclusion of the Court seems to go even further than stated in art. VIII, section 29, as the provision of the General Convention requires the establishment of an 'appropriate method of settlement' but not expressly the creation of international jurisdiction.

This opinion – in a certain way - was supported by the Advocate General of the Dutch Supreme Court in *the Mothers of Srebrenica* case, stating that:

> "The fact that the United Nations […] is granted immunity above any other international organisation places a heavy duty upon it, in my opinion, to provide an effective, alternative legal procedure for the settlement of disputes which, as

[377] United Nations Juridical Yearbook 39, 20 February 1965, New York, Exchange of letters constituting an Agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals.
[378] Law of 7 May 1965 approving the international Agreements between the Kingdom of Belgium and the United Nations Organization, and between the Kingdom of Belgium and the United Nations Organization. It was concluded by exchange of letters dated 20 February 1965 in New York, Moniteur Belge, 29 July 1965.
[379] Judgment of the Brussels Court of First Instance, *Manderlier v. Organisation des Nations Unies et l'Etat Belge.*
[380] Judgment of the Brussels Court of First Instance, *Manderlier v. Organisation des Nations Unies et l'Etat Belge.*

> a result of United Nations peace operations, arise between the organisation and citizens"[381].

In fact, this approach respects the fact that there are, within the organisation (such as art. VIII Section 29), provisions that could be the solution to the friction between immunity and the right of access to the Court. This article could provide victims with the possibility of the UN challenge for the wrongful acts during peacekeeping operations. The national Courts could refuse to grant immunity when the UN refused or failed to establish an alternative body in accordance with Section 29. Nevertheless, the most complex element within section 29 is unquestionably the nature of the claims it refers to. This section states that solely the "claims of private law character" fall within the article scope. What is intended by "private law character"?

Nor the Charter of the United Nations or Courts have clarified the parameters to determine the 'private' nature of a claim. Furthermore, a second complex issue to take into account is the fact that while the UN affirmed the need to create an alternative means to not avoid its accountability, in section 29 it is not specified which kind of mechanism is to be settled (whether this mechanism should be a Court or a different board), it is only stated that it must be 'appropriate'[382].

As we have mentioned, Section 29 considers admissible only disputes "arising out of contracts or other disputes of a private law character to which the United Nations is a party"[383]. According to Rapporteur of the UN General Assembly Sixth Committee's Subcommittee on Privileges and Immunities W.E. Beckett, "it was observed that this provision applied to contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instruments and not to the actual performance of its constitutional functions"[384]. This interpretation has also been accepted by the United Nations, which believes that both the contractual claims and the tort claims "for property loss or damage and personal injury, illness or death arising from or directly attributable to the mission"[385] fall within the scope of section 29 and the Status of Force Agreements (SOFA).

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[381] Conclusion of the AG Vlas to the Dutch Supreme Court of 25 January 2012, case 10/04437, *Stichting Mothers of Srebrenica and other plaintiffs v. the Netherlands and the United Nations*, par. 2.26.

[382] SCHMALENBACH (2015: 320).

[383] General Convention, art. VIII section 29: "The United Nations shall make provisions for appropriate modes of settlement of: a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General".

[384] Rapporteur of the Sub-Committee 1 of the Sixth Committee W.E. Beckett, *Final report of Sub-Committee, Coordination of the privileges and immunities of the United Nations and of the specialized agencies*, 15 November 1947, UN Doc A/C.6/191, p. 12, par. 32.

[385] The UN inserts this standard phrase in all art. VIII, par. 55 SOFA concluded since 1998: "[…] any dispute or claim of a private law character not resulting from operational necessity […] shall be settled by a standing claims commission to be established for that purpose"

But, what is the trait that leads us to understand the nature of the claims that should oblige the United Nations to create an alternative dispute settlement?

The central point is based on the difference between the claims of private law character and claims of a public international law nature.

The first (contractual and tortious claims) fall within the scope of section 29 and general rules governing SOFA, while the public international law claims essentially concern UN policy matters.

Policy matters mean all decisions and actions that the UN may take within its mandate. It seems obvious that such actions cannot be restricted as there is an extension of immunity at the functional level. Therefore, the UN Charter does not recognise the right of the injured individual to sue the UN for operational decisions that are taken within a given mandate to pursue a given purpose. In the same advisory opinion of the ICJ of 1949[386], it was specified that all the claims of public international law, and therefore the mandate-related cases, did not fall within the scope of section 29. In other words, all the breaches that may occur within peacekeeping operations (such as violations of human rights and humanitarian law obligations, and even, as in the case we considered, the duty to prevent international crimes) are to be understood as public international law claims. Most of the violations committed by peacekeeping forces in an official capacity are considered by UN as acts justifiable by an operationally necessary means of implementation, thus falling outside the scope of alternative dispute settlement provisions[387]. Decisions taken by the chains of command within peacekeeping operations to achieve the purpose of the mission to which they have been assigned cannot be subject to limitations.

Nevertheless, to represent an exception, it is specified that "the action must be strictly necessary and not a matter of mere convenience or expediency"[388].

Taking into considerations all the aforementioned, it seems that no alternative, which would be useful to assess the issues that arise from the responsibility of the UN, could be implemented. Nevertheless, a more efficient implementation of the existing internal rules of the International Organisations could provide for internal alternative means that would be qualified to review the individual claims. This represents a first instrument, i.e. 'internal', that will be analysed in the next paragraph. Such an instrument would allow the victims to challenge the UN acts. In other words, if on the one hand it is granted the immunity of the United Nations before the domestic Court, on the other the UN should be bound to respect Section 29. This seems to be a valid reason that leads us to analyse the possible modes of settlement conceived by art. VIII Section 29.

[386] Judgment of the ICJ, *Reparation for Injuries*, par. 174; ivi, par 180.
[387] General Convention, art. VIII section 29.
[388] *Ibidem.*

A question comes naturally. In the absence of such an internal mechanism, or failure to implement it, how could the right of access to a Court of victims be guaranteed?

We can consider two more alternatives, developed in doctrine, which we will consider in the next paragraphs. The second alternative is called indirect: it is provided by art. VIII section 30 of the General Convention. A third alternative is the one that is developing in doctrine and that is the theorisation of a new approach that sees the UN bound by IHRL.

Other authors have also begun to theorise the possibility of considering the right of access to a Court as *jus cogens* norm[389].

4.2.1 Internal mechanisms

As said, the internal option could only be guaranteed and protected by national Courts. It seems to be interesting to recall here what August Reinisch stated:

> "The exercise of jurisdiction by national Courts should not be an end in itself, but rather the means to achieve an end: that is, the development of adequate alternative dispute settlement mechanism within International Organisations in order to ensure their accountability"[390].

This statement needs to be specified: it is not to say that the domestic Court plays an active role since it could not be itself the alternative dispute settlement (considering that national Courts cannot interfere in the affairs of the Intentional Organisations), rather, the domestic Court shall only ascertain that exist an adequate alternative dispute settlement mechanism within International Organisations. In doing so, the Court has the chance to verify whether the alternative means exist and if it is effective to the point of enforcing the right of access to a Court of each individual to avoid that it becomes only an illusory right.

In the early 1990s, in an attempt to seek a response to the responsibility in peacekeeping operations, the United Nations (following the approach of creating an internal mechanism that would allow injured people in peacekeeping operation to have their rights guaranteed) spread the practice of the regulations and SOFA for peacekeeping operations. It established the methods of dealing with claims against UN forces.

Initially, the UN undertook to create a contractual obligation, namely the 'Standing Claims Commission', within the SOFA. The Standing Claims Commission is often foreseen in all UN peacekeeping operations to handle

[389] SCHMITT, WOUTERS (2010).
[390] REINISCH (2013: 572); ID. (2013: 578)

claims for damage arising from its action in peace operations. Once created such a commission, arbitral tribunal was to be set up to hear appeals from that commission[391]. In this paragraph, we will move on to analyse the section 29 in light of the Srebrenica[392] case taking into account paragraph 68 of the SOFA agreed between UNPROFOR and Bosnia-Herzegovina, which contains important provisions concerning a possible alternative dispute settlement. Nevertheless, it must be said that, despite the efforts, an alternative mechanism has never been established.

It has been mentioned in the previous paragraph that the UN shall provide 'reasonable alternative modes of settlement'. Although the ECtHR in the case of the Mothers of Srebrenica ruled that the violation of art. 6 cannot override immunity, at least it must respect the Immunities Convention in Section 29. The approach we are going to define here reflects the decision of the ICJ in the *Cumaraswamy* case: "any such claims against UN shall not be dealt with national Courts"[393], however "immunity from the legal process does not absolve the organisation from Responsibility for unlawful acts"[394]. Indeed, even if the UN operate in peacekeeping operation knowing that they have immunity before domestic Courts, they cannot waive their obligation to provide a remedy for the victims of the damages within its jurisdiction.

To understand then if the Mothers of Srebrenica claims fall within this approach and if the claims fall within the scope of the art. VIII section 29, it is important to move back on to consider one of the most complex issues, namely is determining whether the claims are of private law character.

As mentioned in the previous paragraph, an important clue to trying to address and establish internal claims for violations that occur during peacekeeping operations is given by the SOFA.

In the case of Bosnia-Herzegovina, the SOFA between UNPROFOR and the host State provided for internal claims reviews to be conducted by local claims review boards. Based on the results from these reviews, claims commissions would then be set up to assess the various issues arising on a bilateral basis[395]. As far as the alternative dispute settlement options for victims are concerned, this was recalling the provision of Section 29 of the General Convention: namely, that every possible claim before the jurisdiction commission had necessarily to be of a "private law character"[396]. No claims

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[391] Draft Model-Status-of-Forces agreement between the UN and the Host Countries, Annex to the Report of the Secretary-General, 9 October 1990, UN Doc A/45/594, par. 51.

[392] Status-of-Forces Agreements between the Government of Bosnia and Herzegovina and the United Nations on the status of the United Nations Protection Force in Bosnia and Herzegovina, 1722 UNTS 78 (*UNPROFOR-Bosnia-Herzegovina SOFA).*

[393] Ivi, par. 66.

[394] Judgment of the ICJ, *Difference relating to immunity from legal process of a special Rapporteur of the Commission on Human Rights*, Rep 62, par. 66.

[395] UN Secretary-General, 20 September 1996, UN Doc A/51/389, Report pursuant to paragraph 16 of General Assembly resolution 50/235, administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations, paras. 22–25.

[396] *UNPROFOR-Bosnia-Herzegovina SOFA,* par. 48(1).

commission, neither internal nor alternative dispute settlement options were created. Besides, some authors, such as Schmalenbach, have pointed out that, not only is there a lack of interest on the part of the host state to establish standing claims commissions, but also that very often doubts arise about their judicial independence[397]. Critics aside, the question of obligations under Section 29 remains central.

Despite what said about the operational necessity and public international law claims remains indisputable, it is necessary to draw attention to the fact that there may exist claims of a mixed nature, called 'hybrid'[398]. According to this theory, a same violation can be considered both as a public international law violation and as a private law violation (e.g. human rights violations and tort violations).

A well-known example of such cases is the wrongful conduct of peacekeepers. Although these cases concern wrongful acts performed by UN battalion under the international mandate, they are considered by the UN as receivable under Section 29 of the Convention, because they could be private in character. According to this approach, wrongful acts committed by the UN can be considered, separately, as a tortious or as a public international law acts. Since the hybrid claims could be assessed based on the principles of tort laws[399], without evaluating, on matters of substance, the issues related to the mandate and the implementation of the policy, the operational necessity justification is not applicable in cases of tortious acts constituting human rights violations[400]. The above suggests, thus, that the UN "shall make provisions for appropriate modes of settlement"[401]. By contrast, it is important to pay attention to the fact that if the tortious act is, in any event, understood as an act committed under the operationally necessary means of implementation, this falls outside the scope of Section 29[402].

Taking into consideration all the above mentioned, it would seem that the United Nations shall create an appropriate dispute settlement for the Srebrenica case. For instance, in the *Mothers of Srebrenica* case, since there may be a dual attribution, the evacuation of refugees from the compound, (considered that the Courts held that the UNPROFOR was aware of the risks) can be considered as a "hybrid" claim and therefore be pursued in tort.

