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ON THE ATTRIBUTION TO AN INTERNATIONAL ORGANIZATION  
OF THE ACTIVITY OF PRIVATE COMPANIES THAT OPERATE  
ON ITS ACCOUNT

Laura Magi



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
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*On the Attribution to an International Organization of the Activity of Private  
Companies that Operate on its Account*

**LAURA MAGI**

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## **Abstract**

The increasing outsourcing of the activities of international organizations to private companies, especially in security and military fields, raises the question whether the conduct of private companies can be attributed to the delegating organization.

The paper seeks to explore this new topic in the light of the criteria of attribution provided by the International Law Commission in the Draft Articles of responsibility of international organizations adopted on first reading in 2009. The paper highlights the advantages of the solution reached by the Commission, but also underlines the gaps it has left open.

It formulates suggestions for changes the Commission should follow during the second reading in order to make more clear the approach it has adopted.

## **Keywords**

International organizations, outsourcing of functions, private companies, attribution, international responsibility.

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*Laura Magi*

*Max Weber Fellow, 2009-2010*



## 1. Cases of private companies performing activities on behalf of international organizations.

The outsourcing of the activities of international organizations to private companies is a widespread phenomenon. This relates not only to the activities instrumental to the life of the organization: that is, all those activities connected to the functioning of the organizational apparatus charged with the performance of the functions of the organization. It also relates to the institutional functions of the international organization itself: that is, those functions that are a direct expression of the competences attributed to the organization<sup>(1)</sup> and through which the organization carries out, according to the opinion of some authors, a real international public function<sup>(2)</sup>.

Outsourcing results in giving private actors (so-called private contractors) numerous tasks by means of a complex system of international calls for tender (procurement), regulated by a detailed system of norms developed by the organizations themselves.<sup>(3)</sup> A contract, modeled on “pre-drafted” contractual outlines issued by the organization and generally attached to the call for tender, is drawn up between the private company that successfully obtained the tender and the organization.<sup>(4)</sup>

One of the arguments commonly put forward to justify the choice of delegating organizations’ functions is an assumption (not always groundless) of the greater efficiency of private economic operators. The assumption is that they have greater practical experience as well as greater professional competence than the personnel of the organization. Moreover, private companies are generally considered able to operate more quickly because they are free from the bureaucratic and organizational ties that tend to slow down the complex apparatus of the organization.

The choice to entrust private companies with carrying out functions on behalf of the organization is also motivated by a desire to avoid the burden of managing the performance of a specific activity through the setting up of internal regulations or guidelines addressed to the personnel of the

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<sup>(1)</sup> The distinction between activities relating to the functioning of the organizational apparatus and those relating to the institutional functions of the organization has been drawn up by A. Tizzano, ‘Contratti strumentali e contratti d’impiego delle Comunità europee’, *Rivista di diritto europeo*, 1978, p. 431 and R. Pisillo Mazzeschi, ‘Funzionario internazionale’, *Digesto delle discipline pubblicistiche*, vol. VII (Torino: Utet, 1991), p. 47.

<sup>(2)</sup> During the Rwandan crisis, in the 1990s, the UN Secretary-General Kofi Annan even proposed using private companies instead of national military contingents in the framework of the UN peacekeeping missions. Such a proposal was launched because of the UN need to have highly qualified security personnel able to divide Rwandan refugees from Rwandan combatants in the refugee camp of Goma, in the Republic of Congo: see UN doc. ST/DPI/PRESS/SG/SM/6613. Following this proposal a wide debate about the expediency of delegating peacekeeping activities to private companies began: D. Lilly, ‘La privatisation du maintien de la paix: perspectives et réalités’, *Disarmament Forum*, 2000, p. 57 ff.; O. Bures, ‘Private Military Companies: A Second Best Peacekeeping Option?’, *International Peacekeeping*, 12 (2005), p. 533 ff.; M. Patterson, ‘A Corporate Alternative to United Nations Ad Hoc Military Deployments’, *Journal of Conflict & Security Law*, 13 (2008), p. 215 ff.

<sup>(3)</sup> See, e.g., *United Nations Procurement Manual*, issued by the UN Procurement Division available on <[www.un.org/Depts/ptd/](http://www.un.org/Depts/ptd/)>. As regards the European Community see Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (*O.J.* 16 September 2002 *L* 248, p. 1 ff.). Its Title V contains provisions relating to the EC public procurement. See also Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (*O.J.* 31 December 2002 *L* 357, p. 1 ff.). See also *Practical Guide to Contract Procedures for EC External Actions* available on

<[http://ec.europa.eu/europeaid/work/procedures/implementation/practical\\_guide/index\\_en.htm](http://ec.europa.eu/europeaid/work/procedures/implementation/practical_guide/index_en.htm)>.

<sup>(4)</sup> The drafting of standardized contractual models has its most significant legal consequence in the fact that every private company taking part in the tender is expected to accept the general conditions of contracts provided by such standardized contractual models. In this way whoever wins the tender will be automatically bound by general conditions unilaterally established by the organization.

organization and/or the setting up of internal procedures to check the proper execution of such functions. Conferring on a private company the performance of a specific activity on behalf of the organization allows the former to choose how to exercise the delegated activity, while being expected in return to attain a specific result.

Standardized contractual models so far adopted by some international organizations, such as the United Nations and the European Union, do not contain any element suggesting the will of the organization to instruct private companies on how to carry out the delegated task.<sup>(5)</sup>

The European Union's standardized contractual model only requires the private company to submit a plan of execution of the contract for approval by the organization<sup>(6)</sup> before it begins its activity. It also provides for periodic inspections by the organization during the execution of the contract in question. In the United Nations' contractual model the only control exercised over the private company is of an economic-accounting nature and takes the form of the *audit*.<sup>(7)</sup>

The outsourcing of functions by means of contract is, however, not the only way an organization can establish a relationship with private companies acting on its account.

It is possible, though in exceptional cases, that private companies act *in fact* on behalf of and in the interests of an international organization, mainly in situations where the organization, its organs and agents, are threatened. In such situations the organization may resort either to companies already linked to itself by contracts for the carrying out of activities different from that required *de facto* by the organization,<sup>(8)</sup> or to companies which have no contractual tie with the organization at the time of the performance of the service.<sup>(9)</sup>

Moreover, because of the increasing employment of private companies by States, especially in peacekeeping missions abroad, private companies may act, even though indirectly, on behalf of an international organization by means of a contractual relationship with a contributing State. Indeed, private companies may accompany national military contingents taking part in peacekeeping or multifunctional post-conflict peace-building operations established under the operative and political control of an international organization. For example, the contract made by the United States with DynCorp, entrusted with selecting and training the American policemen taking part in the United Nations International Police Task Force<sup>(10)</sup> in Bosnia-Herzegovina and to supply them with logistic, administrative and sanitary services is well known<sup>(11)</sup>. The British Government has also admitted it has

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<sup>(5)</sup> See, e.g., *General Conditions for Service Contracts* issued by the European Union and usually annexed to the calls for tender for the provision of services in the framework of the EU peacekeeping and peace-building missions. The EU calls for tender are published on the European Commission web site, under the section "Public contracts": <[http://ec.europa.eu/public\\_contracts/index\\_en.htm](http://ec.europa.eu/public_contracts/index_en.htm)>. See also *General Conditions of Contract. Contracts for the Provision of Goods and Services*, issued by the United Nations, and available on <[www.un.org/Depts/ptd/](http://www.un.org/Depts/ptd/)>. For instance, article 3, paragraph 1, of the latter provides that the Contractor must guarantee that its personnel «respect the local laws and customs and conform to a high standard of moral and ethical conduct». This means that the company itself will have to give instructions to its own staff and check its conduct in order to ensure it complies with the internal law of the State where the services are to be provided.

<sup>(6)</sup> See, e.g., article 23 of the EU's *General Conditions for Service Contracts*.

<sup>(7)</sup> See article 24, paragraph 2, of the UN's *General Conditions of Contract. Contracts for the Provision of Goods and Services*.

<sup>(8)</sup> For example, consider the case in which the employees of a private security company, charged with security functions in a prison under the management and control of an international organization, are asked by the latter to protect its supply of arms and ammunitions, and the building they are in, that is about to be sacked.

<sup>(9)</sup> An international humanitarian organization operating in a country where there is an ongoing internal conflict, fearing its headquarters might be the target of an armed attack by one of the conflicting groups –one that accuses it of helping an enemy group –, might ask a private military company acting *in loco* on behalf of the legitimate government, to protect the area where its offices are based in order to allow its staff to evacuate the headquarters and leave the country.

<sup>(10)</sup> See Annex No. 11 to the Dayton Peace Agreement, *International Legal Materials*, 1996, p. 149 ff., and the UN res. No. 1035, of 21 December 1995, on the establishment of the Force (UN doc. S/RES/1035/1995). Such an international police force, together with the United Nations Civilian Office, made up the UN Mission in Bosnia-Erzegovina (UNMIBH).

<sup>(11)</sup> DynCorp was entrusted by the U.S. Department of State with recruiting individuals that had carried out police functions in the U.S. armed forces. Those selected made a contract with DynCorp, becoming its employees. Others were U.S.

used private military companies in support of its own armed forces employed in peacekeeping missions<sup>(12)</sup>.

What cannot be excluded (although this has not yet happened) is that, in the near future, contributing States to peacekeeping or post-conflict peace-building operations under the command of international organizations may decide to send the trained personnel of private companies to carry out military activities or security services instead of members of the national armed forces.

The case in which military or security companies are used by States authorized by the United Nations to use force is, instead, different from this latter case. Nonetheless it will also be taken into consideration in this analysis.

While many studies have already been carried out on the question of the attribution of the conduct of private companies to States for the purpose of their responsibility, this is not the same as the case of the attribution of the conduct of private companies to international organizations.<sup>(13)</sup>

The probability that private companies may act in violation of the international obligations incumbent upon international organization has been rising because international organizations have been increasingly outsourcing their functions to private companies. The latter have also been charged with carrying out duties that represent a direct expression of the competences attributed by Member States to the organizations.

Therefore, it does seem worth verifying, first of all, whether international wrongful acts – i.e. acts that infringe the obligations incumbent upon an international organization – committed by the employees of a private company are attributable to the organization which has made a contract with the company for the provision of services on its behalf.<sup>(14)</sup> The attribution of conduct to such an

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police officers: see C. Lynch, 'Misconduct, Corruption by U.S. Police Mar Bosnia Mission', *Washington Post*, 29 May 2001. See also J. Murray, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina', *Columbia Human Rights Law Review*, 34 (2003), p. 506 f.

<sup>(12)</sup> «The Ministry of Defence let contracts with private companies where appropriate to support a wide variety of deployed commitments, including peacekeeping and humanitarian operations. These contracts are primarily for logistical support, including troop deployment, food supply and maintenance of accommodation and equipment»: *Response of the Secretary of State for Foreign and Commonwealth Affairs*, session 2001–2002, p. 4, available on the Foreign & Commonwealth Office web site: <[www.fco.gov.uk](http://www.fco.gov.uk)>. See also the memorandum sent by ArmorGroup to the Foreign Affairs Committee of the House of Commons during the discussion of the *Green Paper* on the use of private military and security companies: «ArmorGroup closely followed NATO intervention in Kosovo to provide emergency landmine and unexploded ordnance clearance on behalf of the UK Government» (italics added): *Memorandum from ArmorGroup Services Limited*, para. 80, available on <[www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/922/2061318.htm](http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/922/2061318.htm)>.

