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The Practice of Shared Responsibility of United Nations Peacekeeping Operations for Harmful Outcomes

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The Practice of Shared Responsibility of United Nations Peacekeeping Operations for Harmful Outcomes

Ray Murphy and Siobhán Wills[*]

1. Introduction

This chapter examines situations in which different entities involved in United Nations (UN) peacekeeping missions have interfered with the rights of third parties, or have acted in violation of their common obligations and in so doing caused harm, so that shared responsibility may be engaged.[1]

The concept of peacekeeping is neither defined nor specifically provided for in the UN Charter.[2] Historically, it is not a concept associated exclusively with the UN, but it was formalised and expanded by the UN in order to fill a gap in the means available to it to monitor and constrain conflicts and mitigate their effects. Although initially developed to deal with disputes between states, in recent times peacekeeping has been increasingly used in civil wars or intra-state conflicts. Missions are now also deployed to post-conflict situations where they may remain for many years after the conflict has ended.

The objectives of a peacekeeping operation, and the constraints under which it operates, are determined in the first instance by the mandate, which is usually based on a UN Security Council resolution. Resolutions often refer to Secretary-General's reports which outline in greater detail the tasks, duties and challenges of an operation. Although the UN is centrally involved, regional organisations may also play a crucial role and may share responsibility.

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[1] See for the concept of shared responsibility the introduction of this volume, Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1.

[2] Simma, B. (ed.), *The Charter of the United Nations: A Commentary*, 3nd edn (Oxford University Press, 2012), 1185; but see United Nations, *Handbook on United Nations Multidimensional Peacekeeping Operations* (UN, 2003), 1. Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).

Although there are occasions when the difference between UN Charter Chapter VI and Chapter VII authorised operations may be less relevant than ought to be the case, it is submitted that Chapter VII operations are more likely to be involved in situations that may result in questions of responsibility. Since 1999, most peacekeeping missions have been mandated under Chapter VII. The basic argument being that Chapter VII, permitting the use of force, creates more than mere expectations, and any obligations contained in such mandates must incur some degree of responsibility when these are not fulfilled. Provisions relating to the protection of civilians or disarmament are inconsistent with traditional Chapter VI operations, whereas such provisions in a Chapter VII mandate may require some degree of action by a force, depending on the circumstances. However, the mandate is invariably qualified so as to provide for the 'robust' use of force to protect civilians that are under imminent threat, provided that the international force has the capability to respond appropriately. This allows a force to plead inability to respond or lack of an imminent threat. Section 2 of the chapter explores the factual situations involving peacekeeping missions that may have entailed shared responsibility between different entities. Sections 3 and 4 examine the primary and secondary legal rules relevant to peacekeeping missions. Section 5 examines the processes for seeking accountability for harm done in cases of shared responsibility.

2. Factual situations

Criminal and abusive conduct by peacekeepers (particularly sexual abuse) is unfortunately a common problem that the UN has made efforts to combat, but with limited success. This is largely due to the fact that legal responsibility for the personal conduct of peacekeepers generally lies with the troop contributing state; but effective mechanisms for ensuring high standards of conduct need to be integrated throughout the entire mission and require the engagement of the UN directly. Moreover, the UN is usually the only means by which the victims in the host state can bring influence to bear on the troop contributing state to ensure justice is done, and the victims are kept informed.

Examples of UN missions causing significant physical damage to host states are uncommon but can be very serious. The most notable recent example is the pollution of river water in Haiti, leading to an outbreak of cholera that has killed more than 8000 people since 2010, and is directly traceable to a contingent of soldiers coming from an area of active cholera outbreak

in Nepal.[3] The cholera outbreak was due to the negligence of the Nepalese troops in digging latrines without due consideration for health concerns and for not maintaining them properly. Setting appropriate standards and ensuring that they are upheld should surely be the responsibility of the UN. In addition, the severity of the cholera outbreak was greatly exacerbated by the UN's persistent denial that the disease came from their troops, and consequently effective steps to prevent the spread of the disease were delayed.

Examples of situations in which the UN and a sending state, or a sending state and a host state, have breached shared legal obligations are often difficult to determine. Harmful outcomes, such as genocide and crimes against humanity are usually the result of multiple factors (for which different entities may be responsible). But these contributing factors are more likely to relate to violations by different entities of different obligations rather than multiple violations by different entities of a single shared obligation. The most notable example of a multifaceted harmful outcome that was the result of a combination of failings by the UN, sending and host states, was the failure of the UN Protection Force (UNPROFOR) to protect civilians from genocide at Srebrenica.[4]

UNPROFOR's problems were due in part to poor planning, poor leadership, and a lack of clarity as to the nature of the mandate. However, some of the harm was also due to a failure to respect obligations under human rights law, in particular the obligations due to those sheltering at the Dutchbat military base in Srebrenica at the time the town was overrun. Inquiries set up to investigate UN failings at Srebrenica indicate that responsibility for the failure to protect probably lay with both the UN and the sending state.[5]

3. Primary rules

[3] A. Cravioto et al., 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti', 4 May 2011, available at www.un.org.

[4] Netherlands Institute for War Documentation, '*Srebrenica.* A "Safe" Area: Reconstruction, Background, Consequences and Analyses of the Fall of a Safe Area' (Amsterdam: NIOD, 10 April 2002); Report of the Secretary-General pursuant to General Assembly Resolution 53/55: *The Fall of Srebrenica*, UN Doc. A/54/549 (15 November 1999) (*The Fall of Srebrenica*); General Sir M. Rose, *Fighting for Peace: Lessons from Bosnia*, 2nd edn (London: Warner Books, 1999), D. Rohde, *Endgame: The Betrayal and Fall of Srebrenica: Europe's Worst Massacre since World War II* (Boulder, CO: West View Press, 1998).

[5] P.A. Nollkaemper, 'Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica', SHARES Research Paper 04 (2011), ACIL 2011-11, available at www.sharesproject.nl; *Stichting Mothers of Srebrenica* v. *the Netherlands and the United Nations*, ECLI:NL:RBDHA:2014:8748 (16 July 2014), para. 4.149; *The Netherlands* v. *Mehida Mustafić-Mujić et al.*, ECLI:NL:HR:2013:BZ9228 (6 September 2013). *The Netherlands* v. *Hasan Nuhanović*, ECLI:NL:HR:2013:BZ9225 (6 September 2013).

All UN peacekeeping missions involve at least three actors that could be involved in a situation of shared responsibility: the UN itself, the sending state or states, and the host state or states. The arrangements for the mission and the rules that are to apply to it are usually set out, or confirmed in, separate agreements between the UN and the sending state (Memorandums of Understanding, 'MoU'), and between the UN and the host state (Status of Forces Agreement, 'SOFA'.) These agreements operate within the framework of the international rules binding on the UN, and the international and domestic rules binding on the sending state and host state. Thus the rules binding the UN in a particular situation may not always be identical to those binding sending states in the same situation and concerning the same forces. In addition, the rules binding sending states may be different for each state.