Here, however, as said, a new problem arises. Section 29 does not specify which actor would decide the legal nature of the claim. Nor does the SOFA between UNPROFOR and Bosnia-Herzegovina at least have criteria to establish it[403].

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[397] SCHMALENBACH (2015: 320); *UNPROFOR-Bosnia-Herzegovina SOFA,* art. 51
[398] MÉGRET (2013: 168); SCHMALENBACH (2015).
[399] See practice of local claims review (ad hoc local boards) established within a peacekeeping mission; Secretary-General's Peacekeeping Liability Report, par. 22; TAYLOR (2014: 171).
[400] SCHMALENBACH (2004: 229 ss.).
[401] General Convention, art. VIII section 29.
[402] SCHMALENBACH (2015: 323).
[403] *UNPROFOR-Bosnia-Herzegovina SOFA,* par. 48.

According to international procedural law, it is the Court itself (in this case a dispute settlement body) that should decide on its jurisdiction, i.e. the legal nature of the case[404]. As suggested by some authors[405], this would be a further reason for the obligation to create a dispute settlement body. Instead, the UN, according to paragraph 48 of the SOFA between UNPROFOR and Bosnia and Herzegovina states:

> "any dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the Courts of Bosnia and Herzegovina do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose"[406].

The practice adopted to date is that if the UN do not decide unilaterally on the nature of the claim (i.e. assessing it as having a private character), it cannot even be taken into account under Section 29. Again, we are facing a dispute settlement gap[407]. It is made even more known in this matter by the SOFA related to it, which does not seem to give much space to the possibilities of available modes of settlement for the Srebrenica victims[408]. In the case, of Srebrenica however, the UN refused to settle the dispute concerning its alleged failure to prevent genocide on the basis that it was not a private law dispute. What said must make a fundamental point. The existing rules lead to affirm that only the UN shall establish an alternative dispute settlement (even if only to consider whether the legal nature of the claim is private and therefore has jurisdiction).

This would empower the UN to be protected both before domestic Courts, thanks to jurisdictional immunity, and against the 'internal claims' thanks to the limited purpose of Section 29. That is why it is necessary to better implement the already existing system of alternative dispute settlement to make the legitimacy and actions of the UN more credible and reliable (pursuant to art. VIII section 29).

Therefore, it must not be the system of immunity or that of the responsibility of International Organisations that must be changed, but only the way it can be implemented. Moreover, should be consider improving the composition of such bodies, so as to leave no doubt from the credibility point of view.

This gap would, unfortunately, lead to a legal black hole. It might lead to a worrying conclusion: if the UN refuses, as seen, to create and implement measures that could assess its responsibility, then there is no other way for the victims to appeal against the organisation. The only alternative, to the one that has been analysed and to the experimental and pure theoretical ones that will be developed in the next paragraphs, remains that of safeguarding the interest

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[404] TOMUSCHAT (2012: 109).
[405] SCHMALENBACH (2015); SCHRIJVER (2013).
[406] *UNPROFOR-Bosnia-Herzegovina SOFA,* par. 48.
[407] SCHMALENBACH (2014: 248).
[408] *UNPROFOR-Bosnia-Herzegovina SOFA.*

of victims through the diplomatic protection of the host State. This possibility is also recognised by the International Law Commission in the Commentary to the DARIO, where in art. 48 paragraph 2 it is stated:

> "Like article 47 on the responsibility of States for internationally wrongful acts, paragraph 1 provides that the responsibility of each responsible entity may be invoked by the injured State or international organisation. However, there may be cases in which a State or an international organisation bears only subsidiary responsibility, to the effect that it would have an obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organisation fails to do so. art. 62 gives an example of subsidiary responsibility, by providing that, when the responsibility of a member State arises for the wrongful act of an international organisation, responsibility is "presumed to be subsidiary"[409].

The problem of diplomatic protection lies in the fact that the State may have no interest in opening a dispute with the United Nations, and the Srebrenica case is a clear proof of this. Although art. 50 UNPROFOR and Bosnia-Herzegovina SOFA allow "any other dispute between UNPROFOR and the Government" to be sent to arbitration"[410], Bosnia and Herzegovina did not dare to consider itself in dispute with the UN.

In conclusion, there is one last aspect to consider. It is well known that there are no International Courts in which an individual has the possibility to bring an International Organisation to trial. This brings even more pressure for the United Nations to find a way to be held accountable.

In the next sub-paragraph, we will look at the only instrument that the UN could make available to the victims and then move on to consider further alternatives.

4.2.1.1. The UN Standing Claims Commission

At a time when the question arises as to what alternatives might be available to ensure access to justice for all individuals and an effective and real instrument of jurisdiction for the wrongful conduct of UN peacekeeping missions (so as not to allow the UN to remain above the law), the answer is provided directly by the General Convention of the UN.

There is a body which could be made available to victims and could have jurisdiction over all cases where peacekeepers commit a wrongful act, i.e. the UN's Standing Claims Commissions.

Many doubts may arise as to the impartiality of the commission, given that it is composed of staff appointed by the UN itself. But it remains, in fact, the

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[409] International Law Commission, *Report of the International Law Commission on the Work of its 63rd Session*, 2008, UN Doc. A/63/10, p. 286; DARIO Commentary art. 48 par. 2.
[410] SOFA, art. 50.

only instrument available today that allows individuals to have proper access to justice. In other words, the victims, who suffer damage as a result of only tortious actions of the UN battalion, may have accepted an alternative dispute settlement body, designed in line with Section 29[411].

In 1965, the Secretary–General of the UN stated: "It has always been the policy of the UN, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organisation was legally liable. This policy is in keeping with generally recognised legal principles and with the (General Convention)"[412].

The UN's Standing Claims Commissions is a contractual obligation that may be envisaged in the SOFA. The Commission is often foreseen in all UN peacekeeping operations[413]. Although it has never been established, it remains a clear example of the possibility to set an appropriate alternative mechanism. For instance, the Standing Claims Commission was envisaged in paragraph 48 of the UNPROFOR and Bosnia-Herzegovina SOFA, in which the obligation for the UN to establish such a commission was expressed for claims that would arise against the misconduct of peacekeepers in the territory[414].

Even in the case of the cholera epidemic brought by the UN battalion, the victims tried to submit claims against the battalion to the standing claims commission[415] but without success. The UN refused to establish such a commission[416].

In theory, the idea of the claims commission, and the fact of being able to establish a commission that could have jurisdiction over the issues raised by third parties, could represent a fair and proportionate (if one wishes to use the words from the ECtHR in *Waite and Kennedy*) limit to the absolute immunity of the United Nations.

The UN, continuing to reject the possibility of providing a tool like the standing claims commission, not only fails in its duty but also limits the last chance for victims to receive their right of access to a Court.

Moreover, although such contractual obligation between the UN and the host State exists, it is decided unilaterally by the United Nations. The fact that the latter alternative also fails and encounters various difficulties in achieving it, brings the question of a substantial accountability gap in the current framework back to the centre.

For this reason, it is necessary to draw our attention to the new developments that have taken place in doctrine to try and understand if it is

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411 Secretary-General's Peacekeeping Liability Report, par. 7.

412 Letter dated 6 August 1965 from the Secretary-General addressed to the acting permanent representative of the Union of Soviet Socialist Republics, UN Juridical Yearbook, 6 August 1965, UN Doc. S/6595, p. 41.

413 Model SOFA, par. 51.

414 UN-Haiti SOFA, art. 54.

415 Petition for relief from Mario Joseph, Brian Concannon Jr and Ira Kurzban to MINUSTAH Claims Unit, 3 November 2011. In the Petition was clearly mentioned the UN's failure to establish a standing claims commission as required by the UN-Haiti SOFA.

416 Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs to Brian Concannon Jr, 5 July 2013.

possible to erode the absolute immunity of the United Nations and open to a new approach more focused on respect for human rights and international human rights law.

Some scholars have focused their attention on the fact that the UN should adhere to the norms of international human rights law, to protect human rights and not leave a lack of accountability of the UN[417].

> "It is important for the Security Council, in addition to the other principal organs of the United Nations, to fully adhere to applicable international law and basic rule of law principles to ensure the legitimacy of their actions. [...] The Secretary-General fully accepts that relevant international law, notably international human rights, humanitarian and refugee law, is binding on the activities of the United Nations Secretariat, and is committed to complying with the corresponding obligations"[418].

4.2.2 Indirect alternative

A second alternative is the one devised by August Reinisch which could be an indirect alternative to challenge UN acts. According to the author, this approach is provided by the UN General Convention itself, taking into account art. VIII section 30.

To explain this vision, we must start by considering the works of the ICJ. In the UN system, art. 7 of the Charter provides for the existence of a Court, the International Court of Justice, which is one of the six bodies that make up the United Nations. It represents the judicial organ and has the power to issue advisory opinions upon the request of the General Assembly or the Security Council, on any type of legal question that arises about the organisation, and even regarding the relations of the United Nations with its member states[419].

The main task of the ICJ is to verify the functioning of the United Nations, and sometimes, even if it is debated, to check whether the acts of the United Nations can be considered valid. About the latter statement, several scholars have dealt with it and have demonstrated how the ICJ has conducted several reviews of UN acts[420]. But it is worth remembering that the ICJ does not play the role of a "constitutional Court". It can rule on legal questions only when a body or a member state requests its intervention and its opinion (and it is then obliged to respect). However, it should be noted that the right of initiative

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[417] TAYLOR (2014).

[418] Secretary-General United Nations Ban Ki-Moon, *Programme of Action to Strengthen the Rule of Law at the National and International Levels*, 16 March 2012, UN Doc. A/66/749, par. 11.

[419] Charted of the United Nations, art. 96.

[420] AMR (2003: 295 ss.).

belongs only to UN organs and not to the Member States[421]. Bearing this in mind, it is in this context that the idea of an indirect way of challenging the UN acts was born. art. VIII section 30 of the Convention on the Privileges and Immunities of the United Nations, states that:

> "[a]ll differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with art. 96 of the Charter and art. 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties"[422].

In the last part of section 30, it is specified that when an opinion is sought from the ICJ, while remaining an advisory opinion, it has to be accepted by both parties as binding, i.e. both the UN and the Member State involved in the issue[423]. According to Reinisch, this provision may give rise to the possibility of challenging UN acts. According to the author, in this way the ICJ could play a sort of 'preliminary judgment role', similar to the one that the European Court of Justice plays within the European Union according to art. 267 of the Treaty on the Functioning of the European Union (TFEU)[424].

In the European system, as provided for in art. 267 TFEU, a national Court of a Member State may apply to the ECJ for a preliminary ruling on any matter concerning: "(a) the interpretation of the Treaties; and, (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union"[425]. The resulting decision is binding on the national Court.

According to Reinisch, in the same way as the European system, the ICJ could be granted the power to issue preliminary rulings in which the Court could state on whether national jurisdictions should accept a case involving an IO. As made clear also by the author, it

> "aims to shift immunity controversies to resolution at an earlier stage. The idea is to enable contracting States of the General Convention or of other immunities treaties in whose Courts cases against International Organisations are pending to request an advisory opinion of the ICJ on whether the immunity should be upheld or not"[426].

It is here that the author refers to art. VIII Section 30 of the General Convention specifying that, in the United Nations system, the ICJ is already competent to issue an advisory opinion on issues arising on the interpretation

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[421] *Ibidem.*
[422] Convention on the Privileges and Immunities of the United Nations, art. VIII section 30
[423] Advisory Opinion ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, at 76-7.
[424] REINISCH (2013: 585 ss.).
[425] Treaty on the Functioning of the European Union, 25 March 1957, art. 267.
[426] REINISCH (2013: 586).

of a rule between the organisation and its Member States. Thus, when claims relating to specific conduct attributable to the United Nations are brought before national Courts for alleged violations of international law or commission of an internationally wrongful act, the IO could be able to ask the ICJ for an advisory opinion concerning the interpretation of the related rules.

Some authors, such as Pierre Schmitt, have supported this idea and considered it possible[427]. Some have added, however, that to make it effective an 'explicit provision' is needed, i.e. a negotiation between the IO in question and its member states, which regulates the balance between immunity and right of access to a Court in this specific way[428].