<sup>(13)</sup> Few has been written so far on this topic. See A. Tzanakopoulos, 'Attribution of Conduct to International Organizations in Peacekeeping Operations', *European Journal of International Law Talk*, available on <[www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/#more-711](http://www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/#more-711)> and N.D. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', *European Journal of International Law*, 19 (2008), p. 965 ff.

<sup>(14)</sup> The question of attribution of the conduct of employees of private companies to an international organization is raised largely in the case of companies providing for military and security services in the framework of peacekeeping and/or peace-building missions under the command of an international organization (UN, EU, AU), because of the seriousness of any untoward behaviour they may commit in such a framework. The engagement of private companies in peacekeeping and/or peace-building missions is well known. It is useful to quote some recent examples: the UN concluded a contract with KK Security Congo sprl (Contract No. CON/MON/06-079) for the provision of security services for the MONUC buildings in Bandundu (from June 2006 to September 2007): see *Acquisition Plan, UN Mission in the Democratic Republic of Congo, 2006-2007*, available on <[www.un.org/Depts/ptd/2007\\_monuc.htm](http://www.un.org/Depts/ptd/2007_monuc.htm)>. In 2006-2008 the UN concluded contracts with Protectron (Contract No. CON/FIL/U1/06-016/GI) for the provision of security services for the UNIFIL headquarters in Beirut (source: <[www.un.org/Depts/ptd/06\\_others\\_contract\\_field.htm](http://www.un.org/Depts/ptd/06_others_contract_field.htm)>); in 2006 with Ebhatu & Sons PLC (Contract No. CON/06/013) for the provision of security services for the United Nations Mission in Ethiopia and Eritrea (UNMEE) headquarters in Addis Abeba and Adigrat (source: <[www.un.org/Depts/ptd/06\\_others\\_contract\\_field.htm](http://www.un.org/Depts/ptd/06_others_contract_field.htm)>). The UN stipulated a contract with Armorgroup, entrusting it with monitoring the storage of explosive materials in the framework of the United Nations Mission in Nepal (UNMIN): see *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process*, UN doc. S/2007/442, para. 23. Aegis Defense Systems Ltd. provided assistance to the United Nations Electoral Assistance Division (UNEAD) during the first election held in Iraq after Saddam Hussein's fall (source: *Case Studies*:

organization represents, in fact, the legal pre-condition for the establishment of its international responsibility.

Second, it is also important to establish whether the attribution of wrongful conduct of a private company to an organization is possible when the company acted *de facto* on behalf of the organization – that is to say, outside a contractual relationship –, presumably in a situation of danger for the organization or in other exceptional circumstances. If it is possible, then it must be established on what conditions.<sup>(15)</sup>

Third, it is also necessary to evaluate whether the conduct of the employees of private companies, who have been hired by States to provide services in favor of their national military contingents taking part in peacekeeping and/or multifunctional post-conflict peace-building operations, is attributable to the organization under whose command the operation has been carried out. In such a case the situation is particularly complex. Indeed, the difficulty of establishing whether the conduct of a private company contracted out by a State, putting its national military contingent at the disposal of an organization, is attributable to the latter which joins with the difficult question of whether the conduct of national contingents (on behalf of which the company acts) is attributable to the organization or the

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*Supporting Elections*, available on <[www.aegisworld.com/case\\_studies.html](http://www.aegisworld.com/case_studies.html)>); Hart Security concluded a contract with the United Nations World Food Program to protect the humanitarian aid sent by sea for the Somali population (source: <[www.hartsecurity.com/aboutus\\_selectedexperience.asp](http://www.hartsecurity.com/aboutus_selectedexperience.asp)>). Armorgroup has admitted being engaged in peacekeeping missions under UN forces such as UNPROFOR (in Croatia, Bosnia-Erzegovina and Macedonia), ONUMOZ (in Mozambique), UNAVEM (in Angola), MONUC (in Congo): see *Memorandum from ArmorGroup Services Limited*, op. cit., para. 80. In such a *memorandum* the company refers to the engagement of the rival DSL by the UN in the framework of the UNPROFOR. According to the *memorandum* DSL was encharged either with security functions or with functions instrumental to the functioning of the mission: *ibidem*, paras. 73-79.

The EU, differently from the UN, does not issue an annual report of contracts concluded with private companies for the provision of security services in the framework of its peacekeeping missions. However it is possible to find out in which peacekeeping missions the EU wants to use private companies, and for what kind of functions, by looking up the EU database containing calls for tender in the framework of the EU external relations activities. See, for instance, the forthcoming issue of two calls for tender for the provision of security services for the EU monitoring mission in Georgia (EuropeAid/128633/D/SER/GE) and for the EULEX mission in Kosovo (EuropeAid/128856/D/SER/KOS) on <[http://ec.europa.eu/europeaid/work/funding/index\\_en.htm](http://ec.europa.eu/europeaid/work/funding/index_en.htm)>.

<sup>(15)</sup> Regardless of whether a private company acts on the grounds of a contractual relationship with the organization or not, from the point of view of an individual injured by an action or omission on the part of a private company, establishing whether the company's conduct can be attributable or not to an international organization is relevant. This is first of all because the existence of an international wrongful act of the organization is the basis upon which an action in diplomatic protection against the organization by the State entitled to act in favour of the victim can be grounded.

Establishing the attribution of wrongful conduct of private companies acting on behalf of an organization to the latter may also be useful for the victims of serious human rights violations when seeking redress before national tribunals. Indeed, it cannot be excluded that the organization, while invoking its immunity from State jurisdiction, may accept compensating the victims (or their relatives) of serious human rights violations on the condition that, at international law level, such conduct is attributable to the organization. This is what happened in the case of wrongful acts committed by national contingents composing peacekeeping forces under the UN command and control. The agreements concluded between the UN and the States of nationality of individuals injured by the conduct of national contingents of the UN peacekeeping mission in Congo (ONUC) in the sixties is symbolic. On the one hand, contracting States were bound not to consider the agreement as the UN renounced its claim to immunity before national tribunals. On the other hand, the UN was bound not to escape from its responsibility «where [it] was established that *United Nations agents* had in fact caused unjustifiable damage to innocent parties» (italics added), paying the contracting States for injuries caused by ONUC (see the agreement between the UN and Belgium: *United Nations Treaty Series*, vol. 535, p. 191 ff., especially p. 199; similar agreements were concluded between the UN and Italy: *ibidem*, vol. 588, p. 197; Switzerland: *ibidem*, vol. 564, p. 193; Greece: *ibidem*, vol. 565, p. 3, and Luxembourg: *ibidem*, vol. 585, p. 147). See C. Schmalenbach, 'Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and International Administrations', *International Peacekeeping*, 10 (2006), 33 ff. Later, the UN Secretary-General admitted that the UN acceptance to compensate individuals injured by wrongful acts of members of peacekeeping missions under the UN command presupposes that such conduct is attributable to the UN: see *Report of the Secretary-General on Financing of United Nations Peacekeeping Operations*, UN doc. A/51/389, para. 7 and f. Hence, attribution of wrongful conduct to an organization seems to be the condition because the latter, even though invoking its immunity before national tribunals, may agree to redress the victims of abuses committed by private companies performing functions on behalf of that organization, at least in the case of serious human rights violations.

State, or both.

And last, it must also be established whether the conduct of private companies hired by States taking part in multinational forces authorized by the United Nations to use force is attributable to the latter.

This study examines whether, in all the situations just mentioned, the conduct of the employees of private companies that act on behalf of international organizations is attributable to those same international organizations, in the light of the criteria so far adopted on the attribution issue in the Draft Articles on the responsibility of international organizations which was recently adopted at first reading by the International Law Commission. This analysis also provides an opportunity to continue reflecting on the benefits and limits of attribution conceived as a process governed by rules of international law and on the content of international norms providing for attribution criteria.

## **2. The notions of organ and agent of an international organization adopted by the International Law Commission.**

The Draft Articles on the responsibility of international organizations, adopted on first reading in 2009 by the International Law Commission, have followed the position provided by the previous Draft Articles on the responsibility of States adopted in 2001, according to which the attribution is a legal operation which consists of the application of criteria determined by the law.<sup>(16)</sup>

This position is clearly envisaged in article 4, letter *a*), of the Draft Articles on the responsibility of international organizations according to which «[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission is attributable to the international organization under international law».<sup>(17)</sup>

Which conduct is attributable to the organizations according to international law is specified in articles 5-8.

Article 5, which provides the basic rule, is so drafted: «1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization. 2. Rules of the organization shall apply to the determination of the functions of its organs and agents».

The first requirement for the attribution of conduct to an organization is, therefore, that it has been carried out by an organ or an agent of the organization.

Who can be considered an organ of the organization?

Article 5 does not expressly say what criterion should be used in order to establish who are the individuals or entities that have the quality of ‘organ’, nor does the definition of organ appear in other provisions of the Draft Articles.

Paragraph 1 of article 5 only specifies that for the purposes of attribution the position held by organs in the organization is not relevant. Such a paragraph also provides that only the conduct of

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<sup>(16)</sup> In the Draft Articles on State responsibility adopted on second reading (2001) this approach emerges from the introduction to the First Part, Chapter II. Here attribution is qualified as a «normative operation». It has also stated that «[t]he attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality»: *Report of the International Law Commission on the Work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, p. 81. Such an approach has its origin in Ago’s reports (*Third Report on State Responsibility, Yearbook of Int. Law Commission*, 1971, vol. II, 1, para. 106 and ff., p. 233 ff.). This approach is set against the approach supported by Arangio-Ruiz. According to Arangio-Ruiz, international law is not interested in determining criteria establishing when a certain conduct of a natural or legal person is attributable to a State. Following this approach the attribution of conduct of a natural or legal person to a State is possible as far as factual elements showing the existence of an effective relationship between them and a State has been ascertained: see G. Arangio-Ruiz, ‘State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance’, in M. Virally (ed), *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Paris: Pedone, 1991), pp. 28 f. and 32 f.

<sup>(17)</sup> *Report of the International Law Commission on the Work of its Sixty-first session, Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, p. 20, (italics added).

organs in the exercise of their own functions is attributable to the organization. Instead, conduct that organs perform in their private capacity cannot be attributed to an organization.

The only information one may derive from paragraph 1 is that ‘organs’ are those who carry out functions of the organization.

Nor does paragraph 2 of article 5 provide an explicit criterion for the purposes of determining what constitutes an organ.

It refers to the «rules of the organization» – that, according to article 2, letter b), includes the agreement establishing the organization, the decisions, the resolutions and all «other acts taken by the organization in accordance with those instruments», as well as the «established practice of the organization» – in order to establish the function of organs.

Therefore, it may seem that paragraph 2 of article 5 is only intended to distinguish the conduct of organs carried out in their private capacity from those carried out in the performance of the functions of the organization.

If this assumption is correct, it would be justified to deem that, for the purposes of identifying an individual as an organ of the organization, what counts is that he acted on behalf of the organization by carrying out functions of the organization.

