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**RESPONSIBILITY REGIMES IN PEACE OPERATIONS**

***HOLDING STATES AND INTERNATIONAL ORGANISATIONS***

***RESPONSIBLE FOR HARMFUL CONDUCTS***

S.S.D. IUS\13 – DIRITTO INTERNAZIONALE

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*Responsibility Regimes in Peace Operations*

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# INTRODUCTION

In the post Cold War period peace operations have been increasingly seen as promising tools for the maintenance of international peace and security, consequently, a growing number of peace operations have been established since the 90s'. However, many of these missions failed to live up to the high expectations they had raised. Their main shortcoming can be identified in the failure to protect civilians. In some cases, this failure consisted in the inability to halt the perpetration of gross human rights violations and international crimes that occurred while the peace operation was deployed, or soon after its withdrawal, such as the case of the failure to protect the Tutsi population during the Rwanda genocide in 1994, the deployment of UNAMIR (United Nations Assistance Mission for Rwanda) notwithstanding. Similarly, one may think of the failure of UNPROFOR (United Nations Protection Force) in Bosnia to protect the Muslim Bosnians who sought refuge in the Potocari Compound in the safe area of Srebrenica. In other cases, the conduct of missions' components directly contributed to or consisted in violations of international law, as it was the case, for example, in Kosovo during UNMIK administration and KFOR deployment. More recently, one can recall the cholera epidemic outbreak in Haiti during MINUSTAH (United Nations Stabilization Mission in Haiti) of 2011. The origins of the outbreak have been found by several scientific studies in the reckless conduct of the UN and of the UN Nepalese contingent. On the one hand, the Napalese contigent wasn't properly screened, thus including subjects affected by the disease. On the other hand, Nepalese forces failed to properly construct their camp, where the poor hygienic conditions of the infrastructures, namely of the camp pipeline, caused the contamination of the main island's river.

In response to these events we have witnessed in the last twenty years a growing demand for justice brought about by individuals, associations, human rights advocates and scholars. The most evident trace of this quest for

justice is certainly to be found in the numerous lawsuits filed before national courts and the Strasbourg Court such as the cases of the *Mothers of Srebrenica v the UN and the Netherlands*, the *Nuhanovic v the Netherlands* and *Mustafic v the Netherlands*, the *Bici and Bici v the UK*, the *Behrami and Saramati* and the *Al Jedda* cases, to offer an array of well-known examples. Besides judicial proceedings, public opinion has also raised its voice to demand justice from States and the UN for wrongful acts carried out in peace operations. The leverage exerted by the public opinion has pushed some governments to resign as well as international organizations to develop instruments to respond to instances of aggrieved individuals, such as, for example, the Ombudsperson in Kosovo, the UNMIK Human Rights Advisory Panel (HRAP) and of EULEX Human Rights Review Panel (HRRP), to cite a few.

Against this backdrop, the present research aims at inquiring how international law regulates the consequences of the occurrence of a wrongful act in peace operations. In order to answer this main research question the study will first delimit the scope of analysis, namely defining peace operations. Secondly, it will highlight that several ‘responsibility regimes’ come into question when a wrongful act is carried out in peace operations, namely international responsibility, accountability and liability. Thirdly, the focus will move to the so-called problem of ‘many hands’. That is to say, when multiple actors are involved, the question is raised as to who should bear responsibility, and whether and to what extent responsibility should be apportioned among them. Fourthly, the analysis will turn to remedies described under the different ‘responsibility regimes’ available to parties affected by a wrongful act.

The need to begin the research looking for a tentative definition of peace operations lies with the terminological confusion that is generally associated with peace operations. Both international organisations’ practice and academic literature resort in different instances to different terms, namely peacekeeping, peace operations, peace support, and peace enforcement. It will be first inquired whether this troubled lexicon refers to discrete concepts

or rather it is the result of different political and policy considerations. The analysis will then move from language to substance. It will be analysed what makes peace operations what they are, that is to say, what are the legal bases under international law for the establishment of peace operations, and what are their essential features that separate them from other interventions of the international community such as, for example, the intervention upon invitation or enforcement actions undertaken under the collective security system *ex art. 42* of the UN Charter. Some authors have maintained that the initial model of peace operations has ‘exploded’,<sup>1</sup> while others have claimed that a continuity can be traced through the ‘normative model’ thereof, constituted essentially by the consent of the host State, impartiality and the limited use of force.<sup>2</sup> The research will verify these two main hypotheses and conclude that peace operations have evolved around landmark events (and failures) as those described at the outset of this introduction.

Moreover, it will be noted that the crucial shift from inter-State to intra-States conflicts has urged peace operations to adapt to a significantly changed scenario where there is often very little, if not any, peace to keep and where these operations are increasingly called to discharge quasi-governmental tasks, ranging from civilian protection to the promotion of the rule of law, to the interim administration of a territory. As it will be demonstrated, this core evolution of the geo-political scenario has had no small impact on the constituting elements of peace operations. Where the consent of the host State may not be enough to guarantee the mission’s success, absent the cooperation on the field of the main actors involved in the peace process. Impartiality has been stretched so far as to include the possibility to legitimately target certain actors that are hampering the peace process, so called ‘spoilers’. Eventually, the limited use of force has become increasingly less limited, so as to include – as just mentioned – the use of force against specific subjects to protect the mandate, in what are now called

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<sup>1</sup> Picone, “Il peacekeeping nel mondo attuale. Tra militarizzazione e amministrazione fiduciaria”, in *Rivista di diritto internazionale*, vol. 79, 1996, pp. 5-33.

<sup>2</sup> Frulli, *Le operazioni di Peacekeeping delle Nazioni Unite. Continuità di un modello normativo*, Editoriale Scientifica 2012.

‘robust’ or ‘militarised’ operations.

In sum, it will be shown that peace operations are to be understood as field operations, composed both of national military and civilian components, following a UN mandate, aimed at managing conflicts from the moment of their eruption to the prevention of their relapse. Peace operations include peacekeeping, robust operations and peace building. They can be authorised and led by the UN or authorised by a UN mandate and led by a regional organisation. These operations have significantly evolved in the last 20 years, where the model has neither ‘exploded’ nor enjoyed true continuity. By contrast, while retaining the same labels (consent, impartiality, limited use of force) their meanings have significantly changed along with the main evolution of peace operations.

Once delimited the scope of analysis, it will be possible to move to the issue of responsibility. It is widely understood under general international law that the occurrence of an internationally wrongful act, attributable to a State or to an international organisation will entail the latter’s international responsibility, namely calling into question the application of the 2001 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts<sup>3</sup> (DARS) and of the 2011 ILC Draft Articles on the Responsibility of International Organisations for Internationally Wrongful Acts<sup>4</sup> (DARIO). Hence it would have seemed logical to carry out the analysis of the responsibility issue exclusively through the prism of international responsibility. However, the law of international responsibility alone would have proven insufficient for the purpose of the intended analysis on the firm grounding that more than one ‘responsibility regime’ exists in peace operations.

The term ‘responsibility regimes’ is used here to refer to three concepts generally associated with the legal notion of responsibility, namely

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<sup>3</sup> Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report (A/56/10), in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

<sup>4</sup> Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly (A/66/10), in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

international responsibility, accountability, and liability. Authoritative statements, such as the 1996 SG Report on Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations<sup>5</sup> as well as relevant agreements as the UN and the NATO Model Status of Force Agreements<sup>6</sup> (SOFAs) and the UN Model Memorandum of Understanding<sup>7</sup> (MOU), reveal that the language makes reference to several responsibility regimes, especially international responsibility and liability. Scholarly writings also tend to resort to different concepts, namely international organisations' accountability and international responsibility. The existence of different regimes is also confirmed by the complexity of legal relations existing between and among the various actors involved in peace operations. As a consequence of serving as the leading organisation of a peace operation, the United Nations will have a direct relationship with both Troop Contributing Countries (TCCs) and the host country as well. Generally, these relationships are regulated by two different agreements, the MOU and the SOFA respectively. Furthermore, the leading organisation may enter into legal relationships with individuals, for example, due to its responsibility *vis à vis* third parties for damages which may occur during the mission, or for contractual purposes. In United Nations-authorized peace operations the United Nations will not have the direct relationship with TCCs or the host State. By contrast, the leading regional organisation will enter into agreements with those States contributing to the mission and with the host State. Hence, the plurality of actors involved in peace operations and the diverse relationships that may arise between and among them when a wrongful act occurs call into question different responsibility regimes.

The idea of a plurality of responsibility regimes is inspired to a certain extent by the literature concerning 'multilevel accountability', where "accountability extends over multiple levels of government, straddling the

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<sup>5</sup> A/51/389 (1996).

<sup>6</sup> UN Model SOFA, A/45/594 (1990); NATO Model SOFA, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, last updated 14 October 2009.

<sup>7</sup> A/C.5/60/26, chapter 9.

boundary between the national and the international level”.<sup>8</sup> In contrast and differently from the cited literature, the present study relies on the notion of responsibility, rather than accountability, as overarching concept. Accountability has gained great momentum in recent international law discourse, especially concerning the exercise of growing powers entrusted with international organisations and the related need for their control.<sup>9</sup> However, it will be shown that the notion of accountability has a very recent origin and it derives from a very specific sociological tradition, namely the 19th century post-Jacksonian North American context. The precise meaning of accountability as a legal concept remains elusive and consequently fits rather difficulty in most domestic legal systems, where the term lacks a textual translation.

By contrast, the notion and the conception of responsibility derives from the ancient Roman law tradition, namely from the ‘*Lex Aquilia de damno*’ of the III century b.c., the legacy of which has been enshrined in the modern legal systems of most European countries.<sup>10</sup> According to this theory, who breaches a legal command, through a willful act, shall be sanctioned. This notion is strictly linked to a moral conception of responsibility, whereby the willful violation of a legal command also amounts to a breach of the moral imperative of *neminem ledere*. The sanction essentially translates in the obligation of reparation. This ancient conception had significant influence not only on European domestic legal systems, but also on early international law writings on State responsibility of Grotius and de Vattel, for example.<sup>11</sup> As a consequence, it seems more accurate to consider international responsibility, accountability and liability as species of the broader genre of the legal category of responsibility.

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<sup>8</sup> Nollkaemper, “Multi-level Accountability: A Case Study of Accountability in the Aftermath of the Srebrenica Massacre”, in Broude-Shany (eds), *The Shifting Allocation of Authority in International Law*, Hart, 2008, pp. 345-367; see also Palchetti, “Unità, pluralità o inutilità dei regimi di responsabilità internazionale applicabili alle organizzazioni?”, in *Il futuro delle organizzazioni internazionali: prospettive giuridiche*, Editoriale Scientifica, 2015, pp. 43-60.

<sup>9</sup> See *infra* chapter II, para. 3.

<sup>10</sup> Bianca, *Diritto civile. La responsabilità*, vol. V, Giuffrè Editore, 1994, pp. 534 ff.

<sup>11</sup> See *infra* chapter II, para. 2.

As to the third issue, concerning the attribution and distribution of responsibility for wrongful acts occurred in peace operations, the study will consider whether a customary rule has emerged under international law to determine whose responsibility – of TCCs, international organisations or both – is entailed. Differently from the analysis carried out in the previous chapter, the matter of attribution of responsibility will be dealt with under the viewpoint of the law of international responsibility of States and international organisations. It is well known that attribution is a constitutive element of international responsibility, while under other responsibility regimes an inquiry on the so called ‘subjective element’ is not required. Moreover, the relevance of attribution rules under the law of international responsibility is demonstrated by the approach chosen by most courts in dealing with the issue of responsibility for internationally wrongful acts in peace operations.<sup>12</sup> Also in literature the main focus rests on the quest for the appropriate criterion to attribute wrongful conducts under the law of international responsibility. Consequently, in order to answer the question as to who (TCC, international organisations or both) should bear international responsibility for wrongful acts carried out in peace operations, the analysis will turn to the rules of attribution of conduct under the law of international responsibility. More precisely, the study will investigate whether articles 6 (attribution of conduct of organs of the organisation)<sup>13</sup> and 7 DARIO (attribution of conduct of State organs placed at the disposal of an international organisation)<sup>14</sup> constitute a codification of current customary law on the attribution of conduct applicable in peace operations. To this end, the study will first look into the drafting history of article 6 and 7 DARIO, taking into account the *opinio iuris* States and international organisations expressed during the DARIO drafting

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<sup>12</sup> See *infra* chapter III, para. 7.

<sup>13</sup> Art. 6 DARIO stipulates that: “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. The rules of the organization shall apply in the determination of the functions of its organs and agents”.

<sup>14</sup> Art. 7 DARIO prescribes as follows: “[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”.

process; second, relevant international organisations' practice will be analysed. Third, judicial practice of national courts and of the Strasbourg Court will be taken into account; eventually, completing the study with the contribution offered thus far by the intense doctrinal debate on the matter.

Light will be shed on the difficulties in applying the DARIO provisions. On the one hand, widespread disagreement exists on whether art. 6 or art. 7 should regulate attribution of wrongful conduct in peace operations. The quarrel rests essentially on the legal status of UN-led peace operations, where the Organisation maintains that peace operations are UN subsidiary organs and national troops contributed thereto are 'transformed' into UN subsidiary organs. This view clearly triggers the application of art. 6 DARIO and implies an exclusive attribution of conduct to the UN. By contrast, many States and the ILC itself have expressed the view that peace operations, whether led or authorised by the UN, shall be considered national organs placed at the disposal of the organisation leading the operation. This second hypothesis calls into question the application of art. 7 DARIO, premised on the effective control test. On the other hand, even if one concludes in favour of the application of art. 7 DARIO, its interpretation remains uncertain due to the elusive meaning of 'effective control'. Strictly linked to the interpretation of effective control are two further questions. Whether dual or multiple attribution (both to TCC and the UN or leading regional organisations) is allowed under the law of international responsibility; and whether one should endorse the so called 'reciprocal approach' of effective control,<sup>15</sup> whereby the criterion is used not only to attribute a wrongful conduct of state organs placed at their disposal to international organisations, but also to attribute the same conduct to the sending State. In other words, following the 'reciprocal approach', the interpreter would apply art. 7 DARIO both to attribute an international wrongful act to the receiving organisation (e.g. the UN) and to the sending State (e.g. TCCs). No fall-back on the DARS would thus be

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<sup>15</sup> D'Argent, "State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct", in *Questions of International Law*, 2014, pp. 17-31 and Spagnolo, "The 'reciprocal' approach in article 7 DARIO: A reply to Pierre d'Argent", *ibidem*, pp. 33-41.

necessary as attribution will be based on the inquiry of which entity (IOs or State) has exercised effective control over the impugned conduct.

The study will conclude on this point that no customary law has emerged on the attribution of internationally wrongful acts in peace operations. The ILC DARIO, namely arts 6 and 7, constitute an example of progressive development rather than of codification of international customs. Moreover, it is maintained that the different interpretations of effective control offered by courts and authoritative statements derive from the divergence between a normative and a factual interpretation of attribution. Under a normative conception, attribution of conduct depends on where political authority is vested. Whereas according to a factual understanding of attribution, attention is paid to the chain of command and control of an operation, inquiring where operational control is vested. It will be shown that most of the confusion in the interpretation of effective control lies with the failure to differentiate between these two aspects.

Lastly, the study will inquire what are the remedies available to aggrieved parties of wrongful acts occurred in peace operations. The present analysis embraces the notion of remedies as elaborated in human rights law and prefers it to other concepts of the parlance of the law of international responsibility, as for example the implementation of responsibility. This lens allows a better understanding of peculiarities of legal relations existing both between individuals and States or international organisations, and between States and international organisations. The focus on remedies will also further clarify that different responsibility regimes apply in peace operations, giving enough *espace de manoeuvre* to explore their features.

Remedies under international law enjoy a twofold meaning. Firstly, the procedural understanding identifies remedial institutions and procedures to which injured parties can bring their claims. Secondly, the substantial notion of remedies refers to the outcome of the procedure or proceeding instituted by the injured party, also called redress. Particular attention will be devoted to the procedural aspect of remedies available in peace operations.

It will be shown that the claims systems developed by the UN and

NATO are to be considered under the purview of the ‘liability regime’, whereby only compensation of damages come into question and the duty of international organisations (and States) is not premised on the occurrence of an internationally wrongful act. Other instruments such as the Kosovo Ombudsperson, the UNMIK HRAP, the EULEX HRRP, *ad hoc* inquiry commissions can be considered as accountability mechanisms. These are characterised by their lack of mandatory powers, where the outcome consists in recommendations that the international organisation may decide to implement, or ignore. Moreover, no obligation to redress damages potentially assessed through these procedure is envisaged for international organisations; to be more precise, in some cases, the possibility to issue recommendations concerning compensation for damages have been expressly excluded from their mandate.<sup>16</sup> Eventually, it will be underscored that remedies available under the ‘international responsibility remedies’ are largely underdeveloped. As it concerns issues arising between sending States, host States and international organisations, a general waiver of claims is stipulated under the mission’s SOFA or MOU. Claims not excluded are generally settled amicably, or via arbitration, which also implies that they are confidential; with the sole exclusion of the lump sum agreements in the case of ONUC mission in Congo in the 1960s, whose peculiarities will be analysed in detail. As to claims between individuals and States or individuals and international organisations, the study will show that international responsibility has been adjudicated only by domestic courts (and by the Strasbourg Court). These considerations raise two more issues; on the one hand, one shall take into account the impact of UN immunity from domestic jurisdiction on the quest for justice described at the outset of this introduction. On the other hand, domestic case law has dwelled on the question of which international norms confer individually enforceable rights, often denying the application of international treaty provisions to individuals-State claims.

Eventually, the study will conclude inquiring whether these ‘multi-level’ responsibility regimes and the related ‘multi-level remedies’ have been

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<sup>16</sup> See *infra*, chapter IV.

able to fulfill the growing demand for justice generated by the significant failure to protect civilians during peace operations over the last 20 years.



# CHAPTER I

## THE QUEST FOR A DEFINITION OF PEACE OPERATIONS

### 1. The troubled lexicon of peace operations

Diverse terms are used to refer to the wide spectrum of peace and security activities undertaken under the aegis of the United Nations. Both official documents and scholarship resort to a variety of wording, the most common of which include peace operations, peacekeeping, peace support operations and peace enforcement.<sup>1</sup> The present chapter aims at highlighting the main contours and divides of these concepts in order to endorse a working definition of peace operations useful to delimit the scope of analysis that focuses on the legal consequences of harmful conducts occurring in their

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<sup>1</sup> The literature on peace operations and on the definitions thereof is vast. *Inter alia*, Higgins, *United Nations peacekeeping: Documents and Commentary*, Oxford University Press, 1969-1981; Cassese (ed.), *United Nations Peace-keeping. Legal Essays*, Sijthoff and Noordhoff, 1997; Picone, “Il peacekeeping nel mondo attuale. Tra militarizzazione e amministrazione fiduciaria”, in *Rivista di diritto internazionale*, 1996, p. 5-33; Labouda, “Peacekeeping and Peace Enforcement”, in *MPEPIL*, ; Conforti, “L’azione del Consiglio di Sicurezza per il mantenimento della pace”, in Picone (ed.), *Interventi delle Nazioni Unite e Diritto Internazionale*, Cedam, 1995, pp. 1-14; White, *Keeping the Peace*, Manchester University Press, 1997; Pineschi, *Le operazioni delle Nazioni Unite per il mantenimento della pace*, Cedam, 1998; Cellamare, *Le operazioni di peace-keeping multifunzionali*, Giapichelli, 1999; Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite*, Editoriale Scientifica, 2000; Coleman (ed.), *International Organizations and Peace Enforcement*, Cambridge University Press, 2007; Kondoch (ed.), *International Peacekeeping*, Ashgate, 2007; White, “Peace Operations”, in Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon*, Oxford University Press, 2009, pp. 814-823; Oswald-Durham-Bates (eds), *Documents on the Law of UN Peace Operations*, Oxford University Press, 2010; Odello-Piotrovicz (eds), *International Military Missions and International Law*, Brill, 2011; Bothe, “Peacekeeping Forces”, in *EPIL*, 2011; Id., “Peacekeeping”, in Simma-Kha-Nolte (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, 3<sup>rd</sup> edition, 2012, pp. 1171-1199; Frulli, *Le operazioni di Peacekeeping delle Nazioni Unite. Continuità di un modello normativo*, Editoriale Scientifica 2012; Bartolini, *Lo status del personale delle forze armate italiane operante in missioni all’estero e in contesti di cooperazione militare*, Il Saggiatore, 2012; Dayal-Mojé Howard, “Peace Operations”, in Katz Cogan-Hurd-Johnstone (eds), *The Oxford Handbook of International Organizations*, Oxford University Press, 2016, pp. 191-210.

context.

Several classifications have been proposed in literature to systematise these operations, some authors have classified peace operations by their mandate's core content, so distinguishing between: a) monitoring/observer missions, b) traditional peacekeeping, c) multidimensional peacekeeping and d) peace enforcement.<sup>2</sup>

Others, instead, have proposed a 'diachronical approach' highlighting how peace operations have changed over time, namely referring to so-called 'generations' of peace operations.<sup>3</sup> Whereas the 'first generation' of operations, deployed from 1956 and 1989, consisted of interpositions forces deployed to supervise cease-fires following inter-state conflicts and to prevent conflict recurrence.<sup>4</sup> Operations of the 'second generation', established after the end of the Cold War, are characterised by broad mandates including the discharge of sovereign functions (e.g. civilian protection, delivery of humanitarian aid, supervision of electoral operations, *etc.*).<sup>5</sup> Second generations operations are also referred to as 'multidimensional' or 'multifunctional' operations.<sup>6</sup> Eventually, 'third generation' operations, established from the 1990s' on, are classified as 'peace enforcement' missions, where the Security Council authorises the use of force to 'impose' or 'enforce' the peace, typically in situations of intra-State conflicts.<sup>7</sup> Other authors prefer to use 'peace support operations' as a general term, even though quite imprecisely considering that – as it will be demonstrated further – it pertains exclusively to the parlance of NATO operations.<sup>8</sup>

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<sup>2</sup> Doyle-Sambanis, "International Peacebuilding: A Theoretical and Quantitative Analysis", in *The American Political Science Review*, vol. 94, 2000, pp. 779-801; see also Dayal-Mojé Howard, "Peace Operations", *supra* note 1.

<sup>3</sup> Freudenschuss, "Drei Generationen von Friedensoperationen der Vereinten Nationen: Stand und Ausblick", in *Österreichisches Jahrbuch für international Politik*, vol. 10, 1993, pp. 44; Coforti-Focarelli, *Le Nazioni Unite*, Cedam, 10<sup>th</sup> edition, 2015, pp. 309 ff.

<sup>4</sup> Freudenschuss, p. 52 ff.; Coforti-Focarelli, pp. 309-310; see also Picone, "Il peacekeeping nel mondo attuale", *supra* note 1, pp. 6-7.

<sup>5</sup> Coforti-Focarelli, *supra* note 1, p. 309; see also Picone, "Il peacekeeping nel mondo attuale", *supra* note 1, pp. 8-9.

<sup>6</sup> Coforti-Focarelli, *supra* note , pp. 310.

<sup>7</sup> Freudenschus, *supra* note 3, pp. 60 ff.; Coforti-Focarelli, pp. 310 ff.; see also Picone, "Il peacekeeping nel mondo attuale", *supra* note 1, pp. 9-10.

<sup>8</sup> Zwanenburg, *Accountability in Peace Support Operations*, Martinus Nijhoff, 2005, in particular at pp. 11 ff.; for a definiton of peace support operations see *infra* para. 3.4.

Eventually, it has also been noted that most efforts made in literature to systematise these notions have a mere ‘classificatory value’, while they fail to offer means to understand such a complex phenomenon.<sup>9</sup>

Against this background, the *rationale* of this chapter is not only methodological, but also substantial, considering that *nomina sunt consequentia rerum*.<sup>10</sup> The study investigates the roots of this diverse terminology, it inquires whether different definitions relate to different historical scenarios or rather stem from policy and political hurdles that prevent from reaching a shared definition. Moreover, the chapter discusses the core elements of peace operations, namely consent of the host State, impartiality and the limited use of force. It analyses this triad of concepts in order to determine whether they have been immune to change, as some authors maintain<sup>11</sup>, or rather whether significant evolutions have taken place beneath relatively static labels.

The study illustrates how evolution is a key element to consider when analysing peace operations, and which has shown to be a dynamic instrument of crisis management that has been deployed since 1956, though not without significant changes. In the words of the Lieutenant General Babacar Gaye, in its interview for the International Review of the Red Cross, peace operations have evolved around certain landmark events.<sup>12</sup> The chapter, then, considers relationships among historical events and the core features of peace operations, particularly as they change over time. The analysis acknowledges difficulties in identifying a commonly shared definition of peace operations accepted by the main actors, namely the UN, NATO and member States. It also recognises existing limitations that emerge when attempting to define broad categories – such as robust peacekeeping, peace-enforcement and enforcement – whose lines increasingly tend to blur. The chapter concludes

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<sup>9</sup> Picone, “Il peacekeeping nel mondo attuale”, *supra* note 1, pp. 10 ff.

<sup>10</sup> The expression is believed to origin from the grandiose codification of ancient Roman Law achieved under the Emperor Giustiniano, the *Corpus Iuris Civilis*, namely from one of its components *Institutiones*, II, 7, 3. Later, the expression has been brought to a broader audience thanks to Dante in *Vita Nova*, XIII, 4.

<sup>11</sup> In particular, Frulli, *supra* note 1.

<sup>12</sup> “Interview with Lieutenant General Babacar Gaye”, in *International Review of the Red Cross*, vol. 95, December 2013, pp. 485-493.

with an elaboration of a working definition that not only takes into account the evolving nature of peace operations but also would prove useful for the overall research that focuses on the legal consequences of internationally wrongful acts occurring in their context.

Considering that “peacekeeping is the invention of the United Nations”,<sup>13</sup> and that peace operations are always established following a mandate of the world Organisation (regardless of their nature of UN-led or UN-authorized missions), the main focus of the analysis rests on UN doctrine and UN practice. Nevertheless, ample reference is also made to NATO doctrine and practice, and to national military doctrines of some major influential States in the context of peace operations.

## **2. The questioned legal basis of peace operations**

Many authors have maintained that the creation of UN peacekeeping is the response to the Organisation's inability and unwillingness to establish a UN force under article 43 of its Charter.<sup>14</sup> Despite having been created by the UN, peacekeeping is nevertheless the product of a practice developed in the absence of any express Charter provision. This lack of solid constitutional grounding is likely a core reason for its troubling definition. A lively doctrinal debate has been carried out on the matter seeking to identify the legal basis of UN peacekeeping. It has been suggested, for example, that the legal grounding should be identified in the powers entrusted in the Organisations under chapter VI of the Charter.<sup>15</sup> In the opinion of the Secretary General

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<sup>13</sup> *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-keeping*, A/47/277 – S/24111, 17 June 1992, hereinafter *Agenda for Peace*, para. 46: “Peace-keeping can rightly be called the invention of the United Nations”.

<sup>14</sup> *Inter alia*, Higgins, “Second-Generation Peacekeeping”, in Higgins, *Themes and Theories*, Oxford University Press, 2012, pp. 285 ff. and Conforti-Focarelli, *Le Nazioni Unite*, Cedam, 10<sup>th</sup> ed., 2015, pp. 305 ff.

<sup>15</sup> See in particular the Opinion rendered by the International Court of Justice in 1962, *Certain Expenses of the United Nations*, I.C.J. Reports, 1962, p. 151, in particular at p. 163 ss.

Hammarström's legal basis was to be found in between chapter VI and chapter VII, in what he called chapter VI½. More convincingly, it has been maintained that peacekeeping missions have developed by way of customary law to 'complement' the UN Charter; although disagreement still exists as to the relevant chapter – whether Chapter VI or Chapter VII – under which this new custom has emerged.<sup>16</sup> Other authors have understood the phenomenon of peacekeeping as a possible expression of art. 40 of the UN Charter.<sup>17</sup>

While many scholars have attempted to identify the legal basis of peace operations generating an intense debate, the UN has not shown a similar interest in this inquiry, nor it has sought to justify in legal terms these operations. For many years, all the relevant documents constituting what can be called the UN doctrine on peace operations, have completely omitted the discourse on the legal basis. Neither the 1992 Agenda for Peace, nor its 1995 Supplement, nor the 2000 Brahimi Report offer elements to the debate. Only in 2008, the UN has expressed in the Capstone Doctrine its opinion on the matter, where the UN has a wide *espace de manœuvre*. First the Capstone Doctrine stated that “[t]he legal basis for such action [peacekeeping] is found in Chapters VI, VII and VIII of the Charter”.<sup>18</sup> More importantly for the present analysis, the document further specified that

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<sup>16</sup> Picone, “Il peacekeeping nel mondo attuale”, *supra* note 1, considers that the customary norm on peacekeeping can be derived from chapter VI, while Conforti, “L’azione del Consiglio di Sicurezza per il mantenimento della pace”, *supra* note 1 and Conforti-Focarelli, *Le Nazioni Unite*, *supra* note 3, at p. 316 ff., understood peacekeeping as a custom derived from chapter VII; Conforti-Focarelli observe that only by considering peacekeeping as expression of chapter VII powers of the SG one can arrive at the conclusion that there is an obligation for all member States to contribute to the expenses incurred by the Organisation for the establishment and maintenance of these missions, *Le Nazioni Unite*, at p. 317. For a general overview on the legal basis of peacekeeping see Tanzi, “Prospects of Revision of the UN Charter”, in *Prospects for Reform of the UN System. International Symposium*, Cedam, 1993, pp. 454-479; Orakhelashvili, “The Legal Basis of the United Nations Peace-Keeping Operations”, in *Virginia Journal of International Law*, vol. 43, 2002-2003, pp. 485-524.

<sup>17</sup> Nasu, *International Law on Peacekeeping. A Study of Article 40 of the UN Charter*, Martinus Nijhoff, 2009.

<sup>18</sup> *United Nations Peacekeeping Operations: Principles and Guidelines*, Department of Peacekeeping Operations, Department of Field Support, 18 January, reviewed on January 2010, hereinafter Capstone Doctrine, p. 13.

United Nations peacekeeping operations have traditionally been associated with Chapter VI of the Charter. However, the Security Council need not refer to a specific Chapter of the Charter when passing a resolution authorizing the deployment of a United Nations peacekeeping operation and has never invoked Chapter VI. In recent years, the Security Council has adopted the practice of invoking Chapter VII of the Charter when authorizing the deployment of United Nations peacekeeping operations into volatile post-conflict settings where the State is unable to maintain security and public order.<sup>19</sup>

The Capstone Doctrine underscored the political reasons of the reference made to Chapter VII in the following terms

The Security Council's invocation of Chapter VII in these situations, in addition to denoting the legal basis for its action, can also be seen as a statement of a firm political resolve and a means of reminding the parties to a conflict and the wider United Nations membership of their obligation to give effect to Security Council decisions.<sup>20</sup>

In sum, the Capstone Doctrine seems to confirm the position expressed by those scholars that have identified the legal basis of peace operations in a custom developed in the context of Security Council's powers *ex* chapter VII.<sup>21</sup>

### **3. 'What's in a name?' Analysing the terminology of peace operations**

#### *3.1. Peacekeeping operations*

The UN first attempted to codify principles and practice of peace

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<sup>19</sup> *Ibidem*, pp. 13-14.

<sup>20</sup> *Ibidem*, pp. 14.

<sup>21</sup> *Supra*, note 16.

operations in 1965, when the General Assembly appointed a Special Committee to address the whole question of peacekeeping.<sup>22</sup> The Committee was unable to reach a commonly accepted definition of peacekeeping, mainly due to opposing views expressed by States on the dividing line between peacekeeping and enforcement actions.<sup>23</sup> It is instructive to note, as it will be further elaborated, that the identification of a threshold separating peacekeeping from enforcement is still a vexed issue some 50 years later.<sup>24</sup>

Evolution, as a distinctive feature of UN peace and security activities, is traceable through landmark events. The end of the Cold War brought about the first meeting held by the Security Council (SC) at the level of Heads of State and Government. At the conclusion of the meeting the SC invited the then Secretary General (SG) Boutros Ghali to provide for “analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping”.<sup>25</sup> Accordingly, the Secretary General in June 1992 issued the well-known report *An Agenda for Peace*.<sup>26</sup> The document describes peace-keeping as

the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.<sup>27</sup>

This description suggests that in 1992 peacekeeping included conflict prevention and peacemaking. It must be noted, though, that the Secretary General's Report identified three main sets of activities to preserve or restore

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<sup>22</sup> GA/RES/2006 (XIX), 18 February 1965. In particular the Committee was set out to undertake consultations and make proposals to overcome the financial difficulties emerged in relations to peacekeeping operations.

<sup>23</sup> For an extensive analysis of the topic see Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite*, *supra* note 1, in particular at pp. 11-16.

<sup>24</sup> *Infra*, para. 3.3.

<sup>25</sup> Security Council statement, 31 January 1992.

<sup>26</sup> *Agenda for Peace*, *supra* note 13.

<sup>27</sup> *Ibidem*, para. 20.

peace: preventive diplomacy, peacemaking and peace-keeping.<sup>28</sup> An Agenda for Peace focused also on ‘post-conflict peace-building’, but in the definitions section of the document no description is offered of this concept.<sup>29</sup> Peace-building is described as ‘the construction of a new environment’ and represents the ‘counterpart’ of preventive diplomacy: the latter is to avoid a crisis while peace-building is to prevent recurrence.<sup>30</sup>

The blurred contours of peace and security activities as presented in An Agenda for peace had become less uncertain after the elaboration found in the 1995 Supplement to an Agenda for Peace.<sup>31</sup> Only few years divide the two reports, but this time lapse was characterised by dreadful events that have dramatically changed the geopolitical scenario of conflicts as well as altered some peacekeeping features.

In 1994, despite deployment of the ‘UN Assistance mission in Rwanda’ (UNAMIR), the international intervention was not able to prevent the genocide of Tutsi by the Hutu ethnic component of Rwanda.<sup>32</sup> Then, notwithstanding the deployment of the ‘United Nations Protection Force’ (UNPROFOR) in the Balkans in 1995, the town of Srebrenica in Bosnia Herzegovina was the theatre of the first reported European genocide following World War II.<sup>33</sup> Concurrently in Somalia, the ‘United Nations Mission(s) in Somalia’ (UNOSOM I and II), between 1992 and 1995, have been assessed as the most serious failure of UN intervention in a humanitarian crisis; because of the high number of UN personnel fatalities, due to the serious crimes and human rights violations perpetrated by all parties (including peacekeepers), and given the general inability to restore to any extent rule of law in the country.<sup>34</sup>

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<sup>28</sup> *Idem*.

<sup>29</sup> Agenda for Peace, para. 20.

<sup>30</sup> *Ibidem*, para. 57.

<sup>31</sup> *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, A/50/60, S/1995/1, 25 January 1995, hereinafter Supplement to an Agenda for Peace or Supplement.

<sup>32</sup> Dallaire, *Shake Hands with the Devil*, Arrow Book, 2003; Garapon, *Des crimes qu'on ne peut ni punir ni pardonner*, Edition Odile Jacob, 2002.

<sup>33</sup> Hoare, *The History of Bosnia*, Saqi, 2007; Magno, *La guerra dei dieci anni*, Saggiatore, 2001.

<sup>34</sup> Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo*, Cambridge University Press, 2007; Pontecorvo, “Somalia e Nazioni Unite”, in Picone (ed.) *Interventi delle*

In his follow-up report, Supplement to an Agenda for Peace, the Secretary General Boutros Ghali aimed to shed light on these major shortcomings of UN crisis management efforts and to point to the new challenges posed by dramatic changes of the geopolitical scenario.<sup>35</sup> According to the data and figures reported till December 1994, 17 peacekeeping missions were deployed of which the 82% related to conflicts within States.<sup>36</sup> The Supplement, designed in a very different manner from the previous report, did not focus on official definitions but rather highlighted features of the new conflict and post-conflict contexts and presented implications these change had for peace and security activities. It referred in particular to the Bosnian and the Somalian conflicts and to related UN missions that had been deployed.<sup>37</sup> Moreover, the SG underlined that the implementation of complex negotiated peace agreements to prevent conflict recurrence between warring parties had called upon a new type of UN commitment that required an “unprecedented variety of functions”.<sup>38</sup> These new operations were termed ‘multifunctional’,<sup>39</sup> a precursor to what is nowadays defined ‘multi-dimensional’ missions.<sup>40</sup>

The Supplement further detailed ‘instruments for peace and security’ as: i) preventive diplomacy and peacemaking; ii) peace-keeping; iii) peace-building; iv) disarmament; v) sanctions; and vi) peace enforcement.<sup>41</sup> Compared to the 1992 Agenda for peace, in 1995 preventive diplomacy and

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*Nazioni Unite*, *supra* note 1, pp. 201-259; *id.*, *Armed Conflict in Somalia under International Law*, Satura Editrice, 2012.

<sup>35</sup> Bothe, “Peacekeeping”, *supra* note 1, in particular at p. 1176. Higgins, *Themes and Theories*, *supra* note 14, p. 286 ff.

<sup>36</sup> Supplement to an Agenda for Peace, para. 11.

<sup>37</sup> *Ibidem*, para. 19.

<sup>38</sup> *Ibidem*, para. 21: “the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of de-mining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design and supervision of constitutional, judicial and electoral reforms; the observation, supervision and even organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction”.

<sup>39</sup> *Ibidem*, para. 21.

<sup>40</sup> *Supra*, note 13.

<sup>41</sup> Supplement to an Agenda for Peace, para. 23.

peacemaking had evolved into a single category, while peace-building and peace enforcement had acquired discrete identities; while disarmament and sanctions were considered for the first time as peace and security tools.

The current definition of peacekeeping is to be found in the *United Nations Peacekeeping Operations Principles and Guidelines*, known as the Capstone Doctrine.<sup>42</sup> This document, issued by the Peacekeeping Best Practice Section of the UN Department of Peacekeeping Operations in 2008, and revisited in 2010, sets out the definitions of UN peace and security activities. It enumerates regulating principles and indicates best practices emerged from missions' lessons-learned.

The Capstone Doctrine describes a “spectrum of peace and security activities”, which includes discrete features of conflict prevention, peacemaking, peacekeeping, peace enforcement and peace building.<sup>43</sup> A focus on the concept of peacekeeping is instructive to highlight how these features have changed over time in response to certain crucial events. Peacekeeping is defined as “a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers”.<sup>44</sup> Capstone underscores that these activities are “the result of an evolution that started with mere interposition forces supervising cease-fires”<sup>45</sup> to later including complex activities involving various components of military, police and civilian actors that aim at creating the basis for ‘sustainable peace’. The described composite ‘spectrum’ of tasks, then, evolves into a ‘new generation of multi-dimensional peacekeeping’.<sup>46</sup>

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<sup>42</sup> Capstone Doctrine.

<sup>43</sup> Capstone Doctrine, part I, chapter 2.1.

<sup>44</sup> *Ibidem*, p. 18.

<sup>45</sup> *Idem*.

<sup>46</sup> *Ibidem*, p. 22. It must be noted that the term ‘multi-dimensional’ has been used for the first time in relations to peacekeeping operations in the 2003 *Handbook on United Nations Multidimensional Peacekeeping Operations*. Given the pragmatic nature and the goal of the document, the Handbook does not provide for a precise definition of ‘multidimensional’, while it rather focuses on the practical aspects of the setting, deployment and implementation of the various mission's tasks. These operations are described as the evolving point of peacekeeping operations “composed of a range of components including military, civilian police, political, civil affairs, rule of law, human rights, humanitarian, reconstruction, public information and gender”, *Handbook on United Nations Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices

This evolution responds to significant changes in the geopolitical scenario, notably from inter-state to intra-state conflicts, whose main features are internal struggles between paramilitary groups, civil wars of religious or ethnic character, often in the context of failed or failing States where the lack of institutions and infrastructures prevail. These situations call for a much more articulate intervention than mere cease-fire supervision or the deployment of interposition forces to keep the peace. Multi-dimensional peacekeeping operations, then, offer a more nuanced and elaborated kind of intervention process that the Capstone Doctrine describes in three discrete phases: i) stabilisation; ii) peace consolidation and long-term recovery; and iii) development.<sup>47</sup> Moreover, ‘new generation’ operations are designed to interact with a much broader array of actors, such as the International Committee of the Red Cross and NGOs, the World Bank and the International Monetary Fund, as well as local institutions.<sup>48</sup>

Within these modern multi-dimensional peacekeeping operations one can observe both horizontal and vertical dimensions at play. The horizontal dimension of an operation can be described in diachronic terms as the mission evolves from a first phase of stabilization to a last period of recovery and development; while the vertical dimension is informed by cooperation among diverse actors involved in the post-conflict process, performing a wide range of tasks that span humanitarian assistance to political and economic governance support.<sup>49</sup>

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Unit, Department of Peacekeeping Operations, December 2003, p. 1.

<sup>47</sup> Capstone Doctrine, pp. 22-25, in particular figure 2 at p. 23.

<sup>48</sup> *Idem*.

<sup>49</sup> The Capstone doctrine analytically describes traditional peacekeeping task. They consist in: “Observation, monitoring and reporting – using static posts, patrols, overflights or other technical means, with the agreement of the parties; Supervision of cease-fire and support to verification mechanisms; Interposition as a buffer and confidence-building measure”, at p. 21. An even more exhaustive list is provided for in the *Handbook on United Nations Multidimensional Peacekeeping Operations*, *supra* note 30, at pp.1-2.

### 3.2. Peace operations

In 2000 the UN started a reform phase of peacekeeping which took place along the contours traced in the Report of the Panel on United Nations Peace Operations.<sup>50</sup> The document, known as the Brahimi Report, from the name of the appointed special representative, for the first time refers to peace operations rather than to peacekeeping. It describes the need of a reform of peace and security activities emerging not only from the change in the overall conflict and post-conflict landscape but also from major failures occurred during peacekeeping operations, namely in Bosnia, Rwanda and Somalia.<sup>51</sup> With the Brahimi Report, the term peace operations has started to be used generally in UN terminology to include the array of peacemaking, peacekeeping and peace-building. The document did not give an official definition of peace operations but instead stated that these entail three principal activities: i) conflict prevention and peacemaking; ii) peacekeeping; and iii) peace-building.<sup>52</sup> Interestingly, from 2000 on, the label ‘peace operations’ has coexisted with previously used terms as, in particular, peacekeeping. Some reports and policy papers refer to peace operations exclusively, while still others include ‘peacekeeping’.<sup>53</sup>

As concerns the more recent Capstone Doctrine, it presents several terminological inconsistencies. In fact, the main focus of the document,

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<sup>50</sup> *Report of the Panel on United Nations Peace Operations*, A/55/305-S/2000/809, 21 August 2000, hereinafter Brahimi Report.

<sup>51</sup> *Supra*, notes 24-26.

<sup>52</sup> Brahimi Report, para.10.

<sup>53</sup> For example, the *Handbook on UN Multidimensional Peacekeeping Operations*, *supra* note 30; The document on DPKO reform strategy called Peace Operation 2010; The Capstone Doctrine full title is United Nations Peacekeeping Operations: principles and guidelines. It is noteworthy to signal that in October 2014, the Secretary General Ban Ki-moon appointed a High-Level Independent Panel on Peace Operations, chaired by Jose Ramos-Horta from East Timor. The Panel's mission is to issue a new report on the state of the art of peace operations and to provide for recommendations for future reform. In other words, the appointed rapporteurs have been asked to produce a “reform report” that will serve the same goal fulfilled 14 years ago by the Brahimi report. Interestingly enough the terminology used for this newly-established Panel refers to Peace Operations and not to peacekeeping, not differently from the 2000 Panel chaired by Brahimi, providing further evidence of parallel use in UN doctrine of different terms to define peace and security activities. See Secretary-General's statement on appointment of High-Level Independent Panel on Peace Operations, New York, 31 October 2014, available at <http://www.un.org/sg/statements/index.asp?nid=8151>.

according to its title (*United Nations Peacekeeping Operations: principles and guidelines*), is peacekeeping. Nevertheless, the text uses the broader ‘peace and security activities’, which includes conflict prevention, peacemaking, peacekeeping, peace enforcement and peacebuilding.<sup>54</sup> A formal definition of peace operations is given only in an appended glossary, referred to as Annex 2, as “field operations deployed to prevent, manage and/or resolve violent conflicts or reduce the risk of their recurrence.”<sup>55</sup> Thus, it can be suggested that peace operations are viewed as field missions, including both military and civilian components, aimed at managing conflicts from the moment of their eruption to the prevention of their relapse. It can be inferred, therefore, that this definition includes peacekeeping and peacebuilding, while conflict prevention and peace-making would fall outside the scope of the term as they consist of diplomatic efforts that do not fit the narrower definition. It is less evident, however, whether peace operations also include peace enforcement.

Since the context for UN peace operations may involve cooperation with other command forces, it is instructive to compare how other Member States define the term. Recent United States military doctrine endorses the lexicon of peace operations and offers an annotated definition of the concept

[p]eace operations are crisis response and limited contingency operations, and normally include international efforts and military missions to contain conflict, redress the peace, and shape the environment to support reconciliation and rebuilding and to facilitate the transition to legitimate governance. [They] may be conducted under the sponsorship of the United Nations, another intergovernmental organization, within a coalition of agreeing nations, or unilaterally.<sup>56</sup>

The doctrine further specifies that peace operations include peacekeeping, peacebuilding, peacemaking and conflict prevention as well as ‘military

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<sup>54</sup> Capstone Doctrine, chapter 2.1.

<sup>55</sup> Capstone Doctrine, Annex 2, p. 98. See also Oswald-Durham-Bates (eds), *Documents on the Law of UN Peace Operations*, *supra* note 1, in particular at pp. 2-3.

<sup>56</sup> USA Joint Chief of Staff, *Peace Operations*, Joint Publication 3-07.3, 1 August 2012, p. vii.

peace enforcement operations'.<sup>57</sup> Direct reference to the UN and others implies, rightly or wrongly, a shared understanding of the scope and breadth of jointly sponsored peace operations. Here we can understand that from the US military point of view, peace enforcement is part and parcel of the peace operation toolkit.

Moreover, it indicates that these missions can be deployed under the aegis of the UN or of another organisation, led by a coalition of states or unilaterally. The main divide is generally identified by UN-led and UN-authorized missions, whereas the former are not only authorised but also conducted under the command and control of the UN, the latter are established by a UN SC resolution but are mandated to regional organisations as NATO, the African Union (AU), the Economic Community of Western African States (ECOWAS), and others.<sup>58</sup>

### *3.3. Peace enforcement operations*

The UN describes peace enforcement in the Capstone Doctrine as involving

the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force. Such actions are authorized to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.<sup>59</sup>

If peace operations are understood to include both military and civilian

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<sup>57</sup> *Idem*.

<sup>58</sup> Labouda; Bothe; White, *Keeping the Peace*; Coleman (ed.), *International Organisations and Peace Enforcement*, all *supra* note 1; Lattanzi-Spinedi (eds), *Le organizzazioni regionali e il mantenimento della pace nella prassi di fine XX secolo*, Editoriale Scientifica, 2004; Cellamare, “Le attività di mantenimento della pace nei rapporti tra Nazioni Unite e organizzazioni regionali (I parte)”, in *La Comunità Internazionale*, vol. 1, 2013, pp. 51-76; id., “Le attività di mantenimento della pace nei rapporti tra Nazioni Unite e organizzazioni regionali (II parte)”, in *La Comunità Internazionale*, vol. 2, 2013, pp. 233-259.

<sup>59</sup> Capstone Doctrine, p. 18.

components, or both ‘international efforts and military missions’, as suggested by the US military,<sup>60</sup> then, according to the Capstone Doctrine UN peace enforcement should be considered as an exclusively-militarized solution. Furthermore, the Doctrine specifies that so called ‘robust peacekeeping’<sup>61</sup> diverges from peace enforcement as the former involves the use of force at the ‘tactical level’ with the consent of the host authorities and/or the main parties, while the latter does not require the consent of the parties and may involve the use of military force at the ‘strategic or international level’.<sup>62</sup> The terms ‘tactical level’ and ‘strategic level’ are widely used in military operations’ jargon, the former refers to the battlefield dimension while the latter to the institutional/political dimension.<sup>63</sup> The distinction may result quite clear when we refer to the chain of command and control of an operation, where, for example, the UN mandate defines the strategic framework of a mission, where the decision of a State to contribute its troops and assets to a peace operation is taken at the strategic – i.e. political/institutional – level.<sup>64</sup> Whereas instructions and order given to peacekeepers’ units operating on the field by their military commander pertains to the tactical level. On the contrary, it is less evident what should be understood as use of force at the ‘strategic or international level’.<sup>65</sup> One may suggest that this expression refers to the use of force in the relations between States as prescribed in the Charter, thus in self-defence or within the collective security system.

Again, it is instructive to examine UN frequent-partner statements on the lexicon of peace enforcement. The latest NATO Joint Allied Doctrine

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<sup>60</sup> *Supra* note 56.

<sup>61</sup> For the use of the terms ‘robust’ and ‘militarised operations’ see Higgins, “Second Generation Peacekeeping”, *supra* note 14; Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century*, Hart, 2011.

<sup>62</sup> Capstone Doctrine, pp. 19, 34-35.

<sup>63</sup> For a thorough analysis of the chain of command and control in peace operations, see *infra*, chapter III.

<sup>64</sup> The *NATO Glossary of Terms and Definitions*, defines the ‘tactical level’ as “[t]he level at which activities, battles and engagements are planned and executed to accomplish military objectives assigned to tactical formations and units”, APP-06, April 2008 (hereinafter NATO Glossary), p. 2-T-2.

<sup>65</sup> The NATO Glossary defines the ‘strategic level’ as “[t]he level at which a nation or group of nations determines national or multinational security objectives and deploys national, including military, resources to achieve them”, p. 2-S-12.

defines peace enforcement as

A peace support effort designed to end hostilities through the application of a range of coercive measures, including the use of military force. It is likely to be conducted without the strategic consent of some, if not all, of the major conflicting parties.<sup>66</sup>

NATO focuses here on the lack of consent includes not only that of the host country but also the possibility of consent of multiple ‘conflicting parties’. NATO also does not concentrate on the differences between robust peacekeeping and peace enforcement, but rather on the divides between peace and war efforts. In fact, in NATO doctrine the aim of peace enforcement is to ‘compel major conflicting parties to reach a settlement, by impartial use of force to halt the conflict in accordance with an authorization of the Security Council *ex* Chapter VII of the UN Charter’.<sup>67</sup> This contrasts with the aim of war which must be viewed more specifically as to ensure a military victory of one side over the other.<sup>68</sup>

US military doctrine describes peace enforcement in more general terms: as coercive operations tailored to compel compliance with resolutions or sanctions.<sup>69</sup> While mentioning only *en passant* that consent of the host country or of other parties is not required, it stresses the necessity for the mission to be and remain impartial.<sup>70</sup>

The presence of an ever-expanding array of views of peace enforcement may lead one to be inclined to question the value of using it at all. It appears that peace enforcement is characterised by coercive actions, possibly authorised by a UN SC resolution under Chapter VII, deployed in the absence of consent of the host state. It should be differentiated from other forms of peace operations that include in their mandate a coercive use of

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<sup>66</sup> *Allied Joint Doctrine for the Military Contribution to Peace Support*, AJP-3.4.1(A), December 2014, para. 0113.

<sup>67</sup> *Ibidem*, paras 0015-0116.

<sup>68</sup> *Ibidem*, para. 0116.

<sup>69</sup> USA Joint Chief of Staff, *Peace Operations*, *supra*, note 56: “Application of military force, or the threat of its use, normally pursuant to international authorization, to compel compliance with resolutions or sanctions designed to maintain or restore peace and order”, at p. I-8.

<sup>70</sup> *Idem*.

force, which are generally referred to as robust or militarised peace operations. In these cases, the consent of the host state is a key element that must always be present.

What is far from clear is the distinction between peace enforcement and, let us say, ‘full enforcement’, the latter understood as the codified authorisation to member states, under art. 42 of the Charter, to take ‘all measures’ necessary *against* another State to restore international peace and security; as it has been the case of the Korea War, operation *Desert Storm* in Iraq and recently the actions carried out against Libya. In this regard, the wording peace enforcement appears to be misleading due to its foggy contours easily crossing over into notions of enforcement, on the one hand, and peace operations, on the other hand. In addition to its vagueness, the category of peace enforcement does not prove to be of any particular use when other classifications exist, namely robust or militarised peace operation as opposed to enforcement.<sup>71</sup>

The identification of precise contours of peace enforcement may offer academics one of the most vexing aspects of the peace operations lexicon while showing practitioners no clear choice. In the opinion of some authors, the notion of peace enforcement has emerged recently as a terminological response to the development of peace operations increasingly including an enforcement element, namely the authorisation to use force beyond self-defence.<sup>72</sup> However, the term peace enforcement coexists with other similar – but not always identical – wording, namely robust peacekeeping, militarised peacekeeping and (just) enforcement. These parallelisms unfortunately lead less to clarity than to confusion. Accordingly, the present analysis will not endorse the term peace enforcement. The chapter will rather keep distinct the notions of peace operation, including robust missions, from pure enforcement

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<sup>71</sup> For the use of the terms robust and militarised operations see Higgins, “Second Generation Peacekeeping”, *supra* note 14; Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century*, Hart, 2011. As to the notion of enforcement, see Klappe that divides peace enforcement from full-scale enforcement operations, in “The Law of International Peace Operations” in Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, 2013.

<sup>72</sup> See in particular Higgins, “Second Generation Peacekeeping”, *supra* note 14, at p. 285; Labouda, “Peacekeeping and Peace enforcement”, *supra* note 1, at paras 30 ff.

actions. As it will be further elaborated, the watershed between the two concepts is not as much the extent of the use of force allowed in the mission, but rather the presence of consent of the host country.<sup>73</sup>

### 3.4. Peace support

It is worth highlighting that NATO uses a different lexicon from UN doctrine, whereas NATO resorts to the term ‘peace support’ to indicate what the UN calls the spectrum of peace and security activities or peace operations. The latest NATO definition of peace support is set out in the 2014 Allied Joint Doctrine for the Military Contribution to Peace Support and reads as follows: “Efforts conducted impartially to restore or maintain peace. Peace support efforts can include conflict prevention, peacemaking, peace enforcement, peacekeeping and peacebuilding”.<sup>74</sup>

A diachronic analysis of NATO doctrine shows major evolutions. The most significant trend lies with a shift towards the use of briefer and less detailed definitions, and the resort to quite generic terminology. Perhaps the most evident trace of this trend can be seen in the title of strategic documents. In 2001 the Allied Joint Doctrine on the matter was titled ‘Peace Support Operations’. The same terminology was used in the document that is considered a NATO equivalent of the UN Capstone Doctrine (2010 Allied Joint Doctrine)<sup>75</sup> as well as in the 2008 NATO *Glossary of Terms and Definitions* issued by the Standardization Office.<sup>76</sup> Quite recently, in December 2014 the North Atlantic Treaty Organization has eliminated the word ‘operations’ from its glossary and replaced by the term ‘efforts’.<sup>77</sup> The

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<sup>73</sup> *Infra*, para. 4.1.

<sup>74</sup> *Allied Joint Doctrine for the Military Contribution to Peace Support*, AJP-3.4.1(A), December 2014, para. 0104. PSOs indicate an area of engagement very wide, see Keuhner, “The Impact of Organised Crime on Peace Support Operations”, in Arnold (ed.), *Law Enforcement Within the Framework of Peace Support Operations*, Martinus Nijhoff, 2008, pp. 75-104.

<sup>75</sup> *Allied Joint Doctrine*, AJP-01(D), December 2010, in particular at paras 0246-0247.

<sup>76</sup> NATO Glossary.

<sup>77</sup> AJP-3.4.1 (A), 2014, *supra* note 74.

more general terminology of ‘peace support efforts’ is likely to definitively take over the previous lexicon of ‘peace support operations’. In fact, on the one hand, the 2014 Joint Doctrine clearly states that the document is meant to supersede the precedent 2001 Allied Joint Doctrine, on the other hand the lexicon attached to the 2014 Joint Doctrine specifies the proposed modification to the existing glossary and they all include the term ‘effort’.<sup>78</sup>

As to NATO definitions of peace support, it is interesting to compare the most significant documents issued by the organization in the last 14 years. In 2001, peace support operations were defined in a very elaborated manner as

multi-functional operations, conducted impartially, normally in support of an internationally recognised organisation such as the UN or Organisation for Security and Co-operation in Europe (OSCE), involving military forces and diplomatic and humanitarian agencies. PSO are designed to achieve a long-term political settlement or other specified conditions. They include Peacekeeping and Peace Enforcement as well as conflict prevention, peacemaking, peace building and humanitarian relief.<sup>79</sup>

Seven years later, in the NATO Glossary the definition has been simplified and limited to an

operation that impartially makes use of diplomatic, civil and military means, normally in pursuit of United Nations Charter purposes and principles, to restore or maintain peace. Such operations may include conflict prevention, peacemaking, peace enforcement, peacekeeping, peacebuilding and/or humanitarian operations.<sup>80</sup>

In 2014, eventually, in the *Allied Joint Doctrine for the Military Contribution to Peace Support* NATO has defined peace support in an even more synthetic manner as

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<sup>78</sup> NATO letter of promulgation of AJP-3.4.1(A) and attached Lexicon, part II, p. LEX-3 and LEX-4.

<sup>79</sup> *Peace Support Operations*, AJP-3.4.1, July 2001, at para. 0202.

<sup>80</sup> NATO Glossary: ‘peace support operations’. The purpose of the documents issued by the Standardization is precisely to provide for a shared and agreed upon terminology among all NATO Member States. This is probably one of the reasons why this second definition, while not divergent, is clearly more generic than the previous one and thus perhaps better suited to encompass the constant evolution of peace and security tasks.

Efforts conducted impartially to restore or maintain peace. Peace support efforts can include conflict prevention, peacemaking, peace enforcement, peacekeeping and peacebuilding.<sup>81</sup>

Notwithstanding the differences in the previous versions, some significant elements of coherence can be identified in the study of these different wordings. First, all documents stress the role of impartiality as key element of peace support (operations). Second, the goal of NATO action does not change the achievement of peace. Third, NATO Doctrine is quite consistent when enumerating peace support tasks: conflict prevention, peacemaking, peace enforcement, peacekeeping and peace-building. It must be noted though that -according to the 2014 Joint Doctrine- humanitarian intervention now falls outside the scope of peace support efforts. Fourth, wide reference is made to UN doctrine: the terms used to identify the various activities stem from the Capstone Doctrine. In fact, another characteristic of the evolution process of definitions consists in the progressive approximation of NATO doctrine to UN strategic papers, that emerges in particular from the latest Allied Joint Doctrine of 2014.<sup>82</sup> Despite the self-evident similarities, the 2014 NATO Doctrine states that peace-support related terms might have a different meaning in the use of other actors and warns that the differences should be clarified in the early stage of the operation planning, in order to avoid inconveniences.<sup>83</sup> Interestingly enough, the issue of the need of a UN authorisation to establish a NATO peace enforcement operation has been the object of an intense debate between Member States during the drafting process of the latest Allied Joint Doctrine on Peace Support. The lack of consensus on the legal sources of legitimacy of peace enforcement efforts is probably the main reason of the broad definition of the term and of the lack

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<sup>81</sup> AJP-3.4.1 (A), 2014, *supra* note 74, para. 0104.

<sup>82</sup> The proximity of NATO position to UN doctrine is particular manifest in the comparison of the figure that explains the interactions or grey areas between the diverse peace and security activities. See Capstone Doctrine, *cit.*, at p. 19 and AJP-3.1.4(A), 2014, at para. 01.06. Moreover, also NATO understanding of peacekeeping is 'multi-dimensional' in nature, a term that as seen above typically defines 'new generation of peacekeeping' in UN lexicon (para. 0121).

<sup>83</sup> *Ibidem*, para. 0106.

of reference to UN basic rules on the use of force.<sup>84</sup>

#### **4. The key elements of peace operations – the trinity of virtues?**

Peace operations consist in a very complex and varied set of activities that range from peace-making to robust peacekeeping, to peace building. Notwithstanding the evident differences among these types of operations, some fundamental principles have been identified along the development of peace operations practice. The core principles regulating peace operations are generally identified in the triad composed of the consent of the host State, impartiality and the limited use of force. It must be noted that these elements stem primarily from UN practice and UN doctrine. In fact, the first theorisation of the triad dates back to the 1958 Hammarskjold report on UNEF mission.<sup>85</sup> Subsequently, from 1958 on, these three principles have been constantly and consistently recalled in all UN documents on peace operations. Thus, these key elements have progressively emerged from the development of peace operations practice in the last 60 years and are now crystallized in the major pieces of UN and military doctrines, and are generally endorsed by scholarly writings as well.

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<sup>84</sup> The opposed positions on the matter are exemplified in particular by the reservations formulated to the Allied Joint Doctrine by Germany, on the one side and the US, on the other side. The former has clearly stated that UN Security Council resolutions are not the sole legal basis of peace enforcement, others are an invitation by the host country and an agreement with the legitimate government. As to this last case, in our opinion, several doubts remain in order to define a 'legitimate government' in particular in the case of failed states or in civil wars. The US, instead, has specified that peace enforcement necessarily requires UN SC authorization 'in accordance with the UN Charter', see AJP-3.4.1(A), p. V.

<sup>85</sup> *Summary study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General, A/3943, 9 October 1958, hereinafter Hammarskjold Report.* The Report concerned the deployment of United Nation Emergency Force to monitor the cease-fire between Egypt and Israel following the Suez crisis, UNEF is unanimously considered the first peacekeeping operation and a clear example of the 'tradition model' of peacekeeping as it was mandated to merely supervise a cease-fire and the presence of the contingents on the ground was meant as a mere interposition force between two States. Another peculiar feature of UNEF lays with the source of its authorization: it was established by a General Assembly resolution (1001 (ES-I), 7 November 1956), differently from the majority of missions that have been deployed following a Security Council mandate.

It has been argued that the three constitutive elements of peace operations represent a normative model of peace operations and that a continuity in this normative model can be identified.<sup>86</sup> The present paragraph aims at highlighting the features of each element and to show that they are the result of an evolution, rather than an example of continuity. It is indisputable that the UN, but also NATO and other national military doctrines, have resorted to these concepts since the first deployments of peace operations. Nevertheless, it will be shown that the terms consent, impartiality and limited use of force have been used as fixed labels while the very meaning of the concepts has widely evolved. Hence, it seems more appropriate to talk about an evolution of the normative model of peace operations rather than continuity thereof.

Besides the so-called ‘trinity of virtues’ (consent, impartiality and minimum use of force),<sup>87</sup> some scholars and certain military doctrines have pointed out the centrality of other principles as well. These additional concepts generally refer to operational factors of success and stem from a lessons-learned approach.<sup>88</sup> For example, the Capstone Doctrine lists: legitimacy, credibility and promotion of local ownership as ‘other success factors’.<sup>89</sup> 2014 NATO Allied Joint Doctrine mentions a similar set: political

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<sup>86</sup> Frulli, *supra* note 1. It must be specified that the author refers in particular to UN peacekeeping operations rather than to peace operations in general. Nevertheless, the present thesis claims that the triad of principles applies not only to peacekeeping but also to the broader spectrum of peace operations activities, thus the evolution-lines traced for peacekeeping are relevant also to peace operations in general.

<sup>87</sup> White names it the ‘trinity of virtues’ in White, “Towards Integrated Peace Operations: the evolution of Peacekeeping and Coalitions of the Willings”, in Odello-Piotrovicz, *International Military Missions and International Law*, Brill, 2011, pp. 1-23, in particular at p. 7. The expression is endorsed also by Labouda, *Peacekeeping and Peace enforcement*, *supra* note 1. Levine uses the even more picturesque term: ‘holy trinity’, see Levine, “Peacekeeper Impartiality: Standards, Process and Operations”, in *Journal of International Peacekeeping*, vol. 15, 2011, pp. 422-450.

<sup>88</sup> Lessons learned have become crucial in peace operation both for the evolution and the improvement: for example the UN Policy, Evaluation and Training Division was established on 1 July 2007 with the task of collecting, organising and disseminating lessons learned from every peace operation: see <http://www.peacekeepingbestpractices.unlb.org>. See also Benner-Mergenthaler-Rotmann, *The New World of UN Peace Operations*, Oxford University Press, 2011, where the authors have developed an interesting concept of ‘organizational learning’.

<sup>89</sup> “*International legitimacy* is one of the most important assets of a United Nations peacekeeping operation. The international legitimacy of a United Nations peacekeeping operation is derived from the fact that it is established after obtaining a mandate from the United Nations Security Council, which has primary responsibility for the maintenance

primacy, legitimacy, perseverance and promotion of local ownership.<sup>90</sup> US military doctrine on peace operations is particularly rich in enumerating what are called the ‘fundamentals of peace operations’. In addition to the three core principles of consent, impartiality and limited use of force, there are another thirteen elements.<sup>91</sup> Other authors have reiterated legitimacy<sup>92</sup> as well as added an operation’s collective financing.<sup>93</sup>

That Capstone uses the term ‘other success factors’ seems to suggest that the triad of consent, impartiality and limited use of force might be

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of international peace and security. [...] The *credibility* of a United Nations peacekeeping operation is a direct reaction of the international and local communities’ belief in the mission’s ability to achieve its mandate. Credibility is a function of a mission’s capability, effectiveness and ability to manage and meet expectations. Ideally, in order to be credible, a United Nations peacekeeping operation must deploy as rapidly as possible, be properly resourced, and strive to maintain a confident, capable and unified posture. [...] *National and local ownership* is critical to the successful implementation of a peace process. In planning and executing a United Nations peacekeeping operation’s core activities, every effort should be made to promote national and local ownership and to foster trust and cooperation between national actors. Effective approaches to national and local ownership not only reinforce the perceived legitimacy of the operation and support mandate implementation, they also help to ensure the sustainability of any national capacity once the peacekeeping operation has been withdrawn”, Capstone Doctrine, pp. 36-40, italics added.