Nevertheless, while it is true that the final decision of the ICJ must be accepted by both the parties and such a decision could allow the national Court to have jurisdiction over the United Nations for actions carried out during peacekeeping operations, some perplexities could weaken this alternative. First of all, considering that individuals cannot appeal directly to the ICJ, the States themselves should challenge the acts committed by UN organs. The State to which the victims belong should not only take charge of the claims of the individuals but should also report the matter to the General Assembly or to the Security Council, which should then in turn request the advisory opinion from the ICJ. Again, there may be a lack of interest on the part of the State to challenge the UN, or even doubts may arise as to the impartiality of the decision to seek an advisory opinion from the ICJ, as this can be chosen unilaterally by UN bodies.

4.3 THEORISING NEW SOLUTIONS

The alternatives we have seen, show a certain commitment to finding a solution to the issue of rebalancing the relationship between immunity and the right of access to the Court. It is therefore interesting, to address some new doctrinal developments that seek to focus on the importance of respect for human rights as a valid counterweight to the recognition of the immunity of International Organisations.

To open up to doctrinal developments, one must necessarily start from a fundamental consideration. Individuals hold the human right of access to a Court, therefore the fact that this right is not respected and that it becomes impossible to render a decision on the victims' claims, not only allows the UN to avoid responsibility but also violates human rights.

Over the last few years, we have witnessed a continuous development not only of rights belonging to every human being but also and above all their

[427] SCHMITT (2017: 324).
[428] *Ibidem.*

recognition and growing respect by all subjects of international law. This also applies to the UN, which, given their founding purpose and objective, has awarded increasing prominence to human rights[429]. It is true, however, that when we talk about peacekeeping operations, we have seen that the matter becomes much more relevant. There are several variables to consider that may leave no room for the recognition of human rights, thus making the immunity of the IOs prevail. This last hypothesis is in line with the latest pronouncements of the ECtHR.

In an attempt to limit the effects of this trend, many scholars have been asking themselves whether, and on what grounds, the victims who pursue a legitimate human rights claim might challenge UN's immunity. It should be pointed out that although IOs are not part of any kind of treaty or convention on the respect of human rights, it could not be said that IOs are not in some way obliged to respect human rights. First of all, because the IOs, as widely debated, are subjects of international law[430]. As subjects of international law, they are entirely independent of their members State. It is precisely by following this principle of autonomy as we have said and as confirmed by International treaty law, that an IOs is not automatically bound by treaty obligations of their members[431]. For this reason, the international rules binding IOs are not necessarily the same as those of States. Nevertheless, the legal sources to which IOs are bound are the UN Covenants, the general rules of international law, their founding treaties, and the international agreements to which they are parties[432].

For this reason, although not part of human rights treaties or conventions, IOs may find themselves obliged to respect human rights from other sources of international law. Many provisions bind IOs to the respect of human rights. Some of them have also achieved *jus cogens* status which all actors of international law are obliged to respect all the times, including the UN[433].

Part of the doctrine considers the right of access to a Court and the obligation to provide an adequate dispute settlement as a rule of customary

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[429] Charter of the United Nations, art. 1 par. 3. United Nations shall "promote and encourage respect for human rights and for fundamental freedoms"; DANNENBAUM (2010: 137): "Perhaps the most notable watershed in the tiding prominence of human rights at the United Nations was the establishment of a permanent human rights executive in the form of a High Commissioner for Human Rights. High Commissioner for the Promotion and Protection of All Human Rights, G.A. Res. 48/141, U.N. Doc A/RES/48/141 (Dec. 20, 1993)".

[430] Advisory Opinion of the ICJ, *Reparation for Injuries.*

[431] Advisory Opinion of the ICJ, *Reparation for Injuries*.

[432] Advisory Opinion of the International Court of Justice of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Reports 73, par. 37.

[433] Among the human rights norms that have acquired *jus cogens* status there are: prohibition of genocide (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1); prohibition of torture (Convention against torture and other cruel, inhuman or degrading treatment or punishment, 4 February 1985, Articles 2 and 3); prohibition of slavery (ICCPR, art. 8; ECHR, art. 4; ACHR, art. 6); ASR Commentary, art. 26, par. 5; Judgment of the International Court of Justice of 30 June 1995, *East Timor (Portugal v. Australia)*.

law[434], even if there is still no way to implement it in all circumstances. Moreover, in recent years, the concept that IOs[435], being legal persons recognised by international law, are bound by international law has increasingly evolved. This also extends to customary international human rights law[436]. When accepting this hypothesis, it is inevitable to consider that the immunity of the IOs is conditioned by respect for the right of access to a Court.

The first to argue this possibility were Mégret and Hoffmann, who referred to an "external conception" of human rights' applicability to the United Nations[437]. According to this approach, the United Nations are bound by international human rights standards, since they have now assumed the status of international customary law[438]. The only limitation to such a vision might seem to be the fact that only a small part of human rights now codified in the various treaties belongs to the status of customary law[439].

In addition to the 'external conception', Mégret and Hoffmann propose a second approach, called 'internal conception'[440]. According to the two scholars: "the United Nations is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added juridical *finesse*"[441]. And this conception seems to leave no doubt. No one could deny the values that underlie its constitution[442]. Especially if one thinks for instance to the UN grounds of peacekeeping missions, it is possible to determine that the vast majority of the missions are based precisely on human rights, their respect, and protection[443].

In conclusion, the last conception of which Mégret and Hoffmann speak about is called "hybrid"[444]. This conception is explained as follows:

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[434] SCHMITT (2017: 327).
[435] REINISCH (2008: 290 ss.).
[436] GARDAM (1996: 286); KONDOCH (2001: 245); DANNENBAUM (2010).
[437] HOFFMAN, MÉGRET (2008: 317).
[438] Speaking of human rights having customary law status, we refer to some of the rules stated in the regional Conventions such as ECHR and ICCPR, inspired by the same Universal Declaration of Human Rights; Final Report of the sixty-sixth Conference on the Status of the Universal Declaration of Human Rights, National and International Law Association, *Final Report of the sixty-sixth Conference on the Status of the Universal Declaration of Human Rights, Commentary on the Enforcement of Human Rights Law*, 1994, p. 525; ivi, p. 544 ; D'AMATO (1996); HOFFMAN, MÉGRET (2008); DANNENBAUM (2010); BUERGENTHAL (2012: 1023): "human rights are no longer exclusively matters within the domestic jurisdiction of States".
[439] DANNENBAUM (2010: 136).
[440] HOFFMAN, MÉGRET (2008: 317).
[441] *Ibidem.*
[442] DANNENBAUM (2010).
[443] DUPONT (2006: 255), suggesting that the Secretary-General's July 1999 Report on UNMIK interprets Security Council Resolution 1244 as invoking "international human rights standards as [...] [the] basis for the exercise of its authority".
[444] HOFFMAN, MÉGRET (2008: 318).

> "The United Nations is bound 'transitively' by international human rights standards as a result and to the extent that its members are bound [...] because states should not be allowed to escape their human rights obligations by forming an international organisation to do the 'dirty work'"[445].

These conceptions were then later upheld by Dannenbaum. He will continue to insist that, given that the UN has its legal personality under international law, then it is also legally bound by international human rights law[446]. Furthermore, Dannenbaum argues that if the Charter of the UN is taken into account, Articles 1, 55 and 56 expressly state that the UN must respect human rights and therefore if the UN asserts its immunity before national Courts and does not provide any alternative mechanism this would, in turn, violate human rights[447]. That said, it might seem 'counterintuitive' if, at the moment when the UN commits damage to some private individual, they would resort to immunity by failing to provide access to alternative mechanisms, i.e. by violating a human right[448].

According to this theory, granting UN absolute immunity could not only be in violation of human rights with the status of international customary law but would also be in violation of the UN's obligation of the provisions of the Charter of the UN itself that require the organisation to respect human rights[449]. With no doubt, this seems to be an important basis on which to challenge the recognition of the absolute immunity of the United Nations.

One last approach should still be analysed.

Some scholars argue that the right of access to the Courts could be considered a right of *jus cogens* status[450], which would make it possible for a national Court to justify its jurisdiction and the refusal to grant UN immunity. In this case, Wouters and Schmitt argue "is not so much a conflict between internal and international rules, but rather between international rules *inter se*"[451]. In this way, the national Courts could uphold a challenge to the UN's immunity without breaching its obligations.

Wouters and Schmitt's reasoning starts from the fact that there have been some Courts which have considered the right of access to a Court as an exception to absolute immunity. They cite several different cases in which the Courts have rejected the immunity of the IOs[452], for wrongs committed to private persons or its employee, on the basis that since no alternative tribunal

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[445] *Ibidem.*
[446] DANNENBAUM (2010: 123); FREEDMAN (2014: 251).
[447] Ivi, p. 251.
[448] PAUST (2010: 9).
[449] Charter of the United Nations, art. 55, par. (c).
[450] SCHMITT (2010: 26).
[451] Ivi, p. 25.
[452] Judgment of the Brussels Civil Tribunal of 11 May 1966, *Manderlier v Organisation des Nations Unies et l'État Belge* (Ministre des Affaires Etrangères), Journal des Tribunaux 721; Judgment of the US Court of Appeals DC Cir of 2 August 1985, case 768 F. 2d 1497, *Urban v United Nations*, 248 US App. DC 64; Judgment of the French Cour de Cassation of 25 January 2005, *African Development Bank v Haas*, Journal des Tribunaux 454.

was established individuals could not exercise their right of access to the Courts (denial of justice)[453].

According to the authors, it is essential to consider the case *African Development Bank v Haas* of 2005, where the French *Cour de Cassation* referred to the right of access to a Court as "part of the international public order"[454]. In doing so the *Cour de Cassation*

> "does nothing else than satisfy the requirements in the Waite and Kennedy v Germany and Beer and Regan v Germany cases. The question is not so much a conflict between internal and international rules, but rather between international rules inter se. The aforementioned case law points to the emergence of a substantive hierarchy among international norms and the supremacy of the ECHR over other international treaties"[455].

However, if the national Courts lifted the immunity of an International Organisation, then they would breach their international obligations towards that organisation.

That is why they finally argue that the only way to justify this interference by the national Courts and not to violate an obligation towards the IOs, would be to consider the right of access to a Court as a *jus cogens* norms[456]. This vision stems from the ICTY judgement which stated: "art. 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere"[457].

This concept seems a bit risky, especially when it is considered that the national Courts do not seem ready to lift the unconditional immunity of the UN. Nevertheless, there are some pronounces of domestic Courts that consider the right of access to a Court as a *jus cogens* right, even if they represent a legal *unicum*[458].

So far, few national Courts have raised the right of access to Courts as a *jus cogens* rule. This *unicum* is certainly represented by the Argentinean Courts. The first case in which a national Court rejected the immunity of the International Organisation based on the violation of the human right of access to the Courts dates back to 1983 in the *Cabrera* judgment held by Argentinian Supreme Court related to the Comisión Técnica Mixta de Salto Grande[459]. Since the IO had failed to establish a dispute settlement for private parties the Court decided to lift immunity based on the peremptory norm provided by the right of access to a Court envisaged in art. 53 of the Vienna Convention on the Law of the Treaty, articles 8 and 10 of the Universal Declaration of Human

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[453] SCHMITT (2010: 24).
[454] Ivi, p. 25.
[455] Ivi, p. 26.
[456] *Ibidem.*
[457] UN Human Rights Committee, 24 July 2001, Doc. A/56/40, 2001, General Comment No 29, at 191; Judgment of the International Criminal Court for the former Yugoslavia of 27 February 2001*,* case number IT-94-1-A-AR77, *Vujin v Tadic*.
[458] REINISCH (2008).
[459] Judgment of the Argentinian Supreme Court of 1983, 305 Fallos de la Corte Suprema 2150, *Washington Julio Efraín Cabrera v. Comisión Técnina Mixta de Salto Grande*.

rights, articles 3 and 14 of the ICCPR, art. 18 of the American Declaration of the Rights and Duties of Man and in conclusion art. 8 of the American Convention of Human Rights.

There has been much criticism of this decision, given that the mere reference to all the human rights provisions listed by the Court does not establish whether that rule has a status of *jus cogens*[460], nor give at least an explanation to justify that status of the right of access to the Court. This approach (the recognition of the right of access to a Court as a *jus cogens* character) was subsequently confirmed by the Supreme Court decision of Argentina in the 1999 *Duhalde* case[461].

