

**THE UNITED NATIONS, MEMBER STATES AND INDIVIDUALS
SHARING INTERNATIONAL RESPONSIBILITY FOR SERIOUS
VIOLATIONS OF INTERNATIONAL LAW COMMITTED
DURING PEACE SUPPORT OPERATIONS**

by

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A thesis submitted to the
University of Birmingham
for the degree of
DOCTOR OF PHILOSOPHY

Birmingham Law School
College of Arts and Law
University of Birmingham
August 2014

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Abstract

This thesis is dedicated to the analysis of state responsibility, United Nations' responsibility and individual criminal responsibility of peacekeepers for the crimes committed during Peace Support Operations ("PSOs"). It looks into the way public international law, international criminal, humanitarian and human rights law applies in the context of PSOs. The purpose of the thesis is to show that the UN, troop-contributing states and individual peacekeepers share international responsibility for the violations of international law committed during PSOs.

This thesis proves that the conduct of peacekeepers is attributed not only to the UN, but also to troop-contributing states and depends on effective control exercised in fact by the UN Force Commander and national contingent commanders over particular conduct. Both international humanitarian law and human rights law are applicable to PSOs and can be breached by the UN and render it international responsible. Despite immunities and exclusion of the host state jurisdiction, peacekeepers cannot avoid international criminal responsibility in domestic courts and International Criminal Court. Applying the system of international responsibility to the case-studies, the thesis concludes that the UN, states and individuals cannot escape international responsibility by relying on international status and mandate of PSOs.

*To my parents,
Elena Perova and Alexander Perov*

Acknowledgements

I would like to thank my supervisors Prof. Robert Cryer and Dr. Alexander Orakhelashvili for their guidance, help and support during the years of research and writing this thesis. Their insightful comments inspired my depth of analysis and attention to detail in the arguments. I was lucky to have two great academics supervising my thesis and I very much benefited from their comments and arguments.

I am also grateful to the College of Arts and Law of the University of Birmingham for providing me with a full research scholarship during three years of my research for this thesis. Without this, I would not be able to undertake this research.

I would also like to thank Birmingham Law School for support during these years and for giving me an opportunity to teach. I am grateful in particular to Prof. Andrew Sanders and Prof. Anthony Arnull for encouragement and support in my first steps in teaching.

I owe enormous debt of gratitude to my parents who supported me to a great extent during these research years and all the years of my life. Without their support and dedication I would not be able to achieve anything that I have now.

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I. Introduction

1. Statement of the problem

It may sound like a paradox, but those who are sent by the United Nations (“UN”) to keep the peace and protect local population from atrocities, commit crimes themselves. It is not an unfounded criticism or a mere theoretical possibility – it is a reality of peace support operations (“PSOs”) led by the UN. Some operations became infamous for the violations of international law committed by peacekeepers and their merits and achievements in saving lives of hundreds of people remained in shadow of the crimes they have committed against the same local population.¹ The distrust of the population provoked by these crimes contributed to the failures of the missions to protect peace and security in those countries. The public image of the UN has also been damaged by sending human rights violators to protect peace, hence violating the very values it is called promote.

This raises the question of peacekeepers’ accountability, namely who will be responsible for violations of international law committed during UN PSOs? Unfortunately there is no precise response to this question. Due to their unique nature and surrounding immunities, those who could be responsible for the crimes committed by peacekeepers found a loophole to avoid their responsibility. They often play on the unique nature of PSOs to claim that various norms of international law are inapplicable to PSOs or must apply differently. This situation is unfortunate for the victims of those violations who are not able to find those responsible and that can lead to complete impunity.

¹ The most indicative examples of UNOSOM and MONUC missions. See chapter VI for the case-studies of these missions.

Those who may be responsible for the violations by PSOs are: the UN, on whose behalf the peacekeepers act; troop-contributing countries (“TCCs”) who lend their troops to the UN; and peacekeepers themselves, can bear individual criminal responsibility. However, all of them may avoid the responsibility because of different gaps in law applicable to PSOs. The TCCs can argue that their troops become a subsidiary organ of the UN and therefore it is for the UN to bear responsibility for them. Even though they remain in national service participating in PSOs, they are formally under the UN command and control and the UN should be responsible for their conduct. The UN, although sometimes recognising its responsibility and making some reparations, has immunity in national courts and therefore, whenever it decides not to make reparations, victims cannot sue it in national courts. Moreover, certain crimes committed by peacekeepers during PSOs may not be recognised by the UN as its own acts.² Consequently, no entity will be responsible for crimes committed by peacekeepers. Peacekeepers themselves may not be found responsible either. The UN concludes Status-of-Force Agreements (“SOFAs”) with host states where peacekeepers are deployed and those SOFAs exempt peacekeepers from criminal jurisdiction of host states.³ Many TCCs for various reasons decide not to prosecute peacekeepers for crimes committed during PSOs. The UN does not have capacity to prosecute them. Accordingly, peacekeepers may avoid any responsibility for the crimes and this generates a sense of impunity among them and contributes to the likelihood of commission of further violations against local population.

² It especially concerns certain *ultra vires* acts that lay in-between official acts and private acts and may not be considered within the overall functions of the organisation. See discussion in Chapter II on *ultra vires* acts.

³ This refers to the military contingents of the PSOs. However, the civilian personnel of PSOs have their own privileges and immunities provided not only in SOFAs, but in other conventions. See Chapter V for further discussion.

2. Objective of the research

The aim of this thesis is to show that there is no impunity for violations of international law committed during PSOs and the responsibility is shared between the UN, TCCs and individuals. The thesis looks into the responsibility of states, international organisations (“IOs”) and individuals and adapts and applies the existing norms of international law to the unique phenomenon of PSOs, filling-in any gaps in law governing international responsibility by referring to other areas of law.

The thesis is primarily based on the analysis of public international law (“PIL”), international humanitarian law (“IHL”), international human rights law (“IHRL”) and international criminal law (“ICL”). The first four chapters deal with each of these areas of law and address the phenomenon of PSOs from the position and principles of each area of international law. Although some areas do not have norms applicable specifically to PSOs, the thesis looks for ways to adapt existing norms to the unique nature of PSOs. The work builds up the system of international responsibility for PSOs. This system is further applied to two case-studies: the United Nations Operation in Somalia (UNOSOM) and United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC). Accordingly, the thesis proves the proposed system of international responsibility can work in practice.

3. Methodology

A) Doctrinal approach

This thesis takes a doctrinal approach to the problem identified because the phenomenon of PSOs is relatively recent and the legal framework applicable to the situation of PSOs is still unsettled. It is necessary initially to provide a legal basis for the further development of the theory and this is what this thesis aims for.

Applying doctrinal approach, this thesis not only tries to systematise and settle the legal framework surrounding PSOs but also to fill-in the gaps in the existing law and its application to PSOs. This thesis also purports to discuss complex legal issues relevant to PSOs and apply them to the situations of PSO.

The analysis in the thesis takes an objective approach to law surrounding PSOs and does not argue for special treatment for them in the law of international responsibility. The rationale for that is to show that the law can give an adequate response to the crimes committed during PSOs, if it is applied objectively, disregarding political and moral arguments justifying special treatment of peacekeepers, and this response will contribute to the accountability of PSOs rather than become an obstacle to achieving it.

B) Originality

The originality of this work is twofold. Its first element lies in the general approach of the thesis to the material available regarding the PSOs' responsibility. The thesis does not specifically concentrate on the UN statements or policy on application of certain international law norms to PSOs. Instead, it focuses on the legal framework of international law surrounding PSOs. It does not examine the question of the possibility of emerging of separate

international law from state or IOs' practice regarding PSOs, but addresses the existing framework of international law norms and applies them to the situation of PSOs, analysing how four areas of international law would respond to the problem of PSOs' international responsibility. Thus, it does not make exceptions from the existing international law norms for the unique mandate and nature of PSOs, but applies the norms in the form they exist. In this way it builds up the system of international responsibility based on three constituent elements: states' responsibility, IOs' responsibility and individual criminal responsibility.

The second element of originality lies in the way how the thesis deals with specific issues and fills-in the gaps in the existing law. This becomes possible because the thesis not only applies international law to PSOs in theory but also addresses the application of those norms in practice, analysing situations when particular international law norms apply to PSOs. As most of them do not address the phenomenon of PSOs directly, this thesis proposes different legal tests to verify the application of international law norms in particular circumstances.

For instance, it introduces the "material ability to prevent particular conduct" test as a description of "effective control" test applicable in relation to attributability of PSOs conduct to the UN or TCCs. It also introduces "intention to cause harm to the adverse party to the conflict" as a test to find whether the peacekeepers using force in particular situation are "participating in hostilities" and therefore IHL becomes applicable to them. Those tests are not new; they were taken from different areas of law and were logically adapted to the situation of PSOs. This permitted to apply the overall system of international responsibility to the case-studies of PSOs in the last chapter of the thesis. In such a way the analysis of the thesis is capable to have its practical application and not only to exist in theory.

C) Justification for this approach to law

Although this thesis extensively uses and relies upon various UN documents in different chapters,⁴ not all the views of the UN Secretariat are adopted here as reflecting the existing law. Unlike other research previously undertaken on this subject, this thesis does not focus primarily or exclusively on the UN practice in this area and does not argue that what the UN says necessarily reflects the law as it stands now. The aim of the research is to analyse the law objectively and free from political motivations which sometimes underpin the UN Secretariat's opinions on some controversial issues in this area.

UN's arguments are not taken for granted as representing the current law, but rather tested in the framework of sources, such as International Court of Justice ("ICJ")'s decisions, commentaries of the ILC, etc., as well as other surrounding rules of different areas of law. The analysis in the thesis starts from the perspective of already established relevant legal norms and principles, existing independently from PSOs, and then applies them using objective approach to the phenomenon of PSOs, rather than arguing how the law should be adjusted to PSOs or whether the exemptions should be introduced following moral and political considerations. In such a way, if the UN Secretariat's opinions fail the legal test, the thesis says so. This approach is justified for the following reasons.

Firstly, such an approach ensures independent and objective interpretation of legal norm without political bias of international actors who may try to pursue their aims without thinking how such attitude would affect other situations.⁵

Secondly, one dissenting opinion of an international actor does not form practice and this actor must be bound by the law as it is established.⁶ A dissenting state would normally be

⁴ Among them, various Secretary-General's ("S-G") reports, reports of other UN organs and bodies, Security Council and General Assembly Resolutions, S-G's Bulletin, International Law Commission ("ILC") reports, UN Secretariat's opinions, etc.

⁵ See Michael Akehurst, "Custom as a source of international law," 47 *British Yearbook of International Law* 1 (1975), at 21-22 for the overview of this argument.

expected to dissent from the beginning and constantly follow this approach.⁷ If it does not do that, it will be still bound by the formed custom.⁸ In order to dissent from the existing legal framework the UN should have expressly dissented before not only with regard to the application of law to PSOs, but also with regard to the initial formation of the now established legal norms, independently from the phenomenon of PSOs rather than suddenly starting to object and express different opinions following political motivations.

Thirdly, the status of the UN Secretariat's practice is in any event doubtful. It is more likely that the practice of the UN organs that are composed of the representatives of states will be considered as practice forming the custom due to the fact that these are the states that make the pronouncements in the UN fora⁹ rather than when the UN Secretariat does that, being composed not of the representatives of states, but the UN officials acting independently of states.¹⁰

Fourthly, even if the practice of the UN Secretariat is taken into account, it must be supported by other state or IOs' practice and without such support, it is unlikely the customary rule will be formed.¹¹ This thesis also proceeds with the assumption that it is yet premature now to argue in favour of the existence of separate customary law of PSOs and the UN practice alone cannot be the only basis for its formation.

⁶ See Michael Akehurst (1975), at 23-24.

⁷ Ibid, at 24, 53

⁸ Ibid.

⁹ See International Law Commission, "Second report on identification of customary international law," by Michael Wood, Special Rapporteur, A/CN.4/672, 22 May 2014, at 29, para. 43, stating that "a distinction should, moreover, be made between products of the secretariats of international organizations and products of the intergovernmental organs of international organizations. While both can provide materials that can be consulted the greater weight is to be given to the products of the latter, whose authors are also the primary authors of state practice. [...] Considerable caution is required in assessing their practice."

¹⁰ See ILC's Second report on identification of customary international law, at 28, para. 43.

¹¹ See, for example, Michael Akehurst, (1975), at 16, arguing that "a rule of customary law is established if it is accepted by the international community, and that the number of states taking part in a practice is more important criterion of acceptance than the number of acts of which the practice is composed." He also states that the "development of a new rule cannot be achieved unilaterally but requires the participation of other states." (at 24).

Finally, the aim of this thesis is not to discuss the existence or formation of a separate law for PSOs. It rather aims to apply the existing legal norms (independently from PSOs) to the relatively new phenomenon of PSOs and to show how more traditional areas of law respond to peacekeepers committing crimes and this approach forms part of the overall originality of the thesis.

D) Accountability versus responsibility of PSOs

As evident from the title, this thesis focuses on responsibility rather than on general accountability of PSOs. This is done for the following reasons.

Firstly, it can be argued that the responsibility provides more direct and easy access to justice for victims of the crimes committed during PSO. If the victims can sue states in their national courts and if state's responsibility for the crimes committed by peacekeepers is found by a national court, the damages can be awarded to the victims. Recent decisions in Dutch courts support this conclusion.¹² Moreover, if peacekeepers who perpetrated the crimes against victims are found individually criminally responsible, that would also serve justice to the victims. The UN itself may accept responsibility in certain circumstances and make reparations to the victims which would allow justice to the victims as well. By that the victims get not only moral but financial satisfaction in the outcome.

Secondly, although it is accepted that responsibility is only an element or form of accountability regime,¹³ it also serves as a potential path through which accountability can be

¹² These decisions will be discussed in Chapter II, Section IV of the thesis. See *Netherlands v Hasan Nuhanović* (Supreme Court of the Netherlands, 6 September 2013), 12/03324 LZ/TT; *Netherlands v Mustafić et al* (Supreme Court of the Netherlands, 6 September 2013), 12/03329 LZ/TT; *Stichting Mothers of Srebrenica v Netherlands and the United Nations* (The Hague District Court, 16 July 2014), C/09/295247 / HA ZA 07-2973.

¹³ See, also, Jutta Brunnée, "International legal accountability through the lens of the law of state responsibility," 36 *Netherlands Yearbook of International Law* 3 (2005), at 4, who argues that "the concept of international legal 'responsibility' denotes a particular form of legal accountability, focused upon the legal consequences of breach of international law that are attributable to an international actor." See further discussion on the relationship between responsibility and accountability in the article, at 5, 7, 10, 35.

achieved.¹⁴ It provides the most direct redress to the victims of the crimes and without legal responsibility it is difficult to envisage full accountability of all actors who can be blamed for the commission of the crimes during PSOs. If legal responsibility is weak, the other elements constituting accountability must be much stronger to ensure sufficient accountability. Conversely, the stronger the foundations for legal responsibility for all actors involved, the stronger accountability of them and the easier access to justice becomes for the victims.

As the aim of this thesis is to fill-in the gaps in the responsibility regime of all the actors involved, and to show that their responsibility is full and shared, that finding would strengthen accountability of the actors and provide a valid basis for the victims' access to justice. Moreover, this thesis also shows (through the case-law and case-studies) that the system of international responsibility is capable of working in practice and can be involved by victims seeking redress in national courts, therefore contributing to their access to justice.

It is recognised that further analysis of all the elements constituting accountability of PSOs will be highly beneficial, but this would be a topic of separate study. Recognising certain limitations, this thesis focuses primarily on responsibility as an inherent part of accountability and shows that the law of international responsibility, which exists not only on international level but also transpires into national law of states, is not an obstacle to accountability but its crucial element.

E) System of international responsibility for PSOs

This thesis purports to consolidate a legal framework for the system of international responsibility of PSOs. This system comprises three pillars: states' responsibility, IO's

¹⁴ See, for example, Deirdre Curtin and André Nollkaemper, "Conceptualising accountability in international and European law," 36 *Netherlands Yearbook of International Law* 3 (2005), at 5 stating that "the dominant form of 'accountability' in international law has traditionally been the mechanisms of (state) responsibility and (state) liability" and call the traditional concept of responsibility of states or IOS as the primary accountability mechanism in international law (at 9).

responsibility and individual criminal responsibility. All three elements are important and there will be no full system of international responsibility and no accountability of PSOs if one of the elements is missing. This is because of special nature of PSOs and potential involvement of three actors in the commission of violations depending on the factual circumstances: UN, TCCs and individual peacekeepers.

The system comprises the responsibility of the UN and TCCs because members of PSOs are organs of TCCs placed at the disposal of the UN for the period of PSO's deployment. As discussed further in the thesis, this situation means that both the UN and TCCs may become responsible for their conduct depending on whether one of them or both of them exercise effective control.

The responsibility of one of these entities cannot be dissociated from the other one and such a limited discussion would create an incomplete picture of involvement of other actors in the process. For example, if only the UN's responsibility is analysed and the conclusion is that it is not responsible, it does not mean that no one else is responsible for the crime committed: TCCs' may be still responsible for the crimes committed during PSOs.

In fact, given unique structure of PSOs, where national contingent commanders have some powers over military members of PSOs (e.g. disciplinary) and UN Force Commander ("UNFC") have other powers over PSOs (e.g. directing PSOs to participate in particular operation), both the UN and TCCs can be equally responsible for the conduct in question, as argued in the thesis, depending on the effective control and their ability to prevent the wrongful conduct. Therefore it is not possible to talk about the UN's or TCCs' responsibility separately.

The thesis concludes that for most wrongful acts committed during PSOs either the UN or TCCs or both of them can be held responsible and therefore the responsibility is shared

between them. It is important because the TCCs often try to shift the blame for the wrongful acts to the UN. The UN for political reasons sometimes accepts responsibility while claiming immunities from legal suits in domestic courts.

This thesis shows that even if the UN is responsible, it does not mean that the TCCs are exempt from the responsibility and simultaneous responsibility is indeed possible. This conclusion is most important for the victims of the crime who try to find redress in national courts and claim damages against the TCCs.

The complete system of international responsibility is not possible without the existence of individual criminal responsibility of peacekeepers.¹⁵ Whatever the responsibility of their states or the UN is, a prospective of prosecution and subsequent punishment of actual perpetrators for the wrongful conduct can be an effective deterrent from committing crimes. This is especially so when the crimes are committed wholly or partially for private reasons rather than directed by the TCCs/UN. In many situations there can be three actors responsible for the crimes committed during PSOs: the UN for the failure to adopt proper orders and more robust policy against perpetrators committing crimes; the TCCs for failure to exercise proper disciplinary powers over peacekeepers; and individual peacekeepers for actually committing the crimes in question.

If the perpetrators of the crimes are prosecuted and punished, this would also bring justice for the victims. However, the main problem is that due to the exclusion of host state criminal jurisdiction over the peacekeepers and reluctance of the TCCs to prosecute them, the sense of immunity is spread between them. This thesis shows that despite the exclusion of

¹⁵ See also André Nollkaemper, Dov Jacobs, “Shared responsibility in international law: a conceptual framework,” 34 *Michigan Journal of International Law* 359 (2013) at 363, 375, suggesting that the responsibility of non-state actors, including individuals, “is an issue integral to a clear understanding of shared responsibility even though it may sometimes fly below the radar of international law.”

host states jurisdiction and UN immunities, the peacekeepers may not be able to avoid prosecution for international and transnational crimes.

In this way, the thesis builds the system of international responsibility for the crimes committed during PSOs. It shows the ways how the obstacles to holding the UN, TCCs and individuals can be overcome and fills-in any gaps in the existing legal framework to draw a complete picture of the system of international responsibility. It further tests it on the real examples of two PSOs: UNOSOM and MONIC/MONUSCO.

4. Scope and outline of the thesis

A) Terminology

The subject matter of the thesis is responsibility of PSOs. The choice of this author is to use an all-encompassing notion of “peace support operations” to ensure the correct reflection of the scope of the thesis. The thesis does not limit itself to the traditional peacekeeping operations based on three pillars: non-use of force, impartiality and consent of host state¹⁶ but incorporates all generations of peacekeeping and discusses all together so-called “peacemaking”, “peacebuilding” and “peace-enforcement operations,” where either or all the distinctive features of traditional peacekeeping may be absent.

These three pillars are not always maintained in modern PSOs and their presence in PSOs may be only indicative and not conclusive for application of international law to PSOs. It is more important what the PSO does in fact on the ground, and not what claims to be doing.

¹⁶ See, for instance, Brahimi report (Report of the Panel on United Nations Peace Operations General Assembly, Security Council, Comprehensive review of the whole question of peacekeeping operations in all their aspects, A/55/305-S/2000/809, 21 August 2000), paras. 48-49 onward; United Nations, Department of Peacekeeping Operations, Department of Field Support, United Nations Peacekeeping Operations Principles and Guidelines, “Capstone Doctrine” (2008), at 31. See, also for discussion, Nicholas Tsagourias, “Consent, neutrality/impartiality and the use of force in peacekeeping: their constitutional dimension”, 11 *Journal of Conflict & Security Law* 465 (2006), at 465.

It is not the aim of the thesis to consider differences between different types of operations and there are plenty of academic works published on this topic.