Looking at the content of article 2 one may be inclined to draw a similar conclusion with regard to agents of the organization.

Indeed, unlike the provisions that concern organs, the Draft Articles encompass a provision, i.e. article 2, letter c), which specifies that the word agent «includes officials and other persons or entities through whom the organization acts».<sup>(18)</sup>

Similar to article 5, article 2, letter c), does not indicate a criterion to determine what constitutes «officials and other individuals or entities through which the organization acts». Looking at the commentary to article 5<sup>(19)</sup> one may only deduce that the agent is linked to an organ since the former has to be charged by an organ with performing functions of the organization.<sup>(20)</sup>

Even the original notion of agent from which article 2, letter c), of the Draft Articles has drawn inspiration – that is to say, the notion formulated by the International Court of Justice in the famous advisory opinion on the *Reparation for damages suffered in the service of United Nations*<sup>(21)</sup> – emphasizes the factual element as the central element in order to qualify individuals as agents of an organization.

Bernadotte Count, whose killing prompted the request for an advisory opinion to the Court, was not an official of the organization. He was an individual charged with carrying out a specific mission (the mediation between Palestinians and Israelis) on behalf of the United Nations. For this reason the Court has clarified, in a preliminary way, the categories of people in favour of which its conclusions – regarding the right of the organization to act in functional protection and to act in protection of the victim – would have been applicable.

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<sup>(18)</sup> *Ibidem*, p. 20.

<sup>(19)</sup> *Report of the International Law Commission on the Work of its Sixty-first session*, p. 59 f.

<sup>(20)</sup> In this way, e.g. trainees cannot be considered agents. Indeed, they perform activities of the organization, but without being entrusted with them by organs of the organization, neither by means of a contract for the provision of services nor by a regular contract of employment.

<sup>(21)</sup> The advisory opinion is quoted in comments to articles 2 and 5 of the Draft Articles: see *Report of the International Law Commission on the Work of its Sixty-first session*, p. 51 and p. 58 f. Another element confirming the relevance of factual elements instead of the formal status of agent of an organization is the reference the Commission makes in comment to article 5 to the later International Court of Justice (ICJ) advisory opinion on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*. The opinion is concerned with the right of the UN *special rapporteur* for the Sub-commission on prevention of discrimination and protection of minorities to be entitled with immunities granted to “experts on mission” according to section 22 of the Convention on privileges and immunities of the United Nations. The Court held that «[t]he essence of the matter lies *not in* [the experts’ on mission] *administrative position but in the nature of their mission*» (*I.C.J. Reports 1989*, p. 194, para. 47, italics added). It also stated that «[i]n 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*» (*ibidem*, para. 48, p. 194, italics added).

In fact, the Court has asserted that its conclusions were applicable to all the agents of the United Nations, and has indicated that the word agent meant «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*» (italics added), or, put differently, «any person through whom it acts».<sup>(22)</sup>

In the view of the Court the agency relationship is defined in broad terms, so as to include both officials of the organization and, in a more general way, the personnel linked to the organization by a civil service status (it does not matter this is in the capacity of full or part-time employment), or any individual who carries out an activity on behalf and in the interest of the organization. In fact, in the opinion of the Court, only two elements count for the purposes of the definition of an agency relationship: the performance of functions of the organization and the bestowal of such functions by organs of the organization.

In conclusion, with regard to the definition of agent, the Draft Articles, in recalling the notion elaborated from the International Court of Justice, emphasize the factual element as the element on the basis of which the attribution to the organization of the conduct of agents hinges.<sup>(23)</sup>

Despite all appearances, and although the Draft Articles give remarkable importance to factual elements in order to ascertain who can be considered an organ or an agent, the Draft Articles do not intend to exclude the fact that the criterion for the attribution of conduct of organs or agents to an organization is first and foremost a legal criterion.

This orientation stems from the comment to article 5.

The Commission quotes article 4 of the Draft Articles on international responsibility of States, stating that, according to this article, the attribution is primarily, even though not exclusively, premised on the characterization of an individual or an entity as a State organ according to the internal law of the State.<sup>(24)</sup> It concludes that this reasoning must be held valid for international organizations as well.<sup>(25)</sup>

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<sup>(22)</sup> *I.C.J. Reports 1949*, p. 177. The Court was not asked to establish which conditions were necessary in order to attribute conduct of natural and legal persons to an international organization. Nevertheless, an answer to this question was implicitly contained in the answer the Court gave to the question of the UN right to act in diplomatic protection. The ICJ recognized the UN was entitled to act in diplomatic protection for damages caused to the UN as such, because the latter was considered directly injured by offences against an individual entrusted by the organization with carrying out certain UN's functions. This resulted from the fact that, in the opinion of the Court, conduct of the injured individual could no longer be considered conduct of the organization, hence attributable to it. This is easily understandable by some passages of the opinion, e.g., when the Court states that the independence granted to an agent who performs functions delegated to him by the organization is equivalent to granting independence to the organization (*ibidem*, p. 183). The same happens when the Court admits that the power an organization has to protect its agents, although not expressly provided by the UN Charter, is an implicit power of the UN, being essential in order to permit the execution of its functions (*ibidem*). Arguing that the protection of agents' conduct is equivalent to protecting the UN action implies believing that agents' conduct coincides with those of the organization.

<sup>(23)</sup> The comment to article 7 of the Draft Articles confirms that the Commission seems to give exclusive relevance to the fact that an individual or an entity had acted on behalf of the organization, performing its functions, when it affirms that «[i]t is to be understood that, in accordance with article 5, organs and agents are persons and entities exercising functions of the organization»: *Report of the International Law Commission on the Work of its Sixty-first session*, p. 71.

<sup>(24)</sup> «According to article 4 on the responsibility of States for internationally wrongful acts, attribution of conduct to a State is basically premised on the characterization as "State organ" of the acting person or entity. However, as the commentary makes clear, attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned»: *Report of the International Law Commission on the Work of its Sixty-first session*, p. 58. The Commission refers, in particular, to that part of the comment to article 4, paragraph 2, in which it is said that «it is not sufficient to refer to internal law for the status of State organs (...). The internal law of a State may not classify, exhaustively or at all, which entities have the status of 'organs'. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an 'organ', internal law will not itself perform the task of classification»: *ibidem*, para. 11, p. 90.

<sup>(25)</sup> The primarily juridical nature of the criterion used to establish who is an organ or agent of an organization stems also from other passages of the comment to article 5. For instance, paragraph 5 provides that «when persons or entities are characterized as organs or agents by rules of the organization, there is no doubt that the conduct of those persons or

It is true that the Commission is primarily interested in underlining that it is not only on the basis of the rules of the organization that it can be determined who has the quality of organ or agent of an organization.<sup>(26)</sup> Nevertheless, the Commission says indirectly that the *status* of organ and that of agent of an organization is first of all established by the rules establishing the internal legal order of the organization.

This interpretation is confirmed by paragraph 2 of article 5: therefore this article is not useful merely to define – as it might seem to be at first glance – that the attribution to an organization of the conduct of an organ or agent has to be excluded when such an organ or agent acted outside its functions, i.e. in its private capacity. It also means that as far as the rules of the organization set forth the functions of an organization, they will also establish who is an organ or an agent of the organization.

Tracing back the genesis of article 5, from the original draft proposed by the *special rapporteur* to the version adopted so far, the choice of the Commission to take into account the rules of the organization as the main criterion in order to identify who can be considered organ or agent of the organization becomes more evident.

In fact, article 4, paragraph 2, as originally proposed by the *rapporteur*, provided that «[o]rgans, officials and persons (...) are *those so characterized under the rules of the organization*».<sup>(27)</sup> (italics added)

On the one hand this provision did not leave space for any doubt: it said clearly that in order to determine who were organs and agents of the organization reference had to be made to the rules of the organization. Instead, now one has to look carefully at the comment to article 5 and reconstruct the origins of this article in order to understand its exact scope.

On the other hand, the original provision risked identifying the organs and agents only with those who were so classified by the rules of the organization.

The choice of the Commission to reformulate paragraph 2 of article 4, and to transform it into what is today paragraph 2 of article 5, is in fact a sign of its will to restate that not only the rules of the organization but also factual elements can be considered in order to attribute the *status* of organs or agents of an organization to individuals or entities.

Nevertheless, the Draft Articles do not state what these factual elements are.

However, in regard to agents the commentary to the Draft Articles – besides requiring that the agent has to be charged with carrying out functions of the organization by its own organs – clarifies that individuals or groups of individuals that, in a specific situation, act on the instructions or under the direction or the control of the organization, as provided by article 8 of the Draft Articles on States

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entities has to be attributed, in principle, to the organization» (italics added, p. 60). Moreover, paragraph 10 states that «rules of the organization» are not the sole criterion to use in order to attribute the conduct of organs and agents to an organization (p. 61). This confirms that, according to the Commission, the rules of the organization are firstly but not exclusively relevant for the purposes of attribution.

<sup>(26)</sup> The Commission has indirectly taken a stand on the debate concerning the content of article 4, paragraph 2, of the Draft Articles on State responsibility when, in its comment to article 5 of the Draft Articles on the responsibility of international organizations, it has argued that the qualification of a State organ made in article 4 is not exclusively based on the internal law of the State. Scholars widely debate whether the latter provision qualifies as State organs only those having such a qualification according to the State internal law (this is the opinion, e.g., of F. Salerno, 'Genesi e uso della nozione di organo nella dottrina internazionalista italiana', *Rivista di diritto internazionale*, 92 (2009), p. 921 ff.), or whether the word «*includes*» used in such a provision leaves room to consider as State organs also those individuals or entities which are not so qualified by the internal law, but nevertheless act as organs because they have been integrated into the State apparatus and have established consolidated relationships with other State organs (this is the view of P. Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (Milano: Giuffrè, 2007), pp. 182-206). The point has also been dealt with by the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (I.C.J. Reports 1986, pp. 62-65, paras. 109-115)* and in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* of 26 February 2007. In the latter judgment the Court has interpreted article 4, paragraph 2, of the Draft Articles on State responsibility arguing that the notion of organ adopted in such a provision would not be limited only to those qualified as such by the internal law of the State, but would encompass also those having a *de facto* relationship with the State different from the instructions, direction and control. In the opinion of the Court such a link would be represented by their *complete dependence* on the State: see paras. 377-415.

<sup>(27)</sup> *Second Report on Responsibility of International Organizations*, UN doc. A/CN.4/541, para. 28, p. 14.

responsibility,<sup>(28)</sup> must be considered agents.

This point does not expressly stem from the text of article 5, as would have been desirable, but from the comment to it, when it observes that «[s]hould (...) persons or groups of persons act [in fact] under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (c) of article 2. As was noted above in paragraph (8) of the present commentary, in exceptional cases, a person or entity would be considered, for the purposes of attribution of conduct, as entrusted with functions of the organization, *even if this was not pursuant to the rules of the organization*».<sup>(29) (30)</sup> (italics added)

### 3. Private companies contracted out by an international organization: their qualification as agents of the organization.

The commentary to the Draft Articles on the responsibility of international organizations never explicitly refers to the conferral of functions on private companies, unlike the Draft Articles on the responsibility of States. The latter provides for the attribution to a State of the conduct of every «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» (article 5).