Typically, UN peacekeeping missions are subsidiary organs of the Security Council, meaning the UN has primary responsibility for the acts or omissions of the mission. Sending states also have obligations, particularly with regard to the conduct of their nationals. Host states have no direct authority over peacekeeping missions, but host state responsibility may arise in the context of joint operations involving host state forces and UN forces. Thus if both UN and host state forces were to be jointly involved in violating obligations towards third parties, the host state and the UN may share responsibility, for example through abuse of detainees or targeting of civilians; both of which are prohibited under customary international law and in core international humanitarian law (IHL) and international human rights law (IHRL) treaties. The host state may also be obliged to ensure that foreign forces assisting it (at its invitation or with its consent), comply with the host state's obligations under human rights law. In such cases, it would not make sense if sending states were to deny that the human rights law treaties applicable to the host state were applicable to their missions. Hampson has commented that it 'is striking' that neither the UN human rights treaty bodies nor the special procedures

> appear to have paid much attention to the obligation of the state to protect those in its territory from the actions of the authorities of other states, present with its consent. If Afghanistan, which acceded to the ICCPR on 24 January 1983, has the obligation to protect the right to life, does it not have the obligation to ensure that those fighting alongside it also respect the right to life? If that is the case it would be paradoxical if the assisting states denied that they had any human rights obligations because they were acting outside their national territory ... It would be equally bizarre if human rights law was applicable when they were present with consent but not applicable when they were there without consent.[6]

[6] F. Hampson, 'The scope of the extra-territorial applicability of international human rights law', in G. Gilbert, F. Hampson, and C. Sandoval (eds.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (London: Routledge, 2011), 157, 174.

It is difficult to dispute the logic of this argument, but it does raise questions in relation to accountability. Forces deployed with the consent of the host state are invariably covered by a SOFA. Under the UN Model SOFA 'the United Nations peacekeeping operations and all its members shall respect all local laws and regulations' and the 'Special Representative of the Secretary-General shall take all appropriate measures to ensure the observation of those obligations'.[7] Arguably, the UN in doing so takes on the responsibility of ensuring that the mission complies with the laws of the host state, including its human rights obligations.[8] However, the treaty itself does not become directly applicable to the contributing state.

3.1 The mandate

Obligations set out in Security Council resolutions adopted under Chapter VII of the UN Charter are binding on the persons or entities to which its provisions are addressed. The International Court of Justice (ICJ) in the *Namibia* advisory opinion held that resolutions adopted under Chapter VI may also be binding if such was the Council's intent, and that the 'language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect'.[9]

Mandating resolutions tend to be couched in terms that are permissive rather than obligatory, they authorise the mission to take action for specified purposes but generally there is no obligation on the mission to do everything that it is authorised to do. Obligations that are set out in mandating resolutions are generally addressed to the parties to the conflict or to those threatening the peace. However, the mandating resolution may also assert the applicability of particular rules to the mission, or set out certain constraints on its scope of action (for example limits on the use force), and these may create legal obligations for the force. Obligations binding on a UN force that are set out in its mandating resolution may give rise to responsibility for the UN, since UN peacekeeping missions are generally subsidiary organs of the Security Council, and also for sending states at least to the extent that they can be viewed as addressees of the relevant paragraphs of the resolution.

[7] UN Model Status-of-Forces-Agreement for Peace-keeping Operations, UN Doc. A/45/594 (9 October 1990), para. 6.
[8] S. Wills, 'International Responsibility for Ensuring the Protection of Civilians', in N. Tannenwald and M. Evangelista (eds.), *The Geneva Conventions Do They Matter?* (Oxford University Press, 2015, *forthcoming*).
[9] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at 53.

3.2 Primary rules applicable to the UN

The areas of primary norms most commonly applicable to peacekeeping missions will be human rights law and IHL. However, other areas of international law may also be relevant, for example international environmental law, especially where missions are involved in reconstruction and development; and disarmament law given that missions are frequently mandated to assist in disarmament, demobilisation and reintegration into society of members of armed groups.

Although the UN is not a party to any IHRL treaty or IHL treaty, there is wide support in the literature for the view that it is bound by customary IHRL and customary IHL.[10] The UN may also be bound by its own unilateral undertakings, provided that these demonstrate an intention to be bound.[11] For example, the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law,[12] which is binding internally within the UN as part of its administrative law, could also be construed as a unilateral promise and thus binding vis à vis third parties.[13] The Bulletin is publicly promulgated and is clearly intended to be legally binding (since it *is* binding within the organisation). The Secretary-General's 2003 Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse could also be viewed as a unilateral promise. It provides that, inter alia:

> United Nations forces conducting operations under United Nations command and control are prohibited from committing acts of sexual exploitation and sexual abuse, and have a particular duty of care towards women and children, pursuant to section 7 of Secretary-General's bulletin ST/SGB/1999/13, entitled 'Observance by United Nations forces of international humanitarian law'.[14]

[10] M. Zwanenburg, 'United Nations and International Humanitarian Law', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edition available at www.mpepil.com), para. 6; J. Paust 'The UN is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity' (2010) 51 Harv ILJO 1; *Hasan Nuhanović* v. *the Netherlands*, ECLI:NL:GHSGR:2011:BR0133 (5 July 2011); also ILDC 1742 (NL 2011), at 3.1 discussed in Nollkaemper, 'Dual Attribution', n. 5.

[11] In a similar way to the legal obligations arising from unilateral pledges made by States; a promise 'is commonly understood to be a unilateral manifestation of a state's will through which it commits itself in a legally obliging manner vis- à-vis one or several addressees to act or refrain from acting in a particular way in the future. It requires no acceptance or any reaction from the side of the addressee(s) to become effective.' C. Eckhart, *Promises of States under International Law* (Oxford: Hart Publishing, 2012), 5.

[12] UN Secretary-General, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law', ST/SGB/1999/13 (6 August 1999).

[13] The ICJ has stated that: 'When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration', *Nuclear Tests (New Zealand* v. *France)*, Judgment, ICJ Reports 1974, 457, 472, para. 46; *Nuclear Tests* (*Australia* v. *France*), Judgment, ICJ Reports 1974, 253, 267, para. 43.

[14] UN Secretary-General, 'Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse', ST/SGB/2003/13 (9 October 2003), para. 2.