<sup>90</sup> *Political Primacy*: [...] NATO forces should retain planning processes that are flexible enough to support and reflect the political strategy and can be readjusted to exploit political opportunities as the peace process develops; for example, helping to implement agreements made during peace negotiations. Legitimacy can be viewed in two parts. First, the legitimacy required to mount a peace support effort, and second, the legitimacy achieved by implementing the mandate in a manner that reflects the other principles of peace support. Establishing and maintaining legitimacy is an ongoing task requiring constant monitoring and assessment. [...] *Legitimacy*: the legitimacy of a peace support effort will be a crucial factor for drawing support within the international community, contributing nations, the conflicting parties and local population. However, the perception of legitimacy will vary between the different audiences. [...] *Perseverance*: NATO forces should adopt an approach that continually takes into account the long-term objectives that support the end state. [...] For example, identifying any senior command or key decision-making posts that may benefit from a degree of continuity either through prior experience of the region, or through proven expertise in a particular area. [...] *Promotion of Local Ownership*: Every effort should be made to foster and promote local ownership through continual engagement with the state and its national programmes, civil society and the creation of a climate of trust, and cooperation between all parties. Programmes that have local ownership are more likely to be sustainable than those programmes without it [...]", AJP-3.4.1(A), 2014, paras 0227-0238, italics added.

<sup>91</sup> These are: transparency, credibility, freedom of movement, flexibility and adaptability, civil-military harmonization and cooperation, objective/end state, perseverance, unity of effort, legitimacy, security, mutual respect and cultural awareness, current and sufficient intelligence. Peace Operations, Joint Publication 3-07.3, 1 August 2012, chapter I, para. 3.

<sup>92</sup> Coleman (ed.), *International Organisations and Peace Enforcement*, *supra* note 1.

<sup>93</sup> Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite*, *supra* note 1, in particular at p. 331. See also White, *Keeping the Peace*, *supra* note 1, in particular at pp. 237-239.

considered as success factors as well. Differently, these features are expressly indicated as ‘basic principles’ of UN peacekeeping.<sup>94</sup> In NATO and US doctrine, the other elements are not separate from the triad and they do not appear to presume a hierarchy of principles. As a consequence, this combination of heterogeneous categories leads to some confusion that calls for further clarification on the very key elements of peace operations. It seems reasonable to affirm that while the triad represents the three core principles of peace operations, these elements are also to be considered as success factors.<sup>95</sup> Legitimacy, credibility, perseverance and other elements may determine or hamper the mission’s success, but cannot be considered as core principles defining peace operations. In other words, the triad of consent, impartiality and limited use of force makes peace operations what they are; while all other features may influence the success of an operation but do not shape the operation itself. In fact, as it will be further elaborated, peace operations are designed along the lines traced by these key elements. According to these premises the following analysis will focus on the examination of the key elements of peace operations intended as: consent, impartiality and limited use of force.

#### *4.1. Consent of the host State*

Consent is generally referred to as the first key element of peace operations. Its centrality can be understood in light of the core principles regulating international relations, mainly the sovereign equality of States and the prohibition to interfere or intervene in domestic affairs, particularly as enshrined in article 2.7 of the UN Charter. The present analysis sheds light on

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<sup>94</sup> Capstone Doctrine, pp. 31-35.

<sup>95</sup> In the words of the Secretary General Butros Ghali: “Analysis of recent successes and failures shows that in all the successes those principles [the consent of the parties, impartiality, and the non-use of force except in self-defence] were respected and in most of the less successful operations one or other of them was not”, Supplement to an Agenda for Peace, para. 33.

two main issues related to the notion of consent. First, it investigates whose consent is required, seeking to identify which actors are entitled to express legitimate consent to the deployment of a peace operation. Second, the chapter explores the relationship between two different dimensions of consent: strategic and tactical. In particular, it questions whether both strategic and tactical consent are to be considered key elements of peace operations or if the latter is rather one of the success factors mentioned above.

The Hammarskjold Report on the UNEF mission addressed the consent of the host state, and more precisely of the ‘Government concerned’ as early as 1958.<sup>96</sup> The Report mentioned clearly that in case of a conflict between two or more States, the consent to the deployment of an interposition mission is to be expressed by all the parties concerned, meaning by all the official governments. Thus, the consent in the case of UNEF was expressed by Egypt and Israel in the General Armistice Agreement. It should be specified, though, that Israel expressed a general consent to the establishment of the interposition mission, but it did not agree to have ‘boots on the ground’ in its own territory. Hence military personnel were deployed only on the Egyptian side of the border.<sup>97</sup> While it might seem obvious that consent must be derived from legitimate governments in the aftermath of an inter-state conflict, the issue is less clear in civil wars, intra-state struggles between armed groups, and failed States. The significant increase of these types of conflicts constitutes precisely the major change, and challenge, of the geopolitical scenario that has occurred starting in the 1990s.

The shift from inter-state to intra-state conflicts, and the related emergence of non-state actors, has had substantial implications in the evolution of peace operations. The change in the features of consent is one of these. In the post-cold war era the parties are no longer (former belligerent) States, but more likely a State and inside armed groups, different militias guided by warlords in the absence of a legitimate government, a State and its

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<sup>96</sup> Hammarskjold Report, para. 155.

<sup>97</sup> For a mission's analysis see, *inter alia*, Frulli, *supra* note 1, in particular at pp. 31 ff. and Gargiulo, *supra* note 1, in particular at pp. 200 ff. See also White, *Keeping the Peace*, *supra* note 1, at pp. 233 ff.

neighbouring countries financing paramilitary groups to fuel the intra-state conflict. In these cases, it is no longer evident who is the legitimate entity to express consent. An overview on peace operations practice is useful to shed some light on this topic.

The engagement of the UN in the case of the Democratic Republic of the Congo is a clear example of an intra-state conflict where the stability of the country has been constantly undermined by recurrent cycles of violence carried out by a myriad of armed groups, often supported by neighbouring countries. The Lusaka Ceasefire Agreement, that concluded the second Congo war, was signed in 1999 between the governments of DRC, Angola, Namibia, Rwanda, Uganda and Zimbabwe. The agreement foresaw the establishment of a monitoring mission and in November 1999 the Security Council established the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).<sup>98</sup> The signatories of the agreement included governmental forces of the mentioned States and only some of the militias involved in the long-lasting struggles.<sup>99</sup> Namely, the Congolese Rally for Democracy (RCD) and the Movement for the Liberation of Congo (MLC) were parties to the accord, while all other forces were expressly defined as ‘armed groups’ and not considered actors of the peace process.<sup>100</sup> In other words, the parties to the peace process, being governments and selected paramilitary groups, have been deemed by the UN the legitimate actors to express the consent to the deployment of the peace operations. Moreover, the signatory parties have pointed at the groups who were not to be considered legitimate actors; thus paving the way to the

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<sup>98</sup> S/RES/1279, 30 November 1999, the terms of the mission were envisaged in chapter 8 of the Ceasefire, Lusaka Ceasefire Agreement, chapter 8, para. 2.2 a), reported in UN doc. S/815, 23 July 1999. It is worthwhile noting that the proposal made by the negotiator included some peace enforcement tasks including *inter alia* “tracking down and disarming armed groups”. The proposal was not upheld in the first phase of the MONUSCO mandate, but in 2013 the UN took a very decisive offensive mandate against armed groups, see *infra* para. 2.3.

<sup>99</sup> The annex to the cease-fire provides for detailed list of the armed groups included and of those expressly excluded from the negotiation, Annex 'C' of the Lusaka Ceasefire Agreement, reported in UN doc. S/815, 23 July 1999.

<sup>100</sup> Among these groups it is worth mentioning the Lord's Resistance Army (LRA), which has become so notorious for the commission of international crimes to gather the attention of the International Criminal Court, *idem*.

creation of a specific category that was later named in peace operation parlance as ‘spoilers’.<sup>101</sup>

The deployment of MONUC encountered several hurdles in the dealings with the Congolese government of President Laurent-Désiré Kabila and due to endless confrontations of numerous militias on the Congolese territory.<sup>102</sup>

Seeking to address this issue, in May 2010 the UN Security Council established a new operation, the ‘United Nations Organization Stabilization Mission in the Democratic Republic of the Congo’ (MONUSCO) deployed in July 2010.<sup>103</sup> MONUSCO has a more robust mandate to use ‘all necessary measures’ to protect civilians and assist the national army, called FARDC (*Les Forces armées de la République Démocratique du Congo*), to stabilize the country, in particular minimizing the threats to civilians and to the overall stability of the country by the most active paramilitary groups, namely ‘23 March Movement’ (M23), the ‘Democratic Forces for the Liberation of Rwanda’ (FDLR), the ‘Lord’s Resistance Army’ (LRA).<sup>104</sup> A further significant change in the mandate occurred in March 2013 when the UN SC took the unprecedented decision to establish the ‘Force Intervention Brigade’ (FIB) as a pure enforcement unit within the peacekeeping mission.<sup>105</sup> Here,

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<sup>101</sup> Brahimi Report, para. 21: “Groups (including signatories) who renege on their commitments or otherwise seek to undermine a peace accord by violence”. In the definition of the High Level Panel on Threats and Challenges and Change: “factions who see a peace agreement as inimical to their interests, power or ideology, use violence to undermine or overthrow settlements”, UN doc. A/59/565, 2004, para. 222. To be precise, spoilers—factions undermining the peace process—generally gain this label after they have halted a peaceful settlement, but it is interesting to note that in the case of Congo, some groups have been considered spoilers since the very beginning of the peace process.

<sup>102</sup> Autessere, *The Trouble with the Congo*, Cambridge University Press, 2010; Maiden, “Transformative Peace in the Democratic Republic of the Congo”, in *Journal of International Peacekeeping*, vol. 18, 2014, pp. 102-122. Political problems were partially resolved by the death of President Kabila that brought to power his son, Joseph Kabila, who proved to be more open to international intervention in the DRC. As it concerns the lack of cooperation on the ground with MONUC, the situation was not addressed by the UN by seeking the consent of the warring parties, but rather by a series of broader political agreements with the neighbouring countries, on the one hand, and, on the other, by several enforcement-shifts in the mandate.

<sup>103</sup> S/RES/1925, 28 May 2010.

<sup>104</sup> S/RES/925, 28 May 2010, paras 11-12. See also” MONUSCO Background - United Nations Organization Stabilization Mission in the Democratic Republic of the Congo”, available on the official mission website.

<sup>105</sup> S/RES/2098, 28 March 2013. The MONUSCO mandate, including the Intervention Brigade, has recently been extended till 2015; see International Peace Institute, “The UN

the SC acting under chapter VII mandated the FIB to “carry out targeted offensive operation [...] to prevent the expansion of all armed groups, neutralize these groups, and to disarm them”.<sup>106</sup> The creation of the FIB has posed questions on respect of the basic principles of peace operations, in particular of impartiality and limited use of force. These aspects will be addressed in the following paragraphs.

As it regards specifically consent, the analysis of the situation in the DRC allows to draw some conclusions on the features of the consent expressed to the establishment of MONUC, first, and MONUSCO later. It can be argued that the legitimate entities to express consent to the operations have been identified, first in the Congolese government and in the governments of the neighbouring countries. Furthermore, only two armed groups engaged in the Congo war, namely the Congolese Rally for Democracy and the Movement for the Liberation of Congo were considered ‘main parties’. All other militias were labelled as ‘spoilers’ since the beginning of the peace process and neither their consent nor their cooperation ‘on the ground’ has ever been sought. So much so that in 2013 an enforcement unit was established within the UN mission to neutralize these armed groups.

The situation in Somalia has been described by many commentators and by the Security Council itself as a *unicum* in the history of peace operations.<sup>107</sup> Notwithstanding its uniqueness, the Somalian crisis represents a perfect example to underscore the difficulties in gathering consent to deploy a peace operation in a failed State. Following the fall of the Said Barre regime in 1991, Somalia was devastated by a bloody civil war carried out by various opposed factions among which the two major groups headed by General Aideed (United Somali Congress) and by Ali Mahdi, (that later become the interim president of Somalia). The situation raised the grave concern of the international community also preoccupied of the humanitarian crisis worsen

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Intervention Brigade in the Democratic Republic of the Congo”, Issue Brief, July 2013, at p. 7; Plett, “UN under fire over fall of Goma in DR Congo”, in *BBC news*, 21 November 2012, available at <http://www.bbc.com/news/world-africa-20422340>.

<sup>106</sup> S/RES/2098, 28 March 2013, para. 12.

<sup>107</sup> Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo*, Cambridge University Press, 2007; White, *Keeping the Peace*, *supra* note 1.

by the famine that was devastating the population. A ceasefire was finally signed by the two factions in Mogadishu on 3 March 1992 and the intervention of the UN was sought by the parties to monitor its implementation, accompanied by a widespread consent of most actors involved in the peace process.<sup>108</sup> This widespread consent was the result of a complex negotiation process carried out by a UN technical team guided by the Ambassador Mohamed Sahnoun, appointed Special Representative for Somalia.<sup>109</sup>

With resolution 751 of April 1992 the UN established the 'United Nation Operation in Somalia' (UNOSOM I).<sup>110</sup> Despite the broad acknowledgement of the mission by all the parties concerned in this early phase, it is reported that the initial deployment of UNOSOM I was slowed down by a significant lack of cooperation on the ground.<sup>111</sup> The renegade rivalry between the factions combined with gross incidents committed under the UN flag hampered the operation's effectiveness since its start.<sup>112</sup> Soon after, the conflict erupted again and led to the collapse of a central government with which to negotiate. Somalia was once more devastated by warring militias, while the population was affected by recurring humanitarian emergencies.<sup>113</sup> To face this situation the SC took the unprecedented decision to first increase the strength of the operation,<sup>114</sup> then to authorise, under chapter VII, all necessary measures to create a secure environment to guarantee the delivery of humanitarian assistance to the population and

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<sup>108</sup> More precisely President Mahidi and General Aideed sent to the Security Council two separate letters of agreement to the establishment of a UN mission. Further letters of agreement were issued by the Constitutional Elders General Musse of the Somali Salvation Democratic Front and by General Gabieu, of the Somali Patriotic Front, UN doc. S/23829, 1992, pp. 18 ff, 38-40. Moreover, a joint declaration of some of the representatives of smaller factions was also addressed to the Security Council to welcome the deployment of a UN mission in Somalia, UN doc. S/23829, 1992, p. 40.

<sup>109</sup> Murphy, *UN Peacekeeping in Lebanon*, *supra* note 107, at pp. 48-55. See also Frulli, *supra* note 1, at pp. 50-54.

<sup>110</sup> S/RES/751, 24 April 1992.

<sup>111</sup> *Ibidem*, at pp. 51.

<sup>112</sup> Murphy reports the 'incident' of a Russian Aircraft with UN marking that delivered military equipment to one side General Mahdi that allegedly had jeopardized the perception of impartiality of the mission, in *UN Peacekeeping in Lebanon, Somalia and Kosovo*, *supra* note 107, at p. 54.

<sup>113</sup> United Nations, "Somalia, UNOSOM – Background", available on the mission's website.

<sup>114</sup> S/RES/775, 28 August 1992,

protect UN personnel who suffered severe injuries and losses.<sup>115</sup> This signalled a transformation of a peacekeeping mission into an enforcement operation and as such delegated command to member States that set up a multinational force led by the US, named United Nations Task Force (UNITAF).<sup>116</sup> UNIFAT was soon re-transformed in UNOSOM II, which had a chapter VII mandate, but a reduction of force level was soon prescribed by resolution 879 (1994). UNOSOM II was eventually withdrawn in March 1995, being considered one (if not ‘the’) major failure in UN peace operations.<sup>117</sup>

As to the element of consent, it is evident that in the early phase of UNOSOM the UN sought broad consent of the main parties. Differently from Congo, the impression is that, initially, the parties were all brought to the negotiation table and finally agreed on the UN mission’s establishment. As to the lack of cooperation on the ground, it appeared to be the consequence of a change in the strategic and tactical attitude of all parties, that were concerned more to expand their interests, rather than to foster a peace process. The extreme fragmentation, combined with the disappearance of the central government did not present a situation for the UN to develop an ‘anti-spoilers strategy’ as in the DRC. That in Somalia any local actor was probably to be considered a spoiler, the UN (and the US-led mission) tried to address the situation with several enforcement mandates. With no legitimate actors, and no consent, the enforcement option seemed the only available. Considering the current situation in the country, one tends to conclude that it was not the best option.

The case of Lebanon and the establishment of the ‘United Nation Interim Force in Lebanon’ (UNIFIL) also provide for some relevant insights to examine the element of consent. UNIFIL I was first established in 1978 according to Security Council resolutions 425 and 426. UNIFIL I was established with the consent of the government of Lebanon -the very

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<sup>115</sup> S/RES/794, 3 December 1992.

<sup>116</sup> Murphy, at pp. 55-60.

<sup>117</sup> White uses the expression ‘ignominious withdrawal’, in *Keeping the Peace*, *supra* note 1, at p. 234.

mission's host country- and of the government of Israel who committed to put to an end its invasion of South Lebanon. Besides, the consent of the Palestinian Liberation Organisation (PLO) was not considered necessary, despite the PLO controlled some areas of South Lebanon. The absence of the consent of 'non-governmental' parties, namely of the PLO, caused significant problems in to the deployment of UNIFI I, especially in the zones controlled by PLO.<sup>118</sup> The evolution of the mission, with the deployment of UNIFIL II, followed a partially different approach. UNIFIL II was established in 2006 with the consent of the government of Lebanon,<sup>119</sup> but the consent of the Hezbollah movement was somehow taken into account. It is reported that the firm opposition of Hezbollah's leader to a change in the UN mandate, allowing UNIFIL II to directly disarm the armed group and not only to assist the Lebanese army in doing so,<sup>120</sup> caused a deadlock in the negotiations that eventually refrained the UN from adopting a new resolution in the intended direction.<sup>121</sup>

It seems correct to conclude that the legitimate actor to express consent is generally identified in the government of the host State. In some cases, on a non-consistent basis, the UN has also sought the consent of the 'main parties' intended as representatives of groups, formally combatant but now willing to participate in the peace process. In other situations, instead, the UN has preferred to achieve the consent of neighbouring countries to a broad peace framework, rather than to involve the warring factions present in the territory. In the case of the DRC many armed groups were identified since the beginning as non-parties to the peace settlement and negotiations were not carried out with them; while broad agreements were sought solely among the governments of the region with the good offices of the UN.<sup>122</sup> In other cases, a UN Team was sent to Somalia with the precise task of negotiating

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<sup>118</sup> Murphy, *supra* note 107, at pp. 37-47.

<sup>119</sup> S/RES/1701, 11 August 2006.

<sup>120</sup> *Idem*.

<sup>121</sup> Verardi, "La missione italiana in Libano", in *La Comunità Internazionale*, vol. 2, 2011, pp. 261-281, in particular at p. 275 and at note 50.

<sup>122</sup> This is the case of the Lusaka Ceasefire, the Inter-Congolese dialogue and the Great lakes framework agreement.

with the plurality of factions involved in the civil war. As a result, most groups, not only the interim government, expressed their consent to the UN operation. Despite its start, UNISOM I lost the consent and the cooperation of all groups, that re-engaged in the conflict. Thus, the UN decided to issue an enforcement mandate to keep operating in the absence of consent. But this option has proved not to be a successful precedent to imitate in future missions. In Lebanon the leverage of consent has been used by the Hezbollah movement to bend the will of the Organization to certain extents, but it did not prevent the mission to be deployed.

The requirement of consent to the deployment of peace operations seems to bring about some unavoidable risks of manipulation from the parties involved, but this does not prevent that consent is considered a necessary element of legitimacy of peace operations.<sup>123</sup>

It has been maintained that the key element of consent has been progressively ‘tempered’ with the principle of effectiveness, hence consent of the main parties should include to some extent the need of cooperation by all or at least most of actors operating on the ground.<sup>124</sup> The official doctrines seem to keep distinct – though strictly linked – the concept of strategic consent, on the one hand, and of cooperation, on the other hand.

The UN Handbook on multidimensional peacekeeping operations refers to ‘consent and cooperation of the parties to the conflict’ as one of the basic principles for military activities in peace operations.<sup>125</sup> NATO Allied Doctrine only mentions the ‘strategic consent of the main parties’, specifying that only the main parties have enough power to influence the political process. While informal parties may sometime be included in the process it is not deemed necessary to acquire the consent of all parties.<sup>126</sup> Moreover, it is

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<sup>123</sup> The Brahimi Report has pointed out the risk, at para. 48: “The Panel concurs that consent of the local parties, impartiality and use of force only in self-defence should remain the bedrock principles of peacekeeping. Experience shows, however, that in the context of modern peace operations dealing with intra-State/transnational conflicts, consent may be manipulated in many ways by the local parties. A party may give its consent to United Nations presence merely to gain time to retool its fighting forces and withdraw consent when the peacekeeping operation no longer serves its interests”.

<sup>124</sup> Frulli, *supra* note 1, at p. 49.

<sup>125</sup> *Handbook on UN Multidimensional Peacekeeping Operations*, *supra* note 53, p. 57.

<sup>126</sup> *NATO Allied Joint Doctrine*, AJP-3.4.1 (A), 2014, para. 0228, see also therein note 23.

affirmed that “while consent may be given at the strategic level, this may not be reflected at the tactical level” of local groups.<sup>127</sup> Despite this distinction, the document does not further elaborate on the features of tactical consent and on the implications of the lack thereof. US Peace Operations doctrine does not discuss the issue but rather focuses on the relation between a general level of consent and the required force capability of the peace operation. It states that “as consent becomes more general, the PO force can reduce its force capability”, while “as the level of consent decreases, the level of force capability to enforce compliance should increase, creating conditions for peace enforcement operation”.<sup>128</sup>

Though many uncertainties of the full nature of consent remain, some conclusions can be drawn. Peace operations are generally established with the consent of the government of the host state on whose territory the mission is deployed. Consent of the host state is the key element of the legitimacy of the operation. It can be expressed in unilateral declarations, exchange of letters, peace agreements, and ceasefires accords. In some cases, consent can embrace the commitment to the peace settlement of the main parties to the conflict, namely neighbouring countries and armed groups; the latter’s consent, albeit not considered a key element of legitimacy of the operation, is welcome. ‘Strategic consent’ does not imply cooperation (also referred to as ‘tactical consent’) of local actors; nor is ‘tactical consent’ required as a key element of peace operations. Tactical consent may, however, significantly affect the success of an operation as well as influence the level of force required. Where cooperation from local actors is lacking, where some actors behave as spoilers, affecting the implementation of the mandate, the peace operation generally increases the level of force through a robust mandate. The presence of the strategic consent of the host state is the element that divides peace operations from enforcement. Only when strategic consent is completely absent the operation is (or becomes) an enforcement operation.

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<sup>127</sup> *Idem*. For the definitions of ‘strategic level’ and ‘tactical level’ see NATO Glossary reported *supra* note 64 and 65, respectively.

<sup>128</sup> USA Joint Chief of Staff, *Peace Operations*, p. I-3.

#### 4.2 Form neutrality to impartiality

Impartiality is widely considered the second key element of peace operations. Despite its centrality, the contours of the concept are not precisely defined. Impartiality was first mentioned in the Agenda for Peace, where it was twinned with the notion of neutrality.<sup>129</sup> Later, in the Supplement to an Agenda for Peace, the reference to neutrality disappeared and the focus remained only on impartiality.<sup>130</sup> Some authors have used both concepts, neutrality and impartiality, without clear distinctions, nevertheless the following analysis shows that the two notions are far from synonymous.<sup>131</sup>

In the first decades of peace operations, the lines between neutrality and impartiality were quite blurred. The 1958 Hammarskjold Report on UNEF focused on the concept of neutrality.<sup>132</sup> Here, neutrality was understood as ‘non-interference’ in international political issues by restricting the participation of troops whose involvement would compromise objectivity of the mission.<sup>133</sup> That is to say that the military force deployed must not include units from any of the permanent members of the Security Council, nor of States that might have a special interest in the situation.<sup>134</sup> This principle resulted in the significant participation of neutral States that appeared to be ideal for this purpose.<sup>135</sup>

In turn, the concept of neutrality was abandoned as the notion of impartiality emerged in clear juxtaposition. This change was one of the consequences of the dramatic shift in the geopolitical scenarios, namely from

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<sup>129</sup> An Agenda for Peace, para. 30.

<sup>130</sup> Supplement to an Agenda for Peace, para. 33.

<sup>131</sup> White, *Keeping the Peace*, *supra* note 1, in particular at pp. 235 ff.; Von Grunigen, “Neutrality and Peacekeeping”, in Cassese (ed.) *United Nations Peace-keeping*, *supra* note 1, pp. 125-153.

<sup>132</sup> Hammarskjold Report, in particular at paras 149 and 160-161.

<sup>133</sup> The Hammarskjold Report specifies that the UNEF mandate was designed to avoid Force’s “involvement in any internal or local problems and [...] to maintain its *neutrality* in relations to international political issues”, para. 149, italics added.

<sup>134</sup> *Ibidem*, para. 160.

<sup>135</sup> See Von Grunigen, “Neutrality and Peacekeeping”, *supra* note 131. For a thorough analysis of the notion of neutral States and its evolution see Kolb, *Ius contra bellum*, Helbing Lichtenhahn Bruylan, 2009, in particular at pp. 223 ff; Bothe, *Neutrality: Concept and General Rules* in *MPEPIL*, 2009.

inter-states to intra-state conflicts and of the related emergence of non-state actors, that later led to the creation of the ‘spoilers’ category.<sup>136</sup> The new generation of conflicts are generally characterized by internal struggles between armed groups, by civil wars often of religious or ethnic connotation, sometimes by failed States and serious problems of internal law and order. Accordingly, peace operations were no longer required to act as neutral buffer entities to watch over the respect of ceasefires. In this changed scenario, peace operations have been expected to take active roles in fostering the fulfillment of the peace process between the parties, and sometimes against some parties considered spoilers of the peaceful settlement.

Moreover, the elaboration of the concept of impartiality has been the result of the shortcomings of peace operations in the 1990s, in particular the failure to protect civilians in conflict and post-conflict situations. As already mentioned, peace operations deployed in Rwanda, Bosnia Herzegovina and Somalia have shown structural problems, such as the inability of the UN to play a decisive role in preventing atrocities by not taking a position in inter-ethnic conflicts in their exercise of a neutral mandate. Thus, peacekeepers have been accused to have acted as bystanders to atrocities perpetrated against civilian populations.<sup>137</sup>

In response to these accusations, the UN has developed more proactive policies including a wider mandate to protect civilians and a more robust use of force.<sup>138</sup> Beginning with the Brahimi Report, UN doctrine has expressly differentiated impartiality and neutrality. The Brahimi Report states that “impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time”.<sup>139</sup> Hence, the evolution of the concept implied that a peace operation must be impartial in the dealings with the parties but not

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<sup>136</sup> *Supra*, note 101.

<sup>137</sup> See White, *Towards Integrated Peace Operations*, *supra* note 87. Similar criticisms have been echoed in the Secretary General Butros Ghali Supplement to an Agenda, see in particular paras. 34-35, and in the Brahimi Report, which talks of the risk that “continued equal treatment of all parties by the United Nations can in the best case result in ineffectiveness and in the worst may amount to complicity with evil”, p. ix.

<sup>138</sup> The aspect of the increased use of force in recent peace operations will be dealt with in the following paragraph.

<sup>139</sup> Brahimi Report, para. 50.

neutral in the execution of the mandate.<sup>140</sup> Accordingly, the operation “must actively pursue the implementation of [the] mandate even if doing so goes against the interests of one or more of the parties”.<sup>141</sup> The Capstone Doctrine has further elaborated on the concept of impartiality, clarifying that “United Nations Peacekeeping should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate”.<sup>142</sup> Peacekeepers must act as ‘good referees’, that is to say, *super partes* but strict in sanctioning infractions by actors that violate peace process engagements.<sup>143</sup>

NATO doctrine also underscores the need to distinguish between impartiality and neutrality, expressly endorsing the former: the conduct of a peace support operation “should never be neutral in the execution of the mission”.<sup>144</sup> US military Doctrine, besides stating that impartiality shall not be confused with neutrality, stresses that the principle of impartiality applies to the parties to the dispute only and is not relevant to the so called spoilers.<sup>145</sup> This clarification captures the core meaning of the evolution the notion of impartiality in peace operations. Peace operations are deployed in increasingly hostile environments where not all actors are committed to the peace process and the risk of personal security of civilians and UN personnel is high. As a consequence, post-1990s operations have been asked to discharge robust mandates even against some targeted actors.

The principle of impartiality has been recently stretched – in the opinion of some commentators – to a risky breaking point.<sup>146</sup> The Security Council, acting under chapter VII, has created in March 2013 the ‘Force Intervention Brigade’ (FIB).<sup>147</sup> The mandate has authorized the FIB to

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<sup>140</sup> *Handbook on UN multinational Peacekeeping Operations*, supra note 53, p. 55.

<sup>141</sup> *Idem*.

<sup>142</sup> Capstone Doctrine, p. 33.

<sup>143</sup> *Idem*.

<sup>144</sup> *NATO Allied Joint Doctrine*, AJP-3.4.1 (A), para. 0230.c: “Impartiality not neutrality: [...] The conduct of the PSF during peace support should be impartial in relation to the actors but should never be neutral in the execution of the mission”.

<sup>145</sup> USA Joint Chief of Staff, *Peace Operations*, JP-3-07.3, I-4.

<sup>146</sup> Oswald, “The Security Council and the Intervention Brigade: Some Legal Issues”, in *ASIL Insights*, vol. 17, 2013.

<sup>147</sup> S/RES/2098, 28 March 2013. Plett, *UN under fire over fall of Goma in DR Congo*, BBC news, 21 November 2012, available at <http://www.bbc.com/news/world-africa->

carry out targeted offensive operations [...] either unilaterally or jointly with the FARDC, [...] in strict compliance with international law, [...] to prevent the expansion of all armed groups, neutralize these groups, and to disarm them.<sup>148</sup>

The unprecedented creation of the FIB has raised many concerns among Members. In particular, Guatemala and Argentina have highlighted the risk of transforming a peacekeeping mission into an enforcement operation, thus compromising the element of impartiality.<sup>149</sup> Moreover, to some commentators the FIB would likely be considered a party to the conflict. Accordingly, the Brigade is not an impartial force; that is why the unit is expressly bound by international humanitarian law in the letter of the mandate.<sup>150</sup> Despite doubts expressed by some SC Members, the resolution has been approved unanimously upon the consideration that the FIB is created “on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping”.<sup>151</sup> Nevertheless, it is doubtful that the sole inclusion of such clause would prevent from the creation of a precedent.

However, the FIB so far has proven to be an effective instrument, so much so that the M23 surrendered in late 2013. Thus the MONUSCO mandate, including FIB, has been recently extended until 31 March 2017.<sup>152</sup> Its success suggests the likelihood that similar units will be deployed in the

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20422340; *The UN Intervention Brigade in the Democratic Republic of the Congo*, International Peace Institute, Issue Brief, July 2013, at p. 7; Müller, “The Force Intervention Brigade. United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement”, in *Journal of Conflict Security Law*, vol. 20, 2015, pp. 359-380; Sheeran-Case, *The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo*, International Peace Institute, Issue Brief, November 2014; Whittle, “The Intervention Brigade, Monusco, and the Application of International Humanitarian Law to United Nations Forces”, in *Georgetown Journal of International Law*, vol. 6, 2014-2015, pp. 837-875.

<sup>148</sup> S/RES/2098, 2013, para. 12.

<sup>149</sup> The official statements are available in the UN press release of 28 March 2013, available at: <https://www.un.org/News/Press/docs/2013/sc10964.doc.htm>.

<sup>150</sup> Oswald, *The Security Council and the Intervention Brigade and The UN Intervention Brigade in the Democratic Republic of the Congo*. S/RES/2098, 2013, para. 12 (b).

<sup>151</sup> S/RES/2098, 2013, para. 9.

<sup>152</sup> S/RES/2277, 30 March 2016. Another unprecedented element of MONUSCO is the use of an unarmed drone that has so far been reported as extremely useful to successful targeted actions. It is not clear whether this instrument would become a default means in peace operations. See, Sengupta-Somini, “Unarmed Drones Aid U.N. Peacekeeping Missions in Africa”, in *New York Times*, 3 July 2014.

future in particular complex scenarios.

Careful elaboration, then, of the use of impartiality in the sense of a ‘good referee’ has allowed the UN to sanction infractions to peace settlements by embracing robust mandates and thus keeping to its principle respecting the threshold between peace operations and enforcement actions.

#### *4.3 Limited use of force*

The Capstone doctrine refers to the principle of ‘non-use of force except in self-defence and defence of the mandate’ as the third key element of peace operations.<sup>153</sup> The content of this principle seems self-evident: the military component of peace operations shall refrain from using force, as long as it is not essential to self-defence or to defend the operation's mandate. Whether self-defence is limited to the personal integrity of personnel or if it extends to the protection of premises and assets, however, is not clear. Similarly, it is not clear what the defence of the mandate should imply. Moreover, uncertainties exist as to the identification of the legal basis regulating the use of force in peace operations.

Diverging hypotheses have been put forward in the literature, respectively focusing on self-defence as an inherent individual right of peacekeepers,<sup>154</sup> or as the right of self-defence of States in international relations enshrined in article 51 of the UN Charter,<sup>155</sup> or as tentative extension of art. 51 to international organisations.<sup>156</sup> Some others have concluded that

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<sup>153</sup> Capstone Doctrine, p. 34.

<sup>154</sup> Corten-Klein, “Action humanitaire et chapitre VII: la redéfinition du mandat et des moyens d'action des Forces de Nations Unies”, in *Annuaire français de droit international*, vol. 39, 1993, pp. 105-130; McCourbie-White, *The Blue Helmets*, Dartmouth Publisher, 1996; Odello-Piotrowicz, “Legal regimes governing international military missions” in Odello-Piotrowicz, *International Military Missions and International Law*, *supra* note 1, pp. 25-44, in particular at p. 33.

<sup>155</sup> This is the most recent thesis and refers to the notion of legitimate self-defence of troop contributing Countries that naturally extends to the troops posed at the disposal of the mission. See Palchetti, “Azioni in legittima difesa in risposta ad attacchi armati contro contingenti impegnati in operazioni di pace”, in Lanciotti-Tanzi (eds), *Usa della forza e legittima difesa nel diritto internazionale contemporaneo*, Jovene Editore, 2012, pp. 79-104.

<sup>156</sup> This literature maintains that a right to self-defence of International Organisations exists

the use of force in peace operations is a form of law-enforcement with the consent of the host State.<sup>157</sup> This paragraph seeks to clarify the aspects in point to provide for a comprehensive understanding of the principle of the use of force in peace operations. It analyses some examples of national and international doctrines, combined with scholarly literature, to show the evolution of the use of force in peace operations.

It is believed that the principle of the use of force in self-defence in peace operations only dates back to the 1958 Hammarskjold report.<sup>158</sup> It seems more accurate to affirm that Secretary General Hammarskjold did not codify a principle regulating the use of force as such, but rather it only specified the extent of the right of self-defence entrusted to UN contingents. It is worth recalling that the UNEF mission was established by a General Assembly resolution, thus any authorization to use force was excluded as not falling under the competence and powers of the GA.<sup>159</sup> In fact, the Report stated that “men engaged in the operation may never take the initiative in the use of armed force but are entitled to respond with force to an attack with arms”.<sup>160</sup> Accordingly, UNEF units were equipped only with weapons necessary for self-defence. As to the extent of self-defence defence, the UNEF report provided for little guidance, as it only specified that units were allowed to respond to any attempt to impose the withdrawal from their positions.<sup>161</sup> Further clarification is offered by the 1964 Secretary General Report on the mission in Cyprus that stated that self-defence embraces the defence of UN posts, premises and vehicles under armed attack, as well as the support of other personnel under armed attack.<sup>162</sup> Some cases in which the units may be

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in accordance to an analogical interpretation of art. 51. See Seyersted, “United Nations Forces. Some legal Problems”, in *British Yearbook of International Law*, 1961, pp. 472; Cot-Pellet, *La Charte de Nations Unies, Commentaire article par article*, Economica, 3<sup>rd</sup> ed., 2005.

<sup>157</sup> Frulli, *supra* note 1, in particular at p. 196.

<sup>158</sup> Gargiulo; White, *Keeping the peace*, both *supra* note 1.

<sup>159</sup> Hammarskjold Report, para. 175. made reference to the absence of an explicit authorization for the Force to take offensive action and concludes by saying that “had there any remaining doubts in this respect, the legal basis on which the General Assembly took its decision would have made this limitation clear”.

<sup>160</sup> Hammarskjold Report, para. 179.

<sup>161</sup> *Idem*.

<sup>162</sup> *Aide-memoire concerning some questions relating to the function and the operation of the United Nations Peace-keeping Force in Cyprus*, S/5653, 10 April 1964, para. 16.

entitled to act in self-defence were expressly listed, including, by way of example, attempts by force to disarm and attempts by force to prevent peacekeepers from carrying out their responsibilities.<sup>163</sup> Some decades later, the 1995 Supplement to an *Agenda for Peace* has formulated the principle regulating the use of force in peace operations in its current wording: ‘non-use of force except in self-defence’. The Supplement made reference to consent, impartiality and non-use of force as the key elements of peace operations, but it did not elaborate on the content thereof. Nevertheless, the position paper offers interesting insights on peace operations that were reported to fall short of the three key elements.<sup>164</sup> In particular, the Supplement refers to the cases of Somalia and Bosnia Herzegovina where the mandate was changed several times to authorise a proactive use of force.<sup>165</sup> In other words, it highlights the need emerged from the field to increase the resort to force in peace operations. Many factors have determined the emergence of a new trend toward a more extensive use of force in peace operations, which has led to the elaboration of the new formula: ‘non-use of force except in defence of the mandate’. The failure to protect civilians, shown by the Tutsi genocide in Rwanda, by the Srebrenica genocide in Bosnia Herzegovina, by the endless humanitarian crisis in Somalia, combined with the change of the characteristics of conflicts and the related emergence of spoilers proved to constitute a serious threat not only for the peace process, but also for human security of civilians and UN personnel. As a consequence, the Brahimi Report in 2000 has called for the development of a robust doctrine and realistic mandates.<sup>166</sup> Along with the evolution of the concept of impartiality discussed earlier, the Report had also significantly influenced the contents of the principle of the use of force. In fact, the document stated that peace operations must be carried out professionally and successfully, thus military units “must be capable of defending themselves, other mission

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<sup>163</sup> *Ibidem*, para. 18.

<sup>164</sup> The term ‘position paper’ was used by the same SG Boutros Ghali to define the document, see the full title: *Supplement to an Agenda for Peace: Position Paper of the Secretary General on the Occasion of the Fifth Anniversary of the United Nations*, *supra* note 31.

<sup>165</sup> Supplement to an Agenda for Peace, paras 34-37.

<sup>166</sup> Brahimi Report, p. IX.

components and the mission's mandate".<sup>167</sup> Accordingly, troops must have robust rules of engagements (RoE) and be appropriately equipped in order to constitute a realistic deterrent threat<sup>168</sup>.

This evolution has brought about two main changes: first, in these operations the use of force is not limited to self-defence but also extends to the defence of the mandate, meaning security and freedom of movement of personnel and the protection to civilians under imminent threat of physical violence; second, as a direct consequence, from 2000 on peace operations are generally defined 'robust' or 'militarised'.<sup>169</sup> Despite these considerations, the latest codification of the principle of the use of force in UN peace operations doctrine still uses the lexicon of '*non*-use of force except in self-defence and defence of the mandate'.<sup>170</sup> The following analysis of the most recently established missions investigates whether this formula is in line with current practice or whether it corresponds to political or policy constraints. Moreover, it sheds light on the fundamental principles regulating the use of force in peace operations and the limitations thereof in order to verify which of the suggested doctrinal understandings is the more suitable to the subject in point.

The 'United Nations Assistance Mission in Sierra Leone' (UNAMSIL), established in 1999, was the first example of a peace operation where the use of force beyond self-defence was expressly provided in the mandate under Chapter VII of the UN Charter.<sup>171</sup> Resolution 1270 (1999) authorised the mission "to take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas

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<sup>167</sup> *Ibidem*, p. X.

<sup>168</sup> *Ibidem*, para. 51. The rules of engagement (RoE) are the complex set of principle and norms regulating the resort to force of the military component of a mission. The RoE contribute to frame the overall setting of rules of conduct in peace operations and therefore will be dealt with in chapter III.

<sup>169</sup> Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century*, Hart, 2011; Labouda, "Peacekeeping and Peace enforcement", *supra* note 1; Higgins, *Second Generation Peacekeeping*, *supra* note 14. See also the analysis of militarised operations carried out by Roscini in "The United Nations Security Council and the Enforcement of International Humanitarian Law", in *Israel Law Review*, vol. 43, 2010, pp. 330-359, in particular at pp. 348-352.

<sup>170</sup> Capstone Doctrine, p. 34, italics added.

<sup>171</sup> S/RES/1270, 22 October 1999.

of deployment, to afford protection to civilians under imminent threat of physical violence”.<sup>172</sup> UNAMSIL was characterised by the extensive use of force throughout the whole mission, whereby the authorisation to take all necessary action was reiterated in the following mandates that have progressively expanded the strength of the operations.<sup>173</sup> Besides, in July 2000, UNAMSIL launched a targeted operation called ‘Thunderbolt’ to disperse a militia known as ‘Westside Boys’ who were in control of the town of Masiaka. The operation was described as a pre-emptive strike against the rebels who allegedly were planning to attack UN peacekeepers.

The shift towards a proactive use of force in Sierra Leone was a reaction to the widespread violence carried out against UN military personnel, which culminated in the kidnapping of about 500 UN peacekeepers.<sup>174</sup> In the words of the then SG Kofi Annan, ‘Thunderbolt’ was carried out in the discharge of UNAMSIL mandate, for “anyone who attempts to attack the peacekeepers would know that they will defend themselves and that there will be a price to pay”.<sup>175</sup> The lexicon used by the Secretary General echoed the concept of self-defence, nevertheless it seems evident that the use of force in UNAMSIL, which included a pre-emptive strike against rebel militias (operation ‘Thunderbolt’), was far beyond self-defence.

In the same years, the ‘United Nations Organization Mission in the Democratic Republic of the Congo’ (MONUC) was established.<sup>176</sup> The initial mandate did not foresee any authorisation to use force beyond self-defence, but only one year after, in 2000, the SC passed a resolution, acting under Chapter VII, authorising MONUC to “take the necessary action, in the areas

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<sup>172</sup> *Ibidem*, para. 14.

<sup>173</sup> The sequence of the mandate since the deployment in 1999 to the transformation of UNAMSIL into the United Nations Integrated Office in Sierra Leone (UNIOSIL) in 2005 is available on the mission website at: <http://www.un.org/en/peacekeeping/missions/past/unamsil/UnamsilRS.htm>.

<sup>174</sup> *Forth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, S/2000/455, 19 May 2000, in particular at section VII. See also Sloan, *supra* note 152, at pp. 165-181.

<sup>175</sup> Daily Press Briefing by Office of Spokesman for Secretary-General, 24 July 2000, available at: <http://www.un.org/press/en/2000/20000724.db072400.doc.html>. See also “Annan Justifies UN's ‘Preemptive Strike’”, in *Agence France Presse*, July 25 2000, available at: <https://www.globalpolicy.org/component/content/article/203/39316.html>.

<sup>176</sup> S/RES/1279, 30 November 1999.

of deployment of its infantry battalions [...] to protect United Nations [...], ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence”.<sup>177</sup> The evolution of the mission's efforts in the DRC is particularly relevant to the analysis of the use of force. The operation in Congo has gone through significant transformations since the deployment of ONUC in 1960. Despite the efforts of the international community, the situation in the country has always proved to be critical. As a consequence, the response of UN has been more than robust. As just mentioned, in 2000 MONUC had been authorised to take all necessary action to fulfil its mandate. Ten years later, the operation was transformed into the ‘United Nations Organization Stabilization Mission in the Democratic Republic of the Congo’ (MONUSCO).<sup>178</sup> SC resolution 1925 (2010) authorized MONUSCO “to use all necessary means, within the limits of its capacity and in the areas where its units are deployed, to carry out its protection mandate”<sup>179</sup> to fulfil specific tasks set out in the mandate, namely the protection of civilians, the logistical support to the DRC Army to fight the rebel group known as Lord Resistance Army and the enforcement of the embargo. The robust use of force and the elaborated mandate was not sufficient to address the dramatic situation in the country. In November 2012, the armed group March 23 (M23) took control of Goma, the second largest Congolese city at the border with Rwanda. The occupation was carried out despite the presence of about 1.700 MONUSCO troops. After the fall of Goma, the UN mission was harshly criticized for its failure to accomplish the

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<sup>177</sup> S/RES/129, 24 February 2000, para. 8.

<sup>178</sup> S/RES/1925, 28 May 2010.

<sup>179</sup> The resolution has authorised the use of force limited to the performance of very specific tasks as provided for in three sub-paragraph: “12 (a) Ensure the effective protection of civilians, including humanitarian personnel and human rights defenders, under imminent threat of physical violence, in particular violence emanating from any of the parties engaged in the conflict; 12 (k) at the request of the Government of the Democratic Republic of the Congo, may provide logistical support for regional military operations conducted against the LRA in the Democratic Republic of the Congo; 12 (t) Monitor the implementation of the measures imposed by paragraph 1 of resolution 1896 (2009), [...] seize or collect any arms or related materiel whose presence in Democratic Republic of the Congo violates the measures imposed by paragraph 1 of resolution 1896 (2009) [...] and provide assistance to the competent customs authorities of the Democratic Republic of the Congo”, *ibidem*, para. 12.

mandate.<sup>180</sup> Following these events, as already mentioned, the UN SC took the unprecedented decision to establish an enforcement unit under the command and control of MONUSCO Force Commander: the ‘Force Intervention Brigade’ (FIB).<sup>181</sup> Thus, the SC acting under chapter VII of the Charter created the first combat unit within a peace operation with the specific task of neutralizing armed groups. The mandate authorized the FIB to

carry out targeted offensive operations[...] either unilaterally or jointly with the FARDC, [...] in strict compliance with international law, [...] to prevent the expansion of all armed groups, neutralize these groups, and to disarm them.<sup>182</sup>

As explained earlier, the creation of the FIB has raised many concerns among Security Council Members and commentators, as to the respect of the elements of impartiality and use of force in self-defence and defence of the mandate.<sup>183</sup> Despite these doubts, the FIB has been deployed and is still operational as the MONUSCO mandate, including the Intervention Brigade, has recently been extended until 31 March 2017.<sup>184</sup> MONUSCO and its FIB show the extent to which the key element of non-use of force except in self-defence and defence of the mandate’ have been stretched in recent practice, to include offensive actions against targeted actors.

Besides the peculiarities of MONUSCO, the practice of the newly-established UN peace operations constitutes further evidence of the trend to resort to increasing pro-active use of force provided for in SC mandates. The ‘United Nations Multidimensional Integrated Stabilization Mission in Mali’

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<sup>180</sup> International Peace Institute, *The UN Intervention Brigade in the Democratic Republic of the Congo*; Plett, both *supra* note 147.

<sup>181</sup> S/RES/2098, 28 March 2013. The establishment of the Force Intervention Brigade as part of a UN peace operation raises many concerns about the respect of the principle of limited use of force. Several States and commentators have expressed their reluctance towards this practice that is mirrored in the mandate clause stating that the FIB is constituted “on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping”. This provision has allowed many States to eventually vote in favour of this peace enforcement measure.

<sup>182</sup> S/RES/2098, 2013, para. 12.

<sup>183</sup> *Supra*, para. 4.2.

<sup>184</sup> S/2014/957, 30 December 2014.

(MINUSMA) has been established by SC resolution 2100 (2013),<sup>185</sup> following a request of the transitional government of Mali.<sup>186</sup> The transitional government was created in the context of a framework agreement fostered by the Economic Community of West African States (ECOWAS), after the *coup d'Etat* carried out by the military junta called '*Comité national pour le redressement de la démocratie et la restauration de l'Etat*', composed of disaffected soldiers from the Malian army.

The situation in Mali is characterised by chronic instability and by the inability of governmental authority to achieve effective control throughout the country. Various tribes are fighting to occupy strategic areas, while Islamic armed groups and terrorist organisations have moved their headquarters in the country after the international military intervention in Afghanistan and Iraq.<sup>187</sup> Moreover, the strategic position of Sahel coupled with the lack of a law and order system has transformed the region in the perfect crossroad for all sort of smuggling activities dominated by criminal organisations.<sup>188</sup> In this context characterised by deep instability and by the presence of rival armed tribes', criminal organisations and terrorist groups, the SC opted for a robust mandate of MINUSMA. Resolution 2100 (2013) authorised, under Chapter VII, MINUSMA to "use all necessary means, within the limits of its capacities and areas of deployment, to carry out its mandate as set out" in the specific paragraphs of the resolutions.<sup>189</sup> In particular, the extensive use of force has been authorised to protect civilians

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<sup>185</sup> S/RES/2100, 25 April 2013. MINUSMA took over a previous African Union-led operation, the 'International Support Mission in Mali' (AFISMA) authorised by S/RES/2085, 20 December 2012.

<sup>186</sup> S/2013/113, 26 February 2013.

<sup>187</sup> The most active groups are: 'Ansar Dine', 'Al-Qaida in the Islamic Maghreb' (AQIM) and the '*Mouvement pour l'unicité et le jihad en Afrique de l'Ouest*' (MUJAO). *Report of the Secretary-General on the situation in Mali*, S/2013/189, 26 March 2013; *Report of the Security Council mission to Mali, 1-3 February 2014*, S/2014/173, 11 March 2014. See also the Al Jazeera Infographic report available at: <http://www.aljazeera.com/indepth/interactive/2013/07/201372862539638734.html>.

<sup>188</sup> Whiteman, "Backgrounder: Mali's Struggle for Democracy", in *Al Jazeera*, 28 July 2013, available at: <http://www.aljazeera.com/indepth/features/2013/07/201372895450744301.html>; Armstrong, "Crisis in Mali: Root Causes and Long-Term Solutions", United States Institute of Peace, 31 May 2013.

<sup>189</sup> S/RES/2100, 25 April 2013, para. 17.

and UN personnel; to support humanitarian assistance; to protect from attack cultural and historical sites; to support for national and international justice.<sup>190</sup>

Similarly to MONUSCO, the SC foresaw the resort to all necessary means in very specific terms: only to discharge expressly named tasks. It is worth mentioning that this initial limitation of use of force to listed tasks has been superseded in June 2014, whereas the new mission mandate simply “authorizes MINUSMA to take all necessary means to carry out its mandate, within its capabilities and its areas of deployment”, without further specifics.<sup>191</sup>

Moreover, the two resolutions have authorised France, that meanwhile had deployed ‘*Opération Serval*’ upon the request of intervention of the transitional Malian government,<sup>192</sup> “to use all necessary means [...] to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General”.<sup>193</sup> In addition to the presence of French troops, in February 2013 the European Union launched a military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) that was extended till May 2016.<sup>194</sup> For the sake of completeness it is correct to specify that no authorisation to use force is envisaged in the SC mandate for the EUTM mission, nor in the Council Decision, as EUTM Mali expressly “shall not be involved in combat operations”.<sup>195</sup>

The ‘United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)’ is the most recently established UN peacekeeping mission.<sup>196</sup> The official deployment has taken

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<sup>190</sup> S/RES/2100, paras 16 (a) (i) (ii); 16 (c) (i) (ii); 16 (e); 16 (f); 16 (g).

<sup>191</sup> S/RES/2164, 25 June 2014, para. 12.

<sup>192</sup> See <http://www.defense.gouv.fr/operations/mali/dossier/presentation-de-l-operation>.

<sup>193</sup> S/RES/2100, 25 April 2013, para. 18 and S/RES/2164, 25 June 2014, para. 26.

<sup>194</sup> Council Decision 2013/34/cfsp, 17 January 2013 and Council Decision 2013/87/cfsp, 18 February 2013, as amended by Council Decision 2013/729/cfsp, 9 December 2013. Council Decision 2014/220/CFSP, 15 April 2014 has extended the mandate till 18 April 2016, Article 1(2).

<sup>195</sup> Council Decision 2013/34/cfsp, 17 January 2013, Article 1(1).

<sup>196</sup> S/RES/2149, 10 April 2014. Some commentators have suggested that this transfer of authority has been the consequence of serious allegations of biased actions of African peacekeepers supporting the Muslim ‘*Séléka*’ movement and of the reported human rights violations committed by the Central African contingents supported by AU peacekeepers. Human Rights Watch, “Central African Republic: Peacekeepers Tied to Abuse”, 2 June

place in September 2014 in the form of a transfer of authority from the previous African Union-led ‘International Support Mission in the Central African Republic’ (MISCA).<sup>197</sup> The situation in Central African Republic (CAR) is characterised by political instability and recurring cycles of violence involving armed groups of religious connotation. Clashes between the Muslim ‘*Séléka*’ (alliance) and the Christian ‘*anti-Balaka*’ (anti-machete) movement have disseminated death and insecurity throughout the country, affecting primarily civilian population<sup>198</sup>. As a result, hundreds of thousands of CAR inhabitants are internally displaced and it is believed that more than 2,5 million people (half of the population) are in need of humanitarian assistance.<sup>199</sup> Against this background, the UN SC, acting under Chapter VII, authorized MISCA to take all necessary means to carry out its mandate within its capabilities and its area of deployment.<sup>200</sup> In this case, the authorisation to resort to extensive use of force is not limited to certain mandate tasks, as it is for MONUSCO, on the contrary, all necessary means are authorised for the discharge of the whole mandate which embraces numerous tasks ranging from the protection of civilians to demobilisation and disarmament of former combatants.<sup>201</sup>

Moreover, the resolution of the SC has authorised France, that had lunched ‘*Opération Sangaris*’ to strengthen the forces already present in the CAR and to support the peace operations deployed, “to use all necessary

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2014; African Union Press Release, “The African Union Investigates Reports About the Involvement of MISCA Soldiers in Human Rights Violations”, 3 June 2014; African Union, “Information Note of the AU Commission on the incident that took place in Bangui on 29 march 2014 and the withdrawal by the Republic of Chad of its contingent from MISCA”, 10 April 2014, available at: <http://www.peaceau.org>. Sengupta-Cowell, “Chad, Amid Criticism, Will Pull Troops from Force in Central Africa”, in *New York Times*, 3 April 2014.

<sup>197</sup> MISCA was authorised by the S/RES/2127, 5 December 2013.

<sup>198</sup> *Report of the Secretary-General on the Central African Republic*, S/2014/142, 3 March 2014; *Central African Republic: Security Council condemns latest wave of violence*, UN News Centre, 30 May 2014; Human Rights Watch, “Central African Republic: Massacres in Remote Villages”, 3 April 2014; *UN finds ‘ample evidence’ of war crimes committed in Central African Republic*, in [theguardian.com](http://theguardian.com), 6 June 2014;

<sup>199</sup> United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic-Background, available at: <http://www.un.org/en/peacekeeping/missions/minusca/background.shtml>.

<sup>200</sup> S/RES/2149, 10 April 2014, para. 29.

<sup>201</sup> The mandate tasks are set for in para. 30 of S/RES/2149.

means to provide operational support to” the missions (MISCA first, later transformed in MINUSCA).<sup>202</sup>

To complete the picture of the international intervention in the CAR, it is worth signalling that in February 2014 the Council of the European Union has established a EU military operation: EUFOR RCA.<sup>203</sup> As to the principles regulating the use of force, no express definitions are to be found in the Council Decisions. Council Decision 2014/73/CFSP simply refers to the UN SC mandate and seems to suggest that the authorisation to take all necessary means is to be intended to EUFOR as well.<sup>204</sup>

The analysis of peace operations’ practice from the establishment of UNAMSIL in 1999 to the deployment of the recent MINUSCA in 2014 shows a significant evolution of the key element of ‘non-use of force except in self-defence (and defence of the mandate)’. All the missions in point (UNAMSIL, MONUC, MONUSCO, MINUSMA, MINUSCA and EUFOR RCA) have been authorised by the SC, acting Chapter VII of the UN Charter to take all necessary action to fulfil the mandate.

In a first phase, the use of force has been authorised in very specific terms to discharge only limited tasks: namely protection of civilians and of UN personnel and some others, depending on each particular situation. Later, as shown by the second mandate of MINUSMA and of MINUSCA, all necessary measures were foreseen to fulfil the entire mandate in the absence of provided exceptions. Moreover, while it can be maintained that SC resolutions concerning all other operations have envisaged a use of force

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<sup>202</sup> S/RES/2127, 5 December 2013, para. 50 and S/RES/2149, 10 April 2014, para. 47. Official information on Opérations *Sangaris* are available on the government website: <http://www.defense.gouv.fr/operations/centrafrique/operation-sangaris/operation-sangaris>.

<sup>203</sup> The mission has been launched in April 2014 in the framework of the EU Common Security and Defence policy as part of the EU External Action, according to Council Decision 2014/73/CFSP, 10 February 2014 and to Council Decision 2014/183/CFSP, 1 April 2014. The EUFOR RCA mission ended its mandate on 15 March 2015, see [http://www.eeas.europa.eu/archives/csdp/missions-and-operations/eufor-rca/index\\_en.htm](http://www.eeas.europa.eu/archives/csdp/missions-and-operations/eufor-rca/index_en.htm).

<sup>204</sup> “The Union shall conduct a military bridging operation in the CAR, EUFOR RCA, to contribute to the provision of a safe and secure environment [...] *of full Operating Capability*, in accordance with the mandate set out in UNSC Resolution 2134 (2014) and concentrating its action in the Bangui area”. Council Decision 2014/73/CFSP, 10 February 2014, article 1, emphasis added.

limited to the defence of the mandate, it seems evident that ‘Operation Thunderbolt’ (UNAMSIL) and the actions of the FIB (MONUSCO) have extended the notion of defence of the mandate to include pre-emptive and pro-active use of force against targeted elements, generally considered spoilers.

Despite the self-evident development of the use of force in peace operations, UN parlance still resorts to the concept of ‘non-use of force except in self-defence and defence of the mandate’. As mentioned above, not only this notion is recalled in most of SC resolutions, but it has been codified in these terms in the most recent UN Doctrine.<sup>205</sup> To further highlight these inconsistencies, it is worth making reference to other relevant documents concerning peace operations.

The latest NATO Allied Joint Doctrine on Peace Support mentions ‘the use of force’ as one of the principles of peace support efforts, but then it specifies that it should be restricted to self-defence and defence of the mandate and it can be seen as predominantly reactive rather than pre-emptive.<sup>206</sup> At the same time, the Allied Joint Doctrine acknowledges that the use of force provides credible deterrence both to convince conflicting parties to negotiate and to dissuade spoilers to hamper the peace process.<sup>207</sup> On a different line, the US military doctrine on peace operations appears to have the most straightforward approach to the issue and it just refers to the concept of ‘restraint and minimum force’.<sup>208</sup>

In the light of the recent practice, it is unlikely to affirm that the ‘non-use of force’ is the dominant principle in peace operations. It seems more appropriate to refer to the notion of ‘*limited* use of force’, whereas the limitation is not self-defence, but rather the defence of the mandate. Considering that the mandate's tasks expressly envisage the protection of UN

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<sup>205</sup> Capstone Doctrine, pp. 34 ff. See also the *Handbook on UN Multidimensional Peacekeeping Operations*, *supra* note 53, which talks about the ‘appropriate use of force’, maintaining that military forces under UN command are not usually required to use force beyond that necessary for self-defence. Self-defence includes the right to protect oneself, other UN personnel, UN property and any other persons under UN protection, p. 57.

<sup>206</sup> NATO AJP-3.4.1(A), paras 0231 and 0233.

<sup>207</sup> *Ibidem*, para. 0232.

<sup>208</sup> USA Joint Chief of Staff, *Peace Operations*, JP-3-07.3, p. I-5.

personnel, it appears redundant to talk about limited use of force in self-defence *and* in defence of the mandate. To be more precise, the concept of self-defence is a legacy of peacekeeping origins, typically identified in the UNEF mission of 1956. As shown by the study carried out so far, the only element still present in contemporary peace operations is the consent of the host state; while the term neutrality has been abandoned to endorse the more elaborated notion of impartiality; the non-use of force except in self-defence -understood as an inherent right of peacekeepers- has been superseded by the need to resort to force in order to face more complex and dangerous scenarios. Thus, the UN wording ‘non-use of force except in self-defence and defence of the mandate’ appears more respondent to a political will to stick to a traditional understanding of peacekeeping rather than respondent to the evolving reality of peace operations.

As to the international law principle regulating the use of force in peace operations, in light of the presented analysis none of the scholarly hypotheses elaborated so far seems appropriate or up to date. As signalled by some authors, the focus on the right to self-defence both as individual inherent right and as a right stemming from art. 51 of the Charter is misleading.<sup>209</sup> In fact, as just shown, the right to self-defence of personnel is not separate from the concept of the ‘defence of the mandate’, as the latter includes expressly the task of protection of UN personnel, that also extends to missions' premises and assets. Moreover, no reference to art. 51 is made in any SC resolutions. It is submitted that the appropriate lens of analysis is not self-defence, but the use of force in the collective security system, namely the powers of the Security Council under chapter VII, in particular *ex* art. 42. It must be noted that no mention to article 42 is made in the resolutions, nevertheless the wording of the mandates is precisely art. 42-like. In fact, the resolutions of UNAMSIL, MONUC, MONUSCO, MINUSMA, MINUSCA and indirectly EUFOR RCA, were taken under Chapter VII of the Charter on the premise that the given situation constitutes a threat to international peace and security

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<sup>209</sup> Frulli, *supra* note 1; Frulli, “Le operazioni di *peacekeeping* delle Nazioni Unite e l'uso della forza”, in *Rivista italiana di diritto internazionale*, vol. 2, 2001, pp. 347-392.

and the mandates have authorised the missions to take ‘all necessary means’ or ‘all necessary action’.

Thus, the right to use force stems directly from the authorisation of the Security Council, while the limitations to the use of force do not depend on the right of self-defence but are shaped in each mandate, according to the tasks specifically set for in the given mission. The use of force is thus limited to the discharge of the mandate, differently said -in UN parlance- the use of force is limited to the defence of the mandate. Accordingly, the basis for the operations’ deployment and the regulation of the use of force are not dissimilar from an enforcement action. As already highlighted above, the watershed between peace operations (including robust or militarised ones) is the consent of the host State, while this key element is clearly lacking in pure enforcement actions.

### *5. A working definition of peace operations*

The terminology used to refer to peace and security activities is, as we have seen, broad and at best inconsistent. As explained, the most recurrent terms are peacekeeping, peace operations, peace support and peace enforcement. Endorsing the notion of peace operations as the core subject of the analysis responds to an array of considerations. First, ‘peace operations’ is a general term, whereas peacekeeping refers to one of the activities included within peace operations. Second, the term ‘peace operations’ has been elaborated in the world’s largest and farthest reaching organization, whose mandate is to promote international peace and security, that of the UN. This is in stark contrast to peace support, which is the product of regional organisations, such as NATO. Considering the core role played by the UN in this field it seems more appropriate to refer to UN lexicon. Moreover, the term peace operations is broadly used also in scholarly literature, whereas peace support is not preferred.

Peace operations are understood as field operations, composed both of military and civilian components, aimed at managing conflicts from the moment of their eruption to the prevention of their relapse. Peace operations include peacekeeping, robust operations and peace building; while conflict prevention and peacemaking fall outside the scope of the term as they consist in diplomatic efforts, that are not likely to be defined as field operations. As both practice and case law that will be examined in the following sections will show, internationally wrongful acts have occurred (and are likely to occur) during peace operations, intended as field missions.

The category of peace enforcement is not endorsed in the present study as it is considered either misleading or of limited use. The research will, on the contrary, make reference to robust peace operations, considered missions authorised by the SC to resort to force in a significant manner to achieve the mandate, including taking military actions against targeted actors, as occurred in Sierra Leone with UNAMSIL and is presently happening in the DRC with the FIB of MONUSCO. Full scale enforcement actions *ex arts.* 39 and 42 of the Charter, mandated by the SC to member States and carried out against another State, such as the operation of 1990 in Iraq and recently in Libya, are not regarded to any extent as peace operations and therefore fall outside the scope of this research. The watershed between the notions of peace operations and enforcement can be identified in the element of consent of the host State, which is never a prerequisite for enforcement operations.

The key elements of peace operations, *i.e.* what defines them and divides them from other types of crisis management efforts, are the consent of the host State in whose territory the mission is to be deployed; impartiality in the discharge of the mandate, currently understood as ‘good referee behaviour’ that includes the power to sanction – by using military force – actors that spoil the peace process and the mandate fulfillment; limited use of force authorised by the SC, generally acting under Chapter VII of the Charter, that entrusts the mission with the power to use force within the limits sets for in the resolution, namely the discharge of the specific tasks envisaged in the mandate.

Moreover, peace operations can be carried out directly under the command and control of the UN or be mandated to regional organisations as NATO, the AU and ECOWAS. As it will be shown, this difference has significant implications in terms of chain of command and control; nevertheless, both structures share the core feature of being deployed according to a mandate of the Security Council.