In its comment to this article the Commission clarifies that private companies performing functions delegated to them by States by means of contracts are included in article 5.<sup>(31)</sup>

The commentary to the Draft Articles on the responsibility of international organizations does not state explicitly that the agents of the organizations include private companies charged by contract with carrying out functions of the organizations. However this can be understood from the statement that

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<sup>(28)</sup> In its *Second Report* the *special rapporteur* had argued that the wide definition of “agent” in draft article 4 (now articles 2 and 5) gives little scope for an additional rule modelled on article 8 of the Draft Articles on State responsibility (“Conduct directed or controlled by a State”). In the *special rapporteur’s* opinion this is all the more so as the reference to practice in draft article 4 (now article 2, letter b)) would allow one to take into account situations of factual control which characterize article 8 of the Draft Articles on State responsibility: *Second Report*, para. 66, p. 29. The latter statement means that in the *special rapporteur’s* view an agent acting *de facto* under the instructions, direction and control of an international organization could also be considered as having a relationship with the organization established by the «rules of the organization». The Commission has shared the *special rapporteur’s* view according to which the notion of agent as one who acts on behalf of the organization is sufficiently wide to include those who act *de facto* on account of the organization under its instructions, direction and control. Conversely, as above clarified in the text, it has not shared the *special rapporteur’s* opinion that in case of instructions, direction and control the bestowal of functions can also be considered as grounded on the «rules of the organization».

<sup>(29)</sup> Paragraph 8 provides: «The international organization concerned establishes which functions are entrusted to each organ or agent. This is generally done, as indicated in paragraph 2, by the “rules of the organization”. By not making application of the rules of the organization the only criterion, the wording of paragraph 2 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization»: *ibidem*, p. 61.

<sup>(30)</sup> *Report of the International Law Commission on the Work of its Sixty-first session*, p. 61 s. In its *Second Report* the *special rapporteur* has not excluded that «the existence of control may be taken *as implied* in the establishment of a formal link, such as the conferral of a mission of a person by an organ of the organization» (italics added): *Second Report*, p. 10, footnote No. 28. However in the *special rapporteur’s* opinion control is not a decisive element for the purposes of attribution when an individual or an entity have been charged by an organ of the organization with performing functions of the latter by means of the «rules of the organization».

<sup>(31)</sup> «The generic term “entity” reflects the wide variety of bodies which, though not State organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, *private companies*, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. *For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine*» (italics added): *Report of the International Law Commission on the Work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, p. 92.

«[i]t is (...) superfluous to put in the present articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 of the articles on the responsibility of States for internationally wrongful acts. The term “agent” is given in subparagraph (c) of article 2 a wide meaning that adequately covers these persons or entities».<sup>(32)</sup>

So, by means of the recognition of the Commission itself, the notion of agent may also include a private company charged by contract with performing functions on behalf of the organization.<sup>(33)</sup>

#### **4. The “contract” as included in the rules of the organization and the irrelevance, from the international law point of view, of contractual clauses excluding the responsibility of an international organization for the conduct of private companies.**

Since, as mentioned above, the criterion for attribution accepted by the Commission focuses on those considered organs or agents according to the rules of the organization, two problems arise concerning private companies acting on behalf of an organization on a contractual basis.

First, it is necessary to understand whether, according to the rules of the organization, the contract is the proper normative tool for delegating the functions of the organization.

Second, it must be clarified whether the standard contract clauses, according to which contracting parties exclude the relationship between the company and its personnel on one side and the organization on the other side being an agency relationship, rule out the attribution to the organization of the conduct of private companies when such companies are acting on behalf of the organization.

As regards the first issue, paragraph 2 of article 5, as adopted on first reading, provides that the conferral of functions to an agent must result from the rules of the organization. The latter, aside from the constituent instruments, decisions, resolutions and other acts of the organization, also includes «other acts taken by the organization in accordance with those instruments» and the «established practice of the organization». In other words the rules of the organization are either written or unwritten rules, but in the latter case they derive from an established practice.

Taking into account the general scope of these definitions, it is reasonable to hold that a contract between an organization and a private company whereby the former delegate to the latter functions to be performed on its own account may be considered as an «other act taken by the organization» or as an expression of an «established practice of the organization».

The Commission itself, stating in its comment to article 5 of the Draft Articles on the responsibility of States that the conduct of individuals or entities empowered by contract to exercise elements of governmental authority shall be considered an act of the State under international law, only indirectly admits the eligibility of the contract to delegate State functions to private companies.<sup>(34)</sup> It seems logical to consider that the same conclusions are valid when an international organization delegates functions to a private company by contract. Further normative acts issued by the organization will not be necessary in order to delegate the functions of the organization to a private company.

As regards the second issue, standards provisions in contracts excluding an agency relationship do not hamper, in my opinion, the attribution of the conduct of private companies carried out on behalf of the organization.

The *General Conditions of Contracts (Contracts for the Provision of Services)* issued by the United

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<sup>(32)</sup> *Report of the International Law Commission on the Work of its Sixty-first session*, p. 61. The comment to article 2 also specifies that the word “agent” regards both natural and legal persons: *ibidem*, para. 19, p. 51.

<sup>(33)</sup> The group of experts on humanitarian law, convened at Geneva in 2005, shared this view: see University Centre for International Humanitarian Law: *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, p. 32, available on the web site of the Geneva Academy of international humanitarian law and human rights <[www.adh-geneve.ch](http://www.adh-geneve.ch)>.

<sup>(34)</sup> The question as to whether the «internal law of the States» to which the Draft Articles on State responsibility refers may include also contracts between States and private companies is debated by M. Spinedi, ‘La responsabilità dello Stato per comportamenti di *private contractors*, in M. Spinedi, A. Gianelli, M. L. Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti. Problemi e spunti di riflessione* (Milano: Giuffrè, 2006), p. 76.

Nations, for example, contains such a provision. It is stipulated that «[th]e Contractor shall have the legal status of an independent contractor vis-à-vis the United Nations, and nothing contained in or relating to the Contract shall be construed as establishing or creating between the Parties the relationship of employer and employee *or of principal and agent*. The officials, representatives, employees, or subcontractors of each of the Parties shall not be considered in any respect as being the employees or *agents* of the other Party, and each Party shall be *solely responsible* for all claims arising out of or relating to its engagement of such persons or entities». <sup>(35)</sup> (italics added)

In its observations to the Draft Articles UNESCO, recalling the «rules of the organization», argued that it can avoid attribution for activities private contractors perform in the execution of contracts concluded with UNESCO. The reason lies, in the opinion of UNESCO, in the inclusion into such contracts of clauses according to which «[n]either the contractor, nor anyone whom the contractor employs to carry out the work is to be considered as an agent or member of the staff of UNESCO and, except as otherwise provided herein, they shall not be entitled to any privileges, immunities, compensation or reimbursements, nor are they authorized to commit UNESCO to any expenditure or other obligations». <sup>(36)</sup>

Therefore, according to UNESCO, despite the *outsourcing* of functions to private companies, acts committed by private contractors would not be attributable to the organization because the rules of the organization – i.e. the contract as such, that belongs to the rules of the organization –, would exclude the organization from responsibility for wrongful acts of private companies acting on its account. Indeed, in the UNESCO view, «besides acts of officials or experts on mission performed in their official capacity, only the acts of persons or entities operating in fact on the instruction, or under the direction or control, of an organization, could be attributed to the latter». <sup>(37)</sup>

Commenting on UNESCO observations, the *special rapporteur* has argued, in his *Seventh Report* to the Commission, that «[i]n order to establish attribution when an international organization acts through a person or entity that is not an organ (...), the *decisive factor* appears to be whether or not the person or entity *has been charged by an organ of the international organization with carrying out, or helping to carry out, one of the functions of that organization*». <sup>(38)</sup> Therefore it seems that in the *special rapporteur's* view, provisions such as those quoted above cannot result in any legal effect in the international legal order.

I also believe that the comment of the *special rapporteur* is the most reasonable interpretation of the provisions in question. In fact, such clauses are significant in terms of the internal legal order of UNESCO and, consequently, in the relationship between the organization and the private company. However, they are not relevant to the international legal order. In particular it must be excluded that these provisions are an exception to the rules of general international law on the attribution of the conduct of private companies to an international organization, thus excluding the organization's responsibility towards third parties that have been damaged by the conduct of private companies operating on account of the organization.

Moreover, contrary to the opinion of UNESCO, the attribution of conduct of private companies contracted out by an international organization is not hindered, on the basis of the criterion adopted by the Commission, by the absence of an *effective control* exercised by the organization upon the activity of the company. This observation is true both when the expression *effective control* is intended to mean the control over a specific wrongful act, or when it is intended to mean the control over a single activity or operation whose performance has been entrusted to an agent and has resulted in a wrongful act. <sup>(39)</sup>

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<sup>(35)</sup> Para. 1.2.

<sup>(36)</sup> *Comments and Observations Received from International Organizations*, UN doc. A/CN.4/568/Add.1, p. 10 f.

<sup>(37)</sup> *Ibidem*, p. 11.

<sup>(38)</sup> *Seventh Report*, para. 23, p. 8 f.

<sup>(39)</sup> As is well known, the notions of “effective control” and “general control” were used for the first time by the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (I.C.J. Reports 1986, para. 115, p. 64 f.)*. Such notions have been differently interpreted by scholars. For a study underlining difficulties in understanding what

From this point of view, the solution adopted by the Draft Articles deserves positive feedback. Indeed, had the Draft Articles required an organization to exercise a higher degree of control over an agent that is not an official of the organization, than over an official, attributing the conduct of private companies entrusted with carrying out functions on behalf of an organization to the organization would have been particularly difficult. Indeed, showing that the specific wrongful conduct, carried out by a private company, had been performed under specific instructions of the organization, or that the latter had exercised an *effective control* over the specific wrongful act or over the specific activity in the performance of which the wrongful act had been committed, would have been extremely difficult. Difficulties would arise first in the detection of the practice, but most of all because the organization delegating its own functions to private companies has no interest in giving them specific instructions concerning the performance of the delegated tasks.

In fact, the possibility of escaping the task of instructing its own personnel, and exercising over them a rigorous test on how they perform such tasks, is one of the reasons why organizations rely on private companies. What has been declared by UNESCO in its observations on the Draft Articles is representative of this fact. Referring to all the contracts it concludes with private companies, UNESCO has observed that «the contracts in question only impose on contractors *an obligation of result* (for instance, the execution of a project in the field), *while the organization has no direction or control over their actions nor may it exercise disciplinary powers on them*».<sup>(40)</sup>

## 5. Nature of the delegated functions: its irrelevance for the purposes of attribution.

It must now be clarified whether the Commission, recalling article 5 of the Draft Articles on State responsibility – which provides that the conduct of a person or entity that is not an organ of the State under article 4 will be automatically considered an act of the State under international law only whether empowered by the law of the State to exercise elements of the governmental authority – intended to attribute automatically to an organization only the conduct of «other persons or entities» when they have been charged with performing functions belonging to the competences States have conferred on the organization. In fact, the latter can be equated to State functions expressing elements of the governmental authority to which the Draft Articles on State responsibility refer to.