Furthermore, although as specified by the Court itself this approach remains valid and is limited only towards the European Institutions[462], it is worth mentioning the Italian Supreme Court decision in the *Pistelli* case of 2005[463]. In this approach, using art.: 6 ECHR to be read in conjunction with art. 6 Treaty of the European Union (TEU) and art. 48 TEU; art. 14 ICCPR; art. II-47 paragraph 2 Charter of Fundamental Rights, the Court goes so far as to define them as core values of the European 'institutionality' and its *jus cogens.*

Accepting these hypotheses leads to the last, and probably most difficult, possibility, namely that the national Courts, from the recognition of the right of access to a Court to the status of norm *jus cogens*, find themselves counterbalancing the immunity of International Organisations by promoting their respect for human rights. In doing so, they may also find themselves lifting the immunity of the IO without violating any obligation towards them. This could lead national Courts to not only assess the existence of an appropriate alternative means and assess the quality of it, considering whether individual rights are restricted disproportionately and whether the criteria of independence and impartiality are met. In the absence of such standards, it does not seem unthinkable (according to some approaches) to consider the national Courts competent to enter the merits of the issues.

In contrast to this point of view, it is interesting to recall here the partly dissenting opinion of judge Sajó in the ECtHR *al-Dulimi case*.

> "The sole exception to these principles of hierarchy involves *jus cogens*, the body of peremptory norms of international law from which no derogation is permitted. These rules have been referred to as possible limits for Security Council sanctions (see, for example, Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions," 16 *European Journal of International Law* 59, 63 (2005); however, see Milanovic, cited above, at 71: "*[J]us cogens* is used rarely, if ever, to invalidate supposedly conflicting norms"). Established

[460] DI FILIPPO (2014: 203); ID. (2014: 205); SCHMITT (2017: 255).
[461] Judgment of the Argentinian Supreme Court of 1999, D.73.XXXIV, 332 Fallos de la Corte Suprema 1905, *Duhalde v. Organización Panamericana de la Salud – Organización Mundial de la Salud – Officina Sanitaria Panamericana.*
[462] SCHMITT (2017: 295).
[463] Italian Court of Cassation, 29 October 2005, case number 20995, *Pistelli v. European Universtity Institute*.

> peremptory norms include the prohibition against the use of force, the right to self-determination, the prohibition of genocide, and certain fundamental human rights (see Rüdiger Wolfrum, "Judicial Control of Security Council Decisions," *Yearbook of Institute of International Law*, Tokyo Session, 1, 42-43 (2013)). These rights do not include the enjoyment of possessions, economic freedom or access to a Court or tribunal, particularly in civil proceedings. Nor have these rights yet attained the status of customary international law. Consequently, they do not fall under the *jus cogens* exception limiting States' duties to implement non-conforming Security Council resolutions"[464].

For this reason, the acceptance of the right of access to the Court as a *jus cogens* norm seems difficult to apply today. Nevertheless, other means by which the UN acts could be challenged have been considered in this chapter. The first of these, i.e. the so-called internal solution, seems to provide the most plausible and respectful answer to all existing international standards, on the one hand by providing victims of UN damages with an appropriate alternative means, and on the other hand by ensuring the immunity of the UN before national Courts. Despite all the problems related to the nature of the act (which must be a tortious act) and to the fact that to decide whether it is a private or public claim is decided unilaterally by the United Nations, it seems to represent the best solution for a simple reason. It does not require to change or create a new accountability system but it would be sufficient to improve the implementation of the existing rules and better specify what does it mean an 'appropriate method of settlement'[465] mean.

This view could be accepted even because there are some circumstances in which a State that is a member of the UN and part of the ECHR (or any other Convention devoted to the human rights), could be under two conflicting international obligations, which are difficult to resolve by national Courts. Thinking of creating a system that provides greater protection at the UN level, could be a significant solution to this problem.

[464] Partly dissenting opinion of the judge András Sajó of the European Court of Human Rights of 26 November 2013, Application Number 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland*.
[465] Convention on Privileges and Immunities of the United Nations, art. VIII, Section 29.

CONCLUSION

Having established that there is an independent and autonomous legal personality of the United Nations, the present work has analysed the cases in which the Organization could have been responsible for internationally wrongful acts.

Once the possibility of holding an International Organisation accountable was confirmed, the analysis of the Draft articles on the Responsibility of International Organisations showed that the decision to apply, *mutatis mutandis*, some provisions of the Draft articles on Responsibility of States for Internationally Wrongful Acts, led to a complicated application of the codified rules, because it did not take into account the 'principle of speciality' that makes International Organisations different from States precisely because they are created by the latter. It is true that the DARIO is solely a draft and can be subject to modifications and review, however, the guidelines identified in it have already been applied by various courts, as in the case study which is the subject of this thesis.

In the description of the DARIO provisions dedicated to attribution, several questions have arisen.

The first concerns the formula adopted for art. 7 DARIO. The terminology used implies two factors. It refers both to the institutional link and the direct relationship that exists between an organ and the International Organisation to which the former has been placed at disposal of, and, at the same time, to the 'effective control' test. That is the principle, created by the International Court of Justice in the *Nicaragua* case, and confirmed afterwards by the same Court in the case related to Bosnian genocide, which pertains to a type of analysis of the conduct of individuals, or groups, not belonging to the 'machinery of the state'. This has left many doubts about its interpretation and application.

The analysis of the case-law related to States has been taken into consideration precisely to understand why they have been devised and what kind of application has been given to the two principles discussed, namely the 'effective control' and the 'overall control' test. Although, the *Behrami and Saramati* case adopted by the ECtHR has been useful to analyse the application of the 'ultimate control' test in peacekeeping operations, the one that was most helpful for the analysis of the Srebrenica case was undoubtedly the effective control, as seen in the affirmation of the dual attribution.

In the analysis devoted to the UN responsibility in the Srebrenica genocide, there are two main outcomes.

The first concerns the possibility of having a dual attribution, in other words, the possibility of attributing actions performed by peacekeepers to two different actors: the United Nations and the Member States. The second concerns the consequences of the Dutch Court and ECtHR decisions in granting absolute immunity to the UN. This second issue has brought the analysis to focus on a complex issue, namely whether such immunity can be

limited to guarantee not only the right of access to the courts but also an effective system of responsibility for the wrongful conduct of the UN.

Moving back to the first outcome, the Court, through the effective control test used in art. 7 DARIO, was able to affirm that the specific conduct of an organ, even though its control had been transferred to the UN, could be attributed to the State of origin to which the organ formerly belonged. The Court pointed out that the use of effective control pursuant to art. 7 DARIO did not imply since there was no control by the UN, that the conduct should have been attributed directly to the State. For this reason, to determine whether the act was attributable to the State, the Court made use of art. 8 DARIO. In the context of the particular circumstance that occurred (the transitional period), the organ transferred to the UN was considered by the Court as an organ that did not belong to any specific actor, and hence the attribution depended on which subject had factual control over it.

This analysis made it possible to not only determine which subject held effective control during UNPROFOR operations but also to assess the alleged material breach that had occurred. This resulted in verdicts, by the Dutch courts, for the State of the Netherlands for the damages (the *Nuhanović* case in 2013 and *the Mothers of Srebrenica v. the Netherlands* in 2019). This analysis showed how, albeit indirectly, the two constituent elements of internationally wrongful acts could be retraced even by considering the conduct in which the UN held effective control. It is precisely the decision of the Dutch Court of Appeal, then upheld by the Dutch Supreme Court albeit with a different approach, which would determine that UNPROFOR's conduct (if the 'transition period' was not taken into account) is in principle attributable to the UN because the Dutch battalion had been transferred under their control.

Such an approach shows that UNPROFOR acted wrongfully and failed in its mission. Besides, it must be added that declaring the State responsible should not be a palliative to UN accountability. While dual attribution represents an important achievement and a fundamental decision, it does not resolve the issue concerning the responsibility of the United Nations. What are the implications of the responsibility of the UN? Is the UN obliged to provide an alternative legal remedy? This connects us to the second outcome.

Despite the existence of several cases where victims of the damages caused by the UN peacekeeping forces tried to enforce the principle of the right of access to the court as recognised by the ECtHR decision in *Waite and Kennedy*, the Srebrenica cases (the decision of the Dutch Supreme Court in *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations* and the ECtHR in the *Stichting Mothers of Srebrenica and others against the Netherlands* decision of 2013) ruled that a civil claim did not override immunity. In doing so, the Courts recognised the absolute nature of immunity.

This decision highlighted the fact that the victims of the peacekeepers' violations attributable to the UN, substantially, cannot appeal to any international or national court. The impossibility of bringing the UN before a court thus not only results in a denial of justice and alleged violation of the

human right of access to a Court, but also highlights a legal black hole in the UN system of accountability.

The practice adopted in Srebrenica has put the lack of accountability of the UN in the spotlight. The issue of the lack of alternative mechanisms has subsequently gained in importance with the cases of the cholera epidemic unleashed by UN troops in Haiti and the sexual abuse scandal. The lack of implementation of the responsibility has suggested that the immunity of the UN, and the functions it performs, are more important than some human rights. But this has also highlighted the need to re-evaluate UN's immunity. Moreover, according to legal practice, it can no longer be denied that International Organisations also have obligations arising from respect for human rights, namely the obligation to respect the human right of *jus cogens* status, such as: the prohibition of genocide, the prohibition of torture, the right to life, the right to humane treatment, the prohibition of criminal ex post facto laws, the prohibition of war crimes, the prohibition of discrimination on the basis of race, color, sex, language, religion, or social origin and the prohibition of crimes against humanity.

Starting from this hypothesis, some scholars have tried to design new systems that could solve this problem. Taking into consideration all the above mentioned, the possibility of theorizing and implementing valid alternatives to challenge UN acts has returned to the center of the debate. This necessity has been affirmed several times also by the United Nations in its reports and memos even though no measures have been implemented so far.

The final part of the thesis dwelled on this point. As a result, the first outcome is that UN accountability before domestic courts is not an available option for individuals in the present state of the case law. There have been different possible alternatives devised by several authors, such as the 'indirect way' to challenge the UN act, proposed by August Reinisch, the theory of considering human rights as obligations that derive from the recognition of the international legal personality of IOs (the theory refers to the fact that IOs could not abide by these rules as subjects of international law and thus also extends to the right of access to the court); and authors such as Wouters and Schmitt who, to justify the possibility for national courts to have jurisdiction over IOs and lift the immunity, have gone so far as to suggest the possibility of considering the right of access to a court as a *jus cogens* norm. However, as we have seen, none of the above seem to be the most practicable solutions to date.

First of all because International Organisations are not yet parties to human rights treaty. Besides, the possibility of giving jurisdiction to national courts concerning the UN, could lead not only to friction between international actors but could also put at risk the independence and hence the effectiveness of UN peacekeeping missions. For this reason, although of fundamental importance in the world of legal theories and useful for possible future developments, the hypotheses suggested still seem remote and complicated to consider at present.

Nevertheless, during the analysis of alternatives, one seemed to be the most appropriate one. It is, the one that does not want to change the system of responsibility, but tries to implement the rules already existing within the International Organisation in the best way. A clear example is provided by art. VIII Section 29 of the Convention on Privileges and Immunities of the United Nations. While it is true that the UN has failed so far to provide appropriate mechanisms and that there is no sufficient practice of international organisations for resolving those disputes, it could still provide the most credible alternative. In order to do so, however, some existing identified gaps in chapter four must be resolved. To implement an adequate dispute settlement within the UN and not to impair the right of access to the Court it would be necessary to follow some step.

Firstly, it must be specified that the terminology used in art. VIII Section 29, i.e. appropriate method of settlement, refers to a specific *ad hoc* body (or a Court) that could be established when a dispute from a private character arises.

Secondly, it is necessary to establish what is meant by private character, by explicitly including disputes of private character that arise during peacekeeping operations between UN and third individuals.

Thirdly, it must me expressly stated that the nature of the act should not be decided in advance by the United Nations but that, in line with international procedural law, it should be the body (or Court) created ad hoc that declares its jurisdiction, and therefore whether it falls within or outside the scope of the article.

Finally, the body created to solve the dispute must be expressly characterised by two essential elements, namely independence, and impartiality.

In this way, it is not necessary to change or create a new accountability system, nor at least is it required for national courts to violate their obligation towards the UN, but it would be sufficient to improve the existing rules. This remains a fundamental argument because the right of access to the Court is particularly important. The importance of this human right is not only demonstrated by its presence in all the Conventions dealing with human rights but also because it serves as a means for individuals to protect all other existing human rights.

