Chapter 30

THE RESPONSIBILITY OF PEACEKEEPERS, THEIR SENDING STATES, AND INTERNATIONAL ORGANIZATIONS

Breaches of international law may occur during any peace operation either conducted by the UN, by an international organization, or by a group of States (see above, Chapter 6). This raises a number of complicated legal issues which need to be analysed. Who is legally responsible: the international organization, the Member State, or the individual? How are the legal consequences regulated by international law? Does the responsibility of the international organization exclude the responsibility of the Sending State? Under what circumstances will concurrent responsibility exist? Are international organizations or States responsible for all acts by peacekeepers, even if committed in their capacity as private individuals? What is the practice of international organizations? What are the implications of the two recent judgments, *Al Jeddah v Secretary of State for Defence*[1] and the joined cases of *Behrami and Behrami v France and Saramati v France, Germany and Norway*?[2] Since only a few decisions and inquiries have addressed violations of international law by members of UN peacekeeping forces, the question must be raised what kind of mechanisms could be established to ensure the identification of and remedies for law violations committed by UN forces.

International responsibility in the context of peace operations refers to the legal consequences arising from wrongful acts or omissions committed during such operations. International responsibility is part of the broader concept of international accountability for wrongful acts. 30.01

[1] *R (Al Jeddah) v Secretary of State for Defence* (2005) EWHC 1809 (Administrative Court); *R (Al Jeddah) v Secretary of State for Defence* (2006) EWCA Civ 327 (Court of Appeal); *R (Al Jeddah) v Secretary of State for Defence* (2007) UKHL 58, <http://www.bailii.org/uk/cases/ UKHL/2007/58.html>.

[2] ECtHR, *Behrami v France* (Application no. 71412/01), *Saramati v France, Germany and Norway* (Application no. 78166/01), Admissibility Decision of 31 May 2007, 45 EHRR SE10, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=818144&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

30.01 1. Since the early 1990s, peacekeepers have occasionally been accused of violations of international humanitarian law and human rights. The United Nations and their Member States have been criticized for the failure to act in places like Srebrenica, Rwanda, Darfur/Sudan, and the Democratic Republic of Congo.[3] Reports about sexual exploitation and abuse by peacekeeping personnel have damaged the reputation of the UN (see above, Chapter 28). The world organization was also criticized for how it administered territories in Kosovo and East Timor. In recent years, international and national courts have had to address the legal responsibility of international organizations and Member States in regard to wrongful acts committed during peacekeeping operations. In 2007, the European Court of Human Rights (ECtHR) had to address in the *Behrami and Saramati* cases[4] whether Member States of Kosovo Force (KFOR) could be held legally responsible for alleged human rights violations under the European Convention for Human Rights (ECHR). It was the first time that an international court dealt with aspects of international responsibility arising from the administration of a territory by an international organization. In the same year, the House of Lords had to determine in the *Al Jeddah* case[5] whether British armed forces operating as part of the Multinational Force in Iraq had violated the ECHR. Both courts focused on the question under what circumstances wrongful acts could be attributed to an international organization or to the troop contributing countries (TCCs). In 2008, the District Court in The Hague was confronted with the claim by relatives of the victims who had been killed at the Srebrenica massacre and a foundation called the Mothers of Srebrenica[6] that the United Nations and Netherlands had committed a wrongful act by failing to prevent the genocide.

[3] On the institutional attempts to address the political responsibility of the United Nations in regard to the genocide in Rwanda and the Srebrenica massacre, see Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide on Rwanda, UN Doc. S/1999/1257 of 1999; Organization of African Unity, International Panel of Eminent Personalities, The Preventable Genocide of 2000 and the Report of the SG pursuant to General Assembly Resolution 53/35 on the Fall of Srebrenica, UN Doc. A/54/549 of 15 November 1999.

[4] See above (n. 2).

[5] See above (n. 1).

[6] See The Hague District Court, *Judgment in the Incidental Proceedings*, in the case between the *Foundation Mothers of Srebrenica et al. v the Netherlands and the United Nations*, Case No. 295247, Judgment of 10 July 2008. The written summons can be found at <http://www.vandiepen.com>. For a comment on the decision, see O. Spijkers, 'The Immunity of the United Nations in Relation to the Genocide in the Eyes of a Dutch District Court', 13 *Journal of International Peacekeeping* (2009), 197–219. See also The Hague District Court, *M.M.-M., D.M. and A.M. (Mustafic)*, Case No. 265618, Judgment of 10 September 2008, *and H.N. Nuhanovic v the State of the Netherlands*, Case No. 265615, Judgment of 10 September 2008, and The Hague District Court, *Association Udruzenja Gradana 'Zene Srebrenice' Tuzla v the Netherlands*, Case No. 03.531, Judgment of 27 November 2003, referred to in M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005), 282. The Court of Appeal in The Hague ruled on 30 March 2010 that it is impossible to bring the UN before a Netherlands court due to the immunity from prosecution granted to the UN pursuant to international conventions, and also stated that it accepted the Netherlands as a joint party at the side of the UN, see <http://www.rnw.nl/international-justice/article/dutch-court-upholds-un-dutch-immunity-srebrenica-case>.

2. These developments led to an increased interest to discuss and study the accountability and responsibility of international organizations and States involved in peace enforcement and peace operations.[7] An important reference point is the work of the International Law Commission (ILC) which adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS) in 2001.[8] The ILC is currently carrying out work in regard to the responsibility of international organizations,[9] which is also relevant in the present context. The study of the ILC is limited to responsibility for a breach of an international obligation and excludes liability for harm from lawful acts. The ILC has so far provisionally adopted 66 Draft Articles on the Responsibility of International Organizations (DARIO). There is general acknowledgement among international lawyers that most of these Articles reflect customary international law. However, doubts have been raised regarding the status of Article 5 and the existence of a rule on dual or joint responsibility.[10] Another point of reference is the work of the International Law Association (ILA) which addressed the broader concept of accountability of international organizations.[11] 30.01