The term of “peace support operations” may be seen as slightly artificial, although the UN is not consistent in its terminology either.¹⁷ For the purposes of this thesis it is not possible to discuss only “peacekeeping operations” because this term does not include “peace-enforcement operations”,¹⁸ the operations where the force was used to more or less greater extent. This thesis addresses both situations: when the force is used (whether or not in self-defence) and when the force is not used.

It is especially important to maintain the integrity of the subject matter (namely the all encompassing term “peace support operations”), when dealing with the application of IHL to those operations, as the use of force is directly relevant here. To limit the subject matter to only “peacekeeping operations” means limiting discussion of application of IHL only to those operations which do not use force beyond self-defence. It also means to go into deeper analysis of the distinction between “peacekeeping” and “peace-enforcement”, which is not the purpose of this thesis. Therefore there is a need for such a broad term as “peace support

¹⁷ The United Nations itself uses different terminology. For example in the Agenda for Peace (Report of the Secretary-General, An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 - S/24111, 17 June 1992), the Secretary-General clearly distinguishes between peacekeeping, peacemaking and peace-building operations (paras. 20-21), as well as between peacekeeping and peace-enforcement (para. 44). He does not, however, provide all-encompassing term for all of those operations. However, what is clear is that “peacekeeping” does not including either peace-enforcement or peacemaking/peace-building operations and further more general term need to be used here. See also Brahimi report, paras. 10-13, which distinguishes between peacemaking, peacekeeping and peace-building operations, calling them “United Nations operations” but does not talk about peace-enforcement operations. “Capstone doctrine” uses three different terms: traditional peacekeeping operations”, “multi-dimensional peacekeeping operations”, “robust peacekeeping”, “peace operations”, and “peace enforcement” at 24, 97-98 to include the subject matter of this thesis.

¹⁸ “United Nations operations” term used in the Brahimi report (ibid), does not seem to include peace-enforcement operations, which are also a subject matter of this study, the same may be true for “multi-dimensional peacekeeping operations” and “peace operations” used in the “Capstone doctrine”. The term used in the S-G’s Bulletin on Observance by United Nations forces of international humanitarian law (ST/SGB/1999/13, 6 August 1999) was the “UN forces”, which is slightly different from the once used before.

operations.” In fact, this term is not fully artificial. The UN uses it in some of the documents to include “peacekeeping” and “peace-enforcement operations.”¹⁹

This thesis understands the term “peace support operations” to include all operations under the UN command and control, irrespective of their status, their legal basis, their purpose of deployment and their mandate. This is to distinguish the UN operations from other enforcement actions controlled/commanded by other states or coalitions of states. If, however, the UN controlled/commanded operation uses force (like UNOSOM II), it is still included in the scope of this thesis. This objective criterion (under UN command/control) would allow to dispense with an analysis of what type of PSO it was (peacekeeping or peace-enforcement) and to focus on more important issues for the purpose of this thesis, e.g. whether and in what circumstances IHL applies to PSOs, when its conduct is attributed to the UN/TCCs, etc.

Although the thesis adopts the term of PSOs everywhere in the thesis, other terms are used interchangeably: “peace support forces” (“PSFs”) and “peacekeepers”. PSFs are understood in the thesis to be military members of PSOs combined together, whereas the term PSO is used to define a place or an overall situation. Separate members of PSFs are also called “peacekeepers” elsewhere in the thesis, without prejudice to the fact that they are members of PSOs rather than peacekeeping operations, because there is no term of “peace-

¹⁹ See for instance, Economic and Social Council, Commission on Human Rights, Administration of Justice, Rule of Law and Democracy, “Scope of the activities and the accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations (i.e. all operations of a peacekeeping or peace enforcement nature under a United Nations mandate)”, E/CN.4/Sub.2/2002/L.9, 7 August 2002; Economic and Social Council, Commission on Human Rights, Working Paper of the Sub-Commission on the Promotion and Protection of Human Rights, Administration of Justice: The accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations, E/CN.4/Sub.2/2001/WP.1, 13 August 2001; Security Council resolution 1547, S/RES/1547 (2004), para.1; Report of the Secretary-General, “Estimates in respect of special political missions, good offices and other political initiatives, authorised by the General Assembly and/or the Security Council,” A/59/534, 27 October 2004, para. 6, etc; General Assembly Resolution 61/89, Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, A/RES/61/89, 18 December 2006, preamble.

supporter” yet existing in the literature. Therefore “peacekeepers” should be understood in this thesis as military members of PSOs.

B) Scope of the analysis

Given the large number of issues for analysis regarding PSOs, it is necessary to introduce certain limitations for the purposes of this study.

The first limitation is that the “UN PSOs” are understood here only as operations under UN command and control. Although some of them are briefly addressed, the operations only authorised by the Security Council (“UNSC”) and led by a member state (“MS”) or coalition of states or other IOs are not included in the scope of this research.

The second limitation is that it analyses only international responsibility of national contingents of PSOs, who remain in national military service of TCCs and who were seconded to the UN for participation in PSOs. The research does not address the responsibility of military observers, civilian police, UN officials, UN volunteers, international and local contractors, etc. All of them have different statuses, especially with regard to the applicable immunities.

The present research mainly focuses on serious violations of IHL, IHRL and ICL committed during PSOs. Violations of domestic criminal law are only mentioned with regard to jurisdictional issues and not addressed fully (as requiring separate analysis of TCCs’ penal systems).

Similarly, the thesis concerns only violations committed by PSFs, and not other persons or entities (like armed groups operating in host states, any other private individuals or public officials). Therefore it does not address the question of responsibility of the UN and TCCs for failure to prevent atrocities committed by other actors. Although positive

obligations are mentioned in the thesis, their analysis is limited. The thesis does not address the responsibility of IOs, the UN MSs for the actions of the UN as its members or other persons, deserving a separate study.

C) Outline of the thesis

The first three chapters of the thesis are devoted to the analysis of responsibility of the UN and TCCs. Given that the responsibility of states and IOs arises when particular conduct is 1) attributed to them under international law and 2) constitutes a breach of their international obligations. The first chapter discusses the circumstances under which peacekeepers' conduct can be attributed to the UN or TCCs, the second and third chapters proceed with the discussion of the second limb of this test.

The first chapter analyses current law on state responsibility under the International Law Commission ("ILC") Draft Articles on state responsibility ("ASR") and responsibility of IOs under ILC Draft Articles on responsibility of international organisations ("ARIO") and proposes a new way of their application to the phenomenon of PSOs through "effective control" test.

The analysis in third and fourth chapters does not deal with the breach of international obligations *per se* (as it is based on case-by-case approach), but discusses international law obligations that can be breached by the states and the UN, if PSFs commit crimes.

The third chapter discusses the applicability of IHL to PSOs, exploring binding nature of IHL obligations for the UN/TCCs, under what circumstances they become a party to an armed conflict through PSOs' participation in hostilities, analyses the status of PSOs in the conflict, the nature of the conflict and the application of the law of occupation to PSOs.

The fourth chapter analyses human rights law obligations of TCCs and the UN, through the discussion of extraterritorial obligations of states and explores the question of the concurrent application of IHL and IHRL.

The fifth chapter shifts the analysis to the issues of individual criminal responsibility. It discusses the jurisdiction and immunities in national courts and in International Criminal Court (“ICC”) over crimes committed by peacekeepers in the host states.

The sixth chapter applies the system of international responsibility discussed in previous chapters to case-studies of PSOs: UNOSOM and MONUC. These missions were selected because of widespread nature of crimes allegedly committed there.

The thesis shows that there is no impunity for crimes committed by peacekeepers, and individuals, states and the UN must share international responsibility for violation of international law committed during PSOs.

II. Attribution of conduct of PSOs to the United Nations and troop-contributing states in general international law

The present chapter addresses the question of attribution of conduct of PSOs to the UN and/or TCCs. The chapter primarily focuses on the discussion of “attribution” provisions of the ILC ASR and ARIIO and concerns only the first limb of international responsibility – attribution of conduct – and not the second – breach of international obligations. For the sake of analysis, it is provisionally presumed that the second limb is fulfilled. Therefore, when the “responsibility” of states and the UN is mentioned in this chapter, it is assumed the “breach” of international obligations has already been found. It is without prejudice to the complex issue of breach of the UN’s and TCCs’ obligations discussed in the subsequent chapters.

The structure of the chapter aims firstly to analyse the law of attribution of conduct to states (Section 1) and to international organisations (Section 2) and whether they can be concurrently responsible for conduct (Section 3). The last section of the chapter (Section 4) will apply the discussed law to PSOs. The sections (except Section 3) firstly discuss the attribution of conduct of organs and agents of states/organisations, secondly, whether conduct can be attributed by virtue of “effective control” exercised by states/organisations over that conduct, and thirdly, whether *ultra vires* acts can also be attributed to states/organisations.

1. Attribution of conduct to states on the basis of different degrees of control

A) Attribution of conduct of de jure and de facto state organs

Under certain circumstances states may be responsible for the conduct of individuals and entities. Their wrongful acts can be attributed to states under different rules of state responsibility. The ILC's work on ASR provides a consolidation of such rules in ASR Chapter II. While ASR are not a treaty and the UN General Assembly ("UNGA") only "took note" of the half century work of the ILC in 2001¹ and still invited government to submit their comments and information on state practice,² some of their provisions reflect CIL ("CIL").³

The ICJ has repeatedly held that the conduct of any state organ must be regarded as an act of that state and this rule is well-established under CIL.⁴ The rule of attribution of conduct of state organ is provided in ASR Article 4. The wording of the article is primarily focused on the definition of a state organ and simply states the customary rule. The ASR Commentary also defines state organs as "individual or collective entities which make up the organisation of the State and act on its behalf".⁵ There are two main characteristics of a state organ: (1) it makes up the organisation of the state and (2) acts on its behalf.⁶ It should be further analysed whether these characteristics are essential for the attribution of conduct of a person or entity to states.

¹ General Assembly Resolution ("GAR"), "Responsibility of States for internationally wrongful acts", 28 January 2002, A/RES/56/83.

² GAR, "Responsibility of States for internationally wrongful acts", 11 January 2011, A/RES/65/19.

³ See discussion below with regard to certain provisions

⁴ *Difference relating to immunity from legal process of a special rapporteur of the commission on human rights*, Advisory Opinion, ICJ Reports, 29 April 1999 ("*Special Rapporteur*") case, para. 62, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Judgement, ICJ Reports, 26 February 2007 ("*Genocide case*"), para. 385, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement, ICJ, 19 December 2005 ("*Congo case*"), para. 213.

⁵ ASR Commentary to Art. 4, para. 1.

⁶ See also *Genocide case*, para. 388.

The first element will depend on the functions of the entity as a part of state apparatus that the state's internal law allots to it. While this element is primarily based on the state's internal law⁷ and is more formal in nature, the second element is a factual requirement.⁸ The second element ("acting on behalf of state") was crucial in disqualification of the VRS officers and "Scorpions" from being *de jure* organs of the FRY in the *Genocide* case. The ICJ considered that since the VRS officers' functions were to act on behalf of the Republika Srpska and not on behalf of the FRY, they exercised elements of public authority of Republika Srpska and did not consider them to be state organs.⁹ The Court further noted that "the act of an organ placed by a state at the disposal of another public authority shall not be considered an act of that state if the organ was acting on behalf of the public authority at whose disposal it had been placed."¹⁰ The result is the same if the receiving public authority is another state.¹¹

Accordingly, even if a person is a state organ, such status will not be conclusive for determination of state responsibility, although it will create *prima facie* evidence of its responsibility.¹² This presumption is rebutted, when the organ acts not on behalf of its own state, but on behalf of another state. The conduct of the first state's organ may be attributed to the second state if that organ was "effectively" put at the disposal of the second state under ASR Article 6.¹³ The organ must act "exclusively" for purposes and "on behalf" of the second state in order to attribute its conduct to the second state alone.¹⁴ It is the same if the state

⁷ See the wording of ASR Article 4 (2), which specifies that an entity or person will be considered as a state organ by its status under the internal law.

⁸ Brownlie, for example, states that a state will not be responsible for its official who was proved to have been acting on the orders of another state. See Ian Brownlie, *State responsibility* (Clarendon, 1983), at 135.

⁹ *Genocide* case, para. 388.

¹⁰ *Ibid*, para. 389.

¹¹ See ASR Article 6.

¹² See Ian Brownlie (1983), at 135. This derives from the mere principle of Article 4 ASR providing for the unconditional responsibility of states for their organs.

¹³ See also ASR Commentary to Article 6, para. 1.

¹⁴ *Ibid*.

organ is put at the disposal of another public authority (or entity) and acts solely on its behalf.¹⁵

The ECtHR case of *Drozd and Janousek v France and Spain* serves as an example. It concerned the responsibility of the respondent states for their judges who sat as members of Andorran courts. The ECtHR considered that the French and Spanish judges did not sit in Andorran courts in their national capacity and exercised their functions in an autonomous manner.¹⁶ The French and Spanish authorities did not attempt to interfere in their work at the applicants' trial and did not supervise their judgements.¹⁷ The Court found that it had no jurisdiction *ratione personae* in that case (as Andorra was not a party to the Convention). Clearly, the state organ was under the authority of another state and acted solely on behalf of the host state and the responsibility of lending states was excluded.

The ASR Commentary also suggests that the organ must act for the benefit and under the authority of the second state.¹⁸ It provides that the organ must act in conjunction with the state's machinery and under its exclusive direction and control rather than on instructions from the sending state.¹⁹ Thus, the sending state will not have powers of control over the sent organ. The organ becomes an organ of the receiving state.

The ASR Commentary provides two examples which should be distinguished from the aforementioned description. One concerns the situation where the armed forces of the first state were sent to assist the second state but remained under the authority of the first state and therefore exercised governmental authority of the first state. Similarly, a state organ can be sent to another state for shared purposes but retains its own autonomy and status.²⁰ The

¹⁵ *Genocide case*, para. 389.

¹⁶ *Drozd and Janousek v France and Spain*, Application No. 12747/87, 26 June 1992, para. 96.

¹⁷ *Ibid*, para. 96.

¹⁸ ASR Commentary to Article 6, paras. 1-2.

¹⁹ *Ibid*, para. 2 (emphasis added).

²⁰ *Ibid*, para. 4.

conduct of this organ will still be attributed to the first state and will not be covered by Article 6.²¹ This example can be relevant to enforcement actions, where forces act under their national command but are authorised by the UNSC.

The other situation, different from pure Article 6 cases, is where an organ of the first state acts on joint instructions of its own and a second state. In this case the conduct of the organ is attributable to both states under other articles of ASR Chapter II on attribution of conduct to a state.²² The Commentary in the footnote mentions only Article 47 related to the plurality of responsible states which is provided in absolutely different Chapter of ASR, and does not specify under which Article of Chapter II it may be attributed to both states.

The question is what provisions of Chapter II may in theory be applicable to the cases of attribution of conduct of an organ acting on joint instructions of its own state and another state. The former state would be still responsible for the conduct of its organ even though the organ also acts on instructions of the other state, whereas the latter state may be held responsible for the conduct performed by an entity under its instructions under Article 8. Even if the first state did not issue specific instruction to its organ and the organ acted on the instructions of the other state, in some situations the first state may still be responsible for its organ's conduct under Article 7 where the organ acted in the scope of apparent authority.²³

The conduct of the state organ might also be attributable to both states under Article 4 if that organ is considered a joint organ of both states and they actually issued joint instructions for that organ. This provision may be relevant by analogy for the attribution of conduct of PSO which receive instructions both from the UN and from their national state (or even several other states) remaining their national state's organ.

²¹ Ibid, para. 3.

²² Ibid, para. 4.

²³ See, for example, ASR Commentary to Article 7, fn. 150, where the ILC provides an example of a state bribing the organ of another state.

Thus, the requirement that the organ acts on behalf of state is crucial for the attribution of its conduct and cannot be waived. However there may be situations where an entity acts on behalf of a state (i.e. fulfils the second element of being a state organ) but does not form part of the state structure under internal law. The question is whether the conduct of such entity may be attributed to the state by the same rules under Article 4.

The ASR Commentary seems to allow such possibility, providing that although the internal law is relevant in the entity's classification as a state's "organ", it is not conclusive, because the state's internal law may not classify, which entities have the status of state organs.²⁴ Authors also suggest that although the determination of an entity as a state organ is primary done by internal law, for international law the question whether or not it is a state organ is of factual nature.²⁵ Importantly, the state cannot avoid responsibility for the conduct of its *de facto* organ even if this body does not have a formal status of "organ" under its internal law.²⁶ It is part of the principle that state's internal law does not affect the characterisation of an act as unlawful under international law.²⁷ Therefore a body is still regarded as a state organ even if it is not recognised as such under state's internal law.

The ICJ *Genocide* and *Nicaragua* cases provide such examples. According to the ICJ, the conduct of persons or entities may still be attributed to a state, even though "they do not have a legal status of state organs, but in fact act under such strict control by the state that they must be treated as its organs" for the purposes of attribution of their conduct to the state.²⁸ The state needs to exercise such a degree of control in all fields as to justify treating an

²⁴ ASR Commentary to Article 4, para. 11.

²⁵ See Christine Chinkin, "A Critique of the Public/Private Dimension", 10 *European Journal of International Law* 387 (1999), at 388; Ian Brownlie (1983), at 136.

²⁶ See ASR Commentary to Article 4, para. 11.

²⁷ See ASR Article 3.

²⁸ *Genocide* case, paras. 391-392.

entity as acting on its behalf.²⁹ In such a case the entity may still be considered *de facto* state organ for the attribution of its conduct under international law, even where internal law does not provide for such status. Such emphasis of the Court on the requirement to act on behalf of the state shows its importance and determinative nature for the attribution principles.

The Court further explained what degree of control the state needs to have for it to become a *de facto* state organ. It stated that the relationship between the entity and state needs to be “so much one of dependence on the one side and control on the other that it would be right to equate [the entity], for legal purposes, with an organ of [the state].”³⁰ It must act in “complete dependence” of the state, being merely a state’s “instrument” or nothing more than its “agent” and lack “any real autonomy”.³¹ The ICJ held in the *Nicaragua* case that the fact that the United States (“US”) financed, trained, equipped, armed and organised *contras*, is not sufficient to find such “complete dependence”.³² The “strict control” test is very difficult to fulfill.

Thus, the degree of control that the state must have over an entity, formally not having a “state organ” status, is the same as the state has over its *de jure* organs, namely “complete dependence”.³³ There seems to be no reason why the degree of control should be different. The test already provides a very high threshold and if the test is fulfilled, the state will fully

²⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgement, ICJ Reports, 27 June 1986 (“*Nicaragua* case”), para. 109; *Genocide* case, para. 391.

³⁰ *Nicaragua* case, para. 109.

³¹ *Genocide* case, paras. 392-394; *Nicaragua* case, para. 110.

³² *Nicaragua* case, paras. 108-110.

³³ See Stefan Talmon, “The Responsibility of Outside Powers for Acts of Secessionist Entities”, 58 *International and Comparative Law Quarterly* 493 (2009), at 517, who submits that the degree and type of such control “must qualitatively be the same as the control a state exercises over its own *de jure* organs, a requirement fulfilled only by ICJ’s ‘strict control’ test.” See also Marko Milanović, “State responsibility for Genocide”, 17 *European Journal of International Law* 553 (2006), at 577, 587 who explains that if an entity is controlled in such a way as to find it in “complete dependence” on the state, it may be considered as a *de facto* state organ, because the only thing missing for it to actually be considered a proper state organ would be the internal law assignment of such status to that entity. Davis Tyner, “Internationalisation of war crimes prosecutions: correcting the International Criminal Tribunal for the for Yugoslavia’s folly in *Tadić*”, 18 *Florida Journal of International Law* 843 (2006), at 874-875 also submits that as the state normally exercises a very high control over its *de jure* organs (and therefore could be held responsible for them) the same degree of control needs to be exercised by the state over the entities which could be considered as *de facto* organs.

control the body and therefore must be responsible for its conduct. Accordingly, the only difference between a *de jure* and *de facto* state organ is the recognition of the former in the state's internal law, which *per se* does not affect the state responsibility under international law.

A further question is whether the conduct of *de facto* organs fulfilling "strict control" test is attributable to the state under Article 4 like the conduct of *de jure* organs. The ASR Commentary to Article 4 does not contain any reference to the *de facto* state organs. Academic opinion differs on this issue.³⁴ However, the ICJ's reasoning shows that persons who are in a relationship of "complete dependence" on the state "cannot be considered otherwise than as *organs* of the state, so that *all* their actions performed in such capacity would be attributable to the state for purposes of international responsibility."³⁵ Therefore they are organs of state for the purposes of attribution and all their acts are attributable to the state. The only ASR's article that deals with this situation is Article 4.