The Draft Articles on the responsibility of international organizations do not provide for any clear indicators.

Nevertheless, some elements support the view that the Commission has intended to leave out the nature of the delegated functions for the purposes of attribution, also with regard to the «other persons or entities» (private companies included).

A first indicator is the broad notion of agent adopted by the Commission in article 2. No distinction based on the nature of the functions performed stems from this article.

In a similar way, neither does the advisory opinion on the *Reparation for damages suffered in the service of the United Nations*, to which the Commission has referred for the notion of agent.

It is true that the Court refers many times to the «purposes and functions as specified or implied in its constituent documents and developed in practice».<sup>(41)</sup> It might seem that the Court believes in the existence of a right of the organization to act in diplomatic protection only when an agent charged with performing institutional functions has been injured.

Actually, in the opinion of the Court, injuries that give rise to the right of an organization to act in

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kind of control the International Law Commission has intended to refer to in draft article 8 of the Draft Articles on State responsibility see G. Bartolini, 'Il concetto di "controllo" sulle attività di individui quale presupposto della responsabilità dello Stato', in M. Spinedi, A. Gianelli, M. L. Alaimo (eds), op. cit., pp. 25-31. Recently, the ICJ, in its judgment on the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, has interpreted article 8 so that «it must (...) be shown that (...) "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred»: para. 400. From now on, the expression "effective control" used in the text above must take into consideration its ambivalent meaning.

<sup>(40)</sup> *Comments and Observations Received from International Organizations*, UN doc. A/CN.4/568/Add.1, p. 11, italics added.

<sup>(41)</sup> *I.C.J. Reports 1949*, p. 180.

diplomatic protection are not only those «to the interests of the Organization itself». They are also those «to its administrative machine, to its property and assets»,<sup>(42)</sup> so injuries to the functioning of the organization apparatus as well.

Second, the Draft Articles join the «other persons or entities» to the officials. As to the latter, the Commission does not seem to believe that only activities carried out performing institutional functions are attributable to the organization.

Had the Commission wanted to exclude the attribution to an organization of the conduct of «other persons or entities» which have been entrusted with performing instrumental activities for the functioning of the organization apparatus, it would have had to distinguish the «other persons or entities» from the officials.

This argument stems from the comparison with the different solution adopted by the Draft Articles on State responsibility. Here the criterion used for attributing the conduct of a State organ (officials included) to a State (art. 4) is different from the criterion provided for public or private entities acting on behalf of the State (art. 5). This distinction aims at excluding the attribution of wrongful acts committed by private entities not empowered to exercise elements of the governmental authority to the State. On the contrary the conduct of State officials (and, generally speaking, of State organs), is directly attributed to the State, with no regard paid to the nature of the functions they performed.

State officials are similar to officials of an organization: both are linked to a subject of international law (a State or an international organization) by a contract of employment (usually permanent in nature); both usually carry out bureaucratic and administrative functions. Consequently it is logical to argue that had the Commission wanted to attribute directly the conduct of officials to the organization, regardless of the nature of functions they had performed, while limiting the attribution of the conduct of other agents (private companies included) to the organization whether they had carried out institutional functions, it would have had to distinguish officials from the other persons or entities entrusted with exercising functions of the organization (as the Draft Articles on State responsibility have distinguished between State officials and public or private entities acting on behalf of the State).

The implicit choice made by the Draft Articles on the responsibility of international organizations – that is the automatic attribution to the organization of the conduct of «other persons or entities» (private companies included) charged with activities related to the functioning of the organizational apparatus – has the merit of overcoming some contradictions shown by the Draft Articles on State responsibility as to the criterion it uses in order to attribute the conduct of private companies to a State.

In fact, according to the Draft Articles on State responsibility, the wrongful conduct committed by the employees of a private company that has been charged with carrying out functions expressing the governmental authority are directly attributed to the State according to article 5.<sup>(43)</sup> The commentary to this article states: «[f]or the purposes of article 5, an entity is covered even though its exercise of authority involves an independent discretion or power to act: there is no need to show that conduct was in fact carried out under the control of the State».<sup>(44)</sup>

On the contrary, in the case that a private company commits a wrongful act in the performance of delegated functions that are not an expression of the public power, the wrongful act at stake can be referred to the delegating State only after having shown that such a State instructed the company (or

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<sup>(42)</sup> Italics added, *ibidem*.

<sup>(43)</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 92. According to the Draft Articles on State responsibility international law does not limit the delegation of State functions to private companies. Indeed, it recognizes State responsibility for the attribution of conduct of private persons or entities empowered by the law of that State to exercise elements of the governmental authority. In an opposite way the 2009 *Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies*, drawn up by the United Nations working group on the use of mercenaries, provides that the so-called “fundamental State functions” (art. 2, letter k)), would not be delegable to non State actors. Fundamental State functions would be functions expressing the State monopoly on the use of force, particularly «waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees». Also international organizations can adhere to the Draft convention (art. 43). However, it is not clear if its drafter intended also prohibiting the delegation of certain functions of international organization to private companies.

<sup>(44)</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 107.

its personnel) to behave in that specific way, or the company acted under its direction and control (art. 8).<sup>(45)</sup>

This solution has been criticised.

It has been observed that the Draft Articles provide for two different criteria in order to attribute on the one hand the conduct of organs, and on the other those of private companies charged with carrying out State functions even though both are asked to perform the same State functions.

Indeed, the wrongful act of an organ, committed in the performance of its functions, is immediately referred to the State to which the organ belongs, even though it is not the expression of the *governmental authority*. Instead, whether the State delegates the same functions to a private company, the conduct of such a company will be attributable to the State only on condition that the company has been instructed by the State to act in a specific way, or has performed the functions at stake under the *effective control* of the State.

The contradiction seen by scholars in the Draft Articles on State responsibility has not been reproduced in the Draft Articles on the responsibility of international organizations.

Its article 5, equating, for the purposes of attribution, the agents of an organization (among which private companies may be included) with the organs of an organization permits attributing the conduct of both to an organization on the basis of the same criteria. Both must have acted in the performance of functions conferred on them by the organization, by means of the rules of the organization, regardless the nature of the delegated functions, and therefore without distinguishing between functions that express the international “public” role of the organization and those having a “private” nature.<sup>(46)</sup>

The Commission’s choice, although being implicit, has the advantage of not requiring the proof that the wrongful conduct of a company, committed while it was carrying out delegated activities that are merely instrumental for the organization’s performance of its own institutional functions, has been committed under specific instructions given by the organization.

One may argue that the equation of organs and agents (private companies included) for the purposes of attribution, regardless of the functions they carry out, risks causing the excessive increase of cases in which an organization may incur an international responsibility.

Instead, such a risk does not seem to occur since it is quite unlikely that a private company exercising functions that are merely instrumental to the functioning of the organizational apparatus of an international organization may infringe obligations deriving from norms binding the organization at an international level. It is likely that while performing such functions a private company may violate the rules of the organization or the internal law of the State in which is operating on account of the organization.<sup>(47)</sup>

## **6. The employees of private companies can be considered agents of an international organization.**

Once clarified that a private company acting on a contractual basis on behalf of an international organization can be considered an agent of the latter, it must be verified whether, from the

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<sup>(45)</sup> *Ibidem*, p. 103. This is also the solution adopted in a document drawn up by eighteen governmental experts following the initiative launched jointly by the Government of Switzerland and the International Committee of the Red Cross: see *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, 2008, para. 7, p. 6.

<sup>(46)</sup> Article 7 of the Draft Articles on the responsibility of international organizations provides also for the attribution to international organizations of *ultra vires* conduct carried out by an agent performing activities that do not reflect the institutional functions of the organization, while article 7 of the Draft Articles on State responsibility provides for the attribution to a State of *ultra vires* conduct only if the company had been empowered to exercise elements of the governmental authority.

<sup>(47)</sup> Consider an information technology company which, while performing consulting services for the selection of bids submitted following a call for tenders for the purchase of new computers issued by an organization, illegally favours companies coming from the same country.

international legal order point of view, the company qualification as an agent also means that its employees can be automatically considered agents of an organization.

The relationship between the employees of a private company and the international organization is not direct, but happens through the company itself. The former are not directly charged by an organ of the organization with performing a certain activity on behalf of the latter. Instead, they are entrusted by their company supervisors with tasks. Moreover, their working activities, although provided for an international organization, are not governed by the contract for the provision of services between the company and the organization. In fact, an employee acts on behalf of the organization, but on the basis of a contractual relationship with his company. The latter will pay him for the provision of services to the organization. It will also manage its employees' careers, e.g. their promotions or disciplinary sanctions. Moreover many of the instructions an employee receives in order to exercise the activities delegated to the company by the organization are directly issued by the company management, since – as mentioned above – the organization leaves a wide margin of manoeuvre open to the company, while imposing on it only an obligation of result.

Taking into account the notion of agent the Commission has adopted, one might conclude that only the company as such could be qualified as the agent of an international organization, and not its employees. The relationship of employees with an organization might not seem to be grounded in the rules of the organization. Besides, they might seem to have a *de facto* relationship only with their company.

This conclusion must be rejected. Each company identifies with its employees regardless of the tasks they carry out and whatever position they hold in the company. Stating that the company is an agent of the organization therefore means also asserting that its employees are agents of the organization. In fact, by means of the identification just mentioned, the quality of agent of an organization owned by the company coincides inevitably with the quality of agent of its employees.

## **7. Attribution to an international organization of *ultra vires* conduct of its agents.**

The question to be answered is whether *ultra vires* conduct committed by the personnel of a private company is attributable to an organization.

It is a matter of fact that conduct infringing international obligations incumbent upon an international organization is frequently committed when the employees of a private company exceed their competences or contravene the instructions received.

Conduct exceeding the functions an organization has delegated by contract to a private company may result from the initiative of one or more employees without any interference from the company management. *Ultra vires* conduct like that just mentioned may also result from a decision made by the company management.

This also happens if the *ultra vires* conduct consists in the contravention of instructions the company management gave to its employees or, but unlikely, in the hypothesis that the management itself asks its employees to contravene the generic instructions given by the organization and written into the contract.

Since both a company and its employees are agents of the organization, the attribution of their *ultra vires* conduct to it will not depend on who has taken the initiative to act *ultra vires* (a single or a group of employees on their own initiative, or the company as such through its management).

Nor does a distinction derive from article 7 of the Draft Articles on the responsibility of international organizations. This deals with the *ultra vires* conduct of organs and agents providing that «[t]he conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions».<sup>(48)</sup> Therefore, what matters, according to this provision, is that the behaviour exceeding the competences of an organ or an agent or contravening the instructions they had received had been committed by an organ or agent *ex officio*, that is to say not in its private capacity. This formula also seems to apply when the agent is an

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<sup>(48)</sup> *Report of the International Law Commission on the Work of its Sixty-first session*, p. 21.

employee of a private company entrusted to perform functions of the organization.

In reality, the absence of an explicit distinction in article 7 would be insufficient to prove the juridical irrelevance of the distinction above mentioned. Indeed, it could be interpreted as an element indicating the scarce clarity of the Draft Articles on that point. It may not be decisive either in favour or against one or other solution.