[7] See e.g. C. Aoi, C. De Coning, and R. Thakur (eds.), *Unintended Consequences of Peacekeeping Operations* (Tokyo: UNU Press, 2007), 193–267; C. Baele, 'Compensation for Damage in Peace Operations', 45 *The Military Law and the Law of War Review* (2006), 193–214; International Institute of Humanitarian Law, *International Humanitarian Law Human Rights and Peace Operations*, Roundtable 4–6 September 2008, 277–290; S.R. Lüder, 'Responsibility of States and International Organisations in Respect to United Nations Peace-keeping Missions', 12 *International Peacekeeping. The Yearbook of International Peace Operations* (2008), 83–92; S.R. Lüder, *Völkerrechtliche Verantwortlichkeit bei Teilnahme an 'Peace-keeping' Missionen der Vereinten Nationen* (Berlin: BWV, 2004); F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects*, (The Hague: TMC Asser Press, 2008), 375–393; K. Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004); K. Schmalenbach, 'Third Party Liability of International Organizations. A Study on Claims Settlement in the Course of Military Operations and International Administrations', 10 *The Yearbook of International Peace Operations* (2008), 33-51, and M. Zwanenburg, above, (n. 6). In regard to transitional administrations, see L. Cameron, *Accountability of International Organisations Engaged in the Administration of Territories*, available at <http://www.prix-henry-dunant.org/sites/prixhd/doc/2006b_LCameron.pdf>, S. Chesterman, *You the People, The United Nations, Transitional Administration, and State Building* (Oxford: Oxford University Press, 2004), 8, 145–153, 226, 245; and the contributions in Kondoch (ed.), *International Peacekeeping* (Hampshire: Ashgate, 2007), 427–576.

[8] Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–August 2001), GA, Official Records, Fifty-fifth Session, Supplement No. 10, UN Doc. A/561/10.

[9] Relevant documents including the provisionally adopted articles on responsibility of international organizations, ILC reports, and the seven reports from the Special Rapporteur Mr. Giorgio Gaja are available at <http://www.un.org/law/ilc/>.

[10] P. Bodeau-Livinec, G.P. Buzzini, and S. Villipando, '*Behrami & Behrami v France, Saramati v France, Germany & Norway*', 102 *AJIL* 2008, 323–331, 329.

[11] Final Report of the Committee on Accountability of International Organisations, Recommended Rules and Practices on Liability/Responsibility of International Organisations (RRPs), Section IV (peacekeeping and peace enforcement activities), in The International Law Association, *Report of the Seventy-first Conference, held in Berlin, 16–21 August 2004* (London: ILA, 2004), 164–241, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.

3. How can we define accountability and responsibility? There is no generally accepted definition of 'accountability', but there is agreement that the concept is an essential part of the rule of law.[12] International responsibility is a legal concept which deals with the consequences of a breach of an obligation under international law. One may distinguish between different types of accountability: political, legal, administrative, democratic, collective, individual, internal, etc. The ILA considers accountability as a multifaceted phenomenon consisting of three levels which are interrelated and mutually supportive:

> First level—internal and external scrutiny, irrespective of subsequent liability and responsibility, second level—tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law, third level—responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law.[13]

4. One may further distinguish between the responsibility of international organizations, States, and individuals in peacekeeping operations.[14] Different types of responsibility (e.g. direct, coordinate, joint-and-several responsibility) will be addressed in the commentary to Sections 30.02 and 30.08. In peace operations responsibility may become difficult to ascertain, as information on the practice of the relevant international organization is not easily available. For example, unpublished UN documents are only released after 20 years. In addition, there is relatively little jurisprudence on the issue.

30.02 International organizations bear responsibility for internationally wrongful acts imputable to them. In principle, international organizations bear responsibility for internationally wrongful acts in the same way as States.

1. The law of international responsibility requires that the international organization involved in a peacekeeping operation is capable of bearing responsibility and has therefore to be a subject of international law separate from its Member States. International personality is either a *de jure* or *de facto* attribute.[15]

[12] Ibid. 168–170. [13] Ibid. 169.

[14] On specific aspects of the international legal responsibility regarding the potential use of private military contractors in peace operations, see C. Hoppe, 'Passing the Buck: State Responsibility for Private Companies,' 19 *EJIL* (2008), 989–1014; N.D. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility,' 19 *EJIL* (2008), 965–988 and the PRIV-WAR project at <http://priv-war.eu/>. See also above, Chapter 27 'Private Contractors and Security Companies'.

[15] According to Art. 2 (a) DARIO, the term 'international organization' refers to 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'. The international personality of international organizations was confirmed by the ICJ which stated that organizations were 'subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under constitutions or under international agreements to which they are a party', see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 1980, ICJ Reports 73, 89–90. It has to be noted that the legal personality of an organization participating in peacekeeping operations can be

2. International organizations bear responsibility for international wrongful acts imputable to them. In principle, international organizations bear responsibility for internationally wrongful acts in the same way as States do.[16] The rules governing the law of State responsibility can be applied by analogy to international organizations. To invoke responsibility under international law there must be the breach of an international obligation either in the form of an unlawful act or by an omission.

The question, whether the conduct of a peacekeeping force can be attributed to the international organization or to troop contributing States is determined by the legal status of the Force and agreements between the international organization and the contributing States. 30.03

1. The legal status of a peacekeeping force is in general derived from four different sources: (a) the national law of the Receiving or Host State; (b) the law of the international organization, if the peacekeeping force is not established by a group of States; (c) law of the Sending or Participating State; and (d) relevant rules of international law (see above, sub-Chapter 6.1 'Characterization and Legal Basis of Peace Operations').

2. In case of the United Nations, the vast majority of UN peacekeeping operations have been established by an enabling resolution of the Security Council either acting under 'Chapter VI ½' or VII (in exceptional cases, the General Assembly established peacekeeping operations).[17] A Security Council resolution provides the legal basis and the mandate for the peacekeeping force. Unless the Security Council establishes a mission under Chapter VII, the consent of the parties to a conflict is a necessary requirement. A United Nations peacekeeping force established by the Security Council or the General Assembly is considered a subsidiary organ of the United Nations. Like other international organizations, the UN does not have its own peacekeeping force. Therefore, the UN has to recruit forces from Member States. Members of the peacekeeping force are, for the duration of their assignment, considered international personnel under the authority of the United Nations and they are subject to the instructions of the

controversial. See, in detail on the personality of international organizations, N.D. White, *The Law of International Organisations* (Manchester: Manchester University Press, 2005), 30–69.