## CHAPTER II

### RESPONSIBILITY REGIMES IN PEACE OPERATIONS

#### 1. A plurality of responsibility regimes

Peace operations concern a wide range of subjects, from the United Nations and regional organisations such as NATO or the EU, to Member States and, eventually, individuals. While these parties differ vastly in characteristics such as size and scope of involvement, they each remain subject to specific responsibility regimes governing peace operations. Each follows a different set of rules under the umbrella of a particular operation and different relationships may exist between and among various participating parties in the overall context of a particular mission.

As a consequence of serving as the leading organisation of a peace operation, the United Nations will have a direct relationship with both Troop Contributing Countries (TCCs) and the host country as well. Generally, these relationships are regulated by two different agreements, the Memorandum of Understanding (MOU) and the Status of Force Agreement (SOFA) respectively.<sup>1</sup> Furthermore, the leading organisation may enter into legal relationships with individuals, for example, due to its responsibility *vis à vis* third-parties for damages which may occur during the mission, or for contractual purposes.

In United Nations-authorized peace operations, on the other hand, the UN will only set forth the mission's mandate while a regional organisation will take the lead. In this case, the United Nations will not have a direct relationship with TCCs or the host state. By contrast, the leading regional

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<sup>1</sup> *Model Memorandum of understanding between the United Nations and participating State contributing resources to United Nations Peacekeeping Operation*, A/C.5/66/8, 27 October 2011, Chapter 9; *Model Status-of-forces Agreement for Peace-Keeping Operations*, A/45/594, 9 October 1990.

organisation will enter into agreements with those States contributing to the mission and with the host State.<sup>2</sup> To complicate matters further, the responsibility regimes of regional organisations may vary significantly from that of the United Nations.<sup>3</sup> Hence, the plurality of actors involved in peace operations and the diverse relationships that may arise between and among them when a wrongful act occurs, call into question different responsibility regimes.

The term ‘responsibility regimes’ is used in the present chapter to refer to three concepts generally associated with the legal notion of responsibility, namely, international responsibility, accountability, and liability. Some authoritative statements and scholarly writings use the term accountability as a general concept that would include both international responsibility and liability,<sup>4</sup> while others simply employ these three terms interchangeably.<sup>5</sup> As a result of this practice, what emerges over time and through various instances where responsibility comes into question during peace operations is a general lack of clarity differentiating the use of these terms.

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<sup>2</sup> See for example the *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, 19 June 1951 (hereinafter NATO SOFA); *Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context* (hereinafter EU SOFA), C 321/6, 31 December 2003.

<sup>3</sup> *Infra*, paras. 4 ff.

<sup>4</sup> International Law Association, *Accountability of International Organisations*, final report, 2004 (hereinafter ILA Report); Council of Europe, Committee on Legal Affairs and Human Rights, *Accountability of International Organisations for Human Rights Violations*, Draft resolution, 6 November 2013. Reinsch, “Securing the Accountability of International Organisations”, in *Global Governance*, vol. 7, 2001, pp. 131-149; Wellen, *Remedies against International Organisations*, Cambridge University Press, 2002, where the author illustrates ‘the accountability regime for international organisations’, at pp. 7 ff; Wouters-Brems-Smis-Schmitt (eds), *Accountability for Human Rights Violations by International Organisations*, Intersentia, 2010; see also the most recent debate within the American Society of International Law that unfolded in the following publications: Hovell, “Due Process in the United Nations”, in *American Journal of International Law*, vol. 110, no. 1, 2016, pp. 1-48; Tzanakopoulos, “Theorizing or Negotiating the Law?: A Response to Devika Hovell”, in *AJIL Unbound*, 22 July 2016; Freedman, “UN-Accountable?: A Response to Devika Hovell”, *ibidem*; Gordon, “Due Process and the Iraq Sanctions: A Response to Devika Hovell”, *ibidem*.

<sup>5</sup> ILA Report, *supra* note 4; *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, A/51/389 (1996).

The present work aims at highlighting the main features of these three responsibility regimes that are called into question in peace operations when a wrongful act occurs or when an actor has been damaged by a conduct carried out in the course of an operation. This chapter explores whether the terminological differences between international responsibility, accountability, and liability have legal implications for the various issues that arise in peace operations, namely questions of attribution, the implementation of accountability/responsibility by injured parties and reparation instances.

## 2. International responsibility

The present section aims at highlighting the most relevant facets of international responsibility for the purpose of the current analysis, namely noting the differences and similarities among the diverse responsibility regimes (intentional responsibility, accountability and liability). Moreover, the following paragraphs seek to shed light on the issues related to the implementation of international responsibility in the context of peace operations.

International responsibility can be defined as the legal relationship that arises from the breach of an international obligation, attributable to a State or to an international organisation, in the absence of circumstances precluding wrongfulness.<sup>6</sup> Hence, the attribution of conduct and the

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<sup>6</sup> Eagleton, *The Responsibility of States in International Law*, New York University Press, 1928; Anzilotti, *Scritti di Diritto Internazionale Pubblico*, Cedam, 1956; Ago, *Scritti sulla Responsabilità Internazionale degli Stati*, Jovene Editore, 1986; Spinedi-Simma (eds), *United Nations Codification of State responsibility*, Oceana Publications, 1987; Jimenez de Arechaga-Tanzi, “La Responsabilité des Etats”, in Bedajaoui (ed.) *Droit International, bilan et perspectives*, Pedone, 1991, pp. 367-403; Spinedi, “Responsabilità Internazionale”, in *Enciclopedia Giuridica*, vol. XXVIII, 1991; Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Brill, 2005; Spinedi- Gianelli-Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: problemi e spunti di riflessione*, Giuffrè, 2006; Arcari, “La responsabilità internazionale”, in Scovazzi (ed.) *Corso di diritto internazionale*, Giuffrè, vol. 2, 2006, pp. 255-377; Crawford-Pellet-Olleson (eds), *The Law of International Responsibility*, Cambridge University Press, 2010; Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013; Pustorino, “Responsabilità internazionale degli Stati”, in *Enciclopedia del Diritto – Annali*, Giuffrè, vol. VII;

internationally wrongfulness of the act are the constitutive elements of international responsibility. By contrast, neither damage nor fault are considered essential features, that is to say that a State or an international organisation would incur their international responsibility insofar as an act or omission, attributable to them, is in breach of a norm of international law.<sup>7</sup>

Accordingly, the term responsibility deals with the consequences under international law of internationally wrongful acts.<sup>8</sup> These consequences consist mainly of the duty imposed on the responsible entity to cease the wrongful act and to provide full reparation, to which correspond the right of the injured party to obtain full reparation.<sup>9</sup>

Due to the historical primacy of States as main international law actors, the law of international responsibility was first developed to regulate State responsibility. The most significant codification effort is widely considered to be the ILC ‘Draft Articles Responsibility of States for Internationally Wrongful Acts’ (DARS), concluded in 2001 after about fifty years of study.<sup>10</sup> Due to the centrality of States in international relations and in international law-making, the long work of the ILC was firmly grounded on the extensive practice and *opinio iuris* of States. Consequently, the principles and rules elaborated in the DARS have received wide endorsement

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Hartwig, “International Organizations or Institutions, Responsibility and Liability”, in *MPEPIL*, 2011.

<sup>7</sup> Tanzi, “Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?”, in Spinedi-Simma (eds), *United Nations codification of State responsibility*, *supra* note 6, pp. 1-33; Tanzi, *Introduzione al diritto internazionale contemporaneo*, Cedam, 2016, at pp. 381 ff.; on the different categories of damages see Fasoli, *La riparazione dei danni immateriali nei rapporti tra Stati*, Editoria Scientifica, 2012.

<sup>8</sup> A/57/10, 2002, chapter VIII, para. 465.

<sup>9</sup> Ago, *supra* note 6, at p. 367. In Ago’s opinion, this new legal relation that stems from the wrongful act is characterised not only by the above-mentioned restorative consequences, but also by aspects of “punitive nature” (“*aspects afflictifs*”) as, for example, countermeasures or the obligation for third party not to cooperate with the responsible State or organisation in case of breaches of peremptory norms of international law, *ibidem*, at pp. 369-370.

<sup>10</sup> Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report (A/56/10), in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two. The topic of State responsibility was considered by the ILC “suitable for codification” for the first time in 1949, later in December 1953 the GA with res. 799 (VIII) requested the ILC to undertake the codification of the principles regulating State responsibility deemed “desirable for the maintenance and development of peaceful relations between”. Eventually, the ILC started its works in 1964, see A/CN. 4/165, 7 February 1964.

by States and are generally considered representative of the state of the art of customary law on State responsibility.<sup>11</sup>

In stark contrast, the responsibility of international organisation remains a quite under-developed branch of the law of international responsibility, although it has been subject to a codification process by the ILC, culminated in the adoption by the General Assembly of the Draft Articles on the Responsibility of International Organizations (DARIO).<sup>12</sup> In this case, the ILC work was quite expeditious, especially when compared to the efforts required for the DARS' accomplishment.<sup>13</sup> This was probably due to the meaningful precedent constituted by the DARS, that were already completed by the time the ILC started its codification of the responsibility of international organisations and on which the Commission extensively relied. In the opinion of some scholars, this choice resulted in a questionable 'copy-and-paste' approach, according to which the ILC would have not taken in due consideration the differences between international organisations and States.<sup>14</sup> It seems questionable, however, to conclude that the ILC did not take into account the peculiarities of international organisations, given, for example, the express reference made to their distinguishing features, while codifying the issue of attribution, as well as given the attention devoted to the role played by the 'rules of the organisation.'<sup>15</sup>

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<sup>11</sup> Dupuy, "Quarante ans de codification du droit de la responsabilité internationale des États: un bilan", in *Revue générale de droit international public: droit des gens histoire diplomatique, droit pénal, droit fiscal, droit administratif*, vol. 107, 2003, pp. 305-348.

<sup>12</sup> Text adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly (A/66/10), in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

<sup>13</sup> The General Assembly in January 2002 requested the ILC to begin its codification on the topic in A/RES/56/82, para. 8, a few months afterwards, in May 2002, the ILC decided to include the matter in its programme of work (A/57/10, 2002, chap. VIII) and in 2003 the Commission issued its first report A/CN.4/532.

<sup>14</sup> For a general overview on the critique of the so called 'copy and paste approach', see Ahlborn, "The Use of Analogies Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the 'Copy-Paste Approach'", in *International Organizations Law Review*, vol. 9, 2012, pp. 53-66; Blokker, "Preparing Articles on Responsibility of International Organisation: Does the International Law Commission Take International Organisations Seriously?", in Klabbers-Wallandahl (eds), in *Research Handbook on the Law of International Organisations*, Edward Elgar, 2011, pp. 313-341; D'Aspremont, "The Articles on the Responsibility of International Organisations: Magnifying the Fissures in the Law of International Responsibility", in *International Organizations Law Review*, vol. 9, 2012, pp. 15-28.

<sup>15</sup> As it concerns attribution see the analysis provided in chapter III, with particular attention

It cannot be ignored, however, that the DARIO have not obtained the same consent enjoyed by the DARS, especially by international organisations themselves. Significantly, many international organisations have been reluctant to accept the principles enshrined in the DARIO and in some cases certain organisations have even refused to acknowledge the validity of core rules codified therein, as for example in the case of rules on attribution of conduct and full reparation.<sup>16</sup>

Moreover, cases concerning the responsibility of international organisations are very scarce, that show the inner difficulties of the implementation of international responsibility *vis-à-vis* international organisations. These hurdles are mainly due to the absence of judicial mechanisms to settle potential disputes, considering that international organisations are generally immune from national jurisdictions and, at the

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to the notion of 'effective control'. With regard to the rules of the organisation see Ahlborn, "The Rules of International Organisations and the Law of International Responsibility", in *International Organizations Law Review*, vol. 8, 2011, pp. 397-482.

<sup>16</sup> As it will be elaborated more in detail in the following chapters, the main international organisations engaged in peace operations, namely the UN, NATO and the EU, have expressed opposed views to the ones put forward by the ILC during the elaboration of the DARIO. Also, following the adoption by the GA of the DARIO the practice of these organisations contrasted with the principles and rules spelled out in the Draft Articles. By way of example, the UN has maintained that UN peacekeepers are 'transformed' in UN subsidiary organs, therefore their wrongful conduct will be attributed to the Organisation as long as the latter is exercising authority and control over those organs, *Comments and Observation Received from International Organisations*, A/CN.4/637/Add.1, pp. 9-14. Differently, NATO has observed that the ILC work didn't seem to fully contemplate the implications of the structure and functioning of the Organisation. It underlined that the decision-making process is based on consensus and recalled the claims settlement procedures where the duty to compensate rests only on member States. Seemingly NATO intended to imply that wrongful conducts cannot be attributed to the Organisation, on the contrary, only the responsibility of Member States may be entailed, *Comments and Observation Received from International Organisations*, A/CN.4/637, pp. 11-13. The EU was even more explicit on the issue while negotiating its possible accession to the ECHR, when it clearly stated that acts or omission of persons employed or appointed by member States implementing EU law, in particular in the context of an operation "pursuant to a decision of EU institutions", are attributable only to member States, Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe, 47+1(2013)007, 2 April 2013, see *infra* chapter IV. Another significant example concerns the rule of full reparation and full compensation provided for in the DARIO. The relevant practice of claims commissions in peace operations shows that both the UN and NATO envisaged several limitations, by imposing financial ceilings and also by limiting the nature of compensable damages (for a thorough analysis on the matter, see *infra* chapter IV). This non-endorsement of the rule prescribing the duty to provide for full reparation was also questioned in clear terms by the UN when submitting its last observation to the ILC, see A/CN.4/637/Add.1, pp. 29-30, see also *infra* para. 2.2.

same time, are not subject to the jurisdiction of international courts. Alternative dispute settlement mechanisms are rare and, as it will be shown more in detail, depend almost entirely on the good will of the organisation in point. Anyhow, most of alternative dispute settlement mechanisms do not deal with the international responsibility of an organisation but rather with its accountability or its liability in compensation.<sup>17</sup> Thus, the few instruments available to adjudicate claims between international organisations and other entities (States and individuals) offer very little material for the study of the responsibility of international organisations. As it will be demonstrated, this has significant implications in the context of peace operations, where the tension among the practice of States, the policy of international organisations and the instances of individuals is particularly evident.

### *2.1 The origins and evolution of international responsibility*

The concept of responsibility has deep roots in almost all domestic legal systems and enjoys a widely-shared definition. Responsibility is generally described as ‘the necessary corollary law’<sup>18</sup> or in the words of Crawford and Olleson “international responsibility is the necessary corollary of obligation,” where every breach of international law by a subject entails its international responsibility.<sup>19</sup>

As noted by some authors, international responsibility was originally elaborated as an analogy from the domestic legal relationships between actors operating in national legal systems. International responsibility is thus a natural feature of the interplay between States at the international level.<sup>20</sup>

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<sup>17</sup> *Infra*, para. 4 ff.

<sup>18</sup> Pellet, “The Definition of Responsibility in International Law” in Crawford-Pellet-Olleson (eds), *The Law of International Responsibility*, Cambridge University Press, 2010, pp. 5-15.

<sup>19</sup> Crawford-Olleson, “The Character and Forms of International Responsibility”, in Crawford-Pellet-Olleson (eds), *The law of Internaitonal Responsibility*, Cambridge University Press, 2010, pp. 443-476, at p. 443.

<sup>20</sup> Koskeniemi, “Doctrines of Responsibility” in Crawford-Pellet-Olleson (eds), pp. 45-51, at p. 47.

Hence, international responsibility can also be understood as a corollary of States sovereignty and more precisely of the principle of the sovereign equality of States that in the free exercise of their powers enter in mutual relationships and acknowledge the possibility of being held responsible for wrongful acts.<sup>21</sup>

Despite having always been recognised as a general tenet of international law, international responsibility as we know it today is the result of an evolution that has taken place mainly over the last fifty years. It is noteworthy that the term (international) responsibility did not appear in the early studies to which we usually date back the theories of international responsibility. By way of example, Grotius theorised the obligation existing under the law of nature to make reparation for the damage caused, while never mentioning the concept of responsibility as such.<sup>22</sup> Similarly, in the writings of De Vattel, the focus rested on the obligation to make reparation, whereas the notion of responsibility was never resorted to.<sup>23</sup> Also the Permanent Court of International Justice, in 1928, defined responsibility as a general principle of international law in the following terms

it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparations.<sup>24</sup>

The modern theorisation and codification of the law of international responsibility is due to the scholarship of Anzilotti, later endorsed and magnified by the work of Ago, who contributed to the present codification of the DARS in the role of ILC Special Rapporteur. Anzilotti was the first to describe international responsibility as the new legal relation that arises between the injured State and the responsible State from an internationally wrongful act that can be attributed to the latter.<sup>25</sup> Ago, in turn, traced the

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<sup>21</sup> Pellet, *supra* note 18, p. 5, Eagleton, *supra* note 6 pp. 5-6.

<sup>22</sup> Pellet, *idem* and Koskeniemi, *supra* note 20, at p. 47.

<sup>23</sup> Koskeniemi, *idem*.

<sup>24</sup> Permanent Court of International Justice, *Factory at Chorzow*, Merits, 1928, Series A, n. 17, p. 4, para. 29.

<sup>25</sup> “*Al fatto illecito, cioè, in generale parlando alla violazione di un dovere internazionale, si collega così il sorgere di un nuovo rapporto giuridico, tra lo Stato al quale è imputabile*

conception of this new legal relationship even further back in time, precisely to the writings of Grotius, who had theorised the ‘*maleficium*’ as an autonomous source of legal obligations as under the law of the land. In other words, Ago noted that already Grotius, in its *De Iure Belli ac Pacis*, identified in the ‘*maleficium*’ – which can be translated in this context as the internationally wrongful act – the generative cause of a new legal relation between the injured party and the responsible party. The peculiar feature of this further legal relationship is precisely to be ‘new’, that is to say it originates from the wrongful act itself and has a different content from the legal relation deriving from the obligation that has been breached.<sup>26</sup>

Ago also explored the principles underlying State responsibility, and – after having examined all the relevant theories developed up to that moment – came to the interesting conclusion that it is of very little importance to identify the general principle from which we may infer the fundamental tenet of international responsibility. Ago pointed out that despite some minor divergence in its formulation, the responsibility for internationally wrongful acts is recognised by unanimous practice (i.e. generally accepted by the unanimity of actors). Hence, the principle on which international responsibility is based does not need to be deducted from other principles, by contrast, it is to be inferred from the widespread, consistent and homogeneous practice of States.<sup>27</sup>

As it concerns the responsibility of international organisations, some considerations are in order. The emergence of international organisations as new actors of international law is now to be considered a classic topic of international law, literature and practice form a vast body of work with its analysis falling far outside the scope of the present study.<sup>28</sup> Suffice it to note

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*il fatto di cui si tratta [...] e lo Stato verso cui sussisteva il dovere inadempito*”, Anzilotti, *Corso di diritto internazionale*, vol. I, Cedam, 1955, p. 385.

<sup>26</sup> Ago, *supra* note 6, p. 366.

<sup>27</sup> “[...] *le principe fondamental dont il s'agit n'a aucun besoin d'etre justifié ou établi par la voie d'une déduction d'autres principes. En effet, en dépit de quelques variations de formulation, il est expressément reconnu, ou du moins clairement présumé, par une pratique unanime – et, d'ailleurs, aussi par l'unanimité des auteurs*”, Ago, *ibidem*, pp. 365-366.

<sup>28</sup> See the, sometimes opposed, theories concerning international organisations, Klabbers, “Contending Approaches to International Organisations: Between Functionalism and

that it is now generally accepted that international organisations are subjects of international law.<sup>29</sup> As subject of international law they have rights and duties and thus would bear international responsibility for their wrongful acts.

Despite the apparent parallelism between the international responsibility of States and of international organisations as subjects of international law, the development and implementation of the responsibility of international organisations have proven to be quite problematic.

## 2.2 Responsibility of international organisations: some difficulties

As we have just discussed, international responsibility is premised on the legal personality of a subject under international law. Hence, international organisations are considered able to enjoy rights and have duties as legal persons and to bear international responsibility not differently than States.

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Constitutionalism”, in Klabbers-Wallendahl (eds), *Research Handbook on the Law of International Organizations*, Edward Elgar, 2011, pp. 3-32; Seyersted, *Common Law of International Organisations*, Nijhoff, 2008; White, *The Law of International Organisations*, Manchester University Press, 2005. The debate was recently revived within the ESIL discussing and questioning the centrality of functionalism as core principle of international institutional law, see Klabbers, “The EJIL Foreword: The Transformation of International Organizations Law”, in *European Journal of International Law*, vol. 26, 2015, pp. 9-82; Klabbers, *An Introduction to International Organizations Law*, Cambridge University Press, 2015; Boisson de Chazournes, “Functionalism! Functionalism! Do I Look Like Functionalism?”, in *European Journal of International Law*, vol. 26, 2015, pp. 951-956; Nollkaemper, “Saving the Scarecrow”, *ibidem*, pp. 957-973; Sinclair, “The Original Sin (and Salvation) of Functionalism”, *ibidem*, pp. 965-973; Zanghì, *Diritto delle organizzazioni internazionali*, Giapichelli, 3rd ed., 2013; Pérez González, “Les organisations internationales et le droit de la responsabilité”, in *Revue Générale de Droit International Public*, vol. 92, 1988, pp. 63-102; Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, 2nd ed., 2005; Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* Bruylant, 1998; Katz Cogan-Hurd-Johnstone (eds), *The Oxford Handbook of International Organizations*, Oxford University Press, 2016.

<sup>29</sup> The legal personality of international organisations was clearly affirmed by the ICJ in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, *I.C.J. Reports* 1980, p. 73, in particular at para. 37. See Arangio Ruiz, *Diritto internazionale e personalità giuridica*, Unione tipografico-editrice Torinese, 1971; Conforti, *Diritto Internazionale*, Editoriale Scientifica, 2010, at p. 29 ff.; Mauro, “La personalità giuridica internazionale delle organizzazioni internazionali”, in Del Vecchio (ed.), *Diritto delle organizzazioni internazionali*, supra note 6, pp. 43-75; Sarooshi, “Legal Capacity and Powers”, in Katz Cogan-Hurd-Johnstone (eds), supra note 28, pp. 985-1004.

Nevertheless, it cannot be ignored that international organisations are very different subjects of international law compared to States. With regard to the international responsibility of the UN, in particular, Eagleton noted that

the United Nations is not organized in the same way as is a State; it does not perform the same functions as does a State; and the procedures developed to fit existent States do not fit so well the unique character of the new legal person.<sup>30</sup>

It has already been highlighted that the ILC has been deemed partially unable to encompass all the peculiarities of international organisations when codifying their responsibility in the DARIO. In this regard, the ILC has seemingly played a quasi-legislative role, fostering a progressive development of international law in this field rather than its codification.<sup>31</sup>

One of the most problematic aspects of the ILC's push towards a progressive development of international organisations' responsibility consists in having disregarded the *opinio iuris* of the organisations themselves. By way of example, in the observations submitted by NATO to the ILC in 2011, it is clearly stated that the Organisation has legal personality under international law, but, at the same time, the NATO seemed to imply that wrongful conducts have to be attributed solely to member States or to the host State of an operation.<sup>32</sup> The reference to the functioning of the Organisation appears to suggest that there would be no scope for the international responsibility of NATO because such responsibility is entailed and shared by Member States.<sup>33</sup>

To further demonstrate this assumption, the observations submitted to the ILC describe the procedures for the settlement of claims, which prescribe an elaborate burden-sharing mechanism, where States shall compensate *pro*

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<sup>30</sup> Eagleton, "International Organizations and the Law of Responsibility", in *Recueil des cours*, 1950, pp. 319-425, at pp. 401-402.

<sup>31</sup> Pustorino, *supra* note 6, see also Shraga, "ILC Articles on Responsibility of International Organizations: The Interplay between the Practice and the Rule (a View from the United Nations)", in Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Nijhoff, 2013, pp. 201-210; Peters, "International Organisations", in Katz Cogan-Hurd-Johnstone (eds), *The Oxford Handbook of International Organizations*, Oxford, 2016, pp. 34-59.

<sup>32</sup> A/CN.4637, pp. 11-13.

<sup>33</sup> *Idem*.

*quota* the injured party. NATO, instead, plays a bureaucratic/administrative role limited to the handling of claims, while no duty to compensate injured parties rests on the Organisation itself.<sup>34</sup> Even if NATO observations did not address the topic in an outspoken manner, seemingly the Organisation intended to conclude that its responsibility would not be entailed by wrongful acts carried out by its Member States operating in the framework of a NATO mission.

As it concerns the United Nations, when submitting its observations to the ILC, the Organisation maintained that UN operations conducted under United Nations command and control are to be considered subsidiary organs of the UN.<sup>35</sup> Consequently, in the UN opinion, national forces placed at the disposal of the Organisation are ‘transformed’ into UN subsidiary organs.<sup>36</sup> Accordingly, the UN resisted the proposed draft article on the attribution of conduct of seconded organs stating that

in the practice of the UN, therefore, the test of ‘effective control’ within the meaning of draft article 6 [now art. 7 DARIO] has never been used to determine the division of responsibilities for damage caused in the course of any given operation between the United Nations and any of its contributing States.<sup>37</sup>

Moreover, the UN added further elements of complexity to the issue of attribution of conduct in peace operations by affirming that, in order to determine the attribution of wrongful acts in peace operations, the Organisation “has been guided by the principle of command and control over

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<sup>34</sup> “Finally to be noted, but perhaps of most direct relevance to the question of legal responsibility, are the NATO procedures for settlement of claims. The procedures applicable to claims arising among NATO member States are set forth in article VIII of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces of 19 June 1951. Through the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace regarding the Status of Their Forces of 19 June 1995, its provisions also apply, *mutatis mutandis*, to all States participating in the Partnership for Peace programme”, *idem*. See also art. VIII of the Model NATO SOFA, 19 June 1951, extensively analysed in chapter III, para. And in chapter IV, para.

<sup>35</sup> A/CN.4/637/Add.1, p. 10.

<sup>36</sup> *Ibidem*, p. 13.

<sup>37</sup> *Ibidem*, pp. 13-14.

the operation or the action in question”.<sup>38</sup> As it will be explained in detail in chapter III, the issue of command and control is separate from that of the legal status of the entity whose conduct is in question. If one considers national forces contributed to a UN mission as subsidiary organs of the Organisations, attribution under the law of international responsibility should operate under art. 6 DARIO (i.e. attribution of conduct of an organ of the Organisation). By contrast, if one deems national troops are organs seconded to the Organisation, attribution should follow art. 7 DARIO (i.e. attribution of conduct of seconded organs), and the ‘effective control’ test would apply.

As to the issue of command and control, identifying who is the actor (whether a TCC or the UN) that is exercising command and control is a matter of fact and may have nothing to do with the legal status of the organ in question. Furthermore, in its observations to the ILC, the UN substantially refused to acknowledge the principle of full reparation, underlying that in peace operations reparation is generally limited to compensation and that several limitations to compensation are admissible and justified due to financial constraints and to the very nature of these operations.<sup>39</sup>

As far as the European Union is concerned, its observations submitted to the ILC showed a limited interest to participate in the creation of the rules on attribution and, while acknowledging the existence of the debate on the criterion of ‘effective control’, the EU did not express its view on the issue.<sup>40</sup> The Organisation rather preferred to highlight the strengths of the EU regime of responsibility, noting that the “European Union’s institutions are fully accountable *vis-à-vis* each other and European Union member States for acts and failure to act”.<sup>41</sup> It also added that, “the Union does not invoke

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<sup>38</sup> *Ibidem*, p. 10.

<sup>39</sup> *Ibidem*, pp. 29-30. For a more detailed analysis of the limitations and their rationale see *infra* chapter IV.

<sup>40</sup> “Regardless of the merits of the disagreements, the question must be asked whether the international practice is presently clear enough and whether there is identifiable *opinio juris* that would allow for the proposed standard of the International Law Commission (which thus far has not been followed by the European Court of Human Rights) to be codified in the current draft. There is no doubt that this remains a controversial area of international law, in relation to which one can expect a steady stream of case law not only from the European Court of Human Rights, but also from domestic courts, in addition to voluminous academic writings”, A/CN.4/637, p. 22.

<sup>41</sup> *Ibidem*, p. 23.

jurisdictional immunity when European Union acts are challenged by private parties, as long as this is done in European Union courts”;<sup>42</sup> however, the latter statement does not apply in the case of Common Foreign and Security Policy actions (i.e. EU peace operations).<sup>43</sup>

Even if subsequent to the adoption of the DARIO, it is worth considering also the position expressed by the EU during the negotiations concerning its accession to the ECHR. The 2013 Draft Explanatory Report to the Agreement on the Accession of the European Union to the ECHR expressed for the first time the EU position on the rules on attribution of conduct in the following terms

Under EU law, the acts of Member States or of persons acting on their behalf implementing EU law, including decisions taken under the Treaty on the European Union [...] and the Treaty on the Functioning of the European Union [...] are attributed to Member States. Conversely, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf are attributed to the EU in whichever context they occur, including with regard to matters related to the EU common foreign and security policy.<sup>44</sup>

In sum, even if the Accession Agreement has not entered into force, and most likely never will, this statement expresses very clearly the EU *opinio* on the matter. Consequently, we can conclude that also the EU seems to have eventually rejected the rule on attribution of conduct enshrined in the DARIO.

The state of the art of the responsibility of international organisations is thus characterised by a significant asymmetry between the rules and principles elaborated in the DARIO and the practice, or sometimes the total

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<sup>42</sup> *Idem*.

<sup>43</sup> On EU operations see Roscini, “L’art. 17 del Trattato sull’Unione Europea e i compiti delle Forze di pace”, in Ronzitti (ed.), *Le Forze di Pace dell’Unione Europea*, Rubettino, 2005, pp. 49-79; Webber, “The Common Security and Defence Policy in a Multilateral World”, in Koutrakos (ed.), *European Foreign Policy. Legal and Political Perspectives*, Edward Elgar, 2011, pp. 205-234; Naert, “The International Responsibility of the Union in the Context of its CSDP Operations”, in Evans-Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives*, Hart, 2013, pp. 313-338; Spagnolo, *L’attribuzione delle condotte illecite nelle operazioni militari dell’Unione Europea*, Editoriale scientifica, 2016.

<sup>44</sup> *Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe*, 47+1(2013)007, 2 April 2013, art. 21a.

lack of practice. These unresolved tensions contribute to portraying the image of an ‘international responsibility *à la carte*’, where the most relevant international organisations operating in the context of peace operations choose to apply only some of the principles and follow selective rules governing international responsibility. NATO recognises its international legal personality, while dismissing its international responsibility for wrongful actions carried out by NATO forces. The UN does not apply the article that was precisely designed to regulate attribution of conduct in peace operations (namely art. 7 DARIO on seconded organs), nor the general principle of full reparation, while it maintains that UN Forces are transformed in subsidiary organs. The EU has elaborated its own ‘rule’ on attribution following to the adoption of the DARIO.

The divide between the rules supposedly applicable and the practice are further deepened by the concrete difficulties of holding an international organisation responsible under international law due to the lack of adjudication mechanisms, combined with the immunity issue. The growing role of international organisations characterised by the significant shift of powers described above is thus not accompanied by the development of effective mechanisms to implement their international responsibility.

This gap has had at least two evident consequences. On the one hand, growing attention has been paid to alternative responsibility regimes, namely accountability and liability. On the other hand, the lack of implementation mechanisms to invoke the responsibility of international organisations has pushed individuals affected by the exercise of powers of organisations conducting peace operations to turn to domestic jurisdictions (and regional courts of human rights). As a result, in the last 15 years we have witnessed a significant increase in national case law concerning the responsibility of States participating to peace operations.

The resort to domestic jurisdiction and the consequent focus on the responsibility of TCCs has brought about a sort of ‘legal nonsense’ that deserves some attention, with particular reference to the UN. Due to UN immunity from domestic jurisdiction and considering that no international

courts or tribunals have jurisdiction over the Organisation, UN responsibility has never been adjudicated by national or international courts. By contrast, States participating in UN peace operations have been condemned for breaches of international obligations, when the wrongful act has been deemed attributable to them. In sum, the UN maintains to be internationally responsible for wrongful acts occurred in UN-led peace operations, but no mechanisms are available to injured parties to implement this responsibility. Moreover, when individuals resort to domestic courts to adjudicate international responsibility for wrongful acts occurred in peace operations and seeking redress for the damage suffered, Contributing States are the sole actors to bear international responsibility.

This focus on the international responsibility of contributing States produces a further asymmetry: the uneven distribution of responsibility between TCCs. Not all domestic legal systems are equally accessible, for example due to language difficulties or procedural constraints. Not all troop contributing States are bound by the same international rules or are parties to regional human rights instruments. As a result, some TCCs are *de facto* more 'internationally responsible' than others. By way of example, the UK and the Netherlands have been condemned several times before their domestic courts, as well as before the Strasbourg court, for violations occurred in Bosnia Herzegovina, Afghanistan and Iraq, while other coalition partners non-party to the ECHR have avoided similar judgments, even though they might have been involved in the same facts.<sup>45</sup> One may also think of the recent case of

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<sup>45</sup> House of Lords, Appeal and cross appeal judgment, *Attorney General v Nissan*, UKHL 3, 11 February 1969; ECtHR, Grand Chamber, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos 71412/01 and 78166/01, Admissibility Decision, 2 May 2007; District Court of The Hague, *Mothers of Srebrenica et al. v the Netherlands and the United Nations*, RDBH:A8748, 16 July 2014; ECtHR, Grand Chamber, *Al Skeini et al. v the United Kingdom*, no. 55721/07, Judgment, 7 July 2011; ECtHR, Third Section, *Stiching Mothers of Srebrenica et al. v the Netherlands*, no. 65542/12, Decision, 11 June 2013; Court of Appeal of the Hague, *Nuhanović v the Netherlands*, LNJ: BR5388, 5 July 2011; Supreme Court of the Netherlands, *Nuhanović v the Netherlands*, 12/03324 LZ/TT, 6 September 2013; House of Lords, *Al-Jedda v Secretary of State for Defence*, UKHL 58, 12 December 2012; England and Wales High Court, Queen's Bench Division, *Mohammed et al. v Secretary of State et al.*, EWHC 1369, 2 May 2014; Court of Appeal, *Secretary of State v. Mohammed et al.*, EWCA 3846, 30 July 2015; ECtHR, Grand Chamber, *Hassan v. the United Kingdom*, no. 29750/09, Judgement, 16 September 2014; ECtHR, Grand Chamber, *Jaloud v. the Netherlands*, no.

the lawsuit brought before US Courts claiming the responsibility of the UN for the epidemic outbreak in Haiti.<sup>46</sup> While it may appear at this time as mere speculation, nonetheless many would agree with the assumption that if the wrongful conduct had been carried out by a European TCC, and not by the UN Nepal contingent, we would have probably seen some domestic judgments dealing with the international responsibility of the sending State (potentially followed by subsequent Strasbourg case law). To date none such lawsuit has been reported against the State of Nepal.

In conclusion, it seems urgent to find an answer to the issue highlighted by Eagleton some forty years ago, that still appears very relevant today. While its original focus was mainly on the responsibility of the UN, Eagleton's leading question can equally extend to all international organisations

One may therefore properly ask whether the United Nations should be adapted so as to fit into the usual procedures [of international responsibility], or whether new procedures need to be developed to fit the unusual status of the United Nations.<sup>47</sup>

In order to offer a contribution in this regard, the present research will now analyse the other responsibility regimes that come into question in peace operations and will devote its final part to the study of available remedies and to some hypotheses to develop more effective ones.

### **3. Accountability: looking for a general definition**

Accountability is generally defined as the duty to account for the

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47708/08, Judgement, 20 November 2014.

<sup>46</sup> United States District Court Southern District of New York, *Georges et al. v United Nations et al.*, n. 13-cv-7146(JPO), Opinion and Order, 15 January 2015; United States Court of Appeals for the Second Circuit *Georges et al. United Nations et al.*, n. 15-455-cv, Judgment, 18 August 2016.

<sup>47</sup> Eagleton, *supra* note 30, at p. 402.

exercise of the powers entrusted to a given entity.<sup>48</sup> It involves the entity's justification towards other actors that will be assessed against certain standards, where the failure of the entity to live up to the standards in point could result in some forms of sanctions.<sup>49</sup> In more general terms, it has also been described as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences".<sup>50</sup>

The concept has a twofold meaning: it is understood as the duty of an entity *to give account* of the exercise of its powers *vis à vis* others, and as the possibility for other actors *to hold to account* an entity for the exercise of its powers.<sup>51</sup> The first aspect (to give account) concerns a general obligation for the subject in point to grant access to information and to provide for reporting mechanisms. One may think about, for example, the right/duty to access to information in environmental matters stipulated in the Aarhus Convention<sup>52</sup>; the monitoring activities of the Secretary General over several aspects of UN peacekeeping missions, such as the implementation of the measures on sexual exploitation and abuse in peace operations,<sup>53</sup> the duty to report periodically to the Secretary General imposed on Coalition of States authorised by the

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<sup>48</sup> ILA Report, *supra* note 4, p. 5.

<sup>49</sup> Grant-Keohane, "Accountability and Abuses of Powers in World Politics", in *American Political Science Review*, vol. 99, 2005, pp. 29-43; see also Curtin-Nollkaemper, "Conceptualising Accountability in International and European Law", in *Netherlands Yearbook of International Law*, vol. 36, 2005, pp. 3-20, in particular at p. 4.

<sup>50</sup> Bovens, "Analysing and assessing Accountability: A conceptual Framework", in *European Law Journal*, vol. 13, 2007, pp. 447-468, at p. 450.

<sup>51</sup> Curtin-Nollkaemper, *supra* note 49, in particular at p. 7.

<sup>52</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (so called Aarhus Convention), 25 June 1998, Art. 3, para. 2: "Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information".

<sup>53</sup> With Resolution 57/306, 22 May 2003, the General Assembly has requested the SG to issue an annual report on the implementation in peace operations of the *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (ST/SGB/2003/13). Since 2006 the SG has been conducting this monitoring activity publishing a detailed report every year (last published A/71/97, 23 June 2016); for a doctrinal analysis on the measures to combat sexual exploitation and abuse in POs see: Ndulo, "The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions", in *Berkeley Journal of International Law*, vol. 27, 2009, pp. 127-161; Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility Under International Law*, Brill, 2014.

Security Council to conduct chapter VII military operations.

The second and more stringent meaning of accountability (to hold to account) is not limited to access to information, but has rather to be regarded as a process that enables a subject to verify whether the powers entrusted to a given entity have been exercised in compliance with applicable standards, with the possibility to attach certain consequences to a failure to respect these standards, which are typically found in compliance mechanisms established in diverse realms of international law. For example, in environmental matters we can mention the Compliance Committee established by the Aarhus Convention, cited earlier;<sup>54</sup> we can think of compliance mechanisms instituted by several human rights treaty instruments as the Human Rights Committee of the International Covenant for Civil and Political Rights or the European Committee of Social Rights of the Council of Europe. Other interesting examples of compliance mechanisms are constituted by the creation of the UN Ombudsperson to oversee the Security Council's targeted sanctions,<sup>55</sup> and of the Ombudsperson established in Kosovo in the early phase of UNMIK deployment, later *de facto* substituted by the UNMIK Human Rights Advisory Panel, and of the parallel Human Rights Advisory Committee of EULEX.<sup>56</sup> Also there exist examples of *ad hoc* accountability mechanisms such as commissions of inquiry or inspections panels.<sup>57</sup>

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<sup>54</sup> *Supra*, note 52.

<sup>55</sup> SC/RES 1730 (2006) and SC/RES 1904 (2009), see Klabbers, "Self-Control: International Organisations and the Quest for Accountability", in Evans-Koutrakos (eds), *The International Responsibility of the European Union. European and International Law Perspectives*, Hart, 2013, pp. 75-99.

<sup>56</sup> The first mechanism was established in March 2006 by the Special Representative to the SG of the UNMIK mission (UNMIK/REG/2006/12) to address human rights violations complaints filed by individuals against UNMIK, the panel that has now terminated its mandate was entrusted with limited powers, namely to receive the complaint, carry out investigations and issue a report with recommendations to be submitted to the SG. The Panel had no power to grant compensation nor any other remedy to the victims, nor to adjudicate the responsibility of the Organisations. Similar considerations apply to the correspondent EU mechanisms that is to be considered to some extent the successor of the UN mission and its related compliance mechanism. For further considerations see *infra*, chapter IV.

<sup>57</sup> See the considerations of the Council of Europe, Committee on Legal Affairs, *supra* note 4, see also Dekker, "Accountability of International Organisations: An Evolving Legal Concept?", in Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations*, Intersettia, pp. 21-36.

### 3.1 *The origins and evolution of accountability*

The origins of the notion of accountability date back to the early 19th century, precisely to the American conception of the civil servant elaborated following the so-called ‘Jacksonian revolution’. According to the meaningful shift brought about by the innovative ideas of the American President Andrew Jackson, civil servants were to be considered as individuals working for the government and not privileged officials *legibus soluti*, as happened, by contrast, in most European States. As a consequence of their role, civil servants, had to be accountable *vis à vis* their citizens. This ideology has deeply influenced the relationships between the subjects exercising governmental authority and the citizens in whose name that authority was exerted, paving the way for what has been later called ‘democratic governance’.<sup>58</sup>

Accountability has gained great momentum starting from the 1990's, when it has begun to influence the general discourse on responsibility, first in domestic legal systems and later at the international level. The concept was first employed in the context of national democratic governance. In this regard, accountability indicated the mechanisms a government should implement for its action to be transparent, efficient and responsive towards its citizens.<sup>59</sup>

Since the beginning of the present century, the term has started to expand far beyond national borders and has garnered the attention of scholars and practitioners at the international level. More precisely, the notion has been initially employed in the field of international economic institutions, namely the International Monetary Fund, the World Bank and the World Trade Organisation and later extended to international organisations in general.<sup>60</sup>

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<sup>58</sup> Hafner, “Accountability of International Organisations: A Critical View”, in St. John Macdonald-Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden, 2005, pp. 585-630.

<sup>59</sup> See Curtin-Nollkaemper, *supra* note 49; Mulgan, “‘Accountability’: An Ever Expanding Concept?”, in *Public Administration*, vol. 78, 2000, pp. 555-573.

<sup>60</sup> Gellert, “L’Accountability, un Concept Adapté aux Organisations Internationales?”, in *Revue Belge de Droit International*, vol. 2, 2010, pp. 476-497, in particular at p. 477; Dekker, “Accountability of International Organisations: An Evolving Legal Concept?”,

The term accountability, despite its domestic origins, is now mainly used in relation to international organisations and, as will be shown, is generally preferred to the notion of responsibility. This is particularly evident when looking at authoritative statements and reports such as the International Law Association ‘Report on the Accountability of International Organisations’ or the Council of Europe Draft Resolution on ‘Accountability of International Organisations for Human Rights Violations’.<sup>61</sup>

The need to develop forms of accountability of international organisations was determined by the shift in global governance characterised by the increasing transfer of powers by States to international or intergovernmental organisations. The growing powers entrusted to these entities, and their capacity to impact on the life of States and individuals were not counterbalanced by the democratic exercise of these powers. Hence, the demand for accountability has grown together with the growing role played by international organisations. Moreover, as noted by some authors, the “growing awareness of the internal pathologies and ideological biases of the most dominant international institutions”<sup>62</sup> has led to a severe legitimacy crisis.<sup>63</sup> Against this ‘crisis’, Peters notes ‘the new buzzword’ for legal scholars and practitioners alike is accountability.<sup>64</sup> The growing interest around the concept of accountability in the international law debate is also to be understood as an attempt to supersede a major shortcoming of the ‘functionalist approach’. Functionalism has proved to be too limited in terms of accountability as it focuses mainly on the relationship between the

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*supra* note 57, at p. 22; KLabbers, “Making Sense of Accountability in International Institutional Law: An Analysis of the Final Report of the ILA Committee on Accountability of International Organizations from a Conceptual Legal Perspective”, in *Netherlands Yearbook of International Law*, vol. 36, 2007, pp. 83-118.

<sup>61</sup> Council of Europe, Committee on Legal Affairs and Human Rights, *Accountability of International Organisations for Human Rights Violations*, *supra* note 4.

<sup>62</sup> Collins-White, “Moving Beyond the Autonomy-Accountability Dichotomy: Reflections on Institutional Independence in the International Legal Order”, in *International Organizations Law Review*, vol. 7, 2010, pp. 1-8, at p. 2.

<sup>63</sup> See also Peters, “International Organizations and International Law”, in Katz Cogan-Hurd-Johnstone (eds), *The Oxford Handbook of International Organizations*, Oxford University Press, 2016, pp. 34-59, at p. 41 ff.; the author refers to the core example of the legitimacy crisis the ICC is facing, being considered by many developing Countries as ‘neocolonial instruments’, *ibidem*, p. 42.

<sup>64</sup> Peters, *supra* note 63, at p. 42.

organisation and its member States (also called ‘shareholders’)<sup>65</sup>, whereas the interest of individuals and third States (also referred to as ‘stakeholders’)<sup>66</sup> affected by the actions of international organisations where not taken into account.

Two main international law theories have given particular weight to the concept (and the role) of accountability of international organizations, namely global constitutionalism and global administrative law.<sup>67</sup> Where the former underscores the need for the development of additional accountability forums available to aggrieved individuals,<sup>68</sup> while the latter focuses on mechanisms to be designed to ensure accountability without unduly compromising efficacy.<sup>69</sup>

The discourse on accountability has certainly the merit of seeking to fill the legal gap created by the growing powers exercised by international organisations combined with the growing role of the individual in international law.<sup>70</sup> However, as to the proposed solutions to actually fill this gap some concerns immediately arise. Even as one would wonder what accountability actually implies for the organisations and for those asking for

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<sup>65</sup> *Idem.*

<sup>66</sup> *Idem.*

<sup>67</sup> Kingsbury-Krisch-Stewart, “The Emergence of Global Administrative Law”, in *Law and Contemporary Problems*, vol. 68, 2005, pp. 15-61; Kingsbury-Casini, “Global Administrative Law Dimensions of International Organizations Law”, in *International Organizations Law Review*, vol. 6, 2009, pp. 319-358; Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, in *European Journal of International Law*, vol. 20, 2009, pp. 23-57; Cassese, “Administrative Law Without the State? The Challenge of Global Regulation”, in *New York University Journal of International Law and Politics*, vol. 37, 2005, pp. 663-694; Peters, “Are we Moving towards Constitutionalization of the World Community?”, in Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press; Klabbers, *The Constitutionalization of International Law*, Oxford University Press, 2009; Peters, “Humanity as the Alpha and Omega of Sovereignty”, in *European Journal of International Law*, vol. 20, 2009, pp. 513-544.

<sup>68</sup> See for example Peters, “International Organizations and International Law”, *supra* note 63.

<sup>69</sup> Kingsbury-Krisch-Stewart, *supra* note 67, at p. 18.

<sup>70</sup> As noted by Peters, while the traditional functionalist approach does not deny that organisations should serve human needs and interest, it however considered that individuals’ need shall be ‘mediated’ by their States, that are members to a given organisation. This need for ‘State mediation’ results in a lack of democratic accountability of international organizations to natural persons. Especially when considering that actions and omissions of many organisations do not necessarily impact on nationals of member States. See Peters, “International Organisations and International Law”, *supra* note 63, at pp. 45-46.

accountability, one would first have to resolve the question of a precise meaning of accountability.

As noted earlier, accountability as a non-legal concept originates from the North American tradition of democratic governance of the early 19<sup>th</sup> century and is today utilized in international law to describe the need for international organisations to give account for the exercise of their powers. However, the term lacks a generally shared definition in international law and notably does not translate in most non-Anglo-Saxon languages.<sup>71</sup> This suggests that the notion has been exported from specific socio-political contexts and, despite being generally welcomed in the international legal discourse, we would find significant difficulties in systematising the concept into most legal systems, especially of Roman-Germanic legal traditions.<sup>72</sup>

The main effort to systematise the notion of accountability of international organisations was made in 2004 with the, already mentioned, ILA Report on Accountability of International Organisations.<sup>73</sup> The thorough analysis carried out by the ILA begins with a statement that has had much ado: “power entails accountability, that is the duty to account for its exercise”.<sup>74</sup> The Report provides for a very articulated, though quite unsatisfying analysis. Accountability – in the ILA’s view – can take four different forms: legal, political, administrative and financial.<sup>75</sup> At the same time, three levels of accountability exist: i) accountability understood as both internal and external scrutiny and monitoring; ii) tortious liability for damages resulted from conducts constituting a breach of internal law rules and iii) international responsibility (i.e. responsibility for internationally wrongful acts).<sup>76</sup>

In sum, the ILA presented accountability as an overarching concept that includes all forms of responsibilities that may be entailed by international

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<sup>71</sup> *Infra*, para. 3.1.

<sup>72</sup> ILA Report; Hafner, “Accountability of International Organizations”, *ASIL Proceedings*, vol. 97, 2003, pp. 236-240; Hafner, “Accountability of International Organizations”, *supra* note 58, in particular at p. 586; Mulgan, *supra* note 58, at p. 555.

<sup>73</sup> ILA Report.

<sup>74</sup> ILA Report, at p. 5.

<sup>75</sup> *Idem*.

<sup>76</sup> *Idem*.

organisations. Some aspects of this construction appear particularly questionable as, for example the notion of liability that is defined ‘tortious’ and derives from breaches of international law. As will be illustrated below, the generally accepted notion of liability excludes an inquiry on the lawfulness of the conduct and rather focuses on the damage as the constitutive element.<sup>77</sup> A form of responsibility stemming from a breach of international law rules is, on the contrary, international responsibility, as codified in the Draft Articles of the International Law Commission, where damage is not an essential element.<sup>78</sup> Moreover, as proposed in the ILA Report, accountability results in a fragmentation of discrete notions, including different forms and levels. As a result, instead of clarified, the concept looks more opaque and seemingly too complicated to be applied practically.

It also appears questionable that accountability should be understood as an umbrella term that includes several forms of responsibility. As it has been already pointed out in the previous paragraphs, it would seem more accurate to maintain that accountability, liability and international responsibility (of States and international organisations) describe separate regimes of responsibility. In our opinion, the notion of accountability is too vague and unfamiliar to most domestic legal systems to rise to a broad, all-encompassing category of law. Despite the ILA’s endorsement of this term in its codified articulation, we find no choice but to reject its extended, ambitious legal implications on rather firm ground, in place of the more measured approach, as we shall see. This chapter will thus consider international responsibility, accountability and liability as separate, though interconnected, responsibility regimes.

### *3.2 Accountability in peace operations*

As already explained, the notion of accountability has been fostered

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<sup>77</sup> *Infra*, para. 4 ff.

<sup>78</sup> *Supra*, para. 2 ff.

and generally welcomed by international lawyers and scholars. For example, some authors have noted how accountability enables the discourse on responsibility of international law actors to move beyond the traditional concept of international responsibility and liability of States and international organisations.<sup>79</sup> In the opinion of other scholars, this evolution is particularly evident with regard to international responsibility of international organisations, an area where, as already shown, the ILC's work represents more an example of progressive development rather than of codification of international law.<sup>80</sup> Moreover, what are the very legal obligations incumbent upon international organisations is not clearly defined, and thus it would appear particularly difficult to state that an internationally wrongful act has entailed the responsibility of an organisation.<sup>81</sup> In this context, it has been pointed out that it would prove more effective to regard a conduct as 'undesirable' rather than as 'unlawful'.<sup>82</sup> As a consequence, accountability would have the merit of pursuing a broader aim compared to the limited obligations stemming from international responsibility; namely, it would include various instruments of control of public powers and thus it would represent a useful tool to limit abuses of power.

It has also been underscored that accountability would leave scope to the role of individuals that would have access to accountability mechanisms, whereas tools of international responsibility, especially of international organisations, are generally precluded to them.<sup>83</sup> In fact, accountability would not be as limited in scope as international responsibility and the related accountability mechanisms would go beyond sole judicial review, superseding most of the procedural hurdles encountered by claimants before national or international courts, such as jurisdiction, immunities, legal standing, *etc.*<sup>84</sup> In this sense, some theories has conceptualised accountability

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<sup>79</sup> Curtin-Nollkaemper, *supra* note 49, at p. 9.

<sup>80</sup> Peters, "International Organisations and International Law", *supra*, at p. 63. Dekker, "Accountability of International Organisations: An Evolving Legal Concept?", *supra* note 57.

<sup>81</sup> Klabbers, "Self-Control", *supra* note 55.

<sup>82</sup> *Ibidem*, at p. 97.

<sup>83</sup> Curtin-Nollkaemper, *supra* note 49.

<sup>84</sup> *Idem*.

as a ‘social relationship’ that over time will produce the effect of learning and socialisation, rather than of sanctioning the organisation for an unlawful action.<sup>85</sup>

Filling the conceptual or normative gap in terms of responsibility of international organisations is not the only reason that explains the openness to embrace the notion of accountability shown by international organisations themselves. Accountability, in fact, may provide greater freedom and less restriction than international responsibility. Since accountability aims at measuring the conduct of international organisations against generic applicable standards, as a consequence it may not require the precise identification of the rules international organizations are bound by. Moreover, the failure to live up to the applicable standards does not have the same legal consequences prescribed under the law of international responsibility in two main contexts. First, the implementation of accountability mechanisms does not depend on an inquiry into the wrongfulness of the conduct of the organisation, that is to say whether there was breach of a norm of international law.<sup>86</sup> Second, accountability does not imply any right of the potential injured parties – be that of a State or an individual – to an effective remedy, in order to obtain redress of damage suffered.

Moreover, we should not forget that this softer form of responsibility that accountability prescribes depends almost exclusively on the good will and on the good faith of the organisations under scrutiny. In other words, as Klabbers has described, accountability of international organisations manifests in a form of ‘self-control’ or ‘self-regulation’.<sup>87</sup> So, although it is true that public awareness and diplomacy can influence the development of

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<sup>85</sup> The discourse on accountability as a ‘social relationship’ focuses mainly on the role of accountability mechanisms developed by financial institutions, see Ebrahim-weisband (eds), *Global Accountabilities: Participation, Pluralism, and Public Ethics*, Cambridge University Press, 2007, see also Klabbers, “Self-Control”, *supra* note 55.

<sup>86</sup> Few mechanisms constitute an exception to this construction, namely the above mentioned UNMINK HRAP and EULEX HRRP, where it was clearly spelled out which was the normative framework against which the action of the organisation will be assessed, identified in the main human rights treaty instruments, see *infra* chapter IV.

<sup>87</sup> Klabbers, “Self-Control: International Organisations and the Quest for Accountability”, *supra* note 55; See also *id.*, “Unity, diversity, accountability: The Ambivalent Concept of International Organisation”, in *Melbourne Journal of International Law*, vol. 14, 2013, pp. 1-22.

accountability instruments, international organisations still have a wide scope to turn a blind eye and a deaf ear to instances of accountability. As it concerns public awareness more specifically, accountability not only depends on the will of States and international organisations to develop appropriate instruments of responsibility, but it is also deeply influenced by the strength of public opinion itself and by the echo that a given event may create.

The complex interplay between all these factors in the realm of accountability may lead to quite uneven, unfair results. To consider an example of vastly differing responses to similar situations, one need only compare the response of the public opinion to the UN failure to protect civilians during peacekeeping missions in Rwanda in 1994 to that in Bosnia just two years later in 1996.

Recall, on the one hand, the failure of the '*Mission des Nations Unies pour l'Assistance au Rwanda*' (MINUAR) to protect civilians from the Rwanda genocide in 1994, and in particular to the case of the school in Kigali that was under the responsibility of the UN Belgium contingent, where about three thousands Tutsi sought refuge. On the other hand, we can recall the dreadful events of the fall of Srebrenica in 1996 and, in particular, of the Potocari compound, which was at the time under the responsibility of the Dutch Battalion seconded to 'United Nations Protection Force' (UNPROFOR). In Rwanda, the Belgian State decided to unilaterally withdraw all its troops contributed to the UN Mission in the worse days of the genocide attack. Accordingly, the contingent stationed in Kigali left the school- compound, which had offered a safe shelter to some 3000 Tutsi. Few hours after the Belgian withdrawal, almost all the people present in the compound, left without protection, were killed by the Hutu.<sup>88</sup>

The facts in Srebrenica were characterised by a higher level of complexity, due to the articulated chain of command and control through which the decisions were taken in that emergency situation. For the purpose of the present analysis, suffice it to say that the UN and the Dutch government

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<sup>88</sup> See the detailed factual background emerging from the case *Mukeshimana-Ngulinzira et al. v Belgium and ors*, Court of first instance of Brussels, RG No 04/4807/A, 07/15547/A, 8 December 2010. See also *infra*, chapter III, para. 6 ff.

decided to evacuate the area, afterwards the safe area of Srebrenica fell in the hands of Mladic's troops (the commander of the Army of Republica Srpska). The Potocari compound was abandoned as well and the Muslim refugees, who were sheltered there, were handed over to General Mladic. After the departure of UN forces, most of them were executed by Mladic's troops and all the men were separated from the rest and then summarily killed, in what was later ascertained as the first genocide on the European territory after World War II.<sup>89</sup> Against these similar factual backgrounds, the reaction of the public opinion and the individual demand for justice have been very different.

In terms of accountability, only following the Balkan tragedy have the UN and the Netherlands been urged to account for what happened. The UN issued a Srebrenica Report in 1998 apologizing for not having being able to prevent those events.<sup>90</sup> The Dutch government was forced to resign due to the scandal generated in the public opinion by the decision to leave the refugees without effective protection.<sup>91</sup> Associations and foundations were created by the relatives of the victims to pursue justice before national and international courts, both against the State and the UN. As a consequence, several proceedings were initiated leading to ground-breaking rulings in term of international responsibility of the State.<sup>92</sup>

By contrast, the Kigali case, involving the responsibility of the Belgian government (and of the UN to a certain extent), had generated no such reaction. No Reports or Security Council Resolutions were issued to give account of the actions that contributed to that tragedy. No government's resignation was reported, nor judicial proceedings initiated by victims' families, with the sole exception of the *Mukeshimana-Ngulinzira* case in

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<sup>89</sup> ICTY, Trial Chamber, *Prosecutor v Tadic*, case n. IT-94-1-T, 7 May 1997; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports* 2007, p. 43.

<sup>90</sup> *Report of the Secretary General pursuant to General Assembly Resolution 53/35 'The Fall of Srebrenica'*, A/54/549 (1999). See also Nollkaemper, "Multi-level Accountability: A Case Study on Accountability in the Aftermath of the Srebrenica Massacre", in Broude-Shany (eds), *The Shifting Allocation of Authority in International Law*, Hart, 2008, pp. 345-367, at p. 348.

<sup>91</sup> Nollkaemper, "Multi-level Accountability", at p. 348.

<sup>92</sup> See *infra*, chapter III.

2003, that was later discontinued, probably following *ex gratia* payments offered by the government to the claimants.<sup>93</sup>

It is thus evident that accountability, both at the domestic and at the international level, depends significantly on civil society awareness and on the pressure that public opinion is able and willing to put on the responsible entities, whether they are national governments or international organisations. In other words, accountability does not arise simply from the fact that the exercise of powers by a State or an international organisation has caused a wrongful outcome (notwithstanding whether the conduct also constituted a breach of international law). Accountability, in the sense of holding to account, rather refers to a series of *ex post* mechanisms that have to be ‘activated’ from stakeholders. By contrast, liability arises from the simple fact that a damage has been caused, while international responsibility is entailed by the breach of any international obligation attributable to the State or the Organisation in the absence of circumstances precluding wrongfulness. The injured party would indeed trigger the available judicial or extra-judicial mechanisms in order to obtain some form of reparation, but responsibility and liability arise independently of the invocation.

Differently, accountability – i.e. the possibility to hold a subject accountable in the exercise of its powers – would depend, first, on the awareness of the stakeholders involved. Second, it would depend on the good will of States and international organisations to develop accountability mechanisms to enable stakeholders to hold them accountable.<sup>94</sup> The pressure put on the UN for the events in Srebrenica has forced the Organisation to issue a report and later a resolution. Similarly, the critiques received during the Interim Administration of Kosovo have guided the decision of the UN to establish the Human Rights Advisory Panel (HRAP); example that has been followed by the European Union by creating the EULEX Human Rights

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<sup>93</sup> *Mukeshimana-Ngulinzira et al. v Belgium et al.*, *supra* note 88, see the comment to the judgement by Ryngaert in *Oxford Reports on International Law*, ILDC 1604 (BE 2010), and of the same author “Apportioning Responsibility Between the UN and Member States in UN Peace-support Operations”, in *Israel Law Review*, vol. 45, 2012, pp. 151-178.

<sup>94</sup> For the understanding of ‘stakeholders’ in this context see *supra* note 66.

Review Panel.<sup>95</sup> However, the example of the HRAP has never being replicated in any other UN peace operation. Moreover, in the case of the epidemic outbreak in Haiti, the UN has denied any form of accountability and had even refused to establish the local review board that is generally created in UN peace operations to handle compensation claims of private law character. The UN has justified its denial by saying that “considerations of these claims would necessarily include a review of political and policy matters” and thus are precluded under section 29 of the General Convention on the Privileges and Immunities of the UN.<sup>96</sup> It thus seems that if an international organisation does not acknowledge its own accountability there will be no accountability.

In conclusion, some concerns can be raised when referring to the accountability of international organisations. The term accountability was forged at the domestic level and it is strictly linked to the discourse on democratic governance, namely the duty of public servants to give account of the powers they exercise to the citizens in whose name they are operating. This ‘soft form’ of responsibility, mainly of political nature, can prove to be particularly meaningful in the relationship between a State and the individuals that may be affected by the exercise of State powers. Citizens have powerful instruments to hold a State accountable, such as their vote, their capability to generate public opinion, and their right to protest. Even aliens can demand some sort of accountability, especially in the context of international investments and commerce. One may think, for example, of the decision of some Dutch companies to withdraw from a contract with the government of Israel concerning housing construction, considering that those buildings would have eventually contributed to the Israeli’s unlawful policy of land-grabbing in the occupied territories.<sup>97</sup> Furthermore, political accountability at

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<sup>95</sup> See *infra*, chapter III.

<sup>96</sup> *Letter of the United Nations Under Secretary General for Legal Affairs*, 21 February 2013, available at <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf>.

<sup>97</sup> The news was reported on the website of the ‘Shares project’ run by the University of Amsterdam and are available at <http://www.sharesproject.nl/news/dutch-government-urges-local-company-no-to-participate-in-east-jerusalem-project/> and at <http://www.sharesproject.nl/news/dutch-company-terminates-involvement-in-project-in-east-jerusalem-in-view-of-possible-conflict-with-international-law/>.

the national level is just one of the forms of responsibility that natural and legal persons can resort to against State powers. Civil and administrative courts, together with administrative procedures, are available in most rule-of-law countries to challenge acts and omission of States and to seek compensation for the damages suffered.

As it concerns accountability between States, it belongs to the very nature of international relations and ultimately to international law itself, which is informed by the principle of sovereign equality. Diplomatic pressure, countermeasures, retaliations, and so on, one can assume that they all participate in the family of accountability of States *vis à vis* other States. Besides, States can always resort to a plurality of instruments to resolve cases that may arise between them, from mediation to international dispute resolution, either before the international courts or through arbitration.

When it comes to the relationship between international organisations and aggrieved natural persons, accountability seems to have a much more limited reach. Accountability of international organisation does not regulate relationships between equal subjects of international law, and this disparity risks to affect the functioning and effectiveness of accountability. An international organisation cannot neither be pushed by the vote of its citizens – for it has none – nor be influenced by the choice of foreign investors as could a State. While member States, and sometimes other international organisations<sup>98</sup>, may have a say in accountability, thereby triggering accountability mechanisms, more than likely such an imposition would pose a conflict of interests.<sup>99</sup> It is unlikely, for example, that a NATO State would question the Organisation's accountability for the latter's actions in a given operation that caused severe damages to civilians, especially when the State in question has participated to that operation.

In conclusion, while the ongoing debate on accountability of international organisations is certainly contributing to a progressive filling of the legal gap

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<sup>98</sup> Council of Europe, Committee on Legal Affairs and Human Rights, *Accountability of International Organisations for Human Rights Violations*, *supra* note 4.

<sup>99</sup> See the reflections proposed by Gordon, “Due Process and the Iraq Sanctions: A Response to Devika Hovell”, *supra* note 4.

described at the outset of this analysis, nonetheless the inner shortcomings of accountability should not be underestimated.

## 1. Liability

The regime of liability is characterised by the obligation to pay compensation for the damage caused, regardless of the wrongfulness of the conduct causing the harm.<sup>100</sup> Differently from international responsibility, liability does not arise from a breach of an international obligation.<sup>101</sup> In the words of Barboza “only the material damage puts into motion the mechanisms of liability”.<sup>102</sup> While the principle of liability in the realm of tort law is a long-accepted principle in domestic legal systems, at the international level liability of States and international organisations lacks commonly shared definitions and rules. Nonetheless, from the ILC’s attempts to codify the issue and from the treaty practice of States, some general principles can be inferred.