Useful elements are not contained in the commentary to article 7. However the Draft Articles on State responsibility adopted on first reading contain useful indicators. This can reasonably be relied upon because its article 10 has been reproduced in the Draft Articles on State responsibility adopted on second reading in 2001, and both are identical to article 7 of the Draft Articles on the responsibility of international organizations.

Article 10 dealt with the attribution of an *ultra vires* conduct «[of an] organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority» to a State.

Referring to a private company charged by a State with carrying out public functions (for instance a railway company to which certain police powers have been entrusted), the commentary quoted the conduct of a company official who, in carrying out his duties, searches the luggage of a foreign diplomat acting contrary to his instructions as an example of an *ultra vires* conduct attributable to the State.<sup>(49)</sup>

Therefore article 10 assumed that an *ultra vires* conduct of an employ of a private company entrusted with the prerogatives of public powers was attributable to the State regardless of who had decided to act *ultra vires*.

Once explained that the attribution of the *ultra vires* conduct of a private company to an international organization is always possible, because it does not depend on who, between the company as such and its employees, decided to act *ultra vires*, the real question is rather different. It must be understood whether an *ultra vires* conduct performed *ex officio* by an employee of a private company can always be attributed to the organization or whether some limits exist for the purposes of attribution.

In his *Seventh Report* on the responsibility of international organizations the *special rapporteur* excluded attribution of the conduct of organs or agents of an organization to the latter, either they had acted off-duty or they had acted as organs or agents but their «conduct (...) clearly exceed[ed] the authority of the organs or agents, or when it obviously contraven[ed] the instructions of the organization».<sup>(50)</sup> Indeed, in the *special rapporteur's* view, «[i]n the presence of a manifest excess of authority (...) one cannot say that the organ or agent acted "in that capacity"».<sup>(51)</sup>

Let us consider the case in which a peace-building mission, established and functioning under the control of an international organization, manages a prison. Let us suppose that the organization delegates interrogation functions of detainees to a private security company, explicitly forbidding it to use interrogation techniques that are inhuman and degrading. If the employees of the company tortured some detainees during interrogation, such conduct would be manifestly contrary to the instructions received. For this reason, according to the *special rapporteur's* proposal, it could not be attributed to the organization.

Let us consider the case in which the company above mentioned was not only entrusted with carrying out interrogations, but also with the performance of police prison services. If an employee having the task of a prison guard decided, on his own initiative, to interrogate some detainees and meanwhile tortured them in order to obtain their confession, his conduct would fall within the functions the organization had delegated to the company. Yet it would not be attributable to the organization because the actions carried out fell manifestly outside his competences.

The text of article 7 of the Draft Articles on the responsibility of international organizations does not provide for any exception to the attribution to an international organization of *ultra vires* conduct

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<sup>(49)</sup> *Yearbook of Int. Law Commission*, 1975, vol. II, p. 70, para. 27 of the comment to article 10.

<sup>(50)</sup> *Seventh Report*, para. 34, p. 13, italics added.

<sup>(51)</sup> *Ibidem*, para. 36, p. 14.

of its organs or agents in the hypothesis in which the lack of competence or the infringement of instructions received are manifest. Does this restriction have to be deemed implicit?

No suggestions in this regard are contained in the commentary to this article.

Nevertheless the article is identical to the corresponding article 7 of the Draft Articles on State responsibility as adopted at second reading. Therefore, one can once again rely on the latter in order to obtain useful information as to the scope of article 7 of the Draft Articles on the responsibility of international organizations.

The commentary to article 7 of the Draft Articles on State responsibility only excludes the attribution of off-duty the conduct of individuals and legal persons acting on behalf of a State (and exercising public power functions) to the latter.

The commentary makes clear that the conduct committed in their private capacity is only that with no link to the functions such organs, individuals or entities perform *ex officio*.

Moreover, the Draft Articles attribute conduct of an organ to its own State even if such an organ either acted manifestly outside its competences or clearly infringed the instructions received, but acted *ex officio* and used (or misused of) means and powers stemming from its *status*.<sup>(52)</sup>

*Travaux préparatoires* confirms this.<sup>(53)</sup>

The same conclusion is valid for physical and legal persons acting on behalf of the State, but as long as their conduct is not extraneous to the functions the State delegated to them.<sup>(54)</sup> So, as far as the conduct of an employee of a private company acting for a State falls outside his competences (but falls within the competences of another employ), and as far as such conduct is contrary to State international obligations, his conduct will be attributable to that State even though he manifestly lacked competence.

The same happens when the employee, while performing functions delegated by the State to his company, violates, also manifestly, the instructions given to him by the company or by the State. The wrongful act will be attributable to the State.

Vice versa, in the case that an employee performs functions the State has not contracted out to the company itself, his conduct will not be attributed to the State. The reason is not the *ultra vires* nature of his conduct, but the fact that he performed different functions to those that the State had delegated

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<sup>(52)</sup> «The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has *overtly committed unlawful acts under the cover of its official status* or has *manifestly exceeded its competence*» (corsivo aggiunto): see *Report of the International Law Commission on the Work of its Fifty-third session*, p. 99.

<sup>(53)</sup> In its *Fourth Report on State responsibility* the *special rapporteur* Ago proposed expressly excluding the attribution to States of the conduct of an organ «completely and manifestly outside his competence» or «so visibly different from those of the official in question, that no one could be mistaken on that score» (*Fourth Report on State responsibility*, UN doc. A/CN.4/264 and Add.1, *Yearbook of Int. Law Commission*, 1972, vol. II, para. 55, p. 93). Hence, article 10 as proposed by Ago set forth, at paragraph 1, the general rule according to which «[t]he conduct of an organ of the State or of a public institution separate from the State which, while acting in its official capacity, exceeds its competence according to municipal law or contravenes the provisions of that law concerning its activity is nevertheless considered to be an act of the State in international law». Paragraph 2 excluded explicitly that conduct of organs that lacked manifestly of competence could be attributable to the State: «However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest» (*ibidem*, para. 60, p. 95). Paragraph 2 raised many objections among the members of the Commission (*Yearbook of Int. Law Commission*, 1975, vol. 1, pp. 3-23). For this reason Ago decided to delete it. The text of the new article as proposed by Ago will no longer be modified by the *Drafting Committee* (*ibidem*, p. 214) and later will be adopted by the Commission, becoming article 10 of the Draft Articles adopted on first reading. The only change will consist in extending the application of such an article also to entities which are not State organs, but nonetheless are empowered to exercise elements of the governmental authority.

<sup>(54)</sup> «If it is to be regarded as an act of the State (...) the conduct of an entity must (...) concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stocks)» (v. *Report of the International Law Commission on the Work of its Fifty-third session*, p. 94, para. 5 of the comment to article 5).

to his company.

Since neither the text nor the commentary to article 7 of the Draft Articles on the responsibility of international organizations have referred to the criterion of the manifest lack of competence, as instead suggested by the *special rapporteur's Seventh Report*, and also because articles 7 of both projects are identical, one may deduce the following. As regards *ultra vires* conduct committed by organs or agents of international organizations the Commission has implicitly adopted the solution followed for State organs or individuals and legal persons entrusted with acting on account of the State and acting *ultra vires*.

As far as this deduction is correct one can conclude that the Commission is in favour of the attribution of conduct of organs or agents (private companies included) to the organization even though they manifestly contravened the instructions the organization gave to them or even though they manifestly lacked competence, but nonetheless acted within the scope of the delegated functions.

### **8. The nature of agents of an international organization of private companies acting de facto on behalf of the organization.**

The solution adopted by the Draft Articles on the responsibility of international organizations is less explicit as to the conduct of private companies that have not concluded any formal contract with international organizations, but nonetheless act on their behalf, or companies engaged by an organization in order to provide for services different from those agreed by the contract.

The articles on attribution as adopted on first reading clearly envisage that a person or entity can be considered, for the purpose of attribution of its conduct, as entrusted with the functions of the organization on the basis of factual elements. Nevertheless, precisely which elements may reveal a *de facto* agency relationship, that is a relationship not based on the rules of the organization, are only partially and indirectly provided for in the Draft Articles.

In order to justify its choice not to introduce a provision similar to article 8 of the Draft Articles on States responsibility in the Draft Articles on the responsibility of international organization, the commentary to article 5 of the former states that the word “agent”, as defined in article 2, letter c), has a broad meaning. It can therefore include also persons or groups of persons that, in a specific situation, act under the instructions, the direction or control of an organization.

One may deduce indirectly that, in the view of the Commission, as far as the relationship with the organization is not based on the rules of the organization, persons or entities that act under the instructions, the direction or control of an organization in a specific situation can be qualified as agents of the organization. Private companies that have not concluded a formal contract with an organization, or which are engaged by a contract for the provision of services different from those materially required and executed, are included.

However, the Commission does not seem to limit to the hypothesis mentioned above the attribution to an organization of the conduct of persons or entities acting for the organization without being assigned on the basis of the rules of the organization. The Commission seems also to refer to other cases, although it does not qualify them.

Paragraph 8 of the commentary to article 5 declares: «[b]y not making application of the rules of the organization the only criterion, the wording of paragraph 2 is intended *to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization*».<sup>(55)</sup>

This is a general statement, that may be referred to a plurality of factual situations, exceptional in their nature, and not necessarily limited to those in which a person or entity act on behalf of an organization pursuant to its instruction, direction or control. It may also involve cases in which a different *de facto* link exists between the organization and persons or entities acting on its own account in so far as the factual link is such as to justify, in that specific situation, the conferral of their conduct to the organization.

Consequently, one can attribute the conduct of private companies that had not concluded any

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<sup>(55)</sup> Italics added.

formal contract with an organization, but nonetheless have acted on its own account, to the organization in question, also in situations different from those in which the latter has exercised an *effective control* over the contractor. The same conclusion is valid when an organization asks a company it has contracted to perform certain functions, to carry out tasks different from those agreed in the contract.

The advantage of such a solution with regard to private contractors acting *de facto* on behalf of an organization is self-evident.

Indeed, had the Commission attributed to organizations only the conduct of individuals or entities that, without an assignment based on the rules of the organization, acted under the organization's *effective control*, the conduct of private companies not linked to an organization by means of any contract, but nonetheless acting on its own account, would have hardly been attributed to the organization. The same difficulties would arise for private companies that have concluded a contract with an international organization, but have been asked to provide services different from those established in the contract.

Let us consider the employees of a private company entrusted by an international organization (e.g. the African Union) with the military training of national contingents of a peacekeeping mission under the command of such an organization by means of a contract. Let us suppose that because of an emergency situation, the organization asked such a company to protect the humanitarian convoys of a non-governmental organization deployed near the peacekeeping mission's headquarters.

If the employees of such a company acted under the instructions given to them by the company (and not by the organization) while performing the task *de facto* assigned to them by the African Union, and if the organization in question neither controlled the operation nor any single activity put in place during that operation, the organization will not be accountable for wrongful conduct committed by the employees of such a company during the operation.

The same is true, *a fortiori*, when the organization is not bound to a private company by any formal link.

Consider an international organization operating in a country where there is an ongoing internal conflict. Suppose that the organization, fearing its headquarters might be the target of an armed attack, requests a private military company acting *in loco* on behalf of the legitimate government, to protect the area where its offices are based in order for its staff to evacuate their headquarters and leave the country. If, while performing such a function, the employees of the company fired indiscriminately into a crowd of civilians without having received instructions to act in that way by the organization, their conduct would not be attributable to the organization according to the criterion of effective control.