The ASR Commentary to Article 4 does envisage such broader interpretation. It states that "a state cannot avoid responsibility for the conduct of a body which does *in truth* act as one of its organs merely by denying it that status under its own law."³⁶ To accommodate a possibility of attribution of the conduct of entities that "in truth" or "in fact" act as state organs without being recognised as such under internal law, Article 4 contains the word

³⁴ For instance, De Frouville argues that the ICJ considered *de facto* organ under Article 4 and the "effective control" under Article 8 and that such approach "mixes two distinct cases of attribution, the one being based on legal or institutional links, and the other on factual links" (see Olivier De Frouville, "Attribution of conduct to the state; private individuals", in Crawford, James, *The law of international responsibility* (Oxford University Press, 2010), at 268-269). However, Milanović considers that the Nicaragua "complete control" test as one of two tests (one of being "effective control" test and the other "complete control" test), was missed by the ILC in its work on state responsibility (see Marko Milanović, "State responsibility for acts of non-state actors: a comment on Griebel and Plucken", 22 *Leiden Journal of International Law* 307 (2009), at 318-319).

³⁵ *Genocide case*, para. 397 (emphasis added).

³⁶ ASR Commentary to Article 4, para. 11 (emphasis added).

“includes” in paragraph 2.³⁷ However the Commentaries do not seem to provide clear criteria for determining such entities as state organs.³⁸

B) Attribution of the conduct directed or controlled by the state.

The responsibility of a state for conduct of private persons was envisaged under ASR Article 8. As the ICJ stated in the *Genocide* case, this provision reflects CIL.³⁹ The idea of this provision is that a state may choose to act *through* private individuals, rather than through its organs and that no legal or *de jure* link can be established between a state and such private persons before attribution can take place.⁴⁰ According the *Genocide* case, if a “complete dependence” of the entity is not established and it is not a *de facto* state organ, the responsibility for its conduct may still arise, if particular acts were perpetrated by this entity under instructions of or under direction or control of the state.⁴¹ Such control needs to be “effective”.⁴² The Court, however, does not use “effective control” test to qualify a particular person as a *de facto* state organ.⁴³

The rationale behind such attribution of private persons’ conduct is that the state bears responsibility for the conduct of its own organs that gave such instructions or exercised control that resulted in the commission of wrongful acts and became a cause of commission of those acts.⁴⁴ As the ASR Commentary provides, under Article 8 the state is responsible for the

³⁷ See ASR Commentary to Article 4, para. 11. See also Andre De Hoogh, “Article 4 and 8 of the 2001 ILC articles on state responsibility, the *Tadić* case and attribution of acts of Bosnian Serb authorities to the Federal Republic of Yugoslavia”, 72 *British Yearbook of International Law* 255 (2001), at 268, pointing out that “it seems right therefore to reserve the phrase ‘de facto organ’ for an organ considered as such by virtue of the supplementary role of international law under Article 4, paragraph 2.”

³⁸ Andre de Hoogh (2001), at 266.

³⁹ *Genocide* case, paras. 401, 406, 407.

⁴⁰ Andre de Hoogh (2001), at 277.

⁴¹ *Genocide* case, para. 397.

⁴² *Ibid*, para. 400; *Nicaragua* case, para. 115.

⁴³ Stefan Talmon (2009), at 502, who also notes that this test is used for the cases when an entity is only “partially” (not completely) dependent on a state and such a limited degree of state control does not permit to treat this entity as a *de facto* state organ.

⁴⁴ *Genocide* case, paras. 397, 406.

conduct directly or indirectly authorised by an organ of that state.⁴⁵ It must also be shown that the state had issued particular instructions or exercised “effective control” in respect to each particular operation in which the wrongful acts were committed.⁴⁶ The state must be able to control the beginning of the operation, the way it was carried out and the end of particular operation.⁴⁷ Thus, the entity itself would not have discretion to achieve its aim by committing wrongful acts or by lawful means. To be attributable to the state any wrongful conduct must become an integral part of the operation under state control, and not incidentally or peripherally associated with it.⁴⁸

While the ICJ and the ILC seem to agree on “effective control” test for the attribution of conduct of private individuals to a state, the Appeals Chamber of the ICTY in the *Tadić* case partially disapproved this test, considering that the state practice supports the application of “effective control” test with regard to individuals and unorganised groups, but a different test should be applied for organised military and paramilitary groups.⁴⁹ Accordingly, to attribute acts of the organised group to the state, it must be proved that the state possessed “overall control” over the group.⁵⁰ Such control is exercised if the state not only equipped, financed, trained and provided operational support to the group but also coordinated, organised or helped in general planning of its military activities.⁵¹

It seems, however, that the *Tadić* Appeals Chamber confuses the application of “overall control” test to purely private persons with two different types of situations: 1. when a person exercises elements of governmental authority (under Articles 5/9); 2. when a state

⁴⁵ ASR Commentary to Article 4, para. 2.

⁴⁶ *Genocide case*, para. 400; *Nicaragua case*, p. 65, para. 115; ASR Commentaries to Article 8, para. 7.

⁴⁷ Stefan Talmon (2009), at 503.

⁴⁸ ASR Commentary to Article 8, para. 3. However, the “effective control” test and its application were criticised for imposing too strict rule for attribution of conduct of private individuals to states making such situation no more than a theoretical possibility (see, for instance, Tal Becker, *Terrorism and the state: rethinking the rules of state responsibility* (Hart, 2006), at 69).

⁴⁹ *Prosecutor v Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić Appeal Judgement*”), para. 124.

⁵⁰ *Tadić Appeal Judgement*, para. 131.

⁵¹ *Ibid*, paras. 131, 137.

exercises control over territory of another state and is obliged to secure human rights there (so-called “positive obligations”).⁵² In the *Yeager* case, which it referred to,⁵³ the conduct of the Revolutionary Guards was attributed to Iran because they exercised elements of governmental authority in the absence of official authorities.⁵⁴ The ASR Commentary even mentions this case under Article 9.⁵⁵ As such a situation can be analysed only under Article 9 rather than Article 8 and there is no evidence to suggest that the test under Article 9 should be the same as the test applied under Article 8, this case cannot be used to support the “overall control” test against “effective control” applicable to private organised groups under ASR Article 8. Both articles are conceptually different. The situation is different when the Appeals Chamber refers to ECtHR jurisprudence, particularly *Loizidou v Turkey*.⁵⁶ In this case the ECtHR uses the “effective overall control” test,⁵⁷ but it concerns the state control over the territory, which is not the same as the control over an organised group itself.⁵⁸ “Effective overall control” used by the ECtHR is a completely different concept which, as explained in Chapter IV, deals with a question of states’ jurisdiction over persons under human rights treaties and does not directly affect the question of attribution of conduct to a state.⁵⁹ Therefore the *Tadić* Appeals Chamber’s application of the “effective overall control” test from *Loizidou* to the question of attribution is flawed.

The *Tadić* Appeals Chamber concluded that the acts of the group under “overall control” of the state may be considered to be acts of a *de facto* state organ regardless of the

⁵² See Marko Milanović (2006), at 586.

⁵³ *Prosecutor v Tadić*, Case No. IT-94-1-A, Judgement, ICTY, 15 July 1999 (“*Tadić* Appeal Judgement”), paras. 126-127.

⁵⁴ *Kenneth P. Yeager v Islamic Republic of Iran*, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, paras. 43, 45.

⁵⁵ ASR Commentary to Article 9, para. 2.

⁵⁶ *Loizidou v Turkey*, ECtHR Judgement, 18 December 1996. See *Tadić* Appeal Judgement, para. 128.

⁵⁷ *Ibid*, paras. 49, 56.

⁵⁸ See Stefan Talmon (2009), at 511.

⁵⁹ See also Marko Milanović (2006), at 586.

state's instructions on each particular act.⁶⁰ The Appeals Chamber applied the "overall control" test not to particular operations or acts of a group but to the state's control over the group itself. In this sense the "overall control" test is not used instead of the "effective control" test which applies to particular conduct of an entity, but instead of the "complete dependence", or "strict control" test which covers the group as a whole and equates it to a state organ.⁶¹ The threshold of the "overall control" is lower than that of "complete dependence" or "effective control" test.⁶² They differ in the intensity of the connection required between a state and an entity.⁶³

This interpretation of state responsibility in *Tadić* received a lot of criticism, including from the ICJ. In the *Genocide* case the ICJ disapproved *Tadić* "overall control" test by distinguishing the issue of degree and nature of state involvement in an armed conflict (which the Appeals Chamber was concerned with) and the attribution of particular acts to states for the purposes of state responsibility.⁶⁴ The ICJ found that the "overall control" test cannot be applied for the latter purpose, because it broadens the scope of state responsibility: the state is only responsible for the conduct of its own organs, i.e. persons acting on its behalf, those who are under "complete dependence" of the state; or in the situations under the rule of CIL reflected in Article 8, when a state organ issued instructions or exercised effective control over the actions of private individuals.⁶⁵ Unfortunately, the ICJ did not provide state practice to support its conclusion.⁶⁶ Accordingly, the states are responsible only for actions or

⁶⁰ *Tadić* Appeal Judgement, para. 137.

⁶¹ Stefan Talmon (2009), at 506; see also Marko Milanović (2009), at 316-317.

⁶² *Ibid* (2009), at 506;

⁶³ Marko Milanović (2009), at 316.

⁶⁴ *Genocide* case, para. 405.

⁶⁵ *Ibid*, para. 406.

⁶⁶ As Cassese submits, "the Court's basic assumption that Article 8 reflects customary law is undemonstrated, being simply predicated on the authority of the Court itself (the *Nicaragua* precedent), as well as authority of the ILC." See Cassese, Antonio, "The Nicaragua and Tadić tests revisited in light of the ICJ judgment on genocide in Bosnia", 18 *European Journal of International Law* 649 (2007), at 651.

omissions of its organs, where they failed to act while exercising proper effective control over private individuals or when instructed or directed them for wrongful conduct.

C) Attribution of ultra vires acts of its organs

The distinction between Article 4 and Article 8 is important for the application of Article 7 to the different categories of persons: officials (state organs) and private individuals. A state will be responsible for the *ultra vires* acts of its organs but not of private individuals. The same rules apply to *de facto* state organs as to *de jure* state organs due to their complete dependency on the state.⁶⁷

However, Article 7 conceptually cannot apply to private individuals covered by Article 8, where a positive proof of a state control or instructions is required for attribution.⁶⁸ The ILC ASR Commentary states that Article 7 applies only to the cases of attribution of conduct under Articles 4, 5 and 6, but not Article 8.⁶⁹ The state will be responsible for unauthorised conduct of its *de jure/de facto* organs but not of individuals who acted under its instructions, directions or effective control.

In contrast, Cassese considers that Article 7 should apply not only to “state organs”, but also to other similar situations, for example, to private individuals entrusted by a state to perform a lawful task and by doing so, breached international obligations of the state.⁷⁰ That would mean the individuals under Article 8 (who received the instruction from the state) ought to be covered by Article 7. It was not, however, the intention of the drafters. The article was supposed to cover state organs and organ-like entities.⁷¹ It also includes in its text only

⁶⁷ See Marko Milanović (2009), at 312.

⁶⁸ *Ibid*, at 314.

⁶⁹ ASR Commentary to Article 7, para. 9, see also Andre de Hoogh (2001), at 281.

⁷⁰ Antonio Cassese (2007), at 654-655.

⁷¹ Article 7 only refers to organs and entities covered by Articles 4, 5 and 6 without making any distinction among them. See ASR Commentary to Article 7, para. 9.

state organs or those who are empowered to exercise elements of the governmental authority and not private persons instructed by states. Moreover, if a person “contravenes the instructions” of the state under Article 7, he cannot be said to “in fact acting on the instructions” of the state under Article 8 and therefore this article does not apply.

A state will be responsible for the conduct of its organ acting in official capacity in excess of authority or contrary to instructions.⁷² This rule is firmly established in international jurisprudence, state practice and writings of jurists,⁷³ and therefore can be considered to have customary law status. The ASR Commentary explains that a state will be responsible when its organ has “overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.”⁷⁴ The main criterion of attribution of unauthorised acts is whether the state organ acted in its official capacity.⁷⁵ If the conduct of a state official is so remote from its official functions that it is assimilated to that of private individuals, it is not attributed to the state.⁷⁶ However in practice the distinction between private and official conduct is a difficult one.

The ASR Commentary explains that the actions/omissions of state organs will be official acts if the organs “purportedly” or “apparently” carry out their official functions, whereas the private actions/omissions of individuals who “happened to be” the organs of the state, will not be “official” for the purpose of their attribution to that state.⁷⁷ The conduct is official when a state official is acting within “apparent authority”, or “general scope of authority.”⁷⁸ When the organ acts within its apparent authority, the state is responsible for its

⁷² ASR Article 7.

⁷³ *Ibid*, para. 4.

⁷⁴ *Ibid*, para. 2.

⁷⁵ See the wording of Article 7 itself and ASR Commentary to Article 7, para. 7.

⁷⁶ *Ibid*, para. 7.

⁷⁷ *Ibid*, para. 8.

⁷⁸ Meron, Theodor, “International responsibility of states for unauthorized acts of their officials”, 33 *British Yearbook of International Law* 85 (1957), at 93; Ian Brownlie (1983), at 145; ASR Commentary to Article 7, para. 8.

wrongful acts even if the organ exceeded its competence and such rule has customary status.⁷⁹ It does not matter for the attribution of conduct whether the actions of the organ were maliciously motivated or were *bona fide* errors of judgment, the state will still be responsible.⁸⁰ If a police officer acts in revenge by arresting somebody, but seems to act in the role of the police officer to an average observer, these acts will be within his apparent authority.⁸¹

The problem of the “apparent authority” test is that its scope is not clear enough. Moreover, it mostly focuses on the evaluation of victims or an “average observer”, but not on the gravity state organ’s acts or the means that it uses to commit such acts. For example, if a police officer, encharged to protect a victim, instead kills him with a weapon acting on private motives, it would be clear for an average observer that the police officer acted without any authority. At the same time the police officer used means or powers given him by the state for his wrongful conduct. In this regard, Meron suggests that there is another criterion to be used to attribute the *ultra vires* conduct to the state: the state will be responsible for its organ’s acts though committed outside its apparent authority, but by using means put at the organ’s disposal by the state, calling it “abuse of governmental means.”⁸² For instance, in the *Caire* case the Mixed French-Mexican Claims Commission held that in order to hold the state responsible for its officials’ *ultra vires* acts, they either must act at least apparently as state officials, or by committing the acts they used powers or means peculiar to their official capacity.⁸³ It further found the state responsible for the conduct of two officers who acted

⁷⁹ Theodor Meron (1957), at 94, 104.

⁸⁰ *Ibid.*, at 95, 96.

⁸¹ Ian Brownlie (1983), at 145.

⁸² See, Theodor Meron (1957), at 105-111, 103.

⁸³ *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, Reports of International Arbitral Awards (R.I.A.A.), Vol. V, 7 June 1929, pp. 516-534 (“*Caire* case”), at 530.

under cover of their official status and used means placed at their disposal by that state.⁸⁴ Therefore the state is still responsible for the acts of its organs, when it vested powers or means to the organ and the organ committed wrongful acts by using these means.

The ASR Commentary, however, does not mention this test as a separate one from the “apparent authority” requirement, although it cites the case itself. What is possible is that the understanding of the “apparent authority” is broader and the use of means and powers is included in this criterion. Moreover, the ILC refers to this criterion as the organs must act “with” apparent authority, as opposed to “within” the scope of apparent or general authority mentioned by Meron.⁸⁵

The distinction between private and official conduct is appropriate for attribution of state organs’ conduct, recognised under ASR Article 4. Under Article 7, only if an *organ* acts against specific instructions, is its conduct attributable to the state.⁸⁶ This is because private entities or persons under Article 8 simply do not have an official capacity.⁸⁷ If a state is to be responsible for the conduct of the persons acted beyond its authorisation under ASR Article 8, according to the ASR Commentary, the question needs to be asked whether unauthorised conduct was really incidental to the mission entrusted to him, or clearly went beyond it.⁸⁸

This is coherent with the rationale behind the attribution to a state of the conduct of private individuals, to whom state organs entrusted a particular mission. In this sense the Commentary suggests that if a state gave lawful instructions to private individuals, it will not assume the risk that those instructions will be carried out in an unlawful way.⁸⁹ However de Hoogh criticises that stating that, by denying the application of Article 7 to the persons

⁸⁴ Ibid, at 531.

⁸⁵ See, ASR Commentary to Article 7, para. 8 and Theodor Meron (1957), at 93, 95, 113.

⁸⁶ Andre de Hoogh (2001), at 283.

⁸⁷ Marco Milanović (2009), at 314.

⁸⁸ ASR Commentary to Article 8, para. 8.

⁸⁹ Ibid.

covered by Article 8, the Commentary fails to take into account the underlying purpose of Article 8, which is to provide for attribution of conduct of persons through which the state chooses to act rather than acting through its organs.⁹⁰ He points out that the choice of such person by the state ought to entail its responsibility for the acts which went beyond instructions the state should either recall its authorisation or use its power of direction or control to require such person change his behaviour.⁹¹ However, such position assumes that the state not only gives the instructions to the private person, but also exercises direction or control over them. Article 8 uses instructions, directions and control disjunctively, and the state giving the instructions does not necessarily exercise control over a particular person.

Indeed, if the control is exercised, the state may not avoid such responsibility. The Commentary provides that if a person ignores instructions and acts under the effective control of the state, such acts will still be attributable to the state.⁹² Therefore, in the case of private individuals, the question is whether their conduct went beyond the effective control of the state, unlike for the state organs' acts (whether they acted in official or private capacity). It sounds logically correct because private persons do not have any official capacity.

With regard to the responsibility for *ultra vires* acts under Article 7, it seems that a state may be responsible for the acts of private persons who contravene state's particular instructions if their conduct is within its effective control. However the state will not be responsible for the conduct of private persons in excess of their authority or without its effective control.

⁹⁰ Andre de Hoogh (2001), at 283.

⁹¹ Andre de Hoogh (2001), at 283.

⁹² ASR Commentary to Article 8, para. 8.

2. Attribution of conduct to international organisations

A) Attribution of conduct of organs and agents of international organisations

It is widely accepted that the principles of state responsibility are applicable, with some variation, by analogy, to the responsibility of IOs.⁹³ The same may be said about the ILC ASR and ARIO, given that the latter uses the former as a model of drafting. However, there are clear differences between them. Unlike the ASR, in many cases reflecting customary rules, the ARIO cannot be supported by solid practice and their status in international law is somewhat unclear. In lack of IOs' practice and jurisprudence the Drafting Committee had to transfer the provisions on state responsibility to the ARIO,⁹⁴ introducing some changes to reflect specific character of IOs. While the ARIO codifies some principles of IOs' responsibility considered to have customary status, they contain many more novel principles.⁹⁵ IOs invited to comment on the draft articles disagreed with some provisions as not reflecting their own practice.⁹⁶ Each ARIO provision will be examined separately to see whether it is in accordance with IOs' comments and practice.

By analogy with ASR, ARIO Article 6 provides for IOs' responsibility for the conduct of its organs and agents. The ICJ held that the UN may be required to bear responsibility for the damage arising from acts performed in the official capacity by the UN or its agents.⁹⁷ The

⁹³ Moshe Hirsch, *The responsibility of international organizations toward third parties: some basic principles* (Martinus Nijhoff, 1995), at 11; International Law Association, *Accountability of international organizations*, Berlin Conference (2004), at 27; see also Chittharanjan Felix Amerasinghe, *Principles of the institutional law of international organizations* (2nd ed., Cambridge University Press, 2005), at 401.

⁹⁴ Kristen Boon, "New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations", *37 Yale Journal of International Law Online* 1 (2011), at 8.

⁹⁵ *Ibid.*, at 9.

⁹⁶ See below the comments of the UN Secretariat to Article 7[6].

⁹⁷ *Special Rapporteur* case, para. 66.

International Law Association (“ILA”) also provides for such a principle.⁹⁸ It may therefore be considered authoritative.

This Article attributes the conduct of both organs and agents of IOs. The definitions of “organs” and “agents” are provided in ARIO Article 2. The definition of IOs’ “organ” is similar to the definition of state organ given in ASR Article 4(2). However the definition of a state organ is open-ended, because it contains word “includes”, while the IOs’ organs are defined precisely, by including the word “means” (although in the previous draft such definition was open-ended).⁹⁹ As the Drafting Committee pointed out, it was done to align with the definition for “agents” and by this individuals or entities not captured by the definition of organ may still be considered “agents” in terms of Article 2(d).¹⁰⁰

Accordingly, even if an entity or a person does not have a status of an “organ” under the IO rules, this IO may still be responsible for them. Under Article 2(d) an “agent” is defined as “an official or other person or entity, other than an organ, who is charged by the organisation with carrying out or helping to carry out, one of its functions, and thus through whom the organisation acts”. This definition was taken from the *Reparations* case.¹⁰¹

For the definition of IO “agents”, the official status of a person is not relevant – what is important is the fact that a person had been conferred the functions by the IO organ.¹⁰² The ARIO Drafting Committee considered that the definition of “agent” would embrace by analogy not only situations covered by ASR Article 4 (*de jure* and *de facto* state organs), but

⁹⁸ International Law Association (2004), at 28-29.

⁹⁹ See adopted in the first reading draft Article 2(c) in ILC Report (2009), A/64/10.

¹⁰⁰ International Law Commission (“ILC”), 63rd session, Statement of the Chairman of the Drafting Committee, 3 June 2011 (“Chairman’s statement (2011)”), at 5.