Definitions of prohibited exploitation and abuse are then set out clearly in the reminder of the Bulletin, which, like the Secretary-General's 1999 Bulletin, is publicly promulgated and binding within the UN. However, the majority view is that mandates provide an authorisation to act but do not, in themselves, create any legal obligation to do so.[15]

3.3 Primary rules applicable to sending and host states

Sending and host states will be bound by their domestic law; by customary international law; and by relevant provisions of the IHRL and IHL treaties that they are party to.[16] IHRL is binding on states at all times, depending on the nature and form of the human right in question (different treaties have different scopes of application, as does customary law).[17] However, the scope of extraterritorial jurisdiction of IHRL remains controversial;[18] The European Court of Human Rights (ECtHR or Court) has stated that 'there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights' and 'that it is to be expected that clear and explicit language would be used were the Security Council to take particular measures which would conflict with their obligations under international human rights law'.[19] Although members of a UN force are agents of the UN and take on the obligations of that organisation, the IHL obligations of sending states continue to apply to their forces when serving as members of a UN operation, at least to the extent that those obligations have been incorporated into their domestic laws.[20] However, IHL is applicable only in situations of armed conflict and *prima facie* only to the parties to the conflict. IHL is not applicable in post-conflict situations, except where there is a resumption of hostilities sufficient to trigger the resumption of the armed conflict; or where the post-conflict administration of the territory meets the criteria for the

[15] K. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012), 392.
[16] The ICJ has stated that in armed conflict 'both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration' and that 'international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories"' *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, ICJ Reports 2005, 168, at para. 216 (*Armed Activities*).
[17] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (ICRC/Cambridge University Press, 2005), 300; UN Human Rights Committee, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add/11 (24 July 2001), para. 3; Basic Principles for the Protection of Civilian Populations in Armed Conflicts, UN Doc. A/RES/2675 (XXV) 9 December 1970.
[18] The ICRC notes that '[m]ost human rights treaties specify that they are to be applied by States parties wherever they have jurisdiction. However, it should be noted that treaty bodies, and significant State practice, have interpreted this as meaning wherever State organs have effective control.' Henckaerts and Doswald-Beck, ibid., 305.
[19] *Al-Jedda* v. *the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011), para. 102; *Serdar Mohammed* v. *Ministry of Defence* [2014] EWHC 1369 (QB), para. 122; M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 DJCIL 69, 98.
[20] Zwanenburg, 'United Nations and International Humanitarian Law', n. 10, para. 13; A. Roberts and R. Guelff , *Documents on the Laws of War*, 3rd edn (Oxford University Press, 2000), 625, 723.

applicability of the laws of occupation. In addition, IHL applies when IHL specifically provides for its applicability in post-conflict situations, for example in relation to the rules on repatriation of prisoners of war.[21] The possibility that occupation law may apply to UN forces is not explicitly addressed in the Bulletin on Observance by United Nations Forces of International Humanitarian Law. Several states have taken the view that it should be applied where the UN mission is in effective control of territory.[22] Generally however, UN forces act with the consent of the host state government and most commentators believe that occupation law is not applicable in these circumstances (provided that the consent is genuine and from the legitimate government), regardless of the level of effective control exercised by the mission.[23]

3.4 UN internal rules

Obligations of sending states which are set out under their domestic laws, customary international law and treaty obligations, are supplemented by a series of internal UN 'rules' that have both a primary and secondary function. They are primary in the sense that they define the content of certain types of obligations towards populations of host states, for example the Secretary-General's 2003 Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse[24] and the Secretary-General's 1999 Bulletin on Observance by United Nations Forces of International Humanitarian Law.[25] However, their purpose is to try and plug gaps between the standards of conduct expected of peacekeepers and the lack of any means of enforcing those standards, due to the fact that existing law setting out these standards (as embodied in IHL or IHRL treaties or routinely prohibited under domestic criminal laws), is either inapplicable to peacekeepers or only patchily applicable and difficult to enforce. Hence the function of these Bulletins is in some sense secondary,

[21] Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135, Article 5.

[22] S. Wills 'Occupation Law and Multi-National Operations: Problems and Perspectives' (2006) 77 BYIL 256; M.V. Bhatia, *War and Intervention: Issues for Contemporary Peace Operations* (Bloomfield, Conn.: Kumarian Press, 2003), 98; M.J. Kelly *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (The Hague: Kluwer, 1999), 63.

[23] Some commentators believe that occupation is not applicable to UN forces because the UN acts pursuant to the mandate conferred upon it by the Security Council. However Zwanenburg notes that '[a] stronger current in doctrine rejects this view, because it is in contradiction with the fundamental distinction between *ius ad bellum* and *ius in bello.'* Zwanenburg, 'United Nations and International Humanitarian Law' n. 10, para. 21.

[24] Secretary-General's Bulletin on Protection from Sexual Exploitation and Sexual Abuse, n. 14.

[25] Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law', n. 12. M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden and Boston: Martinus Nijhoff, 2005), 51–129.

notwithstanding that they set out primary obligations. Paradoxically, UN Bulletins do not create direct legal obligations for states.[26]

4. Secondary rules

International organisations are responsible for international acts imputable to them, and under existing law a UN peacekeeping operation is considered a subsidiary organ of the UN.[27] The International Law Commission (ILC) Articles on Responsibility of International Organisations (ARIO)[28] mark an important advance, but these have been criticised for drawing too much from the rules on state responsibility. The question whether the conduct of a peacekeeping force can be attributed to an international organisation (most often the UN), or to a contributing state or states, appears to be based primarily on 'who had effective control over the conduct'[29] at the time. The legal status of the force and any relevant agreements entered into by the international organisation and the states concerned are also relevant. Concerning joint operations, the decisive test in determining attribution and the degree, if any, of shared responsibility, is the effective control test.[30]

The effective control test has been adopted by the ILC in Article 7 ARIO.[31] While the 'direction and control' test is likely to be used in determining multiple attribution and shared responsibility, there is no clear definition of what this means which is problematic.[32] In the absence of practice, it is reasonable to refer to the ARIO and not draw analogies from the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[33] The control test, discussed below, can only be applied on a case by case basis. It is also complicated by the fact that there are no established international rules on joint and several

[26] Direct obligations for peacekeepers under IHL arise as a consequence of their participation as combatants, and hence parties to the conflict: 'Application of international humanitarian law and international human rights law to UN-mandated forces: Report on the Expert meeting on multinational peace operations', 11-12 December 2003, (2004) 86 IRRC 207, at 208, available at www.icrc.org/eng/assets/files/other/irrc_853_fd_application.pdf.
[27] D.W. Bowett, *UN Forces* (London: Sevens, 1964), 266–312, esp. at 287.
[28] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).
[29] Second Report on International Organizations, UN Doc. A/CN.4/541 (2 April 2004), para. 40.
[30] Report of the Commission of Inquiry established pursuant to Resolution 885 (1993) to investigate attacks on UNOSOM II personnel, UN Doc. S/1994/653 (1 June 1994), 45, paras. 243–244.
[31] Second Report on International Organizations, n. 29, para. 41; and C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and Attribution of Conduct' (2009) 10 MJIL 346.
[32] J.D. Fry, 'Attribution of Responsibility', SHARES Research Paper 37 (2014), 19, available at www.sharesproject.nl.
[33] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA); Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).

responsibility.[34] Likewise**,** the ECtHR also developed a rule of attribution, but this appears specific to the European Convention on Human Rights (ECHR) (see section 4.2).