In such examples, the difficulties in attributing the conduct of private companies to an organization is not only due to the necessity of demonstrating that the organization in question has actually provided specific instructions to the private company to carry out the wrongful act. Such a difficulty, as is well known, leads to criticism of the criterion of effective control as the method adopted in the Draft Articles on State responsibility in order to attribute the conduct of private actors to States.

The case described adds to such a difficulty the wide margin of *manoeuvre* a private company benefits from in exercising the functions entrusted to it. Indeed, as already mentioned, the organization, relying on the company's professionalism and experience, leaves it free to act. It is also reasonable to assume that the private company's freedom of action will be wider when the organization relies on it in emergency situations, such as those above described, and when a formal contractual relationship between the two parties does not exist.

## **9. Attribution to an international organization of the conduct of private companies contracted out by a State in order to provide support services to national contingents of armed forces put at the disposal of an international organization.**

States commonly conclude contracts with private companies for the provision of support services to national contingents of armed forces put at the disposal of an international organization in the framework of a peacekeeping mission. Such contracts usually provide for the training and protection

of national contingents, logistic and intelligence services to national contingents and so on.

Since peacekeeping missions in which private companies provide services are under the command of the international organization, it is logical to ask whether, at least in certain cases, the conduct of employees of the companies who infringe international obligations which the organization has to comply with, may be attributable to the organization. It is exactly in such a case that it is more likely that a private contractor will act contrary to the obligations an international organization has under international law.

The problem is particularly complex because it is intertwined with the issue concerning the attribution of the conduct of national contingents put at the disposal of an organization to the sending State, to the receiving organization or both.

No uniformity of views exists among scholars on this point.

Whether one believes that the conduct of national contingents is attributable exclusively to the sending States because national contingents remain State organs regardless of whether they are put under the chain of command of the organization one could also argue that the conduct of companies (and/or their employees), which provide services for national contingents, should be regarded as only attributable to the sending State.

*Vice versa*, whether one considers that the conduct of national contingents is attributable to the organization because, exercising the political and operational control over the operation, it usually carries out the prevailing or effective control over the contingent<sup>(56)</sup>, one must ask whether the same applies to private companies who accompany the contingent and act in its support.

The Draft Articles on the responsibility of international organizations do not provide any answer to this question.

Article 6 sets out that «[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct».

This article aims to set out when the conduct of State organs put at the disposal of an international organization is attributable to the latter, providing that the conduct is attributable to who, between the State and organization, concretely exercises the prevailing control (*effective control*).<sup>(57)</sup> This article

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<sup>(56)</sup> This is the opinion of R. Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (The Hague: Martinus Nijhoff, 1968), p. 229; B. Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces', *Revue égyptienne de droit international*, 32 (1976), p.73 f.; J.-M. Sorel, 'La responsabilité des Nations Unies dans les opérations de maintien de la paix', *International Law Forum*, 2001, p. 129; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant, 1998), pp. 380-382. Instead Condorelli has maintained the attribution of wrongful conduct both to the State and to the international organization. He has argued that the national contingent, although acting under the operative command and control of the organization, remains a State organ ('Le statut des forces de l'ONU et le droit international humanitaire', *Rivista di diritto internazionale*, 78 (1995), p. 886 f.). Another writer, S. Dorigo, 'Imputazione e responsabilità internazionale per l'attività delle forze di *peace-keeping* delle Nazioni Unite', *Rivista di diritto internazionale*, 85 (1995), pp. 921-930, claims that the double attribution would be possibile only for wrongful acts committed in the performance of activities that are merely instrumental to the mandate of the contingent. In such a case the contingent would always be a State organ since the State continues to control it. *Vice versa* the contingent would cease to be a State organ, and would be put completely at the disposal of the organization when it performs functions belonging to its mandate. In fact, in such a case, the contingent would be under the strategic and operative command and control of the organization.

<sup>(57)</sup> The comment to article 6 makes clear that the expression "effective control" is used to indicate that for the purposes of attribution the decisive element is the degree of control effectively exercised by the State or the international organization over the contingent committing a wrongful act. Hence, the conduct will be attributable to the subject exercising the prevailing degree of control. Paragraph 8 of the comment observes the «[t]he United Nations Secretary-General held that the criterion of the "degree of effective control" as decisive with regard to joint operations (...). What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, *should also apply to peacekeeping operations*, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over

does not take into account the case in which entities (private companies included) which are not State organs, but operate on its account, are put at the organization's disposal.<sup>(58)</sup>

Private companies sent alongside national contingents operating in peacekeeping missions cannot be regarded as State organs put at the organization's disposal under article 6. This applies even though the activities the company carries out in support of a national contingent entail its involvement in the performance of functions belonging to the contingent's mandate.

In fact, even accepting that the conduct of a company which provides services for a national contingent is attributable to the State,<sup>(59)</sup> this does not mean that such a company is a State organ. In the Draft Articles on State responsibility, companies carrying out, on behalf of a State and on a contractual basis, functions that express public power prerogatives, are in fact kept fully distinct either from *de jure* or *de facto* organs, although their conduct is equally attributed to the State.

In my view the use of private companies hired by States to perform services in support of their national contingents deployed in peacekeeping missions, although not addressed by the Draft Articles on the responsibility of international organizations, represents a hypothesis in which entities, different from State organs, but nonetheless acting on behalf of a State, are put at the disposal of an international organization and this may result in the responsibility falling on the organization, at least in some cases.

In order to test whether, and under what circumstances, this might happen, a distinction is necessary depending on the type of functions companies carry out, and exactly: a) whether the company performs tasks within the mandate of the contingent or b) whether it provides services solely for the benefit of the contingent, thus contributing to activities being purely instrumental to the contingent's mandate, that is exercising functions relating to the contingent's settlement and organization.

Whether the company performs tasks within the mandate given to the contingent (case *sub a*)), it must also be possible to distinguish the case in which the organization accepted the participation of a private company to carry out the contingent's mandate, or at least was aware of the use of military and/or security companies in the performance of such functions and did not oppose it, from the case in which the organization did not authorize the State to delegate part of the functions within the contingent's mandate to private companies, or at least was not aware of the delegation made by the State.<sup>(60)</sup>

In the first case, one can believe that as far as the employees of a private company acted, like the members of State armed forces making up the contingent, under the chain of command of the organization, they will be submitted to the prevailing or effective control of the organization<sup>(61)</sup> (not just escaping from the prevailing control of the State, but also from that of the company). For this reason their conduct will be attributable to the organization. Conversely, whether it is possible to prove they acted under the instructions, the direction or control of the State, their conduct will be attributable to the State.

It may also happen that the conduct of the employees of a company is simultaneously attributable to the State and the organization whether or not it is clear under the prevailing or effective control of who, either State or organization, they acted.

(Contd.) \_\_\_\_\_

peacekeeping forces, attribution of conduct should also in this regard be based *on a factual criterion*» (corsivo aggiunto):  
*Report of the International Law Commission on the Work of its Sixty-first session*, p. 66.

<sup>(58)</sup> *Report of the International Law Commission on the Work of its Sixty-first session*, p. 21.

<sup>(59)</sup> This is the opinion of M. Spinedi, *op. cit.*, pp. 98-103.

<sup>(60)</sup> Both the UN and the EU general conditions for the provision of services provide that in the event that the contractor requires the services of subcontractors to perform any obligations under the contract, it will have to obtain the prior written approval of the organization (see article 6, paragraph 2, of the *EU General Conditions for Service Contracts*, and article 5 of the *UN General Conditions of Contract. Contracts for the Provision of Services*).

<sup>(61)</sup> The criterion according to which the conduct is attributable to the subject exercising the prevailing degree of control has been adopted by the Commission in article 6 in order to establish to whom wrongful conduct committed by members of national contingents put at the disposal of an international organization in the framework of a peacekeeping mission is attributable to. Article 6 uses the expression "effective control": see *supra*, footnote No 57.

*Vice versa*, if the organization did not authorize the State to delegate the functions within the peacekeeping force's mandate to private companies, the conduct of the latter is not attributable to the organization. In such a case, the relationship between the contracting State and the private company must be verified in order to establish whether the conduct of the employees of the company may result in State responsibility. The criteria for the attribution of conduct to States will have to be taken into account. However, a case in which the conduct of a private company may be attributed to an international organization happens when it is possible to prove that the company acted *de facto* under the instructions, the direction or the control of such an organization. In fact this case would fall within the comment to article 5 of the Draft Articles on the responsibility of organizations, which states that «[s]hould (...) persons or groups of persons act [in fact] under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (c) of article 2».

Differently to the case just mentioned, is what happens when a State has delegated functions to a private company by means of a contract, charging it to provide services that are merely instrumental to the execution of the contingent's mandate (case *sub b*)).

In such a case, in fact, the private company, because of the nature of the services it provides, will work directly in favour and in support of the State contingent and not of the organization. This is true regardless of the fact that the company performs tasks that fall under a larger framework – the peacekeeping operation – that is subject to the operational and political command of an international organization.<sup>(62)</sup> In other words, because of the type of functions performed or their aims (i.e. that are

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<sup>(62)</sup> N. D. White, S. MacLeod, *op. cit.*, pp. 973-975 gives decisive relevance to the criterion of control in order to attribute the conduct of private military and security companies operating in the framework of a peacekeeping mission under the command of an international organization to the latter without distinguishing the nature of the functions carried out by the former. These writers maintain that the attribution of conduct of private companies to an organization would be justifiable as far as the organization performs «authority, command and control» over a peacekeeping mission. In their view this conclusion is valid either whether the organization as such uses private companies or whether such companies would be contracted out by contributing States (e.g. in order to support their national contingents). Although the writers above mentioned do not clarify what they mean by «authority, command and control», they seem to use such an expression as synonymous of the *overall control* criterion adopted by the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Tadić*. In fact, they hold it unnecessary to show that private companies are effectively under the complete control of the organization in order to attribute to the latter their conduct. They believe it sufficient that the organization, as the subject authorizing the establishment of the force, exercises an overall control over the latter (private companies operating in such a framework included). In order to support their opinion they first quote the judgments of the European Court of Human Rights (ECHR) in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, therefore recalling the criterion of «ultimate authority and control» used by the Court. Second, they quote the *overall control* criterion giving the impression of considering the ECHR judgments as having accepted such a criterion. This is also the opinion of A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law*, 18 (2007), p. 667. Against this P. Palchetti, 'Azioni di forze autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami* e *Saramati*', *Rivista di diritto internazionale*, 90 (2008), p. 690 f.

carried out in order to answer to the organizational and logistical needs of a national contingent) services that are merely instrumental to the execution of the contingent's mandate are not performed under the command of the organization. Therefore, the attribution of the conduct of private companies to an international organization must be excluded. It remains to be established whether the conduct of the private company is attributable to the sending State of the contingent.