¹⁰¹ Chairman’s statement (2011), at 6; ARIO Commentary on Article 2, para. 23; ICJ advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), p. 177.

¹⁰² ARIO Commentary to Article 6, paras. 2, 3.

also Article 5 (“conduct of persons or entities exercising elements of governmental authority”).¹⁰³

Accordingly, for the attribution of conduct of a person to the IO, proof of their “complete dependence” is not needed. Neither is it relevant which status they have according to the rules of the organisation. There is no requirement spelled out in the Commentary that a person acts solely “on behalf” of the IO which was paramount to the attribution of conduct of *de jure/de facto* state organs or entities exercising governmental authority under Articles 4-6 ASR.¹⁰⁴

The “functional” test is clearly less stringent, as a person carrying out IO functions may still act on behalf of or under the instructions of a state or other IO. Such broad interpretation of “agents” is also confirmed by the Commentary which states that if a person acts under the instructions, or direction or control, of an IO in the meaning of ASR Article 8, they may be regarded as “agents” by the definition under ARIO Article 2.¹⁰⁵ The fact of performance of IO’s functions is still relevant. However, a person may be entrusted with the IO functions even if it was not pursuant to the IO rules.¹⁰⁶ The UN Secretariat expressed some concerns about a broad definition of agents, which could expose IOs to “unreasonable responsibility”.¹⁰⁷ It stated that in some contexts persons performing IO functions may not be regarded “agents”, but rather “partners” assisting the IO in achieving a common goal.¹⁰⁸

¹⁰³ Ibid, para. 10, ARIO Commentary to Article 1, para. 8.

¹⁰⁴ See the discussion in the previous chapter.

¹⁰⁵ ARIO Commentary to Article 6, para. 11.

¹⁰⁶ Ibid, paras. 9, 11. See also Kristen Boon (2011), at 6, who suggests that the proposed definitions of organs and agents can greatly expand liability of IOs

¹⁰⁷ United Nations, submission to ILC on Responsibility of international organisations, Comments and observations received from international organisations, 17 February 2011, A/CN.4/637/Add.1 (“UN Submission (2011)”), at 9.

¹⁰⁸ Ibid, at 9.

Anyway, it is still relevant and important for the attribution of the conduct of “agents” under ARIO Article 6 that they act in the performance of these functions.¹⁰⁹

The category of “agents” unduly broadens the operation of ARIO Article 6 by including the situations covered by ASR Articles 4, 5 and 8. This raises a question of application of ARIO Article 8 for *ultra vires* acts, because as stated previously, the conduct of persons covered under ASR Article 8 was not covered by similar ASR Article 7 on *ultra vires* acts of state organs. Moreover, ASR Article 8 covers particular conduct of private persons which is performed under direction, instructions or effective control of a state. The “functional” test, by contrast, is generally applicable to persons exercising overall functions of the IO. Given no distinction exists between IO “organs” and “agents” for the attribution of their conduct under ARIO Article 6,¹¹⁰ the degree of attribution of international responsibility of IOs under ARIO is higher than for the states.

B) Attribution of conduct of state organs to IOs

ARIO Article 7 deals with situations where IOs may be responsible for the conduct of a state organ placed at its disposal. However, the ARIO Commentary refers only to the cases of peacekeeping operations and provides almost no other example of the IOs’ practice. Like ILC, the ILA also discusses the principle of attribution of state organs’ conduct to IOs referring to PSOs. It states that this attribution depends on effective control (operational command and control) that either IO or states exercise in a particular operation.¹¹¹ Some authors are of the opinion that the principle of attribution of conduct to either entity on the basis of “effective control” constitutes a customary rule.¹¹²

¹⁰⁹ ARIO Commentary to Article 6, para. 7.

¹¹⁰ Ibid, para. 5.

¹¹¹ ILA (2004), at 28-29.

¹¹² See Moshe Hirsch (1995), at 77, 64.

Although the UN Secretariat confirms the existence of practice of applicability of “effective control” test to the allocation of responsibility for the conduct of PSOs, it disagrees with the ILC Drafting Committee on the content of this control. It stated that in the UN practice the “effective command and control” test is applied “horizontally” to distinguish between the UN-commanded and controlled operations and UN-authorized operations under national command, whereas the ILC suggested the application of “effective control” test “vertically” to condition the responsibility on the possession of factual control by either of the entities.¹¹³ The UN Secretariat further stated that in practice the PSFs are UN subsidiary organ and therefore their conduct is attributable to the UN, although ARIO Article 7 may be applicable in connection with the UN activities in other contexts.¹¹⁴ Although the approach regarding the interpretation of “effective control” may differ, ILC members, UN practice and the commentators agree that IOs may be responsible for the conduct of state organs at their disposal.

The conduct of state organs may be attributed to the IO under ARIO Article 7, if (1) it was placed “at the disposal of” this organisation; and (2) the IO exercised “effective control” over that conduct. These two elements need to be fulfilled to attract IOs’ responsibility. However these elements differ from those to be satisfied for the attribution of the conduct to a state under similar ASR Article 6.

The first requirement (to be placed at the disposal of IO) was taken from the text of ASR Article 6. However the content of this element is different from the one of ARIO Article 7. As already mentioned, a state organ placed at the disposal of another state under ASR Article 6 will act for the benefit of the second state, under its authority, *exclusive* direction and

¹¹³ UN Secretariat submission (2011), at 13, para. 2.

¹¹⁴ *Ibid*, at 13-14, paras. 3, 6.

control, for its purposes and therefore only on its behalf.¹¹⁵ If it acts on the joint instructions, its conduct is attributable to both states under other ASR articles.¹¹⁶ However the ARIO Commentary expresses different position regarding ARIO. It states that if an organ is “fully seconded” to the IO, its conduct would be solely attributable to that IO, but under the general rule set up under Article 6 dealing with the attribution of conduct of IO’s organs and agents (not of state organs at the disposal of the IO).¹¹⁷ Article 7 according to the ARIO Commentary concerns different situations when a lent organ “still acts to a certain extent as organ of the seconding state.”¹¹⁸

Therefore although both Articles (of ASR and ARIO) seem to be similar from the first view, they appear to be qualitatively different in their essence. While ASR understands “placed at the disposal of” requirement as an existence of “exclusive direction and control” of receiving entity, ARIO excludes from its cover “fully seconded” organs, and by contrast includes those on which the control is joint or shared by entities (which are in turn excluded by ASR Article 6).¹¹⁹

¹¹⁵ ASR Commentary to Article 6, paras. 1-2.

¹¹⁶ Ibid, para. 3.

¹¹⁷ ARIO Draft Commentary to Article 7, para. 1.

¹¹⁸ Ibid, para. 1.

¹¹⁹ Cf. Larsen, Kjetil Mujezinovic, “Attribution of conduct in peace operations: the ‘ultimate authority and control’ test”, 19 *European Journal of International Law* 509 (2008), at 516. A different interpretation may be given to the “exclusive direction and control” test, at least in the understanding of the ARIO Drafting Committee. Larsen argues (at 516) that the “exclusive control” concerns overall control over an operation and such a test will be different from “effective control” requirement referring to the control over specific conduct. He considers that both tests need to be fulfilled: an organisation must have exclusive command and control over particular operation and effective control over particular conduct, and where the state has effective control over the conduct and the organisation has only exclusive control over operation, the specific conduct may still be attributable to that state. Such an interpretation of “exclusive command and control” test is in conformity with the UN claims of such control over particular peacekeeping operation. However, as it has been shown before, the “exclusive control” notion under the ASR Commentary to Article 6 was used in a different way, envisaging that the receiving state should have exclusive control over the lent organ as a whole, not only over its particular operation, by that this organ acts “on behalf of” the receiving state, and not seconding state (the criterion to be fulfilled to consider an entity as a state organ) (See ASR Commentary to Article 6, paras. 1-2).

With respect to the ECHR previous position, see discussion of the ECHR *Behrami v France and Saramati v France, Germany and Norway* case and its interpretation of the control needed for the conduct of PSFs to be attributed to the UN in the next section of this chapter (Chapter II, section 4(b)).

As discussed, according to the construction of ARIO Article 7, even if a state organ was placed at the disposal of the IO, it does not mean that its conduct is attributed to the IO. This conduct must also be under “effective control” of the IO. In cases where a state organ was placed at the disposal of the UN and the UN claims to have an exclusive control over its operation, there is a presumption that the UN should have responsibility (and therefore “effective control”) over the conduct of the organ forming part of the operation under the UN exclusive control. The UN responsibility for the conduct of a state organ outside the operation should not be presumed.

The “effective control” test does not apply generally to all acts of the lent organ, and in each case it should be examined whether a specific wrongful act was performed under control of the state or IO.¹²⁰ This is also different from the requirement of ASR Article 6 for an organ to exercise “elements of the governmental authority”. This definition is closer to exercise of “functions” of the IO which make a person under ARIO Article 2 an IO’s “agent” and in the same way the conduct can be attributed to it under ARIO Article 6.

However the ARIO Commentary states that ASR Article 6 takes “similar approach” to ARIO Article 7, which requires the “factual control” to be exercised “over specific conduct” taken by the state organ.¹²¹ The ARIO Commentary further refers to the requirement of ASR Article 6 for the receiving state to have an “exclusive direction and control” over the organ, but states that the criteria of “exercise of elements of governmental authority” is “unsuitable” to IOs.¹²² It seems as if the ARIO Commentary considered the “factual” or “effective control” over particular conduct is the same as “exclusive direction and control” over the organ itself. But under ASR these criteria are qualitatively different: the ASR Commentary clearly distinguishes between requirements of Articles 4-6 and Articles 8-11, at least for the purposes

¹²⁰ Moshe Hirsch (1995), at 64.

¹²¹ ARIO Commentary to Article 7, para. 4.

¹²² Ibid.

of Article 7.¹²³ Moreover, “effective control” over particular conduct does not mean that other conduct of this organ will be also controlled by the receiving organisations, as it is so if a receiving state exercises “exclusive direction and control” under ASR Article 6. In sum, ASR Article 6 and ARIO Article 7 are very different despite similar approach to the issue of seconded organs.

The criterion of “effective control” seems to be taken from ASR Article 8.¹²⁴ However, as it stated by Special Rapporteur Gaja, unlike ASR Article 8, ARIO Article 7 does not concern the conduct of private persons, but the conduct of organs and agents placed at the disposal of the IO.¹²⁵ In this regard the ARIO Commentary states that effective control plays a different role: “it does not concern the issue whether a certain conduct is attributable at all to a state or an international organisation, but rather to which entity – the contributing state [...] or the receiving organisation – conduct is attributable”.¹²⁶ The Commentary further provides an example of UN PSFs over which TCCs retain control in disciplinary and criminal matters.¹²⁷ If a PSFs’ wrongful act was under control retained by the TCC, the attribution of conduct to the TCC will be “clearly linked” to the retention of such control by the state.¹²⁸ The attribution is based on a “factual criterion”.¹²⁹

It follows that unlike under ASR Article 8 (where the conduct of private persons either attributable to the state or not), the conduct of lent organ will be attributed to either entity anyway. As Leck points out, if a wrongful act was made on the instructions of the lending state, the conduct is attributed to that state, but if it was carried out on the direction and

¹²³ See, for instance, *ibid*, para. 9. See also Caitlin Bell, “Reassessing multiple attribution: the International Law Commission and the *Behrami* and *Saramati* decision”, 42 *N.Y.U. Journal of International Law and Politics* 501 (2009-2010), at 523.

¹²⁴ See, also ARIO Commentary to Article 7, para. 5.

¹²⁵ Giorgio Gaja, Eighth report on responsibility of international organisations, ILC, 14 March 2011, A/CN.4/640.

¹²⁶ ARIO Commentary to Article 7, para. 5.

¹²⁷ *Ibid*, para. 7.

¹²⁸ *Ibid*, para. 7.

¹²⁹ *Ibid*, para. 9.

control of the IO, it is imputed to the IO.¹³⁰ Everything depends on the factual effective control or powers of a state or IO over particular conduct even in the situations where the organ is generally under operational control of the organisation.¹³¹ It is because the main criterion is “effective control” and not the status of the organ or operational control for the attribution of conduct under ARIO Article 7. Effective control determines whether the conduct can be attributed to the IO to which the organ is lent or if not, to the state whose organ it is under ordinary rules of state responsibility (i.e. under ASR Article 4).

Effective control may be exercised by a particular state organ/official. As the ICJ stated in the *Genocide* case, the state would incur the responsibility because of the conduct of those of its own organs which actually issued instructions or exercised effective control over non-state organs.¹³² By this the conduct of state organs, having been the cause of the commission of wrongful acts, would constitute a violation of international obligations of the state. What needs to be proved is that a state organ/official - a military commander or a superior - exercised effective control over particular individuals.

In order to prove that a military commander exercised effective control over particular individuals, it is possible to refer to the “effective control” test applied by international courts when they deal with individual criminal responsibility of commanders or superiors. The proof of effective control will be based on the material ability of the commander to prevent or punish the commission of crimes committed by his subordinates that may be reflected, for instance, in issuing orders, taking disciplinary actions or submitting reports to the competent

¹³⁰ Christopher Leck, “International responsibility in United Nations peacekeeping operations: command and control arrangements and the attribution of conduct”, 10 *Melbourne Journal of International Law* 346 (2009), at 348.

¹³¹ Moshe Hirsch (1995), at 65.

¹³² *Genocide* case, para. 397.

authorities for proper measures to be taken.¹³³ If the commander failed to take such measure in his disposal, the state may be held responsible for the omissions of its official to exercise effective control, and not directly for the acts of the private individuals who actually committed them.¹³⁴

Similarly, the scope of effective control depends on the ability of states to prevent the occurrence or stop the perpetration of wrongful acts by private individuals. Effective control may be reflected in the effective command or supervision of particular individuals. The state has necessary powers or disciplinary measures over the individual to be able to prevent him from committing wrongful acts or punish him for the wrongful acts already committed, including by discharging him from the previously entrusted task. Such construction of “effective control” would be of a similar degree of state’s involvement as the other criteria of Article 8 (namely, an individual being instructed or directed by the state).

For instance, the emphasis on state’s retention of disciplinary powers and control in criminal matters means that ultimately the responsibility depends on who had particular means to prevent the commission of wrongful acts.¹³⁵ If a state provided a badly disciplined and untrained contingent, it may be held responsible for particular acts which were a consequence of bad training and discipline. If the organisation had its own means (and effective control) to prevent such acts or its direction led to the commission of wrongful acts,

¹³³ *Prosecutor v Delalić et al.*, Case No IT-96-21-A, Judgement, 20 February 2001, (“*Celebići Appeals Judgement*”) para 198; *Prosecutor v Blaskić*, Case No IT-95-14-T, Judgement, 3 March 2000, (“*Blaskić Trial Judgement*”) para. 302. See also Melanie O’Brien, “The ascension of blue beret accountability: International Criminal Court command and superior responsibility in peace operations”, 15 *Journal of Conflict & Security Law* 533 (2010), at 536.

¹³⁴ *Genocide case*, para. 397.

¹³⁵ See also Tom 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”, 51 *Harvard International Law Journal* 113 (2010), at 114, 157, who submits that the effective control must be understood as “control most likely to be effective in preventing the wrong in question.” He asserts that in finding who has effective control over particular conduct, the right question to be asked is that: “given the command and control authority and responsibility with which each entity was endowed, and given the *de facto* actions that each took, which entity was positioned to have acted differently in a way that would have prevented the impugned conduct?”

it should bear the responsibility for them.¹³⁶ It may become a matter of factual evidence and proof in each situation which entity is responsible and not a matter of general attribution of all acts committed during an operation.

C) Attribution of ultra vires acts of its organs and agents

i) Scope of *ultra vires* acts

ARIO Article 8 provides for the responsibility of IOs for the conduct of its organs and agents exceeding their authority or contravening instructions. The ICJ indirectly confirmed this principle in *Certain Expenses* and *Special Rapporteur* cases.¹³⁷ The same rule was asserted by the ILA.¹³⁸ Some authors also consider that such principle exists in international law and is widely accepted.¹³⁹ The UN Secretariat, however, stated that there is only scant practice on this issue and such practice requires a strong link between the impugned act and official functions of the organ/agent: if an organ/agent acts in its official capacity and within the IO's overall functions, but outside the scope of its authorisation, such act may be considered the IO's act.¹⁴⁰

In many cases IOs' agents are in a similar position to the officials¹⁴¹ and for the purposes of ARIO Article 8 there is no distinction between the conduct of organs/officials of

¹³⁶ The IO may be responsible for employing an agent who commits international wrongful act or for entrusting him with the authority or the material power that he in fact abused (see Pierre Klein, "The attribution of acts to international organisations", in Crawford, James, *The law of international responsibility* (Oxford University Press, 2010), at 305).

¹³⁷ See *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports, 20 July 1962 ("*Certain Expenses* case"), at 168; *Special Rapporteur* case, para. 66, where the Court stated that "it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."

¹³⁸ ILA Report (2004), at 28-29.

¹³⁹ See, for instance, Pierre Klein (2010), at 305. Moshe Hirsch (1995), at 94.

¹⁴⁰ UN Secretariat submission (2011), at 15, para. 2.

¹⁴¹ ILA Report (2004), at 29.

the organisation and its agents.¹⁴² Taking into account the fact that the ARIO Commentary included in the “agents” category those who are normally covered by ASR Article 8 (those whose particular conduct was carried out on the instructions, direction or control of the state/organisation), the cover of the *ultra vires* conduct under ARIO Article 8 is broader than under ASR Article 7. In this sense, the UN Secretariat stated that an agent may have a more remote institutional link to the organisation than an organ and suggested to the ILC to reconsider the question of whether the standard for attribution of acts should be the same for agents and the organs.¹⁴³ The ARIO Commentary states that apart from the exceptional cases (where the “agents” acted on the IOs’ instructions or control), the rules of organisation will govern the issue whether an organ/agent has authority to undertake certain conduct.¹⁴⁴ The Commentary does not specify further what rules will govern or how ARIO Article 8 will be applicable to those “agents” who acted in contravention of instructions given by the IO for particular conduct, or who acted in the excess of their authority when such conduct was under direction or control of the organisation, especially when such functions were not entrusted to them under the IOs’ rules.¹⁴⁵

The IO will be responsible for the *ultra vires* acts of its organs/agents under ARIO Article 8 only if they act in the official capacity. Therefore there must be a “close link” between the *ultra vires* conduct and their official functions.¹⁴⁶ It does not matter whether an *ultra vires* act is valid or not under the IO’s rules – the IO may still entail responsibility because, if the attribution of conduct were denied on this ground, it would deprive third

¹⁴² ARIO Commentary to Article 8, para. 7.

¹⁴³ UN Secretariat submission (2011), at 15-16.

¹⁴⁴ ARIO Commentary to Article 8, para. 2.

¹⁴⁵ See *ibid.*, Article 6, para. 11.

¹⁴⁶ *Ibid.*, Article 8, paras. 4, 9. See also Pierre Klein (2010), at 306, pointing out that when “the act in question fails to present any connection with the exercise of official functions and therefore may not be linked back to the organisation”, it is not attributable to the organisation, because “such acts could just as easily have been committed by any private person, with no connection to an international organisation.”

parties of all redress, unless the conduct could be attributed to a state.¹⁴⁷ The ARIO Commentary also provides that Article 8 covers situations when the conduct of its organ/agent exceeds the competence of the IO, because “it will also exceed the authority of the organ[/]agent who performed it.”¹⁴⁸

During the second reading of the ARIO, another criterion was added to the text of Article 8 – an organ/IO’s agent must act not only in its official capacity but also “within the overall functions of that organisation”. The incorporation of the latter element is controversial. The ARIO Drafting Committee itself expressed some concerns that the inclusion of this criterion would unnecessarily limit the ability of victims to seek recourse against IOs.¹⁴⁹ The Committee further considered that the question of IO’s wrongful conduct for failure to control its organs/agents was a matter for Article 6.¹⁵⁰ However ARIO Article 6, by contrast, deals with *intra vires* acts (as opposed to *ultra vires*) of the IO organs/agents. If some conduct fell outside Article 8, it would go beyond Article 6 too and an organ/agent will not be considered as acting “in the performance of its functions” for the conduct to be attributed to the IO.

Another controversy with the new criterion is its correlation with another term - “competence” - used in the commentary. Both of them taken together mean that an organ/agent must act “within the overall functions of organisation” but may exceed the IO’s competence for the *ultra vires* acts to be attributed to the IO. The question lies in the distinction between both of the terms. IOs’ functions reflect its responsibility to fulfil the assigned task and may sometimes in constituent instruments of IOs be referred as “tasks”, “purposes”, “objects” or “aims”.¹⁵¹ The term competence sometimes is used interchangeably,

¹⁴⁷ ARIO Commentary to Article 8, paras. 5, 6.

¹⁴⁸ Ibid, para. 1.

¹⁴⁹ Chairman’s statement (2011), at 11.

¹⁵⁰ Ibid.