Attribution of conduct of national contingents part of UN forces should take account of the contributing state's control over disciplinary matters and exclusive jurisdiction in criminal affairs. However, arrangements that are concluded between the UN and the contributing state only concern the parties and do not affect attribution of conduct under general international law.[35]

4.1 Responsibility of states and international organisations

Under Article 4 ARIO, an internationally wrongful act of an organisation occurs 'when conduct consisting of an act or omission: (a) is attributable to the international organization under international law; and (b) constitutes a breach of an international obligation of that international organization'. Although the body of case law and international practice is limited, commentators generally maintain that rules governing the law of state responsibility can be applied by analogy to international organisations.[36] This makes sense as there is no evidence that a separate regime has developed in respect of international responsibility for international organisations. The argument is strengthened by the customary international law status of the core of the legal regime of state responsibility and the legal connection between legal personality and international responsibility.[37] However, unlike states, international organisations are not created equally and control is derived from different sources.[38]

According to the ICJ, the UN has separate legal personality and is 'capable of possessing international rights and duties'.[39] Under Article 6 ARIO, the conduct of both organs and agents is attributable to the organisation. Article 7 ARIO deals with the situation where a

[34] J.R. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), 272–273. The Commentary to Article 47 ARSIWA, ibid., 125, para. 6, which relates to the 'Plurality of responsible States', states: 'The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.'

[35] Second Report on International Oranizations, n. 29, para. 43.

[36] B. Kondoch, 'The Responsibility of Peacekeepers, their Sending States, and International Organizations', in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010), 515, 519.

[37] Zwanenburg, *Accountability of Peace Support Operations*, n. 25, 70–71.

[38] Fry, 'Attribution of Responsibility', n. 32, 11.

[39] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 179.

seconded organ or agent remains under some degree of control of a sending state or organisation, such as occurs with military contingents on peacekeeping operations.[40] In order to be held responsible, the UN must exercise effective control, i.e. operational command and control.[41] However, a practical problem that arises in this context is the fact that peacekeeping forces are under the operational control of the UN, and this is not the same as under the command of the UN. Furthermore, sending states often impose 'caveats' or 'red card' procedures that govern participation. These can delimit the degree of control exercised and must be assessed on a case by case basis. In this way, effective control is a question of fact to be decided in each case. For example, the report of the Commission of Inquiry established in order to investigate attacks on United Nations Operation in Somalia (UNOSOM) II found that several national contingents were not under the effective control of the Force Commander.[42] In practice this means that either the UN or the troop contributing state will be liable. However, when it is not possible to determine which of the two is liable, the effective control test can result in dual responsibility and the joint liability of the UN and the sending state.[43]

The rules governing joint and several responsibility are however uncertain and a coherent solution has not been established in international law.[44] Furthermore, the terms 'joint' and 'joint and several' responsibility must be interpreted with caution, as they derive from different legal traditions.[45] Nevertheless, it has been argued that in the case of peacekeeping operations, when it cannot be established which sending state bears responsibility for wrongful acts, sending states bear joint responsibility.[46] In the *Banković* case, the issue was raised in the context of action by North Atlantic Treaty Organization (NATO) member states, but the ECtHR declared the case inadmissible.[47] Likewise, in the ICJ case concerning the NATO bombing of the Federal Republic of Yugoslavia (FRY), the FRY had argued that

[40] Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 7 ARIO, at 20.
[41] M. Hartwig, 'International Organizations or Institutions, Responsibility and Liability', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VI (Oxford University Press, 2012), 64, at 67; C.A. Bell, 'Reassessing multiple attribution: the International Law Commission and the *Behrami and Saramati* decision' (2008) 102 NYUJILP 323, at 328–329; and P. Bodeau-Livinec, G.P. Buzzini, and S. Villalpando, 'Behrami & Behrami v France, Seramati v France, Germany & Norway' (2008) 102 AJIL 323, 329.
[42] Report investigating attacks on UNOSOM II personnel, n. 30, at paras. 243–244.
[43] Hartwig, 'International Organizations or Institutions, Responsibility and Liability', n. 41, 69; Kondoch, 'The Responsibility of Peacekeepers', n. 36, 523; and Second Report on International Oranizations, n. 29, para. 48.
[44] Hartwig, ibid., 69.
[45] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 34; ARSIWA Commentary, n. 33, Commentary to Article 47 ARSIWA, 124, para. 3. See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment, ICJ Reports 2003, 161, at 354–358 (Separate Opinion Judge Simma).
[46] Kondoch, 'The Responsibility of Peacekeepers', n. 36, 529.
[47] *Banković and others* v. *Belgium and other states*, App. No. 52207/99 (ECtHR, 12 December 2001).

NATO member states were 'jointly and severally responsible for the actions of the NATO military command structure'.[48] However, the case was dismissed due to lack of jurisdiction.

In practice, the UN has accepted responsibility for UN peacekeeping operations and has paid compensation for damage that was not clearly imputable to the UN. However, the acts complained of must be performed as part of an individual's official function, otherwise such acts are attributable to the relevant sending state.[49] The fact that the UN has settled third party claims before local claims review boards for personal injury and similar claims that occurred during peacekeeping operations may be further evidence of potential liability for wrongful acts committed by peacekeepers, depending on the nature of the settlement made.

Another way that state responsibility may be invoked is when a state acknowledges and adopts such actions *ex post facto*, as occurred in Iran when US citizens were taken hostage by students initially unaffiliated with the state.[50] There is nothing to prevent a state acknowledging responsibility for the acts of its peacekeepers and taking responsibility.

4.2 Effective control/overall control

The wording of Article 7 ARIO is very similar to the relevant provisions governing state responsibility.[51] It emphasises factual or effective control which is exercised over the specific organ or agent. In the *Congo* v. *Uganda* case, the ICJ attributed the conduct of the Ugandan Defence Forces to Uganda as a whole, as it corresponded to the conduct of a state organ and according to customary international law, 'must be regarded as an act of that State'.[52] The ICJ seemed to give significant weight to the status of the forces as persons exercising governmental authority. The status of military, police or civilians part of peacekeeping

[48] *Legality of Use of Force (Serbia and Montenegro* v. *Canada)*, Oral Pleadings of Serbia and Montenegro, CR/99/14 (10 May 1999).
[49] A 1986 Memorandum of the UN Office of Legal Affairs contains the following clarification: 'We consider the primary factor in determining an "off duty" situation to be whether the member of a peacekeeping mission was acting in an non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident'. The Memorandum is reproduced in the *United Nations Judicial Yearbook* (1986) at 300; see also Article 9 of the Model Memorandum of Understanding between the UN and Participating State Contributing Resources to the UN Peacekeeping Operation, Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations, UN Doc. A/46/185 (23 May 1991) (Model Memorandum of Understanding).
[50] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran*), Judgment, ICJ Reports 1980, 3.
[51] See F. Messineo, 'Attribution of Conduct', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 60.
[52] *Armed Activities*, n. 16, para. 213.

operations is quite different and such personnel should not be considered as organs of the sending state. However, if and when a state exercises effective control, responsibility may be attributed to the state. For example, the Netherlands Supreme Court referred extensively to the ILC Commentary in the case concerning the eviction and death of three Bosnians at Srebrenica, and held that attribution should be decided solely in accordance with the rules of international law. It rejected the contention that, in principle, Dutchbat's conduct should always be attributed to the UN under Article 6 ARIO, and confirmed that Article 7 ARIO is the relevant rule for the attribution of the conduct of peacekeepers. Although Dutchbat was an organ of the UN during the time of the mission, it did not cease being an organ of the Netherlands as it retained 'organic command' (disciplinary powers and criminal jurisdiction).[53] Furthermore, the Netherlands Supreme Court held that it was not necessary for the state to have countermanded the command structure of the UN. This was a case of multiple attribution as 'not only the UN but also the Dutch government in The Hague had control over Dutchbat and also actually exercised this in practice'.[54] This is an important judgment on the issue of shared responsibility. However, the particular facts of the case, especially with regard to the exercise of factual control over Dutchbat, are significant. For this reason, while the case will provide an authoritative interpretation of the law on dual attribution, it is unlikely to open a floodgate of similar claims.