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<sup>100</sup> Tomuschat, “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law: The Work of the International Law Commission”, in Francioni-Scovazzi (eds.), *International responsibility for Environmental Harm*, Nijhoff, 1991, pp. 37-72; Barboza, “International Liability for the Injurious Consequences of Acts Not Prohibited by International Law and Protection of the Environment”, in *Recueil des Cours*, vol. 247, 1995, pp. 291-405; Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts not prohibited by International Law: A Necessary Distinction?”, in *The international and comparative law quarterly*, vol. 39, 1990, pp. 1-26; Dupuy “À propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l’environnement” in Prieur-Lambrechts (eds), *Les Hommes et l’environnement: Quels droits pour le vingt-et-unième siècle?: Études en hommage à Alexandre Kiss*, Frison-Roche Paris, 1998, pp. 269-282; Montjoie, “The Concept of Liability in the Absence of an internationally Wrongful Act”, in Crawford-Pellet-Olleson (eds), *The law of international responsibility*, Oxford, 2010, pp. 503-513; Boyle, “Liability for Injurious Consequences of Acts not Prohibited by International Law”, *ibidem*, pp. 95-104; Fitzmaurice, “International Responsibility and Liability” in Bodansky-Brunnée-Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford, 2007, pp. 1010-1035; Tanzi, “Liability for Lawful Acts”, in *MPEPIL*, February 2013. In some less recent literature, the term liability was used to describe the obligation to “pay money in order to fulfil a contractual commitment”, but this is not the meaning referred to in the present section. See Schemers, “Liability of International Organisations”, in *Leiden Journal of International Law*, vol. 1, 1988, pp. 3-14, in particular at p. 4.

<sup>101</sup> *Supra*, para. 4 ff.

<sup>102</sup> Barboza, *supra* note 100, p. 313.

Liability in international law has been the object of a long study and a progressive codification process by the ILC. In 1978 it started its seminal project on ‘International Liability for Injurious Consequences Arising from Acts Not Prohibited by International Law’. The ILC had eventually transformed its sweeping study into two separate, though connected, reports, namely ‘The Prevention of Transboundary Damage from Hazardous Activities’ and ‘International liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities’.<sup>103</sup>

According to the structure proposed already in the late 1970s', international responsibility is entailed by any violation of international law attributable to a State, also in the absence of a material damage, that is not considered a constitutive element of international responsibility.<sup>104</sup> As a consequence, harmful outcomes of State actions or omissions not prohibited under international law were generally excluded by the regime of international responsibility, hence no protection was afforded to actors that suffered a damage resulting from a lawful conduct.<sup>105</sup> The need to fill this conceptual and normative gap was particularly evident in the context of environmental protection for hazardous activities that might cause transboundary harms, as for example, the production of nuclear energy, chemical industries with high risk of polluting effects, and outer space activities.<sup>106</sup> Considering that most of these activities are conducted by private operators, acting on the territory of a State, and not by the State itself, the

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<sup>103</sup> ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session, *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10 (A/56/10) and Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly at that session (A/61/10), *Yearbook of the International Law Commission*, 2006, vol. II, Part Two.

<sup>104</sup> Tanzi, “Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?”, in Spinedi-Simma (eds), *United Nations Codification of State Responsibility*, Oceania Publications, 1985, pp. 1-33; on the different categories of damages see Fasoli, *La riparazione dei danni immateriali nei rapporti tra Stati*, Editoria Scientifica, 2012.

<sup>105</sup> Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law”, *supra* note 100.

<sup>106</sup> Tumaschat; Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law”; Tanzi, “Liability for Lawful Acts”, all *supra* note 100.

liability regime consists essentially of obligations for the State to prevent the occurrence of harm as well as the duty to mitigate or eliminate the harmful effects that may have occurred.<sup>107</sup> In other words, the idea put forward by the ILC was to construct the liability regime not only around the obligation to compensate for the damage resulting from lawful – but harmful – acts, but also to impose on States a series of due diligence obligations. At the same time, though, the scope of these obligations had to be compatible with the free exercise by States of their sovereignty over their own territory.

The attempt of the ILC to codify international liability was inspired by three principles

- 1) every State must have the maximum freedom of action within its territory compatible with respect for the sovereign equality of other States;
- 2) the protection of the rights and interests of other States requires the adoption of measures of prevention and reparation for injury;
- 3) the innocent victim should not be left to bear his own loss.<sup>108</sup>

Probably due to the inner difficulties to reconcile such opposed tenets – coupled with the opposition of States towards the creation of complex preventive rules – the final version(s) of the Draft Articles on International Liability has never seen the light.

Despite the failure to conceptualize liability under international law, the notion has not been abandoned, on the contrary it has had some fortune both in States' treaty practice<sup>109</sup> and in the practice of international organisations, especially in the context of peace operations, as will be analysed in the following paragraphs.

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<sup>107</sup> Tanzi, "Liability for Lawful Acts".

<sup>108</sup> A/CN.4/413, paras 85-86.

<sup>109</sup> *International Convention on Civil Liability for Oil Pollution Damage*, Nov. 29, 1969; *Convention on International Liability for Damage Caused by Space Objects*, 1972, 961 U.N.T.S. 187; Article 235 of the U.N. Convention on the Law of the Sea (UNCLOS) provides that "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law", U.N. Convention on the Law of the Sea art. 235 (1), 1982.

#### 4.1 Liability and international responsibility: main differences

The distinction between liability and responsibility is not always easy to grasp, especially considering that the lines separating the two concepts tend to blur in practice. By way of example, liability has been used in the case law of the International Tribunal of the Law of the Sea (ITLOS) to indicate the obligation to pay compensation deriving from the international responsibility of a State.<sup>110</sup> Another relevant example of the confusion between the two notions can be found in the 1996 Secretary General Report on Administrative and budgetary aspects of the financing of the UN peacekeeping operations, where the ‘principle of liability’ applicable to UN operations is described in the following terms:

The *international responsibility* of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of *State responsibility* widely accepted to be applicable to international organizations that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the *international responsibility* of the State (or of the Organization) and its *liability in compensation*.<sup>111</sup>

The distinction has been criticised in scholarly writings, suggesting that it would have proven more effective to use the term liability to include all situations where obligations to compensate arise, in order to foster a more comprehensive discourse on reparation for damages under international law.<sup>112</sup> This dichotomy has also been defined ‘implausible’ upon the

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<sup>110</sup> ITLOS, Seabed Dispute Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, 1 February 2011.

<sup>111</sup> A/51/389 (1996), para. 6, italics added.

<sup>112</sup> Nollkaemper-Jacobs, “Shared Responsibility in International Law: A Conceptual Framework”, in *Michigan Journal of International Law*, vol. 36, 2012-2013, pp. 359-348, in particular at p. 414 ff.

consideration that almost all topics dealt with by the ILC in the Draft Articles on liability could have been analysed and solved through the prism of State responsibility.<sup>113</sup> While these critiques are certainly well founded, it will be demonstrated that some conceptual differences exist between these two forms of responsibility and that their implications, especially in the context of peace operations, are far from being merely theoretical.

First, international liability is not contingent on a finding of wrongfulness of the conduct that caused the damage, whereas international responsibility has never been entailed in the absence of a breach of international law. This feature may cause certain actors to prefer the regime of liability instead of international responsibility. They may accept to redress the damage caused while refusing, at the same time, any acknowledgement about the occurrence of an internationally wrongful act attributable to them, which is often the case of subjects involved in military operations.<sup>114</sup>

Second, the centrality of (material) damage in the liability regime is not mirrored in the law of international responsibility, where damage has been excluded from the constitutive elements of responsibility.

Third, reparation in the field of liability has neither the same characteristics nor the same function of reparation in international responsibility. Reparation under the law of international responsibility has to be full, this explains the primacy of the *restitutio in integrum* form of reparation, when feasible. Also in the case of compensation *per equivalente*, reparation has to be full, including both *damnum emergens* and *lucrum cessans*. The rationale of full reparation in international responsibility rests with the aim it has to pursue, namely the elimination of all the consequences of an act that is unlawful in the international legal order. In other words, reparation would be full inasmuch as it would allow the victim to eliminate

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<sup>113</sup> Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not prohibited by International Law", *supra* note 100, in particular at p. 21-22; in the opinion of the author the most valuable contribution made by the Draft Articles on Liability concerned the attempt to codify the concept of "strict liability" for environmental harm.

<sup>114</sup> *Infra*, chapter IV.

all the consequence of the illicit action.<sup>115</sup>

As it concerns liability, reparation – *rectius* compensation – is not tailored at eliminating all the consequences of an act that is not prohibited under international law, but rather at providing the injured party with some forms of indemnity. Accordingly, compensation does not have to be full and it may well be limited by several ceilings imposed by the liable party itself, as it is, for example, a well-established policy of international organisations engaging in peace operations.<sup>116</sup>

Fourth, attribution is absolutely central in the law of international responsibility, for it constitutes the so-called subjective element of responsibility, which identifies the link between the wrongful conduct and the State or the Organisation responsible. The design of attribution rules has been probably the most titanic effort of the ILC, while codifying the DARS and the DARIO. The difficulties encountered during the drafting process are also reflected in the problems faced by many national and international courts in applying those rules to the case at hand, often resulting in different – if not diametrically opposed – interpretations.<sup>117</sup>

In the case of liability, the link between the action or omission of the State and the damage occurred is not as central as in the law of international responsibility. As explained by the Special Rapporteur Barboza, for the purposes of liability it does not come into question to determine whether the conduct of private operators can be attributed to the State, that is to say if it can be considered an act of the State. The issue is rather to attribute the harmful consequences of the conduct of another subject to the State.<sup>118</sup> Thus, in the view of the ILC, attribution for the purpose of liability has a territorial character, whereby suffice it to prove that the activity causing the damage

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<sup>115</sup> Barboza, *supra* note 100.

<sup>116</sup> *Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan*, 8 August 2011, Art. VII: “Limitation of Liability of the United Nations [...]: Upon determination of liability as provided in this Agreement the United Nations shall pay compensation within such financial limitations as have been approved by the General Assembly in resolution 52/247 of 26 June 1998”. See *infra*, chapter IV.

<sup>117</sup> See the thorough analysis of this point presented in chapter III.

<sup>118</sup> Barboza, *supra* note 100, p. 313.

took place on the territory of the State, or that is was in any case under its control.<sup>119</sup>

Fifth and last, the liability regime is constituted of primary rules that include both the obligation to compensate and a series of due diligence norms, as opposed to international responsibility, which concerns exclusively secondary norms arising from a breach of international rules attributable to a State (or to an international organisation); hence the obligation to make reparation is just one of the duties arising from an international law violation.

#### *4.2. The relevance of liability in peace operations*

Liability regimes are very common in the context of peace operations, especially in the practice of international organisations. The term ‘liability’ was already being used as early as 1980 by the UN Office of General Service of the Field Operation Division in a report discussing the liability of the United Nations in the case of an accident involving British-owned helicopters put at the disposal of the United Nations Force in Cyprus (UNFICYP), as well as in another report centred upon the “liability of the United Nations for the payment of rent for premises” occupied by UN peacekeeping forces in a host State.<sup>120</sup> The 1996 Report of the Secretary General elaborated a complex set of rules to regulate the responsibility of the Organisation towards third parties for activities of United Nations forces.<sup>121</sup> The Report focused on the notion of liability, namely it enunciated the ‘principle of liability’ that is described as a corollary of the international responsibility of the UN, premised on its legal personality under international law.<sup>122</sup> As consequence of the acknowledgement of its international responsibility and liability, the UN undertook to settle third party claims for damages caused by member of its

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<sup>119</sup> Montjoie, *supra* note 100.

<sup>120</sup> Office of the General Services, *Memorandum to the Officer-in-Charge, Field Operations Division, United Nations Judicial Yearbook*, 1980, part 2, chapter IV, pp. 184-185; *Memorandum to the Assistant Director for Peace-Keeping Matters, ibidem*, pp. 183.

<sup>121</sup> A/51/389.

<sup>122</sup> *Ibidem*, para. 6.

forces by means of standing claims commissions.<sup>123</sup> The document also delimited the scope of UN liability in three regards: *ratione materiae*, *ratione temporis* and financially.

First, third party liability of the United Nations is limited to damages caused by the forces in the performance of their duties, with the consequence that harmful outcomes of ‘off-duty’ actions would fall outside the scope of protection afforded to third parties by the UN liability regime.<sup>124</sup> Within the category of ‘on-duty’ actions, the liability of the UN is further delimited by the concept of ‘operational necessity’. In other words, if the damage “results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates,” then it would not be compensated.<sup>125</sup> Although some criteria have been elaborated by the UN to describe the precise scope of this concept, the Organisation itself admits that the determination of ‘operational necessity’ rests within its discretionary power.<sup>126</sup> Second, not all damages would be compensable under UN liability in peace operations, only claims for personal injury, illness or death would be receivable and the compensable loss would cover exclusively the economic damage (e.g. health care, loss of income, burial expenses, *etc.*), while non-economic damages (e.g. pain, punitive damages, *etc.*) will not be refunded.<sup>127</sup> Third, claims will not be received after six months from the moment the

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<sup>123</sup> *Ibidem*, para. 7. It will be shown in the last chapter that standing claims commissions provided also by art. 51 of the UN Model SOFA have never been established in the practice of UN peace operations. Generally the UN has preferred creating local review. See *infra*, chapter IV.

<sup>124</sup> A/51/389 (1996), para. 7, for the definition of off-duty actions see United Nations Legal Office, *Liability of the United Nations for claims involving off-duty acts of members of peacekeeping forces*, *United Nations Judicial Yearbook*, 1986, pp. 300 ss. On the numerous limitations imposed on international organisations liability see also Shraga, “UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages”, in *American Journal of International Law*, vol. 94, pp. 406-412, where the author describes the so called ‘principle of limited liability’.

<sup>125</sup> A/51/389, para. 13.

<sup>126</sup> *Ibidem*, para. 14: “a) There must be a good-faith conviction on the part of the force commander that an ‘operational necessity’ exists; b) the operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option; (c) the act must be executed in pursuance of an operational plan and not the result of a rash individual action; (d) the damage caused should be proportional to what is strictly necessary in order to achieve the operational goal”.

<sup>127</sup> A/51/389 (1996) and A/RES/52/247 (1997), para. 9.

damage occurred or was discovered, and in any case not a year after the termination of the mission's mandate.<sup>128</sup> Fourth, compensation would not exceed the maximum ceiling of US\$50,000, unless the Secretary General ascertains that a specific case requires, under exceptional circumstances, a higher compensation.<sup>129</sup>

As it concerns the relationships between the UN and TCCs, the official documents of the UN resort once again to the notion of liability. According to the Model Memorandum of Understanding, the UN would be liable towards participating States for deaths and disability incidents of their personnel attributable to UN service.<sup>130</sup> In case of loss or damage to national equipment, liability will be assumed by the UN only if the item's market value exceeded US\$250,000.<sup>131</sup>

In the context of NATO operations, liability is used in the NATO SOFA in relation to damages caused by one contracting party to another, while it is not specifically utilized with reference to third party claims.<sup>132</sup> Third party claims are regulated similarly to the UN system, where claims shall be limited to damages arising out of acts or omissions done in the performance of official duty.<sup>133</sup> Several limitations apply also to compensation claims between State parties to the SOFA: by way of example, contracting States participating in a NATO mission (including the host country) agree to waive all claims for damages to their own property caused

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<sup>128</sup> A/RES/52/247 (1997), para. 8.

<sup>129</sup> *Ibidem*, para. 9 (d) and (e).

<sup>130</sup> A/C.5/66/8, annex A, see also A/RES 52/177 of 18 December 1997 and the "Guidelines for submitting claims arising from death and disability incidents" included in A/52/369 of 17 September 1997.

<sup>131</sup> A/C.5/66/8, annex B, para. 19 and A/C.5/55/39.

<sup>132</sup> NATO SOFA, art. VIII, para. 2 a), 19 Jun. 1951, "In the case of damage caused or arising [...] to other property owned by a Contracting Party and located in its territory, the issue of the liability of any other Contracting Party shall be determined and the amount of damage shall be assessed, unless the Contracting Parties concerned agree otherwise, by a sole arbitrator selected[...]"

<sup>133</sup> *Ibidem*, art. VIII, para 5. It is noteworthy that claims for damages resulting from off-duty 'tortious acts or omissions' are not completely excluded from this architecture. It is indeed suggested that *ex gratia* payments should be granted by the sending State of the responsible personnel when the claim is considered meritorious also on the base of a report prepared by the host state that receive the claim in the first instance, *ibidem*, art. VIII, para. 6.

in the performance of the mission when the damage is less than US\$ 1,400.<sup>134</sup> Even more significantly, contracting parties stipulate to waive all claims for damages for injuries or death suffered by members of their forces occurred in the performance of their official duties during a NATO mission.<sup>135</sup> Despite the lack of express reference to liability in the NATO SOFA in the context of third party claims, the numerous limitations imposed on compensable claims suggest to conclude that we should regard the NATO claims system as a liability regime.<sup>136</sup>

As it concerns EU operations, both the EU Model Status of Force Agreement (EU SOFA) and the Model Status of Mission Agreement (EU SOMA) provide for liability regimes as they set forth a series of limitations, not differently from the systems analysed so far, in establishing claim settlement procedures.<sup>137</sup> Also in the case of EU operations, damages or loss of civilian and governmental property occurred in the exercise of ‘operational necessity’, in particular in the course of civil disturbances and in any case in connection with the mandate protection, are not compensable.<sup>138</sup>

Eventually, as it regards the practice of States participating in peace operations, they generally use the notion of liability too, in particular to indicate the form of responsibility of TCCs towards third parties.<sup>139</sup>

It has been shown that liability is the responsibility regime generally chosen by States and international organisations in peace operations both to deal with third party claims and to address bilateral or multilateral claims

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<sup>134</sup> *Ibidem*, art. VIII, para. 2, (e).

<sup>135</sup> *Ibidem*, art. VIII, para. 4.

<sup>136</sup> See *infra* chapter IV.

<sup>137</sup> The EU Model SOFA (concerning military missions) and SOMA (concerning civilian missions) have been adopted by the Council in 2005, after a first phase of EU operations characterised by the negotiation of single and separate agreements in the absence of a general model, see 2659th Council Meeting (General Affairs and External Relations), 23 May 2005, at 10 and 2674th Council Meeting (General Affairs and External Relations), 18 July 2005, at p. 21. See Sari, “Status of Forces and Status of Mission Agreements under the ESDP: The EU’s Evolving Practice”, in *European Journal of International Law*, vol. 19, 2008, pp. 67-100.

<sup>138</sup> EU Model SOFA, art. 15 and EU Model SOMA, art. 16.

<sup>139</sup> *Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America*, 30 September 2014, art. 22, para. 3 “In settling third party claims, United States forces authorities shall take into account any report of investigation or opinion provided to them by Afghan authorities regarding *liability* or amount of damages”, italics added.

between member States or between them and an international organisation. Several reasons can explain the favour for this regime. The assessment on the wrongfulness of the act that caused the damage is precluded or, in any case, is not required. This relieves claimants from the burden of proof both of the wrongfulness of the act and of attribution of conduct, which would otherwise be required, by contrast, to determine international responsibility. At the same time, it does not require neither the State nor the organisation to acknowledge or assess their acts were carried out in violation of international law.

States and international organisations may impose further limitations on the already limited scope of claimants' instances, not only by establishing financial ceilings on the compensable amount, but also by excluding their liability for certain types of damages, as we have seen regarding the UN's and NATO's 'operational necessity' delimitation.

Liability is governed by the rules created by the liable party and it is enforceable solely throughout the mechanisms established by the same rules. In other words, the existence and the functioning of liability regimes in peace operations depend on the will of the State or the international organisation in question.<sup>140</sup> Intuitively, this feature has a very different weight depending on whether the claimant is a third party or a contracting party of one of the legal instruments that prescribe the limitations in point. A third party does not participate in the negotiation of a SOFA or of a MOU and has a very—if any—limited power to influence rule-making.<sup>141</sup> States and international organisations instead mutually agree upon the conditions of the liability regimes they intend to establish.

In sum, liability regimes for third parties in peace operations appear as a 'take-it-or-leave-it regime', where the claimant may opt between accepting all the rules imposed by the liable party (limitations, mechanisms, *etc.*) or renounce their claim. Despite these critiques, it cannot be ignored that liability regimes generally strike a fair balance between the demand of the injured parties to obtain redress of damage suffered and the opportunity for

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<sup>140</sup> See *infra* chapter IV.

<sup>141</sup> Contractual claims are generally excluded from the general notion of third party claims as they are generally regulated under the terms of the contract itself, A/51/389 (1996).

States and international organisations to avoid an assessment on the lawfulness of their actions, together with the need to limit the costs connected to peace operations' claims. This fair – or at least not excessively unfair – balance between opposed instances seems to explain the success of liability in the context of peace operations.



## CHAPTER III

# ATTRIBUTING AND DISTRIBUTING INTERNATIONAL RESPONSIBILITY IN PEACE OPERATIONS

### 1. Whose responsibility? Attribution of conduct in peace operations

The question on who – the international organisation leading or authorising the mission, troop-contributing nations (TCCs), or both – should bear responsibility for violations of international law in peace operations represents one of the most vexing issues that has gathered the attention of decision-makers and legal scholars for many years now. In the Cold War aftermath, peace operations were increasingly seen as promising tools for the maintenance of international peace and security, consequently, a growing number of peace operations have been established since the 1990s'. However, many of these missions failed to live up with the high expectations this conflict-resolution instrument rose. Between 1993 and 1995, we witnessed the failure of UN missions in Somalia (UNOSOM-I, UNITAF, UNOSOM-II), in Rwanda (UNAMIR) in and Bosnia Herzegovina (UNPROFOR).<sup>1</sup> The main shortcomings were associated with the fact that these missions were not assigned credible mandates nor adequate resources, thus resulting in the inability to protect civilians, namely to avoid that serious violations of human rights and international crimes were perpetrated against the population. As a consequence, public opinion accountability awareness has grown in those years in accordance with the gravity of the facts occurred in peace operations.

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<sup>1</sup> See *supra* chapter I.

Moreover, while issues of liability for damage have always arisen in peace operations,<sup>2</sup> the novelty in the early 2000 was a greater demand, brought about by individuals before domestic and international *fora*, for international responsibility both of States and international organisations.<sup>3</sup>

The present chapter aims at analysing the state of the art of the applicable rules on international responsibility and at shedding light on the most controversial aspects of allocating responsibility between TCCs and international organisations. Thus, the legal status of national troops contributed to an operation, the criterion for the attribution of conduct, the meaning of effective control, and the possibility that a conduct would attribute to more than one entity – so-called ‘dual’ or ‘multiple’ attribution – will be the focus of the following pages.

The study will start with the analysis of the ILC 2011 Draft Articles on the Responsibility of International Organisations (DARIO)<sup>4</sup> and will devote significant attention to their drafting history, considering that ILC works have constituted a unique forum for the collection of the *opinio iuris* of States and international organisations as well as a precious occasion for the classification of relevant practice. Even more importantly, the DARIO have expressly and systematically addressed the topic of international responsibility in peace operations since the very early stage of the process.

In order to collect the *opinio iuris* of States and organisations to properly address the topic of attribution during the DARIO’s drafting process, in 2004 – a full year before the start of the Commission's work – the ILC submitted the following question

[t]he Commission would welcome the views of Governments especially on the following question [...]:

The extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.<sup>5</sup>

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<sup>2</sup> The topic of claims commissions will be dealt with by in detail in chapter IV.

<sup>3</sup> See *infra*, paras 7 and ff.

<sup>4</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

<sup>5</sup> A/58/10 (2003), para. 27, footnotes omitted.

This leading question has guided the entire codification and consequently originated an unprecedented emergence of States and international organisations' *opinio iuris* on the topic. This peculiar focus should not be surprising, when considering the context in which the ILC was operating. When the ILC was about to initiate its works, the international community had recently witnessed the events in Kigali, during the 1994 Rwanda genocide, when the UN peace operation proved unable to halt those dreadful events and the Belgian forces abandoned their compound, leaving all the refugees without protection.<sup>6</sup> Similarly, one can recall the failure of UNPROFOR to protect the Muslim minorities in Bosnia, where the UN Dutch battalion abandoned the Potocari compound contributing with its omissions to the Srebrenica genocide.<sup>7</sup> Moreover, the widespread presence of the international community in Kosovo (UNMIK, KFOR, EULEX), and the wide powers conferred thereto, led to the first applications lodged before the Strasbourg Court against TCCs for alleged human rights violations committed in the course of a peace operation in 2007.<sup>8</sup>

The present chapter will devote particular attention to the works of the ILC, namely to the numerous reports issued by the Special Rapporteur Gaja and to the comments and observations provided by States and international organisations. More specifically, it will focus on the rules on attribution of conduct as set forth in the DARIO, as well as applied by relevant national and international case law. The analysis will mainly deal with the rules on the responsibility of international organisations, considering that the majority of peace missions are carried out under their umbrella, being established, deployed and/or led by the UN or by regional organisations such as NATO, the EU and the AU.<sup>9</sup> However, inferences from, and parallelisms with, the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARS) will be drawn where appropriate.

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<sup>6</sup> *Infra*, para. 7.5.

<sup>7</sup> *Infra*, para. 7.4.

<sup>8</sup> ECtHR, Grand Chamber, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos. 71412/01 and 78166/01, Judgement, 2 May 2007.

<sup>9</sup> For the definition of peace operations and the description of their structure see chapter I.

## 2. The ILC Draft Articles and the general rules on attribution of conduct

The general rule on attribution of conduct, enshrined in art. 4 DARS, provides that a State bears responsibility for internationally wrongful acts committed by its organs and agents.<sup>10</sup> The same rule is mirrored in the DARIO, under art. 6, whereby the responsibility of an international organisation is premised on the characterization of the entity that has carried out the wrongful conduct as organ or agent of that organisation. In other words, suffice it to ascertain that a wrongful conduct was carried out by an organ or agent of an organisation in the performance of its functions.<sup>11</sup> The general rule's strength lies in its simplicity and linearity. Nevertheless, this rule alone is unable to address the complexity of conducts performed by international organisations that, though international law actors with a legal personality, depend heavily on member States for the fulfilment of their tasks.<sup>12</sup>

Clear evidence is constituted precisely by peace operations that could not exist without the contribution of personnel and assets from States participating in each mission. This peculiar feature has been taken duly into account by the ILC while depicting patterns of responsibility for international

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<sup>10</sup> Crawford, *Responsibility of States for Internationally Wrongful Acts*, Cambridge University Press, 2002, see in particular "Attribution of Conduct to a State", pp. 91 ff. For a more general analysis of State responsibility rationale see Koskenniemi, "Doctrines of State Responsibility" in Crawford-Pellet-Olleson (eds), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 45-51.

<sup>11</sup> Klein, "The Attribution of Acts to International Organisations", in Crawford-Pellet-Olleson (eds), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 299-315. For an early analysis, preceding the Draft Articles see Eagleton, "International Organisations and the Law of Responsibility", in *Recueil des cours de l'Académie de Droit International de La Haye*, vol. 76, 1950, pp. 323 and Hirsh, *The Responsibility of International Organisations towards Third Parties: Some Basic Principles*, Martinus Nijhoff, 1995, in particular at pp. 61-85.

<sup>12</sup> On the legal personality of international organisation see Morgenstern, *Legal Problems of International Organisation*, Cambridge Grotius Publications, 1986; Klabbers, "The Changing Image of International Organizations", in Coicaud-Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, pp. 221-255; id., "Two Concepts of International Organization", in *International Organizations Law Review*, vol. 2, 2005, page 277-293; Weiler-Nissel (eds), *The Concept of Legal Personality International Law*, vol. 2, 2011. For a recent analysis see again Klabbers, "The Transformation of International Organizations Law", in *European Journal of International Law*, vol. 26, 2015, pp. 9-82.

organisations. Hence, aside the general rule on attribution described above, the DARIO also contain a special rule on attribution of conduct of organs or agents placed by States at the disposal of international organisations (art. 7 DARIO).<sup>13</sup> In cases of seconded organs or agents, the receiving organisation bears responsibility for wrongful acts over which it exercises effective control.<sup>14</sup>

The main issues concerning international responsibility in peace operations reside in the tension between these two provisions (arts 6 and 7 DARIO) and with the interpretation of the notion of effective control. On the one hand, it remains largely unclear whether peace operations are to be considered organs of the international organisation or rather State organs placed at the disposal of the international organisation under the aegis of which they are deployed, triggering the application of art. 6 or of art. 7 DARIO, respectively. This concern affects exclusively UN-led operations, as the UN claims that peace operations established and led by the organisation are UN ‘subsidiary organs’, while this is not the case of UN-authorized missions led by regional organisations.<sup>15</sup> On the other hand, in the case of UN-authorized operations, where art. 7 DARIO should theoretically apply without hesitation, considerable uncertainties remain as to the content of the

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<sup>13</sup> Some authors have highlighted that art. 7 DARIO represents one of the few provisions that has brought about some novelty from the patterns followed by ILC from the previous drafting of the DARS, introducing a new approach and language in attribution matters. See in particular, Montejo, “The notion of ‘effective control’ under the articles on the responsibility of international organisation”, in Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013, pp. 389-404. For a general overview on the critique of the so called ‘copy and paste approach’ adopted by the ILC in the second project, see Ahlborn, “The Use of Analogies Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the ‘Copy-Paste Approach’”, in *International Organizations Law Review*, vol. 9, 2012, pp. 53-66.

<sup>14</sup> The article encompasses also attribution of conduct of agent lent to an international organization by another international organization, but the present analysis will focus exclusively on the attribution of conduct of seconded State organs, given that peace operations consist of State organs as it will be further elaborated below.

<sup>15</sup> This position has been consistently maintained by the UN since 1990 when it was first spelled out in the Model SOFA that UN peace operations are subsidiary organs of the organization and therefore enjoy the same privileges and immunities, see A/45/594 (1990), para. 15. The statement has been later recalled in the core document concerning the liability of the organization for activities of UN forces, see A/51/389 (1996) and has recently been reaffirmed in the comments submitted by the UN to the Special Rapporteur Gaja during the DARIO drafting-process, see A/CN.4/637/Add. 1 (2011), in particular at para. 3.

effective control test.

In order to determine how international responsibility should be apportioned between international organisations and troop contributing States in peace operations, the chapter will start with tracing the drafting history of art. 6 and art. 7 DARIO. Hence, it will build on the letter of these provisions and will inquire how they have been applied in the relevant case law and how they have been interpreted in literature. Finally, the study will also highlight how the specificities of each peace operation, namely its structure (UN-led, UN-mandated to regional organisations), the features of troops' secondment, and the chain of command and control can influence the interpretation of the attribution criterion.

### **3. The drafting history of art. 6 DARIO**

As explained earlier, art. 6 DARIO on the attribution of conduct of organ or agents of an international organisation constitutes the general rule on attribution according to which

[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

The rules of the organization shall apply in the determination of the functions of its organs and agents.

It has already been highlighted that this provision echoes substantially the general rule on attribution envisaged in the DARS. As a consequence, the basic principles underling this rule have enjoyed a vast consent among States, while most of the ILC drafting efforts were focused on the necessary 'adjustments' of the DARS general rule to fit to the specificities of international organisations. In particular, the ILC had to identify the proper parallelisms between the meaning of 'organic' or 'functional' link between the organs and the State (under art. 4 DARS) and the definition of 'organs or

agents' of an international organisation (under art. 6 DARIO). Article 4 DARS provides that "the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State" and specifies that "an organ includes any person or entity which has that status in accordance with the internal law of the State". Clearly these concepts could not be simply replicated but required adjustments to apply to international organisations that have no typical State-powers nor any internal law, to be understood as domestic law.

The solutions originally put forward by the Commission sought to find a parallelism between States' internal law and the rules of the organisation. The ILC proposed to describe the rules of the organisation on the basis of the definition provided in art. 2 (1)(j) of the 1986 Vienna Convention on the Law of Treaties between States and international organisations.<sup>16</sup> Due to disagreements among States as to the opportunity to define the rules of the organisation as well as to the possible definition to be adopted, this approach was abandoned by the ILC and only a generic reference to the rules of the organisation has survived in the final version.

As to the link between the organ and the organisation, the ILC has eventually opted for a neutral and linear formula "in the performance of functions of that organ or agent" rather than a more elaborated wording originally proposed.<sup>17</sup> The identification of this functional link seemed to be in line with the majority of scholarly writings as expressly underscored by the ILC.<sup>18</sup>

For the purpose of the present analysis it is noteworthy that during the drafting process, attribution of wrongful conduct in peace operations has not

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<sup>16</sup> The first draft of art. 6 [then art. 4] DARIO reads as follows "1. The conduct of an organ of an international organization, of one of its officials or another person entrusted with part of the organization's functions shall be considered as an act of that organization under international law, whatever position the organ, official or person holds in the structure of the organization. 2. Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization. 3. For the purpose of this article, 'rules of the organization' means, in particular, the constituent instruments, [decisions and resolutions] [acts of the organization] adopted in accordance with them, and [established] [generally accepted] practice of the organization." A/CN.4/541 (2004), para. 28.

<sup>17</sup> "[E]ntrusted with part of the organization's functions", *idem*.

<sup>18</sup> A/CN.4/541 (2004), para. 17.

been tackled under the purview of art. 6 DARIO (conduct of organs or agents of an international organisations), while the issue of allocation of responsibility in these operations had been singled out by the ILC at the beginning of its works.<sup>19</sup> As it will be described more in detail below, peace operations have generally been considered State organs placed at the disposal of international organisations, hence they have been dealt with under art. 7 DARIO (conduct of organs of a State placed at the disposal of an international organisation).

The position expressed by the UN according to which UN-led peace operations are ‘subsidiary organs’ of the organisation represents a notable exception to this trend. This is shown also by the fact that the UN submitted most of its comments to the ILC concerning the attribution of conduct in peace operations as observations to art. 6 and not to art. 7 DARIO.<sup>20</sup> Furthermore, in its comments the UN specified that not only peace operations are UN subsidiary organs but also that national “forces placed at the disposal of the United Nations are ‘transformed’ into a United Nations subsidiary organ”.<sup>21</sup> While the statement concerning the nature of subsidiary organ has been consistently expressed by the UN over the years, the element of ‘transformation’ of national contingents into UN subsidiary organs represents to some extent a novelty. To be more precise, the term ‘subsidiary organ’ in this context had been used already in the 1990 UN Model Status of Forces Agreement (UN SOFA), wherein mention is made to “the United Nations peacekeeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations”.<sup>22</sup> In the 2011 comments submitted to the ILC, the UN specified the provision of the 1990 Model SOFA in the sense that not all UN peacekeeping operations are subsidiary organs, but only the missions authorised *and* led by the Organisation itself.<sup>23</sup> Insofar as national contingents contributed to a UN-led

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<sup>19</sup> *Supra*, note 5.

<sup>20</sup> A/CN.4/637/Add.1 (2011).

<sup>21</sup> *Ibidem*, p. 13.

<sup>22</sup> A/45/594, annex, para. 15.

<sup>23</sup> The notion of a UN subsidiary organ was also utilised in 2004 by the United Nations Legal Counsel Mr. Hans Corell in a letter addressed to the Director of the Codification

peace operation are transformed into a UN subsidiary organ, their conduct can be attributed solely to the UN; art. 7 DARIO and the related criterion of effective control do not apply.<sup>24</sup> In other words, the Organisation has claimed to have a twofold power: on the one hand, to establish subsidiary organs, and on the other, to ‘transform’ national forces – i.e. State organs – into subsidiary organs.

In order to test this hypothesis, we shall examine the definition of ‘organ’ of an international organisation. Similarly to the ‘rules of the organisation’, the term ‘organ’ has been described in general art. 2 DARIO, concerning the use of terms. However, the provision provides only a sort of truism, according to which “‘organ of an international organisation’ means any person or entity which has that status in accordance with the rules of the organisation”.<sup>25</sup> In other words, an organ of an international organization would be what the international organization itself says it is, in accordance with its own rules. To that effect, UN authoritative statements affirm that UN-led missions are UN subsidiary organs and with no doubt the UN Charter entrusts the Security Council and the General Assembly with the power to establish subsidiary organs to fulfill its tasks.<sup>26</sup> As noted by Sarooshi, issues of form are not of major importance when defining a UN subsidiary organ; rather, suffice that (a) it has been established by a principal organ of the UN that has delegated part of its powers for the fulfillment of certain tasks, (b) the organisation exercises its authority over the subsidiary organ and (c) at the same time the latter maintains some degree of independence.<sup>27</sup> We would

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Division: “As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.” The extract was cited by the Special Rapporteur Gaja in its second report, A/CN.4/541, para. 36.

<sup>24</sup> A/CN.4/637/Add.1 (2011), pp. 9-10.

<sup>25</sup> Art. 2 (c) DARIO, the definition corresponds to the wording suggested by the UN in their final comments to the ILC, A/CN.4/637/Add.1 (2011), para. 12 p. 13.

<sup>26</sup> Art. 29 of UN Charter or Art. 22 if the mission is established by the General Assembly.

<sup>27</sup> Sarooshi, *The United Nations and the Development of Collective Security*, Oxford University Press, 1999, in particular at pp. 86-141. See also Sarooshi, “The Legal Framework Governing United Nations Subsidiary Organs”, in *British Year Book of*

add to these criteria that the principal organ has first to be entrusted with the power to establish a subsidiary organ by the rules of the organisation. One can then argue that a UN-led mission is indeed a UN subsidiary organ. It is established by the Security Council (or by the General Assembly), in light of its powers enshrined in art. 29 and 22 of the Charter. Moreover, the principal organ retains some authority over the mission via the chain of command and control that is officially headed by the UN Secretary General while, at the same time, the mission enjoys certain autonomy, acting largely under independent direction and oversight, i.e. separate from the Security Council to discharge its duties.

It seems less certain, however, whether the UN also has the power to ‘transform’ State seconded organs (in this case national contingents) into a UN subsidiary organ. The comments submitted to the ILC on art. 6 DARIO do not offer elements of clarification. The UN has simply stated that this ‘transformation’ “has been the long-established position of the United Nations”<sup>28</sup> and to that effect has quoted the 1990 UN Model SOFA extending all the privileges and immunities of the organisation to UN peacekeeping operations in consideration of their status of UN subsidiary organs.

The ILC commentaries to the DARIO maintain that a State seconded organ turns into an organ of an international organisation only when it is ‘fully seconded’ by the sending State to the organisation.<sup>29</sup> Unfortunately, the ILC has not specified when a State organ could be considered fully seconded, but rather has simply stressed that the conduct of a fully-seconded State organ would “clearly be attributable only to the receiving organisation” on the basis of art. 6 DARIO.<sup>30</sup>

It has thus emerged that the secondment’s features would be of

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*International Law*, vol. 67, 1997, pp. 413-478; Conforti-Focarelli, *Le Nazioni Unite*, Cedam, 2012. See also Klein that refers to Salmon's definition of organ as “an element of the structure of an international organisation through which the latter acts, expresses its will and discharges its duties”, in Klein, “The Attribution of acts to International Organizations”, *supra* note 11, at p. 298.

<sup>28</sup> A/CN.4/637/Add.1 (2011), p. 13. The provision of the Model SOFA is contained in para. 15 of the document.

<sup>29</sup> ILC DARIO Commentaries to art. 6, para. 6 and ILC DARIO Commentaries to art. 7, para. 1.

<sup>30</sup> ILC DARIO Commentaries to art. 7, para. 1.

paramount importance to determine whether the UN has this power to ‘transform’ State organs in its subsidiary organs in peace operations. Differently said, it will be necessary to inquire if States that contribute troops to UN-led peace operations fully second their State organs to the organisation within the meaning of art. 6, or rather just place them at the disposal of the UN, within the meaning of art. 7 DARIO. The DARIO, its commentaries and the related drafting process offer no further clues. From this first reading though, it seems unlikely that the UN has a ‘transformation power’, whereas it seems more reasonable to maintain that it would exclusively depend on a State whether or not to fully second one of its organs. A further investigation into the issue will be carried out at a later stage, analysing elements of peace operations’ practice in order to draw some conclusion as to the secondment’s features in UN-led missions.<sup>31</sup>

In sum, the drafting-process of art. 6 DARIO has not expressly addressed the topic of attribution of conduct in peace operations with the exception of the position expressed by the UN, that deems UN-led peace operations as UN subsidiary organs. As a consequence, in the UN view, a wrongful conduct committed by national contingents contributed to the mission should be considered as a conduct of an organisation’s organ and therefore attributed to the UN under art. 6 DARIO. Yet, it has to be ascertained whether this position corresponds to the reality of peace operations and whether it is endorsed in courts’ practice and supported by States’ *opinio iuris*.

#### **4. The drafting history of art. 7 DARIO**

The question of the allocation of responsibility between TCCs and the UN for wrongful acts occurred in peace operations has been extensively dealt with by the ILC in the drafting of the DARIO. At the beginning of its work the Commission submitted to States a specific question as to whether

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<sup>31</sup> *Infra*, para. 5.2.

wrongful conducts in peacekeeping operations should be attributed to the sending State or to the UN and to what extent.<sup>32</sup> As explained above, with the exception of the UN, the debate has been mainly carried out under the purview of art. 7 DARIO; hence, the comments and observations of States and of other international organisations have been made mainly to art. 7 DARIO. From this we understand that, in the opinion of States and of the ILC, peace operations have the legal status of State organs placed at the disposal of an international organisation, rather than of subsidiary organs. Art. 7 DARIO, indeed, regulates attribution of conduct of State organs (and organs of an international organisation) placed at the disposal of an international organisation as follows

[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.

According to this provision, attribution of wrongful conducts committed by national troops in peace operations is premised on two circumstances. On the one hand, the national contingent (State organ) should be placed at the disposal of the international organisation leading the operation. On the other hand, the international organisation should exercise effective control over the wrongful conduct.

In order to understand the scope of application of this rule we have to examine the meanings of ‘disposal’ and ‘effective control’. In light of the art. 7 drafting history, the term ‘disposal’ in this context indicates the features according to which a State organ is transferred to an international organisation. More precisely, a State organ is at the disposal of an international organisation when the sending State still retains some powers and authority over its organ. It essentially differs from the situation envisaged by art. 6 DARIO, whereby a State organ can be considered an organ of an

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<sup>32</sup> *Supra*, note 5.

international organisation when it is ‘fully seconded’ to the latter.<sup>33</sup> To clarify this subtle but fundamental difference, the Special Rapporteur, in its second report, made the example of national troops that are not placed at the full disposal of the UN because the sending State retains exclusive criminal jurisdiction and disciplinary powers over them.<sup>34</sup> Moreover, in the commentary to the final version of DARIO the reference to UN peacekeeping operations as State organs placed at the disposal of the organisation has been made even more evident

[a]rticle 7 deals with the [...] situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.<sup>35</sup>

We can conclude, then, that ‘disposal’ within the meaning of art. 7 DARIO refers to State organs that are transferred to an international organisation without completely losing their organic link to the sending States.

As to the significance of effective control, it has already been highlighted that this represents one of the most controversial issues in the DARIO’s application and interpretation. The drafting history of art. 7 can help to shed some light on this topic as a starting point for the comprehensive analysis of the concept that will be carried out below.<sup>36</sup> The quest for the identification of the attribution criterion in this context has followed two main proposals, which were not necessarily mutually exclusive. On the one hand, some delegations suggested that wrongful conduct should be attributed to the entity that had control over it;<sup>37</sup> on the other hand, the ILC was encouraged to rely on the responsibility regime established on the basis of the internal agreements concluded between the international organisation and TCCs,

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<sup>33</sup> See ILC DARIO Commentaries to art. 7, para 1.

<sup>34</sup> A/CN.4/541 (2004), para. 38

<sup>35</sup> ILC DARIO Commentaries to art. 7, para 1, footnotes omitted.

<sup>36</sup> *Infra*, para. 7.

<sup>37</sup> Canada (A/C.6/58/SR.15, para. 3), Greece (*ibidem*, para. 10), Russia (*ibidem*, para. 31), Spain (*ibidem*, para. 41), Israel (*ibidem*, para. 21).

typically the Memorandum of Understanding (MoU).<sup>38</sup>

As to the meaning of ‘effective control’, the uncertainties that still characterise the interpretation of the notion have been present since the beginning of the drafting process, despite the fact that the concept had already been subject to an intense debate in the purview of the elaboration of the DARS, in particular of art. 8. This is due to the elusive character of the term and also to the awareness that the scope of application of art. 8 DARS should be different from the situations dealt with by art. 7 DARIO. Art. 8 DARS concerns the attribution to a State of wrongful conduct carried out by persons or groups, upon the condition that they had been instructed, directed or controlled by the State. In other words, the notion of control *ex art. 8 DARS* does not concern State organs or agents but individuals.<sup>39</sup> Art. 7 DARIO, by contrast, regards organs – either of a State or of another international organisation – that are placed at the disposal of an international organisation. Hence, the features of control exercised by a State over an individual would not be the same as the control exercised by an international organisation over a State organ placed at its disposal, since both the subject who exercises the control and the subjects over which the control is exercised differ significantly.

Despite its elusive meaning, the use of the notion ‘control’ has been welcomed as the proper attribution criterion by the majority of States and international organisations during the drafting process of art. 7 DARIO. In particular, some governments suggested that control was to be understood as ‘effective control’;<sup>40</sup> others saw it as ‘operative’ or ‘operational control’;<sup>41</sup> other States held the opinion that control has to be understood in connection with wider concepts such as ‘authority and command’;<sup>42</sup> other delegations have preferred to avoid further adjectives to define the term.<sup>43</sup>

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<sup>38</sup> Canada (A/C.6/58/SR.15 para. 3), Gabon (*ibidem*, para. 5), UK (*ibidem*, para. 9), Israel (*ibidem*, para. 21), Portugal (*ibidem*, para. 27), Spain (*ibidem*, para. 41), Mexico A/CN.4/547 2004, p. 9.

<sup>39</sup> ILC DARIO Commentary to art. 7, para. 5.

<sup>40</sup> Israel (A/C.6/58/SR.15 para. 21), Russia (*ibidem*, para. 31).

<sup>41</sup> Spain (A/C.6/58/SR.15 para. 41).

<sup>42</sup> Greece (A/C.6/58SR.15, para. 13).

<sup>43</sup> Italy (A/C.6/58SR.14, para. 46), Canada (A/C.6/58/SR.15 para. 3), Belarus (*ibidem*, para.

In its first effort to clarify the notion of control, the Special Rapporteur has relied widely on the ongoing scholarly debate and on the work of the International Law Association to conclude in favour of the adoption of ‘effective control’;<sup>44</sup> although not decisive for the complete understanding of such a complex notion, the wording ‘effective control’ was welcomed by States and international organisations since its appearance in the first draft of art. 7 DARIO.<sup>45</sup> More precisely, in the initial proposal the attribution criterion was not simply ‘effective control’; its content included “the extent of the exercise of effective control over the wrongful conduct”.<sup>46</sup> In the opinion of the Special Rapporteur a similar wording would have left open to interpretation the provision in the sense of dual attribution and to measure the extent of responsibility in connection with the extent of control operated.<sup>47</sup> This precise legal reasoning, however, did not gather the approval of States and, therefore, was eventually left out from the final version of art. 7 DARIO.

The ILC commentary to art. 7 provides for some guidance on the ultimate meaning of ‘effective control’. First of all, it is specified that it should be understood as ‘factual control’, which takes into account the “full factual circumstances and the particular context”.<sup>48</sup> It is noteworthy that the practice reported in the commentary on this point concerns – almost exclusively – peace operations where the case law originated from wrongful acts occurred during these types of missions. In particular, the ILC has highlighted the divergence emerged in the ECtHR case law in the *Behrami*

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<sup>44</sup> International Law Association, *Accountability of International Organisations*, Final Report, 2004, in particular p. 200.

<sup>45</sup> The first wording of the article, that was initially listed as art. 5, reads as follows: “The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization’s functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ”, para. 50.

<sup>46</sup> A/CN.4/541 (2004), para. 48. This proposal was drawn from a suggestion submitted by the Canadian delegation to consider “the extent to which the United Nations controlled the conduct of the individuals in question”, see A/C.6/58/SR.15 (2003), para. 3.

<sup>47</sup> A/CN.4/541 (2004)

<sup>48</sup> ILC DARIO Commentary to art. 7, para. 4. It has to be noted that this ‘factual’ interpretation was offered for the first time by the English delegation during the drafting process, see A/C.6/64/SR.16, para. 23.

case, where the Court interpreted the attribution criterion in the sense of ‘ultimate authority and control’ rather than ‘effective factual control’ and have found in favour of the attribution to the UN of wrongful conducts occurred in the context of UNMIK and KFOR in Kosovo.<sup>49</sup> While commenting that the Court did not properly apply the provision envisaged in art. 7 DARIO, the ILC has suggested that the resort to ‘operation control’ would have been more useful to address the issue of military actions in the context of UN peace operations.<sup>50</sup> Along the same line, the ILC has quoted the UN statement on the *Behrami* judgement where the Organisation strongly disagreed with the conclusions reached by the Court and maintained that the proper attribution criterion would have been ‘effective operational control’.<sup>51</sup>

This leads us to consider that the UN also attaches a certain importance to the criterion of control, which is confirmed by a closer look at the observations and comments submitted by the Organisation to the ILC. The UN started with identifying three different types of missions. The UN described diverse consequences in terms of international responsibility, depending on the legal status of the force, on the control exercised within the chain of command and control, and on the content of internal agreements. First, the core divide between UN-led operations and UN-authorized operations placed under the command and control of a leading nation or of a regional organisation is underscored. To this two types of peace operations, the UN has added the third category of joint operations, whereby a UN-led mission is deployed alongside other forces that remain under national chain of command or under the lead of a regional organisation.<sup>52</sup> This partition would have substantial implications in terms of responsibility. As elaborated earlier, according to the UN, when a contingent is placed at the disposal of a UN-led operation is ‘transformed’ into a UN subsidiary organ, therefore art. 7 DARIO would not apply nor the criterion of effective control set forth therein, but rather it is art. 6 DARIO that would come into play.<sup>53</sup> Besides this

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<sup>49</sup> For a detailed analysis of the *Behrami* case see *infra* section 7.1.

<sup>50</sup> ILC DARIO Commentary to art. 7, para. 10.

<sup>51</sup> *Idem*.

<sup>52</sup> A/CN.4/637/Add.1, pp. 10-11.

<sup>53</sup> *Ibidem*, p. 13.

structure based on the ‘subsidiary organ theory’, the UN has introduced an element of uncertainty by attaching great importance to the principle of command and control. The Organisation specified that the criterion for attribution is not effective control but rather ‘command and control’. Thus creating a certain confusion as to how to reconcile the ‘subsidiary organ’ criterion and the ‘command and control’ criterion. In other words, one should assume that international responsibility rests with the UN and, also, responsibility lies where command and control is vested.<sup>54</sup> The whole construction of the responsibility of the UN for wrongful conducts in peace operations is structured around this tenet, even in the case of UN-led peace operations in which a presumption applies that contingents are placed “under the exclusive command and control of the United Nations”.<sup>55</sup> Moreover, the observation submitted by the Organisation underlined that “the residual control exercised by the lending State in matters of disciplinary and criminal prosecution” and other issues is not relevant for attribution, as long as it “does not interfere with the United Nations operational control”.<sup>56</sup> It thus remains unclear why the UN has introduced the principle of UN command and control and stated a presumption of exclusiveness in UN-led operations when the nature of subsidiary organs does not require to rely on attribution criteria other than the organic link to the organisation.

In the UN reasoning, the same criterion of attribution – that responsibility lies where command and control is vested – would apply to UN-authorized missions that are placed under the control of a State or of a regional organisation. In these cases, “each State or organisation is responsible for damage caused by forces under its command and control”. In other words, the responsibility for the conduct of the forces is entailed by the entity that headed the chain of command and control.<sup>57</sup>

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<sup>54</sup> The principle had been already elaborated in 1996 in the famous *Report of the Secretary General on Administrative and Budgetary Aspects of Financing of United Nations Peacekeeping Operations*, A/51/389 (1996), in particular at para. 17 which titles “liability is engaged where command and control is vested”.

<sup>55</sup> *Ibidem*, p. 10, para. 2.

<sup>56</sup> *Ibidem*, p. 14, para. 4

<sup>57</sup> *Ibidem*, pp. 10-11, paras. 3-7.

Also in the case of joint operations, the UN has relied on the principle of command and control, though with an important distinction. In order to assess where command and control is vested in this type of operations, one has to look at “the arrangements establishing the modalities of cooperation between the State or States providing the troops”.<sup>58</sup> Only in the absence of these agreements, “responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation”.<sup>59</sup> Differently said, effective control would matter exclusively as a residual criterion and would be determined on a case by case basis.

At the end of this articulated analysis of peace operations and attribution criteria the UN has specified that the effective control test set forth in art. 7 DARIO has never actually been endorsed by the UN to attribute responsibility in military operations<sup>60</sup>. Moreover, in the 2011 observations and comments submitted to the ILC, the UN seems to pivot once again on this issue, introducing yet another variable: one of politics. The Organisation concluded that

[f]or a number of reasons, notably political, the United Nations practice of maintaining the principle of United Nations responsibility vis-à-vis third parties in connection with peacekeeping operations and reverting as appropriate to the lending State is likely to continue. The Secretariat nevertheless supports the inclusion of draft article 6 [now art. 7] as a general guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization, including possibly in connection with activities of the Organization in other contexts.<sup>61</sup>

It thus seems that the UN doctrine of international responsibility for wrongful acts occurred in peace operations is to be understood in no small part through political considerations, in particular on the will of the organisation to maintain the ‘unity of responsibility’ vis-à-vis third parties in UN-led

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<sup>58</sup> *Ibidem*, p. 10, para. 3.

<sup>59</sup> *Idem*.

<sup>60</sup> *Ibidem*, p. 14 para. 3.

<sup>61</sup> A/CN.4/637/Add.1 (2011), para. 6.

operations and to rely on each command and control arrangement in all other types of operations.

It remains to analyse the relevance of internal agreements for the purpose of attribution of wrongful conduct. Many States have underscored the relevance of internal agreements between TCCs and the UN for the identification of existing rules to attribute responsibility in peace operations.<sup>62</sup> Despite wide reference States have made to these accords, the Special Rapporteur, in his second report, categorically affirmed that internal agreements do in fact regulate relationships between parties and do not alter the issue of attribution under general international law.<sup>63</sup> In the drafting process, however, States quickly abandoned references to these internal agreements while the UN and NATO attached greater importance to them for the purpose of attribution.<sup>64</sup>

It has already been shown that the UN has identified internal agreements between States and the organisation as the relevant criterion to determine where command and control is vested in joint operations. A further example of the relevance of internal agreements in UN practice is evident in the right of recovery envisaged in art. 9 of the UN Model MoU, according to which the UN has a right to seek recovery from the sending State “if the loss, damage, death or injury arose from gross negligence or willful misconduct of the personnel provided by the Government, the Government will be liable for such claims”.<sup>65</sup> This mechanism was referred to as ‘concurrent responsibility’ in the 1996 Report of the Secretary General<sup>66</sup> and later recalled by the UN in the 2011 observations and comments to the ILC.<sup>67</sup>

During the DARIO’s drafting process, NATO did not endorse the

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<sup>62</sup> Canada A/C.6/58/SR.14 (2003), para. 3; Gabon (*ibidem*, para. 5), UK (*ibidem*, para. 9), Israel (*ibidem*, para. 21), Portugal (*ibidem*, para. 27), Spain (*ibidem*, para. 41).

<sup>63</sup> A/CN.4/541 (2004), para. 43.

<sup>64</sup> For comments and observations of the UN see A/CN.4/637/Add. 1 (2011) in particular at para. 5, where reference is made to art. 9 of the UN Model MoU. For comments and observations of NATO see A/CN.4/637 (2011), paras 7-9, where reference is made to the procedures for the settlement of claims envisaged in art. VIII of the 1951 Status of Force Agreement and to similar accords concerning non-NATO States participating in partnership programmes or anyway contributing to NATO missions.

<sup>65</sup> A/C.5/60/26, chapter. 9, art. 9.

<sup>66</sup> *Ibidem*, paras 42 and ff.

<sup>67</sup> A/CN.4/637/Add.1 (2011), para. 5.

framework proposed by the ILC concerning attribution of wrongful conduct, but attached greater relevance to internal agreements drafted between the organisation and States taking part in peace operations.<sup>68</sup> Moreover, NATO did not state neither its opinion on to the legal status of forces (whether subsidiary organs of the organisation or State organs placed at the disposal of an IO) nor on the preferred attribution criterion. It raised instead concerns for the little consideration given by ILC to the ‘specific situation’ of NATO, namely to its rules of the organisation.<sup>69</sup> In fact, the 2011 observations and comments submitted by NATO to the ILC stressed the peculiar features of the decision-making procedures that are based on the equal participation of States and thus on consensus.<sup>70</sup> Hence, it seemed to imply that the structure and the functioning of NATO would not allow for attribution of conduct to the organisation itself, that is to say NATO would not recognize distinct responsibility among Member States. This view can be further supported by the reference made in NATO observations and comments to the procedures for settlement of claims envisaged in its internal agreements, namely the 1951 Model SOFA.<sup>71</sup> Art. VIII of this Model Agreement envisages an articulated system of apportionment of costs to compensate damages that can arise from acts or omissions of members of forces in the performance of their official duties. The Model SOFA attributes to the receiving State the prime responsibility to receive and to adjudicate the claim. If compensation is due, the suggested amount is communicated to the responsible sending State. The sending State has two months to express or refuse its consent, while in default of a reply the proposal of the receiving State is considered accepted. Besides these procedural aspects, it is particularly interesting to note that costs linked to the compensation are always distributed between State parties. Three different schemes to allocate the costs are envisaged. First, when only one

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<sup>68</sup> *Ibidem*, p. 11.

<sup>69</sup> *Idem*.

<sup>70</sup> *Idem*.

<sup>71</sup> *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, 19 June 1951, last updated 14 October 2009 (hereinafter NATO SOFA); see also Prescott, “Claims”, in Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001, pp. 159-186, for NATO claims see in particular pp. 163-166.

sending State is responsible, costs are divided between the sending State (75%) and the receiving State (25%)<sup>72</sup>. Second, when more than one State is responsible, costs are split equally between them and the receiving State has to bear 50% of the quota of each State.<sup>73</sup> Lastly, when it is not possible to attribute the damage to one or more States, the costs are distributed equally between all sending States and, as in the previous case, 50% of each quota is paid by the host State.<sup>74</sup> As far as damages arising out of non-official-duty acts are concerned, art. VIII para. 6 of the Model SOFA provides that the sending State of the responsible member of the force can decide to offer an *ex gratia* payment on the basis of facts revealed in the host State's incident report.<sup>75</sup>

From the analysis of this document it emerges that responsibility – more precisely liability in compensation – is borne exclusively by States that are parties to the SOFA, including the host State that is always asked to contribute to the costs incurred by sending States for compensation. NATO, however, does not accept any form of responsibility nor liability in compensation. In sum, the underlying principle that regulates responsibility for wrongful acts in NATO operations seems to result from a combination of the general attribution of conduct to the sending 'responsible' State and a form of subsidiary responsibility of the receiving State. What remains elusive is the criterion according to which responsibility is attributed to member States. The 2011 observations and comments presented to the ILC do not offer any useful elements of clarification here. NATO appeared keener on stressing the relevance of internal agreements, namely SOFAs, rather than expressing its opinion on the legal criteria proposed by the ILC. The NATO comments further specified that in cases of joint operations with non-NATO members, attention shall be focused on the content of internal agreements<sup>76</sup>. It may thus seem that NATO refuses any form of international responsibility arising from wrongful conduct occurred in NATO operations. This understanding was

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<sup>72</sup> NATO SOFA, art. VIII, para 5, lett e) i.

<sup>73</sup> *Ibidem*, art. VIII, para 5, lett e) ii.

<sup>74</sup> *Ibidem*, art. VIII, para 5, lett e) iii.

<sup>75</sup> For a thorough analysis on the NATO claims system see *infra* chapter IV.

<sup>76</sup> A/CN.4/637/Add.1 (2011), p. 13.

already suggested by the German government in its observations and comments to the ILC in 2005.<sup>77</sup> NATO's 2011 comments, however, suggested a different conclusion on the issue of responsibility. It has held that the Model SOFA is – as the name suggests – just a model agreement, whereas in practice such agreements may vary greatly. This is shown, for example, by the recently adopted SOFA between NATO and the Islamic Republic of Afghanistan, whose art. 20 provides for the responsibility of 'NATO Forces Authorities' to settle third-party claims and to pay compensation when due, whereas no responsibility or liability in compensation is envisaged for the host State.<sup>78</sup>

As it concerns the position expressed by the European Union during the DARIO's drafting, the EU Commission's noted that the ILC's work on art. 7 was largely based on UN practice and ECtHR case, seemingly implying that EU practice had not been taken into due account.<sup>79</sup> The EU Commission took note of the leading question posed by the ILC and of the ongoing debate on the meaning of 'effective control'. However, the EU did not show any interest in participating to this debate, avoiding to state its *opinio iuris* on the matter. The Organisation rather preferred to focus on the features of the EU responsibility regime, praising the accountability mechanisms available under EU law.<sup>80</sup> In sum, the EU has not contributed to the drafting of art. 7 DARIO. The Organisation's opinion on the attribution criterion applicable to EU peace operations was expressed some years later, in occasion of the negotiations for the EU accession to the ECHR. After several *revirements*, the final version of the 2013 Draft Agreement on the Accession of the European Union to the European Convention on Human Rights, under its article 1, para. 4, stipulates that conduct carried out by Member States' organs

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<sup>77</sup> A/CN.4/556 (2005), in particular at p. 52.

<sup>78</sup> *Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan*, 30 September 2014, available at [http://www.nato.int/cps/en/natohq/official\\_texts\\_116072.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/official_texts_116072.htm?selectedLocale=en).

<sup>79</sup> ILC, *Comments and Observations Received from International Organizations*, A/CN.4/637, p. 22.

<sup>80</sup> "European Union's institutions are fully accountable *vis-à-vis* each other and European Union member States for acts and failure to act", *ibidem*, p. 23. The comments further stated that "the Union does not invoke jurisdictional immunity when European Union acts are challenged by private parties, as long as this is done in European Union courts", *idem*.

or persons acting on their behalf are attributable solely to the former, even when the States are implementing EU law.<sup>81</sup> The applicability of this attribution rule to EU peace operations (i.e. to Common Foreign Security Policy operations) was confirmed also by the Court of Justice of the European Union (CJEU) in its opinion on the compatibility between the Draft Agreement and the EU constituent Treaties.<sup>82</sup> The CJEU specified that the provision of art. 1 para. 4, of the Draft Agreement would have prevented the ECtHR from applying, to relations between the EU and its Member States, its previous case law on the responsibility of an international organisation in relation to acts performed by a Member State in peace operations.<sup>83</sup>

Interestingly, the Draft Agreement did not preclude dual attribution, that it is to say it envisage the possibility for the EU of being responsible as ‘co-

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<sup>81</sup> *Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Final Report to the CDDH, 47+1(2013)008rev2, 10 June 2013, art. 1, para. 4: “For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union”. See Naert, “The International Responsibility of the Union in the Context of its CSPD Operations”, in Evans (ed.), *The International Responsibility of the European Union: European and International Perspectives*, Hart, 2013; Welles-den Hertog, “EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?”, *ibidem*; Cannizzaro, “Postscript to Chapter 12”, *ibidem*; Den Hejjer-Nollkaemper, “A New Framework for Allocating International Responsibility. The EU Accession to the European Convention on Human Rights”, 31 January 2014, available at <http://www.sharesproject.nl/publication>; Spagnolo, *L’attribuzione delle condotte illecite nelle operazioni militari dell’Unione Europea*, Editoriale Scientifica, 2016, at pp. 216-217 and 224-226; Delgado Casteleir, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016. See also the analysis carried out in the previous chapter, *supra* chapter II.

<sup>82</sup> Court of Justice of the European Union, Opinion 2/13, 18 December 2014.

<sup>83</sup> *Ibidem*, para. 95: “In the first place, as regards the attributability of acts, military operations in application of the CFSP are conducted by the Member States, in accordance with the fourth sentence of the second subparagraph of Article 24 (1) TEU and Articles 28 (1) TEU, 29 TEU and 42 (3) TEU. The Commission states that, in order to take account of that characteristic, Article 1 (4) of the draft agreement provides that, even with respect to operations conducted in the framework of the CFSP, the acts of the Member States are to be attributed to the Member State in question and not to the EU. That clarification should preclude the possibility that the case-law of the ECtHR – whereby the ECtHR has ruled on the responsibility of an international organisation in relation to acts performed by a Contracting Party for the purpose of implementing a resolution of that organisation (decision of the ECtHR in *Behrami and Behrami v. France and Saramati v France, Germany and Norway*, nos 71412/01 and 78166/01, 2 May 2007, and judgment of the ECtHR in *Al-Jedda v the United Kingdom*, no. 27021/08, 2011) – might be applied to relations between the EU and its Member States”.

respondent' for the same act of omission attributed to a Member State both to sending States and to the EU.<sup>84</sup> Art. 3 of the Draft Agreement prescribed an amendment to art. 36 of the ECHR that, by adding thereto a fourth paragraph, would have read as follows

[t]he European Union or a member State of the European Union may become a *co-respondent* to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A *co-respondent* is a party to the case.<sup>85</sup>

Some authors have inquired whether the Draft Agreement may constitute evidence of a *lex specialis* on attribution of conduct in EU peace operations, for the purposes of art. 64 DARIO. It has generally been excluded that this can be the case, considering that internal agreement can apportion responsibility between the parties, while it will not affect the applicability of the rules on attribution of conduct between the organisation and third parties.<sup>86</sup> Also, it cannot be said that a customary *lex specialis* has emerged, as the analysis of case law do not accommodate this understanding.<sup>87</sup>

The missed accession of the EU to the ECHR will prevent from having what would have certainly constituted a rich and enlightening case law on the matter. Anyhow, even if the Accession Agreement has not entered into force, and most likely never will, in the Draft Agreement the EU expressed a very clear *opinio* on the attribution criterion to be applied in EU peace operations, whereby article 7 DARIO will not come into question. Consequently, we can conclude that also the EU has eventually rejected the rule on attribution of conduct enshrined in the DARIO.