As held by the Italian Supreme Court in 2014,

> "Ripetutamente questa Corte ha osservato che fra i principi fondamentali dell'ordinamento costituzionale vi è il diritto di agire e di resistere in giudizio a difesa dei propri diritti riconosciuto dall'art. 24 Cost., in breve il diritto al giudice. A maggior ragione, poi, ciò vale quando il diritto in questione è fatto valere a tutela dei diritti fondamentali della persona. […] Sarebbe invero arduo individuare quanto resterebbe di un diritto se non potesse essere fatto valere dinanzi ad un giudice per avere effettiva tutela. […] Né è contestabile che il diritto al giudice ed a una tutela giurisdizionale effettiva dei diritti inviolabili è

sicuramente tra i grandi principi di civiltà giuridica in ogni sistema democratico del nostro tempo"[466].

[466] Judgment of the Italian Constitutional Court of 29 October 2014, case no. 238/2014, *Simoncioni c. Germania, ILDC 2237 (Italy)*, par. 3.4

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ABSTRACT

CHAPTER I. FROM THE ORIGINS OF THE CONCEPT OF STATE RESPONSIBILITY TO THE INTERNATIONAL ORGANIZATIONS RESPONSIBILITY AND THEIR LEGAL PERSONALITY.

1.1 THE ORIGINS AND THE NOTION OF STATE RESPONSIBILITY

The core argument of this thesis is to question the responsibility of International Organisations. For this purpose, the aim of this paragraph is to retrace the steps that led to recent notion of responsibility in international law. It is useful to understand the bases, parameters and general rules governing the vast field of responsibility because they apply to any entity of international law having legal personality and therefore capable of performing legally relevant acts. But, International Organisations are not States and therefore the same rules should not apply exactly and automatically.

Moving on now to describe the general theory of Anzilotti and Ago, and then the works of the International Law Commission on the responsibility of the State and the International Organisations, it will be possible to consider and frame the large and complicated issue of responsibility.

1.1.1 The notion of State responsibility according to Anzilotti and the evolution of the Concept

Dionisio Anzilotti seeks here to create a new general theory, composed by general principles, which could frame and facilitate the assessment of responsibility in International law. Anzilotti's work, and his conceptual division, have the merit of creating a formal structure of the act giving rise to responsibility. His practical conception of responsibility, simplified and reduced to the causal link, as well as the unification of the object and the purpose of responsibility, have had the extraordinary effect, for his time, of creating a reparatory machinery that was reliable and capable of empirical adjustment.

At the time of the first World War, scholars began to question other and more complex questions. Among the most authoritative scholars, need to mention the Italian jurist Roberto Ago, first Special Commissioner for the Draft Article on the responsibility of the State.

1.2 THE IMPORTANCE OF THE DRAFT ARTICLES ON THE RESPONSIBILITY OF THE STATES AS A BASIS FOR RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

In order to understand the entire legal regime pertaining International responsibility, it is important to start from the analysis, of the Draft Articles on the Responsibility of the States (ASR) codified by International Law Commission (ILC). Attention, evoking the origins of the responsibility of

States it is crucial, as will be shown, in order to assess the responsibility of International Organisations, considering that the former will be applied *mutatis mutandis* to the latter. The decision was taken by the ILC and his Special Rapporteur Giorgio Gaja.

The most important figure was Roberto Ago, as clearly understood in his first Report of 1969, who argues that for being in presence of the responsibility it is necessary to understand the origins, namely the constituent elements of the internationally wrongful acts. Furthermore, Roberto Ago decided to base the entire regime of International responsibility on the 'wrongful act'.

As a matter of fact, the first article on the definition of breach of an International law, introduced in 1973, confirmed in 1981 and later adopted in the final Draft of 2001, stated: "every internationally wrongful act of a State entails the international responsibility of that State"[467].

This was one of the three fundamental parts which, as will be seen, will also apply to the IOs.

The second one was the principle of 'objective' responsibility and the third was the distinction between those that Roberto Ago called substantive norms and general norms, namely 'primary' and 'secondary' rules.

In 2002, due to the similarities and the assumption according to which IOs held legal personality, the ILC decided to open up and broaden the topic of international responsibility, focusing on International Organisations and precisely because they are subjects of international law having legal personality.

1.3 IO LEGAL PERSONALITY AS A PREREQUISITE OF IO RESPONSIBILITY

The responsibility represents a fundamental objective evidence of the IO personality. Furthermore, it is important to focus on the fact that IOs are governed by the 'principle of speciality' which means that they are created by States or other International Organisations that give them powers and limits, and which identify their aim in order to carry out very specific tasks. In fact, there are important differences between State and IOs, such as the nature of the personality, powers on a territory and extension of the powers.

It is important to stress that IOs have a treaty-making capacity, namely the possibility to adhere, or sign, an international treaty. This clearly is another evidence of the fact that each actor like an IO is subject to international law.

An important aspect is how IO acquire the international legal personality. It has been stressed that the acquisition of personality may not only depend on the fact of possessing 'constituent instruments', i.e. the instruments specified by the States when they create a specific IO by treaty, but also the legal capacity to fullfil and implement its purposes.

[467] Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, (ASR), Article 1.

In order to try to justify the IOs legal personality in doctrine there are three different theories: 1) The 'will theory', i.e. from the willingness of some States to create a new entity which could fulfill certain specific purposes; 2) The objective theory argued by Finn Seyersted[468]. According to him, it is not only necessary to pay attention to formal elements but also to examine whether the organs of the IOs can assume obligations on their own; 3) The third is a paramount synthesis between these two theories was expressed by the International Court of Justice in 1949.

The ICJ confirmed that the UN, not only enjoyed functions and rights specified in the founding treaty, but also the fact that it practiced these powers in the international reality, implied the undoubted international legal personality. In conclusion, the ICJ specifies that it has an international personality distinct from that of the States and that, being such, UN is an actor capable of possessing international rights and duties, and therefore capable of bringing international claim.

1.3.1 The Responsibility of the International Organisaitions and the Draft Articles on the Responsibility of International Organizations: similarities and dissimilarities with ASR

Taking into considerations all the above mentioned, it was necessary to create a convention that would take into account the fact that the wrongful conduct of an International Organisation would arise the international responsibility. The work of the ILC, which ended in 2011 with the drafting of a new Draft article on the responsibility of International Organisations, was true, directed to regulate this complex issue following the same structure and approach adopted for the Draft on State responsibility. As said in the previous paragraph, the International Organisation is not a State and it is governed by the "principle of specialty" and therefore the same rules should not apply exactly and automatically. Nevertheless, in 2002, the ILC appointed Professor Giorgio Gaja, as the Special Rapporteur on the topic. He immediately introduced its method, called 'Gaja Method'[469], namely, as stated above, to base the DARIO on the Draft article for States responsibility.

For this reason, it is possible find some identical elements to the ASR within the DARIO. As far as similarities with the responsibility of the Stares are concerned, *in primis* the principle that "every internationally wrongful act of an International Organisation entails the international responsibility of that organisation"[470]. Besides, a general accepted principle that characterise an internationally wrongful act of an International Organisation, which is a rule that remains the same as that previously adopted by the ILC for States, is that the conduct "consist[ing] of an action or omission" must be "(a) attributable

[468] SEYERSTED (1963: 47).
[469] PELLET (2013: 43).
[470] DARIO, Article 3.

to that organisation under international law; and (b) constitutes a breach of an international obligation of that organisation"[471].

As far as concerning the subjective element, few words will be spent here, namely that according to Article 6 DARIO the attribution of conduct of an organ or agent that is part of the structure of the IO attributable to the organisation itself. Subsequently in the next chapter, the issue of attribution will be further taken into account.

With regards to the objective element, chapter III DARIO plays a particularly important role in the Draft, since it deals with the notion of 'breach'. It gives the tools to determine how, once attribution is ascertained, the conduct of the IO constitutes a breach. It was also specified previously, but it is worth repeating, that a wrongful conduct arises when an IO acts in a way that does not comply with the rules of international law to which it is bound. Once this eventuality has been ascertained, a new legal relation arises between the IO that committed the violation and the injured State - or IO. In other words, responsibility. Chapter III plays a fundamental role in determining whether there is a breach, and the time and duration at which it occurred.

By defining the breach as an act that is "not in conformity with what is required of it" not only represents the base of the objective element. The choice of this terminology entails a broader meaning of the breach, insofar the intentions of the ILC were those of not limiting the concept of international obligation, but enclosing in this definition any act or omission.

1.5 THE LEGAL CONSEQUENCES OF AN INTERNATIONALLY WRONGFUL ACT

Having defined the heart of legal responsibility, i.e. the definition and the elements necessary for the IO to be responsible as a result of an internationally wrongful act, also the consequences of the supervening responsibility should be investigated.

With regards to the legal consequences that a responsible State/IO finds itself facing, there is usually a reference to a new legal relationship which arises upon the commission of an internationally wrongful act. This legal relationship constitutes the substance, or content, of the international responsibility of a State/IO and, in order to analyse it, it will be useful to take again as a reference point the work that the ILC (DARIO).

Pushed by the need to create a much more inclusive and clear definition, the ILC decided to accept a new formula, using 'caused by'. In other words, what the ILC does is nothing more than using an inclusive approach to the term 'injury' so that it could have incorporated all forms of damage, and therefore of the violation. In fact, as we read in Article 31 DARIO, dealing with reparation: "The responsible International Organisation is under an obligation to make full reparation for the injury caused by the internationally

[471] DARIO, Article 4.

wrongful act"[472]. Besides, Article 31 DARIO envisage 2 legal consequences that, i.e. cessation and full reparation.

It could be at least interesting to note that the violations of a peremptory norm of general international law, committed by an IO, represents "a gross or systematic failure by the responsible International organisation to fulfill the obligation"[473]. If a serious breach does occur, it calls for the same consequences as in the case of States. The only particularity, as defined in article 42 DARIO, is that "States and International Organisations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article"[474].

CHAPTER II. THE SUBJECTIVE ELEMENTS AND ITS DETERMINATION

2.1 ATTRIBUTION OF CONDUCT: THE NOTION AND ITS SET OF RULES

Attribution is the legal procedure used to identify a specific mechanism that clarifies whether a specific conduct carried out by an organ or an agent, or even by a private individual or a group, is directly attributable, under international law, to a State or an International Organisation.

To get to the core issue of the attribution, it is fundamental to begin by considering Article 4 ASR and Article 6 DARIO in order to understand their characteristic elements. The attribution of conduct must necessarily consist of "an act or omission or a series of acts or omissions" and that these are considered "as the conduct of the IO (or State)"[475].

It is necessary to stress the unity actors in the framework of international law. Even though in the rules of the organisations several organs exist, International law takes into consideration all the organs and agents as a whole, namely it considers the IO as the only subject which has international legal personality and therefore the only subject that can be held responsible before international standards. This position is made clear in both Drafts[476].

At this point, it is essential to outline the rules that exist in international law in cases relating to attribution issues in peacekeeping operations. The question with which we must start determining attribution is, therefore, to whom does the military contingent belong to, the State or the United Nations?

In order to give answers to these questions, it will be necessary to start from a separate analysis of the different existing rules that will allow to frame this complex system of international rules.

2.2 THE INSTITUTIONAL LINK AND THE EX-POST ANALYSIS

[472] DARIO, Article 31.
[473] DARIO, Article 41, par. 2.
[474] DARIO, Article 41.
[475] DARIO, Article 4.
[476] ASR, Article 4, par.1 ASR.

Looking at Chapter 2 DARIO, it is possible to assume that the only purpose of the chapter is to identify the rules and characteristics useful to determine the conduct of an International Organisation and thus to define its attribution, element that could trigger responsibility for an internationally wrongful act. The attribution is based on three main pillars. The first one concerns the "institutional link", and it deals with all the behaviors that are automatically attributed to the State/IO; the second pillar instead is called "factual link", and it refers to the link that is established between a State/IO actor and another private one that can be under instruction or direction and control of the former; finally, the third pillar refers to the behavior that a State/IO adopts after a third actor has put in place a specific behavior - found to be wrongful.