Establishing effective control requires a high standard of proof. In the *Behrami* and *Saramati* cases, the ECtHR referred to the work of the ILC and the criterion of effective control.[55] The ECtHR considered the decisive factor to be whether the 'UN Security Council retained ultimate authority and control so that operational command only was delegated'.[56] It drew a distinction between ultimate authority and control, which had been retained by the Security Council, and the 'effective command' of the operation that had been retained by NATO. In this way, in attributing responsibility for Saramati's detention to the UN, the Court departed from Article 7 ARIO.[57] The lack of a clear definition of what constitutes control remains

[53] *Netherlands* v. *Nuhanovic* and *Netherlands* v. *Mustafić-Mujić*, n. 5, para. 3.10.2. See B. Boutin, 'Responsibility of the Netherlands for the conduct of Dutchbat: overview of the Supreme Court decision', SHARES Blog, 7 September 2013; and P.A. Nollkaemper, 'Dual attribution: liability of the Netherlands for removal of individuals from the compound of Dutchbat', SHARES Blog, 8 July 2011, both available at www.sharesproject.nl.
[54] Ibid., para. 3.11.2.
[55] *Agim Behrami and Bekir Behrami* v. *France*, App. No. 71412/01 (ECtHR, 2 May 2007); and *Ruzhdi Saramati* v. *France, Germany and Norway*, App. No. 78166/01 (ECtHR, 2 May 2007).
[56] Ibid. para. 133.
[57] Bodeau-Livinec, Byzzini, and Villalpando, 'Behrami & Behrami v France', n. 41, 328.

problematic.[58] Likewise, being subject to direction and control may not exempt the influenced party of its responsibility.[59]

The ICJ decision in the *Nicaragua* case sets out the criteria for attributing responsibility of non-state actors to a state.[60] In that case, the 'financing, organising, training, supplying and equipping' in addition to 'the selection of its military or para-military targets and the planning of the whole of its operation' was deemed not to have met the exacting standard of constituting 'effective control'.[61]

The case law of the ECtHR is also relevant for state parties to the ECHR when deploying forces are part of UN or European Union peacekeeping missions and is illustrative of the issues involved. It indicates that 'jurisdiction is a necessary condition' for a finding on responsibility of states parties to the ECHR and while 'jurisdictional competence is primarily territorial',[62] in exceptional circumstances acts of contracting states abroad may amount to an exercise of jurisdiction. In this way, the ECtHR developed a rule of attribution that appears specific to the ECHR. The ECHR does not exclude the transfer of competences to international organisations, provided that rights under the ECHR continue to be 'secured'.[63] Member states' continue to have responsibilities, if the rights have not been secured, even after such a transfer.[64]

Two cases illustrate the complexity of the issues involved. In the *Saramati* case,[65] the applicant alleged there were a number of violations of his rights under the ECHR arising from his detention by the Kosovo Force (KFOR). In the *Behrami* case,[66] it was alleged that neither KFOR's acts nor omissions could be attributable to the UN on the basis that KFOR was not a peacekeeping operation, and that KFOR soldiers remained under the exclusive control of their respective troop sending state. France and Norway submitted that the UN exercised effective control and that KFOR exercised control over Mr Saramati.

[58] Fry, 'Attribution of Responsibility', n. 32, 19.
[59] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 34, 155.
[60] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* Merits, ICJ Reports 1986, 14.
[61] Ibid. para. 115.
[62] *Solomou and others* v. *Turkey*, App. No. 36832/97 (ECtHR, 24 June 2008), para. 43.
[63] *M. & Co.* v. *the Federal Republic of Germany*, App. No. 13258/87 (EComHR, 9 January 1990).
[64] *Matthews* v. *the United Kingdom*, App. No. 24833/94 (ECtHR, 18 February 1999), para. 32.
[65] *Saramati*, n. 55.
[66] *Behrami*, n. 55.

The ECtHR found that the UN had ultimate authority and control. Accordingly, the Court did not have jurisdiction in this case.[67] The 'ultimate authority and control' test adopted appears to be an interpretation of Article 7 ARIO that is particular to the ECHR.[68] In this context, the final Commentary to Article 7 noted that 'when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question'.[69] This is a pragmatic interpretation of the different kinds of control that may exist and their implications. The ECtHR was also criticised for failing to inquire into the possibility of dual or multiple attribution, i.e. whether NATO and/or troop contributing states could also be responsible.[70] By contrast in *Al-Jeddah,*[71] a United Kingdom decision on whether British forces part of the Multinational Force in Iraq could detain a suspected terrorist indefinitely without recourse to a court, the House of Lords distinguished the case from *Behrami* and *Saramati*, on the grounds that the wrongful conduct was attributable to the United Kingdom and not the UN.

In 2011, the ECtHR delivered a unanimous judgment in *Al-Jedda* and *Al-Skeini,*[72] which overruled some of the more controversial precepts set out in *Banković*. While this can be seen as a positive development, the decision did not clarify all the issues. The territorial principle remains the primary principle underlying the notion of jurisdiction under the ECHR. However, depending on the facts, jurisdiction can also be found with reference to the 'state agent authority and control' and the 'effective control' principles.

In June 2013, the ECtHR in *Stichting Mothers of Srebrenica and Others* v. *the Netherlands* concluded that 'the grant of immunity to the UN served a legitimate purpose and was not disproportionate' and therefore held the application inadmissible.[73] The complainants had sought to hold the UN responsible for failing to prevent genocide.

The cases demonstrate the challenges in determining whether sending states or the international organisation is responsible. The 'ultimate authority and control test' adopted by the ECtHR is not the same as the 'effective control test' applied by the ILC. However, the

[67] Ibid., paras. 133–144.
[68] K.M. Larsen, 'Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test' (2008) 19 EJIL 509, 521.
[69] ARIO Commentary, n. 40, Commentary to Article 7 ARIO, 23, para. 10.
[70] Larsen, 'Attribution of Conduct in Peace Operations', n. 68, 517. H. Krieger, 'A Credibility Gap: The *Behrami* and *Saramati* Decision of the European Court of Human Rights' (2009) 13 JIP 159.
[71] *R (on the Application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58.
[72] *Al-Jedda*, ECtHR, n. 19; and *Al-Skeini and others* v. *the United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011).
[73] *Stichting Mothers of Srebrenica and others* v. *the Netherlands*, App. No. 65542/12 (ECtHR, 11 June 2013), para. 69.

Court did not explain its reasoning. The ramifications of the *Behrami* and *Saramati* judgments are significant. If followed, it means the wrongful conduct of Security Council authorised peacekeeping operations is no longer attributable to sending states and the ECHR is not applicable in such cases.

