RESPONSIBILITY IN PEACE SUPPORT OPERATIONS: REVISITING THE PROPER TEST FOR ATTRIBUTION CONDUCT AND THE MEANING OF THE ‘EFFECTIVE CONTROL’ STANDARD

by Ömer Faruk Direk*

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Abstract

This article examines attribution of conduct and responsibility in peace support operations, which is, and will continue to be, a troubling subject of international law. It particularly examines two specific questions: what is the proper test for attribution of conduct, and whether and, if so, how dual attribution of conduct and responsibility can be established in international joint operations? As regards the former question, a brief critique of the major case law and documents recently dealing with attribution of conduct and responsibility in peace support operations shows that Behrami and Saramati poses a serious obstacle to determining the most suitable test without any confusion, thus there is a strong need to radically depart from this decision of the European Court of Human Rights. With respect to the latter, the meaning of the ‘effective control’ criterion, which is to be the basis for dual attribution in joint military missions, ought to be clarified.

* Lecturer in International Law at Kocaeli University Law School (Turkey), omer.direk@kocaeli.edu.tr. Many thanks to Yutaka Arai, Karen Openshaw and Patrick Terry for providing very helpful comments on earlier drafts of this article.
In this respect, the Mustafić and Nuhanović judgments delivered by The Hague Appeal Court and the Supreme Court of the Netherlands, to which the article pays special attention, are exemplary – to the extent that the latter did not conflate the notion of dual attribution of conduct with that of (dual or) multiple attribution of responsibility – and these judgments can be seen as a source of inspiration for the future application of the ‘effective control’ standard in practice.

1. INTRODUCTION

Peace support operations have been an important tool in maintaining international peace and security. This type of operations includes the ones directly operated by the United Nations (UN) and those carried out by states or other international organisations authorised by the Security Council under Chapter VII of the UN Charter. Both UN peacekeeping and UN-authorised missions involve complex structural and diplomatic arrangements. In peacekeeping operations, the operational command rests with the UN, but troop-contributing nations (TCNs) continue to retain some degree of power over their forces. In UN-mandated missions, although the Security Council merely delegates authority, the involvement of another international organisation may result in the deployment of a multi-layer mission comprised of an international organisation and its member states, as seen in Kosovo. As a consequence, the attribution of conduct and responsibility in such military missions has become quite problematic and has led to difficult legal questions. The examination of such questions by judicial bodies and institutions or even in the legal literature, however, has raised divergent and controversial views. Therefore, the attribution of conduct and responsibility in peace support operations continues to be a troubling subject of international law.

This article aims to discuss two specific legal questions concerning the allocation of responsibility in peace support operations: (i) what is the proper test for attribution of conduct and (ii) whether and, if so, how dual attribution of conduct as one major way of triggering the multiple attribution of responsibility can be established? It begins with a brief review and critique of the major case law and documents recently dealing with the international law of responsibility. Thereafter, the article makes an assessment of the proper test to be applied both in UN peacekeeping and UN-authorised operations. In the following part, the issue of dual attribution of conduct and multiple (or a plurality of) responsibility is discussed in depth, together with a thorough analysis of the rulings of the Dutch Courts – particularly that of the Supreme Court of the Netherlands – in cases stemming from Srebrenica.