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<sup>84</sup> *Fifth Negotiation Meeting*, *supra* note 81, art. 1, para. 4: "This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36, paragraph 4, of the Convention and Article 3 of this Agreement".

<sup>85</sup> Italics added. On the co-respondent mechanisms see Den Hejier-Nollkaemper, *supra* note 81, p. 7-8 and Gaja, "The 'Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR", in *ESIL Reflections*, vol.2, 2013.

<sup>86</sup> Spagnolo, *supra* note 81, at p. 234, see the observation of the Special Rapporteur Gaja on the relationship between internal agreements and the rules on international responsibility, *supra* note 85.

<sup>87</sup> Spagnolo, *supra* note 81, at p. 234.

## 5. The legal status of UN missions

It has been shown that different approaches exist as to the definition of the legal status of national troops contributed to peace operations. In particular, from the analysis of the *opinio iuris* of States and of international organisations as well as from the study of arts. 6 and 7 DARIO and their commentaries, opposed positions have emerged. On the one side, the ILC and the majority of States have considered national contributed troops as State organs placed at the disposal of the organisation within the meaning of art. 7 DARIO. On the other side, the UN has claimed that in the case of UN-led missions, i.e. operations not only established by but also placed under the command and control of the UN, are to be considered subsidiary organs of the UN; moreover, national troops contributed to this type of operations are ‘transformed’ into UN subsidiary organs.<sup>88</sup> The DARIO have not taken into account the remarks of the UN as to this peculiar legal status of UN-led missions. On the contrary, the ILC has discussed the issue of peace operations only under art. 7 (attribution of conduct of seconded State organs) and not under art. 6 (attribution of conduct of organs of the IO).

It is evident that the determination of the legal status of contributed personnel to peace operations is far from purely theoretical. If one assumes that national contingents forming part of a UN-led mission are ‘transformed’ into a subsidiary organ of the UN, what naturally follows is that the applicable rule to determine the international responsibility would be art. 6 DARIO. In other words, if contributed troops are UN subsidiary organs their wrongful conducts committed in the performance of their functions would be attributed to the UN, while there would be neither the scope to determine the responsibility of the sending State nor the need to apply the effective control test. By contrast, if one assumes that national contingents are and remain State

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<sup>88</sup> *Supra*, note 53.

organs placed at the disposal of the UN, the applicable rule to assess the international responsibility of the UN and/or of the sending State would be art. 7 DARIO and thus the effective control test would apply.

The aforementioned distance between the two positions has not only emerged during the DARIO's drafting-process but it has characterised the diverse approaches followed by national and international courts as well as the ongoing debate among scholars.<sup>89</sup> As it will be shown, the Strasbourg Court and the most recent jurisprudence of English Courts have fully endorsed the UN position, while Dutch Courts, Belgian Courts and older English case law have embraced the approach followed by the ILC, according to which all national contingents are State organs placed at the disposal of the international organisation.

The legal status of UN-led peace operations has garnered the attention of the European Court of Human Rights, since 2007 when the famous *Behrami and Saramati* case was adjudicated.<sup>90</sup> The suit concerned two joint cases of responsibility of certain troops contributing States of UNMIK and KFOR for the alleged violations of the right to life and the right to freedom due to the improper de-mining process carried out by UNMIK and to the unlawful arrest of Mr Saramati carried out by KFOR forces, respectively. In the part of the judgment where the Court investigated whether the failure to de-mine the area<sup>91</sup>, which allegedly caused the death of Behrami, was attributable to UNMIK it clearly stated that

[i]n contrast to KFOR, UNMIK was a subsidiary organ of the UN [...]. UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC [...]<sup>92</sup>

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<sup>89</sup> *Infra*, para. 5.1.

<sup>90</sup> ECtHR, Grand Chamber, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos 71412/01 and 78166/01, Admissibility Decision, 2 May 2007.

<sup>91</sup> The present analysis will be limited to the attribution of acts of UNMIK as it deals specifically with conducted carried out by troops contributed to a UN-led mission whose status is contentious. The attribution of acts of KFOR will be tackled the following paragraph considering that the legal status of KFOR contributed-troops do not come into play, on the contrary the (contested) approach followed by the Court concerned the interpretation of effective control which implies that KFOR troops were considered State organs placed at the disposal of the organisation. See *infra* para. 7.1.

<sup>92</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, para. 142.

Accordingly, the Court noted that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, ‘attributable’ to the UN in the same sense.<sup>93</sup> This interpretation has been cited in numerous rulings. In 2008, it was recalled by the Appellate Committee of the House of Lords in *Al Jedda*, when distinguishing the nature of the Multi-national Force in Iraq from the status of UNMIK, whereby only the latter had to be considered a UN subsidiary organ.<sup>94</sup> These rulings were further recalled in 2011 by the European Court itself in the *Mothers of Srebrenica* case, where, for the purpose of exploring the extent of immunity enjoyed by the UN, the European Court quoted the 1996 UN Secretariat Report on the budgetary and financial aspects of peacekeeping, according to which UN-led peace operations are subsidiary organs of the Organisation.<sup>95</sup> Finally, this position was cited recently by the English Court of Appeal in the *Serdar Mohammed* case concerning the responsibility of the English contingent contributed to ISAF for the alleged unlawful detention of the claimant.<sup>96</sup> Again, while examining the scope of UN immunity, the Court of Appeal quoted extensively a letter dated 17 April 2015 submitted to the UK Permanent Representative by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, where not only does it re-state the well-known opinion on the legal status of UN-led peace operations, but it also traced the core divide between the UN-led and UN-authorized peace operations, which do not enjoy the legal status in this case

operations authorized by the Security Council and conducted under the control of States or regional organizations – as was the case with ISAF – are distinct and separate from the United Nations. These authorized operations are therefore different from United Nations

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<sup>93</sup> *Ibidem*, para. 143. The expression “in the same sense” has to be intended as reference to the concept of attribution within the meaning of the DARS, hence as one of the essential elements of international responsibility. See paras. 3-29 and 121 of the judgement.

<sup>94</sup> House of Lords, *Al-Jedda v Secretary of State for Defence*, UKHL 58, 12 December 2012, in particular at para. 24.

<sup>95</sup> ECtHR, Third Section, *Stiching Mothers of Srebrenica et al. v the Netherlands*, no. 65542/12, Decision, 11 June 2013, at para. 141.

<sup>96</sup> England and Wales High Court, Queen's Bench Division, *Mohammed et al. v Secretary of State et al.*, EWHC 1369, 2 May 2014.

operations, such as peacekeeping operations, that are considered to be subsidiary organs of the Security Council. The Organization's longstanding practice on the issue is reflected, for instance, in the *amicus* briefs submitted by the United Nations to the European Court of Human Rights regarding the cases *Behrami and Behrami v. France* [...] as well as regarding the case *Atallah v. France*.<sup>97</sup>

The opposite stream of cases which has regarded UN missions as composed of State organs placed at the disposal of the UN starts with the landmark ruling of the House of Lords in the *Nissan* case.<sup>98</sup> Although this judgement was issued well before the beginning of the ILC's works, its analysis would prove the paramount importance of the legal status issue for the purposes of allocating international responsibility in peace operations. The suit concerned a claim for compensation and damage proposed by a British citizen who owned a luxury hotel in Nicosia, Cyprus, that was occupied by the British forces as headquarter during their engagement in the assistance mission to Cyprus. During a first period (from 29 December 1963 to 27 March 1964) the British contingents were deployed at the request of the government of Cyprus to restore peace and security. Few months after their deployment, the mission was transformed into the UN-led mission UNFICYP and the named contingents were thus contributed to the UN mission. For the purpose of the present analysis suffice it to say that the English courts had to assess whether, during the second period, after the establishment of UNFICYP, British soldiers were to be considered UN subsidiary organs or State organs and therefore their conducts were attributable to the UK or rather to the UN. In this regard, the House of Lords clearly stated that

[f]rom the documents it appears further that, though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty.<sup>99</sup>

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<sup>97</sup> *Ibidem*, para. 78.

<sup>98</sup> House of Lords, *Attorney General v Nissan*, Appeal and cross appeal judgment, UKHL 3, 11 February 1969.

<sup>99</sup> *Idem*.

With its ruling the House of Lord overturned both the findings of the Queen's Bench division and of the Court of Appeal, that held the impugned acts attributable solely to the UN wherein British soldiers acted as agents of the UN.<sup>100</sup>

Another series of domestic judgements before Dutch courts concerning the responsibility of the Dutch contingent of UNPROFOR for the events during the fall of Srebrenica are useful to shed some light on the topic. In the *Nuhanovic* case, the Court of Appeal of The Hague upheld the plaintiff's claim stating that the appropriate criterion for attribution of conduct would consist in the 'effective control' test as laid down in art. 7 DARIO, thus implying that national troops of UN-led missions have to be regarded as State organs seconded to the UN.<sup>101</sup> The same approach was then upheld by the Supreme Court of the Netherlands that further clarified the role of art. 7 DARIO in answering to the government's submission according to which the Court of Appeal would have failed to apply art. 6 DARIO, whereby the Dutch contingent was a subsidiary organ of the UN. In this regard the Supreme Court of the Netherlands affirmed that the applicable rule on attribution was precisely art. 7 DARIO and dismissed the cassation appeal on this point.<sup>102</sup> More recently, in 2015, this reasoning was followed also by District Court of the Hague in the second suit brought by the *Mothers of Srebrenica* against the UN and the NLs, making express reference to the ruling of the Supreme Court in the *Nuhanovic* case.<sup>103</sup> In particular, the Court endorsed and applied the effective control set forth in art. 7 DARIO as the valid attribution criterion.<sup>104</sup> It thus seems that before the Dutch judges there is no longer scope for the UN position claiming the 'transformation' of national contingents into subsidiary

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<sup>100</sup> For a thorough analysis of the three judgements, see Hirsh, *The Responsibility of International Organisations Toward Third Parties: Some Basic Principles*, Nijhoff, 1995, at pp. 74 ff.

<sup>101</sup> Court of Appeal of The Hague, *Nuhanović v the Netherlands*, LNJ: BR5388, 5 July 2011. It should be noted that at the time of the judgement the Court has expressly referred to the DARIO.

<sup>102</sup> Supreme Court of the Netherlands, *Nuhanović v the Netherlands*, 12/03324 LZ/TT, 6 September 2013, in particular at para. 3.10.1.

<sup>103</sup> District Court of The Hague, *Mothers of Srebrenica et al. v the Netherlands and the United Nations*, RDBH:A8748, 16 July 2014.

<sup>104</sup> *Ibidem*, para. 4.33.

organs and for the exclusive attribution of wrongful conducts to the UN.

Another instructive case can be found in the Belgian case law, where the Brussels Court of first instance was asked to adjudicate the liability in compensation of the Belgian State and of two Belgian high officers for the actions and omissions of the Belgium contingent of the ‘*Mission des Nations Unies pour l'Assistance au Rwanda*’ (MINUAR).<sup>105</sup> While the Court did not make express reference to the DARIO it did however apply the criterion of control exercised by the State over its troops contributed to MINUAR, namely over the decision to de-mobilise the Belgian contingent from the Kigali compound. Hence the Belgian judge has implicitly rejected the UN position as to the subsidiary-organ status.

The issue of the legal status of the forces has been analysed extensively also in scholarly writings where the general view recognises that national troops contributed to UN-led operations have a double institutional status, as both State organ and at the same time as UN organs. Despite this common premise, authors may reach very different conclusions in terms of attribution of conduct in peace operations.<sup>106</sup> Writing in the late 1990’s,

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<sup>105</sup> *Infra*, para. 7.5.

<sup>106</sup> Condorelli, “Le statut des forces de l'ONU et le droit international humanitaire”, in *Rivista di diritto internazionale*, vol. 78, 1995, pp. 881-906; later followed by “Le statut des forces des Nations Unies et le droit international humanitaire”, in Emanuelli (ed.), *Les casques bleus: policiers ou combattants?*, Wilson & Lafleur Itée, 1997, pp. 89-113; Dorigo, “Imputazione e responsabilità internazionale per attività delle forze di peacekeeping delle Nazioni Unite”, in *Rivista di Diritto Internazionale*, vol. 85, 2002, pp. 903-945; Palchetti, “Azioni di forze istituite o autorizzate delle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Seramati”, in *Rivista di diritto internazionale*, vol. 90, 2007, pp. 681-704; Tsagourias, “The Responsibility of International Organisations for Military Missions”, in Odello-Piotrowicz (eds), *International Military Missions and International Law*, Brill, 2011, pp. 245-265; Sari, “UN Peacekeeping Operations and Article 7 ARIIO: The Missing Link”, in *International Organizations Law Review*, vol. 9, 2012, pp. 77-85; Spagnolo, “Imputazione di condotte lesive dei diritti umani nell'ambito delle operazioni militari delle Nazioni Unite e rimedi per le vittime”, in *Diritti umani e diritto internazionale*, vol. 7, 2013, pp. 285-314; Condorelli, “De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlandais”, in *Questions of International Law*, 2014, pp. 3-15; D'Argent, “State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct”, in *Questions of International Law*, 2014, pp. 17-31; Spagnolo, “The ‘reciprocal’ approach in article 7 DARIO: A reply to Pierre d'Argent”, *ibidem*, pp. 33-41; Palchetti, “The Allocation of Responsibility for Internationally Wrongful Acts committed in the Course of Multinational Operations”, in *International Review of the Red Cross*, vol. 95, 2013, pp. 727-742; Palchetti, “Attributing the Conduct of Dutchbat in Srebrenica: the 2014 Judgment of the District Court in the Mothers of

Condorelli was the first author to tackle the issue of UN peacekeepers' status, describing it as a double organic status (*'double statut organique'*), according to which nationally contributed personnel are to be considered at once as 'experts on mission', or as *'fonctionnaires'* of the UN, and simultaneously as organs of the sending State.<sup>107</sup> The author has further elaborated in a later work that the organic link with the State is neither frozen nor broken as result of the secondment to the UN, thus peacekeepers become 'agents double', i.e. of the sending State and of the UN. For Condorelli, peacekeepers of UN-led missions are under the authority of the UN nations and under the authority of the contributing country; in other words, they are placed under a *'double commandement'*.<sup>108</sup> As a consequence of this double hat (the legal status) and of this double command (chain of command and control), wrongful acts of UN peacekeepers should in principle be attributable both to the organisation and to the sending State. It should be specified that Condorelli's first work preceded the DARIO by nearly a decade. Necessarily, the author's findings are not linked to, nor do they suggest the application of, any specific provision set forth in the DARIO. Even in Condorelli's later work, he has not shown great interest in possible implications for either art. 6 or of art. 7 DARIO, whereas his main focus has remained on double attribution, both to the UN and to the TCC as a result of the dual status of contributed troops.<sup>109</sup>

It is noteworthy that while developing his theory, Condorelli identified two different approaches to determine the consequences of this double status for international responsibility. On the one hand, the 'minimalist approach' is based on the assessment of the control exercised by the sending State over the impugned conduct (e.g. by the authorisation or by the order to act). Here, the

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Srebrenica Case", in *Netherlands International Law Review*, vol. 62, 2015, pp. 279-294; Palchetti, "International Responsibility for Conduct of UN Peacekeeping Forces: The question of attribution", in *Sequencia*, n. 70, 2015, pp. 19-56.

<sup>107</sup> Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", and "Le statut des forces des Nations Unies et le droit international humanitaire", *supra* note 106.

<sup>108</sup> Condorelli, "Le statut des forces des Nations Unies et le droit international humanitaire", at p. 95.

<sup>109</sup> Condorelli, "De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlandais", *supra* note 106. It has to be highlighted that the main aim of this piece of literature was to comment and critique the landmark judgements of the Srebrenica case before the Dutch Courts, hence its focus stayed on double attribution.

sending State would be responsible for the wrongful conduct of its contingent when it has exercised a form of control over it.<sup>110</sup> On the other hand, the ‘maximalist approach’ – endorsed by Condorelli – is rooted in the double legal status of the members of the force (State agents and agents of the UN). Accordingly, a wrongful conduct occurring during a UN-led peace operations would be attributed to the UN and to the lending State without the need to inquire into the control exercised by the latter.<sup>111</sup> To translate these two approaches in the parlance of the Draft Articles, one can conclude that the minimalist approach seemingly would result in the application of art. 7 DARIO, interpreted in a fashion that would allow for double attribution to the UN and to the sending State. By contrast, the maximalist approach would call for the combined application of art. 6 DARIO (peacekeepers are agents of the UN) and of art. 4 DARS (peacekeepers remain State organs).

Another author has reached a quite different conclusion, even while departing from very similar considerations. Sari has in fact affirmed that members of UN-led peace operations have a ‘dual institutional status’ and has claimed that the applicable provisions on the allocation of international responsibility must be based on the legal status of the forces and not on the factual criterion of effective control.<sup>112</sup> It is affirmed that the transfer of authority from the lending State to the UN generates a presumption that national contingents act on behalf of the UN while assigned to the mission; accordingly, insofar as they are UN subsidiary organs, art. 6 DARIO (not art. 7) would apply. Thus, the author has clearly valued the legal status rather than the analysis of the factual circumstances of the case in order to determine the applicable rules on attribution of conduct.

This approach has been followed by another author, who has welcomed and developed the idea of the presumption but has drawn different conclusions from that premise. Palchetti has maintained that members of UN-

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<sup>110</sup> Condorelli, “De la responsabilité internationale de l’ONU et/ou de l’État d’envoi lors d’actions de Forces de Maintien de la Paix: l’écheveau de l’attribution (double?) devant le juge néerlandais”, *supra* note 106, see in particular pp. 11-15.

<sup>111</sup> *Idem*.

<sup>112</sup> Sari, “UN Peacekeeping Operations and Article 7 ARIIO: The Missing Link”, *supra* note 106.

led operations have a dual status as organs both of the UN and of the sending State.<sup>113</sup> Nevertheless, it is further stated that what matters is not the legal status of subsidiary organ but rather the internal agreement between the UN and the sending State governing the secondment of personnel. In particular, the formal transfer of powers to the organisation creates a presumption according to which wrongful conducts are in principle attributable to the UN. Hence, although the author has recognised that troops contributed to UN-led operations are UN subsidiary organs, he has however resorted to some extent to art. 7 DARIO, thereby setting forth a presumption of attribution to the organisation where the effective control test, in principle, would not be of use. It is further clarified that the presumption can be rebutted in cases of wrongful acts originated from orders given by the sending State and performed under a mere ‘formal authority’ of the UN.<sup>114</sup> Thus, despite the dual nature of UN peacekeepers (both UN and State organs), the author has given more weight to the status of State organs of peacekeepers. Accordingly, he has ruled out the applicability of art. 6 DARIO in favour of a peculiar interpretation of art. 7 that establishes a rebuttable presumption of attribution to the receiving international organisation.<sup>115</sup>

*5.1 National troops contributed to UN peace operations are UN subsidiary organs or State organs placed at the UN disposal?*

It has been shown that major disagreements have emerged in defining the legal status of national troops contributed to UN-led missions. On the one hand, during the DARIO’s drafting the UN has firmly stated that UN-led peace operations are subsidiary organs of the organisations and that national

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<sup>113</sup> Palchetti, “The Allocation of Responsibility for Internationally Wrongful Acts committed in the Course of Multinational Operations”, *supra* note 106.

<sup>114</sup> *Idem*, at p. 734.

<sup>115</sup> See also Palchetti, “Attributing the Conduct of Dutchbat in Srebrenica: The 2014 Judgment of the District Court in the Mothers of Srebrenica Case”; “International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution”, and “Azioni di forze istituite o autorizzate delle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo”, all *supra* note 106.

contingents contributed thereto are ‘transformed’ in subsidiary organs as well. On the other hand, the ILC and the majority of States have regarded troops contributed to these missions as State organs placed at the disposal of the organisations. Moreover, scholars have often claimed that national contingents enjoy a dual status, both as organ of the UN and as State organs and, although departing from the same assumption, they have reached different conclusions on the applicable attribution rules. Some authors have favoured the institutional link with the organisation, highlighting the relevance of art. 6 DARIO, others have stressed the importance of control mechanisms and have called for the application of art. 7 DARIO accordingly.

The present chapter maintains that the issue of the legal status of UN-led peace operations should be a matter of fact and of law. It is certainly true that UN peace operations present elements of complexity due to the multiple connections they have both with the sending States and with the receiving organisations and due to the specific powers the Organisation has to establish subsidiary organs. It has been highlighted earlier that the issue has arisen exclusively in connection with UN-led operations, while neither NATO nor the EU have claimed that peace operations established under their aegis would be considered as subsidiary organs.<sup>116</sup>

In our opinion the disagreement centres on two issues, namely the UN powers to actually establish subsidiary organs and the power to transform a State organ into an organ of the organisation. In other words, the UN Charter entitles both the General Assembly and the Security Council to establish subsidiary organs “as it deems necessary for the performance of its functions”, under arts. 22 and 29 respectively. Furthermore, art. 2 (c) DARIO has made clear that an “‘organ of an international organization’ means any person or entity which has that status in accordance with the rules of the organization”. This leads one to consider that peace operations established by the Security Council (or by the General Assembly) cannot be deemed anything else but a UN subsidiary organ.

It is common knowledge that the UN, as any other international

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<sup>116</sup> *Supra* para. 4

organisation, would not be able to act without the contribution of its Member States. This is particularly evident in peace operations, where States contribute civilian and military personnel and assets to the mission. The UN has claimed that once military contingents are contributed to the mission they are ‘transformed’ in UN subsidiary organs. While we have demonstrated that wide powers to establish subsidiary organs are recognised by the Charter to the main UN organs, no other ‘power of transformation’ is entrusted to the UN in order to turn State organs into organs of the organisation. To be more precise, a similar transformation may occur but it would exclusively depend of the sending State’s will to ‘fully second’ its organ to the receiving organisation.<sup>117</sup> A State organ would be fully seconded when it would cease to act as organ of its sending State, hence when it would be subjected exclusively to the authority of the receiving organisation. The core question to determine the legal status of UN peace operations is, thus, whether contributed personnel are fully seconded to the organisation. Only if the answer is affirmative we could share the UN view that national organs are transformed in UN subsidiary organs.

### *5.2. The features of national contributed troops’ secondment*

In order to find an answer to this pivotal question we will explore the features of secondment in UN peace operations. As mentioned earlier, ILC commentaries provides for some clarification when defining the scope of application of art. 7 DARIO that would not include State organs fully seconded to an organisation, to which art. 6 is dedicated, but rather State organs placed at the disposal of an organisation. Commentaries further specify that military contingents contributed to UN peace operations are a perfect example of lent – but not fully seconded – State organs whereby “the State retains disciplinary powers and criminal jurisdiction over the members

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<sup>117</sup> ILC DARIO Commentary to art. 7, para. 1.

of the national contingent”.<sup>118</sup> Although helpful to place national contingents in the DARIO’s pattern, the ILC considerations do not represent the most illustrative features of the secondment.

This study suggests that the attention should rather be focused on the authority that States do not hand over to an organisation when lending their troops in peace operations, namely ‘full command’. “Full command implies the totality of command authority and covers all aspects of organisation and directions of forces and is only possessed and exercised at the national level”.<sup>119</sup> A typical example of full command is the power States have to withdraw their troops from the mission, prior notification to the receiving organisation.<sup>120</sup> Full command can never be transferred nor delegated to an international organisation or another State, as widely understood in literature and pointed out in several pieces of military doctrine.<sup>121</sup> NATO, for example, has clearly stated that “[n]o NATO or coalition commander has full command over the forces assigned to him since, in assigning forces to NATO, nations will delegate only operational command or operational control”.<sup>122</sup> The same

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<sup>118</sup> *Idem*.

<sup>119</sup> Gill, “Legal Aspects of the Transfer of Authority in UN Peace Operations”, in *Netherlands Yearbook of International Law*, vol. 42, 2011, pp. 37, at p. 46. Other authors generally resort to the definition provided by the NATO standardisation office, according to which “full command is the military authority and responsibility of a commander to issue orders to its subordinate. It covers every aspect of military operations and administration”, NATO *Glossary of Terms and Definitions*, ‘full command’, AAP-06 (2014).

<sup>120</sup> See for example the decision of the Belgian government to withdraw its troops from MINUAR, reported in the *Mukeshimana-Ngulinzira* case, *infra* para. 7.5.

<sup>121</sup> Cathcart, “Command and Control in Military Operations” in Gill-Fleck (eds), *Handbook of international military operations*, pp. 235-245; Gill, “Legal aspects of the transfer of authority”, *supra* note 119; Murphy, “Legal framework of UN forces and issues of command and control of Canadian and Irish forces” in *Journal of Armed Conflict Law*, vol. 4, pp. 41-73, in particular at p. 50. *Comprehensive review of the whole question of peace-keeping operations in all their aspects, command and control of United Nations peace-keeping operations Report of the Secretary General*, A/49/681 (1994), para. 6; Sanfelice di Monteforte, “Operational Command versus Organic Command: who is in charge?”, in Beruto (ed.) *International Humanitarian Law Human Rights And Peace Operations, Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law Sanremo*, 4-6 September 2008, pp. 280-283; D’Argent, “State organs placed at the disposal of the UN, effective control, wrongful abstention and dual attribution of conduct”, in *Questions of International Law*, vol. 1, 2014, pp. 17-31; Tsagourias, “The responsibility of International Organisation for Military Missions”, in Odello-Piotrowicz (eds), *International Military Missions and International Law*, Brill, 2011, pp. 245-265.

<sup>122</sup> AAP-06 (2014), NATO *Glossary of Terms and Definitions*, ‘full command’.

holds true in UN operations' practice where "United Nations command is not full command and is closer in meaning to the generally recognised military concept of 'operational command'".<sup>123</sup>

Moreover, States may impose further limitations to the secondment of their contingents, the so-called national *caveats*, which include any restriction imposed by the sending State over several aspects of the deployment and employment of troops. The general definition of *caveat* elaborated by the NATO Standardisation Office reads as follows

any limitation, restriction or constraint by a nation on its military forces or civilian elements under NATO command and control or otherwise available to NATO, that does not permit NATO commanders to deploy and employ these assets fully in line with the approved operation plan.

Note: A caveat may apply *inter alia* to freedom of movement within the joint operations area and/or to compliance with the approved rules of engagement.<sup>124</sup>

They generally concern – but are not limited to – the area where troops can be deployed, the prohibition to employ troops outside the agreed area of operation, the use of force as authorised in the rules of engagement (ROE).<sup>125</sup>

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<sup>123</sup> A/49/681 (1994), para. 6

<sup>124</sup> AAP-06 (2014), NATO Glossary of Terms and Definitions, 'caveat'. See also Gill, "Legal aspects of the transfer of Authority", *supra* note 119. Art. 8 of the UN Model Memorandum of Understanding, provides for specific conditions, exemplified by: environmental condition factor, intensity of operations factor and hostile action/forced abandonment factor and that can be agreed between TCCs and the UN for every mission, see A/C.5/66/8, chapter 9.

<sup>125</sup> The rules of engagement "are issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives. ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities", *Sanremo Handbook on Rules of Engagement*, Institute of International Humanitarian Law, 2009, p. 1. ROE are one of the most strategic document in combatant activities and are by definition classified materials. They are issued by national military authorities and may vary significantly amongst different national contingents and these difference may cause problems in multi-national operations. "In multi-national operations participating nations should operate under coherent ROE arrangements. Policy and legal differences can lead to different ROE among the members of a multi-national force. Different ROE can be a source of friction in conducting operations. Problems of this sort are best resolved through negotiations rather than through a process that leads to an ROE that reflects the lowest common denominator", *ibidem*, p. 2.

In some cases, *caveats* may extend instead of restricting national powers and responsibilities, as exemplified by the UK *caveat* applied to ISAF detention policy in Afghanistan in 2009 according to which English troops contributed to ISAF would be entitled to detain individuals for longer than the 96 hours allowed under NATO detention standards.<sup>126</sup>

These limitations may stem from political and strategic disagreements among contributing States on the way to achieve a given mandate and their rationale lies with the need to take part to the peace operation without derogating from national laws and regulations.<sup>127</sup> In this regard, some commentators have described *caveats* as ‘self-protection mechanisms’ States may employ in multi-national operations to avoid potential violations of their domestic legal framework.<sup>128</sup> These constraints can be officially formulated by contributing States, for example while transferring the authority over their contingent to the Force Commander or while reaching a shared definition of common ROE, or can be opposed at a later stage in course of operation.<sup>129</sup> Besides this official pattern, the practice of ‘hidden *caveats*’ may also be common in multi-national operations, whereby sending States do not formalise their limitations, but contributed troops may refuse to take part in actions that would require crossing a ‘red line’, or demarcation between competing standards of engagement.<sup>130</sup> From

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<sup>126</sup> The issue has been dealt with by extensively in *Mohammed v. Ministry of Defence et al.*, *supra* note 96, in particular at paras 46-53. For more details on the case and its implications in the present analysis see *infra* section 7.3.

<sup>127</sup> Marucci, “Il *caveat*, strumento di garanzia o di gestione delle Operazioni Fuori Area?”, in *Informazioni della Difesa*, vol. 2, 2009, pp. 35-40.

<sup>128</sup> Telalian, “Responsibility and Compensation for Damages Caused During Peace Operations”, in Beruto (ed.) *International Humanitarian Law Human Rights and Peace Operations*, *supra* note 121, pp. 319-323.

<sup>129</sup> Marucci, *supra* note 117; Institute of International Humanitarian Law, *Sanremo Handbook on the rules of engagement*, 2009, in particular at p. 70; the present considerations are also based on the information and the teaching materials provided during the ROE workshop that the writer has attended at the Sanremo Institute in September 2015.

<sup>130</sup> UN press release, “Civilian Protection, Restrictions by Troop Contributors, Asymmetrical Attacks Top Operational Hurdles to Implementing Peacekeeping Mandates, Security Council Told”, 17 June 2015, SC/11930, available at: <http://www.un.org/press/en/2015/sc11930.doc.htm>. ‘Hidden *caveats*’ are also referred to as ‘informal’ or ‘unknown’, see Auerswald-Saideman, “NATO at War: Understanding the Challenges of Caveats in Afghanistan”, paper presented at the Annual Meeting of the American Political Science Association in Toronto, 2-5 September 2009, available at: <http://www.aco.nato.int/resources/1/documents/nato%20at%20war.pdf>.

this we infer that national *caveats* may have a great impact on a peace operation and on the mandate's achievement, especially when they are excessive in number and in complexity. By way of example, it has been reported that during the deployment of ISAF, between fifty and eighty national *caveats* existed, while the number of the 'hidden' ones was – by definition – unknown.<sup>131</sup> Lately, *caveats* have been identified by the UN as one of the 'top operational hurdles' in implementing peace operations mandates.<sup>132</sup> International organisations, in particular NATO and the UN, disapprove of this practice and have encouraged member States over the years to avoid or at least to significantly reduce national *caveats* in multi-national operations.<sup>133</sup> It is noteworthy that the June 2015 Report of the High-level Independent Panel on Peace Operations has suggested that the UN should embrace a very strict attitude for the future on national *caveats*. So strict that the Panel has advised the UN Secretariat to "weight the specific *caveats* when a contingent is offered against the value of its deployment, and it must be willing to decline an offer if the caveats will impede performance"<sup>134</sup> and even more importantly it has been suggested that hidden limitations should be treated as "disobedience of lawful command".<sup>135</sup> Despite the growing awareness that national *caveats* should be limited in multi-national operations, it is unlikely that contributing States would renounce this practice, which, in essence, represents a corollary of full command retained and exercised by every State over its national contingents.

In conclusion, it has been shown that national troops contributed by sending States to UN peace operations cannot be fully seconded to the organisation due to the wide powers and authority that States keep in their hand, exemplified *in primis* by 'full command' that can only be exercised at the national level and never be handed over to any other entity and *in secundis*

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<sup>131</sup> Auerswald -Saideman, *supra* note 130.

<sup>132</sup> UN press release, *supra* note 130.

<sup>133</sup> *Supra* note 130.

<sup>134</sup> *Report of the High-level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People*, A/70/95 - S/2015/446, 17 June 2015, para. 220.

<sup>135</sup> *Ibidem*, at para. 105 (c).

by the set of limitations (*caveats*) that a State, in its exercise of full command, may impose over various aspects of its troops' deployment and employment. In the absence of a full secondment the alleged 'transformation' of national organs in UN subsidiary organs cannot take place. The inference is therefore that the UN has the power to establish subsidiary organs and UN peace operations would be correctly deemed as one, and that contributed national troops, lacking the full secondment to the organisation, would not be considered as UN subsidiary organs.

### *5.3. UN peace operations as 'composed subsidiary organs'*

The present work suggests that the contrast between the two opposed views that see UN-led peace operations, on the one hand, as UN subsidiary organs and, on the other hand, as national seconded organs can be reconciled by looking at UN missions as 'composed subsidiary organs'. That is to say, UN-led operations should be considered UN subsidiary organs composed of State organs (i.e. national troops) placed at the disposal of the mission. Accordingly, wrongful conducts should be attributed on the basis of the rule concerning the conduct of organs placed at the disposal of an international organisation, art. 7 DARIO. This interpretation would reconcile the powers of the UN to establish subsidiary organs with the need to assess international responsibility of the entities involved in UN missions in a better suited fashion in order to encompass the complexity of peace operations.

In the first place, it should be highlighted that maintaining that a UN-led mission is a subsidiary organ of the organization does not equate to saying that national contingents contributed to the mission are themselves subsidiary organs of the UN. To put it differently, the subsidiary organ of the organization is the UN mission, not national contingents contributed to the mission. By contrast, national troops are State organs placed at the disposal of the UN mission. Hence, the UN mission should be regarded as an abstract entity, established according to the powers entrusted by the UN Charter to the

Security Council (or the General Assembly) and composed of State organs placed at the disposal of the mission.

It has been shown that the UN does not have the power to directly create a subsidiary organ made of State organs. The only possibility is that States place their national organs at the disposal of the organization. As demonstrated earlier, a State organ can be ‘transformed’ in a subsidiary organ of an international organisation only upon the will of the sending State to fully-second its organ to the organisation. In the previous section it has been highlighted how the set of features characterising the secondment of national troops to UN peace operation preclude that they are fully seconded to the organisation, due to the powers retained by lending States (in particular full command and the application of national *caveats*). Thus, it cannot be said that UN peacekeepers enjoy a double status of State organs and of organs or agents of the organisation, but they are and remain State organs. The fact that national contingents are placed at the disposal of an IO does not interfere with their original status; i.e., they do not cease to be State organs to become organs of the organisation. By contrast, the core feature of a peace operations has to be identified in the ‘placement at the disposal of the organisation’, i.e. the (non-full) secondment. As a consequence of the secondment of national forces to the UN – and not because of an alleged transformation of their legal status into UN subsidiary organs – special rules on attribution of conduct come into play. More precisely, in peace operations States contribute troops to the UN mission, thus to the subsidiary organ, not directly to the UN. The act of contributing national contingents (and assets) is an *ad hoc* activity that regulates the specific participation of a country to a given mission. The details of the agreement are contained in several documents including, for example, the Memorandum of Understanding signed between the TCC and the UN, and the transfer of authority (TOA).<sup>136</sup> Notwithstanding the existence of a UN MoU Model, such agreements are concluded each time for every single mission. Moreover, the text of the UN Model itself makes clear that States

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<sup>136</sup> *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations*, A/C.5/66/8, chapter 9.

contribute troops (and assets) to the UN mission and not generically to the UN.<sup>137</sup>

In terms of attribution, peacekeeping troops form part of the subsidiary organ of the UN that is the UN-led mission, but are not to be considered themselves organs of the organisation. On the contrary, national contingents should be regarded as State organs placed at the disposal of the UN mission. Peace operations are a peculiar example of subsidiary organs as the mission in practice can act only through the deployment of the troops that are placed at its disposal by TCCs. Therefore, it can be understood that since peacekeepers are not UN organs, it follows that the relevant link between conduct and the responsible entity is the factual link between the conduct and the mission or/and the sending State, not the institutional link between the organization and its organ. Hence, wrongful conduct that may arise during UN missions should be attributed in light of art. 7 DARIO, according to the rule of attribution of conduct of State organs placed at the disposal of an international organization. This framework appears particularly respondent to reality as, on the one hand, it is able to endorse the UN official position and, on the other hand, it takes into due considerations the implications of placing State troops at the disposal of the UN. In sum, it seems that it would be possible to reconcile the existing opposed positions as to the legal status of contributed troops to UN-led operations by regarding UN peace operations as ‘composed subsidiary organs of the UN’.

## **6. The relevance of art. 7 DARIO and the effective control test**

Once demonstrated that attribution of conduct should be determined on the basis of art. 7 DARIO in all types of peace operations (UN-led, UN-authorized and joint), it is then crucial to interpret the key provision contained therein: the effective control test. If the whole process of attribution of

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<sup>137</sup> *Ibidem*, “Contribution of the Government: Art. 5.1 The Government shall contribute to [United Nations peacekeeping mission] the personnel listed in annex A.

wrongful conduct of seconded organs is based on the assessment of whether the receiving organisation was exercising effective control over the impugned conduct, it follows that the meaning of effective control is crucial to the determination of international responsibility. It has been shown above that the criterion of effective control had been largely welcomed by States and international organisations during the DARIO drafting process. Despite widespread acceptance of the effective control test, its precise meaning and content has been and still is at the heart of an intense debate that involves scholars as well as domestic and international judges.

The following analysis will highlight the different interpretations offered in legal literature and in the relevant case law. We will then seek to answer questions left open in the current debate, namely whether: (i) effective control in peace operations would translate into operational control; (ii) it would allow for dual or multiple attribution to the receiving organisation and to the contributing State, and (iii) effective control has emerged as a general attribution criterion that applies to sending States in the default of effective control exercised by the receiving organisation.

### *6.1. Effective control as operational control? A look into peace operations' chain of command and control*

As shown by the drafting history of art. 7 DARIO, a widespread agreement existed among States as to the attribution criterion based on 'effective control'. Even though the very meaning of the notion remains elusive, some guidance in its interpretation can be found in the ILC's work and the related commentaries. First, we should bear in mind that the criterion of effective control has been elaborated in response to the Special Rapporteur's question of whether wrongful acts occurred in UN peacekeeping operations should be attributed to sending States, the UN or both. Second, the commentary to art. 7 DARIO specifies that effective control should be

understood as a factual criterion and take into due account “all the factual circumstances”.<sup>138</sup> Third, the same commentary has suggested that ‘effective control’ in peace operations should translate into ‘operational control’.<sup>139</sup> Evidently, as already noted by some authors, the notion clearly has ‘a military genesis’.<sup>140</sup> It is hence appropriate to explore the meaning of operational control in military parlance and in light of related concepts used to describe the chain of command and control, namely full command, operational command, operational control, tactical command, and tactical control. Wide reference will be made to UN and NATO doctrines, considered the most influential in shaping national approaches and standards to be followed during peace operations.

Full command, as described earlier, “implies the totality of command authority and covers all aspects of organisation and direction of forces and is only possessed and exercised at the national level”.<sup>141</sup> In the exercise of its full command a troop-contributing State may decide to impose national limitations on the deployment of its force (so called *caveats*), and at the same time retain administrative and disciplinary powers over its troops as well as exclusive jurisdiction.<sup>142</sup> More importantly for the purpose of the present analysis, in the exercise of its full command a sending State may decide the level of authority that would be transferred to a multi-national military commander when seconding its troops to a peace operation. In other words, a TCC can determine whether its contingents would be under operational command, operational control, tactical command, or tactical control of the receiving organisation. More precisely, States may transfer the aforementioned levels of authority in the Memorandum of Understanding

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<sup>138</sup> ILC DARIO Commentary to art. 7, para. 10

<sup>139</sup> *Idem*, the ILC has stressed its favour for ‘operational control’ as opposed to the ‘ultimate control’ elaborated by the ECtHR in the *Behrami and Saramati* case, the ultimate authority and control approach followed by the Court, which resulted in the exclusive attribution of the impugned acts to the UN, has been criticised also by the UN itself, see S/2008/354, para. 16. See also more extensively *infra* para. 7.1

<sup>140</sup> Montejo, “The Notion of ‘Effective Control’ under the Articles on the Responsibility of International Organizations”, in Ragazzi (ed.) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013, pp. 389-404.

<sup>141</sup> *Supra* para. 5.1.

<sup>142</sup> *Idem*.

agreed upon with a receiving organisation or in a Transfer of Authority (ToA) agreement, which is the formal act through which national contingents are placed under an agreed level of authority of a designated commander for a determined period of time.<sup>143</sup> According to UN doctrine, ToA takes place when units arrive in a mission area and is reverted back to the sending State on completion of assignment or when repatriated.<sup>144</sup> The actual transfer of the level of command may also occur in the absence of a ToA, as was the case of the Dutchbat contributed to UNPROFOR, for example, as noted by Dutch judges in some judgements concerning the events of Srebrenica.<sup>145</sup> When transferring authority in peace operations a State can hand over operational command or, at a lower level, operational control. This is confirmed, for example, by the definition of the NATO Glossary elaborated by the Standardisation Office, which describes the ToA as “an action by which a member nation [...] gives operational command or control of designated forces to a NATO Command”.<sup>146</sup>

Generally, States prefer to delegate operational control rather than operational command as exemplified by the Guidelines for troop contributing countries to UNMIS, where it is clearly stated that the Force Commander “is assigned operational control of the military component including all military personnel and formed military units” which “come under the operational control of the Force Commander upon arrival”.<sup>147</sup> This is further confirmed

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<sup>143</sup> Gill, “Legal Aspects of the Transfer of Authority in UN Peace Operations”, supra note 119 and Leck, “International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct”, in *Melbourne Journal of International Law*, vol. 10, 2009, pp. 316-364; Fleck, “Multinational Units” in Gill-Fleck (eds), *The Handbook of the Law of Visiting Forces*, supra note 71, in particular at pp. 39-43; Houck, “The Command and Control of United Nations Forces in the Era of ‘Peace Enforcement’”, in *Duke Journal of Comparative and International Law*, vol. 4, 1993, pp. 1-69.

<sup>144</sup> *Authority, Command and Control in United Nations Peacekeeping Operations*, UN DPKO, Department of Field Support, Ref. 2008.4, 2009, in particular at para. 15.

<sup>145</sup> Court of Appeal of The Hague, *Nuhanovic v the Netherlands*, para. 5.7 and District Court of The Hague, *Mothers of Srebrenica et al. v the Netherlands*, para. 4.37.

<sup>146</sup> AAP-06 (2014), ‘transfer of authority’, see also COPD-V 1.0 (2010), lett. (e) and AJP-3-4-1 (2014), section VIII.

<sup>147</sup> *Guidelines for Troop Contributing Countries Deploying Military Units to the United Nations Mission in Sudan (UNMIS)*, in Oswald-Durham-Bates (eds), *Documents of the Law of UN Peace Operations*, Oxford University Press, 2010, at 531-555, quotations at paras. 74 and 79 respectively.

in the MoU concerning the contribution of troops to the Stabilisation Force in Iraq under which “[O]perational Control of all National Contingents contributed to MND(CS) [Multi National Division – Central South] will be assigned to a superior Commander”.<sup>148</sup> The main difference between the two levels of command may be deduced by comparing the following definitions. Operational command (OPCOM) is defined by the UN as the

authority granted to a commander to assign missions or task to subordinate commanders to deploy units, to reassign forces, and to retain or delegate operational and tactical control; it is the highest level of operational authority which can be given to an appointed commander who is acting outside of his own national chain of command and is seldom authorised by Member States.<sup>149</sup>

It is worth highlighting that while some authors have maintained that general and universally accepted definitions are lacking,<sup>150</sup> it appears to the contrary that the concepts under analysis enjoy quite a shared understanding; by way of example, the NATO definitions of OPCOM sounds quite identical to the UN one.<sup>151</sup>

Operational control (OPCON), on the other hand, can be described as

the authority granted to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location by troop-contributing countries in the Security Council Resolution/mandate, to deploy units and retain or assign tactical control of those units.<sup>152</sup>

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<sup>148</sup> *Memorandum of Understanding between the Republic of Latvia et al. concerning Command Arrangements and Related Matters for The Multinational Division Central South (MND-CS) within the Stabilisation Force in Iraq*, 2003, available on the Official Gazette of Latvia at [https://www.vestnesis.lv/body\\_print.php?id=99221](https://www.vestnesis.lv/body_print.php?id=99221).

<sup>149</sup> *Glossary Prepared by the Department of Peacekeeping Operations Training Unit*, 1998, available at: <http://www.un.org/en/peacekeeping/sites/glossary>, lemma ‘operational command’.

<sup>150</sup> Cathcart, *supra* note 111. MacDougall, “United Nations Operations: Who Should Be in Charge?”, in *Revue de droit militaire et de droit de la guerre*, vol. 33, 1994, pp. 21-92.

<sup>151</sup> AAP-06 (2014), ‘operational command’ reads as follows: “[t]he authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control as the commander deems necessary. Note: It does not include responsibility for administration”.

<sup>152</sup> *Glossary Prepared by the Department of Peacekeeping Operations*: lemma ‘operational control’.

The UN Glossary goes on to specify that authority vested in a commander in the case of OPCON is more restrictive than in the case of OPCOM, which implies that under OPCON “a commander cannot change the mission of those forces or deploy them outside the area of responsibility previously agreed to” nor he or she can “separate contingents by assigning tasks to components of the units concerned”.<sup>153</sup>

While this UN peacekeeping glossary offers clear and discrete notions of OPCOM and OPCON, UN Peacekeeping Operations Policy Guidance, on the contrary, adds some elements of confusion.<sup>154</sup> While OPCON is described in line with the above-mentioned definition, OPCOM is absent and seems to be replaced by another term, ‘United Nations Operational Authority’ that is vested with the Secretary General and implies

the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal of a contingent would require the contributing country to provide adequate prior notification; (3) a specific mission geographic area (the mission area as a whole).<sup>155</sup>

This operational authority is also referred to as ‘overall authority’ and, while being vested in the Secretary General, it is exercised in the field by the Head of Mission (HOM), also called the Special Representative of the Secretary General (SRSG), who is generally a diplomat appointed by the Secretary General. At the same time, the Head of the Military Component (HOMC), also referred to as the Force Commander (FORCOM), who is generally a senior military commander of one of the contributing nations appointed by the Secretary General, exercises OPCON over national military contingents seconded to the mission.<sup>156</sup> According to these definitions, the United Nations seems to merge military notions describing the chain of command and control with terms concerning political

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<sup>153</sup> *Idem*.

<sup>154</sup> *Authority, Command and Control in United Nations Peacekeeping Operations, supra* note 144.

<sup>155</sup> *Ibidem*, para. D.7.

<sup>156</sup> *Ibidem*, in particular at paras 15-21-25-29-45.

authority exercised over a mission.

In our opinion, the main source of the uncertainties in the interpretation of ‘effective control’ lies precisely with the overlapping use of the notions of political authority and military authority. A clear example of this confusion can be found in the *Behrami* case, where the ECtHR interpreted effective control as ‘ultimate authority and control’ and accordingly attributed, not only the conduct of UNMIK, but also the acts occurred in the framework of KFOR, to the UN.<sup>157</sup> If the Court had endorsed the interpretation proposed by the ILC – according to which effective control means operational control – it would not have focused on who had the political authority over the mission, but rather on where operational control was vested, looking at the military chain of command and control.<sup>158</sup>

To summarise the above considerations, the chain of command and control in peace operations can be described as follows: the multinational Force Commander (FORCOM), appointed by the international organisation leading the operation, exercises operational control over national contingents contributed to the mission. A part of this authority may be delegated to subordinate commanders in the form of tactical command (TACOM) or tactical control (TACON) in order to fulfill specific missions or tasks within a specific area and time frame. At the same time, troop-contributing States

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<sup>157</sup> *Infra* para. 7.1.

<sup>158</sup> Klein, “Responsabilité pour les faits commis dans le cadre d’opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l’homme: quelques considérations critiques sur l’arrêt *Behrami* et *Saramati*”, in *Annuaire Français de Droit International*, vol. 53, 2007, pp. 43; Larsen, “Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test”, in *European Journal of International Law*, vol. 19, 2008, pp. 509; Sossai, “Accesso alla Corte Europea dei Diritti dell’Uomo per violazioni compiute dalle forze armate degli Stati contraenti all’estero”, in Francioni-Gestri-Scovazzi-Ronzitti (eds), *Accesso alla giustizia dell’individuo nel diritto internazionale e dell’Unione Europea*, Giuffrè, 2008, pp. 197-232; Milanović-Papić, “As Bad As It Gets: The European Court of Human Rights’s *Behrami* and *Saramati* Decision and General International Law”, in *International and Comparative Law Quarterly*; vol. 58, 2009, pp. 267-296; Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, in *European Journal of International Law*, vol. 23, 2012, pp. 121-139; Ryngaert, “Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the Effective Control Standard after *Behrami*”, in *Israel Law Review*, vol. 45, pp. 151-178; Palchetti, “Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: i casi *Behrami* e *Saramati*”, *supra* note 108.

retain full command over their troops, which is exercised on a daily basis throughout the national contingent commander. This national senior commander has the direct responsibility to liaise with FORCOM and with his own sending State, assuring that troops are employed within the limits imposed by their transfer of authority as well as by potential national *caveats*.<sup>159</sup> Political authority may lie with: (i) the Secretary General via its Special Representative in UN peace operations; (ii) the North Atlantic Council via SHAPE in NATO-led operations; (iii) both the Secretary General and a single nation (or regional organisation), in joint operations. It is important to underscore that to inquire where the political authority lies should fall outside the scope of analysis of attribution of international responsibility, considering that effective control should be understood as a factual criterion. In conclusion, when operational control over a wrongful conduct is exercised by FORCOM, conduct should be attributed to the international organisation who is leading the operation.

## *6.2. Effective control and dual or multiple attribution*

Despite the apparent clarity of the proposed structure, some core issues remain unanswered. On the one hand, it is not evident whether operational control can be exercised jointly by FORCOM and a sending State and consequently if more than one entity can exercise effective control over a wrongful conduct. In other words, could art. 7 DARIO be interpreted to allow dual attribution? On the other hand, it is not clear what would be the proper attribution criterion when the organisation is not in effective control. Would that imply a fall-back on State responsibility rules under the DARS, namely, the general rule of attribution of conduct of State organs, or would the effective control test be applied as a general criterion?

In order to address these issues, the study will first focus on the doctrinal

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<sup>159</sup> Leck, “International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct”, in *Melbourne Journal of International Law*, vol. 10, 2009, pp. 316-364

debate concerning dual attribution, including a reference to the pertinent drafting history of the DARIO; second, it will turn to analyse the answers provided by relevant domestic and international case law.

Multiple attribution has recently been at the heart of a lively scholarly debate, due to the unprecedented judgements of the Dutch Courts in the *Nuhanovic* case that have ruled in favour of double attribution both to the UN and to the Netherlands of wrongful conducts committed by the UNPROFOR Dutch Battalion (Dutchbat), after the fall of Srebrenica.<sup>160</sup> Moreover, dual or multiple attribution has gathered great momentum in relation to the broader discourse on shared responsibility in international law.<sup>161</sup>

Nevertheless, in light of art. 7 DARIO the problem of multiple attribution is not new, rather it has been dealt with by States and the ILC during the DARIO drafting process, with particular regard to wrongful conducts occurred in peace operations. Hence, a brief look at the DARIO drafting history in this perspective will help to shed light on the current debate.

When States submitted their first comments at the request of the ILC in 2003, several delegations considered dual attribution as an available option, however the topic was not addressed thoroughly. Some States put forward the hypothesis of ‘concurrent responsibility’ between the UN and TCCs in cases of gross negligence or willful misconduct of sending States.<sup>162</sup> It was not clear, though, what form of responsibility was envisaged in this case. In fact, this proposal echoes the pattern described in authoritative statements of the UN, whereby the Organisation, once it has assumed the responsibility *vis-à-vis* third parties, has a right to seek recovery from sending State to which wrongful conduct was attributable in cases of gross negligence and willful misconduct.<sup>163</sup> In other words, the term ‘concurrent responsibility’ in this context pertains more to a right of redress than to a form of responsibility as such. Other delegations mentioned, more specifically, the

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<sup>160</sup> For more details, see *infra* para. 7.4.

<sup>161</sup> Nollkaemper-Jacobs, “Shared Responsibility in International Law: A Conceptual Framework”, in *Michigan Journal of International Law*, vol. 34, 2013, pp. 359-438.

<sup>162</sup> Denmark, Finland, Iceland, Norway and Sweden (A/C.6/58/SR.14, para. 21).

<sup>163</sup> *Inter alia* A/51/389 (1996).

possibility of attributing wrongful conduct concurrently to the UN and to the TCCs.<sup>164</sup> The notion ‘concurrent or subsidiary liability’ was also used to refer to the matter of dual attribution.<sup>165</sup>

In sum, at the early stage of the ILC work the possibility of attributing wrongful conduct both to the UN and to TCCs as a result of the effective control test was not excluded but was addressed only in quite generic terms. The sound legal reasoning of the Special Rapporteur Gaja was essential in clarifying the contours of the issue. Professor Gaja, in his second report, noted that dual attribution cannot be excluded and that international responsibility can be incurred simultaneously by an international organisation and member States as the result, for example, of the planning and of performance of a military action.<sup>166</sup> Similarly, there can be a case of dual attribution between two States as, for example, resulting from the establishment of a joint organ.<sup>167</sup> The inference therefore, is that the wording of article 7 DARIO would allow for dual attribution both to the UN and a sending State. This has been confirmed at a later stage in the 7<sup>th</sup> Report of the Special Rapporteur of 2009, where it was articulated that the criterion envisaged in art. 7 [former art. 5 DARIO] can lead in many cases “to the conclusion that conduct has to be attributed both to the lending State and to the receiving international organisation”.<sup>168</sup> However, it cannot be ignored that this openness towards dual attribution later faded and in the last report of the Special Rapporteur we cannot find any reference to the point.<sup>169</sup> At the same time, very few delegations kept expressing their favour for the interpretation of that draft article in the sense of dual attribution.<sup>170</sup> Eventually, even the DARIO commentary remains vague on whether art. 7 should lead to dual or exclusive

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<sup>164</sup> Italy (A/C.6/58/SR.14, para. 45).

<sup>165</sup> Greece (A/C.6/58/SR.15, para. 13).

<sup>166</sup> A/CN.4/541, para. 7, with particular reference to the possible dual attribution to NATO and to lending States.

<sup>167</sup> *Ibidem*, para. 6. No reference is made here to a concrete example, but one can note that, just few months before the issue of the Report, the USA and the UK had established the Coalition Provisional Authority to administer Iraq during the occupation phase, prior to the formation of the new interim government. The CPA represents a typical example of joint organ.

<sup>168</sup> A/CN.4/610, para. 25.

<sup>169</sup> A/CN.4/640.

<sup>170</sup> Mexico (A/CN.4/636/Add.1, p. 10).

attribution to the entities that have exercised effective control over the conduct. On the one hand, the commentaries specified that the criterion of control serves to assess “to which entity – the contributing State *or* organisation *or* the receiving organisation – conduct has to be attributed”.<sup>171</sup> In the opinion of some authors, this wording would only accommodate an interpretation in support of exclusive attribution.<sup>172</sup> On the other hand, the DARIO commentary extensively quoted the decision of the Court of Appeal of the Hague, mentioned above, that allowed for dual attribution of the Dutchbat's conduct in Srebrenica simultaneously to the UN and the Netherlands, together with the rich literature accompanying and supporting this approach.<sup>173</sup>

Eventually, one has to take into account another provision of the DARIO, which seems to imply that dual attribution is an available option, art. 48 DARIO indeed stipulates that

where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

Although it has been highlighted that this provision does not concern attribution of responsibility but rather its invocation,<sup>174</sup> it seems however reasonable to infer that – at the least – that the DARIO do not preclude dual responsibility. Nonetheless, it is not self-evident whether this joint responsibility would result from dual attribution under art. 7 DARIO.<sup>175</sup>

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<sup>171</sup> Art. 7 DARIO, para 5.

<sup>172</sup> Messineo, “Attribution of Conduct”, in Nollkaemper-Plakokefalos, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, Cambridge University Press, 2014, pp. 60-97; D’Argent, *supra* note 106. The position of exclusive attribution was also maintained by the Procurator General of the Dutch Supreme Court in the *Nuhanovic* case: see the comment of Nollkaemper, available at: <http://www.sharesproject.nl/procurator-general-of-the-dutch-supreme-court-concludes-to-reject-appeal-against-srebrenica-judgment/>.

<sup>173</sup> ILC DARIO Commentaries to art. 7, para. 14 and note 129.

<sup>174</sup> Direk, “Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the ‘Effective Control’ Standard”, in *Netherlands International Law Review*, vol. 61, 2014, pp. 1-22.

<sup>175</sup> Other forms of attribution include the so called ‘attribution of responsibility’ or ‘indirect responsibility’ where international responsibility is entailed not as result of attribution of

Hence, the issue of art. 7 DARIO interpretation in light of exclusive or dual attribution does not find a definite answer in the work of the ILC.

In the absence of clear rules on the matter, it is noteworthy that dual/multiple attribution is generally seen favourably by scholars, although on the basis of slightly different arguments. For example, Condorelli, as already mentioned, has linked dual attribution to the dual status of peacekeepers: State organs and agents of the organisation.<sup>176</sup> Leck has suggested that the nature of multinational operations imply the necessity that every decision is jointly agreed upon by the leading organisation and the sending State, namely between FORCOM and the National Contingent Commander (NCC). In his opinion, no action could be taken without the contribution of the NCC that would take part in the decision-making process and would perform an essential function in transmitting orders to his or her national contingents. Accordingly, acts would always be joint and the attribution criterion should be identified in ‘the extent of effective control’ exercised over the wrongful conduct, as originally suggested by the Special Rapporteur Gaja.<sup>177</sup> Also Spagnolo has endorsed this interpretation,<sup>178</sup> while Palchetti has described dual attribution as a residual criterion to apply whenever it would not be possible to assess whether the national contingent was acting under the authority of the sending State or the receiving organisation.<sup>179</sup> Tsagurias, instead, has identified in dual attribution the

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wrongful conduct. On the contrary international responsibility results from other behaviours carried out in connection with the wrongful act or resulting from the institutional link between two entities as, for example, the membership of States to international organisations. See in particular arts. 17 and 58-62 DARIO; as to the doctrinal debate see, Nollkaemper-Nedeski, “Responsibility of International Organizations ‘in Connection with Acts of States’”, in *International Organizations Law Review*, vol. 9, 2012, pp. 33-52; Cortés Martín, “The Responsibility of Members Due to Wrongful Acts of International Organizations”, in *Chinese Journal of International Law*, 2013, 679-721; Voulgaris, “Rethinking Indirect Responsibility: A Study of Article 17 of the Draft Articles on the Responsibility of International Organizations”, in *International Organizations Law Review*, vol. 11, 2014, pp. 5-52.

<sup>176</sup> Condorelli, “Le statut des forces de l’ONU et le droit international humanitaire”; id., “De la responsabilité internationale de l’ONU et/ou de l’État d’envoi lors d’actions de Forces de Maintien de la Paix: l’écheveau de l’attribution (double?) devant le juge néerlandais”, *supra* note 106.

<sup>177</sup> Leck, “International Responsibility in United Nations Peacekeeping Operations”, *supra* note 158.

<sup>178</sup> Spagnolo, “The ‘reciprocal’ approach in article 7 ARIIO”, *supra* note 106.

<sup>179</sup> Palchetti, “The allocation of responsibility for internationally wrongful acts committed in

applicable criterion in joint operations, while Ryngaert has expressed a general favour for ‘shared responsibility’ in peace operations on the basis of accountability considerations, as it would limit the separate responsibility of the actors involved and rather “locates responsibility where it lies”.<sup>180</sup>

Once shown the general view expressed in the scholarly debate on effective control, the inquiry shall now be completed with the study of the relevant case law.

## **7. *La bouche de la loi*: the judges’ interpretation of effective control**

### *7.1. Effective control before the ECtHR: Behrami and Saramati, Al Jedda and related case law...*

With the *Behrami* and *Saramati* cases, in 2001, the ECtHR was asked for the first time to adjudicate the responsibility of member States participating in a peace operation. More precisely, the case concerned the alleged responsibility of France, Germany and Norway for wrongful conduct committed during their participation to UNMIK and KFOR in Kosovo.<sup>181</sup> The joint cases present a high level of complexity as they concern the alleged international responsibility of TCCs both in a UN-led mission (UNMIK) and in a UN-authorized mission conducted under the aegis of NATO (KFOR). The claimant in the *Behrami* and *Behrami* case asserted that France was responsible for the death of his son caused by the explosion of a bomb while playing in an area that should have been cleared in the course of de-mining

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the course of multinational operations”, and “International Responsibility for Conduct of UN Peacekeeping Forces: The question of attribution”, *supra* note 106.

<sup>180</sup> Ryngaert, “Apportioning Responsibility”, in particular at p.167. For a different approach on the opportunity to share the accountability burden see Ahlborn, “To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States”, in *Die Friedens-Warte*, vol. 88, 2013, pp. 45-75.

<sup>181</sup> ECtHR, Grand Chamber, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos 71412/01 and 78166/01, Admissibility Decision, 2 May 2007.

under the responsibility of UNMIK, and precisely of the French contingent; while the claimant in the *Saramati* case claimed the responsibility of France, Germany and Norway for his unlawful detention carried out by KFOR forces. The Court was asked to adjudicate the international responsibility of TCCs and it decided to address the issue under the viewpoint of attribution of conduct. In other words, in order to determine the Court's competence the judges investigated whether the impugned acts were attributable to the respondent States or rather to the UN or to NATO. The judges found that the de-mining fell within the responsibility of UNMIK, which was considered a UN subsidiary organ, accordingly the conduct (the alleged failure to de-mine the area) was attributed to the UN.<sup>182</sup> As to the detention of Mr Saramati, the Court deemed that the detention mandate fell within the responsibility of KFOR and it further inquired whether the conduct of KFOR (alleged illegal detention) was attributable to the UN or to KFOR. In a notorious passage of the sentence it was affirmed that "the Court finds that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO",<sup>183</sup> hence the conduct in point was attributed to the UN.<sup>184</sup> As a consequence, the case was declared inadmissible for lack of jurisdiction.

Although the Court made express reference to the ILC's work and specified that it "used the term 'attribution' in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations"<sup>185</sup>, the judges resorted to unprecedented concepts such as 'ultimate authority and control' and 'effective command'. The Court's findings have been harshly criticised not only in scholarly writings, but also by the UN itself.<sup>186</sup>

Notwithstanding the widespread criticism against the '*Behrami*

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<sup>182</sup> *Ibidem*, paras 127 and 142-3.

<sup>183</sup> *Ibidem*, para. 140.

<sup>184</sup> "In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN", *ibidem*, para. 141.

<sup>185</sup> *Ibidem*, para. 121.

<sup>186</sup> See A/CN.4/637/Add.1 p. 12, para. 9 and S/2008/354 para. 16, the opinion of UN is also reported in the ILC DARIO Commentaries to art. 7, para 10.

approach', the Court has followed the same reasoning in several other judgements such as in *Kasumaj v. Greece*<sup>187</sup> and in *Gajic v. Germany*,<sup>188</sup> which concerned, respectively, the alleged violation of property rights by Greece and Germany during their participation in KFOR. Both cases have been declared inadmissible due to the Court's lack of competence *ratione personae*, as the impugned conducts of KFOR forces were attributed to the UN. It is worth mentioning the *Beric* case as well, that represents a further confirmation of the 'ultimate authority and control test'<sup>189</sup>, with a minor innovation according to which the Court has partially rephrased the concept by referring to 'effective overall control'.<sup>190</sup> Wording notwithstanding, also this case was dismissed, as the impugned acts of the High Representative for Bosnia and Herzegovina were attributed to the UN, hence the Court has declared its lack of jurisdiction.

The '*Behrami* approach' has been criticised for a number of reasons. First, it has been pointed out that the Court should have addressed the preliminary issue of jurisdiction within the meaning of art. 1 of the ECHR rather than resolving the case on the basis of attribution of conduct.<sup>191</sup> Other authors have also noted that the case should not have been decided by applying rules of international responsibility.<sup>192</sup> On a different line, some scholars have maintained that the interpretation of rules of international responsibility, applied in this stream of cases, was indeed not in line with the

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<sup>187</sup> ECtHR, First Section, *Kasumaj v Greece*, no. 6974/05, Decision on Admissibility, 5 July 2007.

<sup>188</sup> ECtHR, Fifth Section, *Gajic v Germany*, no. 31446/02, Decision on Admissibility, 28 August 2007.

<sup>189</sup> ECtHR, Fourth Section, *Beric et al. v Bosnia and Herzegovina*, nos 36357/04 *et al.*, Decision on Admissibility, 16 October 2007. See the comment by Gradoni, "L'altro rappresentante per la Bosnia-Erzegovina davanti alla Corte europea dei diritti dell'uomo", in *Rivista di diritto internazionale*, vol. 91, 2008, pp. 621-668.

<sup>190</sup> *Beric*, *supra*, para. 27.

<sup>191</sup> Lawson, "Life after Bankovic: on the Extraterritorial Application of the European Convention on Human Rights", in Coomans-Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Intersetia (2004), pp. 83 ff; Palchetti, "Azioni di forze istituite o autorizzate delle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Seramati", *supra* note 106.