Determining responsibility for detainees during peacekeeping missions demonstrates some of these challenges and is an issue that will continue to arise in the future. State practice with regard to detention varies

The importance of control was also referred to in the concluding observations by the UN Human Rights Committee (Committee), when considering reports by states contributing troops to UN peacekeeping missions. Although sometimes adopting ambiguous language, the Committee invariably suggests that the International Covenant on Civil and Political Rights (Covenant)[74] applies to troops operating abroad and states may be held accountable for violations.

In the concluding observations on the third periodic state report by Belgium, the Committee indicated that it was concerned about 'the behaviour of Belgian soldiers in Somalia … and acknowledges that the State Party has recognised the applicability of the Covenant in this respect'[75] (though it appears that Belgium later changed its position). Similarly, in relation to the involvement of Dutch peacekeepers at Srebrenica, the Committee suggested that at least some of the provisions of the Covenant applied.[76] The official position adopted by the Committee has been supported by certain states, notably Italy and Poland. For example, the Committee welcomed the guarantees that the Covenant applies 'to the acts of Italian troops and police officers who are stationed abroad, whether in the context of peace or armed conflict'.[77]

The Committee has adopted a broad approach indicating that mere control over individuals abroad might trigger the applicability of the Covenant. It rejected the more restrictive interpretation of the UK government that such extraterritorial application would only occur in

[74] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR or Covenant).
[75] Concluding Observations of the Human Rights Committee on the Third Periodic Report of Belgium, CCPR/C/79/Add. 99 (19 November 1998), para. 14.
[76] Concluding Observations of the Human Rights Committee on the Third Report the Netherlands, CCPR/CO/72/NET (27 August 2001), para. 8.
[77] Concluding Observations of the Human Rights Committee on the Fifth Report of Italy, CCPR/C/ITA/CO/5 (24 April 2006), para. 3; and similarly with regard to Polish troops, Concluding Observations of the Human Rights Committee on the Fifth Report of Poland CCPR/CO/82/POL (2 December 2004), para. 3.

situations when people were detained in British-run military detention facilities abroad. [78] The Committee considered that a state party should acknowledge that the Covenant applies to all individuals who are subject to its jurisdiction or control.

What constitutes control may vary, depending on the context. The *Bosnian Genocide*[79] case decided, inter alia, that neither the Republic of Srpska nor its army (VRS) could be considered de facto organs of the Federal Republic of Yugoslavia (as Serbia was then called), because they were not in a relationship of 'complete dependence'. Furthermore, the acts of the VRS were not under such strict control that responsibility for their wrongful acts should be attributed to Serbia. Acts will be attributable to a state 'if and to the extent that the physical acts ... that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility'.[80] The ICJ concluded that the acts of genocide were not committed by persons who acted on the instructions of the FRY or under its direct control in the specific circumstances of the incident, therefore the international responsibility of Serbia was not engaged.[81] The decision is consistent with established case law and in effect rejects the International Criminal Tribunal for the former Yugoslavia (ICTY) overall control test for determining state responsibility.[82] On this subject, the ICJ held that the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ARSIWA.[83]

5. Processes

There have been a number of cases involving peacekeepers where injured parties have brought claims against multiple responsible parties, or against individual parties, in situations where on the basis of the available information there were grounds for considering this as a situation of shared responsibility. However, while cases like *Srebrenica* are important in

[78] Concluding Observations of the Human Rights Committee on the Sixth Report of the United Kingdom of Great Britain and Northern Ireland CCPR/C/GBR/CO/6 (30 July 2008), para. 14.
[79] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (*Genocide* case).
[80] Ibid. para. 401.
[81] Ibid. paras. 396–415.
[82] Ibid. para. 404. The International Criminal Tribunal for the former Yugoslavia (ICTY) judgment in the *Tadić* case adopted the test of 'overall control'. Overall control requires 'going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operation', *Prosecutor* v. *Tadić*, Judgment, ICTY Case No. IT-94-1-A, 15 July 1999, (1999) 38 ILM 1518, para. 145.
[83] ARSIWA, n. 33.

interpreting the law on dual attribution and in demonstrating the difficulties of establishing shared responsibility, the facts are unique to the case.

5.1 Claims brought against the UN and a sending state (Srebrenica)

Relatives of some of the victims of the genocide at Srebrenica have attempted to bring cases against both the UN and the Netherlands. In 2008, the District Court of The Hague ruled that it did not have jurisdiction to hear claims against the UN.[84] Later that year, the same Court also denied a claim against the Netherlands (brought on behalf of relatives of Mr Mustafić-Mujić, an electrician working for Dutchbat, who was forced out of the camp and killed; and Mr Nuhanović, a translator for Dutchbat, who survived, but whose family were forced out and killed) on the grounds that 'operational command and control' over the Dutchbat troops had been transferred to the UN.[85] However, the District Court's decision was overturned by the Court of Appeal, which held that Dutchbat's actions in evicting Mustafić-Mujić and Nuhanović were unlawful under customary international human rights law;[86] and that these violations were attributable to the Netherlands.[87] The Court of Appeal left open the possibility that Dutchbat's actions might also be attributable to the UN.[88] The Dutch government lost its appeal to the Supreme Court on 6 September 2013. Significantly for the purposes of (potential) shared responsibility, the Supreme Court stated that:

> In so far as these grounds of appeal are based on the submission that international law excludes the possibility that conduct can be attributed to both an international organisation and to a State … they are based on an incorrect interpretation of the law ... article 7 DARIO, in conjunction with article 48 (1) DARIO does not exclude the possibility of dual attribution of conduct. [89]

The *Srebrenica* case and the range of allegations made demonstrate the challenges to holding peacekeepers accountable and the complexity of determining dual attribution for the conduct of peacekeepers.[90]

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[84] *Stichting Mothers of Srebrenica et al.* v. *the Netherlands and the United Nations*, ECLI:NL:RBSGR:2008:BD6795 (10 July 2008). See Nollkaemper, 'Dual attribution' (blog), n. 53.
[85] *Mehida Mustafić-Mujić et al* v. *the Netherlands*, ECLI:NL:RBSGR:2008:BF0182 (10 September 2008); and *Hasan Nuhanović* v. *the Netherlands*, ECLI:NL:RBSGR:2008:BF0181 (10 September 2008).
[86] *Mehida Mustafić-Mujić et al* v. *the Netherlands*, ECLI:NL:GHSGR:2011:BR5386 (5 July 2011); and *Nuhanović* v. *the Netherlands* (2011), n. 10, paras. 6.7–6.8.
[87] *Mustafić-Mujić*, ibid.; and *Nuhanović*, ibid., paras. 5.8–5.9
[88] Ibid., para. 5.9.
[89] *Netherlands* v. *Nuhanovic* and *Netherlands* v. *Mustafić-Mujić*, n. 5, para. 3.11.2.
[90] Human Rights Watch, 'The Fall of Srebrenica and the Failure of UN Peacekeeping – Bosnia and Herzegovina', Vol. 7(13), October 1995, at 29–31. Netherlands Institute for War Documentation, *Srebrenica*, n.