¹⁵¹ Kirsten Schmalenbach, “International Organizations or Institutions, Supervision and Sanctions”, *Max Planck Encyclopedia of Public International Law* (2006), para. 39.

sometimes as a synonym of IOs' "powers"¹⁵² but more frequently to denote the IO's jurisdiction, i.e. its authority to deal with a certain matter.¹⁵³ Accordingly, one potential approach to the definition of *ultra vires* acts can include "acts beyond the ascribed powers and competences but within the attributed functions."¹⁵⁴

Applying this approach, conduct of an organ/agent may exceed not only its authority, but also authority (competence) of the IO to act but must still fall within the IO's functions. However, this would limit the application of Article 8 to a great extent. For example, if an IO's "agent" inhumanly treats detainees to find out necessary information to support benevolent activities of the IO, the question is whether it is an *ultra vires* act exceeding the IO's competence of and its authority, or it also exceeded its overall functions and therefore cannot be covered by ARIO Article 8. It would be covered by ASR Article 7, if it was an organ of state and acted in official capacity. However, an IO normally cannot have overall functions to treat people inhumanly, and therefore such acts may fall outside ARIO Article 8 and not attributed to the IO.

ii) Interpretation of "within overall functions"

Instead, another interpretation of the controversial criterion of "within overall functions" is possible. There is another definition of *ultra vires* acts defined as "acts taken outside or beyond the constitutionally ascribed functions."¹⁵⁵ In support to this approach, the ICJ's judgement in *Certain Expenses* suggests that in the situations where an act appropriate for the fulfilment of an IO's function, the presumption is that this act is not *ultra vires*.¹⁵⁶ This

¹⁵² Functions and powers are two different concepts: IOs' powers reflect their capacity to act in certain ways, with certain means and with certain legal effects. See *ibid*, para. 40.

¹⁵³ *Ibid*, para. 41.

¹⁵⁴ *Ibid*, para. 51.

¹⁵⁵ *Ibid*, para. 51.

¹⁵⁶ *Certain Expenses* case, at 168. See also *ibid*, para. 51.

does not however mean that those acts going beyond the IO's functions will be necessarily attributed to the IO.

The second approach can be supported by the construction of ARIO Article 8 itself, which mentions two different notions: the conduct of the organ which may or may not be attributed to the IO (and which may amount to the wrongful act) and organ's acting in official capacity during that conduct. The criterion "within the overall functions of that organisation" refers to organ's "acting" in an official capacity and not to the conduct at issue. Therefore this criterion qualifies "acting in an official capacity" requirement but not the attributable "conduct". It is so important because the conduct may well exceed the authority of the organ or may even not reflect the functions of the organisation, as long as the organ at that moment is acting in its official capacity and within IO's functions.

The following example can illustrate that. A peacekeeper killing a civilian during authorised and mandated PSO may be acting in official capacity as a peacekeeper and within overall function of maintaining international peace and security, but his conduct (killing of civilian) is in excess of his authority (assuming that it is not in Rules of Engagement to kill civilians). If "overall functions" criterion was attached to the conduct instead, killing a civilian could not be considered as an IO's function.

This approach if accepted would not result in application of ARIO Article 8 limited to the extreme and would adequately reflect its wording and purpose. What is controversial in such interpretation is that the "overall functions" criterion is unnecessary as "acting in official capacity" presupposes acting within IO's functions. It is difficult to imagine examples where the former requirement is fulfilled but not the latter. It is only possible if a peacekeeper performs its conduct (kills a civilian) following the order of UNFC, being outside official functions of IO but following that order still acts in its official capacity. Then the

responsibility of IO can still be triggered for the conduct of the UNFC, who when acting as a Commander (acting within functions of IO), ordered killing (already conduct attributable to IO but still *ultra vires*).

Although the second approach is preferable, it will be seen how the “overall functions” notion is to be interpreted. Given ambiguity of interpretation, one would expect the ARIO Commentary to address this question. However, the Commentary omits to discuss this criterion and only mentions it in conjunction with the “official capacity” requirement,¹⁵⁷ which implicitly supports the second approach to interpretation.

The origin of the criterion is not evident either. “Within overall functions” was added only in the last draft of the ARIO.¹⁵⁸ It was included in Article 8 upon the insistence of the UN Secretariat.¹⁵⁹ Although the Special Rapporteur noted that the UN did not provide any examples from the practice even though claiming that such practice exists, he simply agreed to add such reference following the UN’s suggestion.¹⁶⁰ Surprisingly, given possible negative consequences of inclusion of such limitation into Article 8, this criterion was not much debated in the ILC and received an approval (although with some concerns expressed as to limitation of redress for the victims).¹⁶¹

Lack of much debate in the ILC regarding this requirement does not permit to make a definite conclusion which approach to follow. The ARIO Commentary does not discuss it either. Interestingly, the ARIO Commentary does not refer to the suggestion by the UN as to include the “overall functions” criterion, but instead states that it was advocated by one

¹⁵⁷ See ARIO Commentary to Article 8, para. 4.

¹⁵⁸ See, for instance previous version of the ARIO in the United Nations, Report of the International Law Commission, Sixty-first session (4 May-5 June and 6 July-7 August 2009) (2009), A/64/10, at 21.

¹⁵⁹ See UN Secretariat’s suggestion in UN Secretariat submission (2011), at 15, para. 5.

¹⁶⁰ See Giorgio Gaja, Special Rapporteur, Eighth report on responsibility of international organizations (2011), A/CN.4/640, at 37, para. 14.

¹⁶¹ Summary record of the ILC 3097th meeting, 3 June 2011, A/CN.4/SR.3097, at 21.

academic author (J.M. Cortés Martín) and provides the only reference (to his book).¹⁶² In his book, Cortés Martín argued that only *ultra vires* acts related to the IO's functions can be attributed to the IO due to the principle of speciality which applies to them (unlike states which possess a general competence).¹⁶³ According to him, as IOs can exercise their rights only within their competences, they cannot be responsible for the acts committed manifestly outside their sphere of competences.¹⁶⁴ He also deduced this principle from Article 46(2) of the Vienna Convention of the Law of the Treaties 1986 (VCLT 1986).¹⁶⁵

This reasoning cannot be accepted as giving correct explanation to the “within overall functions” notion in the framework of the ARIIO and its Commentary. Firstly, the difference between IOs’ and states’ competences lying in the essence of the argument for special treatment of IOs’ *ultra vires* acts as opposed to the states’ *ultra vires* acts is not demonstrated by Article 46 VCLT 1986, as argued by the author.¹⁶⁶ Article 46 provides for the same rule for IOs in para.2 and for states in para.1.¹⁶⁷ Therefore this cannot serve as evidence of the need to define *ultra vires* acts for IOs and states differently.

¹⁶² See ARIIO Commentary to Article 8, para. 4, fn. 136, which mentions the work of J.M. Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Instituto Andaluz de Administración Pública: Sevilla, 2008), at 211–223.

¹⁶³ Cortés Martín (2008), at 223. With regard to this difference between States and IOs, see *Legality of the threat of use of nuclear weapons*, Advisory Opinion, ICJ Reports, 8 July 1996 (requested by WHO) (“*Nuclear Weapons case (WHO)*”), at 78-79.

¹⁶⁴ Cortés Martín (2008), at 214.

¹⁶⁵ VCLT, Article 46(2) provides: “An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.” Cortés Martín concluded from this that “international wrongful acts committed by organs or agents *ultra vires* (beyond the competences/powers of the organisation) do not lead to its international responsibility, if the violation of the mandate could be qualified as objectively evident to any third party conducting itself in the matter in accordance with the normal practice of States and in good faith. This means that *ultra vires* acts will be attributed to the organisations, whenever their objective is included in the normative objectives of the organisation.” See Cortés Martín (2008), at 215.

¹⁶⁶ See Cortés Martín (2008), at 215.

¹⁶⁷ Article 46(1) VCLT 1986 provides similar wording but in relation to states: “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

Secondly, Article 46 VCLT 1986 provides for the invalidation of the consent of IOs to conclude a treaty only in the circumstances of manifest violation of IOs' competences, but does not say anything that violation should go beyond the IOs' functions to be considered "manifest". Thirdly, a reverse application of the principle of invalidity of IOs' consent vis-à-vis rights of parties to the treaty may not necessarily be equated with IOs' international responsibility for *ultra vires* acts. Finally, the Commentary makes a distinction between *ultra vires* acts exceeding the IOs' competences for which the IOs can be held responsible and *ultra vires* acts being beyond overall functions that cannot attract the IOs' responsibility. This distinction between competences and functions is not provided either in Article 46 VCLT 1986, or in the book itself.¹⁶⁸

Therefore the conclusions contained in the book (being the only source of reference provided by the ILC in the Commentary to explain "within overall functions" test) cannot serve as interpretative guidelines for the "within overall functions" notion included in Article 8 ARIO. As suggested before, the wording of ARIO Article 8 provides for a different conclusion, namely that "within overall functions" is attached to the "official capacity" requirement and not as a limitation for the *ultra vires* conduct itself. As there is no suggestion to the contrary in the Commentary, this approach is to be preferred.

iii) Attribution of *ultra vires* acts and effective control test

Another question is whether ARIO Article 8 is applicable to the situations covered by ARIO Article 7, i.e. when it exercises effective control over conduct of an organ placed on its disposal by the state. Neither Commentary, nor the article itself mentions that it is applicable

¹⁶⁸ See for instance Cortés Martín (2008), at 214, where the author is talking about competences rather than functions.

to such situations.¹⁶⁹ The reference to ASR Article 6 is not helpful either because, as mentioned before, ASR Article 6 and ARIO Article 7 are different in their cover, even though their construction is similar.¹⁷⁰ The lack of any reference to ARIO Article 7 in ARIO Article 8 may mean that the *ultra vires* acts of the organ at the disposal of the organisation will not be attributed to that organisation. The question is whether they are attributable to the seconding state. If not the case, the whole purpose of the draft articles on responsibility of IOs and states may be defeated.

Logically, the *ultra vires* act of such an organ needs to be attributable to the seconding state at least because it is ultimately its organ and therefore ASR Article 7 should be applicable. It should apply whether or not the state exercises effective control over particular conduct, because of the requirements of ASR Article 7 itself (the fact that an entity is a state organ is already enough). Under ARIO Article 7, the fact that a state organ was placed at the disposal of the IO does not mean that it loses its identity as a state organ. Only if it is fully seconded to the organisation, it may do so.¹⁷¹ Therefore the state responsibility for its own organ may still be invoked for any *ultra vires* conduct of its organ.

Another matter for consideration is whether by exercising effective control over particular conduct of the organ at its disposal, the *organisation* is also responsible for organ's *ultra vires* acts. By that, the IO "places" such organ in the position of its "agent" due to the broad definition of the notion of "agent" in the ARIO and its cover of the situations, *mutatis mutandis*, under ASR Article 8, i.e. persons carrying out particular conduct under effective control of the state. If the IO exercises effective control over the state organ's conduct at its

¹⁶⁹ See also ARIO Commentary to Article 8, para. 3, which states that this article only needs to be aligned with Article 6, without any mentioning of article 7.

¹⁷⁰ The organs under ASR Article 6 are indeed covered by ASR Article 7.

¹⁷¹ See for instance ARIO Commentary to Article 7, para. 1, which states that if an organ is "fully seconded" to the organisation, its conduct would clearly be attributable *only* to that organisation.

disposal, this organ may be considered its “agent” for the purposes of attribution of *ultra vires* acts (only those under its effective control) to the organisation under ARIO Article 8.

A further issue is whether the state remains responsible for the *ultra vires* acts of its organ if the IO is already found to be responsible for that conduct due to its effective control. It would be strange to argue that it is possible to apply simultaneously ARIO Article 8 (due to the IO effective control over the conduct) and ASR Article 7 (due to the identity of that entity as a state organ). One may possibly argue that, in this case, the conduct would be performed by the organ not in official capacity of state organ, but in official capacity of the IO’s agent. However, the primary responsibility would still lie on the IO for the conduct under its effective control, whereas a state may be responsible under other articles (e.g. as aiding or assisting for a wrongful conduct). The IO and state may also be jointly responsible if they both exercise effective control (see next section).

3. Concurrent responsibility of states and international organisations

A) Possibility of simultaneous attribution of conduct to states and international organisations

The possibility of multiple attribution of conduct to states and IOs was expressed in the ARIO Commentaries:

Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an [IO] does not imply that the same conduct cannot be attributed to a State, nor vice versa does attribution of conduct to a State rule out attribution of the same conduct to an [IO].¹⁷²

¹⁷² ARIO Commentary to Chapter II, para. 4.

Special Rapporteur Gaja mentioned in his seventh report to the ILC that in many cases the application of “effective control” criterion may lead to the conclusion that the conduct at issue has to be attributed to both the state and the IO.¹⁷³ However, the Special Rapporteur does not provide any example of dual attribution.¹⁷⁴ ARIO Chapter II concerning the attribution of conduct does not contain any provision on shared responsibility between a state and an IO.¹⁷⁵

In theory, in order to make a dual attribution to the state and IO possible, the requirements of both ASR and ARIO articles on attribution of conduct need to be fulfilled. A notion of “organ”/“agent” under the rules of one entity needs to be combined with “control” over particular conduct by the other entity. By that, general rules of attribution of conduct for organs/agents will be concurrently applicable with rules on “control” over particular conduct.

Two situations may be envisaged. One is when an IO’s agent/organ acts under instructions, directions or effective control of the state in carrying out a particular conduct. Then ARIO Article 6 in combination with ASR Article 8 can be invoked. The other situation is when a state organ’s conduct was done under effective control of an IO. In this case, ASR Article 4 may be combined with ARIO Article 7. It is also possible that effective control over an organ is shared between the state and IO (when command and control are joined) and therefore both entities assume joint legal responsibility for the wrongful act by that organ.¹⁷⁶

In the first case, an IO’s official/agent may commit wrongful acts acting under instructions or directions of a state (and/or being under its control). Supposedly, a state issued instructions unlawful under international law for the IO’s agent/official to detain an individual.

¹⁷³ Giorgio Gaja, Seventh report on responsibility of international organisations, ILC, 27 March 2009, A/CN.4/610.

¹⁷⁴ Pieter Jan Kuijper (2010), “Amsterdam Center for International law: introduction to the Symposium on Responsibility of International Organizations and of (Member) States: attributed or direct responsibility or both?” 7 *International Organizations Law Review* 9, at 30.

¹⁷⁵ Ibid, at 25.

¹⁷⁶ Moshe Hirsch (1995), at 65.

It was in excess of their authority given by the IO and is considered *ultra vires* act. It may be attributed to the IO under ARIO Article 8 or Article 6 (as *intra vires* but still wrongful). However, for the purposes of ARIO Article 8, such official/agent is not acting in their “official capacity” and therefore their *ultra vires* acts are not attributable to the IO, but may still be attributable to the state under ASR Article 8.

A difficulty is that ASR Article 8 was not supposed to include persons being IO’s organs/agents and was drafted only to include private individuals acting without any official capacity. Nevertheless, there is nothing in the text of the article to exclude such officials/agents from its scope. Moreover, if it can be applied to the members of non-state (e.g. secessionist) entities, it may also apply to the IO agents. Therefore dual attribution of conduct is possible.

The second case, where a state organ acts under the instructions or control of the IO, may be more common due to the specific construction of ARIO Article 7. This organ does not lose its identity of a “state organ”; and therefore its conduct is still attributable to the state under ASR Article 4. If the requirement of effective control over particular conduct is fulfilled, the IO can also be responsible under ARIO Article 7. Although the state may have lost its effective control over its organ’s conduct, the organ does not lose its definition as a state organ for ASR Article 4. ARIO Article 7 is broad enough to encompass dual attribution of conduct to the state and IO.¹⁷⁷

The ARIO Commentary states that, as the state retains some control over disciplinary and criminal matters over its national contingent placed at the IO’s disposal for peacekeeping purposes, it may affect the attribution of conduct,¹⁷⁸ meaning that dual attribution is not

¹⁷⁷ See also Caitlin Bell (2010), at 510, who points out that Article 7 leaves open the possibility of attribution of a single wrongful act to more than one state or IO.

¹⁷⁸ ARIO Commentary to Article 7, para. 7.

excluded.¹⁷⁹ Moreover, the point made in the ARIO Commentary to Article 7 that if an organ is fully seconded to the organisation, its conduct would be attributable only to that IO, means, *a contrario*, that dual or multiple attribution is possible with organs placed at the IO's disposal and not "fully seconded" to it.¹⁸⁰ Even if the IO has effective control over a state organ, the actions taken by this organ within state control might breach international obligations of the state itself and constitute its wrongful act.¹⁸¹

Due to the broad definition of "agent" (including situations covered by ASR Article 8), such a person acting under IO's instructions/control may become an "agent" of this organisation and his conduct may be attributable to the organisation under ARIO Article 6 as conduct of that organisation (although it may then lose its identity as a state organ). Such extension of the notion "agent" may lead to confusion in the attribution of conduct under both Articles (ARIO Article 6 and Article 7) as both of them would concern the situations when particular conduct is under IO's "effective control" (the notion originating from ASR Article 8). Anyway, dual attribution of conduct of state organ to the state itself (under ASR Article 4) and to the IO at least under ARIO Article 7 is possible.

B) Possibility of simultaneous responsibility of states and international organisations

The ARIO Commentary distinguishes between attribution of conduct and attribution (or distribution) of responsibility. It notes that ARIO Articles 6-9 like ASR Articles 4-11 deal with attribution of conduct, not with attribution of responsibility, whereas practice often

¹⁷⁹ See also Pierre Klein (2010), at 307, suggesting that if activities were carried out jointly by an IO and a state which gave rise to international law violations, the IO and the state would be co-authors of the wrongful act and that act could be attributed to the state and IO jointly.

¹⁸⁰ Pierre Bodeau-Livinec, Gionata P. Buzzini, and Santiago Villalpando, "Behrami & Behrami v. France; Saramati v. France, Germany & Norway", 102 *American Journal of International Law* 323 (2008), at 329.

¹⁸¹ Caitlin Bell (2010), at 517.

focuses on attribution of responsibility rather than on attribution of conduct.¹⁸² One of the examples of such practice is the model contribution agreement between the UN and TCC, and as stated in the Commentary, it appears to deal only with distribution of responsibility and not attribution of conduct.¹⁸³

Since the attribution of responsibility differs from the attribution of conduct, the question is whether states and IOs may assume simultaneous responsibility for the conduct of the same organ/agent. In its report on accountability of IOs the ILA provides that “the responsibility of an [IO] does not preclude any separate or concurrent responsibility of a state [...] which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act.”¹⁸⁴ In this sense, ARIO Article 48 and its analogous ASR Article 47 provide for such simultaneous responsibility. ARIO Article 48 primarily deals with the situations covered by ARIO Articles 14-18, 58-62 which concern “joint responsibility” of an IO with one/more states.¹⁸⁵ These articles provide for responsibility for aid and assistance, direction and control, by one entity over/for another in commission of wrongful act. Apart from that the ARIO Commentary merely deals with the example of so-called mixed agreements concluded by the EU with its MSs.¹⁸⁶

However the ASR Commentary to Article 47 seems to envisage more situations. It provides both for responsibility for direction/control and for such responsibility where two/more states (it concerns only states, not IOs) act jointly or through a common organ carrying out the conduct (e.g. a joint authority responsible for the management of a boundary

¹⁸² ARIO Commentary to Chapter II, para. 4.

¹⁸³ Ibid, Article 7, para. 3.

¹⁸⁴ ILA Report (2004), at 28.

¹⁸⁵ ARIO Commentary to Article 48, para. 1.

¹⁸⁶ See *ibid*, para. 1.

river).¹⁸⁷ In this way, both states may be responsible for the conduct of the common organ. If it is not possible to separate the responsibility of each state for any particular act and the contribution of each state in creation and managing the organ was the same, the responsibility for a wrongful act of that joint organ will be also the same for each contributing state. However, if it is possible to attribute each act to one of them (e.g. a wrongful act was committed by the officials of one state, and not the other), the “effective control” may be the right test to apply for attribution of the act.

In the situation of joint organs the responsibility is attributed to each state on equal footing (in some cases depending on the “effective control”), but not only where one state directs or assists the other in committing the act. Moreover, the ASR Commentary states that Article 47 specifically addresses the situations where “a single course of conduct is [simultaneously] attributable to several states and is internationally wrongful for each of them.”¹⁸⁸ The ASR Commentary seems to mean the attribution of conduct to several states, not only the attribution of responsibility under Article 47. The ARIO Commentary does not provide such possibility for the respective Article 48.

The ASR Commentary mentions the *Nauru* case concerning the administration of the Nauru trust territory shared by Australia and two other states under the Trusteeship Agreement. The ICJ held that the claim brought only against one state – Australia – is admissible despite the Australia’s argument that the claim should be brought jointly against all the states sharing the responsibility for breach of obligations.¹⁸⁹ The Court distinguished the issue of reparations for damages (whether it can be liable for damages in full or in part)

¹⁸⁷ Ibid, Article 47, para. 2.

¹⁸⁸ Ibid, para. 3.

¹⁸⁹ *Certain phosphate lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgement, ICJ Reports, 26 June 1992 (“*Nauru case*”), para. 48.

and the question of the breach of obligations by Australia.¹⁹⁰ The former question concerns the distribution of responsibility among several states responsible for the consequences of the wrongful conduct, whereas the latter concerns the attribution of conduct to several states, when each of them is individually responsible for the conduct.