<sup>192</sup> Sari, "Jurisdiction and International Responsibility in Peace Support Operations: the Behrami and Saramati Cases", in *Human Rights Law Review*, vol. 8, 2008, pp. 151-170; Milanović-Papić, "As Bad as It Gets", *supra* note 108; Larsen, "Attribution of Conduct in Peace Operations", *supra* note 158; Klein, "Responsabilité pour les faits commis dans le cadre d'opérations de paix", *supra* note 158.

understanding put forward by the work in progress of the ILC. According to this critique, the Court has not relied on the effective control criterion but, to the contrary, has created a new attribution standard, namely the ‘overall authority and control’ linked to the legality and the scope of the delegation of powers by the Security Council to a certain mission.<sup>193</sup> It has also been highlighted that the solution foreseen in *Behrami* could have the regrettable consequence of allowing States participating in peace operations to shield themselves from their international responsibility.<sup>194</sup> Furthermore, concerns have been raised as to the lack of judicial protection of potential victims of internationally wrongful acts occurred in peace operations due to immunity from jurisdiction the UN enjoys before domestic courts, combined with the proved ineffectiveness of non-judicial remedies established by the UN.<sup>195</sup>

A new hope for human rights advocates, commentators and effective-control supporters was brought with the *Al Jedda* case in 2011.<sup>196</sup> It can be said that with the *Al Jedda* judgement the Court operated a very accurate analysis of all issues of attribution in multinational operations. Even if Multi-National Force in Iraq (MNF-I) can hardly be considered a peace operation under the working definition elaborated in the first chapter, the attribution issue dealt with by the Court does not differ from those arising in peace operations *strictu sensu*. The Court had to adjudicate the international responsibility of the UK for the alleged unlawful detention of the claimant during the presence of the MNF-I authorised by SC RES 1511 and later by SC RES 1543. The impugned acts occurred when the governing powers had been transferred from the joint organ set up by the US and the UK (the Coalition Provisional Authority) to the Iraqi Interim Government.<sup>197</sup> The

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<sup>193</sup> Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, in *European Journal of International Law*, vol. 23, 2012, pp. 121-139. Ryngaert, “Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations”, *supra* note 158.

<sup>194</sup> Milanovic, *supra*.

<sup>195</sup> Tomuschat, “Attribution of International Responsibility: Direction and Control”, in Evans (edited by), *The International Responsibility of the European Union*, *supra* note 106, pp. 7-34, for a detailed analysis of remedies available to individuals affected by UN peace operations, see *infra*, chapter IV.

<sup>196</sup> Grand Chamber, *Al-Jedda v. the United Kingdom*, no. 27021/08, Judgment, 7 July 2011.

<sup>197</sup> On 19 March 2003, the Coalition of Willing States composed by the USA and the UK carried out a military action against Iraq to oust Saddam Hussein’s regime. Few months after the initiation of the operation, with a letter addressed to the President of the SC,

Court followed to some extent the approach chosen in *Behrami*, it first assessed the issue of attribution in order to determine its competence. Nevertheless, it revisited the ‘overall authority and control test’ in favour of the ‘effective control test’ relying *apertis verbis* on the letter of what is now art. 7 DARIO. In particular, the Court has moved away from the unfortunate interpretation based on the delegation of powers and has rather favoured a factual understanding of effective control.<sup>198</sup> Therefore, it concluded that the authorisation of MFN-I contained in the above-mentioned SC resolutions did not imply that the UN has assumed any degree of control over the acts of the MNF-I. Hence, the judges concluded that

[t]he Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations.<sup>199</sup>

Moreover, in resorting to the effective control test the Court has fostered a factual interpretation thereof in the following terms: “[i]n a multi-State operation, responsibility lies where effective command and control is vested and practically exercised”.<sup>200</sup> Accordingly, the Court came to the conclusion that the conduct was attributable to the UK and not to the UN, therefore it affirmed its competence.

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dated 8 May 2003, the USA and the UK announced the establishment of the Coalition Provisional Authority as follows: “*the United States and the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of the Coalition Forces have created the Coalition Provisional Authority [...] to exercise powers of government temporarily and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction*”. The Security Council with resolution 1483 of 22 May 2003 defined the USA and the UK as “occupying powers under unified command”. See, *inter alia*, Talmon, “A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq”, in Shiner-Phil-Williams-Andrew (eds), *The Iraq War and International Law*, Hart Publishing, 2008, pp. 185 ff.; Chinkin, “The Continuing Occupation? Issues of Joint and Several Liability and Effective Control”, *ibidem*, pp. 161 ff.

<sup>198</sup> “When examining whether the applicant’s detention was attributable to the United Kingdom or, as the Government submit, the United Nations, it is necessary to examine the particular facts of the case”, *Al Jeddah*, para. 76.

<sup>199</sup> *Ibidem*, para. 80.

<sup>200</sup> *Ibidem*, para. 69.

The decision was welcomed with enthusiasm for its careful fact-finding and for the quite precise application of the rules on attribution and on jurisdiction. Nevertheless, for the purpose of the present analysis a few further remarks are in order to underscore remaining criticisms in the Court's reasoning.

First, it may be too soon to state that the judges have definitely abandoned the *Behrami* approach, considering that the *Al Jeddah* judgement has dedicated an entire paragraph to point out the differences between the two cases.<sup>201</sup> In fact, one cannot disregard that the factual background of the two cases differs significantly. The first judgement concerned the attribution of conduct allegedly committed both by UNMIK forces and KFOR forces, that is to say by national contingents contributed to a UN-led mission and to a UN-authorized mission led by a regional organisation (NATO), respectively. The *Al Jeddah* case, instead, dealt with human rights violations committed by a State participating in a UN-authorized mission led by coalition of States, and not by a regional organisation. Namely, the case addressed the responsibility of the UK as one of the two leading nations (together with the US) of MNF-I. In other words, during MNF-I no international organisation came into questions as the mission was led by two States and not by a regional organisation (as it was instead KFOR) and certainly not by the UN (as it was instead UNMIK).

Second, while the Court indeed superseded the delegation-of-powers reasoning (the UN authorisation does not imply any degree of control assumed by the organisation), at the same time it did not depart completely from the 'overall authority and control' test. The judges have clearly affirmed that "the United Nations Security Council had *neither* effective control *nor* ultimate authority and control over the acts and omissions of troops within the Multi-National Force".<sup>202</sup> This wording was seemingly chosen to leave some scope to the application of the 'ultimate authority and control' criterion in future case law and certainly to imply that the Court did not intend to reject

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<sup>201</sup> *Ibidem*, para. 83.

<sup>202</sup> *Ibidem*, para. 84, emphasis added.

its previous reasoning.

Third, it seems that the Court has not revised the understanding elaborated in *Behrami*. UNMIK was in fact defined as a UN subsidiary organ, therefore the alleged violation following within the mandate of UNMIK, namely the failure to de-mine the area, was attributed to the UN, even if the judges did not make express reference to the terms of art. 6 DARIO. In *Al Jedda* the Court reiterated the argument that UN-led missions are subsidiary organs of the Organisation, with reference to the United Nations Assistance Mission for Iraq (UNAMI) that was operating as a political mission aside to MNF-I.<sup>203</sup> The inference should then be that in future cases of alleged wrongful conducts occurred in UN-led operations the Court could again determine exclusive attribution to the UN, applying again the ‘authority and control’ criterion, instead of the effective control test.

Fourth, the *Al Jedda* case was the last judgement of the Strasbourg Court dealing specifically with the attribution of conduct and of the related effective control test in multinational military operations. Hence, it would not seem wise to claim that the Court has definitely moved away from the *Behrami* approach, yet.

7.2... *Al Skeini, Hassan and Jaloud: anything new in post-Al Jedda case law?*

Other relevant judgements, concerning the responsibility of member States for human rights violations occurred in Iraq in the context of the MNF-I or other multinational military operations that have accompanied the presence of the MNF-I, have been issued by the Strasbourg Court, namely *Al Skeini v UK, Hassan v UK* and *Jaloud v The Netherlands*.<sup>204</sup> None of these,

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<sup>203</sup> *Ibidem*, para. 82.

<sup>204</sup> Grand Chamber, *Al Skeini et al. v the United Kingdom*, no. 55721/07, Judgment, 7 July 2011; Grand Chamber, *Jaloud v. the Netherlands*, no. 47708/08, Judgment, 20 November 2014; Grand Chamber, *Hassan v. the United Kingdom*, no. 29750/09, Judgment, 16 September 2014. See Borelli, “Jaloud v Netherlands and Hassan v United Kingdom: Time for a principled approach in the application of the ECHR to military

though, have addressed openly the issue of attribution of wrongful conduct nor, consequently of effective control. To be more precise, the cases that will be examined in this section made use of the concept of ‘effective control’ but for the purpose of determining extraterritorial jurisdiction and not attribution of conduct. The following analysis will thus help to shed light on one of the most problematic aspects in the Strasbourg case law: the use of the term ‘effective control’. On the one hand, it is considered a criterion to determine jurisdiction under art. 1 of the European Convention of Human Rights, namely when dealing with cases of extraterritorial application of the Convention. When a State exercises ‘effective control over an area’ as result of lawful or unlawful military operations beyond its national borders, the requirement of the jurisdictional link between the alleged victim finding himself in that area and the respondent State is met. The criterion was created for the first time in the *Loizidou* case and has been extensively elaborated along the development of the Court's case law, in particular in the *Al Skeini* case, which is considered the landmark judgement pointing out the criteria to interpret jurisdiction within the meaning of art. 1.<sup>205</sup> On the other hand, effective control indicates the criterion to determine attribution of conduct (hence, of responsibility) in cases concerning State organs seconded to an international organisation, as referred to in *Behrami* and *Al*

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action abroad”, in *Questions of International Law*, vol. 16, 2015, pp. 25-43; Bohrer, “Human Rights vs Humanitarian Law or rights vs obligations: Reflections following the rulings in Hassan and Jaloud”, *ibidem*, pp. 5-24.

<sup>205</sup> Grand Chamber, *Loizidou v Turkey*, no. 15318/89, Judgement (Preliminary Objections), 23 March 1995. In *Al Skeini*, the Court has elaborated the following jurisdiction's tenets: i) the territorial principle; ii) the effective control over an area; iii) State agent authority and control; iv) the Convention legal space, para. 141. Literature on the notion of jurisdiction under the ECHR is particularly vast, see De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Giapichelli, 2002; Commans-Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp, 2004; Lawson, “Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights”, *ibidem*, pp. 83 ff; O’Boyle, “The European Convention on Human Rights and Extraterritorial Jurisdiction: A comment on ‘Life after Banković’”, *ibidem*, pp. 125 ff.; Papanicolopulu, “La nozione di giurisdizione ai sensi dell’art. 1 della Convenzione Europea dei Diritti Umani nella recente giurisprudenza della Corte Europea dei Diritti Umani”, in Scovazzi-Papanicolopulo-Urbinati (eds), *I diritti umani di fronte al giudice internazionale: atti della giornata di studio in memoria di Carlo Russo*, Giuffrè, 2009, pp. 83 ff.; Goodwin-Gill, “The Extra-territorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction”, in Boisson De Chazournes-Kohen (eds), *International Law and the Quest for its Implementation. Liber Amicorum Vera Gowlland-Debbas*, 2010, pp. 293 ff; Milanovic, *Extraterritorial Application of Human Rights Treaties: Law Principles, and Policy*, Oxford University Press, 2011; Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 193; Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, 2013.

*Jedda*.

The *Jaloud* case is particularly instructive to elucidate the difficulties faced by the Court in keeping attribution and jurisdiction separate.<sup>206</sup> The claim concerned the responsibility of the Netherlands for the alleged failure to investigate into the death of Mr Jaloud's son, shot by a Dutch soldier in a check-point incident occurred in a post that was under the responsibility of the Netherlands contingent participating to MNF in Iraq.<sup>207</sup> The Court's reasoning presents several elements of novelty, even though the final outcome raises some concerns as to the interpretation pattern followed by the Court. The judges have, correctly, first addressed the issue of jurisdiction within the meaning of art. 1 of the Convention. Quite surprisingly though, to assess whether the Netherlands had exercised its jurisdiction over the victim the judges analysed in great detail to the chain of command and control of the mission, including the inquiry of the levels of authority transferred within the operational framework. In other words, the Court relied extensively, for the first time, on the chain of command and control toolkit, we have referred to above. From the analysis of several documents, including the MoU made public by the Latvian government and applied by analogy to the respondent government,<sup>208</sup> the Court has concluded that the Dutch battalion was under the "operation control of the British division as an independent unit",<sup>209</sup> while at the same time the battalion remained under the full command of its sending State.<sup>210</sup> The judgement has gone further, stating that, despite being placed under the operational control of the UK, the Dutch troops were not 'placed at the disposal' nor 'under the exclusive direction or

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<sup>206</sup> Sari, "Untangling Extra-Territorial Jurisdiction from International Responsibility in 'Jaloud v. Netherlands': Old Problem, New Solutions?", in *Revue de droit militaire et de droit de la guerre*, vol. 53, 2014, pp. 287-317; Tzevelekos, "Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility", in *Michigan Journal of International Law*, vol. 36, 2014, pp. 129-178.

<sup>207</sup> *Jaloud*, para. 152: "Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer".

<sup>208</sup> The Memorandum of Understanding is generally considered by States a classified document and accordingly State may refuse its disclosure to the Court, as it has been the case of the Netherlands, see *ibidem*, para. 102. By contrast the Latvian government has made public on the National Gazette its MoU concerning the MND-Central South, available at: [https://www.vestnesis.lv/body\\_print.php?id=99221](https://www.vestnesis.lv/body_print.php?id=99221).

<sup>209</sup> *Ibidem*, paras 57 and 115.

<sup>210</sup> *Ibidem*, paras 57 and 103 (5.2).

control’ of any foreign power, i.e. neither under the UK nor the Iraqi government, whose forces they were assisting.<sup>211</sup> In drawing this conclusion the Court has made express reference to art. 6 DARS “*mutatis mutandis*”.<sup>212</sup> Besides the doubts linked to the very meaning to attach to this exception clause, serious concerns raise from the use of attribution rules in order to determine jurisdiction. The same critique applies to resorting to operational concepts such as full command and operational control in order, not to attribute wrongful act, (as suggested by the ILC and by the entire analysis proposed so far) but only insofar as to inquire whether the jurisdiction requirement was met. It is noteworthy that the attribution issue has been indeed dealt with by the Court in relatively short shrift, as few as 20 lines, wherein the criterion chosen by the judges seems to be the one of State organs *ex art. 4 DARS*, even though no direct reference to the Draft Articles is made.<sup>213</sup>

This approach was criticised by some of the judges themselves, in the concurring opinion of Judge Spielmann, joined by Judge Raimondi, who stressed how the Court in *Jaloud* missed an opportunity to elaborate on the critical distinction between the two issues of attribution and jurisdiction. The two judges made clear that the concept of ‘jurisdiction’ essentially refers to: (i) the territorial principle; (ii) State agent authority and control; (iii) effective control over an area and, (iiii) the Convention legal space,<sup>214</sup> while attribution “essentially concerns the sensitive issue of the ‘imputability’ of internationally wrongful acts”.<sup>215</sup> Accordingly, the two jurists claimed that the reference to the ILC Draft Articles, discussed above, that were made in

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<sup>211</sup> *Ibidem*, para. 151.

<sup>212</sup> In brackets the Court specified: “compare, *mutatis mutandis*, article 6 of the ILC Articles on State Responsibility”, *idem*.

<sup>213</sup> *Ibidem*, paras 154-155: “The Court reiterates that the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law [...] Furthermore, in *Al-Skeini* the Court emphasised that ‘whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. [...]’. The facts giving rise to the applicant’s complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention”.

<sup>214</sup> *Jaloud*, *Concurring opinion of Judge Spielmann, joined by Judge Raimondi*, para. 3.

<sup>215</sup> *Ibidem*, para. 4.

the jurisdiction's section of the judgement, was essentially "ambiguous, subsidiary and incomprehensible".<sup>216</sup>

In sum, the analysis of the ECtHR case law has highlighted some major inconsistency as to the interpretation of attribution rules in general, and the effective control test in particular. First, the criterion of 'ultimate authority and control' forged by the Court in order to attribute every conduct of the UN has emerged. Second, this approach has been – apparently – abandoned to endorse the effective control test, understood as a factual criterion. Nevertheless, caution is in order before stating that the Court has definitely superseded the 'ultimate authority and control' approach, considering the very diverse factual backgrounds underlining the different precedents. After *Behrami* and *Saramati*, the ECtHR has never been asked to adjudicate responsibility arising from wrongful acts occurred in UN-led operations but only in UN-authorized operations. Third, when it comes to UN-led operations, the Court has, in effect, continued claiming the nature of UN subsidiary organs. Hence, attribution of conduct would operate *ex art. 6 DARIO* and would not imply any effective control assessment. In other words, a core tension between a normative interpretation (UN as subsidiary organs and application of art. 6 DARIO) and a factual interpretation (art. 7 DARIO and effective control as a factual criterion) seems to characterise the current Court's interpretation of attribution rules. This interpretative tension mirrors to a certain extent the confusion caused by the conceptual overlap between the political dimension and the military framework of a UN operations, mentioned earlier. Where the concepts of 'operational authority' and 'overall authority' (exerted by the UN Secretary General via the Head of Mission in peace operations) are often (conf)used with the notion of 'operational control' (exercised by the Force Commander).<sup>217</sup>

In the end, no support is to be found in the Court's findings regarding the interpretation of effective control as operational control in military operation, which has been proposed by the ILC commentaries of art. 7 DARIO. As shown

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<sup>216</sup> *Ibidem*, para. 5.

<sup>217</sup> *Supra* section 5.1.

above, the judges have demonstrated a recent interest in looking at the mission's chain of command and control but the use they have made of the chain of command and control toolkit (operational command and control, transfer of authority, full command, *etc.*) has been misguided and therefore misapplied, leading to determinations concerning jurisdiction instead of attribution. In conclusion, the ECtHR offers an ambiguous and incoherent picture of the interpretation of attribution rules, which adds confusion to an already complex scenario rather than clarifying its framework.

### *7.3. Effective control before English Courts: Bici and Bici, and Serdar Mohammed*

While the ECtHR was examining its first case concerning State responsibility in peace operations, in 2004 the Queen's Bench Division adjudicated a case concerning the liability in compensation of the UK for the killing, the wounding and the illness caused to two Kosovar Albanians who were shot by UNMIK British forces in 1999.<sup>218</sup> The plaintiffs were travelling in a car in the streets of Pristina during the 'Kosovo National Day'. One of the victims was sitting on the roof of the car and, according to the findings of the Court, had fired his gun in the air during the gathering of that celebration day; the other claimants were sitting inside the car. The British soldiers, who were defending a building while the car was passing by fired back at the car in alleged self-defence. The gunfire resulted in the killing of the person sitting on the car's roof, in the injuring and in the psychiatric illness of the other two plaintiffs seated in the car. The sentence, which found the UK liable in compensation, touched upon the issue of attribution of wrongful conduct quite succinctly. In fewer than 40 words on the subject, the findings reported a very interesting *opinio iuris* of the UK on the attribution of conduct of its forces seconded to a UN-led mission, expressed in the following terms

[t]he defendant has conceded that it is vicariously liable for any

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<sup>218</sup> Queens Bench Division, *Bici and Bici v. Ministry of Defence*, EWHC 786, 7 April, 2004.

wrongs committed by any of the soldiers. The Crown retained command of the British forces notwithstanding that they were acting under the auspices of the U.N.<sup>219</sup>

In other words, the UK has accepted its liability in compensation for the wrongful acts committed by its soldiers. Moreover, it has stressed the requirement of national command exercised over the forces, implicitly refusing the theory of UN-led mission as UN subsidiary organs and the related exclusive attribution to the Organisation. It is well known, however, that the UK has significantly changed this approach by claiming before the Strasbourg Court in several occasions the exclusive attribution to the UN of wrongful conducts occurring not only in UN-led, but also in UN-authorized, operations.<sup>220</sup>

Another example of this change can be found in the *Mohammed* case, where the UK maintained the exclusive attribution to the UN of conduct of its soldiers in Afghanistan.<sup>221</sup> The claim concerned the illegal detention of the plaintiff by British Forces participating in ISAF, the first case dealing with the responsibility of the UK for alleged violations occurred during their presence in Afghanistan. The judge of the Queen's Bench division, Justice Leggatt, carried out a careful analysis of the facts and of the legal precedents to respond to the government's argument, investigating, on the one hand, whether the conducts of ISAF were generally attributable to the UN and, on the other hand, whether the impugned actions were attributable to the ISAF or solely to the UK.

In order to inquire the attribution link between ISAF and the UN, Justice Leggatt looked into the chain of command and control of ISAF, stressing that since August 2003 “overall operational command had been

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<sup>219</sup> *Ibidem*, para. 2.

<sup>220</sup> See *Behrami, Al Saadon, Al Jeddah, Al Skeini*. It is interesting to note in the *Al Skeini* case the UK was expressly estopped by the Court to formulate this objection as it was never brought before national Courts while exhausting local remedies, see *Al Skeini*, para. 100.

<sup>221</sup> *Mohammed v Ministry of Defence et al. and Secretary of State v Mohammed et al.*, Court of Appeal, EWCA 3846, 30 July 2015. See also the Supreme Court Judgment that eventually upheld the crown of State act defence, while not dealing with attribution issues, n. 2017 UKSC 1, 17 January 2017.

vested with NATO”<sup>222</sup> (beforehand ISAF had been under the alternating leadership of the UK, Turkey, and, jointly, Germany and The Netherlands). The impugned acts occurred in April 2010, hence in the context of NATO-led ISAF, that is to say of a UN-authorized mission, as opposed for example to UNMIK which was a UN-led operation. These considerations notwithstanding, the Judge was convinced that

the chain of delegation of command for ISAF is essentially similar to the chain of delegation and command for KFOR, as described in the judgement of the European Court in the *Behrami* and *Saramati* cases.<sup>223</sup>

From this premise, the Judge drew another unfortunate parallelism with the *Behrami* case, maintaining that “the UN Security Council has ‘effective control’ (and ‘ultimate authority and control’) over ISAF in the sense required to enable wrongful conduct of ISAF to be attributed to the UN”.<sup>224</sup> As a consequence, Justice Leggatt, stated that should the detention of Mr Mohammed be authorised by COMISAF (ISAF Commander), the wrongful act would be attributable to the UN, similarly to the detention of Mr Behrami that was authorised by the COMKFOR (KFOR Commander) and hence attributed to the UN by the ECtHR.<sup>225</sup>

In the Court's reasoning it was thus crucial to determine which entity authorised the detention, whether the UK or COMISAF, or both. To resolve this pivotal issue, Justice Leggatt relied again on the mission's chain of command and control, this time with a special focus on existing policies and special arrangements for detention. The evidence before the Court showed that since November 2009 the UK operated in Afghanistan according to its national detention policy, which implied, on the one hand, that the applicable laws and regulations were set forth not in ISAF standards but rather in UK national standards; on the other hand, the authority to detain was vested in

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<sup>222</sup> *Mohammed v Ministry of Defence et al.*, para. 177.

<sup>223</sup> *Idem*.

<sup>224</sup> *Ibidem*, para. 178.

<sup>225</sup> *Idem*.

the UK national chain of command and not with COMISAF.<sup>226</sup> In other words, prisoners detained by UK forces participating in ISAF were under UK authority, through the Commander of Joint Force Support who reported to the UK Permanent Joint Headquarter and finally to the Ministry of Defence; whereas the relationship between the UK and ISAF on the issue of detention was “of *liason* and coordination only”.<sup>227</sup>

Furthermore, the Standard Operating Procedures of detentions of UK forces differed significantly from those of ISAF. Under the latter, an individual can only be detained for 96-hours, afterwards she or he had to be released or handed over to Afghan authorities. A possible extension can only be authorised by COMISAF. The UK applied a *caveat* to NATO ISAF guidelines stating that the detention regime was the troop contributing nation’s “sovereign business and based upon UK national sovereignty”.<sup>228</sup> Accordingly, the UK had informed NATO of its intention to detain individuals for longer than 96 hours based on the main concern that the time lapse foreseen in NATO standards was too limited to grant effective information-gathering, which was deemed essential to the mission.<sup>229</sup> Due to the lack of objection from NATO, the judge inferred that the *caveat* had been eventually accepted by the Organisation.<sup>230</sup>

Once the general detention-policy framework in Afghanistan was depicted, the Court ascertained that in the circumstances of the case the capture and the detention of Mr Mohammed was authorised and periodically revised by the UK and that his internment took place in the military base of Camp Bastion, under the “full and exclusive *de facto* control of the UK”.<sup>231</sup> Hence Justice Leggatt concluded that the impugned acts were only attributable to the UK as the conduct took place solely under the national chain of command and control. Differently said, the wrongful acts are not attributable to ISAF as no authorisation concerning Mr Mohammed detention

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<sup>226</sup> *Ibidem*, paras 34-53.

<sup>227</sup> *Ibidem*, para. 180.

<sup>228</sup> *Ibidem*, para. 183.

<sup>229</sup> *Ibidem*, paras 43-44.

<sup>230</sup> *Ibidem*, para. 184.

<sup>231</sup> *Ibidem*, para. 185.

had been sought by COMISAF. Accordingly, no attribution to the UN could be envisaged, lacking a previous attribution of conduct to ISAF.<sup>232</sup>

As to the conduct's wrongfulness, the Court concluded that the plaintiff's detention beyond the initial 96 hours was arbitrary, as no power to detain beyond that period was entrusted to the respondent country, neither under the UN mandate nor under ISAF mandate, not under Afghan law, nor under international humanitarian law. Consequently, the Ministry of Defence has incurred liability for violations of art. 5 of the European Convention on Human Rights and of section 6 of the Human Rights Act.<sup>233</sup> The Court's findings have been confirmed in the appeal.<sup>234</sup>

The impact of this case law on the interpretation of attribution under international law is a mixed blessing. The judgement's main shortcomings lie with the application of the rules on international responsibility as the domestic judge seems more familiar with the ECtHR jurisprudence rather than with the DARIO. While the sentence relied extensively on the *Behrami* approach, it only resorted to the DARIO in a brief consideration on *ultra vires acts*.<sup>235</sup> Furthermore, a major inconsistency in the Court's reasoning lies with the use of the effective control test, that has been interpreted both in a normative and in a factual fashion. In the first part of his analysis, Justice Leggatt determined that the UN SC had 'effective control' and 'ultimate authority and control' over ISAF for the purposes of attributing conducts of ISAF to the UN. The inference was therefore that the impugned conduct would be attributable to the UN insofar as it would be attributable to ISAF. In the second part of the judgement, in order to determine whether the wrongful acts were attributable to ISAF, the Judge included a very detailed factual analysis of the chain of command and control of the mission in general, and also of the impugned detention in particular. The Court resorted extensively to military concepts, as well as to military documents and to the witness of several military high-ranking officers. Hence, in this section of the

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<sup>232</sup> *Ibidem*, para. 186.

<sup>233</sup> *Ibidem*, paras 418-424.

<sup>234</sup> England and Wales High Court, Queen's Bench Division, *Secretary of State v Mohammed et al.*

<sup>235</sup> *Mohammed v Ministry of Defence et al.*, para. 170.

judgement the criterion of effective control was intended as a factual test (inquiring which entity had authorised the detention within the mission's chain of command and control) and not as normative standards (the 'ultimate authority and control' test), although the term 'effective control' was never used in this part of the sentence.

In sum, the *Mohammed* judgement constitutes another meaningful example of the existing tension between the normative and the factual interpretation of attribution criteria. Despite the inconsistencies highlighted so far, this case provides for an extremely accurate analysis of how a factual effective control test can be applied to peace operations, focusing on the chain of command and control that was followed to carry out the internationally wrongful act at hand.

#### *7.4. Effective control before Dutch courts: Nuhanovic, Mustafic and the Mothers of Srebrenica*

The Dutch courts, confronted with the liability in compensation of the State for the dreadful events following the withdraw of the Dutch Battalion of UNPROFOR from the compound in Potocari, Srebrenica, have shown an increasing familiarity with the rules on attribution and have significantly contributed to the development of some key concepts, in particular of effective control and dual attribution.

Many next of kin of the victims who were killed by the Bosnian Serb troops of Mladic and by related paramilitary militias after the Dutchbat left the compound in July 1995, sued the Dutch State before Dutch courts to seek compensation for the alleged damages suffered following those events. The series of claims brought before the national judges have originated a judicial saga, similarly to what has happened before British courts for the responsibility of the UK during its involvement in Iraq.

In 2008 the first case was brought by the association 'Mothers of Srebrenica' and other claimants against the Netherlands and the UN for

alleged breaches of their obligation to prevent the crime of genocide as set forth in the 1948 Genocide Convention. The Court dismissed the case as it lacked jurisdiction *ratione personae* due to the immunity of the UN.<sup>236</sup> The sentence was appealed before The Hague Appeal Court and, later, before the Supreme Court of the Netherlands.<sup>237</sup> The findings of the District Court were confirmed by both superior Courts. The plaintiffs finally brought a related case against the Netherlands before the Strasbourg Court claiming a violation of art. 6 of ECHR.<sup>238</sup> The claimants maintained that the respondent State had violated their right to a fair trial by granting UN jurisdictional immunity in presence of alleged violations of peremptory norms of international law (the prohibition of genocide), in particular in the absence of alternative remedies. The European Court of Human Rights issued a landmark judgement on this delicate topic, concerning the balance between immunity and the right to a fair trial and to an effective remedy, affirming that the grant of UN immunity from domestic jurisdiction by the respondent State served a legitimate purpose and was proportionate, hence the responsibility of the State was not entailed.<sup>239</sup> The whole focus of the judgement rested on the immunity of the former, while attribution of wrongful conduct carried out in Srebrenica was never at issue before the ECtHR in this case.<sup>240</sup>

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<sup>236</sup> District Court of the Hague, *Stitching Mothers of Srebrenica v the Netherlands and United Nations*, n. LJN:BD6796, 10 July 2008.

<sup>237</sup> Court of Appeal the Hague, *Stitching Mothers of Srebrenica et al. v the Netherlands and United Nations*, LNJ: BR538830, 30 March 2010 and Supreme Court of the Netherlands, *Stitching Mothers of Srebrenica et al. v the Netherlands and United Nations*, 13 April 2012.

<sup>238</sup> European Court of Human Rights, Third Section, *Stitching Mothers of Srebrenica et al. v the Netherlands*, no. 65542/12, Decision, 11 June 2013.

<sup>239</sup> Andreoli, "Immunità delle Nazioni Unite et protezione equivalente: l'affare 'Associazione madri di Srebrenica', in *Rivista di diritto internazionale*, vol. 97, 2014, pp. 443-462; Papa, "Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'associazione Madri di Srebrenica", in *Diritti umani e diritto internazionale*, vol. 8, 2014, pp. 27-62; Bonafé, "L'esistenza di rimedi alternativi ai fini del riconoscimento dell'immunità delle organizzazioni internazionali: la sentenza della Corte suprema olandese nel caso delle 'Madri di Srebrenica'", in *Rivista di diritto internazionale*, vol. 95, 2012, pp. 826-829; Spijkers, "The Netherlands' and the United Nations' Legal Responsibility for Srebrenica Before the Dutch Courts", in *Revue de droit militaire et de droit de la guerre*, vol. 50, 2011, pp. 517-534.

<sup>240</sup> As will be explained below, the plaintiffs have later modified their approach to the case and in 2013 brought a new claim before the District Court of the Hague based on a different defence strategy that had been developed in another set of cases of the Dutch of Srebrenica, see *infra*.

The twin judgements of *Nuhanovic v. The Netherlands*<sup>241</sup> and of *Mustafić v The Netherlands*<sup>242</sup> represent a watershed in the case law concerning the responsibility of the Netherlands for the acts and omissions committed by the Dutchbat of UNPROFOR during the fall of Srebrenica and are likely to have a significant influence on the developments of the international rules on attribution of conduct. Given that the two cases concern very similar facts and have been decided by the Court in a parallel manner, the analysis will focus primarily on the *Nuhanovic* case, but the general considerations are valid for both judgements.

Mr Nuhanovic worked as an interpreter for United Nations military observers seconded to UNPROFOR and forming part of the Dutchbat. After the fall of Srebrenica in July 1995, when the troops of the Bosnian Serbs Army entered into the UN safe area of Srebrenica, Nuhanovic's family (mother, father and brother) sought refuge in the Potocari compound under the protection of UNPROFOR. Due to the impossibility to protect the area with the resources and the mandate available, the UN and the Dutch State decided to evacuate the area and to withdraw the Dutchbat. UN employees, such as Mr Nuhanovic, were authorised to evacuate along with the Dutch troops, while any other person present in the compound was handed over to the troops of Mladic, who should have been responsible to safely evacuate those people following the agreement reached with the UN in this regard.

Numerous commissions of inquiry and international judgements concerning these events have provided evidence to conclude that, soon after the withdrawal of the Dutchbat, the able-men handed over to the troops of Mladic were separated from the rest and executed in the proximity of the compound. About 7000 Bosnian Muslim men lost their lives in what was then defined as the first genocide on the European territory since World War II. Additionally, many other people fleeing from the compound upon the arrival of the Bosnian Serbs troops were killed. This was the fate of the entire family of Mr Nuhanovic, despite that he had tried to convince the Dutchbat

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<sup>241</sup> District Court of the Hague, *Nuhanovic v the Netherlands*, 10 September 2008.

<sup>242</sup> District Court of the Hague, *Mustafić et al v the Netherlands*, LJN: BF0182, 10 September 2008.

commander to allow them to be evacuated along with him and the Battalion. The plaintiff thus claimed the responsibility of the Netherlands for the failure to protect his family in breach of the UN mandate and of the ECHR and the ICCPR and the consequent State's liability in compensation for loss suffered.

In the case only the responsibility of the State – and not of the UN – was at issue. Nevertheless, the Netherlands government maintained that the impugned conduct was attributable to the UN and no responsibility of the State was entailed. The District Court of The Hague addressed the issue of attribution under the purview of the rules of international responsibility, but instead of looking at the DARIO it applied the DARS. More precisely, it resorted to art. 6 DARS and applied ‘by means of analogy’ the criterion of ‘direction and control’ to the case in point, concluding that since ‘operational command and control’ of the Dutchbat was transferred to the UN, the acts of the Dutchbat were considered exclusively attributable to the UN.<sup>243</sup>

The Court of appeal of The Hague overruled the first instance judgement fostering a series of innovative concepts of attribution of conduct in peace operations, namely dual attribution, ‘reciprocal’ effective control and the power-to-prevent.<sup>244</sup> It has thus represented a focal point in the current debate on attribution issues.<sup>245</sup> The above-named aspects will be analysed in turn.

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<sup>243</sup> *Ibidem*, paras 4.8- 4.9.

<sup>244</sup> Court of Appeal of the Hague, *Nuhanovic v the Netherlands*, para. 5.7.

<sup>245</sup> Nollkaemper, “Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica”, in *Journal of International Criminal Justice*, vol. 9, 2011, pp. 1143-1157; Bakker, “Dual Attribution of Acts Committed by a UN Peacekeeping Force: an Emerging Norm of Customary International Law?: The Dutch Supreme Court's Judgments in Nuhanović and Mustafić”, in *Italian Yearbook of International Law*, vol. 23, 2013, pp. 287-297; D’Argent, “State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct”, in *Questions of International Law*, 2014, pp. 17-31; Spagnolo, “The ‘Reciprocal Approach’ in Article 7 ARIO: A Reply to Pierre d’Argent”, *supra* note 106; Boutin, “Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peacekeeping”, in *Leiden Journal of International Law*, vol. 25, 2012, pp. 521-535; Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers”, in *Harvard International Law Journal*, vol. 51, 2010, pp. 113-192; *id.*, “Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct”, in *International Law and Comparative Law Quarterly*, vol. 16, 2012, pp. 713-728.

In the first place, the Court of Appeal resorted to the effective control test as attribution criterion, as suggested by the claimant's defence according to which “the decisive criterion for attribution is not who exercised ‘command and control’, but who actually was in possession of ‘effective control’”.<sup>246</sup> The Court upheld this ground of appeal giving weight also to the work of the ILC, namely to art. 7 [then art. 6] DARIO and to the doctrinal debate in the following terms

in international law literature, as also in the work of the ILC, the generally accepted opinion is that if a State places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed, depends on the question which of both parties has ‘effective control’ over the relevant conduct.<sup>247</sup>

In the second place, the Court specified that the criterion of effective control does not only apply to attribution of conduct to an international organisation, but can also be used to inquire whether the conduct is attributable to the sending State of the seconded organ.<sup>248</sup> A major implication of this innovative ‘reciprocal’<sup>249</sup> understanding of effective control consisted in the possibility to allow for dual attribution, according to which

the Court adopts as a starting point that the possibility that more than one party has ‘effective control’ is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.<sup>250</sup>

In the third place, the power-to-prevent argument extended the reach of State responsibility claiming that effective control does not only encompass conducts carried out in the execution of a specific order or instruction but also includes omissions the State had the power to prevent.<sup>251</sup> Consequently the Court found that

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<sup>246</sup> Court of Appeal of the Hague *Nuhanovic v the Netherlands*, para. 5.7.

<sup>247</sup> *Ibidem*, para. 5.8.

<sup>248</sup> *Idem*.

<sup>249</sup> D'Argent and Spagnolo, *supra* note 106

<sup>250</sup> Court of Appeal of the Hague, *Nuhanovic v the Netherlands*, para. 5.9.

<sup>251</sup> *Idem*.

it is beyond doubt that the Dutch Government was closely involved in the evacuation and the preparations thereof, and that it would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time.<sup>252</sup>

Furthermore, considering that in the Court's opinion the effective control test should take into account all the circumstances of the case, the judges carried out a long and accurate analysis of the facts and of the decision-making processes that took place in the days of the fall of Srebrenica and of the Dutchbat withdrawal. The judges concluded that the decision to evacuate the compound and to take only UN employees was agreed upon by the NLs and the UN, and more specifically that the decision not to allow the family of Mr Nuhanovic to be evacuated along with him was taken by the Dutchbat's commander. As a result, the Court of Appeal concluded that the decision to evacuate the compound was taken jointly by the UN and the Dutch government.<sup>253</sup> This implies that the Netherlands – through the decision-making process and through its organ – had effective control over the wrongful conduct. Consequently, the District Court decision was quashed and the respondent government was condemned for the first time, for the failure to protect Mr Nuhanovic's family. In sum, effective control, *ex art. 7 DARIO*, was then chosen by the Court of Appeal as the appropriate attribution criterion and interpreted as a factual criterion in light of all relevant circumstances of the case.<sup>254</sup>

The Supreme Court<sup>255</sup> confirmed the Court of Appeal's ruling and

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<sup>252</sup> *Ibidem*, para. 5.18.

<sup>253</sup> *Ibidem*, para. 5.12.

<sup>254</sup> The following passage is explanatory of the factual approach chosen by the Court: "The fact that The Netherlands had control over Dutchbat was not only theoretical, this control was also exercised in practice: the Government in The Hague [...] took the decision for the evacuation of Dutchbat and of the refugees, Minister Voorhoeve gave the instruction that Dutchbat was not allowed to cooperate in a separate treatment of the men, and he told Karremans that he had to save as much as possible. [...] According to the judgment of the Court, in all these cases it was a matter of orders being given and not just transmitting the wishes or expressing the concerns, which Nicolai understood very well (if the Dutch Government says something like that, as a military officer you just carry it out)", *ibidem*, para. 5.18.

<sup>255</sup> Supreme Court of the Netherlands, *Nuhanovic v the Netherlands*, LZ/TT 12/03324, 6 September 2013.

further elaborated on the attribution criteria, providing for extremely valuable elements to the present study. While considering the first ground of cassation based on the alleged wrongful application of international rules on attribution, the Court expressly rejected the theory of UN organs put forward by the appellant State, according to which the Dutchbat was an organ of the UN and its conduct should consequently be attributed solely to the UN under art. 6 DARIO. The Court stated that troops contributed to a UN mission have to be considered State organs placed at the disposal of the organisation, in accordance with art. 7 DARIO; and specified that the Dutchbat enjoyed this status, considering that the sending State retained disciplinary powers and criminal jurisdiction over its troops.<sup>256</sup> As it concerns effective control – to be interpreted as a “factual control over a specific conduct”<sup>257</sup> – the Court effectively rejected the idea that a State must necessarily have countermanded the mission's chain of command and control, or have exercised independent operational command, in order for a State to have effective control.<sup>258</sup> On the contrary, the ground for attribution was identified in the circumstance that, after the fall of Srebrenica, the decisions concerning the compound's evacuation were taken jointly by the UN and the Dutch government.<sup>259</sup> In this context, it was the Court's opinion that dual attribution of conduct represented the correct outcome of a thorough and factual interpretation of art. 7 DARIO read in conjunction with art. 48 DARIO.<sup>260</sup> In sum, the Court showed a sound understanding of the ILC Draft Articles and commentaries, which were quoted several times within the judgement. Moreover, it strongly restated the dual attribution argument created by the Court of Appeal. The sole perplexity arising from the judgement's approach to attribution lies with the Court's conclusion stating that the Court of Appeal had correctly identified in art. 7 DARIO the attribution criterion “partly in view of what is provided in the attribution rule of article 8 DARS”.<sup>261</sup> It remains unclear whether the Court

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<sup>256</sup> *Ibidem*, para. 3.11.

<sup>257</sup> *Ibidem*, para. 3.12.

<sup>258</sup> *Ibidem*, para. 3.11.3.

<sup>259</sup> *Ibidem*, para. 3.12.2.

<sup>260</sup> *Ibidem*, para. 3.9.4.

<sup>261</sup> *Ibidem*, para. 3.13.

intended to suggest, or imply, that effective control should be interpreted in light of the ‘direction and control’ concepts set forth in art. 8 DARS.

As mentioned earlier, the association Mothers of Srebrenica brought a new lawsuit against the Netherlands and the United Nations – following the successful results of the *Nuhanovic* and *Mustafic* cases – which was decided by the District Court of the Hague in 2014.<sup>262</sup> Despite the identical factual background, this last case was a more wide-ranging suit, concerning the respondents’ liability towards more than 320 victims killed after the evacuation from the Potocari compound. Moreover, the plaintiffs claimed a long list of alleged wrongful acts which ranged from abandoning blocking positions to the cooperation in the ‘deportation’ of the refugees from the compound.<sup>263</sup> Similarly, the claimants have invoked the violations of a plurality of international rules, namely international humanitarian law, in particular 1977 First Additional Protocol of the Geneva Conventions, the 1948 Genocide Convention and the right to life enshrined both in the ECHR and in the ICCPR.<sup>264</sup>

After a lengthy and thorough analysis of the facts and the law, the Court concluded that the liability of the Netherlands was entailed due to the Dutchbat cooperation with the deportation of about 320 men, which constituted a breach of art. 2 ECHR and art. 6 ICCPR as well as a violation of the ‘standard of care’ prescribed by Book 6, Section 162 of the Dutch Civil Code.<sup>265</sup> These groundbreaking findings stigmatised for the first time the Netherlands for its overarching responsibility in the dreadful events of 1995, and no longer focused solely on isolated misconducts, as it was in the *Nuhanovic* and *Mustafic* cases.

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<sup>262</sup> District Court of the Hague, *Sticting Mothers of Srebrenica et al. v the Netherlands*. For an introductory note including a full English translation of the judgment see Ryngaert, “Srebrenica Continued. Dutch Court Holds the Netherlands Liable for Cooperating with Bosnian Serbs”, in *Netherlands International Law Review*, vol. 61, 2014, pp. 365-454. For a thorough comment see Palchetti, “Attributing the Conduct of Dutchbat in Srebrenica: the 2014 Judgement of the District Court in the *Mothers of Srebrenica* Case”, *ibidem*, pp. 279-294.

<sup>263</sup> For the comprehensive list of allegations see District Court of the Hague, *Mothers of Srebrenica et al. v the Netherlands*, para. 3.2.1.

<sup>264</sup> *Ibidem*, para. 4.147.

<sup>265</sup> *Ibidem*, paras 4.329 and 4.338.

Besides, the judgement also offers important elements contributing to the interpretation of attribution before national courts. The District Court extensively relied on the previous rulings of the Supreme Court, and of the Court of Appeal, in *Nuhanovic* and *Mustafic* and fully endorsed their findings on the attribution criterion. The judge of first instance resorted to art. 7 DARIO, specifying that the Supreme Court considered that the DARIO (and the DARS) “may generally be accepted as a reflection of current unwritten international law and were apparently accepted as such even in 1995”.<sup>266</sup> While the first part of this statement may be generally endorsed, the extension back to 1995 seems quite hazardous, considering that in those years the DARS were still being negotiated and the DARIO were not even in the mind of its Special Rapporteur yet. Second, the District Court undertook an interpretation of effective control that has been fostered by the Court of Appeal, according to which

though this provision of effective control [art. 7 DARIO] is only mentioned in relation to attribution to the UN the same criterion holds when answering the question whether action of troops must be attributed to the State that placed them at the disposal of the others.<sup>267</sup>

This ‘reciprocal approach’, which had already generated some debate in the aftermath of the *Nuhanovic* appeal<sup>268</sup>, has been recently criticised in the literature, where it has been underscored that art. 7 DARIO does not accommodate such an interpretation. It has been stated that, in the default of effective control by the organisation, there should be a fallback on the rules on State responsibility according to which the conduct of State organs is always attributable to the State.<sup>269</sup> Nevertheless, this rigorous interpretation of the Draft Articles does not take into account the complexities of a field operation; namely, the possibility that the chain of command and control

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<sup>266</sup> *Ibidem*, para. 4.33.

<sup>267</sup> District Court of The Hague, *Stitching Mothers of Srebrenica et al. v the Netherlands*, case n. ECLI:NL:RBDHA:2014:8748, 16 July 2014, para. 4.33.

<sup>268</sup> The opposed views of D'Argent, and Spagnolo see *supra* note 235.

<sup>269</sup> Palchetti, “Attributing the Conduct of Dutchbat in Srebrenica: the 2014 Judgement of the District Court in the *Mothers of Srebrenica* Case”, *supra* note 245.

might not always be crystal clear, which was precisely the case at hand. If one prevents to extend the ‘effective-control inquiry’ on sending States, this would necessarily preclude the possibility of dual attribution. This case shows, on the contrary, that dual attribution might be more respondent to operational reality, especially in moments of crisis, as was the case in the fall of Srebrenica in 1995. In support to its reasoning, the District Court inquired whether and to what extent the Dutchbat was seconded to UNPROFOR. The judges thus found that the Battalion was seconded to the UN, following a ToA under which the Dutchbat was in OPCON of UNPROFOR; nevertheless, the Court pointed out that the

transfer of command and control over the operational implementation of the mandate to the UN is not decisive and *leaves open the possibility that the State exercises effective control over Dutchbat’s actions.*<sup>270</sup>

These findings originated from a statement made by the then Minister of Defence Voorhoeve, according to which in strictly legal terms it was possible to argue that once troops were seconded to the UN, the State had only the right to withdraw them, while every other power was exercised by the organisation; “[i]n practice however things were not like that”, concluded the Minister.<sup>271</sup>

In this context, the District Court affirmed that effective control means “the actual say or ‘factual control’ of the State over Dutchbat’s specific actions”<sup>272</sup>, accordingly it carried out a detailed factual analysis into the events and into the chain of command and control, prior to and after the fall of Srebrenica. The outcome is particularly valuable for the purpose of the present study as the judges singled out which State conducts amounted to effective control and which did not. Hence, the fact that UNPROFOR Dutch officers and Dutchbat officers had in some occasions direct contacts did not

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<sup>270</sup> District Court of the Hague, *Stitching Mothers of Srebrenica et al. v the Netherlands*, para. 4.48, italics added.

<sup>271</sup> *Ibidem*, para. 4.47.

<sup>272</sup> *Ibidem*, para. 4.34.

imply effective control of the State.<sup>273</sup> Similarly, the maintenance of a direct contact between Dutch officers and The Hague did not imply any exercise of such control, the request of information by the sending State is a normal operational standard. Differently, after the fall of Srebrenica, in July 1995, the Dutch government together with the UN decided to evacuate the area. Accordingly, the Court found that the sending State, in the few days constituting the ‘transitional period’ between the fall of Srebrenica and the final Dutchbat's withdrawal (11-21 July 1995)<sup>274</sup>, exercised over its troops effective control limited to the operations concerning the preparation and the evacuation of the Potocari compound.<sup>275</sup>

After having conducted this detailed inquiry, the Court then added some confusion to its reasoning, examining what it called ‘*ultra vires*’ acts. The judges determined that the order given by the government to the Dutchbat on 9 July 1995 to avoid unnecessary casualties was contrary to the order given by General Gobilliard (Deputy Commander of UNPROFOR Headquarter) on 11 July 1995 to “take all reasonable measures to protect refugees and civilians”.<sup>276</sup> More precisely, in the Court’s view, all actions taken by the Dutch troops contrary to Gobilliard's order (i.e. not doing enough to protect the refugees) were to be considered *ultra vires* in respect to the mandate and hence – again in the Court's opinion – attributable to the State.<sup>277</sup>

Some critiques of this passage seem necessary. In the first place, it is not clear why the Dutch order to avoid casualties should be deemed in

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<sup>273</sup> *Ibidem*, para. 4.51.

<sup>274</sup> *Ibidem*, 4.84 and 2.41-2.44.

<sup>275</sup> The full list of attributable actions reads as follows: “(i) abandoning the blocking posts; (ii) Not reporting war crimes; (iii) Not providing the refugees with adequate medical care; (iv) Handing over weapons and other equipment to the Bosnian Serbs; (v) Maintaining the decision not to allow any refugees into the compound; (vi) Separating the men from the other refugees during the evacuation; (vii) Cooperating in the evacuation of refugees who had sought refuge at the compound.” *ibidem*, para. 4.1444. Among these, only cooperating in the evacuation of refugees who had sought refuge at the compound and not reporting war crimes were deemed unlawful, but only the first conduct entailed the State’s liability as the Court determined that the causal link between the failure to report war crimes and the death of the victims was not met.

<sup>276</sup> *Ibidem*, para. 2.37.

<sup>277</sup> *Ibidem*, paras 4.67-4.89 where the Court affirmed that “for this reason too [exercise of effective control by the State] and inasmuch as Dutchbat acted contrary to Gobilliard's order (see: 2.37) this *ultra vires* action must be attributed to the State”.

contrast with Gobilliar's order, considering also that the latter followed the Dutch order. In the second place, the order sent from the government should be read in the broader context of the operation, namely in accordance with the UN 'Post Airstrike Guidance' of May 1995 which expressly stated that "the execution of the mandate is secondary to the security of UN personnel".<sup>278</sup> In the third place, the order coming from The Hague had passed through the UN chain of command and control, hence it cannot be said that it had interfered with it. Although these circumstances were already acknowledged by the Supreme Court, the District judges did not draw from them consistent conclusions in terms of attribution.

In our opinion, none of the above-mentioned activities should be regarded as *ultra vires* acts. Furthermore, under art. 8 DARIO, *ultra vires* conduct should be attributed to the Organisation and not the sending States. Even more precisely the provision is not at all designed to encompass the conduct of seconded organs, but only of organs of an international organisation.<sup>279</sup> It might be the case that the Court intended to consider the orders coming from The Hague not only as an exercise of effective control, but also as cutting-across orders,<sup>280</sup> in line with the UN position concerning non-attributable acts resulting from national interferences in the UN chain of command. Should this be true, a similar finding of cutting-across orders would similarly contrast with the ruling made by the same judges on the joint exercise of effective control by the UN and the Dutch government following the fall of Srebrenica. In sum, the Court's twisted reasoning on *ultra vires* acts appears both redundant, as an attribution criterion had already been soundly

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<sup>278</sup> The rationale of this Guidance lays with the facts preceding the air strike, when hundreds of UN personnel were kidnapped by Bosnian Serbs troops in order to use the hostage to blackmail their national government to refrain from the air strike. See *ibidem*, paras 2.20, 4.66 and 4.72.

<sup>279</sup> Article 8 DARIO: "Excess of authority or contravention of instructions. The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions".

<sup>280</sup> In military jargon the term 'cutting-across orders' defines orders that will 'cut' the official chain of command and control, generally sent by a troop contributing nation to its own contingent, irrespective of the fact that the contingent has been put under the authority of another entity, in this case under UN operational control, see *supra* note 113.

identified in art. 7 DARIO, and misleading, as the *ultra vires ex art. 8 DARIO* rule does not encompass the conduct of seconded organs.

#### 7.5. *Effective control in Brussels: the Mukeshimana-Ngulinzira case*

The Court of first instance of Brussels was asked to adjudicate the liability in compensation of the Belgian State and of two Belgian high officers for the actions and omissions of the Belgium contingent of the ‘*Mission des Nations Unies pour l'Assistance au Rwanda*’ (MINUAR).<sup>281</sup> The case was brought by nine survivors and next of kin of those killed in the mass killing of Tutsi and moderated Hutu that sought refuge in a school in Kigali that was then the headquarter of the Belgium contingent participating to MINUAR, in the context of 1994 Rwanda genocide. After Belgium decided to withdraw its troops from the mission, including the contingents in the school that became a *de facto* refugee camp in April 1994, most of the refugees – about two thousand people – were killed by the Hutu's militias during the genocide; only some hundreds people managed to escape the massacre.<sup>282</sup> The claimants maintained that the killings were a direct consequence of the evacuation of the Belgium contingent and therefore the Belgium State and the respondent commanding officers failed to fulfill the mission’s mandate to protect civilians.

The judgement, which is just an interim decision, tackled several issues including the question of statute of limitations under Belgian law. For the purpose of the present analysis it is particularly interesting to highlight the Court’s findings as to jurisdiction and to attribution of conduct.

The respondent State contented that the Court lacked jurisdiction because in order to adjudicate the claim it would have had to assess the responsibility of the UN and of the other member States participating in the

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<sup>281</sup> Court of first instance of Brussels, *Mukeshimana-Ngulinzira et al. v Belgium et al.*, RG No 04/4807/A, 07/15547/A, 8 December 2010.

<sup>282</sup> *Ibidem*, paras 8-17.

mission. In the State's reasoning, the Court would have clearly been precluded to do so due to the jurisdictional immunity of the Organisation. The Court did not share this view and positively affirmed its jurisdiction stressing that only the liability of Belgium and of two Belgian nationals was at issue because the impugned acts were attributable exclusively to the State.<sup>283</sup> The inquiry conducted by the Court showed that the decision to evacuate the Belgium contingent from the camp was taken exclusively by the Belgium State in the exercise of its full command. In fact, Belgium at that time had not only withdrawn troops from the school-camp but had withdrawn its whole participation from MINUAR.<sup>284</sup> Hence the Court determined that

*[...] la thèse défendue par les parties demandereses est précisément que le contrôle des troupes stationnées à l'ETO [the compound] a été retiré à la MINUAR et placé sous la responsabilité exclusive de l'ETAT BELGE lequel aurait commis seul les fautes reprochées, entraînant une responsabilité qui lui est propre [...] comme le précisent les demandeur, "les faits reprochés à l'Etat belge ne relèvent pas de son action en qualité d'Etat participant à la MINUAR".*<sup>285</sup>

It should be noted that the Court did not make any explicit reference to the provisions of the DARIO, but it is quite evident that it endorsed to a certain extent the effective control test and, more precisely, a factual interpretation thereof, by looking into the chain of command of the contingent's withdrawal from the refugee camp.<sup>286</sup>

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<sup>283</sup> *Ibidem*, para. 26.

<sup>284</sup> *Ibidem*, para. 14.

<sup>285</sup> *Ibidem*, para. 26.

<sup>286</sup> In this sense see the comment to the sentence by Ryngaert in *Oxford Reports on International Law*, ILDC 1604 (BE 2010), and of the same author "Apportioning Responsibility Between the UN and Member States in UN Peace-support Operations", *supra* note 148.



# CHAPTER IV

## REMEDIES FOR HARMFUL CONDUCTS IN PEACE OPERATIONS

### 1. Introduction

In international law the term ‘remedies’ has a twofold meaning, the first concerns procedural aspects, while the second focuses on substantial characteristics.<sup>1</sup> In the first sense, remedies can be understood as the set of processes by which a claim for violations of international law can be heard and adjudicated. These include both judicial and non-judicial institutions such as courts, tribunals and administrative bodies.<sup>2</sup> In sum, the procedural meaning of remedies defines remedial institutions and procedures to which injured parties can bring their claims.<sup>3</sup> As to the substantial notion of remedies, it generally refers to the relief afforded to the successful claimant, hence to the outcome of the procedure or proceeding instituted by the injured party; in this sense it is also called redress.<sup>4</sup>

As noted by some authors, an international law of remedies does not exist and the matter is characterised by a significant ‘terminological disorder’.<sup>5</sup> This is exemplified by the fact that the concept does not only have a twofold meaning as described above, but it is also generally used as a

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<sup>1</sup> Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 2005, p. 7; id., “Human Rights, Remedies”, in *MPEPIL*, 2006; Schmalenbach, “International Organizations or Institutions, Legal Remedies against Acts of Organs”, in *EPIL*, 2006.

<sup>2</sup> Shelton, *supra* note 1.

<sup>3</sup> Schmalenbach, “International Organizations or Institutions, Legal Remedies against Acts of Organs”, *supra* note 1, para. 2.

<sup>4</sup> Shelton, *supra* note 1, pp. 7-8.

<sup>5</sup> Gray, “Is there an International Law of Remedies?”, in *British Yearbook of International Law*, vol. 56, 1985, pp. 25-38; id., *Judicial Remedies in International Law*, Calendon Press, 1987; Haasdijk, “The Lack of Uniformity in the Terminology of the International Law of Remedies”, in *Leiden Journal of international law*, vol. 5, 1992, pp. 245-263, at 245.

synonym of reparation in the law of international responsibility, including restitution, compensation and satisfaction.<sup>6</sup> Moreover, in the ILC Draft Articles on the international responsibility of States and of international organisations the term ‘remedies’ is employed only to indicate the rule of the previous exhaustion of local *remedies* concerning the admissibility of claims.<sup>7</sup> The term clearly refers to the procedural aspect of remedies, to be understood as the mechanisms available to the injured party within the responsible State’s domestic legal system and to the instruments provided by international organisations, that may also include arbitral tribunals, national courts or administrative bodies when an organization has accepted their competence to examine claims.<sup>8</sup>

This leads us to consider that, although used to some extent in this context, the notion of remedies is generally not associated with the theory of international responsibility. On the contrary, the concept has been developed and is widely resorted to in the realm of human rights law. In the language of the law of international responsibility other concepts are preferred to the use of ‘remedies’, such as the invocation of responsibility, as part of the broader

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<sup>6</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, arts 31-34-35-36-37; Draft Articles on Responsibility of International Organizations, with Commentaries, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, art. 31-34-35-36-37; see also Schachter, “International Law in Theory and Practice: General Course in Public International Law”, in *Recueil des cours*, vol. 178, 1982, pp. 1-395; Stern, “The Obligation to Make Reparation”, in Crawford *et al* (eds), *The Law of International Responsibility*, Oxford, 2010, pp. 563-571; Shelton, “Righting Wrongs: Reparation in the Articles on State Responsibility”, in *American Journal of International Law*, vol. 96, 2002, pp. 833-856.

<sup>7</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 6, art. 44 (b) and Draft Articles on Responsibility of International Organizations, *supra* note 6, art. 45, para. 2: “When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted”.

<sup>8</sup> See Commentaries to art. 45 of the Draft Articles on Responsibility of International Organizations, *supra* note 6, paras 6-9; Cançado Trindade, “Exhaustion of Local Remedies and the Law of International Organizations”, in *Revue de Droit International et de Sciences Diplomatiques*, vol. 57, 1979, p. 81-123; *id.*, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983; Amerasinghe, *Local Remedies in International Law*, Cambridge University Press, 2004; Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani*, Giappichelli, 2004; Thallinger, “The Rule of Exhaustion of Local Remedies in the Context of the Responsibility of International Organizations”, in *Nordic Journal of International Law*, vol. 77, 2008, p. 401-428.

mechanism of the implementation of responsibility.<sup>9</sup> In human rights law, remedies are the very content of an autonomous right, namely the right to an effective remedy, entrusted to individuals who are victims of human rights and international humanitarian law violations, as enshrined in several human rights treaties and contained in numerous authoritative statements.<sup>10</sup>

The present study embraces the understanding of remedies as elaborated in human rights law and prefers it to other concepts of the parlance of the law of international responsibility, e.g. the implementation of responsibility. This lens of analysis allows one to better view the peculiarities of the legal relations existing between individuals and States or international organisations that are severely underdeveloped in the law of international responsibility, especially in the DARIO. In particular, the attention paid to the procedural aspects of remedies will enable one to draw a comprehensive picture of possible remedial actions in peace operations, including those concerning claims between States and international organisations.<sup>11</sup>

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<sup>9</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 6, arts 42 ff. and Draft Articles on Responsibility of International Organizations, *supra* note 6, arts 43 ff.

<sup>10</sup> *European Convention on Human Rights*, art. 13, Right to an effective remedy: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. *Charter of Fundamental Rights of the European Union*, art. 47 Right to an effective remedy and to a fair trial. “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”; *International Covenant of Civil and Political Rights*, art. 3, para 2: “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006. Art. 13 ECHR: Right to an effective remedy; International Law Association, *Reparation for Victims of Armed Conflict*, Hague Conference, 2010. The existence of an individual right to a remedy for IHL violations is contended both in national case law and in literature, the terms of the debate will be illustrated *infra* para 6.2.

<sup>11</sup> See for all Gaja, *The Position of Individuals in International Law. An ILC Perspective*, in *European Journal of International Law*, vol. 21, 2010, pp. 11-14. The issue of the position of the individual in international law and the evolution its role has undergone during the last century will be considered *infra*.

The present chapter focuses on the remedies available in peace operations to victims of international law violations, whether States or individuals, considering both non-judicial and judicial remedies. As to non-judicial or quasi-judicial remedies, the chapter analyses the structure and the functioning of various claims systems established in peace operations by international organisations and TCCs. Particular attention is devoted to the mechanisms devised by the UN and the EU during the international administration of Kosovo, namely to the Ombudsperson, the UNMIK Human Rights Advisory Panel and the EULEX Human Rights Review Panel, as well as to the UN and the NATO claims system. As to judicial remedies, the study will shed light on the increasing role played by domestic courts in adjudicating individual claims seeking an effective remedy for harms caused by the UN and by TCCs in peace operations. The core difficulties in bringing these claims before national courts will be highlighted, with particular attention to the recent debate concerning the nature and the scope of UN immunity from national jurisdiction. Remedies available to settle claims between States and between States and international organisations will also be discussed, by way of examining the normative framework regulating them.

The understanding of the term remedies chosen in this chapter essentially concerns mainly its procedural aspect, which is to say, the set of mechanisms available to an injured party to seek reparation for damage suffered. However, the study will also take into consideration the substantive aspect of remedies, namely the outcome of the procedure or proceeding initiated by injured parties. The chapter investigates what type of remedy is generally granted to a claimant and whether the general principle of full compensation applies.

## **2. The United Nations Claims System**

Under the General Convention on the Privileges and Immunities of the United Nations the UN has a general duty to provide for dispute settlement

mechanisms in order to allow plaintiffs to bring claims of private law character, whose justiciability would be otherwise precluded due to the jurisdictional immunity of the Organisation and of its personnel.<sup>12</sup> Art. VIII, section 29 of the General Convention prescribes that

The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a *private law character* to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.<sup>13</sup>

Specifically concerning disputes arising from harmful outcomes of UN peace operations, art. 51 of the UN Model SOFA stipulates that disputes of a private law character involving a UN peacekeeping mission shall be settled by a ‘standing claims commission’ composed of three members, one appointed by the UN, another by the host State, while a third, serving as chairman, would be nominated by the other two members.<sup>14</sup> The commission's award would be final and binding, however with the possibility of appealing it before an *ad hoc* arbitration tribunal upon mutual agreement of the UN and the host State.<sup>15</sup>

In practice, the standing claims commission envisaged under the UN Model SOFA has never been established, resorting instead to a different mechanism, the ‘local claims review board’, generally established at the missions’ headquarters on the territory of the host State, upon the decision of each UN head of mission.<sup>16</sup> These local boards can be defined as UN

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<sup>12</sup> *Convention on the Privileges and Immunities of the United Nations* (hereinafter General Convention or GCPI), 13 February 1946.

<sup>13</sup> Article VIII, section 29, italics added.

<sup>14</sup> A/45/594, 9 October 1990, art. 51.

<sup>15</sup> *Ibidem*, arts. 51 and 53.

<sup>16</sup> The missed establishment of the standing claims commission is acknowledged in several reports of the SG, see *inter alia*, A/51/389, para. 22. In order to explain this practice that does not abide by the terms of the relevant legal sources, the General Assembly maintained that “this [the fact that a standing claims commission has never been established] may have been the result of a lack of political interest on the part of host States, or because the claimants themselves may have found the existing procedure of local claims review boards expeditious, impartial and generally satisfactory”, A/51/903, para 8. This reasoning notwithstanding, it remains uncertain why the Organisation has never amended the 1990 Model SOFA to uphold this subsequent practice and why both the UN and host States continue to conclude SOFAs under which third party claims would

administrative organs operating in the receiving country and composed exclusively of UN personnel tasked with the settlement of third party claims for personal injury, death and property loss, as well as for damages attributable to acts performed in connection with official duties by civilian or military members of a mission.<sup>17</sup>

### 2.1. The 'private law character' of third party claims

According to art. VIII of the General Convention and to art. 51 of the UN Model SOFA, third party claims are receivable by a standing claims commission, *rectius* local claims review boards, insofar as the claims are 'of private law character'. Despite the paramount importance of this notion to the functioning of the entire UN claims system, the 'private law character' of a dispute lacks an official definition. An interpretation of policy and legal documents of the Organisation, together with some claims practice, may help in seeking a tentative definition of the concept.