5.2 Claim brought against the UN for Cholera outbreak in Haiti

In November 2011, a claim for compensation was lodged with the UN on behalf of victims of a cholera outbreak in Haiti. In February 2013, a UN spokesperson advised those representing the claimants that the claims are 'not receivable'.[91] The UN commissioned final report of the Independent Panel of Experts on the Cholera Outbreak in Haiti (Panel or Panel of Experts) found that the evidence overwhelmingly supported the conclusion that the source of the Haiti explosive cholera outbreak was due to contamination of a river tributary adjacent to the Nepalese UN camp.[92] The pathogenic strain was of current South Asian type and occurred as a result of human activity. The Panel went on to conclude that the cholera outbreak was caused by a confluence of circumstances, and was not the fault of, or deliberate action of, a group or individual. Inadequate sanitation was a major factor. In this case the UN did not need to invoke the protection of the 1946 Convention on the Privileges and Immunities of the United Nations[93] or the Status of Forces Agreement with Haiti. Realising the legal protection available to the UN in the ordinary courts, the non-governmental organisation representing a number of Haitian victims attempted to get around this obstacle by filing a claim with the UN itself.

The 1946 Convention and SOFAs can provide a possible means for the resolution of certain disputes that courts cannot otherwise consider because of the UN's immunity. According to Article 29 of the 1946 Convention, '[t]he United Nations shall make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.' In accordance with this obligation, Mission des Nations Unies pour la stabilisation en Haïti (MINUSTAH)'s SOFA provided for the establishment of a three person Standing Claims Commission to hear civil claims arising out of actions of MINUSTAH, or its members, outside of the Haitian courts' jurisdiction. However, a Commission was not established. For this reason, the victims submitted their petition to MINUSTAH's claims unit and directly to the UN Headquarters.

4, Chapter 9; Letter from Commander in Chief of the Land Army Forces, A. van Baal to the Minister of Defence Joris Voorhoeve, 12 May 1995, available at www.nrc.nl/W2/Lab/Srebrenica/baal.html.

[91] C. Lynch, 'UN invokes diplomatic immunity on Haiti cholera epidemic', *Foreign Policy-Turtle Bay*, 21 February 2013.

[92] In order to determine the source of the outbreak definitively, the Secretary-General of the UN formed an Independent Panel of four international experts with a mandate to investigate and seek to determine the source of the 2010 cholera outbreak in Haiti, see Cravioto et al., 'Final Report on the Cholera Outbreak in Haiti', n. 3, 29.

[93] Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, in force 17 September 1946, 1 UNTS 15 (1946 Convention).

The UN Office of Legal Affairs took fifteen months to review the claim. Its position is that the cholera claims are not the sort of 'dispute of a private law character' envisioned by Article 29 of the 1946 Convention, but rather involve questions of public law and policy.

This process highlights the challenges for claimants. This can be exacerbated when obstacles relating to discovery, classified information and related issues make apportioning responsibility difficult.

5.3 Procedures

5.3.1 National or parliamentary inquiry

Canada conducted a major national inquiry in the aftermath of allegations of serious violations of international human rights in the early 1990s in Somalia.[94] The Canadians convened a number of courts-martial to try those deemed most responsible for the violations. Italy and Belgium also conducted enquiries into allegations of misconduct by their respective forces in Somalia. Canada was an example of good practice by a sending state in the establishment of a national inquiry and the action taken in response to the allegations of misconduct by Canadian forces. Parliamentary inquiry and judicial decisions in the Netherlands have also proved useful mechanisms for establishing the facts and evidence gathered may be of probative value in establishing responsibility.

5.3.2 UN reports

The UN Secretary-General has issued reports following investigation of serious incidents involving peacekeepers in Srebrenica, Rwanda and Somalia.[95] These are good fact finding mechanisms and while the findings can apportion blame, they are findings of fact, not law.

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[94] *Dishonoured Legacy, Report of the Commission of Enquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Canadian Government Publishing, 1997).

[95] *The Fall of Srebrenica*, n. 4; Report of the Independent Inquiry into the action of the United Nations during the 1994 genocide in Rwanda, UN Doc. S/1999/1257 (16 December 1999); and Report investigating attacks on UNOSOM II personnel, n. 30.

5.3.3 Cases before international courts

Cases brought before the ICJ involving the Congo and the former Yugoslavia, and cases brought before the ECtHR have established legal principles, but there is still uncertainty regarding issues of shared responsibility.[96] The cases also demonstrate the difficulty in bringing a range of parties before such courts and the limitations in trying to hold organisations like the UN responsible.

5.3.4 Co-operation and criminal accountability

Although the issue of sexual abuse by peacekeepers has received much attention in recent years, it is just one form of misconduct by such forces. The critical issue is that of accountability of members of peace forces. The major impediment to effective accountability mechanisms remain sending states and their reluctance to surrender the right to exclusive jurisdiction. There are no examples of a state being held criminally liable for violations of international law by its personnel on peacekeeping duties or violations of its obligations towards the international community as a whole.[97] The treatment of offenders is not uniform and varies as between the forces of different nationalities. Municipal laws differ in the jurisdiction they confer on courts and courts-martial, especially with regard to offences committed by nationals abroad. Furthermore, criminal codes differ and an act deemed criminal in a host state might not be criminal in a contributing state, and the laws of sending states may differ between themselves in a similar manner.

Under the Model Memorandum of Agreement between the UN and sending state, the latter acknowledges that the commander of its national contingent is responsible for the discipline of members of the contingent while assigned to UN peace operations. Sending states also commit to ensure that the Commander of its national contingent regularly informs the Force Commander of any serious matters involving discipline among members of its national contingent. In practice, this does not always occur and there appears to be little sanction

[96] *Armed Activities*, n. 16; *Genocide* case, n. 79. *Behrami*, n. 55; and *Saramati*, n. 55; *Mothers of Srebrenica* v. *the Netherlands* (ECtHR), n. 73.
[97] J.R. Crawford, 'State Responsibility', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (Oxford University Press, 2012), 517, at paras. 13, 17 and 32.

against recalcitrant states. A draft Convention on the Criminal Accountability of United Nations Officials and Experts has been developed by a UN Working Group; however, this does not apply to military personnel.[98]

Even if the Secretary-General's 1999 and 2003 Bulletins were to be construed as a legally binding unilateral promises by the UN to the world, there is nothing in them to suggest that their provisions may override the immunity of the UN under the UN Convention on the Privileges and Immunities of the UN. Section 4 of the 1999 Bulletin provides that 'in case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts'. Since the Bulletins do not create direct legal obligations for states, this statement should be viewed as purely protective of states' interests in ensuring jurisdiction over its nationals, and not as obliging sending states to ensure that their forces are in fact subject to prosecution in national courts for their conduct abroad. However, if the Bulletins were to be viewed as legally binding on the basis that they constitute a unilateral promise by the UN, it could be argued that the UN has a legal responsibility to ensure that sending states have in place an effective means of ensuring that their military personnel can be prosecuted for crimes committed abroad.[99]

5.3.5 Investigations

Sending states have the primary responsibility for investigating any acts of misconduct.[100] There is a requirement to inform the UN 'without delay' and forward the case to its appropriate national authorities for investigation.