[16] Art. 4 DARIO defines an internationally wrongful act of an organization 'when conduct consisting of an action or omission: (a) is attributable to the international organization under international law; and (b) constitutes a breach of an international obligation of that international organization'. See the Report of the International Law Commission on the Work of its Fifty-seventh Session, 2 May–3 June and 11 July–5 August 2005, UN Doc. GA O.R. 60th Session, Supp. No.10, A/60/10.

[17] The United Nations Emergency Force I (UNEF I) was established by General Assembly Resolution 1001 (E-I) of 1956. It was the first mission explicitly labeled as peacekeeping. The GA also created the United Nations Temporary Executive Force (UNTEA) and the United Nations Security Force in New Guinea (UNSF) during the 1960s and took over the mandating of the United Nations Operations in the Congo (ONUC).

UN Force Commander (FC) who is usually appointed by the Secretary General (SG) with the consent of the Security Council. In principle, he determines the chain of command and has operational control over the military component.[18] As described in Article 11 of the regulations issued to UNFICYP in 1964, the FC 'exercises in the field full command authority of the Force. He is operationally responsible for the performance of all functions assigned to the Force by the United Nations, and for the deployment and assignment of troops placed at the disposal of the Force.'[19] However, one has to note that the national contingents continue to be organs of the Sending State and therefore have a dual *de jure* role. Nevertheless, they are obliged to discharge their functions with the interest of the United Nations only in view.[20] The peace operation is under the overall direction of the Security Council (or in some cases in the past, the General Assembly) and the executive direction and control of the Secretary General. The overall authority on the ground is exercised by a Special Representative appointed by the SG. The Force Commander reports to the Special Representative.[21] Status-of-forces agreements and status-of-mission agreements concluded between the UN and the Host State regulate the status of the peacekeeping force (see above, sub-Chapter 6.2 'Status of Forces in Peace Operations'). They include, *inter alia*, provisions such as the freedom of movement within the area of operation and immunities and privileges. Participation agreements between the UN and Sending States contain specific rights and obligations of the Force. The level of command and control conferred to the UN may also be laid down in the participation agreements and/or the memorandum of understanding relating to the transfer of authority.

30.04 **Wrongful acts can be attributed to the United Nations when the peacekeeping force was under the UN's military command and effective control. The acts must be undertaken in the performance of the individual's official function.**

1. As the UN has legal personality separate from its Member States and a UN peacekeeping force is considered a subsidiary organ of the organization, wrongful acts can be attributed to the Organization. The separate legal personality of the United Nations which is the main actor in the field of peacekeeping operations was for the first time recognized in the *Reparation for Injuries* case by the

[18] More in detail on command structures, see in addition to sub-Chapter 6.5 above, H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Aldershot: Dartmouth Publishing Company: 1996), 137–151, 202, 204–205. On command and control in regard to the use of force, see F. Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2002), 9–13, 366–368. In regard to ESDP operations, Naert, see above (n. 7), 379–383. For an explanation of the scope of 'operational control' in general, see Chapter 15 above.

[19] Reprinted in R.C.R. Siekmann, *Basic Documents on United Nations and Related Peace-keeping Forces* (Dordrecht: Martinus Nijhoff Publishers, 1989), 180.

[20] See Art. 9 of the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations, A/46/185 of 23 May 1991.

[21] See Arts. 7 and 8, ibid.

International Court of Justice which stated that the United Nations 'is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its right by bringing international claims'.[22] 30.04

2. Every internationally wrongful act can be attributed to the United Nations when the peacekeeping force was under the UN's military command and effective control.[23] The criterion of effective control is also recognized by the ILA.[24] The United Nations assumes that in principle it has exclusive control of national contingents participating in UN peacekeeping operations. In practice, the United Nations never exercised full command. This practice is also confirmed by the so-called *Capstone Doctrine* which provides the doctrinal foundation for UN peacekeeping operations: 'In the case of military personnel provided by Member States, these personnel are placed under the operational control of the United Nations Force Commander or head of military component, but not under the United Nations command'.[25] As the SG explained in a report of 1994:

> United Nations command... is closer in meaning to the generally recognized military concept of 'operational command'. It involves 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 requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole).[26]

For a long time, the United Nations did not use standard definitions in regard to the terms 'command and control' (see above, sub-Chapter 6.5 'Authority, Command, and Control in Peace Operations'). According to the policy document 'Authority, Command and Control in United Nations Peacekeeping Operations'[27] adopted by the UNDPKO in February 2008, different levels of command and control can be distinguished:[28]

a) *Command*: The authority vested in a Force Commander/Police Commander for the direction, coordination and control of military and police forces/personnel.

[22] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports, 174 at 179.

[23] See Art. 6 DARIO: 'The 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'. For the general rule of attribution of conduct to an international organization, see Art. 5 DARIO.

[24] See ILA Committee 'Accountability of International Organizations', *Final Conference Report* (above, n. 11), 28.

[25] DPKO, *UN Peacekeeping Operations: Principles and Guidelines* (2008), 9, 68 (*Capstone Doctrine*).

[26] Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Command and Control of United Nations Peacekeeping, UN Doc. A/49/681 of 21 November 1994, para. 6.

[27] On file with the author.

[28] On definitions used in NATO operations, see the *NATO Glossary of Terms and Definitions*, AAP-6, 2009, <http://www.nato.int/docu/stanag/aap006/aap6.htm>. In regard to ESDP operations, see, for example, Council Doc. 11096/03 EXT 1.

30.04 Command has a legal status and denotes function and knowledgeable exercise of military/police authority to attain military/police objectives or goals.

b) *United Nations Operational Control*: The authority granted to a Military Commander in a United Nations Peacekeeping Operation to direct forces assigned so that the Commander may accomplish specific missions or tasks which are usually limited by function, time, or location (or a combination), to deploy units concerned and/or military personnel, and to retain or assign separate tasks to sub units of a contingent, as required by operational necessities, within the mission area of responsibility, in consultation with the Contingent Commander and as approved by the United Nations Headquarters.

c) *United Nations Tactical Command*: The authority delegated to a Military or Police Commander in a United Nations Peacekeeping operation to assign tasks to forces under their command for the accomplishment of the mission assigned by higher authority.

d) *United Nations Tactical Control*: The detailed and local direction and control of movement, or manoeuvre, necessary to accomplish missions or tasks assigned. As required by operational necessities, the Head of the Military Component (HOMC) and the Head of Police Component (HOPC) may delegate the Tactical Control of assigned military forces/police personnel to the subordinate sector and/or unit commanders.[29]

In order to establish the international responsibility of the United Nations, one has to show that the Organization was in effective control over the national contingent and its soldiers. Effective control is considered a factual criterion. As pointed out by the United Nations Secretary General:

> The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, 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.[30]

[29] UNDPKO, Department of Field Operations, *Authority, Command and Control in United Nations Peacekeeping Operations*, 4 February 2008 (above, n. 27), 4.