This first paragraph will focus on the first of the three pillars, i.e. the "institutional links". It is used to identify all those actors, which exercise governmental authority or even agents exercising IO functions, whose conduct is automatically attributed to State or an International Organisation, i.e. *de jure* IO organs. The process of assessing the attribution to the institutional link group is probably the most straightforward.

It is necessary to look at the connection, created by internal law through authorization, between the IO and the organ or agent in question.

Nevertheless, there is an important exception that should not be underestimated. In some specific cases, the conduct of a private individual could give rise to the responsibility of an IO. However, this hypothesis should be distinguished from cases of unauthorised conduct, or conducts that go against the indications or orders given, i.e. '*ultra vires'* conduct.

In conclusion, it is necessary to mention the third pillar of attribution norms, that concerns the links that are established *ex post facto*.

2.2.1 Ultra Vires conduct

Among institutional link cases, the conduct of an organ, acting in official capacity, is deemed attributable to a State or IO "even even if it exceeds its authority or contravenes instructions"[477]. This last case, called *ultra vires*, has been widely discussed and finally adopted with an important aim: that to guarantee clarity and security in international relations and to prevent IOs from justifying violations of international law simply by hiding behind the justification of having given a specific order which was not respected by the body or agent which received such order.

In 'ultra vires conduct', the most pressing issue is certainly to determine whether the body performs the conduct in an official capacity or not ("whether they were acting with apparent authority"[478]). The thin line that separates the 'private' conduct from the 'official', could be summarized in observing if the

[477] ASR, Article 7.
[478] ASR Commentary, Article 7, par. 8.

State in question "knew or ought to have known of it and should have taken steps to prevent it"[479].

2.3 THE CASE OF AN AGENTS OR AN ORGAN PLACED AT DISPOSAL OF AN INTERNATIONAL ORGANISATION: A COMPARISON OF CONTROL TESTS IN ASR AND DARIO

Although the IOs have their own legal personality, it would be misleading not to consider States as an essential part of the decision-making process, being the creators of a specific common end to achieve by the IO. This relationship creates important issues that can be resolved through the rules of attribution. Who and to what extent is responsible for a specific act? The IO itself or its Member States?

When talking about organs of an International Organisation it is helpful to look at the link that exists between the organisation and the organ. In this case (i.e. organs placed at disposal of an IO), it is also necessary, if not fundamental, to observe the functional link that exists between the organ that performed a certain action and the International Organisation. If we take a step back, while Article 6 ASR is limited to a specific situation[480], Article 7 DARIO is not properly the same.

Whereas in cases concerning States the functional link between this organ and the receiving State already existed in the act of placing an organ at the disposal of the receiving State[481], in Article 7 DARIO, the ILC not only uses separately both the two concepts (namely, the 'placed at disposal' and the effective control itself as envisaged by Article 8 ASR) but also opens the possibility of shared responsibility between IO and its Member States.

Some scholars argue that probably the provisions for the organs placed at disposal of an IO serve to make clear some concepts: for instance, the fact that in military peacekeeping operations, the State that places at the disposal of the UN its own troop continues to maintain a certain degree of power and control over disciplinary and criminal matters of the battalion.

In the analysis of the degree of control used for article 8 ASR and transferred to article 7 DARIO, it is clear that the ILC stated to assess, on a case-by-case basis, who is held responsible over specific conduct. This analysis may be very useful in the evaluation of the attribution for military operations and UN peacekeeping and, as will be seen, is fundamental in the approach adopted by Dutch Courts in *Nuhanović* case.

The ILC manages to evoke the principle of effective control as stated in Nicaragua first and confirmed in the Bosnian genocide then (which will be

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[479] *Ibidem.*

[480] ASR, Article 6, par. 1.

[481] It is a link that derives directly from the act of sending the State of "place at the disposal" of another State an organ that is part of its "machinery" (therefore, from an institutional point of view: i.e. institutional link).

analysed in the next paragraph). In response to this, some scholars have argued that the criterion of effective control used here is completely misleading[482].

2.4 THE UTILITY OF FACTUAL APPROACH

Taking into consideration all the aforementioned, and considering that article 7 DARIO gives the elements of the factual link analysis, for this thesis, it is very useful to consider how they were created and what use was given to the degree of control analysis

It is precisely the situation in which the conduct of individuals, or groups of them, who are not part of the State structure (or as seen in the International Organisation) and no other 'machinery', (in private capacity) that is codified in Article 8 ASR. For this reason, it is important to consider the Nicaragua case, where for the first time the "effective control" test was used. The degree of control that an IO could exercise over an organ placed at disposal, is precisely in the same way as factual.

It seems necessary to specify the interest in the practice of Courts about the "control" of States while dealing, in this thesis, with International Organisations. This is because in the absence of sufficient practices and legal cases relating to International Organisations it is important to analyse the article 8 ASR. In addition, it makes assessable the effective control, which it is necessary in order to analyse any specific conduct and in order to establish its attribution.

The starting point must be, as said, the ICJ decision on the issue of the 'contras' role in Nicaragua. The degree of control was taken into consideration for the first time in the case related to it, in order to assess the violation of international humanitarian law. It was necessary to determine whether the breach of the contras was attributable to the United States according to the principle of direction and control, or whether the 'contras' were instead acting autonomously. In the evaluations carried out, the ICJ affirmed the application of the 'effective control' test. The Court in using it, decided to evaluate only those cases in which there was an effective instruction, direction, and control relative to specific wrongful conduct - such as, for example, if in the case in question the US had indeed ordered the 'contras' to act in that particular way that led to the violation of humanitarian law - and therefore not to a general situation of support or dependence.

In contrast the ICTY, in a case very different from the one analysed, decided to consider the test differently, adopting the concept of 'overall control'. Despite this interesting discussion among scholars of international law, the ICJ, in order to delineate a clear and definitive threshold of attribution, pronounced itself in the case of the Bosnian Genocide in favour of

[482] MESSINEO (2014: 60 ss); LARSEN (2008: 518); International Labour Organisation Commentary, 2006, UN Doc. A/CN.4/568/Add.1, p. 14 ss.

the Nicaragua decision[483]. A clear outcome of this decision was that, when it comes to direction and control, this must, and can be, only "effective".

2.4.1 The "degree of control" as a tool to assess the authority shared between UN and its Member States

Most of the practice relating to Article 7 DARIO relates to UN military operations and thus to the conduct of the armed forces which is made available to the United Nations by the Member States.

All the organs, in cases of the peacekeeping operation, become organs in the service of the UN, which holds the operational control. Hence, their conduct should be considered as actions performed on behalf of the UN and therefore attributable to the latter. Moreover, speaking about peacekeeping operations, it states that the authority "is vested in the Secretary-General, under the authority of the Security Council, […]; [and] involves the full authority to issue operational directives"[484]. Nevertheless, since the States still retain part of the powers and criminal jurisdiction over the members of the national contingent, an issue arises. For this reason, it becomes necessary to evaluate how effective control operates and how the question of the attribution in UN peacekeeping operations is evaluated.

To this end it is interesting to look at a case where International Court applied Article 7 DARIO and provided its interpretation. This includes the decision of ECtHR in May 2007, where the "ultimate authority and control" is used as a test to assess the attribution[485]. In the Judgment of the Grand Chamber of the European Court of Human Rights of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* the Court answered that the only actor which held operational control was the Security Council. In affirming this, the Court starts from the analysis of the Security Council Resolution 1244, specifying that the same council retains ultimate authority and control over KFOR. Therefore, the operational command was exclusively delegated. The Court makes it clear that although the troops had some control over the operations, they were acting on behalf of the Security Council and that the latter ultimately owned the "overall authority and control"[486]. This conclusion, although reached by different means, confirms the international standards in force.

CHAPTER III. THE SREBRENICA GENOCIDE AND THE RESPONSIBILITY OF THE UNITED NATIONS

3.1 AN INTRODUCTION TO THE CASE OF SREBRENICA

[483] Judgment of the ICJ *Nicaragua v. United states of America*; Judgment of the ICJ *Bosnia and Herzegovina v. Serbia and Montenegro*, par. 402.
[484] *Ibidem.*
[485] Judgment of the ECtHR, *Behrami and Behrami case.*
[486] Ivi, par. 134.

This third chapter is entirely devoted to the case of the Srebrenica genocide and the issue of the wrongful acts performed by the Dutch military contingent (Dutchbat), which was placed at the disposal of the United Nations for its peacekeeping mission. The legal cases relating to Srebrenica will be analysed here in order to demonstrate not only the decisions made and the results achieved by the Courts but also the consequences and criticisms directed at a system that is still widely debated - the responsibility of the United Nations.

The Dutch Courts had to address the issue of attribution in cases of peacekeeping operations. The final judgment, the *Mothers of Srebrenica v. The State of Netherlands* case (2019[487]), was able to identify the two constitutive elements of the internationally wrongful act during the "transition period"[488]. This important conclusion was achieved solely through other decisions which stated on the matter:

1. Dutch Court judgment in the case *Association Mothers of Srebrenica et al. v. The Netherlands and the United Nations* (2012)[489];
2. ECtHR judgment in the case *Stichting Mothers of Srebrenica and Others v. The Netherlands* (2013)[490] ;
3. Dutch Court judgment in the case *Hasan Nuhanović v. The Netherlands* (2013)[491].

We thus need to try and respond to the following question: is it possible to attribute the Dutchbat's conduct to the State which the military contingent belonged even considering the UN effective control?

3.2 FACT CHECKING: WHAT HAPPENED IN SREBRENICA?

The Srebrenica genocide was the culmination of a series of atrocities during the Yugoslav conflict, that began in 1992 and culminated in the Dayton Accords of February 1996.

It is essential to understand the role played by the Dutchbat, present in the Bosnian territory since 1991. Having established a security zone, UNPROFOR assumed responsibility to protect these areas[492]. To this end, UNPROFOR commanders convinced the Bosniacs to sign an agreement and "give up their arms to UNPROFOR in return for the promise of a ceasefire

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[487] Judgment of the Dutch Supreme Court of 19 July 2019, case ECLI:NL:HR:2019:1223, *The Mothers of Srebrenica Association et al. v. The Netherlands*.

[488] Transition period is the expression used by the Dutch Courts in order to specify the period that started after that the Netherlands and the UN jointly decided to evacuate Dutchbat and the Bosnian Muslim refugees from Srebrenica, on the night of 11 July 1995, following the fall of Srebrenica.

[489] Judgment of the Dutch Supreme Court, first division of 13 April 2012, case 10/04437, LJN: BW1999, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*.

[490] Judgment of the European Court of Human Rights (ECtHR) of 11 June 2013, Application Number 65542/12, *Stichting Mothers of Srebrenica and Others v. The Netherland*s (*Stitchting Mothers of Srebrenica*).

[491] Judgment of the Dutch Supreme Court, *Nuhanović.*

[492] Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica, U.N. Secretary-General, 15 November 1999, U.N. Doc. A/54/549, 19, p. 48.

[and] the insertion of a UNPROFOR company intro Srebrenica"[493]. The citizens of Srebrenica agreed to the request and handed over their weapons. On 8 May 1993, was finally declared a "demilitarized zone"[494].

Nevertheless, the attacks, the bombardments and the advancement of the Serbs continued relentlessly and without UNPROFOR doing anything, even though they acknowledged that the population was at great risk of a massacre

What is interesting here is what happened during those days in July and how the situation evolved from a legal point of view. The Mothers of Srebrenica, an association of 6000 women which had lost their loved ones during the siege, called for justice before the Dutch Courts on the grounds of the genocide, issuing criminal and civil charges.

3.3 THE CLAIMS OF THE ASSOCIATION MOTHERS OF SREBRENICA ET AL. V. THE NETHERLANDS AND THE UNITED NATIONS BEFORE THE DUTCH COURT

The first case was brought by the Mothers of Srebrenica before a Dutch District Court, against the UN and the State of the Netherlands: *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*. They complained about the alleged responsibility on the side of the Netherlands and the UN in failing to prevent genocide. According to the claimant, the UNPROFOR mission unfulfilled the mandate of peacekeeping, since it was its duty to monitor and protect the "safe areas" such as Srebrenica.