The reports of the Secretary General concerning third party claims in peace operations expressly exclude claims arising out of accidents involving UN vehicles, contractual claims and off-duty actions claims.<sup>18</sup> The Secretary General has also enumerated the type of claims that are considered receivable under the UN claims system, including cases of personal injury and death, as well as damage and property losses.

One must also consider the peculiar use of the term 'private law character', which recalls the divide between public law and private law under

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be settled by a never-to-be-established standing claims commission. See for example the SOFA of UNMISS signed in 2011, whose art. VIII, para. 55 provides this dispute-settlement mechanism. See also the commentary edited by Reinisch, *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies. A Commentary*, Oxford University Press, 2016.

<sup>17</sup> A/51/389, para 22. Schmalenbach, "Third Party Liability of International Organizations. A Study on Claim Settlement in the Course of Military Operations and International Administration", in *International Peacekeeping. The Yearbook of International Peace Operations*, vol. 10, 2006, pp. 33-51, p. 42; Wellens, *Remedies against international organisations*, Cambridge University Press, 2002, p. 103 ff.

<sup>18</sup> A/51/389, note 1 and A/51/903, note 3.

domestic law and thus seems to suggest the intention to draw a distinction between damages occurred in the ordinary operation of the mission and those resulting from political or policy decisions of the Organisation. In other words, we may deem that a dispute of private law character concerns damages caused by a peace operation when the Organisation is acting as a ‘private law entity’, thus causing injuries that at the domestic level would be regulated most likely by domestic tort law. On the other hand, a claim would not be of private law character when its adjudication would imply an inquiry into the performance of the mission’s mandate, that is to say, a review of the exercise of UN powers.

The case of the UN’s refusal to receive claims concerning health damages suffered by third parties as result of a lead contamination in an internally displaced persons (IDP) camp in Mitrovica, Kosovo, under the responsibility of UNMIK, seems to support this understanding of ‘private law character’. The UN Under-Secretary-General for Legal Affairs declared the claims neither receivable under Section 29 of the General Convention nor under the General Assembly Resolution A/RES/52/247, stating that “the claims do not constitute claims of a private law character and, in essence, amount to a review of the performance of UNMIK’s mandate as the interim administration in Kosovo”.<sup>19</sup>

One would thus conclude that for a dispute to be deemed of private law character it must concern personal injuries, death, property loss or damage to an individual on the territory of the host State, caused by the ordinary operations of a UN peace operation; thus only when the adjudication of the claims does not require or imply a review of the performance of the mission’s mandate. However, a closer analysis of UN claims practice in peace operations raises some concerns as to the possible misuse of the notion by the Organisation, resulting in the exclusion of meritorious claims of reparation. For example, in the above-mentioned case of health damages deriving from lead pollution during UNMIK international administration of Kosovo, one

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<sup>19</sup> Letter of the Under-Secretary-General for Legal Affairs Patricia O'Brien concerning claim for compensation on behalf of Roma, Ashkali and Egyptian residents of Internally Displaced Person camps in Mitrovica, Kosovo, 25 July 2011.

might rightly question whether this exclusion was too generic and too far-reaching in rejecting any potential claims concerning those events. The case concerned the alleged responsibility of UNMIK for placing IDPs belonging to the Roma minority in camps contaminated by the mines located nearby, in the area of Trepča. As a result of the contamination and the lack of health treatment made available to the IDPs, 138 victims, including many children, were poisoned and several died. After being rejected by the claims board for the above-mentioned reasons, the claims were brought by the plaintiffs before the Human Rights Advisory Panel that found UNMIK responsible “for compromising irreversibly the life, health and development potential of children who were born and grew up in the camps”.<sup>20</sup> This leads us to suspect that there were political implications in the adjudication of this case, and potentially high costs to compensate damage. One may thus wonder whether the ‘private character exception’ is intended to serve as a shield for the Organisation, especially in cases that would shed light on gross violations and on the related responsibility of the UN.

Another recent and critical example is the Haiti cholera case. In this case, the UN flatly refused to establish local review boards to address third party claims for death and health damages following the epidemic outbreak caused by the UN Nepalese contingent of MINUSTAH, a fact that has been proved by several sources.<sup>21</sup> The letter of the UN Under-Secretary-General

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<sup>20</sup> Human Rights Advisory Panel, “The Human Rights Advisory Panel History and Legacy Kosovo, 2007-2016. Final Report”, 30 June 2016, hereinafter The Final Report, pp. 79-82; Mivrov, “Local Impact of UN 'Accountability' Under International Law. The Rise and Fall of UNMIK's Human Rights Advisory Panel”, in *International Peacekeeping*, vol. 19, 2012, p. 3-18; The plaintiffs had also filed a lawsuit against UNMIK before the ECtHR, that was dismissed for lack of jurisdiction, see Human Rights Watch, “Better Late than Never. Enhancing the Accountability of International Institutions in Kosovo”, June 2007, p. 11. For a detailed analysis of the functioning of the Human Rights Advisory Panel, see *infra* para. 3.2.

<sup>21</sup> Global Health Justice Partnership, Yale Law School and Association Haitienne de Droit de L'Environnement, *Peacekeeping without Accountability. The United Nations' Responsibility for the Haitian Cholera Epidemic*, 2013; Pavoni, *Choleric notes on the Haiti Cholera Case*, in *QIL*, 2015, p. 19; Freedman-Lemay Hebert, “Towards an Alternative Interpretation of UN Immunity. A Human Rights-Based Approach to the Haiti Cholera Case”, in *Questions of International Law*, 2015, pp. 5-18; Pillinger-Hurd-Barnett, “How to Get Away with Cholera. The UN, Haiti, and International Law”, in *Perspectives on Politics*, vol. 14, 2016, pp. 70-86; Alvarez, “The United Nations in the Time of Cholera”, in *AJIL Unbound*, 4 April 2016; Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, *UN Responsibility for the*

for Legal Affairs declared the claims not receivable pursuant to Section 29 of the General Convention because “consideration of these claims would necessarily include *a review of political and policy matters*”.<sup>22</sup> Even though the letter does not mention the ‘private law character’ requirement, its relevance is evident from the reference made to Section 29 of the General Convention. It seems quite questionable that health claims of the local population should not be receivable under the UN claims system, especially considering the facts that led to the epidemic outbreak. Reportedly, the UN failure to properly screen the Nepalese contingent together with the negligent maintenance of sanitary facilities by the Nepalese troops caused the contamination. Both these activities (screening troops and running units’ facilities) are undoubtedly ordinary activities in a peace operation that relate to the routine planning and functioning of a mission, rather than to political and policy matters.

This case has had great resonance thanks to the association created by victims to seek justice and access to an effective remedy.<sup>23</sup> As part of this action, the Haitian victims sued the United Nations before the Court of New York claiming the violation of their rights and challenging UN immunity on grounds of its alleged functional nature, conditional upon the existence of alternative remedies, that were denied in their case. As it will be explained further in this chapter, the suits (first instance and appeal) were unsuccessful in winning UN immunity but proved to be very successful in raising awareness and swaying public opinion, so much so that the UN was pressured into considering – for the first time – to give “cash payments from a proposed \$400 million cholera response package”,<sup>24</sup> especially after the statement by Professor Alston, Special Rapporteur on extreme poverty and human rights,

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*Introduction of Cholera into Haiti*, General Assembly 71st session, Third Committee, Item 6825, October 2016.

<sup>22</sup> Letter of the Under-Secretary-General, *supra* note 19, italics added.

<sup>23</sup> Institute for Justice & Democracy in Haiti and Bureau des Avocats Internationaux, <http://www.ijdh.org>.

<sup>24</sup> Sengupta-Katz, “U.N. Plans to Pay Victims of Cholera Outbreak It Caused in Haiti”, in *New York Times*, 24 October 2016, available at [http://www.nytimes.com/2016/10/25/world/americas/haiti-united-nations-cholera.html?smid=fb-share&\\_r=1](http://www.nytimes.com/2016/10/25/world/americas/haiti-united-nations-cholera.html?smid=fb-share&_r=1).

affirming the “UN responsibility for the introduction of cholera into Haiti”.<sup>25</sup>

In conclusion, considering the precedents analysed thus far, one is left with the clear impression that the notion of ‘private law character’ of claims lacks a precise legal definition. The scope left to the interpretation of the terms, and thus to reject instances of claims settlements, seems to ensure a legal pathway for the Organization to avoid the costs of mass claims as well as potentially negative political implications that could stem from the adjudication of these claims.

### *2.1 The new claims policy of the United Nations: the era of limitations*

Since the first UN peace operation, UNFEF I in 1956, the UN has handled third party claims through internal review mechanisms and mediation.<sup>26</sup> The system of local claims review boards developed by the practice of the Organisation proved to be quite successful in dealing with operation-related third party claims at the early stage of UN peace operations. Despite the initial success of these mechanisms, the growing number of UN peacekeeping operations deployed after the end of the Cold War and the related increased number of claims highlighted the shortcomings of the existing system.

The unsatisfactory claims experience in Congo first and later in the Balkans are illustrative of the difficulties faced by both the Organisation and the claimants. By way of example, the local review boards’ procedures in the ONUC mission was so lengthy and ineffective that the boards remained operational for three years after the end of the mission, until 1967 and, despite the extension, at that time not all claims were espoused, with the consequence

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<sup>25</sup> Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, *UN Responsibility for the Introduction of Cholera into Haiti*, *supra* note 21.

<sup>26</sup> Schmalenbach, “Dispute Settlement (Article VIII Sections 29-30 General Convention)”, in Reinisch (ed.), *The Conventions*, *supra* note 16, pp. 529-587; Spagnolo, *L'attribuzione delle condotte illecite nelle operazioni militari dell'Unione europea*, Editoriale Scientifica, 2016, pp.185-187.

that the remaining claims had to be handled directly by the UN headquarter until 1970.<sup>27</sup>

The UNPROFOR claims system in Bosnia Herzegovina and Croatia received numerous submissions, some for very high amounts, that challenged the limited financial and human resources of the mission.<sup>28</sup> The workload due to the scarce personnel available to investigate claims, together with the impossibility to compensate the high amounts claimed, caused widespread dissatisfaction among the civilian population that gave rise to several incidents of local people taking the law into their own hands. It was reported that locals, who believed to have been waiting too long to have their claims settled, had stolen UN vehicles with the support of local police, especially in areas controlled by the Serbs.<sup>29</sup> Furthermore, the governments of Bosnia Herzegovina and Croatia jointly submitted a claim for about 70 million US dollars claiming the liability of the UN for damage caused to roads and main infrastructure.<sup>30</sup> Following this claim, the General Assembly in 1996 called for urgent reform of the UN claims policy with the aim of introducing several ceilings to reduce UN liability towards third parties.<sup>31</sup>

The Secretary General upheld the request of the General Assembly and elaborated a new liability policy centred on limitations and ceiling imposed both on the admissibility of claims and on the maximum amount of compensation. These limits were divided into three categories: temporal, financial and subject-matter limitations.<sup>32</sup> The UN General Assembly endorsed the recommendations of the 1997 Secretary-General Report in Resolution 52/247 of 17 July 1998 that officially introduced the new third party liability policy of the UN. These new limitations became legally binding

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<sup>27</sup> *Idem.* Schmalenbach, "Dispute Settlement", *supra* note 26.

<sup>28</sup> Prescott, "Claims" in Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001, 159-186, p. 172.

<sup>29</sup> *Idem.* See also Report of the Secretary General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, A/51/389, para 8.

<sup>30</sup> Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", in *American Journal of International Law*, vol. 94, 2000, pp. 406-412, at p. 410; see also *NATO Legal Deskbook*, 2010, p. 274 ff.

<sup>31</sup> A/51/13.

<sup>32</sup> A/51/389.

on Member States due to the liability clauses contained in missions SOFAs, which mirror the general principles of limited liability provided in GA RES 52/247.<sup>33</sup>

### *2.2.1. Temporal and financial limitations*

GA RES 52/247 of 1998 prescribes a time limit within which a claim can be submitted to the local review board: six-month from the time the damage was sustained or discovered by the injured party, and in any event no later than one year after the termination of the mandate.<sup>34</sup>

Several limitations were also imposed on the financial liability of the Organization, namely by excluding some types of losses from compensation and by setting a maximum ceiling on the compensable amount. According to the SG Report, only the economic loss related to personal injury, illness and death is compensable, while non-economic loss such as “pain and suffering and mental anguish” are excluded from UN liability.<sup>35</sup> In any case, the maximum amount of compensation due to a claimant shall not exceed 50,000 US dollars, even if in exceptional circumstances the Secretary General, following a specific authorisation by the General Assembly, may determine that a particular case would justify the need to exceed this financial

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<sup>33</sup> A/51/903, paras 37-41. See also art. VII of the *Status of Force Agreement between the United Nations and the Government of the Republic of South Sudan concerning the United Nations Missions in South Sudan (UNMISS)*, that titles “Limitation of Liability of the United Nations”: “Third party claims for property loss or damage and for personal injury, illness of death arising from or directly attribute to UNMISS, *except for those arising from operational necessity ... shall be ... submitted within six months* following the occurrence of the loss, damage or injury or, if the claimant did not know or could not reasonably have known of such loss or injury, within six months from the time he or she had discovered the loss or injury, but in any event not later than one year after the termination of the mandate of the operation. Upon determination of liability as provided in this Agreement, the United Nations shall pay compensation *within such financial limitations* as have been approved by the General Assembly in its resolution 52/247 of 26 July 1998”, italics added.

<sup>34</sup> A/51/903, 1997, paras 17-20.

<sup>35</sup> Economic loss typically includes medical expenses, loss of income or financial support, medical expenses and burial expenses. See A/51/903, para. 25, see also A/RES/52/247, para. 9.

limitation.<sup>36</sup>

This new claims policy contemplates a further rule in cases of damages resulting from gross negligence or wilful misconduct of members of the force in the course of a UN peace operation. In such case, the UN would assume liability in compensation towards third parties, while retaining at the same time the right to seek recovery from the responsible individual or sending State. Under similar circumstances, financial limitations would not apply.<sup>37</sup>

### *2.2.2 The subject-matter admissibility criterion: the 'operational necessity' exception*

GA Resolution 52/247 introduced a further limitation to compensable claims. Under the exception based on the suggestion proposed by the SG in his 1996 Report on budgetary and financial aspects of peacekeeping operations<sup>38</sup>, damage is not compensable when it resulted from “necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of the mandate”.<sup>39</sup>

‘Operational necessity’ echoes to some extent the concept of military necessity in *jus in bello*; it cannot be defined in advance because it depends on the discretionary powers of the force commander.<sup>40</sup> In describing the notion, the Secretary General, rather than providing for a formal definition, indicated four cumulative criteria against which local claims review board should assess, *ex post facto*, whether the impugned acts were carried out in the exercise of operational necessity. First, the force commander should deem

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<sup>36</sup> A/RES/52/247, para. 9, let. e).

<sup>37</sup> A/51/903, para. 14; A/RES/52/247, para. 7.

<sup>38</sup> A/51/389, para. 13 ff.

<sup>39</sup> *Ibidem*, para. 13.

<sup>40</sup> See art. 48 Additional Protocol I to the Geneva Conventions; Draper, “Military Necessity and Humanitarian Imperatives”, in *Revue de droit pénal militaire et de droit de la guerre*, vol. 12, 1973, pp. 129-151; Dunbar, “The Significance of Military Necessity in the Law of War”, in *Juridical Review*, vol. 67, 1955, pp. 201-212; Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, 2004.

in good faith that an operational necessity existed. Second, the harmful act should be strictly necessary and not carried out for mere convenience or expediency. Third, the act should be part of an operational plan. Fourth, the damage caused should be proportional to the achievement of the operational goal anticipated.<sup>41</sup>

The notion of operational necessity did not originate in the 1996 Secretary General Report, on the contrary it was already mentioned in the 1958 UNEF I Report by SG Hammarskjöld and later also in the agreement between the UN and Canada regulating the contribution of Canadian forces to UNFICYP mission.<sup>42</sup> Initially, the concept of operational necessity was developed by the UN to justify the non-consensual use of privately-owned property and premises.

Host States generally have a duty to provide the UN and the mission with the necessary premises, and in case of occupation of private property by the mission, the host State should bear the burden of compensation.<sup>43</sup> More precisely, when the receiving State does not abide by its obligation to make adequate premises available to the UN, and the Organisation shoulders the burden of compensation, the UN should pay adequate compensation calculated on the fair rental value of the property. In this case, the UN has a right to seek redress from the host State.<sup>44</sup> Moreover, while claims by private parties should be submitted to the host State that has the prime responsibility in compensation, it has often happened in the practice of UN peace operations that third parties sought redress directly from the Organisation.<sup>45</sup> In order to

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<sup>41</sup> A/51/389, para. 14. Shraga, “UN Peacekeeping Operations”, *supra* note 30, pp. 410-411. Arsanjani, “Claims against International Organizations: *Quis Custodiet Ipsos Custodes*”, in *Yale Journal of World Public Order*, vol. 7, 1981, pp. 131-176.

<sup>42</sup> A/3943, para. 142: “The question of privately-owned land used because of *operational necessity*, and for that reason required to be provided under the Agreement, has been the subject of discussion between Egyptian authorities and the Secretary-General...”, italics added.

<sup>43</sup> These obligations are generally prescribed in the SOFAs concluded between the Organisation and the host states, see Schmalenbach, “Third Part Liability of International Organizations”, *supra* note 17; Shraga, “UN Peacekeeping Operations”, *supra* note 30, p. 411.

<sup>44</sup> UN Model SOFA, art. 16, see also A/51/389, paras 9-12.

<sup>45</sup> See for example the case of UNEF I, where many property-related claims were submitted to UNEF by the Egyptian Liaison Office. Following an agreement with the government under which it was established a joint assessment procedure according to which Egypt

limit to the maximum extent possible for this type of claims, the UN has thus developed the operational necessity rule.

### 2.3. *Lump Sums Agreements in the Congo*

The practice of UN claims has also been characterised by rare cases of third party claims settled by lump sums agreements concluded between the UN and the State of nationality of the claimants, acting in diplomatic protection. In the course of ONUC mission in Congo in the late 1960s the UN agreed to resolve claims for damages and injuries to foreign citizens occurred in the territory of the Congo and attributable to the mission by way of lump sums agreements.<sup>46</sup> These agreements were concluded, in the form of exchange of letters, with the governments of Belgium, Greece, Italy, Luxembourg and Switzerland.<sup>47</sup> As a result, the UN undertook to pay a fixed amount of compensation to each State, while the responsibility to distribute the sums among the entitled plaintiffs rested on the State of nationality. By accepting the sum offered by the UN, the claimants waived any further cause of action against the Organisation, while at the same time the States accepted

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assisted UNEF in the oversight of the property allegedly damaged or occupied. Upon the assessment carried out, the UNEF undertook the commitment to pay compensation to third party and to seek redress from the Egyptian government on due course. In this case, damages resulted from operational necessity were found compensable as result of an intense negotiation on this issue with the Egyptian government. As it has been observed by some commentators Egypt stand out from the general lack of interest of host state in protecting the interests of third party claims that suffered damages on their territory. A/3943, 3 October 1958, para. 142, see also Schmalenbach, "Dispute Settlement", *supra* note 26.

<sup>46</sup> Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, Martinus Nijhoff, 1995; Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff, 2005, p. 80 ff.; Wouters-Schmitt, "Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials", in Reinisch (ed.), *Challenging Acts of International Organisations Before National Courts*, Oxford University Press, 2010, pp. 77-110.

<sup>47</sup> *United Nations and Belgium Exchange of Letters Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals*, 20 February 1965. Identical provisions were included in analogous lump sums agreements concluded with Italy, Greece, Luxembourg and Switzerland. With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France and also with the International Committee of the Red Cross, see *Draft Articles on Responsibility of International Organizations, with Commentaries*, *supra* note 6, art. 36, para. 1.

to provide for complementary compensation of meritorious claims when the amount decided by the UN was not deemed equitable.

Although the instrument of lump sums agreements has been frequently resorted to in order to settle international claims in other realms of international law, it has never been replicated in the practice of third party claims in peace operations.<sup>48</sup> Some commentators have identified the uniqueness of the ONUC case in the political reasons that led to the choice of this means of dispute settlement. Reportedly, many States in the General Assembly refused the hypothesis to establish local claims boards or other forms of *ad hoc* mechanisms to receive individual claims for Belgian citizens, that were considered by many responsible of the dreadful situation in the Congo that led to UN intervention.<sup>49</sup> Moreover, the UN preferred not to go into a detailed analysis of the activities – and possible violations – carried out by ONUC forces, nor to incur the high cost – in terms of compensation amounts and personnel – necessary to handle a high number of individual claims. Eventually, the idea to settle third party claims by lump sums agreement, hence by *una tantum* compensation agreements, seemed to accommodate the interests both of the UN and of States acting in diplomatic protection.

The ONUC example was thus considered by many commentators and decision-makers as a successful precedent; however, the fact that these agreements represent a *unicum* in the experience of third party claims raises some important questions. One can argue that two reasons may have led to the *de facto* lack of success of this precedent, which was never repeated in UN claims practice. First, one can contemplate a burden-sharing problem between the UN and States of nationality of the claimants; one also cannot ignore the likely negative consequences for the UN should it acknowledge its

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<sup>48</sup> Lillich, *International Claims. Their Settlement by Lump Sum Agreements*, University Press of Virginia, 1975; Weston-Lillich-Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995*, Transnational, 1999; id., “Lump Sum Agreements. Their Continuing Contribution to the Law of International Claims”, in *American Journal of International Law*, vol. 82, 1988, pp. 69-80.

<sup>49</sup> Wouters-Schmitt, “Challenging Acts of Other United Nations’ Organs”, *supra* note 46, p. 105.

international responsibility in peace operations.

As it concerns the burden-sharing problem, one can make the hypothesis that States may not be willing to participate in the claims settlement process because it may turn out very costly. For example, States can be asked to provide for elaborate internal procedures to distribute the sums among meritorious claimants. States also risk to be sued by those claimants that consider their right to an equitable compensation was breached by the lump sums agreement or by the internal procedure.<sup>50</sup> Considering that most UN Members States contribute financially and also directly with their personnel and assets to UN peace operations, and given that the UN has a specific obligation to settle third party claims by establishing specific procedures under the General Convention and the SOFA,<sup>51</sup> it is not inconceivable that member States may have avoided to shoulder a burden considered excessive compared to that carried by the Organisation itself.

As to the issues concerning the responsibility of the UN, a preliminary analysis of the text of the agreements is in order. In the letter dated 20 February 1965 the Secretary General U Thant stated

The United Nations has agreed that the claims of Belgian nationals who may have suffered damage as a result of harmful acts committed by ONUC personnel, and not arising from military necessity, should be dealt with in an equitable manner.

It has stated that it would not evade *responsibility* where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.<sup>52</sup>

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<sup>50</sup> Schmitt, “*Mendeliev v Organisation des Nations Unies et Etat Belge (Ministre des Affaires Etrangères)*”, Tribunal Civil, 11 May 1966, Journal de Tribunaux, 10 December 1966, No. 4553, 121”, in Ryngaert *et al.* (eds), *Judicial Decisions on the Law of International Organisations*, Oxford University Press, 2016, pp. 364-374. In the present case the plaintiff argued that the UN was bound to provide for appropriate methods of settlement for third-party disputes of a private law character in accordance with Article VIII, section 29 of the General Convention. The claimant argued that this failure was in breach of Article 10 of the Universal Declaration of the Human Rights and of Article 6 of the ECHR. The UN maintained that the lump sum agreement concluded with the Belgian constituted an appropriate method of dispute settlement under article VIII, section 29. The tribunal rejected the UN argument, stating that “the UN took a unilateral decision by which [...] it believed itself bound to limit its spontaneous intervention”. This reasoning notwithstanding, the Tribunal eventually dismissed Mr Menderlier case upholding the UN defence on absolute immunity from jurisdiction. The judgement was later affirmed by the Appeals Court.

<sup>51</sup> General Convention, art. VIII, Section 29.

<sup>52</sup> *United Nations and Belgium Exchange of Letters*, *supra* note 47.

In this section the UN expressly acknowledged its responsibility for ‘unjustifiable damage’ caused by its agents. It is not clear, however, towards whom it would bear this responsibility, whether towards the ‘innocent parties’ or the State itself. Another passage of the Agreement referred to the ‘financial responsibility’ that the UN must bear in a ‘list of individual cases’, suggesting that the responsibility should be understood *vis à vis* third parties.

As to the legal concepts recalled by the Organisation in the Letter, some elements of confusion can be noted. In the first section analysed above, the UN used the notion of ‘responsibility’, that is later defined ‘financial responsibility’, as follows

Upon the entry into force of this exchange of letters, the Secretary-General of the United Nations shall supply to the Belgian Government all information at his disposal which might be useful in effecting the distribution of the sum in question, including the list of individual cases in which the United Nations has considered that it must bear *financial responsibility*, and any other information relevant to the determination of such *responsibility*.

The concept of ‘financial responsibility’ is unusual in the realm of international responsibility of international organisations and it seems closer to the notion of ‘liability’ that has later become the core of UN claims policy, as illustrated earlier in chapter II.<sup>53</sup> A further element of confusion in the language of the Agreement lies with the use of the notion of liability, where the Organisation raised the military-necessity exception, excluding its liability for damage

[...] the United Nations does not assume *liability* for damage to persons or property which resulted solely from military operations or which, although caused by third parties, has given rise to claims against the United Nations; such cases are therefore excluded from the proposed compensation.<sup>54</sup>

In sum, the UN used interchangeably the notions of ‘responsibility’, ‘financial responsibility’ and ‘liability’, with the result of a general

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<sup>53</sup> *Supra* chapter II, about the set of limitation see for all A/51/389.

<sup>54</sup> *United Nations and Belgium Exchange of Letters, supra* note 47, italics added.

uncertainty of the legal concepts involved. In other words, it is not clear whether the UN incurred its international responsibility, hence implying the acknowledgement that its actions were internationally wrongful; or whether it intended to recognise the damage caused without an assessment on the conduct's wrongfulness, thus assuming its liability for damage (or 'financial responsibility').

### **3. The experience of UNMIK and EULEX in Kosovo: the Human Rights Advisory Panel and Human Rights Review Panel**

Following SC Resolution 1244 (1999), the United Nations Mission in Kosovo (UNMIK) was deployed with the mandate to carry out the interim administration of the territory of Kosovo, pending the final determination on its status.<sup>55</sup> UNMIK was empowered both to exercise legislative and executive authority and to administer the justice system. The Special Representative to the Secretary General and the Secretary General who headed UNMIK's chain of command, together exercised governmental functions by imposing their authority over the inhabitants of Kosovo. As an interim administration, UNMIK was thus positioned, not differently than any national governmental authority, to infringe upon individual rights and violate human rights standards and it was indeed accused of several such abuses and violations.<sup>56</sup> The variety and extent of quasi-governmental powers of the

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<sup>55</sup> Milano, "Security Council Action in the Balkans. Reviewing the Legality of Kosovo's Territorial Status", in *European Journal of International Law*, vol. 14, 2003, pp. 999-1022; id., *Formazione dello Stato e processi di 'state-building' nel diritto internazionale. Kosovo 1999-2013*, Editoriale Scientifica, 2013; Ryngaert, "The Accountability of International Organizations for Human Rights Violations. The Case of the UN Mission in Kosovo (UNMIK) and the UN 'Terrorism Blacklist'", in Fitzmaurice-Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights. Legal and Practical Implications*, Nijhoff, 2013, pp. 73-91; Knoll-Uhl, "Too Little, Too Late. The Human Rights Advisory Panel in Kosovo", in *European Human Rights Law Review*, vol. 12, 2007, pp. 534-549; Palchetti, "Les autorités provisoires de gouvernement (PISG) du Kosovo, EULEX et ONU. Les principes d'attribution à l'épreuve", in *Revue Belge de Droit International*, vol. 47, 2013, pp. 45-5.

<sup>56</sup> Many allegations were made against UNMIK police, accused of brutality, looting and excessive use of force against individuals, especially during riots in the Mitrovica province. UNMIK was also accused of illegal seizures of private property, unlawful

interim administration were not, therefore, duly counterbalanced by the establishment of judicial review mechanisms as a system based on the rule of law would prescribe. Furthermore, in August 2000 UNMIK regulation n. 47 stated the immunity of UNMIK, KFOR and related personnel from any legal process, thereby halting any chance of judicial checks and balances.<sup>57</sup>

UNMIK's 'superpower' raised serious concerns among scholars and human rights advocates as to the lack of responsibility characterising Kosovo's administration.<sup>58</sup> In response to these allegations, UNMIK established some accountability and liability mechanisms to receive individual claims, namely the Ombudsperson,<sup>59</sup> the Human Rights Advisory Panel (HRAP)<sup>60</sup> and the Claims Commission.<sup>61</sup>

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detentions and generally for violating the right to an effective remedy. See Istrefi, "Should the United Nations Create an Independent Human Rights Body in a Transitional Administration", in Wouters *et al.* (eds), *Accountability for Human Rights Violations by International Organisations*, Intersetia, 2010, pp. 355-372, at p. 355; Amnesty International, "Kosovo, Setting the Standard? UNMIK and KFOR's Response to the Violence in Mitrovica", March 2000; see also the various reports issued by the Office of the Ombudsperson on specific topics, *inter alia*, "Special Report No. 4, Certain Aspects of UNMIK Regulation No. 2001/18 on the Establishment of a Detention Review Commission for Extra-Judicial Detention Based on Executive Orders", 12 September 2001; Human Rights Watch, "Better Late than Never. Enhancing the Accountability of International Institutions in Kosovo", June 2007.

<sup>57</sup> UNMIK/REG/2000/47, 18 August 2000.

<sup>58</sup> Human Rights Watch, "Better Late than Never.", *supra* note 56; Venice Commission, "Opinion on Human Rights in Kosovo. Possible Establishment of Review Mechanisms", Opinion no. 280/2004, CDL-AD (2004)033, Strasbourg, 11 October 2004.

<sup>59</sup> *Infra*, para. 3.1.

<sup>60</sup> *Infra*, para. 3.2.

<sup>61</sup> UNMIK Regulation No. 2000/47, section 7, provided for the establishment of UNMIK and KFOR claims commissions to settle third party claims for "property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from 'operational necessity'". According to Human Rights Watch and to the Venice Commission, the lack of public information on the creation and operating of these claims commissions made impossible to determine whether they had ever been established. Human Rights Watch, "Better Late than Never.", *supra* note 56, p. 18; Venice Commission, "Opinion on Human Rights in Kosovo", *supra* note 58, pp. 13-14. Admittedly, the UNMIK claims commission did come into existence in consideration of the provision contained in the Administrative Direction No. 2009/1, section, 2.2, under which the criterion of the previous exhaustion of all available domestic avenues to determine the admissibility of a case before the HRAP encompassed explicitly "third party claims process or proceeding". For further analysis of the HRAP, its subsequent reforms and the admissibility criteria, see *infra*, para. 3.2.

### 3.1 The UNMIK Ombudsperson

The Ombudsperson was established by UNMIK regulation 2000/38 and charged to “receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim administration or any emerging central and local institution”.<sup>62</sup> Besides receiving claims, the Ombudsperson was also entitled to initiate *ex officio* investigations.<sup>63</sup> The main shortcoming of this institution is to be found in its limited, if any, enforcement powers, whereby the Ombudsperson was only able to make recommendations to the Secretary General and to suggest the adoption of specific measures. Despite its limited powers, the Ombudsperson was soon regarded as a trusted human rights defender. Polish human rights lawyer Marek Antonin Nowicki, along with Hilmi Jashari as deputy, together built for the office an admirable reputation.<sup>64</sup> Furthermore, the Ombudsperson issued regular reports providing both for an annual comprehensive assessment of its activity and for an account on specific issues that contributed to the dissemination, outreach and transparency of the institution’s work.<sup>65</sup>

In February 2006, UNMIK issued Regulation no. 6 providing for the so called ‘Kosovarization’ of the office of the Ombudsperson, which was no longer under the auspices of UNMIK, to become a local institution. This change was advocated as part of the local-ownership process in light of the progressive transfer of powers from the interim administration to the developing local institutions, following the 2001 Constitutional Framework

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<sup>62</sup> UNMIK regulation No. 2000/38, section 3.1. It is worth noting that the Ombudsperson also had jurisdiction over NATO KFOR's actions based on an agreement with the Commander of the Kosovo Forces (COMKFOR). For a detailed analysis of this institution see Murati, “The Ombudsperson Institution vs the United Nations Mission in Kosovo (UNMIK)”, in Wouters *et al.* (eds), *Accountability*, *supra* note 58, p. 373, see also Istrefi, “Should the United Nations Create an Independent Human Rights Body”, *supra* note 58.

<sup>63</sup> UNMIK regulation No. 2000/38, section 3.1.

<sup>64</sup> Besides the central body, the institution established also satellite offices throughout Kosovo in order to penetrate the territory and reach out to almost all communities, Human Rights Watch, “Better Late than Never.”, *supra* note 56, p.13.

<sup>65</sup> Human Rights Watch Report, Venice Commission; Murati, “The Ombudsperson Institution vs the United Nations Mission in Kosovo (UNMIK)”, *supra* note 56.

for Provisional Self-Government in Kosovo.<sup>66</sup> However, this change in nature from an international to local authority brought about a radical modification in the functioning of the Ombudsperson, whereby the institution was essentially deprived of its powers as Regulation 2006/6 stipulated that UNMIK actions were no longer within its jurisdiction.<sup>67</sup> The impact of this reform in the institutional framework can be seen through the lens of statistics provided in the Ombudsperson annual reports, according to which in the period between 2000 and 2009 it received approximately 1,400 complaints, while after the mandate change, the number of cases diminished precipitously, approaching zero.<sup>68</sup>

### 3.2 *The UNMIK Human Rights Advisory Panel*

The Human Rights Advisory Panel (HRAP) was established pursuant to UNMIK Regulation 2006/12 in March 2006 and became operational in November 2007, following the appointment of the three members forming the panel, and completed its mandate in June 2016.<sup>69</sup> The HRAP was the quasi-judicial mechanism that *de facto* substituted the Ombudsperson after its ‘Kosovarization’. It was mandated to examine individual complaints of violations of human rights, as set forth in the main human rights treaty bodies,<sup>70</sup> attributable to UNMIK. It received complaints relating to actions or

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<sup>66</sup> UNMIK Regulation No. 2001/9 of 15 May 2001.

<sup>67</sup> *Ibidem*, section 3. A residual option was envisaged in the regulation concerning the possibility for the Ombudsperson to enter into agreements with the Secretary-General to establish “procedures for dealing with cases involving UNMIK”, *ibidem*, section 3.4. There are no reports that any form of cooperation had actually been established, due to the “no-answer-policy” undertaken by UNMIK, see Istrefi, *supra* note 53, p. 362. Under this new legal framework, the Ombudsperson lost its capacity to deal with KFOR cases, see Human Rights Watch, “Better Late than Never”, *supra* note 56, p. 14.

<sup>68</sup> Mivrov, “Local Impact of ‘UN Accountability’ Under International Law. The Rise and Fall of UNMIK’s Human Rights Advisory Panel”, in *International Peacekeeping*, vol. 19, 2012, p. 3-18.

<sup>69</sup> UNMIK Regulation No. 2006/12, 23 March 2006; Human Rights Advisory Panel, The Final Report; Mivrov, *supra* note 68; Milano, *Formazione dello Stato e processi di ‘state-building’ nel diritto internazionale*, *supra* note 55, pp. 159 ff.; Istrefi, *supra* note 53. The HRAP was composed of three members appointed by SRSG upon the proposal of the President of the European Court of Human Rights.

<sup>70</sup> UNMIK Regulation No. 2006/12, 23 March 2006, section 1.2, enumerated the following

omissions that occurred from 23 April 2009 onwards; applications were receivable until 31 March 2010.<sup>71</sup> The outcome of this unprecedented oversight mechanism was limited to the submission of final findings and recommendations to the SRSG.

The applications received by the Panel concerned mainly property cases, the responsibility of UNMIK for failure to investigate into disappearance, abduction and unlawful killings, and access to justice, and two high profile cases concerning the killing and injuring by UNMIK police of four demonstrators in Pristina in March 2004 and the lead contamination of the Roma internally displaced persons (IDPs) living in the UNMIK camp in the proximity of Trepca mines, as mentioned before.<sup>72</sup>

The creation of the Human Rights Advisory Panel seemed a promising initiative, showing the UN's goodwill to fill the accountability gap underlying its activities in peace operations, in general, and of UNMIK, in particular. However, since its inception, serious shortcomings in the HRAP architecture hindered the functioning of this newly-created mechanism. It was soon contested that, as an entity created by UNMIK, the HRAP was hardly to be considered an independent body, the panellists were appointed by the SRSG and the institutional framework governing its functioning was designed by UNMIK itself, issuing regulations and administrative directions.

Despite these ontological limitations, the HRAP's independence and impartiality was achieved through the appointment of qualified and outstanding panellists, whose candidacy was subject to the proposal of the

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instruments as the HRAP institutional framework: a) The Universal Declaration of Human Rights of 10 December 1948; b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; d) The International Covenant on Economic Social and Cultural Rights of 16 December 1966; e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; f) The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979; g) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 17 December 1984; and h) The Convention on the Rights of the Child of 20 December 1989.

<sup>71</sup> *Ibidem*, section 2. The cut-off day was set forth in the Administrative Direction No. 2009/1, section 5.

<sup>72</sup> A detailed analyses of cases examined by the HRAP is provided in its "HRAP Final Report", 30 June 2016, paras 139-228; see also Mivrov, *supra* note 68, pp. 11-13.

ECtHR's President.<sup>73</sup> However, the HRAP's functioning faced serious challenges due to the non-cooperative approach of the SRSG, who undertook a very intrusive policy in the exercise of its prerogatives. As it will be illustrated below, the SRGR issued regulations and orders that limited and eventually subverted the authority and the powers of the Panel, while no cooperation was granted to the HARP and its recommendations were not implemented.

On several occasions the SRSG stressed that the HRAP was “neither a judicial, nor a quasi-judicial body, but simply an advisory panel” of UNMIK, thus functional to the mission, as it was only entitled to issue findings and recommendations; while the authority to take any action rested solely with the SRSG and ultimately with the SG.<sup>74</sup> In this spirit, the SRSG felt entitled to cancel the public hearing of one of the most important cases brought to the attention of the HRAP, the *Balaj et al.* concerning the alleged violence of UNMIK police in Pristina that caused the death of two demonstrators and serious injuries to two others.<sup>75</sup> In the opinion of the SRSG the public hearing was believed to put forward a misconception of the powers entrusted with the HRAP, which was not a court. When the HRAP decided not to cancel the hearing, but to hold it at closed doors, its work was harshly criticised by the SRSG, according to whom the adversarial mode under which the hearing was conducted was inappropriate for an advisory panel and it left room for complainants to misuse the hearing as a “forum that holds court over

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<sup>73</sup> UNMIK Regulation No. 2006/12, section 5. Despite this guarantee of independence and impartiality, the tense relationship between the SGRG and the HRAP also affected the appointment of the panellists; for example, for several months in 2009 the members had to work without a formal charge as their mandate had expired without being renewed. Furthermore, the mandate renewal was limited by the SGRS to a few months instead of a full year as provided in UNMIK Regulation No. 2006/12, impairing the operation of the Panel. Also the election of a new member, following the resignation of a component, caused major problems and paralysed the HRAP for several months. Finally, the appointment process was revised by the Administrative Direction 2009/1, section 3.1, under which “[i]f no proposals or an insufficient number of proposals are received by UNMIK within a period of one calendar month of such request, the Special Representative of the Secretary General may make the necessary appointment without the requested proposal and following consultation with relevant international Human Rights bodies”. See HRAP Final Report, 30 June 2016, para. 107 ff.

<sup>74</sup> See the HRAP Final Report, para. 83, where it is reported a quotation from the letter from SRSG to HRAP Secretariat Executive Officer, 15 December 2008.

<sup>75</sup> A detailed oversight of the case is presented in the HRAP Final Report, para. 62 ff.

UNMIK or the UN”.<sup>76</sup>

Following these events in October 2009, in order to reduce once for all the *espace de manoeuvre* of the HRAP, UNMIK issued Administrative Direction No. 2009/1 (hereinafter AD), prescribing various limitations. Public hearings were only allowed if held “in such a manner and setting that allow a clear sense of non-adversarial proceedings”.<sup>77</sup> It introduced the cut-off date for submission of complaints of 31 March 2010, allegedly due to the limited involvement of UNMIK in the transition phase from that moment on.<sup>78</sup> Moreover, the HRAP was no longer entitled to interpret the admissibility criteria, namely the rule of the previous exhaustion of all available avenues. Section 2.2 of the AD prescribed that cases submitted for compensation to the UNMIK Claims Commission, established pursuant to UNMIK regulation 2000/47, were to be declared inadmissible.<sup>79</sup> The implementation of this amendment caused the HRAP to dismiss, as inadmissible, the two highest profile pending cases, even if they were found admissible prior to the entry into force of the AD.<sup>80</sup>

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<sup>76</sup> *Ibidem*, para 87 ff. See the letter from SRSG to the HRAP Presiding Member, 8 May 2009, cited in the Final Report, para. 88, footnote 70.

<sup>77</sup> Administrative Direction No. 2009/1, 17 October 2009, section 1.1.

<sup>78</sup> *Ibidem*, section 5.

<sup>79</sup> *Ibidem*, section 2.2.

<sup>80</sup> Mivrov, *supra* note 68. In the opinion of the author the Administrative Direction was serving not only the purpose of limiting HRAP powers, in general, but it aimed specifically at the dismissal of the complaints whose examination risked to highlight major violations and responsibility by UNMIK, namely the *Balaj and Others* and the *X and Others*. It should be noted that after the UN Claims Commission rejected the claims of *X and Others*, the 138 victims of the lead contamination in the IDP camps in the Mitrovica region, the HRAP found the case admissible again and in 2015 finally gave its opinion affirming UNMIK responsibility for health damages to the plaintiffs suffered as a consequence of the UNMIK decision to establish the camps in that area, and the later omissions of not moving the camps upon the allegations of severe pollution of soil and water and for the lack of health care offered to the claimants. See HRAP Final Report, paras 227-228. Despite the firm opposition of UNMIK, the HRAP was able to reopen also the *Balaj and Others* case, concerning the deaths and injuries occurred following the riots in the Mitrovica region. Setting a precedent, later named the *Balaj* exception the HRAP considered the claim receivable even if it was re-submitted after the cut-off date (namely in 2012) because of the time needed by the claims commission to process the claim. The HRAP based its decision upon the consideration that the deadline was initially met by the first submission, and by the fact the applicable regulation has change after the claims was filed before the Panel. Also in this case, the HRAP found that UNMIK violated human rights standards, by failing to investigate into the incident and by using excessive force against protesters, considered by the Panel “disproportionate and not necessary in a democratic society”. See HRAP Final Report, paras 225-228.

Underscoring the antagonistic relationship between the HRAP and UNMIK, observers have noted that not a single recommendation issued by the Panel to offer compensation to the victims or to provide for other means of reparation, as for example official excuses, was undertaken by the SGRG, during the entire mandate of the HRAP.<sup>81</sup>

### *3.3 The EULEX Human Rights Review Panel*

In February 2008, few days before the unilateral declaration of independence of Kosovo of 17 February 2008, the Council of the European Union established the European Union Rule of Law Mission (EULEX), with the mandate to assist Kosovo in developing the rule of law, namely in the domain of police, justice and customs, hence EULEX was intended to progressively substitute UNMIK in its Pillar I functions.<sup>82</sup>

Largely inspired by the UNMIK HRAP, the EULEX Human Rights Review Panel (HRRP) was established pursuant to a decision of the EU of 20 October 2009 and became operational in June 2010. Very similarly to its UN twin, the HRRP was mandated to review individual complaints of human rights violations – as enshrined in the main human rights treaty bodies<sup>83</sup> –

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<sup>81</sup> Amnesty International, “Kosovo: Unmik’s Legacy the Failure to Deliver Justice and Reparation to the Relatives of the Abducted”, 2013.

<sup>82</sup> EU Council Joint Action 2008/124/PESC/4, February 2008; Spornbauer, *EU Peace building in Kosovo and Afghanistan*, Nijhoff, 2014, p. 369 ff. On the legal basis of the EULEX presence in Kosovo as well as on the complex issues arisen from the multilayer presence of several actors in the Kosovo-transition, especially on the change from UNMIK to EULEX see Milano, “Il trasferimento di funzioni da UNMIK a EULEX”, in *Rivista di diritto internazionale*, vol. 4, 2008, p. 967 ff. and id., *Formazione dello Stato e processi di ‘state-building’ nel diritto internazionale*, supra note 56, p. 172 ff.

<sup>83</sup> The Universal Declaration on Human Rights (1948); The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, 1950); The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965); The International Covenant on Civil and Political Rights (CCPR, 1966); The International Covenant on Economic, Social and Cultural Rights (CESCR, 1966); The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW, 1979); The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT, 1984); The International Convention on the Rights of the Child (CRC, 1989).

committed by EULEX in the performance of its functions.<sup>84</sup>

Composed of 3 members, appointed by the EULEX Head of Mission, one of which is a EULEX Judge, the HRRP has jurisdiction over violations occurred since 9 December 2008 and it is still operational at the time of writing, having held its 31<sup>st</sup> session in October 2016. The Panel is exclusively of an advisory nature, as it may submit findings and recommendations, suggesting remedial actions different from monetary compensation, to the EULEX Head of Mission (HoM), who can bring the matter to the attention of the respective member State involved in the facts at issues.<sup>85</sup> Recommendations exclude monetary compensation because in the EULEX architecture third party claims are dealt with pursuant to the ‘Third Party Liability Scheme’, following investigations carried out by the EULEX International Investigation Unit. Thus, compensation for damages caused by EULEX activities are not handled by the HRRP but are settled through the mission insurance cover.<sup>86</sup>

According to official data provided by the HRRP, since its inception 188 cases have been filed, of which 140 were considered by the time the last annual report was finalised in December 2016.<sup>87</sup> The complaints concern mainly violations of the right of access to justice and the right to an effective remedy, typically claiming the alleged failure of the EULEX Prosecutor or of the police to take action and to properly investigate; other claims focus on the breach of property rights and on cases of ‘excessive use of force’ by EULEX police.<sup>88</sup>

HRRP has received so far limited attention both in the media and in

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<sup>84</sup> Milano, *Formazione dello Stato*, p. 203 ff.; Klein, “Panel, Mediateur et Mecanismes Informels de Controle des Activités des Organisations Internationales: entre accountability et responsibility”, in Crawford (ed.), *Select Proceedings of the European Society of International Law*, vol. 3, 2010, p. 217-228. HRRP Annual Report, 1 January-31 December 2015, pp. 7-8; Venice Commission, “Opinion on Human Rights in Kosovo”, p. 12 ff.

<sup>85</sup> Venice Commission, “Opinion on Human Rights in Kosovo”, p. 14. See also Spornbauer, p. 369 ff.

<sup>86</sup> Venice Commission, “Opinion on Human Rights in Kosovo”, p. 16; HRRP Report 2015, p. 8.

<sup>87</sup> HRRP Annual Report 2016, p. 7.

<sup>88</sup> The full list of closed cases is provided in the HRRP Annual Report 2015, p. 44 ff. Indications on the pending case can be found on the HRRP official website at: <http://www.hrrp.eu/Pending.php>.

literature, especially when compared to the harsh critiques made to the UNMIK HRAP, but it has generally be found substantially respondent to standards of independence.<sup>89</sup> Also in terms of implementation of Panel's recommendations, the relation between the HRRP and EULEX HoM proved to be more successful than the one between the HRAP and UNMIK SRSG, showing a better relationship between the chief of mission and its oversight body.<sup>90</sup>

The better functioning of the EULEX Review Panel, compared to the UNMIK Advisory Panel, can be explained by considering that the EU mission has been established when a considerable part of governmental powers had already been handed over to the newly constituted authorities of Kosovo. By contrast, UNMIK was initially deployed in a post-conflict situation with full responsibilities as interim territorial administration of Kosovo. In other words, EULEX had a much more limited scope and power to infringe upon human rights of individuals on the territory of Kosovo. This can explain, to a certain extent, the different nature of the relationships existing between the HoM and the oversight mechanism in the two missions and the difficulties faced essentially by UNMIK HRAP only.

The HRRP of EULEX, however, is not exempt from criticisms. It should be noted, for example, that the HRRP was established under the provisions of a restricted document, namely the so called 'EULEX Accountability Concept', purportedly because the Accountability Concept is part of the mission's Operational Plan, a strategic document whose details have not been disclosed.<sup>91</sup> It seems extremely questionable that the mandate establishing a mechanism tailored to grant accountability (which implies transparency) of the EU mission is contained in a restricted document and can be accessed exclusively in so far as it is made partly available in other documents, upon the decision of EULEX.<sup>92</sup>

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<sup>89</sup> Venice Commission, "Opinion on Human Rights in Kosovo".

<sup>90</sup> See for example the Decision on the Implementation of the Panel's Recommendations, *X and 115 other complainants v. EULEX*, case n. 2011-20, 11 November 2015, where the Panel found that the HoM has implemented, at least in part, the its recommendations.

<sup>91</sup> HRRP Annual Report 2015, p. 9.

<sup>92</sup> See the critique in this sense of the Venice Commission, "Opinion on Human Rights in

#### 4. NATO claims policy

The NATO claims commissions system is generally considered a well-developed and adequate instrument to address both inter-State and individual-State disputes arising from Organisation's operations.<sup>93</sup> The general legal framework for the NATO claims system is set forth in the 1951 Model SOFA, which was later complemented by several policy documents as, for example, the *Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property*.<sup>94</sup>

Article VIII of the NATO Model SOFA deals with both inter-State claims and third party claims. Inter-States claims include disputes between NATO Member States participating in a mission and disputes between Member States and the host State. Third party claims concern disputes between individuals and member States participating in a mission. Contractual claims between States and between States and third parties are specifically excluded from the SOFA and are generally settled pursuant to the contract terms.<sup>95</sup>

As to inter-States claims, the Model SOFA provides for a general waiver of all claims for damages to military property and injuries and death of military personnel occurred in the course of military exercises or operations.<sup>96</sup> However, damages to non-military properties amounting to

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Kosovo", p. 13, note 17.

<sup>93</sup> A/CN.4/637, paras 7-9; Prescott, "Claims", in Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001, pp. 159-185; Naert, "The International Responsibility of the Union in the Context of its CSDP Operations", in Evans-Koutrakos (eds), *The International Responsibility of the European Union, European and International Law perspectives*, Hart, 2013, pp. 313-338; Degezelle, "General Principles of the NATO Claims Policy", in *NATO Legal Gazette*, vol. 28, 2012, pp. 13-19, re-edited in the *NATO Legal Gazette-Special Edition*, August 2016, pp. 93-99; *NATO Legal Deskbook*, Second Edition, 2010, pp. 271-280.

<sup>94</sup> Available in *NATO Legal Deskbook*, p. 280; see also the *NATO Claims Policy for Designated Crisis Response Situations*, Annex 1, AC/119-N (2004) 0058, 19 May 2004.

<sup>95</sup> *Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces*, (hereinafter NATO Model SOFA), 19 June 1951, last updated, 14 October 2009, art. VIII.

<sup>96</sup> NATO Model SOFA, art. VIII, para 4. See also *Military Technical Agreement between International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*, Annex A, 5 March 2005, para. 10, later replaced by the RS Agreement, 20 September 2014, art. 20, para. 1.

more than 1,400 US dollars are not waived.<sup>97</sup> These are minor claims that generally do not occur during peace operations, but rather in the use of diplomatic premises or headquarters on the territory of a member State.<sup>98</sup>

Third party claims can be divided into two main categories, ‘official duty’ and ‘non-official duty’ claims depending on whether the tortious act or omission was carried out in the performance of official duty or not.

Official-duty third party claims are handled by the host State that will settle or adjudicate them in accordance with its domestic law, whereas the costs of the compensation eventually awarded to the injured party will be shared between all participating States, including the host State.<sup>99</sup> Under art. VIII of the Model SOFA, the expenses incurred to compensate meritorious claims are shared between States participating in the operation and the host country. Under this cost-sharing arrangement the receiving State is responsible for 25% of the expenses.<sup>100</sup> This rule is intended as a form of burden-sharing with the sending States to partly compensate the costs of their assistance.<sup>101</sup> When it is not possible to identify the responsible TCCs, compensation costs may be distributed equally between all participating States, or, as it happened in some missions, the payment was made from the account of the related headquarters.<sup>102</sup>

Instead, non-official duty third party claims shall be reported by the host State to the ‘responsible’ sending State, whereby the latter may decide to offer an *ex gratia* payment to the claimant. The plaintiff may accept the offer in full satisfaction of the claim, otherwise the Model SOFA stipulates the claimant may seek compensation by resorting to host State’s court, thus affirming the jurisdiction of national courts in cases of tortious acts carried out by a member of a force not done in the performance of its official duty.

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<sup>97</sup> NATO Model SOFA, art. VIII, para. 2 (e).

<sup>98</sup> An example of this type of claim concerned damages to car of the Belgian Minister of Justice resulting from the incorrect operation of security poles at the entrance of the US embassy in Brussels, see Degezelle, “General Principles of the NATO Claims Policy”, *supra* note 93, p. 94.

<sup>99</sup> NATO Model SOFA, art. VIII, para. 5, lett. a), b), e).

<sup>100</sup> NATO Model SOFA, art. VIII para 5 (e) (i), see *supra* chapter III.

<sup>101</sup> NATO Model SOFA, art. VIII para. 5 let. e) establishes the reimbursement system.

<sup>102</sup> For example, this was the procedure chosen during EUFOR/IFOR and KFOR missions, see *NATO Legal Deskbook*, *supra* note 95, p. 274 and 276.

The general framework of NATO claims provided in art. VIII of the Model SOFA, negotiated in 1951, was essentially designed to apply in peacetime situations between the Alliance's Member States, typically to deal with claims related to ordinary operations on the territories of member States. As it will be demonstrated in the following paragraphs, the practice of NATO SOFAs concluded in peace operations may differ in several aspects from the rules envisaged in Model SOFA. For example, all NATO SOFAs (or equivalent military agreements) signed in the course of peace operations prescribe the absolute immunity from jurisdiction, arrest and detention of NATO personnel.<sup>103</sup> In these SOFAs, immunity applies also to off-duty actions, differently from what provided in the NATO Model SOFA.

The practice concerning the claims system in peace operations requires a closer analysis, that will be carried out in the following paragraphs. The dichotomy between on-duty and off-duty claims remains crucial to the understanding of NATO claims policy, hence the study will consider these two categories of claims in turn.

#### *4.1. Official duty claims*

Defining the difference between on-duty and off-duty actions is one of the most challenging aspects of the claims system. While one may think

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<sup>103</sup> *Dayton Peace Agreement*, Appendix B to Annex 1-A, 21 November 1995, arts 2, 7, 8, 15; *Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia*, Appendix B, 9 June 1999, art. 3; *Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*, Annex A, 5 December 2001, arts 1, 3, 4, 10. Both the Dayton Appendix and the ISAF Military Technical Agreement expressly recall the General Convention on the Privileges and Immunities of the United Nations of 1946, see respectively arts 2 and 1; *Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan*, 30 September 2014, art. 11, stipulates that Afghanistan recognises that the sending State shall have "the exclusive right to exercise jurisdiction over" its personnel (para. 1), while NATO agrees to inform the host State of the status of any criminal proceedings allegedly committed in Afghanistan at the request of the government (para. 2). Interestingly, the host State maintains the "right to exercise jurisdiction only over NATO contractors and NATO Contractor Employees (para. 5).

military personnel deployed in a mission should be considered ‘round the clock on duty’,<sup>104</sup> neither sending States nor the Organisation subscribe to this understanding. NATO does not define on-duty/off-duty actions nor is a definition contained in the NATO Model SOFA, in the NATO Glossary, or in any other relevant NATO policy document.<sup>105</sup>

The procedures to distinguish between on-duty and off-duty are not specified in the NATO Model SOFA; generally, the sending State determines whether the impugned actions of its personnel were carried out in the performance of official duty.<sup>106</sup> In practice, when the claims process is administered by the host State, the sending State is asked to provide the claims commission with an ‘on duty attest’, stating whether the member of the force was on duty at the time of the alleged incident.<sup>107</sup> Art. VIII, para. 8 of the Model SOFA prescribes that if there is a dispute as to whether the tortious act was carried out in the performance of official-duty, the issue of the nature of the conduct can be settled with a conclusive and final decision by an arbitrator.<sup>108</sup>

Under article VIII of the Model SOFA, third party claims for damage arising out of official-duty acts are submitted to the competent authority established in the host State and are settled and adjudicated in accordance with its laws and regulations.<sup>109</sup> This system has obvious advantages for the claimants because the applicable law is accessible as well as the remedy itself,

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<sup>104</sup> Schmalenbach, “Third Party Liability of International Organizations”, *supra* note 30, p. 38.

<sup>105</sup> According to information gathered in informal meetings with NATO high ranking officer, it can be said that, example, tortious acts committed by forces while on leave or during their spare time, such as engaging in a bar fight or committing acts of sexual violence, tend to be considered off-duty actions.

<sup>106</sup> Cooley, *Base Politics. Democratic Change and the US Military Overseas*, Cornell University Press, 2008, p. 44.

<sup>107</sup> Degezelle, “General Principles of the NATO Claims Policy”, *supra* note 93, p. 95. Woodliffe, “The Stationing of Foreign Armed Forces Abroad in Peacetime”, in *International and Comparative Law Quarterly*, vol. 43, 1994, p. 443 ff., at p. 456.

<sup>108</sup> Degezelle, “General Principles of the NATO Claims Policy”, *supra* note 93, p. 96. For example, art. 20, para. 5 of the *Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan*, *supra* note 102, established an “Afghanistan-NATO Implementation Commission” in order to deal with “any issues that may arise regarding the implementation of this Article [art. 20-claims]”.

<sup>109</sup> NATO Model SOFA, art. VIII, para. 5 (a).

especially if compared to the alternative of suing a sending State before its own domestic courts. These procedures notwithstanding, in conflict or post-conflict situations it is often unlikely that the receiving State will have sufficient economic and institutional means to establish and administer the claims. Hence, despite the specific provision contained in the Model SOFA, often each troop contributing State would adjudicate its own claims *in loco* by the respective headquarters or the Organisation would set up a specific system operation on the territory of the receiving State.

For example, during IFOR's mission in Bosnia-Herzegovina and Croatia, under the terms of the Claims Annexes to the Dayton Agreement and to the Technical agreements, third party claims were originally submitted to an *ad hoc* claims commissions established by the host States (Bosnia Herzegovina and Croatia), whose decisions could be appealed before a three-member arbitration tribunal.<sup>110</sup> In case of non-compliance by the sending State of the payment order, the claim could be sent to the NATO Headquarter.<sup>111</sup> This framework proved too complicated and ineffective, especially due to the inability of the host States to process claims. Consequently, the Claims Annexes to the Dayton SOFA and to the Technical agreements were re-negotiated in order to make sending States primarily responsible for receiving and settling claims. In case of disagreements between the sending State and the claimant, the dispute was referred to the IFOR Claims Offices in Sarajevo and Zagreb for mediation. If mediation had failed, the claim was then brought before the Claims Commission, with the possibility of further appeal before an arbitral tribunal.<sup>112</sup>

Another peculiarity of the IFOR claims system consisted in the absence of the usual claims waiver between sending States and the receiving States.<sup>113</sup> This led to some issues resulting from claims for billions of US

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<sup>110</sup> *NATO Legal Deskbook*, *supra* note 95, pp. 273-275.

<sup>111</sup> *Idem*.

<sup>112</sup> *Idem*.

<sup>113</sup> *Dayton Peace Agreement*, Appendix B to Annex 1-A, *supra* note 105, art. 15: "Claims for damage or injury to Government personnel or property, or to private personnel or property of the Republic of Bosnia and Herzegovina, shall be submitted through governmental authorities of the Republic of Bosnia and Herzegovina to the designated NATO Representatives". See also *NATO Legal Deskbook*, *supra* note 93, p. 274.

dollars for road damage in Bosnia-Herzegovina and Croatia during IFOR and later SFOR operations caused by NATO vehicles.<sup>114</sup> These claims were eventually dismissed by NATO as non-compensable because they were considered ‘unavoidable results of conducting the operation’, similar to combat-related damages or to the operational necessity exemption.<sup>115</sup>

Moreover, not all SOFAs or military agreements provide for a duty to compensate damages occurred in the performance of official duty. For example, the 1999 Military Technical Agreement concerning KFOR did not contemplate the liability of KFOR forces for any damages caused in “the course of duties related to the implementation” of the Agreement.<sup>116</sup>

Another example can be found in art. 10 of the 2001 ISAF Agreement, where compensation for damage occurred pursuant the mission’s mandate was excluded in the following terms

The ISAF and its personnel will not be liable for any damages to civilian or government property caused *by any activity in pursuit of the ISAF Mission*. Claims for other damage or injury to Interim Administration personnel or property, or to private personnel or property will be submitted through Interim Administration to ISAF.<sup>117</sup>

Interestingly, under the NATO SOFA re-negotiated with the new Afghan government in 2014, the provisions concerning claims are much more elaborated than in the previous Agreement and afford sounder guarantees for injured parties. Under art. 20 of the 2014 NATO-Afghanistan SOFA, NATO Forces shall

pay just and reasonable compensation in settlement of meritorious third party claims arising out of acts or omissions

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<sup>114</sup> *NATO Legal Deskbook*, *supra* note 93, p. 274.

<sup>115</sup> Prescott, “Claims”, *supra* note 93, p. 179.

<sup>116</sup> *Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia*, *supra* note 105, Appendix B, art. 3.

<sup>117</sup> *Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*, *supra* note 105.

[...] done in the performance of their official duties and incident to the non-combat activities.<sup>118</sup>

Comparing the two SOFAs of the Afghanistan missions, one will note the change in the language used and the related expansion of the duty to compensate incumbent upon sending States. One can conclude that the less fragile (or needy) is the host State negotiating the SOFA, the more elaborated and solid will the claims provisions be. Hence, despite the framework provided by the Model SOFA, the actual structure of the NATO claims system may vary significantly in each mission, depending on several factors, mainly on the situation of the host State.

#### *4.2 Non-official duty claims*

Non-official duty claims include all claims against members of a force resulting from tortious acts or omissions carried out not in the performance of official duties. Under NATO claims policy, sending States are not responsible for acts or omission of their forces not done in the performance of official duty, hence member States do not have a duty to compensate non-official duty claims. However, under the Model SOFA sending States may decide to settle this type of claims by offering ‘*ex gratia* payments’ to meritorious claimants.<sup>119</sup>

When the receiving State is in charge of the claims process, it can issue a report on the case assessing whether the claim is meritorious and potentially compensable and recommend to the sending State to provide for redress.<sup>120</sup> When TCCs administer the claims process, each sending State evaluates the claim’s merits and decides whether to offer an *ex gratia* payment. In both cases, final decision on whether to make payment rests solely with the

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<sup>118</sup> *Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan*, *supra* note 105.

<sup>119</sup> NATO Model SOFA, art. VIII para. 6; see also Prescott, “Claims”, *supra* note 93.

<sup>120</sup> NATO Model SOFA, art. VIII para. 6, let. (a).

sending State.

If payment is offered, the claimant can accept it in ‘full satisfaction’ of his or her claim. As a consequence, when the payment is made, the receiving State is deprived of exercising local jurisdiction over the claim. By contrast, the Model SOFA provides that absent the claimant’s acceptance of payment in full satisfaction, local courts retain jurisdiction.<sup>121</sup> As shown earlier, though, in all NATO operations undertaken so far the receiving State’s jurisdiction was precluded in any case as result of personnel immunity. *Ex gratia* payments are widely used by TCCs to settle other non-compensable claims, such as combat-related and operational necessity claims. In these cases, the terms ‘*solatia*’ or ‘condolence’ payments are also used.<sup>122</sup>

Even if both types of claims are premised on the wrongfulness of the force’s acts or omissions, there are two main differences between ‘on-duty’ and ‘off-duty’ claims. First, with ‘on-duty claims’, the sending State assumes responsibility, or more precisely, it accepts liability. While in ‘off-duty’ claims, TCC may acknowledge the impugned act was tortious, i.e. in breach of the law of the receiving State, while not recognising any responsibility. For many States, *ex gratia* payments are accompanied by a statement expressively excluding any acknowledgement of liability or responsibility for violations of international humanitarian law.<sup>123</sup> Second, with ‘on duty’ claims the State seeks to come to an agreement with the claimant as to the amount of the compensation, and absent an agreement, or when the claimant finds the

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<sup>121</sup> Immunity from jurisdiction does not apply to members of the force outside their official duty, NATO Model SOFA, art. VIII para. 6, let. (c), (d).

<sup>122</sup> These concepts have been elaborated by US practice, especially during the ISAF campaign. They refer to different damages and diverse procedures: *solatia* payments are made in accordance with local customs to convey personal feeling and condolence to injured civilians, up to two thousands US Dollars, the costs are incurred by the Unit Operations and Maintenance Fund. Condolence payments covers both damages to property and death of civilians up to 2000 and 2,500 US Dollars, respectively, the costs are covered by the “Commander’s Emergency Response Programme”. See *Money as a Weapon System Afghanistan* (MAAWS-A), USFOR-A Pub 1-06, December 2009, p. 13 ff., Oswald-Wellington, “Reparations for Violations in Armed Conflicts and the Emerging Practice of Making Amends”, in Liivoja-McCormack (eds), *Routledge Handbook on the Law of Armed Conflicts*, Routledge, 2016, p. 520 ff., p. 534.

<sup>123</sup> Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 2015, p. 180, see also US practice: US Department of the Army, “Legal Claims Service Procedures”, 21 March 2008.