[30] Report of the Secretary General on the Financing of United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters; Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations of 20 September 1996, UN Doc. A/51/389.

The effective control test has been adopted by the ILC in Article 5 DARIO[31] and is supported by the prevailing view in legal literature.[32] In practice[33] either the UN or the TCC has been held responsible for wrongful acts based on the effective control. However, it appears that the effective control test could also give rise to dual or joint responsibility in the context of peacekeeping operations. This could be the case when it cannot be clearly determined whether the organization or the Sending State exercised effective control.[34] Arguably, 'the dual or multiple attribution of conduct, leading to joint or several responsibility of the parties concerned, would be in line with the aims of international responsibility, which is to prevent breaches of international law through deterrence'.[35] 30.04

3. The United Nations or any other international organization also bears international responsibility if it aids or assists the Sending State(s) in the commission of an internationally wrongful act if it does so with the knowledge of the circumstances of the internationally wrongful act and the act would have been internationally wrongful if committed by the United Nations or the international organization.[36] Furthermore, the United Nations or any other international organization may incur responsibility in connection with the wrongful act of a Sending State or another international organization if it directs and controls or coerces the commission of an internationally wrongful act.[37] There is also international responsibility if the United Nations or an international organization adopts a decision or authorizes or recommends commission of an act that would be internationally wrongful if committed by the UN or the international organization and would circumvent an international obligation of the UN or the international organization.[38]

4. Since the early days of peacekeeping, the UN has accepted responsibility for UN peacekeeping operations[39] and has, in exceptional cases, also paid compensation for

[31] Second ILC Report on International Organizations, UN Doc. A/CN.4/541, para. 41.

[32] For a detailed analysis, see C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', 10 *Melbourne Journal of International Law* (2009), 346–364. The effective control test was also applied in the *Nicaragua* and *Genocide* cases, see *Military and Paramilitary Activities and against Nicaragua (Nicaragua v United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, 14, 62–64 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, paras. 400–407.The Appeals chamber of the ICTY developed the more flexible 'overall control test' in the *Tadić* case. However, the 'overall control' deals with the issue of individual responsibility, see ICTY Appeals Chamber Judgment of 15 July 1999, *Prosecutor v Duško Tadić*, IT-94-A. For a comment, see A. Cassese, 'The *Nicaragua* and *Tadić* Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* 2007, 649–688. For an early example of a control based test, see the *Zafiro* case, Arbitral Decisions, *S. Earnshaw et al. (Great Britain) v United States* (*Zafiro* case), 30 November 1926, Reports of the International Arbitral Awards, Volume VI, 160–165.

[33] On the practice of international organizations, Schmalenbach, see above (n. 7), 513–575.

[34] See ILC, Second Report, para. 48 and Krieger, 'A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights', 13 *Journal of International Peacekeeping* (2009), 159–180, at 170–172.

[35] Leck, see above (n. 32), 18

[36] See Art. 13 DARIO.

[37] See Arts. 14 and 15 DARIO.

[38] See Art. 16 DARIO.

[39] For a general statement of the UN Secretary General accepting international responsibility of the organizations for wrongful acts, see Report of the Secretary General, A/51/389 of 20 September 1996, para. 3.

30.04 damage that could not clearly be imputed to the organization. Where the UN has not exercised effective control over the forces, as was the case with the enforcement operations in the Korean War and the Gulf War of 1991, the organization has denied responsibility. The acts must be undertaken in the performance of the individual's official function.[40] If the unlawful act has been performed outside of the individual's official function, the State of which the individual is a national is responsible. This is also reflected in Article 9 of the Model Memorandum of Understanding between the United Nations and Participating State Contributing Resources to the United Nations Peacekeeping Operation:

> The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this MOU. However if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.[41]

According to a 1986 Memorandum of the UN Office of Legal Affairs:

> a soldier may be considered 'off duty' not only when he is on 'leave' but also when he is not acting in an official or operational capacity while either inside or outside the area of operations. In this regard, we wish to point out that there have been such off-duty determinations made with previous incidents involving soldiers acting in a non-official capacity in the area of operations. We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident occurred inside or outside the area of operations.[42]

In the past, the UN has settled third-party claims brought before local claims review boards for personal injury, property loss, or damage occurring during peacekeeping operations. Although the claims review boards do not apply international law but the private law of torts, their establishment may be seen as the recognition of the international responsibility for wrongful conduct committed by UN peacekeeping forces.[43]

[40] There are relatively few documented cases where the UN rejected responsibility because of *ultra vires* acts. One reported case is related to the United Nations Emergency Force (UNEF I), see Schmalenbach, see above (n. 7), 253. For further discussion regarding off-duty and *ultra vires* acts, F. Mégret, 'The Vicarious Liability of the United Nations' in C. Aoi, C. De Coning, and R. Thakur, (eds.), see above (n. 7), 250, at 258 and Zwanenburg, above (n. 6), 90, 106, 127.

[41] Memorandum of Understanding between the United Nations and Participating State Contributing Resources to the United Nations Peacekeeping Operation, in *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* of 9 June 2008 (UN Doc. GA A/C.5/63/18 of 2009), <http://www.un.org/Depts/dpko/COE/COE_Manual221205.pdf>.

[42] The Memorandum is reprinted in *United Nations Juridical Yearbook* (1986), 300.

[43] Report of the Secretary General on Financing of United Nations Peacekeeping Operations, UN Doc. A/51/389 of 20 September 1996, paras. 7–8.