There is no doubt that this is a case of genocide, as ruled by both the ICTY and the International Court of Justice (ICJ)[495]. Nevertheless, it was not only necessary for the Court before which the action was filed, to scrutinize whether the obligation to prevent genocide (Article 1 Genocide Convention) applied in such a specific case[496] but also whether the Netherlands and the UN of committing a tort, since (after reaching such an agreement), they failed to reinforce the contingent in the enclave by sending insufficient weapons, "poorly trained and ill-prepared troops and failing to provide them with the necessary air support"[497]. As declared by some scholars[498], the Mothers of Srebrenica could have based their claims on some important principles of law, both of domestic and international law. With this regard, the most appropriate grounds seem to be: the gross negligence, the breach of duty to protect and the breach of the personal right to self-defence.

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[493] Ivi, par. 59.
[494] Ivi, par. 65.
[495] Judgment of the ICTY, *Krstić case*, par. 37; Judgment of the ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, at 43, par. 430.
[496] Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948.
[497] Judgment of the Dutch Court of Appeal of 5 July 2011, case LJN: BRO133, *Mustafic. and Nuhanović. v. the State of The Netherlands.*
[498] HASANBASIC (2014: 415).

3.4 THE UN IMMUNITY FROM THE LEGAL PROCESS IN THE DUTCH SUPREME COURT (2012) AND IN THE ECTHR JUDGMENT (2013)

By trying to answer to these charges, and the possibility to hold the Netherlands or the UN responsible for the acts of the Dutchbat, the Dutch Courts decided to dismiss the suit. The Court ruled its lack of jurisdiction *vis-à-vis* the UN. This decision was rendered in the Court of first instance[499], upheld by the Court of Appeal[500] and confirmed by the Supreme Court[501]. The Dutch Court granting immunity to the UN triggered several criticisms.

Although, it is clear, the case of *the Mothers of Srebrenica v. the State of the Netherlands and the UN* cannot be taken into consideration for the analysis of the elements of the responsibility, the Courts' argument is important for two fundamental reasons.

The first concerns the value given to the immunity of the UN, and the second reason, on the other hand, will serve as a benchmark for demonstrating that an alternative mechanism should be granted.

However, focusing on the decision of the ECtHR will be useful in order to understand the reasoning that is behind the decision that will characterise a new path, namely to deny the test established in *Waite and Kennedy* case and to give UN immunity a higher value than the protection of the human right of access to a Court.

After the two decision, in 2008 of the District Court and in 2010 of the Court of Appeal, which ruled their lack of jurisdiction, in 2012 the Dutch Supreme Court upheld this decision but dismissing the Court of Appeal's argumentation. This decision, based on the view of the special nature of the UN, represented the granting of the UN immunity as "absolute" [502]. On the 27 June of 2013, the ECtHR affirms that the peacekeeping operations established under Chapter VII of the UN Charter, are "fundamental to the mission of UN" [503] and, for this reason, the Court adds that since this is a civil law case[504], international law "does not support the position that civil claim should override immunity from suit for the sole reason that it is based on an allegation of particularly grave violation of a norm of international law, even a norm of *ius cogens*"[505]. The ECtHR concludes that even though there is "the absence

[499] Judgment of the Dutch District Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*.
[500] Judgment of the Dutch Court of Appeal of 30 March 2010, case 200.022.151/01, LJN: BL8979, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations*.
[501] Judgment of the Dutch Supreme Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations.*
[502] Judgment of the Dutch Supreme Court, *Association Mothers of Srebrenica et al. v. the Netherlands and the United Nations,* par. 4.3.4-4.3.6; Judgment of the ECtHR, *Behrami and Behrami case.*
[503] Ivi, par. 154.
[504] Ivi, par. 158.
[505] *Ibidem.*

of an alternative remedy for the recognition of immunity", this "is [not] *ipso facto* constitutive of a violation of the right of access to a Court" [506].

3.5 DUAL ATTRIBUTION AND ITS APPLICATION

Although the case seemed to be definitely closed, the *Nuhanović* case opened the possibility for the Mothers of Srebrenica, to bring suit against the State stating the possibility of having a dual attribution. We will start with the analysis of the subjective element of responsibility, taking into consideration also the new case of *the Mothers of Srebrenica Association et al. v. The Netherlands* concluded before the Dutch Supreme Court in 2019. It is thus necessary to go over how international law poses the question of the attribution of peacekeepers' conduct.

3.5.1 The pivotal role of the Nuhanović case: the possibility of dual attribution

The innovative approach of the Dutch Court in the *Nuhanović* case in based on the dual attribution. Besides, since the charges were only made against the State, the Dutch Court was able to, in its assessment of the effective control test (citing Article 7 DARIO and Article 8 ASR) and in its use of Article 48 DARIO, determine that the same conduct can be attributed to both the State and the UN. Such an approach, now accepted by a large part of the doctrine[507], not only represented an important legal precedent to the Mothers of Srebrenica to bring a claim against the State of Netherlands, but it also gives the possibility of assessing the issue of the attribution of Dutchbat's conduct.

As mentioned above, the main legal finding is that the State, in the period before the transition period, has never exercised effective control over the Dutchbat, so the answer, therefore, seems obvious. On the other hand, if we consider Articles 6 And 8 DARIO, the conduct of the organs, in principle, must be attributed to the organisation to which they belong and which they act on behalf of, even when they act outside the established orders, i.e. ultra vires, as they continue to be part of the structure of the organisations

3.5.2 The application of the dual attribution in the Mothers of Srebrenica et all. vs. The Netherlands case

The dual attribution approach, was afterwards upheld by the Dutch Court even in the case concerning *Mothers of Srebrenica et al. v. the Netherlands*.

Summarizing the judgment of the Dutch Court of Appeal in *Mothers of Srebrenica v. the State of the Netherlands and the United Nations* case it gives a fundamental clue to understand the outcome. The Court of Appeal, in the analysis of the facts of Srebrenica (in the light of the DARIO articles), ruled

[506] Ivi, par. 164.
[507] MESSINEO (2012).

that the conduct of the peacekeeping forces is, in principle, to be attributed to the UN as it holds overall control. Furthermore, according to the analysis of *ultra vires* acts, the actions, even if they are different from the instructions received or in contrast with the orders received, must necessarily be attributed to the actor who holds control, therefore the UN (Article 8 DARIO).

In order to reach these conclusions, the Court of Appeal does not rely, as initially stated, on Article 6 DARIO, but only on Article 7 DARIO. The Court starts by assessing ground 7 of the Mothers of Srebrenica, according to which "the State, after the fall of the safe area, took over control from the UN and initiated the evacuation of the refugees contrary to Gobillard's[508] order"[509].

In fact, the decision to evacuate was not taken by the chains of command of the UN, but by an agreement reached by two members of the Dutch government: Van den Breemen and Van Baal, and the General of the UNPROFOR Bernard Janvier.

The agreement made not only represented the failure of the UN mission but also the central element to determine the attribution of the final decision to evacuate the population from the mini safe area[510]. Taking into consideration all the above mentioned and relying on the DARIO, the Court of Appeal stated that the attribution to the State was possible for two reasons. The first because there was a clear interference of the State in the evacuation's decision, and the second because the Dutchbat acted outside the official capacity and overall functions of the UN.

The Court of Appeal makes clear that the Netherlands had no control over the missions. To be precise, the Court specified in two passages that State control was limited to the "evacuation of the population and the withdrawal of Dutchbat"[511] and in relation to "the humanitarian aid and the evacuation of refugees in the mini safe area"[512].

3.5.3 The Supreme Court Judgment Mothers of Srebrenica et al. vs. the Netherlands (2019)

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[508] UNPROFOR General Hervé Gobillard the commander of Sector Sarajevo. On the 11 July 1995, General Gobillard was acting as UNPROF commander in General Rupert Smith's absence.

[509] Judgment of the Dutch Court of Appeal, *The Mothers of Srebrenica Association et al. v. The Netherlands*; ivi, par. 23.8; Ivi, par. 2.45: "On 11 July 1995 at 6.45 p.m. Karremans received a fax from Gobilliard with the following contents (hereinafter also: Gobilliard's order): "a. Enter into local negotiations with BSA forces for immediate cease -fire. Giving up any weapons and military equipment is not authorised and is not point of discussion.
b. Concentrate your forces into the Potoc˘ari Camp, including withdrawal of your Ops. Take all reasonable measures to protect refugees and civilians in your care.
c. Provide medical assistance and assist local medical authorities.
d. Continue with all possible means to defend your forces and installation from attack. This is to include the use of close air support if necessary.
e. Be prepared to receive and coordinate delivery of medical and other relief supplies to refugees".

[510] Ivi, par. 24.1.

[511] Ivi, par. 24.3.

[512] Ivi, par. 32.2.

In the Supreme Court decision, as well as in the opinion of the AG, the fact that the Dutchbat was an organ transferred to and controlled by the UN is not questioned. Nevertheless, the Court decided to implement a different decision than the Court of Appeal, i.e. taking Article 8 ASR as the ground of the analysis. In using Article 8 ASR, the Court suggests that Dutchbat should be viewed as an entity that did not belong to any subject, an autonomous organ whose membership should be determined on a case-by-case basis by analysing its effective control.

However, one thing must be clarified. The approach of the Dutch Supreme Court was acceptable only since the transition period represented a rare case in which the UNPROFOR became a no one organ and the State (Netherlands) was able to begin to exercise effective operational control. In all other situations that happened before the evacuation period, the Dutchbat conduct remains attributable to the UN.

Even if the conclusions of the Supreme Court are the same as those of the Court of Appeal, the lack of use of the DARIO articles seems to be unconvincing, insofar as Article 7 DARIO envisages situations of organs placed at the disposal of an IO. In the Commentary to article 7 DARIO, there is a clear reference to situations in which a Member State places a military contingent at the disposal of the UN.

An important result is that this case gives the possibility of assessing the presence of precise wrongful acts.

3.6 THE WRONGFULNESS OF THE CONDUCT ATTRIBUTED TO THE STATE OF NETHERLANDS AND STATE RESPONSIBILITY FOR DAMAGES

The Dutch Court has affirmed that, in principle, unless one considers the 'transition period', the UN possesses effective control over the conduct of the Dutchbat. Following this reasoning, it is useful and interesting to analyse the second constitutive element of the internationally wrongful act, the material breach. Could it indicate that in the absence of the shield of immunity, the UN could also be held responsible for the violations linked to the events in Srebrenica?

Having assessed the question of attribution, and having established that during the transition period UNPROFOR's actions were attributable to both the UN and the Netherlands (dual attribution), perhaps extending this discourse, one could envisage here the grounds for holding the UN responsible. Nevertheless, it is necessary to keep in mind that International Organisations are not subject to the internal laws of the State nor at least are they part of the international human rights conventions mentioned.

In conclusion, even though the Dutch Supreme Court ruled that the State committed a material breach by allowing men refugees to get out of the compound and into the hands of Bosnian Serbs, to recognise the material breach of the IOs a different kind of analysis should be applied

However, it seems that what has been said can also be extended to the UN. General Janvier could probably have opposed the decision to evacuate the citizens of Srebrenica by not agreeing with the members of the Dutch Government. If it were possible to attribute this conduct to the UN, namely by lifting the immunity, the analysis could have led to the presence of the material breach. In that case, the implementation of responsibility should be inevitable.

3.7 CONCLUDING REMARKS

Besides, in principle, though, this analysis suggests that concerning certain violations of international law, the UN could also be held responsible for them. The most important implication regarding the responsibility of the UN is the alleged obligation to provide an alternative legal mechanism. The core issue seems to be the need to find a solution to the lack of accountability that characterises International Organisations and primarily the UN.

CHAPTER IV. THE POSSIBILITIES OF GUARANTEEING THE RIGHT OF ACCESS TO THE COURT FOR INDIVIDUALS

In the following chapter, the possibility of providing for alternative mechanisms that could, in cases where the UN is protected by immunity, not only guarantee the respect for the human right of access to a Court but also not leave a dangerous legal gap in the system of international accountability that would place the UN above the law will be explored. This draws attention to the need for guaranteeing an effective system that could counterbalance the immunity of IOs. To address this issue we will have to start from the friction that exists between United Nations jurisdictional immunity from national Courts and violation of human rights.

While immunity represents a form of protection for International Organisations from unilateral State and national Courts interference[513], at the same time a peculiar human right exists that guarantees the right of access to the Court for individuals. As a result, respecting and guaranteeing the immunity of the United Nations would result in a possible denial of justice and a violation of international obligations (right of access to a Court)[514].