Under ASR Article 47, the states may also be responsible for separate wrongful acts caused damages and, in such a case, the responsibility of each state is determined individually, on the basis of its own conduct.¹⁹¹ The *Corfu Channel* case is an example of such a situation. In this case, the ICJ found Albania responsible for failure to warn about and prevent the damage caused by the explosions of the mines laid by Yugoslavia, about which it knew or should have known, although it appears that Yugoslavia would have been responsible for that damage.¹⁹² Accordingly, the attribution of conduct to one state did not preclude the responsibility of another state for its own wrongful conduct resulted in damages.

Another possibility for simultaneous responsibility of states and/or IOs is when one of them commits a wrongful act and the other aids, assists, controls and directs. Such scenarios are provided by ARIO Articles 19, 63 and the analogous ASR Article 19.

While the situations when an entity assists the other in commission of an act may be more common, the cases of direction and control of the entity by the other will be quite rare. The ARIO Commentary to Article 14 provides only one situation from the practice where an IO could be regarded as assisting in the commission of the wrongful act. This concerned the support given by MONUC to FARDC which may have committed violations of international

¹⁹⁰ Ibid, paras. 48, 56.

¹⁹¹ ASR Commentary to Article 47, para. 8.

¹⁹² *Corfu Channel* case, Judgement, ICJ Reports, 9 April 1949 (“*Corfu Channel* case”), at 22-23.

law.¹⁹³ MONUC would have to discontinue its support to the forces if it had reasons to believe that these forces were violating international law.¹⁹⁴

As for the direction and control of the state by the IO under ARIO Article 15, the Commentary provides the argument of French Government in *Legality of Use of Force (Yugoslavia v France)* case before the ICJ that “NATO is responsible for the ‘direction’ of KFOR and the [UN] for ‘control’ of it”.¹⁹⁵ The UN Secretariat noted that this statement is controversial because it was not judicially determined and suggests that in Kosovo the UN exercised control over KFOR, which was not the case.¹⁹⁶ France in that case argued that it will not be responsible for its contingent, if both organisations exercised the direction and control.¹⁹⁷ This argument would be contrary to the nature of Article 15, which does not exclude the responsibility of the state for the commission of a wrongful act, even if the organisation directed and controlled it.¹⁹⁸

The UN Secretariat expressed doubts about the necessity of ARIO Article 15 and possible existence of any practical situations when the IO can control and direct the state, as it does not have means available to the states to do so.¹⁹⁹ Regarding aid and assistance of the IO to the states, the UN Secretariat also gave an example of MONUC assistance to the governmental forces.

Under ARIO Article 58, a state may assist an IO by providing an incompetent, undisciplined or untrained organ for its disposal and this organ commits wrongful acts under

¹⁹³ See Chapter IV of the dissertation for the further analysis of this issue.

¹⁹⁴ ARIO Commentary to Article 14, para. 6.

¹⁹⁵ France argued that the responsibility for the events at issue “lies primarily with NATO and to a lesser extent with the UN, which authorised KFOR’s deployment and receives regular reports on its activities, but not with their member States.” Preliminary objections of the French Republic (5 July 2000) for the Case concerning the Legality of use of force (*Yugoslavia v France*), para. 45

¹⁹⁶ UN Secretariat submission, at 20, para. 4. However, the UN Secretariat does not take into account the *Behrami* case decided by ECtHR in which the court provided controversial analysis of the UN’s control over the conduct in question. See the next section of this chapter for further discussion of this case.

¹⁹⁷ Preliminary objections of the French Republic, paras. 45, 46.

¹⁹⁸ See ARIO Article 19.

¹⁹⁹ UN Secretariat submission (2011), at 20, para. 3.

effective control of the IO. The conduct will be attributed to the IO and responsibility would be shared between the IO for the act itself and the state for its assistance, if it knew about the circumstances of the wrongful act (e.g. that such organ may commit wrongful acts being undisciplined). As in case of responsibility for aid and assistance, the state will be responsible only as accomplice,²⁰⁰ it will be responsible not for the consequences of the IO's wrongful acts but for its participation in that act.²⁰¹

The ICJ dealt with the question of state complicity in the *Genocide* case. Although the case was decided on the basis of the provisions of the Genocide Convention,²⁰² the Court took ASR Article 16 as a point for departure in its analysis.²⁰³ Having found that ASR Article 16 reflects CIL, the Court made no distinction between the notions of "aid and assistance" under ASR Article 16 and "complicity in genocide" in the meaning of Article III(e) Genocide Convention.²⁰⁴ The Court distinguished this form of responsibility from those envisaged by ASR Article 8 stating that if it was established that the act had been committed on the instruction or under the direction/effective control of a state, the conclusion would be that this act was attributable to the state and the state would be *directly* responsible for it, which would extend the effects of responsibility beyond complicity.²⁰⁵ In case of state responsibility as an accomplice, the state organs or persons acting on its instructions or under its direction/effective control, furnish "aid or assistance" in the commission of the wrongful acts in the sense of providing means to enable or facilitate the commission of the acts and not committing wrongful acts by themselves.²⁰⁶

²⁰⁰ Jean D'Aspremont, "The limits to the exclusive responsibility of international organisations", 1 *Human Rights & International Legal Discourse* 217 (2007), at 221.

²⁰¹ Philippe Sands, Pierre Klein, *Bowett's law of international institutions* (Sweet & Maxwell, 5th ed., 2001), at 525.

²⁰² Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

²⁰³ *Genocide* case, para. 420.

²⁰⁴ *Ibid*, para. 420.

²⁰⁵ *Ibid*, paras. 419, 420 (emphasis added).

²⁰⁶ *Ibid*, paras. 419, 420.

Other provisions of the ARIO to be distinguished from the direct commission of the wrongful acts are ARIO Articles 15, 59. The stringent criteria of the ARIO Articles 15, 59, provided in the ASR Commentary to Article 17 (to which ARIO Commentary refers),²⁰⁷ are difficult to fulfil as the cumulative criteria of “control” as “domination over the commission of wrongful conduct” and “actual direction of an operative kind” are required.²⁰⁸

An example will be if an IO’s agent/official directs the state organ to commit a particular act, simultaneously exercising actual and operative control over it, then the organisation may be considered as directing and controlling the commission of act. However, it is much easier to attribute the wrongful act of the state organ to the IO if it simply exercises effective control over the conduct of that organ under ARIO Article 7. In fact, in practice it will be difficult to differentiate between “effective control” and “direction and control”. Unfortunately the commentary does not provide a more straightforward distinction for these notions.

The combination of different articles on state responsibility and responsibility of IOs makes it possible to hold responsible either the IO or the state or both, for a wrongful conduct of a state organ, such as national contingent. The identity of the organ, its position in the IO, the degree of control exercised over its conduct by the state and IO, the degree of involvement of the state and IO in the commission of the wrongful act should be taken into account in the analysis on case-by-case basis of whether a particular conduct is attributed to a state or an IO.

²⁰⁷ ARIO Commentary to Article 15, para. 4; ARIO Commentary to Article 59, paras. 1, 3.

²⁰⁸ Ibid, Article 17, para. 7.

4. Attribution of conduct of PSOs to the UN and troop-contributing states

A) Should the peacekeepers be considered a state organ or an organ of the UN?

ARIO Article 6 provides for the responsibility of IOs for the conduct of its organs and agents. Similarly ASR Article 4 attributes the conduct of state organs to the state. It has been repeatedly stated that the PSOs under UN command and control are subsidiary organs of the UN.²⁰⁹ Consequently, the UN can be responsible for the peacekeepers' conduct as for the conduct of its organ.²¹⁰ Nevertheless, unlike civilian personnel of the PSOs (normally individually recruited by the UN), members of military forces remain in national service and continue to be an organ of their national state. Unlike military observers and civilian personnel, serving in a personal capacity, military members are provided by TCCs in a contingent and are not selected on an individual basis.²¹¹ The national contingents are provided as separate units with internal command structures, whereas the authority over the internal chain of command remains within the contingent itself.²¹² For example, the responsibility for payment for members of contingent and their promotions in rank rests with their national government.²¹³

A transfer of the unit to UN operational control and its subsequent transformation into a UN subsidiary organ does not completely sever legal and institutional relationship between national contingents and the TCC retaining some important powers such as discipline and

²⁰⁹ See, for example, Report of the Secretary-General, Model status-of-forces agreement for peace-keeping operations, 9 October 1990, A/45/594, ("Model SOFA"), para.15; UN Secretariat submission (2011), at 10, para. 2; at 13, para. 3.

²¹⁰ UN Secretariat submission (2011), at 13, para. 3.

²¹¹ Note by the Secretariat, Criminal accountability of United Nations officials and experts on mission, A/62/329, 11 September 2007, para. 56.

²¹² Tom Dannenbaum (2010), at 146.

²¹³ Ibid, at 146.

criminal jurisdiction.²¹⁴ National contingents occupy dual legal position acting in international capacity in the UN institutional structure participating in the operation, and in national capacity remaining an organ of their TCC.²¹⁵ They can be considered equally an organ of state and a subsidiary organ of the UN.

The domestic courts of some TCCs have already tried to find a solution to this dichotomy of PSFs' legal status.²¹⁶ In the United Kingdom ("UK"), the House of Lords in the *Nissan* case²¹⁷ considered whether the government may be responsible for the acts of national forces forming part of the UN PSFs in Cyprus. The court attached more importance to the fact that the national contingent remains in national service than to the UN operational command over it. Lord Morris, for example, stated that although national contingents were under the UN authority and subject to its instructions, the troops as members of the force remained in their national service and they were subject to the exclusive jurisdiction of their national states in respect of any criminal offences committed by them in Cyprus.²¹⁸ Lord Pearce also pointed out that while the functions of PSF as a whole are international, "its individual component forces have their own national duty and discipline and remain in their own national service."²¹⁹ However, the House of Lords did not deny the UN's responsibility but did not deal with it, as in such circumstances concurrent responsibility between two entities may be possible.²²⁰

²¹⁴ Sari, Aurel, "Jurisdiction and international responsibility in peace support operations: the *Behrami* and *Saramati* cases", 8 *Human Rights Law Review* 151 (2008), at 160.

²¹⁵ *Ibid*, at 160. See also ARIIO Draft Commentary to Article 7[6], para. 1.

²¹⁶ See also discussion of the famous ECHR case *Behrami v France and Saramati v France, Germany and Norway* and its interpretation of the attribution of conduct and control of the UN over PSFs in the next subsection of this chapter (Chapter II, section 4(b)).

²¹⁷ *Attorney-General v Nissan* [1970] A.C. 179.

²¹⁸ *Ibid*, at 222.

²¹⁹ *Ibid*, at 223.

²²⁰ Chittharanjan Felix Amerasinghe (2005), at 404.

Dutch courts also considered the issue in the *H.N.*²²¹ and *Mustafic*²²² cases, deciding whether the state was responsible for the conduct of its national contingent serving in UNPROFOR in Srebrenica. Although initially Dutch District Court held in that since the contingent was placed to the UN operational command and control, its actions are attributed exclusively to the UN and found against the claimants,²²³ on the appeal²²⁴ the Dutch Court of Appeal quashed the District Court's decisions finding the Dutch government responsible. The Court of Appeal considered that the "effective control" test serves as a criterion to attribute the conduct of troops to either the IO or to state.²²⁵ The court reasoned that it was not only important whether particular conduct constituted the execution of specific instructions from either entity, but also whether in the absence of such instructions the UN or the state had the power to prevent the conduct concerned.²²⁶ The court stated that more than one entity may exercise "effective control" and thus the attribution of conduct to both entities is possible.²²⁷ The court further analysed evidence and came to the conclusion that the state had "effective control" over the alleged conduct of Dutchbat and that this conduct is attributed to the state.²²⁸ The court based its finding of "effective control" on the analysis of the factual situation rather than attributing all the conduct of particular mission to the UN.

The Dutch Court of Appeal rulings were affirmed by the Dutch Supreme Court,²²⁹ Which confirmed the Court of Appeal's choice of legal basis – Article 7 ARIO rather than

²²¹ *H.N. v Netherlands* (Ministry of Defence and Ministry of Foreign Affairs) (District Court in The Hague, September 2008), 265615 / HA ZA 06-1671

²²² *M. M.-M. et al. v Netherlands* (Ministry of Defence and Ministry of Foreign Affairs) (District Court in The Hague, 10 September 2008), 265618 / HA ZA 06-1672

²²³ *H.N.* (District Court) case, paras. 4.8, 4.9, 4.11, 4.13, 4.14.1, 4.14.5.

²²⁴ *Hasan Nuhanovic v Netherlands* (Court of Appeal in The Hague, 5 July 2011), 200.020.174/01; *Mustafic et al. v Netherlands* (Court of Appeal in The Hague, 5 July 2011), 200.020.173/01.

²²⁵ *Ibid*, para. 5.8.

²²⁶ *Ibid*, para. 5.9.

²²⁷ *Ibid*.

²²⁸ *Ibid*, para. 5.20.

²²⁹ *Netherlands v Hasan Nuhanović* (Supreme Court of the Netherlands, 6 September 2013), 12/03324 LZ/TT, para. 4; *Netherlands v Mustafić et al* (Supreme Court of the Netherlands, 6 September 2013), 12/03329 LZ/TT, para. 4.

Article 6 ARIO for the attribution of the PSFs' conduct to the TCC due to the fact that TCC retained disciplinary powers and criminal jurisdiction over its contingent.²³⁰ It also confirmed the Court of Appeal's finding that under international law on the possibility of dual attribution of the conduct and left open the possibility UN also having effective control.²³¹ The Supreme Court also affirmed the Court of Appeal's conclusion that effective control is a factual control over specific conduct²³² and its finding that Netherlands exercised such control and therefore responsible for the conduct of Dutchbat.²³³ The Hague District Court adopted the Supreme Court's reasoning and factual nature of "effective control" in the famous *Mothers of Srebrenica* case, although finding Netherlands' effective control over its peacekeepers only in some instances.²³⁴

The situation of PSOs is not clear-cut. A national contingent is considered international personnel and is under operational control of the UNFC, who is a clearly a UN official and a member of the Secretariat.²³⁵ Conversely, unlike other UN officials/agents, members of PSFs do not lose an affiliation with their national state because they remain in the

²³⁰ *Ibid*, para. 3.10.2.

²³¹ *Ibid*, para. 3.11.2.

²³² *Ibid*, para. 3.11.3.

²³³ *Ibid*, para. 3.12.3.

²³⁴ See *Stichting Mothers of Srebrenica v Netherlands and the United Nations* (The Hague District Court, 16 July 2014), C/09/295247 / HA ZA 07-2973. The Court repeated the findings of the Supreme Court in relation to the effective control and its factual basis and irrelevance responsibility/immunity of the UN due to the possibility of dual attribution of the conduct to both the UN and Netherlands (see paras. 4.33-4.35, 4.45). The Court also noted that for the purposes of PSO the Netherlands transferred its command and control over Dutchbat in relation to the operational implementation of the mandate (4.40) but retained full command over it, including right to withdraw it, as well as the authority to punish its military personnel, disciplining them and subjecting them to its criminal law, as well as the power to select and train troops (4.41). Importantly, the Court also considered that if peacekeepers act beyond instructions and authority given by the UN (having command and control over the operational implementation of the mandate), i.e. acting *ultra vires*, such action is attributable to the TCC because it has control over mechanisms underlying those *ultra vires* acts, namely training and preparation of troops for the mission, and has the ability to take measures to counter *ultra vires* acts of its troops given its disciplinary powers (4.57).

²³⁵ Sarooshi, Danesh, *The United Nations and the development of collective security: the delegation by the UN Security Council of its Chapter VII powers* (Oxford University Press, 1999), at 70.

state's national service and function as a unit and not individually. They can be considered representatives of their national state.²³⁶

Although such status of national contingents seems to be unique, it is possible to find an analogy in the UN system. The majority of the UN organs are in fact composed of MSs' representatives of member states. Being provided by their national state they represent it in the UN organs and acting jointly they compose the UN's organs. Their joint decision/action is considered as an UN's decision/action. They are not individually recruited by the UN (as e.g. UN staff members of the Secretariat). Representatives of the states act on behalf of their states and jointly on behalf of the organ which they compose. National contingents are supposed to act on behalf of the UN alone, but being selected and provided by sending states to carry out particular mandate they in fact represent their national states which still participate as a TCC in the discussions of the PSO's mandate and details of deployment. The fact that the TCCs reserve their powers on discipline, jurisdiction, promotion and payment for the members of their national contingents (see next subsection for details), confirms the suggestion that their status is more similar to the status of representatives of MSs than to the UN officials.

The UN is responsible for the conduct of its organs, including those composed by member states representatives. It will be responsible for the decisions/actions, taken jointly by the states representatives, rather than for the actions or words of each representative (unlike for the individual acts of its officials). The same is true for the PSOs. The UN is responsible for the actions of the PSFs in general, for their particular operation or any directions issued by the UNFC in carrying out this mandate. However, all the acts of each member of national contingent cannot be indiscriminately attributed to the UN based on the sole claim that PSOs are a subsidiary organ of the UN.

²³⁶ Note by Secretariat (2007), A/62/329, para. 56.

Even if the members of national contingents cannot be individually “organs” of the UN (and only jointly, acting as a PSO), they may still fall under the definition of “agents” of the organisation and their individual acts will be attributable to the UN under ARIO Article 6 in the same way as acts of “organs” of the UN.²³⁷ The members of national contingent may be considered persons who are “charged by the organisation with carrying out or helping to carry out, one of its functions.”²³⁸ As the ARIO Commentary to Article 6 specifically included in this category persons who act under the instructions/direction/control of the IO, members of PSFs acting under the instruction/directions of the UNFC can satisfy this criterion. There is also no requirement that “agents” must act solely on behalf of the organisation carrying out its functions. By that members of PSFs could be included in the category of UN’s “agents”.

The only characteristic that may distinguish them from this broad and all-encompassing category of IO’s “agents” is their continuous institutional link with their national state. As they are organs of their sending states and acting to some extent on their behalf, their acts may not be simply attributed to the UN under the rules of ARIO Article 6. It is so because the conduct of members of national contingents remaining organs of states can still be attributed to the state too and therefore states responsibility under ASR Article 4 can be invoked.²³⁹ Therefore either entity can be responsible not on the basis of attribution of overall conduct of members of national contingents, but on the basis of each particular act over which the state or the UN exercised actual control. For this purpose the attribution of

²³⁷ ARIO Commentary to Article 6, para. 5, see also discussion above in Chapter II, Section 2(a).

²³⁸ ARIO Article 2(d).

²³⁹ See also Marko Milanović, “*Al-Skeini and Al-Jedda in Strasbourg*”, 23 *European Journal of International Law* 121 (2012), at 135, who considers that in PSOs “the default rule of attribution constitutes to apply: being organs of the same state the conduct of the troops will be attributable to the state under Article 4 [ASR].”

conduct of members of national contingents is assessed under ARIO Article 7 and not ARIO Article 6,²⁴⁰ as it was proposed by the UN Secretariat led by mostly political reasons.²⁴¹

B) Which entity has effective control over the acts of PSOs?

ARIO Article 7 deals with situations where a state organ placed at the disposal of the IO, and attributes the conduct to the IO if it exercises effective control over particular acts of that organ. As the ARIO Commentary explains, this article does not concern the issue whether certain conduct is attributable at all to a state or IO, but rather to which entity it is attributable.²⁴² A special status of PSFs in the UN system fits to such kind of situation. Their conduct will be attributable to either entity (state/UN) anyway, because they are a state organ and at the disposal of the IO (thus, having institutional links with both entities), however the main issue is to which entity the conduct is attributable and the effective control will play a principal role in this regard,²⁴³ because the lent organ (national contingent) is not fully seconded to the UN and still acts to a certain extent as a state organ.²⁴⁴

i) Variations of “effective control” test

The UN accepts that the TCCs retain disciplinary powers and exclusive criminal jurisdiction over the members of national contingents,²⁴⁵ considering them as under the “residual control” of TCCs, and claims that it still has “exclusive command and control” over

²⁴⁰ See, for instance, the opinion of the ILC Drafting committee in the ARIO Draft Commentary to Article 7[6], para. 1; see also ARIO Commentary, Art. 6, para. 6. See also Marten Zwanenburg (2005), at 127, who considers that it is appropriate to apply ARIO Article 7 to the specific case of PSOs, as it reflects the plurality of legal persons involved, because by contrast to the UN officials, the contingents in the PSOs continue to have a functional connection with their state of nationality. See also *Nuhanović* case (Supreme Court); *Mustafić* case (Supreme Court), para. 3.10.2. See also Marko Milanović (2012), at 135.

²⁴¹ See UN Secretariat submission (2011), at 13, para. 3; at 14, para. 6.

²⁴² ARIO Commentary to Article 7, para. 5.

²⁴³ See also *Mustafić* case, para. 5.8-5.9.

²⁴⁴ ARIO Commentary to Article 7, para. 1.

²⁴⁵ See also, Model SOFA, A/45/594, para. 47(b).