There are temporal and financial limitations on third-party liability.[44] In case of personal injury, illness, or death resulting from UN peacekeeping operations, only economic loss will be compensated. The maximum payment for the injury, illness, or death of any individual is US$50,000 (exceptions can be made). Regarding property loss and damage the rates for non-consensual use of premises are fixed according to the pre-mission rental value. In addition, there is no liability in cases of 'operational necessity'.[45] According to the UN Secretary General, the UN's liability for property loss and damage caused by its forces in the ordinary operation of a Force is subject to the exception of operational necessity. He defines operational necessity 'as a situation in which damage results from the necessary actions taken by a peace-keeping force in pursuing its mandate. The determination of such a necessity remains the discretion of the force commander'.[46] 30.04

5. Two recent cases, *Al Jeddah v Secretary of State for Defence*;[47] and *Behrami and Behrami v France and Saramati v France, Germany and Norway*,[48] *have* addressed organizational control.

The *Behrami* and *Saramati* cases were decided by the European Court of Human Rights (ECtHR).[49] In the case of *Saramati*, the applicant complained under Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) of the Convention about his detention by KFOR. He further complained under Article 6 (1) (right to a fair trial) that he did not have access to court, and, under Article 1 (obligation to respect human rights), that France, Germany, and Norway had failed to guarantee the Convention rights of individuals living in Kosovo. The case of *Behrami* concerned the death of Gadaf Behrami and the injuries of Bekir Behrami which occurred in Mitrovica. The city was at that time within the sector of Kosovo for which

[44] *Third Party Liability: Temporal and Financial Limitations*, UN Doc. GA Res. 52/247 of 22 June 1998. See D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage', 94 *AJIL* (2000), 406–412.

[45] Operational necessity has been also applied in non-UN peacekeeping operations. In regard to OAS operations, Schmalenbach (above, n. 7), 532–553 and in regard to NATO operations, Zwanenburg, above (n. 6), 291, 308–309.

[46] See *United Nations Peace Forces in the Former Yugoslavia and on the Administrative and Budgetary Aspects of the Financing of Peace-keeping Missions*, UN Doc. A/51/389. For further discussion, see Mégret, see above (n. 30), 257–258; Zwanenburg, above (n. 6), 289, 291, 308–309.

[47] See above (n. 1). [48] See above (n. 2).

[49] For a detailed discussion, see U. Häußler, 'Regional Human Rights v. International Peace Missions: Lessons Learned from Kosovo', *Humanitäres Völkerrecht-Informationsschriften* (2007), 238–244; H. Krieger, see above (n. 34); K.M. Larsen, 'Attribution of Conduct in Peace Operations' The Authority and Control Test', 19 *EJIL* (2008), 509–531; M. Milanović and T. Papić, 'As Bad as It Gets: The European Court of Human Rights Behrami and Saramati Decision and General International Law', 58 *ICLQ* 2009, 267–296; and A. Sari, 'Jurisdiction and International Responsibility in Peace Operations: The *Behrami* and *Saramati* Cases', 8 *Human Rights Law Review* (2008), 1–20. The Venice Commission arrived at the conclusion that alleged human rights violations by KFOR were not attributable to the UN but to NATO or the Sending State. It also considered intermediate cases, see the opinion of the Venice Commission, Opinion No. 280/2004 on *Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, CDL-AD (2004)033, para. 79. For a general discussion on the international responsibility of NATO, the Sending States, and the United Nations in regard to the administration of Kosovo, see K.A. Wierse, *Post-Conflict: Peacebuilding im Kosovo* (Köln, München: Carl Heymanns Verlag, 2008), 223–235.

30.04 a multinational brigade led by France was responsible. The brigade was part of KFOR, authorized by Security Council Resolution 1244 of June 1999. The applicants alleged that the death of one brother and the serious injuries of the other brother were caused by the failure of the French KFOR troops to mark and/or defuse the undetonated cluster bombs which KFOR had known to be present on the site in question. They relied on Article 2 of the ECHR (right to life). They submitted that KFOR was the responsible organization. Neither KFOR's acts nor omissions could be attributed to the UN, since KFOR was not a UN peacekeeping operation and the Security Council lacked operational control. Furthermore, the applicants maintained that KFOR troops were subject to exclusive control of their troop contributing nations (TCNs).[50] France and Norway submitted that the UN exercised effective control and KFOR exercised control over Saramati.[51] The ECtHR rejected the claim, because the UN had ultimate authority and control and therefore the individual States had no responsibility.[52] The Court concluded that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within the mandate of United Nations Interim Administration Mission in Kosovo (UNMIK). It further analysed whether the impugned action of KFOR and inaction of UNMIK could be attributed to the UN. According to the ECtHR, Chapter VII of the UN Charter provided a framework for the delegation of the Security Council powers to KFOR and powers to UNMIK. Because KFOR exercised lawfully delegated Chapter VII powers of the Security Council and UNMIK was a subsidiary organ of the UN established under Chapter VII, the impugned action and inaction were, in principle, 'attributable' to the UN which has a legal personality separate from that of its Member States and is not a Contracting Party to the Convention. According to the ECtHR, operations established under Chapter VII of the UN Charter were fundamental to the mission of the UN to secure international peace and security and since they relied for their effectiveness on support from Member States, the Convention could not be interpreted in a manner which would subject the acts and omissions of Contracting Parties which were authorized by Security Council resolutions. Furthermore, the Court held that the impugned acts and omissions of KFOR and UNMIK could not be attributed to the Respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the Security Council. Their actions were directly attributable to the UN and therefore, the Court decided the cases as inadmissible.

The *Al Jeddah* case brought before the House of Lords concerned the Multinational Force (MNF) in Iraq.[53] The House had to decide whether the British forces which were part of the MNF could detain a suspected terrorist for an indefinite period without access to the court. Mr Al Jeddah who was a national of both Iraq and the UK claimed that his detention was in violation of Article 5 of the ECHR (right

[50] See above (n. 2), paras. 73–81. [51] Ibid. at paras. 82–95.

[52] Ibid. at paras. 133–140.