For this reason, the right of access to the Court seems to be a counterbalance to the same immunity possessed by international subjects. Accepting this statement would mean that in the absence of alternative legal remedies there would be a lack of accountability for international organisations and a violation of human rights.

The main question is, how can the recognition of immunity for the United Nations be balanced without violating the right of access to a Court?

Certain Courts tried to address this issue with the conditional immunity approach. One of the most emblematic cases is certainly the judgment of the

[513] Judgment of the ECtHR, *Waite and Kennedy*, par. 63.
[514] FRANCIONI et al. (2008: 3 ss.); ID. (2008: 21 ss.).

ECtHR in the *Waite and Kennedy* case[515]. Although, the decision of the ECtHR is characterised by a lack of accuracy, it denotes a positive engagement in counterbalancing the IO's immunity from the legal process with the right of access to the Court. For some scholars [516]. This decision seems to be an essential basis for the theory of counter-limits. Nevertheless, as said the ECtHR in *Stichting Mothers of Srebrenica* case dismissed the principle enshrined in *Waite and Kennedy* case.

Although the UN's immunity before the domestic Court ruled by the ECtHR cannot be questioned, the practice adopted in Srebrenica has put the lack of accountability of the UN in the spotlight. The issue of the lack of alternative mechanisms has subsequently gained in importance with the cases of the cholera epidemic unleashed by UN troops in Haiti and the sexual abuse scandal.

Moreover, according to legal practice, it can no longer be denied that International Organisations also have obligations arising from respect for human rights, namely the obligation to respect the human right of *jus cogens* status, such as: the prohibition of genocide, the prohibition of torture and the prohibition of slavery.

All the above mentioned, support the thesis that an alternative mechanism must, in any case, be found. This shifts the attention from whether to apply the alternative means test at all to how to apply it.

4.2 THE POSSIBLE ALTERNATIVE MECHANISM. HOW TO CHALLENGE UN ACTS?

Given that UN immunity is generally still considered unconditional and absolute, except for an express waiver; since there are no examples in the case law that demonstrate how an alternative means test can be applied nor ever a Court lifted the immunity of the UN; it remains the need to find the proper balance between the immunity of International Organisations (which remains an important tool that allows UN to perform its missions independently from its Member States without the risk of interference) and the right of access to a Court.

According to existing doctrine, one of the approaches that seem to be most appropriate is that domestic Courts should refrain from becoming themselves an appropriate forum for settling disputes between individuals and IOs, so as to respect the UN immunity before national Courts. In other words, national Courts have the sole task of verifying that the IO has complied with the obligation to provide an appropriate alternative mechanism so as not to impair the essence of the victims' right of access to a Court.

In fact, this approach respects the fact that there are, within the organisation (such as Article VIII Section 29), provisions that could be the solution to the friction between immunity and the right of access to the Court. This article

[515] Judgment of the ECtHR, *Waite and Kennedy*.
[516] SCHMITT (2017: 260).

could provide victims with the possibility of the UN challenge for the wrongful acts during peacekeeping operations. The national Courts could refuse to grant immunity when the UN refused or failed to establish an alternative body in accordance with Section 29.

Nevertheless, there are some complex elements within section 29, such as the lack of accuracy in the nature of the claims it refers to (claims of private law character), and lack of precision on which kind of mechanism is to be settled (whether this mechanism should be a Court or a different board), considering that it is only stated that it must be 'appropriate'[517].

The interpretation accepted by the United Nations, consider that both the contractual claims and the tort claims "for property loss or damage and personal injury, illness or death arising from or directly attributable to the mission"[518] fall within the scope of section 29.

But, what is the trait that leads us to understand the nature of the claims that should oblige the United Nations to create an alternative dispute settlement? The central point is based on the difference between the claims of private law character and claims of a public international law nature. Public international law claims essentially concern UN policy matters (all decisions and actions that the UN may take within its mandate) and these fall outside the scope of the article.

Taking into considerations all the aforementioned, it seems that no alternative, which would be useful to assess the issues that arise from the responsibility of the UN, could be implemented.

4.2.1 Internal mechanisms

In this paragraph, we will move on to analyse the section 29 in light of the Srebrenica[519] case taking into account paragraph 68 of the SOFA agreed between UNPROFOR and Bosnia-Herzegovina, which contains important provisions concerning a possible alternative dispute settlement. Nevertheless, it must be said that, despite the efforts, an alternative mechanism has never been established.

It has been mentioned in the previous paragraph that the UN shall provide 'reasonable alternative modes of settlement'. The approach we are going to define here reflects the decision of the ICJ in the *Cumaraswamy* case. Indeed, even if the UN operate in peacekeeping operation knowing that they have immunity before domestic Courts, they cannot waive their obligation to provide a remedy for the victims of the damages within its jurisdiction.

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[517] SCHMALENBACH (2015: 320).

[518] The UN inserts this standard phrase in all Article VIII, par. 55 SOFA concluded since 1998: "[…] any dispute or claim of a private law character not resulting from operational necessity […] shall be settled by a standing claims commission to be established for that purpose"

[519] Status-of-Forces Agreements between the Government of Bosnia and Herzegovina and the United Nations on the status of the United Nations Protection Force in Bosnia and Herzegovina, 1722 UNTS 78 (*UNPROFOR-Bosnia-Herzegovina SOFA).*

To understand then if the Mothers of Srebrenica claims fall within this approach and if the claims fall within the scope of the Article VIII section 29, it is important to move back on to consider whether the claims are of private law character. Despite what said about the operational necessity and public international law claims remains indisputable, it is necessary to draw attention to the fact that there may exist claims of a mixed nature, called 'hybrid'[520]. The hybrid claim (both of international law violation and private law violation) are considered by the UN as receivable under Section 29 of the Convention, because they could be private in character. Since the hybrid claims could be assessed based on the principles of tort laws[521], without evaluating, on matters of substance, the operational necessity justification that is not applicable in cases of tortious acts constituting human rights violations[522].

Taking into consideration all the above mentioned, it would seem that the United Nations shall create an appropriate dispute settlement for the Srebrenica case. For instance, in the *Mothers of Srebrenica* case, since there may be a dual attribution, the evacuation of refugees from the compound, (considered that the Courts held that the UNPROFOR was aware of the risks) can be considered as a "hybrid" claim and therefore be pursued in tort.

Here, however, as said, a new problem arises. Section 29 does not specify which actor would decide the legal nature of the claim. The practice adopted to date is that if the UN does not decide unilaterally on the nature of the claim, it cannot even be taken into account under Section 29. Again, we are facing a dispute settlement gap[523].

The existing rules lead to affirm that the UN is protected both before domestic Courts, thanks to jurisdictional immunity, and before the 'internal claims' thanks to the limited purpose of Section 29. That is why it is necessary to better implement the already existing system of alternative dispute settlement to make the legitimacy and actions of the UN more credible and reliable (pursuant to Article VIII section 29).

The only alternative, to the one that has been analysed and to the experimental and pure theoretical ones that will be developed in the next paragraphs, remains that of safeguarding the interest of victims through the diplomatic protection of the host State.

4.3 THEORISING NEW SOLUTIONS AND CONCLUDING REMARKS

Starting from this hypothesis, some scholars have tried to design new systems that could solve this problem. Taking into consideration all the above mentioned, the possibility of theorizing and implementing valid alternatives to challenge UN acts has returned to the center of the debate. This necessity

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[520] MÉGRET (2013: 168); SCHMALENBACH (2015).
[521] See practice of local claims review (ad hoc local boards) established within a peacekeeping mission; Secretary-General's Peacekeeping Liability Report, par. 22; TAYLOR (2014: 171).
[522] SCHMALENBACH (2004: 229 ss.).
[523] SCHMALENBACH (2014: 248).

has been affirmed several times also by the United Nations in its reports and memos even though no measures have been implemented so far.

The final part of the thesis dwelled on this point. As a result, the first outcome is that UN accountability before domestic courts is not an available option for individuals in the present state of the case law. There have been different possible alternatives devised by several authors, such as the 'indirect way' to challenge the UN act, proposed by August Reinisch, and the theory of considering human rights as obligations that derive from the recognition of the international legal personality of IOs[524], (the theory refers to the fact that IOs could not abide by these rules as subjects of international law and thus also extends to the right of access to the court).

This last concept was then later upheld by Dannenbaum. He will continue to insist that, given that the UN has its Legal personality under International law, then it is also legally bound by international human rights law[525].

According to this theory, granting UN absolute immunity could not only be in violation of human rights with the status of international customary law but would also be in violation of the UN's obligation of the provisions of the Charter of the UN itself that require the organisation to respect human rights[526].

One last approach should still be analysed. Some scholars argue that the right of access to the Courts could be considered a right of *jus cogens* status[527], which would make it possible for a national Court to justify its jurisdiction and the refusal to grant UN immunity. In this case, Wouters and Schmitt argue "is not so much a conflict between internal and international rules, but rather between international rules *inter se*"[528]. In this way, the national Courts could uphold a challenge to the UN's immunity without breaching its obligations.

However, as we have seen, none of the above seem to be the most practicable solutions to date.

First of all because International Organisations are not yet parties to human rights treaty. Besides, the possibility of giving jurisdiction to national courts concerning the UN, could lead not only to friction between international actors but could also put at risk the independence and hence the effectiveness of UN peacekeeping missions. For this reason, although of fundamental importance in the world of legal theories and useful for possible future developments, the hypotheses suggested still seem remote and complicated to consider at present.

Nevertheless, during the analysis of alternatives, one seemed to be the most appropriate one. It is, the one that does not want to change the system of responsibility, but tries to implement the rules already existing within the International Organisation in the best way. A clear example is provided by Article VIII Section 29 of the Convention on Privileges and Immunities of the

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[524] HOFFMAN, MÈGRET (2008)
[525] DANNENBAUM (2010: 123); FREEDMAN (2014: 251).
[526] Charter of the United Nations, Article 55, par. (c).
[527] SCHMITT (2010: 26).
[528] Ivi, p. 25.

United Nations. While it is true that the UN has failed so far to provide appropriate mechanisms and that there is no sufficient practice of international organisations for resolving those disputes, it could still provide the most credible alternative. In order to do so, however, some existing identified gaps in chapter four must be resolved. To implement an adequate dispute settlement within the UN and not to impair the right of access to the Court it would be necessary to follow some step.

Firstly, it must be specified that the terminology used in Article VIII Section 29, i.e. appropriate method of settlement, refers to a specific *ad hoc* body (or a Court) that could be established when a dispute from a private character arises.

Secondly, it is necessary to establish what is meant by private character, by explicitly including disputes of private character that arise during peacekeeping operations between UN and third individuals.

Thirdly, it must me expressly stated that the nature of the act should not be decided in advance by the United Nations but that, in line with international procedural law, it should be the body (or Court) created ad hoc that declares its jurisdiction, and therefore whether it falls within or outside the scope of the article.

Finally, the body created to solve the dispute must be expressly characterised by two essential elements, namely independence, and impartiality.

In this way, it is not necessary to change or create a new accountability system, nor at least is it required for national courts to violate their obligation towards the UN, but it would be sufficient to improve the existing rules. This remains a fundamental argument because the right of access to the Court is particularly important. The importance of this human right is not only demonstrated by its presence in all the Conventions dealing with human rights but also because it serves as a means for individuals to protect all other existing human rights.

As held by the Italian Supreme Court in 2014,

> "Ripetutamente questa Corte ha osservato che fra i principi fondamentali dell'ordinamento costituzionale vi è il diritto di agire e di resistere in giudizio a difesa dei propri diritti riconosciuto dall'art. 24 Cost., in breve il diritto al giudice. A maggior ragione, poi, ciò vale quando il diritto in questione è fatto valere a tutela dei diritti fondamentali della persona. (…) Sarebbe invero arduo individuare quanto resterebbe di un diritto se non potesse essere fatto valere dinanzi ad un giudice per avere effettiva tutela. (…) Né è contestabile che il diritto al giudice ed a una tutela giurisdizionale effettiva dei diritti inviolabili è sicuramente tra i grandi principi di civiltà giuridica in ogni sistema democratico del nostro tempo"[529].

[529] Judgment of the Italian Constitutional Court of 29 October 2014, case no. 238/2014, *Simoncioni c. Germania, ILDC 2237 (Italy)*, par. 3.4