PSOs.²⁴⁶ It also undertakes to be liable towards third parties for the conduct of peacekeepers, but if the damage was caused by gross negligence or wilful misconduct of peacekeepers, TCCs will be liable.²⁴⁷ However, the agreements between the UN and TCCs providing such provisions are considered by the ARIO Drafting Committee dealing with the distribution of responsibility, which is separate issue from the attribution of conduct to either entity under ARIO Article 7.²⁴⁸

The UN Secretariat understands “effective control” as tied to the notion of “operational control”. The UN assumes responsibility over the conduct of forces in the operations where it exercises effective command and control and it insists to have such control over PSOs.²⁴⁹ When it does not have operational control (e.g. over UNSC-authorized operations under national or regional command and control), it does not take responsibility for the conduct of the forces.²⁵⁰ Some commentators consider that the amount of operational control exercised by the UN is the better criterion to determine the responsibility of entities for the conduct of UN PSOs and the UN is responsible if it in fact possesses such control.²⁵¹

However, such interpretation of the “control” test for the attribution of conduct of PSOs is not the only one. The ECtHR, for example, proposed different test of control, namely “ultimate authority and control” in *Behrami* and *Saramati* case.²⁵² The Court considered whether the TCCs may be responsible for the acts (unlawful detention) and omissions (failure

²⁴⁶ UN Secretariat submission (2011), at 14, para. 4; Report of the Secretary-General, Administrative and budgetary aspects of the financing of the United National peacekeeping operations: financing of the United Nations peacekeeping operations, A/51/389, 20 September 1996, paras. 17-18.

²⁴⁷ Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual), Chapter 9, Memorandum of Understanding, A/C.5/60/26, 11 January 2006 (“MoU”), Chapter 9, Article 9.

²⁴⁸ ARIO Commentary to Article 7, para. 3.

²⁴⁹ UN Secretariat submission (2011), at 13-14.

²⁵⁰ *Ibid*, at 10, 13; S-G Report (1996), A/51/389, para.17.

²⁵¹ See, *inter alia*, Borhan Amrallah, “The international responsibility of the United Nations for activities carried out by U.N. peace-keeping forces”, 32 *Revue Egyptienne de Droit International* 57 (1976), at 65, 66; Marten Zwanenburg, *Accountability of peace support operations* (Martinus Nijhoff, 2005), at 126.

²⁵² *Behrami v France*, Application No. 71412/01; *Saramati v France, Germany and Norway*, Application no. 78166/01, 2 May 2007.

to clear unexploded bombs) of UNMIK and KFOR. The Court held that these acts and omissions are in principle attributable to the UN. Coming to this conclusion, the Court introduced a new test of attribution. It stated that “the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated.”²⁵³ The Court accordingly found that the UNSC delegated to NATO the power to establish and the operational control of KFOR, retaining ultimate authority and control over it.²⁵⁴ As for UNMIK, the Court found that it was a “subsidiary organ of the UN, institutionally directly and fully answerable to the UNSC” and therefore its “inaction was, in principle, ‘attributable’ to the UN in the same sense.”²⁵⁵

Firstly, it should be noted that “ultimate authority and control” is completely different from “effective control”, as it is linked neither to direct control over a specific act, nor to operational command and control.²⁵⁶ What is striking in the ECtHR decision is that the Court completely ignored that effective control and command may play any role in the attribution of conduct to an entity. It found that NATO had effective command of the relevant operational matters over the KFOR.²⁵⁷ However, it attributed the conduct to the UN on the basis of the “ultimate authority and control” test that appeared to be more important than even “effective command”, as the Court did not mention that the conduct might be attributable to NATO.²⁵⁸ The Court constructed this test on the basis that the UNSC delegated its powers to the MSs and relevant IOs and it received the reports from KFOR.²⁵⁹

²⁵³ *Ibid*, para. 133.

²⁵⁴ *Ibid*, para. 135.

²⁵⁵ *Ibid*, paras. 142-143.

²⁵⁶ Kjetil Mujezinovic Larsen (2008), at 522.

²⁵⁷ *Behrami* case, para. 140.

²⁵⁸ *Ibid*, paras. 140-141.

²⁵⁹ See *Ibid*, para. 134.

However, the question of attribution of conduct is not a question of institutional law of the UN, but of law of international responsibility.²⁶⁰ More direct links of the KFOR command with the MSs and relevant IOs were not even considered by the Court.²⁶¹ The possibility of dual attribution of the conduct to the UN and NATO was not considered either.²⁶² The Court did not take into account that the KFOR troops were directly answerable to their national commanders and fell under their national state exclusive disciplinary, civil and criminal jurisdiction.²⁶³ The exchange of the “effective control” test with the “ultimate authority and control” test would expand UN responsibility to a wide range of conduct which even slightly associated with its organs and spread impunity for the conduct of states under the cover of the UN immunities.²⁶⁴

An example of the possible implications and development of the *Behrami* approach was demonstrated in the *Al-Jedda* case, where the House of Lords had to decide, *inter alia*, on the validity of the Secretary of State’s argument that by analogy with the attribution of the conduct of KFOR to the UN in the *Behrami* case, the actions of multinational forces in Iraq should be attributed to the UN and not to the UK. The House of Lords, however, did not find the *Behrami* case applicable to the situation in Iraq. Lord Bingham, in his lead opinion, considered that in UNSC resolution 1511 on Iraq “the [UNSC] was not delegating its power by empowering the UK to exercise its functions but was authorising the UK to carry out

²⁶⁰ Aurel Sari (2008), at 164.

²⁶¹ See also the ARIIO Commentary to Article 7, para. 10, where the Drafting Committee stated that “when applying the criterion of effective control, ‘operational’ control would seem more significant than ‘ultimate’ control, since the latter hardly implies a role in the act in question.”

²⁶² See also Aurel Sari (2008), at 159, who points out that the attributability of the acts and omissions to the UN does not exclude the possibility that the same conduct may also be attributable to the states and may engage their international responsibility.

²⁶³ Marko Milanović, Tatjana Papić, “As bad as it gets: the European Court of Human Rights’s *Behrami and Saramati* decision and general international law”, 58 *International & Comparative Law Quarterly* 267 (2009), at 286.

²⁶⁴ In this regard Starmer points out that the case might undermine the accountability of troops operating abroad under international human rights law and that “such political accountability as there may be for the [UN] through the [UNSC] is not substitute for legal accountability under international human rights law.” (see Starmer, Keir, “Responsibility for troops abroad: UN mandated forces and issues of human rights accountability”, 3 *European Human Rights Law Review* 318 (2008), at 328-329).

functions it could not perform itself.”²⁶⁵ The only similarity between two situations was a duty to report to the UNSC, but to the Lord Bingham’s opinion, this cannot lead to the conclusion that the UN exercised effective command and control over multinational forces.²⁶⁶ Without challenging the validity of the ECtHR’s reasoning in the *Behrami* case, the House of Lords distinguished the *Behrami* case from the *Al-Jedda* situation and did not spread the *Behrami* “immunity” any further.²⁶⁷

This case was further considered by the ECtHR in *Al-Jedda v UK*. Firstly, the Court recognised that where the conduct is attributed to the UN, it does not mean that it will not be attributed to the state, as this attribution in such situations is not excluded.²⁶⁸ It is very significant because the Court literally accepted the existence of dual or multiple attribution of the same conduct of the forces both to the UN and the state.²⁶⁹

The Court also confirmed the House of Lords’ findings concerning the attribution of the conduct to the UK government and also distinguished *Al-Jedda* from *Behrami*.²⁷⁰ It found that the UNSC had “neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the [UN].”²⁷¹ The Court concluded that as the detention took

²⁶⁵ *Regina (Al-Jedda) v Secretary of State for Defence (Justice and another intervening)* [2007] UKHL 58 (“*Al-Jedda* (House of Lords case)”, para. 23.

²⁶⁶ *Ibid*, para. 24.

²⁶⁷ Milanović and Papić, however, consider that “*Behrami* cannot really be distinguished from *Al-Jedda*, [as] in reality [...] KFOR troops are under no more UN control than are the coalition troops in Iraq, [and] in distinguishing *Behrami* the House of Lords avoided telling their fellow judges in Strasbourg they got it wrong.” See Marko Milanović, Tatjana Papić (2009), at 291-292.

²⁶⁸ It was stated in the *Al-Jedda* case (para. 80) that “the 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.”

²⁶⁹ See Marko Milanović (2012), at 136.

²⁷⁰ *Al-Jedda v the United Kingdom*, Application No. 27021/08, 7 July 2011, para. 83.

²⁷¹ *Ibid*, para. 84.

place within a detention facility, controlled exclusively by British forces, and therefore within the authority and control of the UK, the applicant's internment was attributable to the UK.²⁷²

Although the ECtHR denoted the limits of the “ultimate authority and control” test, envisaged in *Behrami*, such an interpretation of the “control” test diverges from the UN position and practice not to assume responsibility for the operations over which it does not have any operational control.²⁷³ While the “ultimate authority and control” test clearly extends the responsibility of the UN too far over the conduct of operations it can hardly influence, it is not so evident whether the “effective command and control” test proposed by the UN Secretariat and distinguishing only between the UN-led and UN-authorized operations would fairly reflect its real control over the conduct of PSFs.²⁷⁴

ii) Essence of “effective control” test

It often happens that the national contingent commanders seek advice and instructions from their TCCs and may disobey the orders of the UNFC.²⁷⁵ The TCCs sometimes try to interfere with the control by the UN Commander which results in the lack of effective command authority over the national contingents.²⁷⁶ In such a case it is difficult to talk about exclusive command and control or effective operational control of the UN over such PSO,

²⁷² *Ibid*, paras. 85-86.

²⁷³ See, for instance, UN Secretariat submission (2011), at 12, paras. 9-10; at 10, para. 2. In para. 9, the UN Secretariat stated that in attributing to the UN acts of the KFOR conducted under regional command and control, “solely on the grounds that the Security Council had ‘delegated’ its powers to the said operation and had ‘ultimate authority and control’ over it, the Court disregarded the test of ‘effective command and control’ which for over six decades has guided the United Nations and member states in matters of attribution.”

²⁷⁴ Moreover, now the UN seems to claim only operational control over PKO, and not operational command and control. See United Nations, Department of Peacekeeping Operations, Department of Field Support, United Nations Peacekeeping Operations Principles and Guidelines, “Capstone Doctrine” (2008), which states that the MS military personnel are placed under the “operational control” of the UNFC, but not under UN “command”, at 68. See also Christopher Leck (2009), at 352-353.

²⁷⁵ See, *inter alia*, Margaret Harrell, Robert Howe, “Military issues in multinational operations”, in Daniel, Donald, Hayes, Bradd, *Beyond traditional peacekeeping* (Macmillan, 1995), at 196-197; Agostinho Zacarias, *The United Nations and international peacekeeping* (Tauris Academic Studies, 1996), at 158; Ray Murphy, *UN peacekeeping in Lebanon, Somalia and Kosovo: operational and legal issues in practice* (Cambridge University Press, 2007), at 124-125.

²⁷⁶ Stuart Gordon, F. H Toase, *Aspects of peacekeeping* (Frank Cass, 2001), at 30-31.

even though it was formally led by the UN.²⁷⁷ In this case the national contingent may in fact act on behalf of the national state, which leads to the attribution of the PSO's conduct to the TCC on the basis of ASR Article 4.²⁷⁸ Depending on the role left to the UN in the exercise or supervision of that conduct, the degree of control of TCCs over a national contingents, it is possible to envisage dual or joint control of the UN and TCC and attribution of PSO's conduct to both.²⁷⁹

Given differences between the UN and TCC's degree of potential control over PSOs, the ARIO Commentary, considers that "while it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion."²⁸⁰ Therefore the analysis of factual situations where the UN has in fact exercised operational control over particular part of the operation and whether the UNFC's orders were obeyed by the national contingents is consider to be a better indicator as to whether the UN for the purposes of international responsibility can claim that it exercised effective control and responsible for the conduct of particular operation.

Even if the UN exercised effective operational control over PSFs, it does not mean that it had effective control over particular conduct of individual members of forces. It is also accepted by some academics that it is necessary to adopt case-by-case approach and each

²⁷⁷ See also Cortés Martín (2008), at 198.

²⁷⁸ Marten Zwanenburg (2005), at 128.

²⁷⁹ See also Christopher Leck (2009), at 359-360, who further explains that if the TCC consented to the instructions of the UNFC which led to the wrongful act, it may be responsible for concurrence in this act and failure to prevent it (if it could do so), whereas the UN would be responsible as the "originator" of the instructions. The Dutch courts also concluded that the dual control of the UN and TCC is not excluded: see *Nuhanović* (Court of Appeal) case, para. 5.9; *Mustafić* (Court of Appeal) case, para. 5.9; *Nuhanović* case (Supreme Court); *Mustafić* case (Supreme Court), para. 3.11.2.

²⁸⁰ ARIO Commentary to Article 7, para. 9. See also Cortés Martín (2008), at 199. See also *Nuhanović* case (Supreme Court); *Mustafić* case (Supreme Court), para. 3.11.3.

individual case must be examined separately to identify whether specific wrongful act was performed under the control of the IO or the TCC.²⁸¹

Although the UN normally claims to have “operational control” over national contingents, it does not have “full command and control” over the troops,²⁸² which rests in the hands of TCCs according to the national law governing armed forces of the state.²⁸³ The UN, exercising operational control, has the authority to issue operational directives within specific mandate, time and location, deploy units concerned, retains tactical control, but the powers in discipline and promotion of members of national contingents rest with TCCs.²⁸⁴ Full command involves military authority and responsibility of a superior officer to issue orders to subordinates, covering every aspect of military operations and administration and exists only within national services.²⁸⁵ Usually, in multinational operations, the TCCs are represented by a national commander who is responsible for ensuring that full command is exercised and the national laws and policies are observed.²⁸⁶

The UNFC, exercising “operational control” over the PSFs, is responsible for the conduct of the operation, but not for the conduct of individual members of national contingents. He lacks the most effective means to enforce his orders – disciplinary powers and prosecution, which rests with TCCs.²⁸⁷ The TCCs acting through the national contingent commanders are responsible for the executions of the UNFC’s orders, for administration of

²⁸¹ Moshe Hirsch (1995), at 65.

²⁸² See Report of the Secretary-General, Command and control of United Nations peace-keeping operations, A/49/681, 21 November 1994, para. 6.

²⁸³ Ray Murphy (2007), at 118. See also *Mothers of Srebrenica* case (The Hague District Court), paras. 2.40-2.41.

²⁸⁴ See S-G report, A/49/681, para. 6; Ray Murphy (2007), at 118; *Mothers of Srebrenica* case (The Hague District Court), para. 2.41.

²⁸⁵ Ray Murphy (2007), at 117.

²⁸⁶ *Ibid*, at 118.

²⁸⁷ Ulf Häußler, “Command responsibility in combined environments: putting combined operations. Legal lessons learned into perspective”, 44 *Military Law and the Law of War Review* 143 (2005), at 152.

national contingents,²⁸⁸ discipline of troops, for their payment and promotion and exercise of criminal jurisdiction over the acts committed by members of national contingents. The factual control over troops may be divided between the UNFC and national commanders.²⁸⁹ This situation may contribute to inability of the UN to exercise effective control over the troops and ensure that the law is respected by them because of the UN's lack of direct control over discipline and execution of orders by members of national contingent.²⁹⁰ The question is whether the UNFC's operational control is sufficient to represent "effective control" for the purposes of attribution under ARIO Article 7.

The ARIO Commentary to Article 7 provides some clues in this regard. The Commentary veiledly submits that the control the contributing state retains over disciplinary and criminal matters may have consequences for attribution of conduct.²⁹¹ It further continues with more certainty that "[a]ttribution of conduct to the [TCC] is clearly linked with the retention of some powers by that state over its national contingent and thus on the control that the state possesses in the relevant respect."²⁹² The Commentary does not say that the TCC will definitely have effective control over conduct of its national contingent, but leaves this matter to the factual situation.²⁹³

²⁸⁸ See Robert Kolb, Gabriele Porretto, Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales, Forces de paix et administrations civiles transitoires* (Bruylant, 2005), at 152.

²⁸⁹ Ibid, at 152.

²⁹⁰ See Ibid, at 164. See also Christopher Leck (2009), at 363, who notes that "effective control only has 'teeth' and is realistic when the entity exercising effective control has the real authority and means to exercise it" and "the UN has no real authority or means to control peacekeepers, absent the TCC's concurrence." He further states that if the responsibility is attributed to the UN alone, it may encourage more reckless and negligent behaviour on the part of the TCC, since they may not bear responsibility for the wrongful conduct of its peacekeepers.

²⁹¹ ARIO Commentary to Article 7, para. 7.

²⁹² Ibid.

²⁹³ Ibid, paras. 4, 9.

It is crucial that TCCs retain disciplinary powers and criminal jurisdiction over their national contingents. More so when TCCs fail to prosecute offenders or discipline them.²⁹⁴ Consequently, the peacekeepers get sense of impunity for any crimes committed during PSOs.²⁹⁵ These powers serve as the means that the entities normally use to prevent wrongful acts.²⁹⁶ All these powers are in the hands of states and national contingent commanders but not of the UNFC, who is only able to report about any misconduct to the UN Headquarters and take only administrative measures (to repatriate the wrongdoer), but any disciplinary and prosecutorial measure rest solely with TCCs.²⁹⁷

However the UNFC will be able to prevent wrongful acts committed as part of an operation by issuing the correct orders and directions to the forces under his operational command. Depending on wrongful acts committed by members of national contingents and the circumstances of their commission, the UNFC and national contingent commanders may have material ability to prevent such wrongful acts from occurring and therefore may exercise effective control over the conduct of members of forces. In this way the UN and TCCs may be able to exercise effective control over particular acts through their organs and officials (UNFC, national contingent commanders).²⁹⁸

Accordingly, one should distinguish between effective control over particular operation and effective control over particular conduct. Special Rapporteur Gaja suggests that

²⁹⁴ See, for example, Maogoto, Jackson Nyamuya, "Watching the watchdogs: holding the UN accountable for violations of international humanitarian law by the 'Blue Helmets'", 5 *Deakin Law Review* 47 (2000), at 55-57; Muna Ndulo, "The United Nations responses to the sexual abuse and exploitation of women and girls by peacekeepers during peacekeeping missions", 27 *Berkeley Journal of International Law* 127 (2009), at 152; Report of Prince Zeid Ra'ad Zeid Al-Husseini, A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations, A/59/710, 24 March 2005, para. 67.

²⁹⁵ See, for example, Muna Ndulo (2009), at 144-145; Shotton, Anna, "A strategy to address sexual exploitation and abuse by United Nations peacekeeping personnel", 39 *Cornell International Law Journal* 97 (2006), at 103; Prince Zeid's report, para. 66.

²⁹⁶ See also *Nuhanović* (Court of Appeal) case, para. 5.9; *Mustafić* (Court of Appeal) case, para. 5.9.

²⁹⁷ Prince Zeid's report, paras. 19, A.35.

²⁹⁸ See, also Tom Dannenbaum (2010), at 157, who considers that the effective control depends on the ability of either entity to prevent the wrongful conduct from occurrence.

“while in principle the conduct of the [UN peacekeeping] force should be attributed to the [UN], effective control of a particular conduct may belong to the [TCC] rather than to the [UN].”²⁹⁹ The ILC Commentary can also be interpreted as making the “effective control” test applicable not to overall conduct of PSF but to each wrongful act for its attribution to IO or the state.³⁰⁰

The UN’s claim that it exercises effective command and control over particular operation may be perfectly true and relevant, but it does not mean that it will exercise effective control over particular conduct and that conduct is attributed to it by the reason of effective operational control. What is important is whether particular wrongful act is inherent to or constitutes integral part of the PSO. If it is, the UNSC, the UN Secretary-General (“S-G”) or the UNFC in the field had material ability to prevent it and failed. Similarly to the attribution of conduct of private individuals to a state, envisaged by the ICJ in the *Genocide* case,³⁰¹ the attribution of the conduct to the UN is based on the wrongful actions/omissions of the UN organs or officials (wrongful instructions, orders or failure to issue them, or even specific nature of the PSO’s mandate).

However, if the nature of operation, instructions and orders given by the UN organs and operational control exercised by the UNFC were irrelevant to the acts committed by a member of national contingent, the question is whether the national contingent commander or other organs of the TCC had material ability to prevent such act, by better training of the national contingent, better controlling discipline or prosecuting for any criminal act committed by forces. If so, the TCC exercised effective control over particular wrongful act

²⁹⁹ Giorgio Gaja, Eighth report on responsibility of international organizations, ILC, 14 March 2011, A/CN.4/640, para. 34.

³⁰⁰ See Christopher Leck (2009), at 348.

³⁰¹ *Genocide* case, para. 397, where the ICJ held that the state will be responsible for the conduct of its own organs which gave the instructions or exercised effective control resulting in the commission of wrongful acts. See also discussion above in Chapter II, section 2.

and is responsible for it. Actions and omission of TCC's organs will be similarly relevant to establish such effective control and responsibility. The concurrent responsibility of the TCC and the UN is not excluded, if they both had ability to prevent the wrongful acts.

The UN, while insisting on having exclusive operational control over peacekeeping operations and accepting responsibility for its conduct as its subsidiary organ, does not want the TCCs to avoid their accountability for the misconduct of national contingents by shifting all responsibility to the UN. In order to address the paradoxical situation, the amendments to the Model Memorandum of Understanding (MoU) between the UN and TCC were introduced. These amendments included several provisions clearly stipulating the responsibility of the TCCs to carry out the retained powers for the prevention of misconduct of their troops.