[53] For a detailed analysis, see A. Sari, 'The Al-Jedda Case before the House of Lords', 13 *Journal of International Peacekeeping* (2009), 181–196.

to liberty). The British Secretary of Defence argued that the United Nations was responsible for the detentions and therefore the European Convention could not be applied. In addition, he argued that the UN Security Council authorized the detentions in order to maintain security and the compliance with the resolution could not be considered a violation. The House of Lords analysed mainly three questions[54] and only the first question is relevant in the present context, namely whether the UK could be liable for the appellant's allegedly wrongful detention or whether the United Nations was the responsible party because the impugned acts were attributable to the organization as a result of Security Council Resolutions authorizing the Multinational Force in Iraq. The House of Lords found that the allegedly wrongful conduct was attributable to the United Kingdom and not the United Nations. The majority distinguished the *Al Jeddah* case from the *Behrami* and *Saramati* decision, which attributed the acts of KFOR to the United Nations and not to the individual countries that contributed forces to that mission. According to Lord Bingham, 'the analogy with the situation in Kosovo breaks down at every point'[55] and: 30.04

> the international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The Multinational Force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.[56]

The House thus decided that Mr Al-Jeddah was being held by the UK, not by the UN. Lord Rodger dissented on this point, because he did not accept a difference between *Al-Jeddah*'s case and *Behrami* and *Saramati*. He followed the approach chosen by the Grand Chamber in the case of the detention of Mr. Saramati.[57]

Both cases show the difficulties of international lawyers involved in determining the attribution of conduct to international organizations or to Sending States. The *Behrami* and *Saramati* cases have already become a precedent. The ECtHR declared a number of complaints in regard to conduct of KFOR as inadmissible on the same grounds.[58] The House of Lords also paid close attention to this case in its *Al Jeddah* decision.

[54] The other two questions were whether the British obligations under the European Convention on Human Rights were qualified by those that arose under the UN Charter, particularly relevant Security Council Resolutions, and what law—English common law or Iraqi law—applied to the detention.

[55] Ibid. at para. 23. [56] Ibid. para. 24. See also Lord Brown, ibid. paras. 145–148.

[57] Ibid. para. 105.

[58] See ECHR, *Kasumaj v Greece*, Application no. 6974/05, Judgment of 5 July 2007; *Gajic v Germany*, Application no. 31446/02, Judgment of 28 August 2007; *Beric v Bosnia and Hercegovina*, Application no. 36357/04, Judgment of 16 October 2007.

The 'ultimate authority and control test' introduced by the ECtHR is in no way linked to any direct control over a specific action during a peace operation and is contrary to the 'effective control test' adopted by the ILC, the UN, and the majority of legal scholars. It is regrettable that the Court did not explain why it did not apply the 'effective control test'. It appears that if the 'ultimate authority and control test' was to be followed, wrongful conduct could not be attributed any longer to Sending States in regard to peace operations authorized by the Security Council. It also means that the ECHR would become inapplicable.

30.05 International organizations bear a coordinate responsibility with Sending States for ensuring compliance with applicable rules of international law.

1. Although there are no reported cases in which a successful claim was based on coordinate responsibility in the context of peacekeeping operations, international organizations bear a coordinate responsibility with Sending States for ensuring compliance with applicable rules of international law. This principle has been adopted in the Recommended Rules and Practices by the ILA Committee on Accountability of International Organizations.[59]

2. While Sending States are responsible for violations of international humanitarian law, there may be a political responsibility of international organizations to provide best practice for ensuring compliance with international humanitarian law. As suggested by the ILA Committee on Accountability of International Organizations, international organizations should include in their force regulations and in their agreements with TCCs and Host States the obligation to observe the applicable principles and rules of international humanitarian law.[60] With regard to crimes committed by their peacekeepers, Sending States have a duty to investigate and prosecute them and the international organizations bear a coordinate responsibility that Sending States comply with this obligation.

30.06 Where peace operations are conducted under command and control of the troop contributing State and therefore outside of the chain of command of an international organization, legal responsibility rests exclusively with the Sending State.

1. Where peace operations are under command and control of the Sending State, wrongful acts will be attributed to the Sending State, since the Force is considered a State organ.

2. A Sending State is also responsible if it aids and assists, or directs and controls or coerces an internationally wrongful act committed by another TCC or an international organization and if that State does so with knowledge of the circumstances

[59] See above (n. 11), 195. [60] Ibid.

of the internationally wrongful act and the act would be internationally wrongful if committed by that State.[61]

3. There may also be direct responsibility of one Sending State for the acts for another Sending State under international human rights law or international humanitarian law (see for example, Articles 2 and 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1980 or Common Article 1 of the Geneva Conventions).

Sending States are responsible for all acts performed by peacekeepers on their behalf. In regard to omissions, States are responsible, if there was a duty to act. 30.07

Sending States bear responsibility for wrongful acts performed on their behalf, even if such acts are committed contrary to orders or instructions. The same applies to relevant omissions if there was a duty to act.[62] While Article 7 DARS excludes acts committed by State agents in their capacity as private individuals not exercising 'elements of governmental authority', Article 3 HC IV and Article 91 AP I provide that a State is responsible 'for all acts committed by persons forming part of its armed forces'. This rule applies as *lex specialis*[63] to peacekeeping operations.

Where it cannot be clearly established which particular Sending State bears responsibility for wrongful acts, Sending States bear joint responsibility. 30.08

1. In multinational military operations State responsibility cannot be easily attributed. A relevant principle for such attribution has been included in Article 47 DARS,[64] yet certain issues will remain. As pointed out by the Special Rapporteur James Crawford in his commentary to the Draft Articles, '[t]erms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions and analogies must be applied with care'.[65] The general rule in international law is that of separate responsibility of a State for its own wrongful acts. Article 47 (1) reflects this general rule. It neither recognizes a general rule of joint-and-several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Under Article 47 (1) a State may be held liable only if its responsibility for the internationally wrongful act is clearly established. Whether this is so will depend on the circumstances and on the international obligations of the State concerned. Each of several States may be responsible for a given action, e.g. by jointly planning and coordinating it together

[61] See Arts. 16–18 DARS and Arts. 57–59 DARIO.

[62] See Arts. 2, 7, and 8 DARS.

[63] See Art. 55 DARS.

[64] See Art. 47 (1) DARS: 'Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act'.