#### **10. The conduct of private companies contracted out by States in the framework of multinational forces authorized by the UN to use force cannot be attributed to the UN on the grounds of the "overall authority and control" criterion.**

Some authors,<sup>(63)</sup> as well as the European Court of Human Rights in its decision on the admissibility of the case *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,<sup>(64)</sup> have held that the conduct of a multinational force under the control of States or regional organizations is attributable to the United Nations on the grounds that the multinational force has been authorized by the UN to use force as a delegation of UN functions.

According to this view, the delegating authority (the UN) should be accountable for the conduct of the delegated entity on condition that the delegation is lawful under the UN Charter and whether the UN, in authorizing the entity to use force in order to achieve objectives related to maintaining or restoring international peace and security, has set out conditions<sup>(65)</sup> permitting itself to perform an «overall authority and control»<sup>(66)</sup> over the delegated entity. The latter expression seems to refer to a general control, of a political nature, over the delegated entity.

It may be useful to immediately clarify that such a thesis has been referred to the relationship between the United Nations, on one hand, and States or regional organizations authorized to use force, on the other hand.

I do not want to take a stand on the validity of such a criterion in order to attribute the conduct of States authorized by the UN to use force to the UN.<sup>(67)</sup> Nevertheless I am keen to underline that such a criterion has already been used to attribute to the UN the conduct of private companies that have been sent along with State contingents put at the disposal of the UN, in the framework of a UN peacekeeping mission.<sup>(68)</sup> It would not take much for the same approach to be used in an attempt to attribute to the UN the conduct of private companies used by States authorized by the UN to use force within a multinational force.

Applying the thesis just mentioned one may attribute to the UN the conduct of private military and security companies hired by States composing a multinational force as far as States entrusted the company with performing functions related to the authorization to use force, and exercised over the company in question the same control the UN exercises over them. In other words, tracing back the

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<sup>(63)</sup> See D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Oxford University press, 1999), especially pp. 163-166; R. Kolb, *Ius contra bellum: le droit international relatif au maintien de la paix*, 1<sup>st</sup> edn (Bruxelles: Bruylant, 2003), p. 90 ff.

<sup>(64)</sup> *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, decision on the admissibility, 2 May 2007, available on the ECHR web site at <<http://echr.coe.int/echr/en/hudoc>>, paras. 132-136.

<sup>(65)</sup> See R. Kolb, *op. cit.*, p. 96 and D. Sarooshi, *op. cit.*, pp. 154-163; see also *Behrami and Saramati*, para. 134.

<sup>(66)</sup> This expression is used by R. Kolb, *op. cit.*, p. 96 f.. The ECHR made use of the same expression in *Behrami and Saramati*, para. 134.

<sup>(68)</sup> N.D. White, S. MacLeod, *op. cit.*, pp. 973-975.

chain of delegations one may claim that as far as the conduct of private companies is attributable to States, and the latter's conduct is attributable to the UN, the conduct of private companies carrying out, by contract, functions the UN has delegated to States is also ultimately attributable to the UN. In this case certain conditions should also be satisfied, i.e. that States exercise toward companies the same control the UN carries out over them, and that the delegation is clear and temporally limited.

I believe that such a solution should be completely rejected. Although it may be accepted in relation to States (or regional organizations) authorized to use force and the United Nations, the non-existence of a relationship between private companies hired by States and the UN in the hypothesis above mentioned does not allow for the attribution to the latter the conduct of such companies.

This conclusion should also apply when the UN authorization to single States or multinational forces to use force is released in a broader framework, like that in which the UN authorization is only a step, usually the first, toward the subsequent establishment of peacekeeping and/or multifunctional peace-building operations under the United Nations command. In both cases, the UN has delegated the use of force to States. It therefore exercises over them only the so-called *overall control* which, according to some scholars, is sufficient to attribute their conduct to the UN, the only exception being when it is proved that the United Nations had (implicitly or explicitly) admitted that States can exercise the delegated powers (the use of force) using private military and security companies.

## **11. Concluding observations on the general rule on attribution of conduct to an international organization adopted by the Commission.**

The previous sections have shown that the Draft Articles on the responsibility of international organizations adopted on first reading allows the conduct of private companies to be attributed to an international organization, whether they act for an international organization with a regular contract for the provision of services or whether they act *de facto* for it. In the latter case the conferring on an organization of the conduct of private companies also occurs when individuals are not acting under the instructions, direction or control of it.

It is consequently possible to attribute to international organizations using private companies much of the conduct of those companies.

This is the result of a conception of attribution intended as a procedure ruled, surely, by international law, but in which international rule does not attribute exclusive relevance to the rules of the organization. Indeed it also gives value to an existing material link between individuals or entities and the organization in each specific case. In the opinion of the Commission, this applies equally to organs and to agents: in fact, the content of the rule on attribution is the same for both.

It may be feared that this solution means that international organizations may be too easily held accountable for the conduct of private companies – charged with the tasks of the organizations – which are not under their control.

In reality, if one takes into account that international organizations are increasingly delegating their functions to private companies, not limiting themselves to cede those activities that are merely instrumental to the life of the organization – but even entrusting them with tasks directly expressing the competences of the organization – the solution followed by the Commission may have an advantage. It might encourage organizations to regulate, with specific rules, the behaviour of private companies on which they rely, and meanwhile to control them, setting up special monitoring mechanisms when appropriate.

The study I have conducted so far concerning the attribution of the conduct of private contractors used by international organizations also allows for a more general reflection over the approach followed by the Commission in regard to the attribution of international wrongful acts.

The solution adopted by the Commission, while falling within the paradigm that considers the attribution as a legal proceeding, has the merit of offsetting the disadvantages arising from the exclusive reference to the rules of the organization, with the difficulties of enquiring into, in each single case, the existence of a *de facto* relationship between the organization and the organ or agent.

On the one hand, the attribution of the conduct of organs or agents having an effective link with the organization to the latter is made possible by the criterion adopted by the Commission, even though their relationship is not predetermined by the rules of the organization. This provision avoids an organization invoking its internal rules in order to escape from its international responsibility with regard to the behaviour of individuals who are not qualified by those rules as organs or agents, but nevertheless, have an effective relationship with the organization.

On the other hand, the Commission does not seem to go so far as to hold that the quality of organ or agent can be denied for the purposes of attribution to those who, while formally having such a status under the rules of the organization, do not have (or have no longer) an effective relationship with it. Indeed, the Commission seems to allow for the search of a *de facto* relationship only as far as a link established by the rules of the organization does not exist. Had the Commission not intended to place the rules of the organization over those of factual elements, and had therefore considered that, as far as a material and effective relationship with the organization did not exist the formal status of organ or agent under the rules of the organization was not relevant, it would have been much easier for the Commission providing that organs or agents are who materially have an actual relationship with the organization as the only criterion for the attribution.

This double criterion has the merit of providing a jurist with an easier criterion to establish whether the conduct of a private company is attributable to a subject of international law. The question of attribution is also dealt with in a more uniform way than would happen when considering the reference to factual elements as the only object of the rule on attribution, or holding attribution as an operation consisting merely in ascertaining a factual situation. The analysis of the rules of the organization, to be carried out in the first instance, avoids subjective evaluations relating to the material elements that could detect the existence of an effective relationship between an individual or an entity and a subject of international law. It also avoids subjective evaluations of the intensity of the link such elements would express.

It has been noted with regard to States that this approach would contradict the widely held idea according to which international law does not place rules on State organization. Assuming that the rule on attribution gives importance to factual elements one would, in fact, end up qualifying as organs of the State those whose existence and functions have not been predetermined by the State legal order as organs of the State. Therefore, one would end up admitting that international law may interfere in State organization.<sup>(69)</sup>

A similar criticism could be claimed with reference to international organizations. General international law does not care about establishing the internal organizational structure of an international organization, thus leaving States free to establish what kind of organizational model to adopt.

In this respect, I agree with the view according to which recognizing that the State is free to self-organize does not necessarily imply that, for the purpose of attribution of a wrongful act, one should make exclusive reference to the State organization as it stems from its internal law, i.e. either from its written or unwritten rules, but resulting from an established practice. I believe it possible to hold that, from the international law point of view, the State organization is also the one the State has adopted *de facto*,<sup>(70)</sup> not necessarily through a practice that establishes national custom.

The same conclusion applies to international organizations: the view that there are no international rules relating to their organization, so that States are free to choose their internal organizational structure, does not mean that as regards attribution of conduct to an organization, only its apparatus as outlined in the rules of the organization – being written or unwritten, but anyway deriving from an established practice – is relevant.

It is true that an international organization materializes as a “real” entity thanks to the agreement establishing the organization and which provides for its competences. Nevertheless, the fact remains that once (legally) established it develops its own apparatus and its internal structure, not necessarily provided *ex ante* or authorized *ex post* by the rules of the organization.

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<sup>(69)</sup> F. Salerno, *op. cit.*, p. 937.

<sup>(70)</sup> P. Palchetti, *L'organo di fatto dello Stato*, *op. cit.*, especially p. 208 f.

Therefore, I share the approach adopted by the Commission regarding the attribution of wrongful acts to international organizations.

Although I understand such an approach, I believe that articles on attribution as adopted on first reading do not express in a sufficiently clear way such an approach.

In fact, at first glance, the texts of articles 2 and 5 of the Draft Articles could give the impression that the Commission had accepted an attribution criterion that exclusively provides for a material tie between an individual or an entity and the organization in each specific case.

The choice of the Commission to include directly in the text of article 2, letter *c*), the notion of agent as defined by the International Court of Justice, may strengthen this impression. In particular, the notion of agent may encourage the belief that the existence of a purely factual relationship is sufficient in order to attribute to an organization the conduct of agents.

I wonder whether it would not be appropriate that during the second reading the Commission, in order to make its position immediately comprehensible, while using the word “agent” in the text of the article to indicate both officials and other individuals or entities acting on behalf of the organization, omitted to include the definition of agent given by the Court in article 2.

Such a definition could be included in the comments to the articles on attribution as long as the Commission clarified that it does not exhaust the notion of agent used in the text of the articles. It would be desirable for the Commission to clarify that the reference to the definition given by the Court is rather intended to emphasize that, with regard to agents, factual elements may have a significant impact as a precondition for the attribution of their conduct to the organization, i.e. they may be more relevant than in the case of organs.

This would also give the Commission the chance to exemplify cases of agents whose conduct can be attributable to the organization on the basis of a factual relationship different from instructions, direction and control. In this framework the Commission could refer to private companies that have not concluded any formal contract, but nonetheless act *de facto* on its account, or private companies linked by a contractual relationship with the organization which, nevertheless, ask them to perform functions different from those agreed in the contract.

Moreover, it might be useful during the second reading that the Commission, in order to make more explicit its position, clarifies the wording of article 5. It could take into account two possible alternatives.

A first clear-cut alternative might be declaring directly in the text of article 5 that organs and agents are primarily, even though not exclusively, those that the rules of the organization designate as such. Then the Commission could specify that factual elements, showing the existence of a *de facto* link with the organization, must also be taken into consideration for the purposes of determining the quality of organs or agents, but only when a link under the rules of the organization does not exist.

Could the Commission go further in adopting a clear-cut solution: it could simply provide, in the text of article 5, that the conduct of organs and agents of an organization are attributable to it. Then, in the comment to article 5 the Commission could clarify that, in order to identify those who can be considered as organs or agents, one should refer primarily to the rules of the organization and, if not sufficient, to factual elements.