When it is necessary to preserve evidence and where the sending state does not conduct fact-finding proceedings, the UN may initiate a preliminary fact finding inquiry.[101] This has

[98] 'Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations', Appendix III, UN Doc. A/60/980 (16 August 2006).

[99] Not all states retain a military justice system in peace time and ordinary domestic criminal legal systems do not always provide for extraterritorial jurisdiction: International Commission of Jurists and Columbian Commission of Jurists, 'Military jurisdiction and international Law: Military courts and gross human rights violations' Vol. 1, 24 February 2004, 154; Austria, the Czech Republic, Denmark, Estonia, France, Germany, Guinea, the Netherlands, Norway, Senegal, Slovenia and Sweden have abolished military courts, at least in peacetime (ibid., 158). In addition some countries have removed serious crimes that violate human rights from the jurisdiction of military courts (ibid., at 161–164).

[100] F.J. Hampson and A. Kihara-Hunt, 'The accountability of persons associated with peacekeeping operations', in C. Aoi, D. de Coning, and R. Thakur (eds.), *Unintended Consequences of Peacekeeping Operations* (New York: United Nations University Press, 2007), 195. United Nations, Report of the Secretary-General, *Criminal accountability of United Nations officials and experts on mission*, General Assembly UN Doc. A/63/260 (11 August 2008).

happened in a number of cases in recent years. However, the primary role of the sending state is maintained, and the UN has little investigative powers and even less accountability mechanisms at its disposal, should the sending state fail to take appropriate action.

In the event that the sending state does not notify the UN as soon as possible, the sending state is considered to be unwilling or unable to conduct such an investigation. In such cases, the UN may initiate an administrative investigation of alleged serious misconduct and national contingent commanders are obliged to co-operate.[102]

If either a UN investigation or an investigation conducted by the competent authorities of the sending state concludes that suspicions of misconduct are well founded, the sending state must forward the case to its appropriate authorities for action. Sending states also agree to notify the Secretary-General of progress on a regular basis, including the outcome of the case. The Department of Field Support follows up with relevant Permanent Missions where no response is received. The outcome of these follow up efforts is confidential.[103]

5.3.6 Investigation Division – Office of Internal Oversight Services

According to the UN Investigations Manual, the aim of UN Office of Internal Oversight Services (OIOS) investigations is to establish facts and make recommendations.[104] The OIOS is not a law enforcement agency and does not have subpoena or other coercive statutory powers. The UN Investigations Manual and procedures pursuant to the MoU between the UN and contributing states is evidence of the UN's efforts to improve the process despite the reluctance of states to accept more robust investigative powers.[105] In the end, what is now in place is a largely emasculated UN process that relies on sending states to take the appropriate action. Establishing what states actually do in practice remains a challenge.

6. Conclusion

[101] 'Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session', New York, 11 June 2007, Article 7 quarter Investigations, para. 2, UN Doc. A/61/19 (Part III).
[102] Ibid., para. 3(a).
[103] Interview, UN Investigation Division – Office of Internal Oversight Services, June 2013.
[104] UN, 'Investigations Manual', Investigation Division – Office of Internal Oversight Services, March 2009.
[105] Ibid., and Report of the Special Committee on Peacekeeping Operations, n. 101.

The examination of the rules, case law and state practice is not conclusive in respect of shared responsibility. In many cases the issue was not specifically addressed and each case must be decided on its own merits.

Although peacekeeping missions undertake tasks that imply significant obligations, the actual legal obligations are primarily determined by the mandate and terms of any agreements explicitly entered into and intended to be legally binding. The principles of customary international law, IHL and IHRL are relevant to the extent they are applicable, but this can only be decided on a case by case basis. In some instances, especially with regard to IHL, this may prove challenging.

In order to be held responsible, the organisation or state must exercise effective control which is sometimes equated with operational command and control. Effective control is a question of fact to be determined in each case and establishing this requires a high standard of proof. Complex UN command and control structures combined with individual arrangements for sending states participation render each situation unique.

Rules governing joint and several responsibility are uncertain. While attributed responsibility may facilitate a determination of shared responsibility, deciding the degree of responsibility among multiple parties remains problematic.[106] The ARSIWA recognise both 'control' and 'acknowledgment' as bases for state responsibility. The case law and state practice does not lend itself to a set of coherent principles applicable in all cases. The cases demonstrate the challenges in determining responsibility. The 'ultimate authority and control test' adopted by the ECtHR is not the same as the 'effective control test' applied by the ILC. However, the ECtHR reasoning is unclear. The ramifications of the *Behrami* and *Saramati* judgments are significant. If followed, it means the wrongful conduct on Security Council authorised peacekeeping operations is no longer attributable to sending states and the ECHR is not applicable in such cases.

The case of troops deployed as part of national contingents should be distinguished from individual police or civilians. In the case of national contingents, the sending state may share in responsibility for acts or omissions of such troops, as the state can exercise some degree of control, depending on the circumstances. Acts of individuals seconded to the UN are more problematic.

[106] Fry, 'Attribution of Responsibility', n. 32, 30–31.

In the case of the Haiti cholera outbreak, scientific evidence indicated that the source was most likely the Nepalese peacekeepers. The UN position is that the cholera claims are not the sort of dispute of a private law character envisioned under the 1946 Convention on Privileges and Immunities, but rather involve questions of public law and policy. The law protects the UN, for good reason in most cases, but it does not grant immunity from moral obligation.

The decision of the Dutch Supreme Court in relation to Srebrenica is important for its reliance on international law principles to determine the shared responsibility of states and international organisations in the conduct of peacekeeping operations.[107] A sending state and the UN may share responsibility and dual attribution. The Netherlands Supreme Court adopted the effective control test and unequivocally recognised the possibility of multiple attribution. When a state exercises some degree effective control, it cannot evade responsibility for the conduct of its soldiers on peacekeeping missions.

In the *Srebrenica* case, the primary responsibility for the UN's failure must rest with the member states, especially the permanent five. Deployment of a peacekeeping force that was configured for traditional peacekeeping, not combat, combined with an arms embargo and the delivery of humanitarian aid, was an inadequate response given that there was no peace to keep.[108] The failure to share intelligence among all the international actors was an 'endemic weakness throughout the conflict'.[109] The resolutions adopted in New York bore little resemblance to the reality on the ground. The robust terms of the mandate meant that the rhetoric did not match the reality and false expectations were created with regard to the potential role of UNPROFOR to prevent atrocities.[110]

[107] *Netherlands* v. *Nuhanovic* and *Netherlands* v. *Mustafić-Mujić*, n. 5.
[108] *The Fall of Srebrenica*, n. 4, para. 490.
[109] Ibid., para. 474.
[110] Y. Akashi, 'The Use of Force in a United Nations Peacekeeping Operation: Lessons Learnt from the Safe Areas Mandate (1995) 19 FILJ 312, at 312, 315–316.