[65] See J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), Commentary to Art. 47 para. 3, <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

with the other States, but this particular aspect may be difficult to prove. Hence, where several Sending States could be held liable for the same wrongful act, their exact responsibilities may remain open to question. In such situations Article 47 DARS will not be sufficient. Similar questions have been raised regarding the status of Article 6 DARIO and the existence of a rule on dual or joint responsibility.[66]

2. In the *Oil Platforms* case Judge Simma has argued that the problems of attribution and causality posed by the existence of several tortfeasors (Iran and Iraq in that case) could have been solved by recourse to a general principle of joint-and-several responsibility recognized by major domestic legal systems, 'to the effect that, even though responsibility for the impediment caused to United States commerce with Iran cannot (and ought not [...]) be apportioned between Iran and Iraq, Iran should nevertheless have been held in breach of its treaty obligations'.[67] This principle is also relevant in regard to military operations that are planned and conducted by several States.[68] Yet there is little State practice on the issue so far. Neither international nor national courts have affirmed the existence of the principle of joint-and-several responsibility in international law. In the litigation over NATO's bombing of the Federal Republic of Yugoslavia (FRY), the FRY had argued that the NATO Member States were 'jointly and severally responsible for the actions of the NATO military command structure'.[69] The ICJ dismissed the case due to the lack of jurisdiction. The issue of the several liabilities of NATO Member States for acts carried out by NATO was also raised in the *Banković* case, but the European Court of Human Rights declared the case inadmissible.[70] Therefore, one may conclude that the rules concerning joint-and-several responsibility are uncertain. Nevertheless, it could be argued in case of peace operations, where it cannot be clearly established which particular Sending State bears responsibility for wrongful acts, that all States arguably bear joint rather than joint-and-several responsibility.

30.09 In general, breaches of international law committed by peacekeepers are not attributed to the Receiving State.

1. A wrongful act committed by a member of a peacekeeping force cannot be attributed to the Receiving State for the only reason that the wrongful act occurred

[66] See above (n. 10 and accompanying text).

[67] See *Oil Platforms* (*Islamic Republic of Iran v United States of America*), Merits of 6 November 2003, Separate Opinion Judge Simma, <http://www.icj-cij.org/docket/files/90/9735.pdf>, para. 74.

[68] For a detailed discussion in regard to the Multinational Force in Iraq (MNF), see C. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (Portland: Hart Publishing, 2008), 161–183. See also S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', and K. Starmer, 'Responsibility for Troops abroad: UN-Mandated Forces and Issues of Human Rights Accountability', in the same Volume.

[69] *Oral Pleadings of Serbia and Montenegro, Legality of Use of Force (Serbia and Montenegro v Canda)*, CR/99/14 (10 May 1999), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=07&PHPSESSID=80a6e2618de162d40f95ea3a641b20f2&case=106&code=yca&p3=2>.

[70] *Banković v Belgium*, ECHR Decision of 12 December 2001, Application no. 52207/99), 9.

on the territory of the Receiving State or the Receiving State gave its consent to the peacekeeping operation.

2. There are no reported cases in which the Receiving State was held liable. However, one may argue that wrongful conduct could be attributed to the Receiving State when there is a causal link between the wrongful act and acts or omissions by the Receiving State.[71] The Receiving State bears responsibility if it aids and assists, or directs and controls the international organization or the Sending State in the commission of an internationally wrongful act. However in these situations, the Sending State has to have knowledge of the circumstances of the international wrongful act. Furthermore, the act has to be in violation of international law if committed by the Sending State.

Valid consent, self-defence, necessity, counter-measures, and *force majeure* preclude wrongfulness but there is no preclusion in case of the breach of peremptory norms. Core norms of human rights and humanitarian law are considered as peremptory. 30.10

1. Certain circumstances such as valid consent, self-defence, necessity, countermeasures, and *force majeure* may provide a justification or excuse for non-performance.[72] However, there is no preclusion in case of the breach of peremptory norms.[73] Core norms of human rights and humanitarian law are considered as peremptory.[74]

Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. 30.11

1. The legal consequences of an internationally wrongful act committed during any peacekeeping operations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[75] The State or/and the organization responsible for the internationally wrongful act during a peacekeeping operation is under an obligation to cease that act if it is continuing and to offer assurances and guarantees of non-repetition. In addition, there is the obligation to make full reparation, which shall take the form of restitution, compensation, and satisfaction.

International organizations and Sending States should provide effective remedies to victims of violations committed by peacekeepers. 30.12

[71] See also S.R. Lüder, see above (n. 7), 65–69 and C. Wickremasinghe and G. Verdirame, 'Responsibility and Liability of Human Rights in the Course of UN Field Operations', in C. Scott, *Torture as Tort. Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001), 465–489.

[72] See Arts. 20–25 DARS and Arts. 19–24 DARIO.

[73] See Art. 26 DARS and Art. 25 DARIO.

[74] See L. Hannikainen, *Peremptory Norms (jus cogens) in International Law* (Helsinki: Lakimkesliiton Kustannus, 1988); A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008).

[75] See Arts. 30–37 DARS and Arts. 27–41 DARIO.

30.12 1. Mechanisms for addressing the responsibility and accountability of international peace operations are problematic.[76] Providing effective remedies to victims of violations committed by peacekeepers is of utmost importance, since 'the goodwill of the local population in the Host state and of the population of the TCCs countries is crucial for the accomplishment of the mandate of a peace support operation'.[77] In regard to violations of international humanitarian law, the exercise of international and individual responsibility is generally rudimentary.[78]

2. The United Nations enjoys immunity before national courts.[79] In addition, diplomatic protection which is at the discretion of States is often not available. There are only few reported cases when States exercised diplomatic protection in the context of peacekeeping operations. An example is the lump sum agreement between the UN and Belgium during the 1960s for damage resulting from conduct of ONUC.

3. Individuals may bring claims before the courts of the Sending State for alleged violations by the national contingent of the Sending State. A recent example is the *Bici* case, where a claim was upheld concerning damages sought from the United Kingdom Ministry of Defence in negligence and trespass to the person for injuries as a result of actions of British soldiers taking part in the UN operation in Kosovo. The case was determined according to English law.[80]

[76] In detail, Zwanenburg, above (n. 6), 241–314 and M. Zwanenburg, 'UN Peace Operations between Independence and Accountability', 5 *International Organizations Law Review* (2008), 23–27

[77] Zwanenburg, above (n. 6), 285. See, in general on the relationship between the local perception of a peacekeeping operation's legitimacy and the operation's success, see UNDPKO, *United Peacekeeping Operations: Principles and Guidelines* (United Nations; New York, 2008), 36.