State's offer unsatisfactory, the claimant can resort to a further instance of adjudication, a sort of appeal. In contrast, *ex gratia* payments are not negotiated between the parties, the sum is offered and once accepted and paid by the State, the settlement is final.

#### *4.3. Operational claims: combat-related activities and operational necessity exemption*

'Operational claims' encompass claims for damages to third parties resulting from combat operations and related activities.<sup>124</sup> These damages are not envisaged in the NATO Model SOFA, nor are they generally compensable under the NATO claims system.<sup>125</sup> In other words, there is no international obligation for States participating in a mission to compensate these types of claims.

NATO practice contemplates two categories of claims excluded from compensation: 'combat and combat-related activities' and 'operational necessity'. The first includes acts typically carried out for the safety of personnel involved in combat operations and to achieve the military objective anticipated, e.g. firing weapons in force protection, manoeuvring in combat, *etc.*<sup>126</sup> The second category excludes damages arising from inevitable harmful activities necessarily linked to the pursuance of the mission's mandate but not due to combat activity.

The similarities in the two categories may cause some uncertainties in their interpretation and practical application. For example, during the SFOR mission in 2002, NATO troops searched a Bosnian village for an individual indicted by the ICTY, Karadzic, and subsequently several villagers claimed property damages. Their claims were submitted to the SFOR claims commission but were denied because they fell under the 'combat and combat-

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<sup>124</sup> See Zwanenburg, *Accountability of Peace Support Operations*, *supra* note 48, p. 115 ff.

<sup>125</sup> Prescott, "Claims", *supra* note 93; Degezelle, "General Principles of the NATO Claims Policy", *supra* note 93.

<sup>126</sup> *NATO Legal Deskbook*, p. 274.

related' exemption.<sup>127</sup> The main difference seems to lie with the fact that combat activities were actually conducted. However, considering that the purpose of these concepts is the same, namely to serve as exceptions to compensable claims, it is not clear why the Organisation's practice needs two separate notions to this end.

These exceptions have been increasingly tempered by the practice of *ex gratia*, *solatia* and condolence payments.<sup>128</sup> For example, in the case of damages related to the search of Karadzic, even if barred under the SOFA compensation systems, TCCs made *ex gratia* payments to repair the village.<sup>129</sup> More recently, during ISAF mission the claims provisions of the Military Technical Agreement proved to be ill-suited to address the very volatile situation of high-intensity combat activities, where the numerous civilian casualties and property damages were having a very negative impact on the local population.<sup>130</sup> According to NATO practice, third party claims for these types of damages were not compensable and this caused major local distrust towards the mission, with the collateral risk of jeopardising the mission success.

For strategic reasons in order to maintain and not alienate local support, NATO and sending States changed their claims policy.<sup>131</sup> *Ex gratia*, *solatia* and condolence payments were paid to victims of combat-related activities, with the TCC sustaining the costs, especially the US, and by making contributions to the 'Post-Operational Humanitarian Relief Fund' established for this purpose.<sup>132</sup>

This shows that each TCC can develop its own policies and procedures and be primarily responsible for claims related to the conduct of its personnel, hence the settlement of these claims depends exclusively on the

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<sup>127</sup> *Ibidem*, p. 275.

<sup>128</sup> *Supra* para. 4.2.

<sup>129</sup> *NATO Legal Deskbook*, p. 275.

<sup>130</sup> Degezelle, "General Principles of the NATO Claims Policy", *supra* note 93.

<sup>131</sup> *Idem*; Corn-Van Landingham-Reeves, *US Military Operations. Law, Policy and Practice*, Oxford University Press, 2016, 467 ff.

<sup>132</sup> Holewinski, "Fixing the collateral damage", in the *New York Times*, 7 March 2007. Despite the meritorious initiatives only a handful of countries contributed to the fund, causing major critique and hampering the potential of the Fund to address the inequity experienced by the local population affected by combat activities.

will of TCCs. Moreover, State parties can make reservations when signing or ratifying the SOFA or decide not to sign the NATO SOFA and sign a separate SOFA with the host country.<sup>133</sup> Also, the SOFA can be amended at a later stage in the course of the operation in order to adapt to operational realities and requirements such as, for example, the inability of the receiving State to administer the claims process due to a general institutional collapse.<sup>134</sup> In this way, each TCC can develop its own policies and procedures and be primarily responsible for claims related to the conduct of its personnel. As a consequence, despite the existence of a general legal framework under which claims can be settled in NATO operations, it is difficult to identify a uniform NATO claims practice because each Member State and NATO Partners<sup>135</sup> may settle claims according to their own regulations and policy.

Seeking to develop a more uniform claims practice, NATO elaborated in 2010 a new policy specifically addressing combat-related damages, the *Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties and Damage to Civilian Properties*, based on Afghanistan lessons learned.<sup>136</sup> It encouraged *ex gratia* payments and in-kind assistance, while stressing that *ex gratia* payments do not imply any admission of legal liability.<sup>137</sup> However, it should be borne in mind that, differently from a SOFA, these Guidelines are expressly understood as non binding and it is specified by the Organisation that “TCNs must be free to follow their own

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<sup>133</sup> For example, it is common in US practice to sign bilateral agreements with the host State. This practice's rationale aligns with the intention to enter into specific and detailed agreement with the host state for the purpose of granting far reaching immunity of US personnel (military and civilian), not only from the domestic jurisdiction of the receiving State but also from the possible transfer to an international (criminal) tribunal. See the Security and Defence Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America, art. 13. The mission Resolute Support is by contrast regulated by the SOFA of September 2014.

<sup>134</sup> This was for example the case of IFOR/SFOR mission in Bosnia Herzegovina and Croatia, *NATO Legal Deskbook*, pp. 273-275.

<sup>135</sup> The term “NATO Partners” indicates States that are non-members of the Washington Treaty but enter in several cooperation agreements with the NATO, the full list is available on the official website: <http://www.nato.int/cps/en/natohq/51288.htm>

<sup>136</sup> Available at [http://www.nato.int/cps/en/natohq/official\\_texts\\_65114.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/official_texts_65114.htm?selectedLocale=en).

<sup>137</sup> *Ibidem*, rule n. 9: “Payments are made and in-kind assistance is provided without reference to the question of *legal liability*”, italics added.

fiscal laws and regulations”.<sup>138</sup> Accordingly, similar documents may provide for a useful tool to harmonise State practice only insofar States are willing and able to implement them.

## **5. Remedies made available by States and international organisations in peace operations: an assessment**

As to claims that arise between States and between States and international organisations, generally a far-reaching waiver applies under the NATO model SOFA and the UN model MoU. Where the waiver does not apply, claims may be settled amicably or via arbitration. The legal framework governing these claims systems in peace operations generally shares wide endorsement among the parties, as it is negotiated and agreed upon by the same actors that are also the addressees of those provisions, namely States and international organisations, acting on an equal footing. While some States and international organisations may exert a certain leverage on others, thereby conditioning the negotiation of bilateral agreements (and of claims provisions) nevertheless, with few exceptions, SOFAs and MoUs have generally led to agreed claims settlement procedures, providing for scope for subsequent amendments, should the existing systems prove to be ineffective.<sup>139</sup> It can thus be concluded that the claims systems regulating disputes between States and international organisations do not present major criticisms.

By contrast, remedies made available to individuals by international

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<sup>138</sup> *NATO Legal Deskbook*, p. 279.

<sup>139</sup> One may think, for example, of the Claims Annexes to the Technical Arrangements, concerning IFOR in the Balkans, that was amended by several appendices to improve the existing claims system, to make it more functional. Another example can be found in the issue of claims for damages brought by Bosnia Herzegovina and Croatia against the UN for damage to roads and infrastructures during UNPROFOR and IFOR, that were later dismissed by the UN on grounds of the “operational necessity exception”. It should be noted that in the present case the claimant States were able to submit these claims absent a general waiver provision in the first mission agreement, see *NATO Legal Deskbook*, p. 274.

organisations in peace operations have shown several shortcomings. For example, since UN claims commissions (*rectius* local review boards) are established upon the goodwill of the Organisation, in some cases, despite strong evidence of violations committed by the UN, such as we have seen in Srebrenica and in Haiti, local review boards have never been created. Moreover, victims are not allowed to participate in the procedure on equal footing with the United Nations, whereby under UN claims policy victims can only submit claims and decide whether or not to accept sums offered in compensation by local review boards. Furthermore, review boards' decisions are final: the UN claims system does not include any appeal mechanism. In this regard, the NATO claims system is more sophisticated, as it gives scope for further mediation when the compensation offered does not satisfy the victims' requests and also provides for the possibility to appeal the decision, should the mediation fail, generally before missions' headquarters.

As it concerns the substantive aspect of remedies, i.e. the outcome of the remedial process, the analysis has demonstrated how the principle of full compensation does not apply to claims system of international organisations in peace operations. Financial ceilings and various limitations are imposed both under the UN and the NATO claims policy.

Only claims concerning official duty actions or omissions are considered compensable, whereas off-duty wrongful acts of members of a force can be settled amicably with the intervention of the sending State through the practice of *ex gratia* payments. It should be highlighted that these sums offered by States or international organisations shall not to be considered compensation, as no liability nor international responsibility is incurred by sending States under the claims system's legal framework. Generally, they are offered for strategic purposes, such as to gain or to keep the consent of the host population, deemed essential to the mission's success.<sup>140</sup>

Furthermore, the UN prescribes that only claims of 'private law nature' are receivable by local review boards. It has been highlighted how the

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<sup>140</sup> See NATO policy, that substantially mirrors US policy in military operations.

interpretation offered by the Organisation of this threshold criterion has allowed some distortions in more than one case, *de facto* preventing accessibility of meritorious claims to the claims system, when the claims would have had a too high political impact on the UN.<sup>141</sup>

Moreover, numerous claims are excluded from compensation under specific exceptions prescribed by each claim system. Exceptions of ‘operational necessity’ and ‘military necessity’, whereby harmful outcomes of activities that were necessary to mission accomplishment, are neither compensable under UN nor NATO claims policy.

Other limiting factors include that compensation offered in UN-led missions shall not exceed certain financial limitations prescribed by the Organisation itself and that claims shall be submitted within a fixed timeframe, generally within 6 months from when the damage occurrence and not-later than a year after the mission accomplishment.

The peculiar remedies established in Kosovo, during the Interim administration of UNMIK and later during EULEX mission, have also shown major pitfalls. Initially, it seemed promising that, for the first time, two international organisations were acknowledging the possibility to be held internationally responsible for violations of human rights, as enshrined in most human rights treaties. The UNMIK Ombudsperson, the HRAP and the HRRP have been designed to receive individual claims of human rights violations committed by UNMIK or EULEX forces and personnel. This unprecedented recognition implied that the UN and the EU shall abide by human rights norms, as prescribed in the human rights treaties explicitly recalled in the Panels' mandates, and that their subsidiary organs – UNMIK and EULEX respectively – can be held responsible for human rights violations occurred during the mission and that are attributable to them.

This enthusiasm was however tempered by the fact that these oversight bodies had a limited mandate both *ratione materie* and *ratione*

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<sup>141</sup> The distorted implications of the misuse and misinterpretation of this vague notion have been illustrated above, with specific reference to the dismissal of serious claims related to health issues of Roma IDP in Kosovo during UNMIK administration and of Haitian victims of cholera during MINUSTAH, *supra* paras 2.1 and 3.2.

*temporis*, which in the case of the UNMIK Ombudsperson and the HRAP were progressively restricted as the mission went on. Even more importantly, these mechanisms were/are of advisory nature only, being entitled to submit findings and recommendations to the SRSG or the Head of Mission, where those recommendations could not include monetary compensation.

In any case, the UN has quickly betrayed the high expectations of responsibility and accountability, giving its substantial lack of good will to respect the independence of the Panel, cooperate with the HRAP and undertake reparatory actions towards victims endorsing the finding and recommendations of the Panel.

The EULEX HRRP has shown so far to be a more effective forum for victims than the HRAP, also given the efforts of the HoM to grant effective cooperation with the Panel's functioning. However, the HRAP's lack of power to grant compensation to meritorious claims, together with independence and transparency issues, cannot be disregarded. In sum, none of the mechanisms established during the Kosovo state building process can be considered a successful example of effective remedy for victims affected by the UN and the EU missions.

## **6. The role of domestic courts**

In light of the main limitations and shortcomings of remedial actions made available by international organisations and States in peace operations, and considering also a complete lack of remedial actions in some cases, many individuals have turned to domestic courts to seek a more effective remedy (or a remedy *tout court*), both from the UN and from TCCs.

Although some isolated suits dated back to late 1960s,<sup>142</sup> domestic claims concerning peace operations have been on the rise since the early

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<sup>142</sup> *Mendelier v Organisation des Nations Unies et Etat Belge (Ministre des Affaires Etrangères)*, Tribunal Civil de Bruxelles, 11 May 1966, *Journal de Tribunaux*, 10 December 1966, No. 4553, 121.

2000s. The significant increase in cases brought before domestic judges is also a consequence of the growing efforts of the international community in conflict and post-conflict situations, namely in the form of peace operations and enforcement actions.<sup>143</sup>

Bringing an individual claim for violations occurred in peace operations before domestic courts presents serious difficulties. The most troublesome issues faced by plaintiffs concern three main problems: *a)* the immunity of the United Nations, which translates in the dismissal of the case for lack of jurisdiction, *b)* the question of attribution, namely whether the impugned acts shall be attributed to the UN (which brings us back to the first issue), or to the sending State or both, and *c)* the justiciability of rights, that is to say the determination of whether an international norm can be invoked by an individual *vis à vis* the respondent State. The issue of attribution has been dealt with extensively in the previous chapter, hence the present analysis will focus on UN immunity and on the justiciability of individual rights.

### *6.1 The immunity of the United Nations before domestic courts*

The immunity of the UN from national jurisdiction of Member States is prescribed under art. 105 of the UN Charter stipulating that “the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its

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<sup>143</sup> As evidenced in several conflicts: The former Yugoslavia, from NATO military intervention to the deployment of several UN and EU peace operations up to include the interim administration of Kosovo. The Afghanistan war, followed by a series of post-conflict efforts, including several training missions, and two broad NATO operations, ISAF till 2015 and the ongoing RS. It is however difficult to draw a clear line between pure military intervention and post-conflict efforts of the international community in this country as the situation remains extremely volatile, as shown by several combat incidents, such as the latest Kunduz bombing of the MSF hospitals by US air forces, just to cite one. The coalition intervention in Iraq, which was first a war of invasion and later a complex of measures that included the interim administration of the Country by the US and the UK through the CPA, with the cooperation of several partners, including the Netherlands and Italy. Mention should also be made to the notorious MINUSTAH peace operation in Haiti, that did not present difficulties in terms of categorization as it falls straight under the category of peacekeeping, but that has represented a benchmark to measure the accountability gap of the UN.

purposes”.<sup>144</sup> The immunity rule is deemed necessary for the achievement of the Organisation’s mandate, to protect its independence and to resist the potential interference of States.

A few years after the entry into force of the Charter, the general rule of immunity was further elaborated and specified in a dedicated treaty signed by all member States, the General Convention on the Privileges and Immunities of the United Nations and Related Personnel (GCPI), under which

the United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity.<sup>145</sup>

Furthermore, according to art. VIII, section 29 of the GCPI, the UN has a duty to make provisions in order to provide for appropriate dispute settlement mechanisms to adjudicate claims that would otherwise be dismissed in domestic courts due to the immunity of the Organisation, namely contract disputes, disputes of ‘private law nature’<sup>146</sup> and disputes concerning UN officials, where immunity has not been waived by the SG.<sup>147</sup>

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<sup>144</sup> Arsanjani, “Claims against International Organizations. Quis custodiet ipsos custodes”, in *Yale Journal of World Public Order*, vol. 7, 1981, pp. 131-176; Singer, “Jurisdictional Immunity of International Organizations. Human Rights and Functional Necessity Concerns”, in *Virginia Journal of International Law*, vol. 36, 1996, pp. 53-165; Reinisch (ed.), *International Organizations before National Courts*, Cambridge University Press, 2000; Zanghì, *Diritto delle Organizzazioni Internazionali*, Giapichelli, 2001, pp. 317-339; Pingel-Lenuzza, “International Organizations and Immunity from Jurisdiction. To Restrict or to Bypass”, in *International and Comparative Law Quarterly*, vol. 51, 2002, pp. 1-15; Ryngaert, “The Immunity of International Organizations Before Domestic Courts. Recent Trends”, in *International Organizations Law Review*, 2010, pp. 132 ss.; Reinisch (ed.); *Challenging Acts of International Organizations Before National Courts*, Oxford University Press, 2010; De Brabandere, “Immunity of International Organizations in Post-conflict International Administrations”, in *International Organizations Law Review*, vol. 7, 2010, pp 79-111; Rashkow, “Immunity of the United Nations Practice and Challenges”, in *International Organizations Law Review*, vol. 10, 2013, pp. 332-348; Irmischer, “Immunities and the Right of Access to Court. Conflict and Convergence”, in Sarooshi (ed.), *Remedies and Responsibility for the Actions of International Organizations*, Nijhoff, 2014, pp. 443-492; De Brabandere, “Immunity as a Guarantee for Institutional Autonomy”, in Collins-White (eds), *International Organizations and the Idea of Autonomy*, Routledge 2011, pp. 278-296.

<sup>145</sup> Convention on the Privileges and Immunities of the United Nations and Related Personnel, 1946, art. II, section 2.

<sup>146</sup> For an extensive analysis of the notion and its implications see *supra* para 2.1.

<sup>147</sup> “The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) Disputes involving any official of the United Nations who

In the realm of peace operations, this general obligation to settle third party disputes of ‘private law character’ is reiterated and further specified in the Model SOFA, whose art. 51 prescribes that these disputes shall be settled by a standing claims commission to be established by the UN.<sup>148</sup> However, as explained in detail earlier, art. 51 is dead letter, since the UN has devised a different mechanism to settle third party claims in peace operations, namely the local review boards. UN practice shows that these boards are not necessarily established in each UN mission, as their creation depends on the political will of the Organisation.

It does not seem a mere coincidence that from those very cases in which the UN refused to establish a claims procedure have originated the most important lawsuits brought against the Organisation for its wrongful acts in peace operations. We are referring here to the case of the *Mothers of Srebrenica v the UN and the Netherlands* adjudicated by Dutch Courts and by the ECtHR<sup>149</sup> and of *the Georges et al. v the UN*, recently ruled by the Court of Appeal of New York.<sup>150</sup> The different factual background of the cases

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by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”

<sup>148</sup> On the missed establishment of standing claims commissions and on the creation of their substitute local claims review board, see *supra* para. 2.

<sup>149</sup> Court of Appeal the Hague, *Stichting Mothers of Srebrenica et al. v the Netherlands and United Nations*, LNJ: BR538830 March 2010; Supreme Court of the Netherlands, *Stichting Mothers of Srebrenica et al. v the Netherlands and United Nations*, 13 April 2012; European Court of Human Rights, *Stichting Mothers of Srebrenica et al. v the Netherlands*, no. 65542/12, Decision 11 June 2013; District Court of The Hague, *Stichting Mothers of Srebrenica et al. v the Netherlands and the United Nations*, RDBH:A8748, 16 July 2014. This case law has been extensively analysed in the previous chapter, see *supra* chapter III, *inter alia*, Palchetti, “Attributing the Conduct of Dutchbat in Srebrenica: The 2014 Judgment of the District Court in the Mothers of Srebrenica Case”, in *Netherlands International Law Review*, vol. 62, 2015, p. 279; Schmalenbach, “Preserving the Gordian Knot. UN Legal Accountability in the Aftermath of Srebrenica”, *ibidem*, pp. 313-328; Krieger, “Addressing the Accountability Gap in Peacekeeping. Law-Making by Domestic Courts As a Way to Avoid UN Reform?”, *ibidem*, p. 259.

<sup>150</sup> Southern District Court of New York, *Georges et al. v. United Nations*, 13 cv 07146, JPO, Decision and Order, 9 January 2015; Second Circuit Court of Appeals, *Georges et al. v. United Nations*, 15-455-cv, 18 August 2016 For comments and notes see Pavoni, “Choleric notes on the Haiti Cholera Case”, in *Questions of International Law*, 2015, pp. 19-41; Freedman-Lemay-Hebert, “Towards an Alternative Interpretation of UN Immunity. A Human Rights-Based Approach to the Haiti Cholera Case”, in *Questions of International Law*, 2015, p. 5; Pillinger- Hurd-Barnett, “How to Get Away with Cholera. The UN, Haiti, and International Law”, in *Perspectives on Politics*, vol. 14, 2016, pp. 70-86; Alvarez, “The United Nations in the Time of Cholera”, in *AJIL Unbound*, 4 April 2016.

notwithstanding, the plaintiffs raised very similar arguments, claiming that UN immunity is not absolute but functional and that it is conditional upon the availability of other remedies for the victims, hence the respective national courts were competent to hear the case, they maintained.<sup>151</sup>

The Supreme Court of the Netherlands confirmed lower Courts' judgements, upon the consideration that the right to court is not absolute. Consequently, the Court found that the limitation imposed by UN immunity from jurisdiction was proportional to the aim served by the immunity rule. That is to say, proportional to the goal of preserving UN independence while carrying out its mission to maintain international peace and security.<sup>152</sup> The judges also specified that the right of access to court was not undermined by UN immunity, nor by the absence of alternative remedies against the UN, for two orders of reasons. First, the claimants could have sued the individual perpetrators before a 'court of law', and failed to explain why they did not.<sup>153</sup> Second, the plaintiffs were able to claim the international responsibility of the Dutch State for its failure to act precisely before Dutch courts. Accordingly, the right of access to court was not considered infringed upon.

When bringing their case before the ECtHR, the applicants in *Mothers of Srebrenica* claimed that by upholding UN immunity, Dutch courts infringed upon their right to access to court, as enshrined in art. 6 of the

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<sup>151</sup> Another interesting argument put forward by the Mother of Srebrenica concerned the very nature of their claims bearing on the (alleged) responsibility of the UN for failing to prevent genocide, hence it dealt with *jus cogens* violations. Upon this consideration, in the claimants' view, their submissions should override immunity from suit of the UN. This reasoning was rejected by the ECtHR also based on the ICJ precedent in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgement 3 February 2012. As it now well known the ICJ finding was later indirectly overruled by the Italian Constitutional Court with the judgment 238/2015, see Tanzi, "Un difficile dialogo tra Corte Internazionale di Giustizia e Corte Costituzionale", in *Comunità internazionale*, vol. 70, 2015, pp. 13-36.

<sup>152</sup> Supreme Court of the Netherlands, *Stichting Mothers of Srebrenica et al. v the Netherlands and United Nations*, n. 10/04437, 13 April 2012, para. 4.1.1

<sup>153</sup> District Court of The Hague, *Stichting Mothers of Srebrenica and ors v the Netherlands and United Nations*, n. 07-2973, 30 March 2010, para 5.11: "it has not clearly emerged from the Association's arguments why there would not be an opportunity for them to bring the perpetrators of the genocide, and possibly also those who can be held responsible for the perpetrators, before a court of law meeting the requirements of article 6 ECHR".

ECtHR and in art. 14 of the ICCPR.<sup>154</sup> In the plaintiffs' opinion, no proportionality can exist where there is not a remedy, alternative to national courts, available to victims. In making this argument, the claimants relied on the *Waite and Kennedy* and the *Beer and Regan* precedents, where the ECtHR carefully analysed whether the legal framework of the international organisations (claiming their immunity from domestic jurisdiction), provided for alternative dispute resolution mechanisms and eventually, upon the finding of alternative remedies available to the claimants, the Court dismissed the case.<sup>155</sup>

Also the ECtHR dismissed the case at issue, stating that “the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate”.<sup>156</sup> The Court, while acknowledging the relevance of the precedent quoted by the claimants, quite interestingly affirmed that the two cases (*Beer and Regan* and *Waite and Kennedy*) cannot be interpreted in absolute terms and that from the lack of alternative remedies it does not necessary follow that granting immunity before domestic courts to international organisations violates art. 6 ECtHR.<sup>157</sup>

The victims of the cholera outbreak in Haiti brought a lawsuit against the UN before US Courts, claiming that the fulfilment of the duty to establish third-party claims settlement procedures (*ex art. VIII, section 29 of the GCPI*) is a condition precedent to UN immunity. Absent this requirement, the Organisation should not be entitled to invoke immunity – to benefit of the ‘bargain’, in the plaintiffs’ words.<sup>158</sup> The submission was rejected by the District Court first, and by the Court of Appeals later. The latter court decided

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<sup>154</sup> European Court of Human Rights, *Stiching Mothers of Srebrenica et al. v the Netherlands*, no. 65542/12, Decision, 11 June 2013.

<sup>155</sup> European Court of Human Rights, Grand Chamber, *Waite and Kennedy v Germany*, no. 26083/94, Judgment, 18 February 1999 and Grand Chamber, *Beer and Regan v Germany*, no. 28934/95, Judgment, 18 February 1999; see Pustorino, “Immunità giurisdizionale delle organizzazioni internazionali e tutela dei diritti fondamentali. Le sentenze della Corte europea nei casi Waite et Kennedy e Beer et Regan”, in *Rivista di diritto internazionale*, vol .83, 2000, pp. 132-150.

<sup>156</sup> European Court of Human Rights, *Stiching Mothers of Srebrenica et al. v the Netherlands*, para. 169.

<sup>157</sup> *Ibidem*, para. 165.

<sup>158</sup> Southern District Court of New York, *Georges et al. v. United Nations*, 13 cv 07146, JPO, Decision and Order, p. 5.

the case based on a textual interpretation of the General Convention, coming to the conclusion that only one exception exists to UN immunity from suit: the express waiver by the Secretary General, and it was not met in the present case.<sup>159</sup>

The question of UN immunity from jurisdiction has generated a lively debate among scholars and practitioners. Many authors have praised the immunity rule, considering it quintessential to the notion of functionality and of independence. By contrast, other commentators have harshly criticised how the interpretation of UN immunity, as absolute, turned into a shield protecting the UN from bearing international responsibility for its wrongful acts. As evidenced by the case law analysed so far, several arguments have been advanced seeking to strike a fair balance between the victims' right to a remedy and to court and the functional independence of the Organisation. None of the suggested interpretations has until now succeeded in taking down a brick in the wall of UN immunity.

In our opinion, there might be some scope for challenging the current overly extensive understanding of UN immunity by interpreting the immunity rule through the prism of functionality. Immunity should not be claimed as conditional upon the existence of other remedies, as indeed the texts of the General Convention and of the Charter do not accommodate such an understanding. Similarly, the proportionality test, that weighs the general purposes pursued by the UN against the right to a remedy and the right to access to court, can offer a different solution. According to the ECtHR's reasoning, in the context of peace operations, the purposes pursued by the UN should be understood by reference to the very broad notion of the maintenance of international peace and security. It is evident that any individual – though fundamental – right would be overridden by such a far-reaching goal. This is even more evident when dealing with 'not-absolute rights' or 'derogable rights' as the right to access to court and the right to an effective remedy.

It is our opinion that by looking at the problem from a different angle,

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<sup>159</sup> Second Circuit Court of Appeals, *Georges et al. v. United Nations*, 15-455-cv, p. 12.

there would be some scope to win the immunity defence, namely by focusing on the very breaches of the SOFA and of the GCPI and not of human rights instruments. In other words, a suit should be based on the breaches of art. 51 of the Model SOFA and art. VIII, section 29 of the General Convention entailed by the UN failure to provide for third party dispute settlement mechanisms. In this case, the core claim would not concern human rights violations allegedly perpetrated by the UN during peace operations, hence in the performance of its functions in the context of chapter VII powers, but rather the violation of the duty to settle third party claims that does not concern the exercise of a UN mandate. Thus, we would not claim that the UN failed to prevent genocide, or failed to properly screen peacekeepers from cholera, or violated the right to life and health of hundreds of people. Under the proposed defence, victims could more simply maintain that the UN, by not establishing remedial mechanisms, has infringed upon a general obligation that it has undertaken, stipulating the General Convention and the SOFA. In other words, it will not be questioned how the UN operated in the execution of a mission's mandate, i.e. while achieving its functions, but rather it will be submitted that the UN, even after the accomplishment of the mandate, has breached a general treaty obligation to set up claim commissions or equivalent instruments to receive third party claims.

This reasoning is premised on a further issue, the justiciability of rights. In order for individuals to claim a breach of art. VIII, section 29 of the GCPI and of art. 51 of the UN Model SOFA (i.e. international treaties), the provision in point has to grant an individually enforceable right, namely the right to have their claims received by a dispute resolution mechanism to be established by the UN. If this is not the case, only the parties to the treaty will be entitled to raise the issue of compliance with the treaty. To address this core question, the analysis will now discuss when international norms create individual enforceable rights that can constitute a cause of action when claiming the responsibility of international organisations and of States before domestic courts.

## 6.2 The issue of individually enforceable rights

The issue of when an international treaty confers enforceable rights upon individuals has been addressed in several cases concerning peace operations. National case law, however, has not offered so far consistent answers. The majority of national courts tend to exclude that international treaties, namely the Geneva Conventions, the Genocide Convention, the GCPI, missions SOFAs, and in some cases even human rights conventions, can be invoked by individuals. It is generally understood that these international conventions regulate exclusively legal relationships between States and between States and international organisations.<sup>160</sup> At the same time, though, some courts have come to different conclusions as to the possible enforcement of international norms by individuals.<sup>161</sup> Similarly, scholarly writings disagree on whether international treaties relevant in military operations, especially IHL, should be interpreted as granting individual rights.

In 2001, the Italian Court of Cassation, deciding the *Markovic* case had to determine whether the Italian government, by cooperating with 1999 NATO bombing of the radio-television in Belgrade, violated several treaty provisions among which arts 35.2, 48, 49, 51, 52 and 57 of Additional Protocol I to the Geneva Conventions and also arts 2 and 15.2 of the ECHR.<sup>162</sup> The Court dismissed the case on the basis of a generic assessment: although the norms invoked by the claimant are tailored to protect civilians in case of attack, they regulate exclusively inter-States relations, being international

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<sup>160</sup> Italian Court of Cassation, *Presidenza del Consiglio dei Ministri c. Markovic et al.*, Order, sez. Un., 8 February 2008; District Court of Bonn, *Kunduz case*, n. 1 O 460/11, Judgment 11 December 2013;

<sup>161</sup> European Court of Human Rights, *Stichting Mothers of Srebrenica et al. v the Netherlands*, no. 65542/12, 11 June 2013; District Court of The Hague, *Stichting Mothers of Srebrenica et al. v the Netherlands and the United Nations*, RDBH:A8748, 16 July 2014.

<sup>162</sup> Italian Court of Cassation, *Presidenza del Consiglio dei Ministri c. Markovic et al.*, Order, sez. Un., 8 February 2008; Ronzitti, "Azioni belliche e risarcimento del danno", in *Rivista di Diritto Internazionale*, 2002, p. 683; Frulli, "When are States Liable Towards Individuals for Serious Violations of Humanitarian Law, The *Markovic* Case", in *JICJ*, 2003, p. 406.

norms.<sup>163</sup> Moreover, in the Court's opinion, nothing in Italian laws implementing the Geneva Conventions and the ECHR prescribes explicitly they can be individually enforced to claim damages suffered as the result of violations thereof.<sup>164</sup> The Court's conclusions appear quite questionable, especially in light of a precedent of the same Court, stating in 1998 that ECHR norms impose on State parties legal obligations immediately binding that, once implemented in a domestic system, become a source of rights and duties for all subjects of that legal system.<sup>165</sup>

Several years later in 2014, the application of Additional Protocol I to individual-State relations came again into question in the second *Mothers of Srebrenica* case, where the plaintiffs asked the District Court of the Hague to adjudicate that the Netherlands violated art. 87 of AP I to the Geneva Conventions.<sup>166</sup> The claimants submitted that the Dutch government – through its officers participating to UNPROFOR – breached its obligation to report war crimes witnessed prior to the evacuation of the Srebrenica compound.<sup>167</sup> The District Court of the Hague did not elaborate on whether the norm creates individually enforceable rights, nevertheless it found that the State, through its officials, violated its duty to report war crimes; it thus

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<sup>163</sup> *Presidenza del Consiglio dei Ministri c. Markovic et al.*, para. 3: “[l]e norme del Protocollo di Ginevra del 1977 ... e della Convenzione europea dei diritti dell'uomo ... che disciplinano la condotta delle ostilità, hanno bensì come oggetto la protezione dei civili in caso di attacchi, ma in quanto norme di diritto internazionale regolano rapporti tra Stati”.

<sup>164</sup> *Idem*.

<sup>165</sup> Italian Court of Cassation, *Galeotti Ottieri Della Ciaja et al. c. Ministero delle Finanze*, Judgement n. 6672, 8 July 1998, the Court stated that ECHR norms “*impongono agli Stati contraenti veri e propri obblighi giuridici immediatamente vincolanti e, una volta introdotte nell'ordinamento statale interno, sono fonte di diritti ed obblighi per tutti i soggetti*”; see Raspadori, *I trattati internazionali sui diritti umani e il giudice italiano*, Milano, 2000.

<sup>166</sup> Art. 87, para. 1, I PA stipulates the following: “The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol”.

<sup>167</sup> District Court of The Hague, *Stichting Mothers of Srebrenica et al. v the Netherlands and the United Nations*, RDBH:A8748, 16 July 2014, par. 4.147. “Claimants adopt the position that the State has violated international law in the following ways: ... [v]iolating international humanitarian law (the Geneva Conventions, Article 87 of the First Supplementary Protocol to these Conventions and the SOP) by not reporting war crimes Dutchbat had observed whereby Claimants also appeal to Article 1 paragraph 3 of the UN Charter”.

implicitly acknowledged that the norm in point is individually enforceable.<sup>168</sup> It should not be disregarded, however, that the Dutch Court preferred to identify the source of the obligation to report war crimes in customary law, rather than in the treaty provision invoked by the plaintiffs.<sup>169</sup>

In the same proceeding, it was also claimed that the Netherlands violated the 1948 Genocide Convention by the UNPROFOR Dutchbat failure to prevent genocide.<sup>170</sup> As it concerns the Genocide Convention, the Court carried out a textual and contextual interpretation of the norms, that were also read in light of the Convention drafting history and of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation,<sup>171</sup> and concluded that the norms invoked were “not as yet ‘enforceable’”.<sup>172</sup> The Court agreed with the claimants’ argument that the Genocide Convention enshrines *jus cogens* norms, however, in the Court’s view it was not possible to infer from this sole feature that the Convention was meant to create individually enforceable rights.<sup>173</sup> As a matter of fact – the Court stated – the Genocide Convention does codify the crime of genocide and imposes specific obligations on States, but nothing in its text confers right upon individuals.

The Geneva Conventions have also been invoked before German courts in the *Kunduz* case, where the plaintiffs asked the District Court of Bonn to adjudicate the responsibility of the German government for bombing two oil trucks with the ‘collateral damage’ of killing of about 90 people near Kunduz, Afghanistan, during an ISAF operation directed by a German Commander.<sup>174</sup> According to the claimants, the government violated, *inter*

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<sup>168</sup> It should be specified that, despite that the Court found the State in breach of the said obligation, the judge eventually found that the casual link between the violation and the damage suffered by the victims was absent, hence this part of the claim was eventually dismissed. *Ibidem*, paras 4.235 and 4.278.

<sup>169</sup> *Ibidem*, para 4.264.

<sup>170</sup> *Ibidem*, para. 3.2.

<sup>171</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Assembleia generale, risoluzione n. 60/147 del 21 marzo 2006.

<sup>172</sup> District Court of The Hague, *Stichting Mothers of Srebrenica et al. v the Netherlands and the United Nations*, RDBH: A8748, 16 July 2014, para. 4.163.

<sup>173</sup> *Ibidem*, par. 4.164.

<sup>174</sup> District Court of Bonn, *Kunduz case*, n. 1 O 460/11, Judgment 11 December 2013, see introductory note and comment by Aust, in ORIL, ILDC 1858 (DE 2012); Achten,

*alia*, its duty to give an ‘effective advance warning’ prior to the attack as codified in art. 51 para. 1 (c) del I AP.<sup>175</sup> The German Court did not consider if the norm in point was enforceable or not, instead it focused on the argument that international humanitarian law does not confer upon individuals a right to claim reparation. Hence it was concluded that the plaintiff had no standing before German courts and the case was dismissed. This reasoning was later confirmed also by the German Constitutional Court in the *Varvarin bridge* case.<sup>176</sup>

As mentioned earlier, the alleged material breach of the GCPI and of the UN-Haiti SOFA was invoked by the cholera victims in Haiti suing the UN before US courts in the *Georges et al.* case. The 2015 Opinion and Order of Justice Oetken of the Southern District Court of New York did not offer many elements to elaborate on this very topic, as he upheld the UN absolute immunity defence and dismissed the case for lack of jurisdiction. Nevertheless, the thoughtful argument proposed by the United States Attorney in its letter to Justice Oetken provides for some insights. It maintained that “the obligations under the General Convention and the SOFA are owed by the UN to the other parties to those agreements, not to the Plaintiffs”.<sup>177</sup> By contrast, the judgement of the United States Court of Appeals for the Second Circuit, even if it upheld the first instance ruling, nonetheless responded in detail to the claimants’ submission concerning the

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“Compensation Claims of Individuals for Violations of Rules on Conduct of Hostilities. Comment on a Judgment of the District Court of Bonn, Germany – LG Bonn 1 O 460/11, 11 December 2013”, in *Humanitares Volkerrecht*, 2015, p. 34; Henn, “The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflicts. The Kunduz Case”, in *Journal of International Criminal Justice*, 2014, p. 615.

<sup>175</sup> Art. 51 AP I, para 1 (c) stipulates that “constant care shall be taken to spare the civilian population, civilians and civilian objects”. Specifically, it is prescribed that an “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”.

<sup>176</sup> District Court of Bonn, *Varvarin brigade* case, n. 1 O 361/02, Judgement 10 December 2003, appealed before the Regional Court of Colonia, n. 7 U 8/04, 28 July 2005, and eventually before the Federal Constitutional Court, n. 2 BvR 2660/06, Judgement 13 August 2013; see Mehring, “The Judgement of the German Bundesverfassungsgericht concerning Reparations for the Victims of the Varvarin Bombing”, in *International and Comparative Law Review*, vol. 15, 2015, pp. 191-209; see also the introductory note to the Judgement of the Regional Court of Colonia by Aust, in *Oxford Reports of International Law*, ILDC 887 (DE 2006).

<sup>177</sup> *Letter of the United States Attorney to Southern District of New York to Justice Oeteken*, 7 July 2014, section B, pp. 11-12.

UN material breach of the Convention and the SOFA.<sup>178</sup>

Relying on several precedents, the Court stated that in the present case plaintiffs lacked standing to raise the argument.<sup>179</sup> The Court started with illustrating the general rule governing the private enforcement of international norms and then focused on the analysis of its exceptions. In the Court's view, plaintiffs would have had standing only to the extent that a sovereign State party to the General Convention or to the SOFA would have claimed its violation.<sup>180</sup> This rule sees two exceptions: the 'express language' and the 'responsive posture' exclusions. Under the first, the plaintiffs would have had standing if the treaty contained 'express language' that created privately enforceable rights to be vindicated by individuals themselves.<sup>181</sup> Under the second exception, plaintiffs could have invoked a treaty provision (otherwise not directly enforceable) in a 'responsive posture', which may occur in two cases a) "to defend against a claim by the United States government", b) "to defend against a claim by another private party under State or federal law".<sup>182</sup> In the opinion of the Court, none of these conditions was satisfied by the plaintiffs, hence it concluded they had no standing to raise the material breach of the treaty.

It is interesting to note that the ECtHR in the *Mothers of Srebrenica v the Netherlands*, even if just touching upon the issue that was not at the heart of its reasoning, came to the opposite conclusion as it concerns the private enforcement of SOFA provisions on the UN duty to establish a claims commission by stating that

[t]he only international instrument on which individuals could base a right to a remedy against the United Nations in relation to the acts and omissions of UNPROFOR is the Agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina [...], which in its

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<sup>178</sup> United States Court of Appeals for the Second Circuit, *Georges v. United Nations*, 18 August 2016.

<sup>179</sup> United States Court of Appeals for the Second Circuit, *Georges v. United Nations*, p. 19. The Court quoted *United States v. Garavito-Garcia*, 2016 WL 3568164, at 3 (2d Cir. July 1, 2016); see *United States v. Emuegbunam*, 268 F.3d 377, 390 (6th Cir. 2001): "It is well established that individuals have no standing to challenge violations of international treaties in the absence of protest by the sovereign involved."

<sup>180</sup> *Idem*.

<sup>181</sup> *Ibidem*, p. 20.

<sup>182</sup> *Ibidem*, pp. 20-21.

Article 48 requires that a claims commission be set up for that purpose.<sup>183</sup>

From this study of national and international case law, we can deduce the absence of a uniform rule used by domestic judges to determine whether an international norm is individually enforceable. The question, however, is of great importance to respond to the quest for justice for victims of serious violations occurred in peace operations. The paradigm change occurring in international law, where individuals are becoming “primary international legal persons” holding rights and bearing duties in the international legal order, reveals the limits of the argument according to which international law would only regulate relations between States and international organisations.<sup>184</sup>

It seems thus questionable that a court can dismiss a case of individuals claiming a violation of IHL, or a breach of the duty to establish third party claims systems provided in the SOFA and in the GCPI, upon the sole and generic consideration that international norms operate only between States and international organisations. Even less compelling is the argument that these norms cannot be invoked before domestic courts because they do not expressly provide for an individual right to reparation. This idea shows a very limited approach to the matter, both under the prism of international law and of domestic law, given that a right to a remedy exists under international law and a right to a remedy to injured parties is generally provided for in every domestic legal system based on the rule of law.

It is undoubtable that an autonomous right to a remedy exists under international law, as enshrined for example in art. 13 of the ECHR,<sup>185</sup> in art. 47 of the Charter of Fundamental Rights of the European Union,<sup>186</sup> and

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<sup>183</sup> European Court of Human Rights, *Stiching Mothers of Srebrenica et al. v the Netherlands*, par. 162.

<sup>184</sup> Peters, *Beyond Human Rights*, Cambridge University Press, 2016.

<sup>185</sup> European Convention on Human Rights, art. 13, Right to an effective remedy: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

<sup>186</sup> Charter of Fundamental Rights of the European Union, art. 47 Right to an effective remedy and to a fair trial. “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in

articulated with specific regard to IHL and HR violations in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>187</sup> Furthermore, it is commonly understood that reparation represents the remedial action *par excellence*, as clearly stated in the Commentary to the ILA Declaration on Reparation for Victims for Armed Conflict, where it is specified that “the term ‘reparation’ [...] represents the basic remedy laid down in the present Declaration”.<sup>188</sup> Similarly, in the UN Guidelines, appropriate remedies are understood to include reparation; art. VII, para 11 encompasses reparation as one of the appropriate forms of remedies

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) *Adequate, effective and prompt reparation for harm suffered*;
- (c) Access to relevant information concerning violations and reparation mechanisms.<sup>189</sup>

It is thus evident that many scholarly writings and the restrictive jurisprudence analysed here err in focusing on the alleged non-existence of an individual right to reparation for IHL violations. An individual right to reparation exists under international law as part of the broader right to an effective remedy for serious violations of fundamental rights and humanitarian law.

Moreover, the issue of reparation is not the only relevant problem linked to the nature of privately enforceable international norms. International treaties provisions can be invoked not only as ground for compensation, in cases of violations, but also as source of rights to be defended. This is exemplified by the US jurisprudence developed in relation to the treatment of detainees at Guantanamo Bay and to the implementation of the notorious

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compliance with the conditions laid down in this Article”.

<sup>187</sup> A/RES/60/147, 21 March 2006, hereinafter “UN Guidelines”.

<sup>188</sup> ILA Declaration, 2010, Art. 1 Commentary, para 1.

<sup>189</sup> A/RES/60/147, art. I, para 2 lett (c), italics added.

Military Commissions Act. The plaintiffs invoked the violation of common art. 3 of the Geneva Conventions not to claim damages, but to have their rights respected by the US Government, namely the right to *habeas corpus*, to be informed of the charges, to be judged by a regularly constituted court.<sup>190</sup>

It is thus evident that the question does not centre upon the right to reparation but rather on the very nature of the international norms invoked by plaintiffs in each case, and whether or not they confer individually enforceable rights upon individuals. To challenge the unsatisfying answer given by many courts that individuals are not the addressees of international norms just because the latter are ‘for States only’, the present study suggests that each case should be decided, not based on aprioristic considerations. Instead, a thorough interpretation of the very provisions invoked by the plaintiffs should be carried out, in order to assess whether that specific international norm creates individual rights.

In the opinion of Sloss, treaty norms give rise to individual rights when they impose “a specific, vertical duty that a State owes to an identifiable class of individuals”.<sup>191</sup> A similar reasoning can also be identified in a passage of the judgement quoted by the Court of Appeal of the Southern District of New York in the Haiti case

It is true that there is an exception to this rule where a treaty contains ‘express language’ “creat[ing] privately enforceable rights [...] or some other indication that the intent of the treaty drafters was to confer rights that could be vindicated in the manner sought by [...] affected individuals”.<sup>192</sup>

It is thus crucial to understand when an international norm provides for a

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<sup>190</sup> Sloss, “When do treaties create individually enforceable rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas”, in *Columbia Journal of Transnational Law*, vol. 45, 2006, pp. 20-113; Pavoni, “Norme non self-executing in materia di diritti umani e diritto umanitario e violazione del diritto di accesso alla giustizia nella recente prassi statunitense”, in Fancioni-Gestri-Scovazzi-Ronzitti, *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008, pp. 305.

<sup>191</sup> Sloss, *Self-executing Treaties and Domestic Judicial Remedies*, in *ASIL Proceedings*, n. 98, 2004, p. 346.

<sup>192</sup> *Georges et al.*, p. 20, quoting *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015). The rule mentioned concerned the application of international treaties exclusively to sovereign States.

vertical duty of a State *vis à vis* a specific private addressee. The ICJ reasoning elaborated in the *LaGrand* and in the *Avena* cases offers an enlightening guidance to adjudicate when international norms set forth individual rights.<sup>193</sup> In the *LaGrand* case, the Court was asked to decide whether art. 36, par. 1 (b) of the 1961 Vienna Convention on Consular Relations stipulates an individual right of detainees to be informed of the rights they are entitled under the Convention and to demand the detaining authorities to inform their State of nationality. Based on a textual and contextual interpretation of the Convention, the Court noted that the paragraph in point clearly provides for an obligation for State parties towards not only other State parties, but also towards the detainees themselves.<sup>194</sup> The ICJ further emphasised the language used by the Convention underlying that “the said authorities shall inform the person concerned without delay of *his rights* under this subparagraph”.<sup>195</sup> Following the careful interpretation of the norms, the Court concluded that “the clarity of these provisions, viewed in their context, admits of no doubt”, Article 36, paragraph 1 (b) creates individual rights.<sup>196</sup> This interpretation was later confirmed in the *Avena* case, concerning the violation of individual rights of Mexican citizens.<sup>197</sup>

All the above leads us to conclude that international treaties do not necessarily regulate only relations between States or international organisations, but between States or international organisations and individuals as well. If not all, certainly some provisions of international

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<sup>193</sup> ICJ, *LaGrand (Germany v. United States of America)*, Judgement, 27 June 2001, para. 77; Vierucci, “La tutela dei diritti individuali in base alla Convenzione di Vienna sulle relazioni consolari: in margine al caso LaGrand”, in *Rivista di diritto internazionale*, vol. 84, 2001, pp. 686-710; Milano, “Diplomatic Protection and Human Rights Before the International Court of Justice. Re-fashioning Tradition?”, in *Netherlands Yearbook of International Law*, vol. 35, 2004, pp. 85-142.

<sup>194</sup> *LaGrand*, par. 77.

<sup>195</sup> *Idem*, the emphasis was added by the ICJ itself.

<sup>196</sup> *Idem*. The Court of Appeal did not come to the conclusion that article VIII, Section 29 of the GCPI contained this “express language” creating an enforceable right of individuals to have their claims settled by

<sup>197</sup> ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, para. 40; Sossai, “L'esecuzione della sentenza Avena negli Stati Uniti”, in *Rivista di diritto internazionale*, vol. 89, 2006, pp. 423-447; Orakhelashvili, “Judicial Competence and Judicial Remedies in the Avena Case”, in *Leiden Journal of International Law*, vol. 18, 2005, pp. 31-48.

agreements do create individual rights, and a domestic court seized on the matter should operate a proper interpretation of the law. This interpretation should consider whether the norm invoked by the plaintiff sets forth specific rights entrusted to a given individual, or group of individuals, that correspond to obligations States or international organisations shall abide by. In other words, it should be analysed if a vertical relation between a State/organisation and individuals exists whereby the former has an obligation to grant to the latter a certain right. Once a judge has come to the conclusion that the norm in point creates an individual right, then the judge should not ask the further – and pleonastic – question of whether that individual right is enforceable. Every individual right that comes to light in a domestic legal system (whether or not it stems from an international norm) is enforceable, otherwise, it would not be an individual right, but rather some other ‘legal situations’ recognised under domestic law, such as for example, prerogatives or legitimate interests.<sup>198</sup> And the enforceability of individual rights includes access to appropriate remedies (typically reparation) for, as in the words of Lord Denning, “a right without a remedy is no right at all”.<sup>199</sup>

Against this backdrop, it seems evident that art. VIII, Section 29 of the GCPI and art. 51 of the UN Model SOFA can be interpreted in the sense of prescribing a duty of the UN to establish dispute settlement mechanisms to adjudicate third party claims that otherwise would be barred by UN immunity from jurisdiction. Even if the letter of these articles does not expressly mention the term ‘right’, however, it sets forth an obligation for the UN, as the use of the verb ‘shall’ clearly indicates. It follows that this

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<sup>198</sup> Satta, *Diritto Processuale Civile*, Cedam, 1973, pp. 104 ff.; Zegveld, “Remedies for Victims of Violations of International Humanitarian Law”, in *International Review of the Red Cross*, vol. 85, 2003, pp. 497-527. In the Italian legal system “Il diritto soggettivo è tradizionalmente definito come un interesse protetto dal diritto oggettivo. Lo si può [...] descrivere come la pretesa di un soggetto ad esigere da un altro soggetto l'osservanza di un dovere che una norma impone al secondo nell'interesse del primo”. The main difference between individual rights and legitimate interest rests with the different level of protection the law grants to “human interests”, Galgano, *Diritto Privato*, Padova, 2004, pp. 20.

<sup>199</sup> Lord Denning in *Gouriet v. Union of Post Office Workers*, AC, 1978, p. 435, cited by Higgins, “The role of domestic courts in the enforcement of international human rights: The United Kingdom”, in Conforti-Francioni (eds), *Enforcing International Rights in Domestic Courts*, Nijhoff, 1997, p. 38.

obligation is due by the UN to aggrieved third parties, thus creating a ‘vertical relation’ between them and the Organisation, where the latter has a duty towards the former. In other words, we can affirm that individuals affected by harmful conducts carried out in UN peace operations have an individually enforceable right to access alternative remedies to be established by the UN according to its internal rules and procedures.<sup>200</sup> From this we can further infer that, should the UN fail to respect this obligation, aggrieved third parties deprived of their right to access a remedy would be entitled to claim a violation of art. VIII, Section 29 of the GCPI and art. 51 of the UN Model SOFA; eventually challenging UN immunity on this basis, as suggested earlier in this study.<sup>201</sup>

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<sup>200</sup> This conclusion *de iure condendo* is also supported by a contextual interpretation of the treaty provisions commented here, carried out in light of the relevant international rules on the right to an effective remedy analysed in this section. As prescribed by customary rules on treaty interpretation, enshrined in art. 31.3 (c) of the 1969 Vienna Convention on the Law of Treaties and in art. 31.3 (c) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, “[t]here shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties”.

<sup>201</sup> *Supra* para. 6.1.



## CONCLUDING REMARKS

Over the last 20 years, peace operations have been increasingly deployed all around the globe in conflict and post-conflict situations. The core shift from inter-States to intra-States conflicts has called on peace operations to operate with robust mandates in extremely volatile environments, and to discharge ambitious mandates through a wide array of functions and powers. Accordingly, peace operations have had a growing impact on the territory and on the population of missions' receiving States. The difficulties in fulfilling overly ambitious mandates, combined with the challenging geopolitical scenario of deployment, have hampered the success of many operations. The main pitfall has to be identified in the failure to protect civilians, who were affected by harmful conducts carried out by the very peace operations' forces that were called upon to protect them.

The occurrence of harmful conducts to the detriment of civilians, which in some cases amounted to serious violations of international law, have generated a growing demand for justice by aggrieved individuals. This has led us to our main research question, looking at the legal consequences under international law of harmful conducts carried out by States and international organisations in peace operations.

The research has shown that the legal consequences of the occurrence of a wrongful act in peace operations can be described through the lens of multiple responsibility regimes, namely international responsibility, liability and accountability. Each offers its own perspective as well as possible legal outcomes for civilians, States and international organisations.

It has emerged that these responsibility regimes essentially complement each other. In the first place, injured parties tend to turn to liability regimes developed by each international organisation or by member States in a given operation. It is the case of claims commissions in NATO missions and of UN local claims review boards. Through these remedial instruments, claimants essentially seek, and in some cases obtain,

compensation for damages suffered.

Aggrieved individuals also resort to accountability mechanisms as, for example, the Ombudsperson, the UNMIK HRAP and the EULEX HRRP. In other cases, especially at the occurrence of serious crimes, the public opinion has triggered the establishment of other accountability tools, namely national and international *had hoc* committees and inquiry commissions. This was the case of Srebrenica and Haiti, for example. Through these remedial instruments, victims are entitled to ‘tell their stories’, while no form of redress is envisaged. To be more precise, none of the accountability mechanisms established so far in peace operations have either compensated damages caused to third parties, nor developed other forms of compensation *per equivalente*.

When third parties have found these remedial mechanisms unsatisfactory – or inaccessible – they have turned to national courts, and in some cases to the Strasbourg Court, hence calling into question the international responsibility of States and international organisations.

Once described this general pattern, we can now move to our second research question, in order to determine whether these ‘multi-level’ responsibility regimes have been able to fulfill the growing demand for justice generated by the failure to protect civilians during peace operations. At first glance, this articulated system may seem well-suited to respond to the multiple instances of injured individuals. However, the study has demonstrated that each regime presents some major shortcomings that cause an uneven distribution of responsibility between States and international organisations, and among member States themselves, eventually depriving plaintiffs of an effective remedy.

The liability claims systems, especially of the UN, impose too stringent limitations on compensable claims and on compensable damages. It is well understood that liability does not foresee an obligation to provide for full reparation. Accordingly, several ceilings can be imposed by the liable entity on the compensation due to the injured party. The main problem of UN’s compensation policy lies with the – often arbitrary – interpretation

given by the Organisation of the notion of ‘private law character’ of disputes. As it has been explained, under art. 51 of the UN Model SOFA and art. VII para. 29 of the GCPI third party claims that are not of ‘private law character’ are not receivable. For example, the UN has refused to receive certain claims, upon the justification that the submissions were not ‘of a private law character’. This was the case of plaintiffs of the Srebrenica massacre during UNPROFOR, of the victims of the cholera outbreak in Haiti during MINUSTAH, and of the internal displaced persons stationed in a lead-contaminated camp during UNMIK administration of Kosovo. The distort use of this elusive notion *de facto* provides for a leeway for the UN to escape its liability, especially in cases with potential high financial and political implications. Hence numerous victims of very serious international law violations were left without a remedy and without redress.

Absent the possibility to obtain some form of redress through the liability regime, claimants have turned to accountability mechanisms, calling for the establishment of independent inquiries on the events or referring to existing accountability bodies, as in the case of UNMIK and EULEX in Kosovo. They seemed at first promising tools to address the instances of aggrieved parties. However, the UN recognizes no obligation to adhere to their findings. The fact that no legal consequences derived from the assessment of these bodies, neither in terms of reparation nor of official apologies, has hampered their very mission. Moreover, the UN refusal to endorse and enforce the recommendations of the HRAP and the progressive reduction of the Ombudsperson’ powers further hinders the effectiveness of these mechanisms. Considering that – as just mentioned – accountability mechanisms do not provide for redress but are limited to some form of official ‘story telling’, the resort to accountability regime have had essentially two main consequences. On the one hand, victims were left again without compensation for damages suffered. On the other hand, the fact-finding process often brought to light ample evidence of the responsibility of States and international organisations for the impugned conducts. It follows that victims have often faced situations where serious violations of human rights

were ascertained, but no redress was offered for the damages they have incurred, nor the actors involved acknowledged their international responsibility. This was again the case of the UNPROFOR involvement in the Srebrenica massacre, and of the outbreak of cholera following MINUSTAH deployment in Haiti.

Against this background, plaintiffs have then resorted to domestic jurisdiction and, in some cases, to regional courts of human rights, as the ECtHR, thus calling into question the international responsibility of States and of international organisations, especially the UN.

Also this last responsibility regime has proved to have several pitfalls, both of substantial and procedural nature. As to the former, no rule on attribution of wrongful conducts exists at the present time under international law. National and international judges have thus come to sometimes very different, if not opposite determinations. In some cases, they have attributed wrongful acts exclusively to the UN, while in others solely to the sending State, and in still others both to the UN and to TCCs; to the detriment of the certainty of law and of the right to an effective remedy of victims.

As to procedural issues, States generally do not act in diplomatic protection of their nationals in peace operations, with the sole exception of the ONUC mission in the 60s, where the UN entered into lump sums agreements with many States of nationality of aggrieved third parties.<sup>1</sup> Consequently, when individuals have turned to national courts and regional courts of human rights, namely the ECtHR, they have faced two pervasive obstacles. Firstly, plaintiffs' suits were often dismissed for lack of jurisdiction due to the immunity of the UN, which has never waived its immunity before national courts in this type of case law. Applying UN immunity has thus repeatedly resulted in closing the door to any individual instance. Secondly, plaintiffs' lawsuits have been barred by a very limited interpretation of the notion of privately enforceable rights. Accordingly, individuals were not entitled to claim a violation – nor the reparation for that violation – of most international law norms *vis à vis* the respondent State.

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<sup>1</sup> See *supra* chapter IV, para. 2.3.

As a further consequence, these procedural obstacles have determined an uneven distribution of responsibility between TCCs and the international organisation leading the operation, and between TCCs themselves. On the one hand, the immunity of international organisations, especially the UN, has caused States to be the sole responsible entity; even when the responsibility of the leading international organisation was clearly at issue. This is exemplified by the Srebrenica case law, where solely the responsibility of the Netherlands was adjudicated by Dutch Courts, although there was clear evidence that the decision to evacuate the compound was taken jointly by the UN and the Dutch government. Moreover, some TCCs are *de facto* more responsible than others, for example, because their domestic legal systems are more accessible or because they are parties of regional human rights instruments, such as the ECHR.

In order to better address the growing demand for justice for wrongful acts occurred in peace operations, this study has suggested that a ‘multi-level effort’ could be undertaken. Such a determination to improve the current setting is described as ‘multi-level’ for it concerns every responsibility regime, upon the consideration that they complement each other. Consequently, a tentative reform of this responsibility system would require a multi-level effort of all actors involved in peace operations, namely States, international organisations, especially the UN, national and international courts, as well as individuals.

This ‘multi-level effort’ would begin with the UN’s reconsideration of its notion of ‘private law character’ of disputes submitted thereto. The UN could engage in a non-distorted interpretation of the notion of ‘private law character’ of disputes, no longer excluding claims of numerous plaintiff with highly political and financial implications. These are precisely the kinds of claims that plaintiffs would later bring before national and regional courts of human rights, as it was the case of the events in Srebrenica and Haiti. This with the uneven consequences described so far in terms of access to justice and distribution of responsibility among multiple actors.

To redistribute the burden of responsibility, the UN could also reform

its claims system establishing a permanent UN claims tribunal to adjudicate human rights violations occurred in UN peace operations. The creation of such a forum would offer effective protection to victims while safeguarding UN autonomy. A permanent tribunal within the UN system to assess UN responsibility already exists. The UN Dispute and Appeals Tribunal has been created by the General Assembly in 2007 to adjudicate disputes between the Organisation and its employees.<sup>2</sup> Despite the very different subject matter, this Tribunal exemplifies the powers of the GA to establish an internal judicial body entitled to render binding decisions and order appropriate remedies.

As to accountability mechanisms, the Ombudspersons and other advisory bodies could become more effective if the international organisation establishing them would confer thereto the power to order some forms of indemnization or reparation *per equivalente*. Reasonable ceilings can be imposed, recalling some of the limitations existing under the relevant claims policies. International organisations, moreover, could undertake to respect recommendations issued by their advisory bodies, which was identified as the main failure of the HRAP structure.<sup>3</sup> It is our opinion that accountability mechanisms, such as those established in Kosovo, once corrected could provide for a very effective forum for victims. In all the above-mentioned hypotheses TCCs also have an important role to play. Principally, they could choose to exert their diplomatic influence for the development of these mechanisms. Along with other parties, TCCs would clearly benefit from a more even distribution of responsibility.

As it concerns the international responsibility regime, national courts and the Strasbourg Court could develop a more consistent interpretation of attribution rules applicable in peace operations. As suggested, the factual approach premised on the consideration that national forces are State organs put at the disposal of the receiving organisation is the attribution criterion to apply and to elaborate on. A judge should thus inquire who exercised

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<sup>2</sup> GA RES 61/261 (2007).

<sup>3</sup> See *supra* chapter IV, para. 3.

effective control over the impugned act in the situation at issue. Effective control should be interpreted as operational control, to be understood looking at the features of the chain of command and control in that specific operation. Accordingly, the proposed interpretation would allow the interpreter to take into account all the factual circumstances of the case. Moreover, effective control should be interpreted following a ‘reciprocal approach’, with the effect of determining whether, not only the international organisation, but also the sending State exerted effective control over the wrongful conduct. This implies that the relevance of the DARS to attribute wrongful acts in peace operations should eventually be excluded. Moreover, this reciprocal approach would allow both dual attribution (when the international organisation and the State exercised effective control over the conduct) and exclusive attribution to the sending State (in the case the chain of command and control was ‘broken’).<sup>4</sup>

Moreover, national courts could develop a sounder theory of privately enforceable rights when they are called to determine whether an international norm confers rights upon individuals. So far, many lawsuits have been dismissed upon the consideration that the international norms invoked by the plaintiffs did not confer upon them individual rights, the main justification of the dismissal being that international norms regulates only the relationship between States or between States and international organisations. In our opinion, a sounder legal theory on the issue can be developed by focusing on the interpretation of the very norms invoked and not on *a priori* considerations. In interpreting international law for this purpose, national judges should consider whether the norm invoked by the plaintiff sets forth specific rights entrusted to a given individual, or group of individuals, that correspond to obligations States or international organisations shall abide by. To put it differently, the interpreter should inquire whether a vertical relation between a State (or an international organisation) and individuals exists, whereby the former has an obligation to grant to the latter a certain right. When a judge has ascertained that the norm invoked by the plaintiff does

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<sup>4</sup> See *supra* chapter III, para. 6.

confer an individual right, he or she should necessarily come to the conclusion that the individual right in question is enforceable. For, every individual right that comes to light in a domestic legal system – whether or not it stems from an international norm – is enforceable. Through this more solid textual interpretation of international law norms, national judges would allow aggrieved parties to see their rights granted before a court of law.

Eventually, claimants can elaborate alternative defences to challenge the immunity of the UN before domestic courts. It has been shown in the present study that the plaintiffs' defence based on the consideration that UN immunity is conditional upon the existence of alternative remedies to victims has failed before several courts. Indeed, this submission found no support in the text of the relevant treaty provisions. In contrast, this study has suggested that there can be some scope to challenge the current overly extensive notion of UN immunity by interpreting the immunity rule through the prism of functionality. In other words, a suit against the UN could focus on the very breaches of art. 51 of the UN (Model) SOFA and of art. VIII, section 29 of the GCPI entailed by the UN failure to provide for third party dispute settlement mechanisms. Hence, the core claim would not centre upon human rights violations allegedly perpetrated by the UN during peace operations, but rather the violation of the duty to settle third party claims, that does not concern the exercise of a UN missions' mandate. For example, one would not claim that the UN failed to prevent genocide, or failed to properly screen peacekeepers from cholera, or violated the right to life and health of hundreds of people. Rather, under the proposed defence, victims would more simply maintain that the UN, by not establishing remedial mechanisms, has infringed upon a general obligation that it has undertaken, as stipulated in the General Conventions and in the SOFA. This would imply that the claimed violation does not concern the UN failure to fulfil its mandate, that is to say it does not concern an assessment on how the UN pursued its core mission to maintain international peace and security. This defence should allow national courts to assess that UN immunity does not serve a legitimate purpose, and it is not proportioned to the aim pursued. The benchmark would be the respect of a

simple and general treaty provision on the duty to establish third party remedies for claims that would be otherwise barred by the Organisation's immunity. This is certainly a consideration *de iure condendo*, however in our opinion the present construction would provide plaintiffs with an alternative defence that has not been rejected by courts, yet.

In conclusion, none of these responsibility regimes alone is able to address issues of individuals affected by wrongful acts in peace operations, yet with broad promise these regimes can effectively complement one another. This system of 'multi-level responsibility regimes' is not at the present stage able to adequately respond to the growing demand for justice arisen as a consequence of the significant failure to protect civilians during peace operations. However, a 'multilevel effort' carried out in the multiple directions traced in this study would contribute to close the existing responsibility gap and would reduce the current uneven distribution of responsibility between States and international organisations.



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