[78] See D. Fleck, 'Individual and State Responsibility for violations of the Ius in Bello: An Imperfect Balance' in W.H. von Heinegg and V. Epping (eds.), *International Humanitarian Law Facing New Challenges* (Berlin, etc.: Springer, 2007), 171–206; D. Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law', 11 *JCSL* (2006), 179–199; M. Sassòli, 'State Responsibility for Violations of Humanitarian Law', 84 *IRRC* (2002), 401–434; L. Zegveld, 'Remedies for Violations of International Humanitarian Law', 85 *IRRC* (2003), 497 and the work of the ILA Committee on Reparations for Victims of Armed Conflict, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

[79] See Art. 105 of the UN Charter and the Convention on the Privileges and Immunities of the United Nations (1946). See also Art. 15 of the Model Status of Forces Agreement for Peacekeeping Operations, UN Doc. A/45/594 of 1994. The document is reprinted in M. Bothe and T. Dörschel (eds.), *UN Peacekeeping. A Documentary Introduction* (The Hague, London, Boston: Kluwer Law International, 1999), 58–74. On the latest unsuccessful attempts to bring claims against the United Nations, see n. 6.

[80] See *Bici and Bici v Ministry of Defence*, 7 April 2004, 2004 EWHC 786, QB. See also the *Mandelier* case which concerned a claim against the UN and Belgium arising from the United Nations Operation in the Congo (ONUC) during the 1960s, *Mandelier v United Nations and Belgium*, Court of First Instance of Brussels, 11 May 1966, 81 *Journal des Tribunaux*, No. 4533 (1966); *Mandelier v United Nations and Belgium*, Court of Appeals, 15 September 1969, 69 ILR 139 (169); in an Austrian case, the plaintiff claimed compensation for damage caused by an Austrian peacekeeper during the peacekeeping operation in the Golan Heights. The court applied Austrian State liability law, see *N.K. v Austria*, Superior Provincial Court (*Oberlandesgericht*) of Vienna, 16 February 1979, reproduced in 77 ILR 470. In the *Nissan* case, the United Kingdom was held liable for damages caused to the British citizen, Nian Nissan, by British troops not only before they joined the United Nations Force in Cyprus (UNFICYP) but even afterwards, see *Nissan v Attorney-General*, Queen's Bench Division

4. Claims brought before international human rights courts may be inadmissible, *inter alia*, because of the lack of the subject-matter jurisdiction or territorial jurisdiction or lack of jurisdiction over an international organization.

5. In regard to UN peace operations,[81] the settlement of disputes is regulated by status-of-forces agreements. The Model SOFA provides for a 'standing claims commission' to settle such disputes. In practice, standing claims commissions have never been established.[82] Private individuals have brought claims before local claims review boards, which were considered UN organs and reported to the SG. A standing claims commission would offer the advantage that it would not be necessary to establish a claims review board at the beginning of each mission.

6. Another mechanism for ensuring compliance could be the establishment of an Ombudsperson as a permanent institution in peacekeeping operations which would investigate alleged violations of international human rights and international humanitarian law.

30.13 **The responsibility under international law of an international organization or of the Sending State for wrongful acts committed during a peace operation does not affect the individual criminal responsibility of the perpetrator.**

1. Individual peacekeepers bear individual criminal responsibility for serious breaches of international law (war crimes, crimes against humanity, etc.).[83] Peacekeepers are accountable for wrongful acts even if they are carrying out the orders of a superior. They have a duty not to comply with manifestly unlawful orders. Commanders are accountable for orders which are in violation of international law. They are likewise accountable, if they allow their subordinates to act in violation of international law, fail to punish such violations, or do not prevent such violations if they knew, or should have known, that such a violation was being committed or was going to be committed. See in this respect Chapter 29, above.

2. Where peacekeepers commit crimes, they ought to be subject to criminal proceedings. Members of national contingents are in general granted immunity from criminal proceedings from the host State jurisdiction by a status-of-forces agreement. The UN does not exercise criminal jurisdiction over them. If the individual peacekeeper commits a crime, the individual remains under the jurisdiction of the Sending State and he or she may be held accountable for their action by the courts

of 17 February 1967 (1967) 2 All ER 200, *Nissan v Attorney-General*, Court of Appeal (Civil Division) of 29 June 1967 (1967) All ER 1238, *Nissan v Attorney-General*, House of Lords, 11 February 1969 (1969) All ER 629.

[81] Other organizations such as NATO have also provided procedures for the settlement of claims. In case of NATO, claims were handled by the contingent who caused the damage. On the practice of regional organizations, see Schmalenbach, see above (n. 7), 513–575.

[82] Schmalenbach, ibid. 457–460

[83] For further reading, see for example, J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), ch. 43.

30.13 of the Sending State.[84] While only a few decisions of courts-martial and inquiries have addressed the violations of international law by members of UN peacekeeping forces, academic writers and non-governmental organizations have criticized the United Nations and Member States for not providing effective mechanisms of accountability. It will be one of the challenges of the future to create consistent mechanisms to ensure the identification and punishment of law violations committed by UN forces.[85]

[84] On the decisions of courts-martial and enquiries which have addressed the violations of international law, N. Lupi, 'Report by the Enquiry Commission on the Behaviour of Italian Peacekeeping Troops in Somalia', 1 *YIHL* (1998), 375. *R v Brocklebank*, Court Martial Appeal Court of Canada, April 1996, Case File No. CMAC-38, published in 106 Canadian Criminal Cases (3rd) 24. For a commentary, see K. Boustany, 'Brocklebank: A Questionable Decision of Canada', 1 *YIHL* (1998), 371. See also the judgment of the Belgian Military Court regarding violations of international humanitarian law in Rwanda and Somalia, Nr. 54 A.R. 1997, 20 November 1997, published in *Journal des Tribunaux* (24 April 1998), 286–289. For a commentary, see M. Cogen, 1 *YIHL* (1998), 413 and Zwanenburg, above (n. 6), 224–234.

[85] See F. Hampson, Working Paper on the Accountability of International Personnel Taking Part in Peace Support Operations, UN Doc. E/CN.4/Sub.2/2005/42 of 7 July 2005; the Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Officials and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations, UN Doc. A/60/980 of August 2006 and *Criminal Accountability of United Nations Officials and Experts on Mission*, UN Doc. A/62/2007. See also F. Rawski, 'To Waive or not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations', 18 *Connecticut Journal of International Law* (2002), 103–132. In regard to the sexual exploitation and abuse by United Nations peacekeeping personnel, see above Chapter 28 and the recommendations of Prince Zeid's Report of 2005, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse*, UN Doc. A/59/710.