The amended MoU provides that the TCCs are responsible to ensure that all members of national contingent comply with the UN standards of conduct,³⁰² that the national contingent commander receives adequate and effective predeployment training,³⁰³ that TCCs are primary responsible for investigating any acts of misconduct by members of national contingents,³⁰⁴ that TCCs must exercise jurisdiction in respect of any crimes or offences that might be committed by national contingents³⁰⁵ and exercise disciplinary jurisdiction with respect of all other acts of misconduct committed by the members.³⁰⁶

The amendments to the MoU provide for special responsibilities of the national contingent commanders. They are responsible for the discipline and good order of all members of contingents and must have authority and take necessary measures and to inform

³⁰² Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, Annex, Revised draft model memorandum of understanding, A/61/19 (Part III), 12 June 2007, ("Revised MoU"), Article 7bis (1).

³⁰³ Ibid, Article 7ter (3).

³⁰⁴ Ibid, Article 7quater.

³⁰⁵ Ibid, Article 7quinquiens (1).

³⁰⁶ Ibid, Article 7quinquiens (2).

the UNFC about any misconduct in his contingent.³⁰⁷ The amendments to the MoU envisaged the responsibility of the national contingent commanders for the failure to cooperate with a UN investigation of misconduct, for the failure to report to appropriate authorities or take action in respect of allegations of misconduct and failure to exercise effective command and control.³⁰⁸ Despite that, the revised MoU does not provide any clear enforcement tools for accountability of the contingent commanders and lacks adequate sanctions for TCCs or individual members.³⁰⁹ Even without providing such sanctions, the revised MoU may serve as basis for holding TCCs responsible, if they fail to prosecute or discipline members of their contingents.³¹⁰

Interestingly, the UN included in the revised MoU the responsibility of national contingent commanders to exercise effective command and control over their contingent.³¹¹ This provision confirms that the state through its contingent commander exercises effective command and control over members of national contingents, while the UN itself claims to have exclusive operational control over PSOs.³¹² The distinction that the UN draws between the acts of members of national contingents involving gross negligence and wilful misconduct and other acts of mere negligence for the purposes of distribution of responsibility also shows that TCCs are responsible for the acts which they were able to prevent by exercising exclusive criminal and disciplinary jurisdiction over their national contingent.³¹³

The approach distinguishing between the acts inherent to the particular operation over which the UN exercises effective control and other acts that can fall under state's effective command and control coincides with the UN practice in this regard. It is also in line with the

³⁰⁷ Ibid, Article 7ter (1), (2).

³⁰⁸ Ibid, Article 7sexiens (2).

³⁰⁹ Odello, Marco, "Tackling criminal acts in peacekeeping operations: the accountability of peacekeepers", 15 *Journal of Conflict & Security Law* 347 (2010), at 359.

³¹⁰ Christopher Leck (2009), at 352.

³¹¹ See Revised MoU Article 7sexiens (2).

³¹² See, for example, UN Secretariat submission (2011), at 14, para. 4.

³¹³ See MoU, Chapter 9, Article 9, see also S-G report, A/51/389, paras. 42-44.

overall position expressed in the ARIO Commentary insisting on factual criterion of effective control and giving more consideration to the TCCs' powers of discipline and jurisdiction over members of national contingent. It remains to be seen which particular acts may be attributed to the state under its effective control or to the UN under its effective operational control.

C) Which entity is can become responsible for ultra vires acts of the PSO?

ASR Article 7 attributes *ultra vires* conduct of state organs to states. Similarly ARIO Article 8 refers to the IOs' responsibility for *ultra vires* conduct of their organs/agents if they act within overall functions of the IO. The dual institutional link of PSOs with the UN and TCCs poses a problem of attribution of their *ultra vires* acts to either entity.

As discussed before, PSOs as a whole are considered UN organs for the purposes of ARIO Article 6 and ARIO Article 8. Its *ultra vires* conduct is attributable to the UN. However the conduct of individual national contingent and its members is governed by ARIO Article 7, to which ARIO Article 8 does not refer.³¹⁴ The question is under which circumstances *ultra vires* acts of PSOs may be attributed to the UN or TCCs.

Several situations can be considered. The first situation may exist where a PSO acts as a whole beyond its mandate. This may involve *ultra vires* or unclear instructions/orders of the UNFC or UNSC or S-G. For example, the instructions to detain all suspicious people resulted in unlawful detention of civilians, or the UNFC failed to issue specific order/directions to the PSFs and they acts according their own understanding of the mandate. The *ultra vires* acts of the PSO will be attributable to the UN as *ultra vires* acts of either organ of the UN (UNFC's acts or the PSO's acts).³¹⁵

³¹⁴ See the discussion on this issue in Chapter II, Section 3.

³¹⁵ However, the Dannenbaun considers that one should distinguish between manifestly unlawful orders (which may attract responsibility of the state for contingent's failure to disobey and of the UN for unlawful orders) and

The second situation may exist where the orders of the UNFC were lawful and according to the mandate, but their implementation by some national contingents involved *ultra vires* wrongful acts. For example, an order to find out specific information from a particular person resulted in maltreatment of this person during the interrogation. If the acts are form an integral part of the operation, the situation falls within ARIO Article 7 and the notion of effective control becomes crucial. If the UNFC exercises effective operational control and is able to prevent wrongful acts, such *ultra vires* acts are attributable to the UN. However it cannot automatically exclude the state responsibility for those acts, because the national contingent still remains a state organ and therefore ASR Article 7 may be applicable.

The issue of concurrent state responsibility for *ultra vires* acts of its national contingent still arises especially if it had powers to prevent the wrongful acts from occurring.³¹⁶ This possibility was also considered by the Dutch District Court in the *Mothers of Srebreniča* case, which held that because TCCs retain disciplinary and training powers over their contingents, *ultra vires* acts beyond their UN mandate can be attributed to them as they can take measures to counter *ultra vires* acts³¹⁷ (i.e. they can prevent those acts). If the state had just some powers to prevent such act (e.g. provide better trained forces), it may be

“forced omission” where the UN did not give the contingent the capacity to act and therefore it alone should bear the responsibility. See Tom Dannenbaum (2010), at 175-183.

³¹⁶ See Tom Dannenbaum (2010), at 169-170, considering the in similar situations both the UN and the TCC should be responsible.

³¹⁷ See *Mothers of Srebrenica* case (District Court), paras. 4.57-4.58, which stated that:

4.57. If a military force’s command and control over operational implementation of the mandate is transferred to the UN and said military force then goes on to act beyond the authority given it by the UN or on its own initiative acts against the instructions of the UN [...], [s]uch action is attributable to the State supplying the troops because the State has a say over the mechanisms underlying said *ultra vires* actions, selection, training and the preparations for the mission of the troops placed at the disposal of the UN. Moreover the State supplying the troops has it in its powers to take measures to counter *ultra vires* actions on the part of its troops given the fact that it has a say about personal matters and disciplinary punishments.

4.58. In order to attribute *ultra vires* actions to the State supplying the troops there is no requirement for said state to give any instruction or order relating to *ultra vires* action or that this specifically influences the case in some other way. What is decisive is that the State delivering the troops retains the powers it has after transfer of command and control to the UN as well as the relevant say in respect of and with it effective control over self-willed powers acting beyond the powers the UN has granted or against the instructions of the UN concerning the actions of troops put at the UN’s disposal.

responsible for its aid and assistance to the IO in the wrongful act under ARIO Article 58 (upon the fulfilment of other requirements).³¹⁸

The third situation is where the wrongful acts of national contingents cannot be considered as integral part of a particular operation, nevertheless they happened during PSO. For example, if looting of civilian houses or unlawful killings by a contingent was done during PSO, the question is whether they can be considered *ultra vires* acts for the purposes of either ARIO Article 8 or ASR Article 7 and if so, which entity is responsible for this conduct.

A requirement of both articles is that an organ/agent acts in its official capacity. As previously discussed, an organ must act within its apparent authority or use powers or means placed by the entity at its disposal and “within the overall functions of the organisation”.³¹⁹

If the members of national contingent commit looting or unlawful killings, it is difficult to consider them acting within the UN’s apparent authority or their TCC. However they may use the powers or means given by the TCC and/or the UN by conducting these acts: they may use arms and their power as a military force to carry out such acts. As for considering such conduct as *ultra vires* acts of the UN, it is very doubtful that unlawful killings or looting may be regarded “within the overall functions” of the UN. While clearly, the latter criterion may prevent the attribution of acts to the UN, these acts may also go beyond effective operational control of the UN over the PSO. The UNFC (or other UN organs) may not have any means to prevent such conduct. Any measures that can be employed are held by the TCCs and national contingent commanders, namely, any disciplinary sanctions, criminal jurisdiction and prosecution, adequate training. Therefore the TCCs would exercise

³¹⁸ Consider, for example, the situation where Bulgarian authorities included convicts in their contingent. See Tom Dannenbaum (2010), at 163 in this regard. See also William Branigin, Tarnishing UN’s Image in Cambodia, Washington Post, October, 29, 1993, at A33.

³¹⁹ See discussion in Chapter II, Section 1(c).

effective control over such conduct of its national contingent and the conduct may be attributed to them, but everything depends on particular facts of each case.³²⁰

The fourth scenario that may exist is where the members of national contingents commit wrongful acts outside the operation itself, whilst off-duty. There were many allegations of rape or other sexual crimes committed by peacekeepers. The main problem of attribution of these acts is that they may not be considered to be done by peacekeepers in their official capacity. While the UN may not have any effective control over such acts,³²¹ the states may have some. The ability to prevent by taking necessary sanctions is still relevant. Due to the specific command-subordinate structure of military forces, the national contingent commanders may have material ability to prevent such wrongful acts. The state may be considered responsible for even off-duty acts of the members of armed forces. This is especially true for the situation where a PSO participates in the armed conflict and IHL applies to them. Both Article 91 of Additional Protocol I to the Geneva Conventions (API) and Article 3 of Hague Convention IV provide that a party to the conflict “shall be responsible for all acts committed by persons forming part of its armed forces.” Under this provision the state may be responsible for all acts of its armed forces committed both in official and in private capacity and this rule can constitute a *lex specialis* to the general rule under ARS Article 7 (covering only official acts).³²² This is because the state exercises much stricter control over its soldiers than over other officials and during the wartime the soldiers are always on duty and never act in a purely private capacity (because as private persons, they

³²⁰ See also Tom Dannenbaum (2010), at 158, who also considers that the TCC in the better position to prevent such human rights violations from occurring and therefore should be responsible for them.

³²¹ The UN will not be responsible for the off-duty claims. See Robert Siekmann, *National contingents in United Nations peace-keeping forces* (Martinus Nijhoff, 1991), at 143.

³²² Sassòli, Marco, “State responsibility for violations of international humanitarian law”, 84 *International Review of the Red Cross* 401 (2002), at 405-406. See also Astrid Delissen, Gerard Tanja, Frits Kalshoven, *Humanitarian law of armed conflict: challenges ahead* (Martinus Nijhoff, 1991), at 837.

would never have entered into contact with enemy nationals or acted on enemy territory).³²³
The same is true for the peacekeepers.

Even if IHL does not apply to them because they do not participate in hostilities, the same principle may be applicable given that being on mission, they cannot be considered as acting in a purely private capacity. They are entrusted a mission to protect the civilian population or provide humanitarian support. If they commit a crime, they are still considered on mission and having a duty to fulfil their humanitarian role. But for being on mission, they would not come across with the local population in the role of protectors. Therefore their conduct at the PSO, even private, may be attributed to their TCCs.

Contrary to that, Zwanenburg argues that although the structure of armed forces provides better opportunity to prevent violations of international law than the structure of other state organs, this does not apply to PSOs because the UNFC the same disciplinary powers as national commanders.³²⁴ While it may be true that the UN lacking disciplinary powers should not be liable for off-duty acts of members of national contingents, it does not mean that their TCCs would not be liable either, as they have such powers and are in a better position to prevent wrongful acts through the military structure of their contingent still preserved after its integration in the UN forces. Moreover, the ASR Commentary to Article 7 states that the distinction between official and private conduct may be avoided if “the conduct complained of is systematic or recurrent, such that the state knew or ought to have known of it and should have taken steps to prevent it.”³²⁵ This may be exactly such a situation. The state through its national contingent commanders ought to have known about these crimes taking place and had ability to prevent it by taking disciplinary or criminal sanctions and providing adequate training.

³²³ Marco Sassòli (2002), at 406.

³²⁴ Marten Zwanenburg (2005), at 106-107.

³²⁵ ASR Commentary to Article 7, para. 8.

Conclusion

The present chapter has demonstrated that members of national contingents may be considered simultaneously as organs of their TCCs and the UN agents. Consequently, for the purposes of attribution their conduct will be covered by Article 7 ARIO. The criterion to identify whether the UN or TCCs must be responsible for the conduct in question is “effective control” over that conduct. The existence of “effective control” cannot be presumed by general “operational control” exercised by the UN over PSOs. The finding of this control must be done on factual basis. In each case, one needs to examine whether the UN or TCCs had “effective control” over particular conduct, which constitutes a breach of the UN or TCCs’ obligations. Both of them can also have effective control over the conduct. The determination of “effective control” depends on material ability of the UN or TCCs to prevent that conduct. This must be done on case-by-case basis. This “material ability to prevent” derives from the material ability of military commanders to prevent crimes committed by their subordinates. If the UNFC had such ability to prevent, the conduct must be attributed to the UN. If the national contingents’ commanders it, the conduct must be attributed to the TCC. If they both had it, the conduct can be attributed to both of them.

In majority of cases the TCCs have the ability to prevent wrongful acts and therefore exercise effective control over such conduct of their national forces. The UN, however, may still be responsible in the scope of its effective operational control over PSFs. It will also be responsible for the conduct of the PSO in general as it is considered to be a subsidiary organ of the UN. Where the wrongful acts are committed by members of national contingents, the state may be the only entity which has means at its disposal to prevent these acts and to punish the perpetrators and therefore it must be responsible for the conduct of its national contingent which remains a state organ.

III. United Nations and troop-contributing states' obligations under international humanitarian law during PSOs

1. Participation of PSO in armed conflicts

In order for the UN and TCCs to become responsible for the conduct of PSOs, in addition to the attribution of PSOs' conduct to the UN/TCCs, analysed in the previous chapter, the breach of international obligations by the UN/TCCs must be proved. Crimes committed by peacekeepers under certain circumstances can amount to a breach of IHL obligations by UN/TCCs. This chapter does not analyse various IHL obligations that states and IOs may have and customary status of each provisions of the Geneva Conventions ("GC") (it is beyond the scope of the thesis). It does not deal with particular breaches of IHL obligations by PSFs, as this would be done by a case-by-case analysis.¹ The aim of this chapter is to show that the UN and TCCs can be bound by IHL obligations and under what circumstances.

The chapter starts analysing the question whether IHL may in principle bind the UN/TCCs or both by virtue of PSFs' participation in armed conflicts. The next subsection discusses the circumstances under which IHL binds UN and TCCs, namely when there is an armed conflict and PSFs begin to participate in it. The second section discusses the scope of IHL obligations of the UN/TCCs. Three general problems are addressed: whether peacekeepers can be considered combatants or civilians, when the conflict they participate in becomes international or non-international, and whether the law of occupation can apply to PSOs.

¹ The example of such analysis will be provided on the basis of the particular case-studies in Chapter VI of the thesis.

A) *How can IHL bind UN and TCCs during PSOs?*

The first question is whether the UN and TCCs in principle can be bound by the GC. While obviously TCCs are bound by the GC by virtue of their ratification/accession,² it is not true for the UN, which is not the GC party. For the UN to be bound by the GC provisions (1) those provisions must be part of CIL; and (2) the UN must be bound by CIL.

Firstly, it is fair to say that the great majority of the GC provisions represent CIL.³ As ICJ stated in the *Nuclear Weapons* case (GA), “the extensive codification of [IHL] and the extent of the accession to the resultant treaties, [...] the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognised humanitarian principles.”⁴ In *Nicaragua*, the Court also considered that “the Geneva Conventions are in some respects a development, and in other respects no more than the expression”, of fundamental general principles of IHL.⁵ The Hague Regulations of 1907 (“HR”) are regarded as being declaratory of laws and customs of war.⁶

Secondly, as a subject of international law, the UN is bound by CIL, including the rules of customary IHL.⁷ In the *WHO and Egypt* case the ICJ stated that “the [IOs] are

² There are 194 parties to the GC at the present.

³ See also Jean-Marie Henckaerts, Louise Doswald-Beck, International Committee of the Red Cross, *Customary international humanitarian law: Volume 1, Rules* (Cambridge University Press, 2005), at xlv; *Legality of the threat of use of nuclear weapons*, Advisory Opinion, ICJ Reports, 8 July 1996 (requested by UN General Assembly), paras. 79, 82. See also Theodor Meron, “State Responsibility for Violations of Human Rights: Remarks”, 83 *American Society of International Law Proceedings* 372 (1989), at 45-46, who submits that most of the substantive provisions of GC I, II and III are based on earlier Geneva Conventions and thus have a strong claim to customary law status, unlike GCIV, which however repeats many of the Hague Regulations relating to the protection of civilians, that can provide the foundation for building the customary law content of the Convention. He states that all of the Conventions contain a core of principles that express customary law (at 46).

⁴ *Nuclear Weapons* case (GA), para. 82.

⁵ *Nicaragua* case, para. 218.

⁶ See International Military Tribunal at Nuremberg, *Case of the Major War Criminals*, Judgement, 2 October 1946, at 253-254.

⁷ See also Marten Zwanenburg (2005), at 151-153 for discussion; see also Rachel Opie, “United Nations’ responsibility for United Nations-mandated peace operations: a necessary contribution to the efficacy of

subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.”⁸ This conclusion is also supported by the academic opinion.⁹ Therefore most of the provisions of the GC are binding upon the UN due to their customary status. Having found the TCCs and UN to be bound by the GC, the next issue is when these obligations arise.

There are three situations when such obligations apply: (1) armed conflicts between two or more High Contracting Parties (GC Common Article 2) (“CA2”); (2) armed conflicts between a contracting party and a Power, not a party to the GC, but which accepts and applies their provisions; (3) armed conflicts not of an international character occurring in the territory of one of the contracting parties, to all the parties to the conflict (Common Article 3) (“CA3”). Regarding first and second situations, because of the fact that most of the GC provisions are part of CIL binding upon non-parties to the GC, there is no distinction between High Contracting Parties and Powers which are parties to an armed conflict in relation to the binding nature of the GC provisions forming part of CIL.

Common elements of three situations are 1) the existence of the armed conflict and 2) Party’s/Power’s participation in it. Therefore for IHL to apply during PSOs there must be an armed conflict on a particular territory and PSFs must participate in it. It should be further

international humanitarian law”, *New Zealand Armed Forces Law Review* 18 (2003), at 24; Dietrich Schindler (1984), at 526.

⁸ *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ, 20 December 1980, para. 37.

⁹ Greenwood is of the opinion that “the [UN] is subject of customary [IHL], even if it is not bound by the IHL treaties, to the extent that it engages in armed conflict” (Christopher Greenwood, “International humanitarian law and United Nations military operations”, 1 *Yearbook of International Humanitarian Law* 3 (1998), at 16). Bowett also submits that “while the activities of United Nations forces created for peace-keeping operations are initially not belligerent in nature, the military actions taken by them in self-defence or in the general execution of their mandate” will be regulated by the laws of armed conflict (Derek William Bowett, *United Nations forces: a legal study of United Nations practice*. (Stevens, 1964), at 503). Kelly comes to the same conclusion in a different way suggesting that as the PSFs consist of various national contingents, who do not lose their link with the TCCs, they bring to the UN operation all the applicable international treaties which are binding to their national governments, especially due to the fact that disciplinary functions remain with the contingent commander only (Kelly, Michael, *Restoring and maintaining order in complex peace operations: the search for a legal framework* (Kluwer Law International, 1999), at 177).

analysed how PSFs' participation in the armed conflict can be qualified. Although neither GC, nor their Additional Protocols 1977 ("APs") provide for rules concerning PSOs directly,¹⁰ it is possible to apply those provisions to the specific situation of PSOs.

Notably, PSFs cannot become a "party to the conflict" in the meaning of CA3. Although CA3 states that not only states or "powers" but also non-state actors can become a party to the conflict, unlike other organised groups, PSFs do not act on their own behalf, pursuing their own political or any other goals.¹¹ A PSF is not a separate entity, but a subsidiary organ of the UN mandated to maintain peace in the host state. It consists of national contingents delegated by TCCs to serve for the UN and these contingents do not lose their national identity and remain in the TCC's military service.¹² Its unique nature and structure do not separate them from TCC/UN. Accordingly, they cannot be considered as a separate party to the conflict and their participation in it should be analysed in conjunction with the TCCs/UN. Therefore the analysis of applicability of IHL to PSOs under CA3 is problematic.

The next question is whether the UN or TCCs may become party/parties to an armed conflict which the PSFs appeared involved in the scope of CA2. For that, it should be discussed whether the UN can be considered "Power" for the purposes of CA2 (as all TCCs are already contracting parties).

Although CA2 does not clarify whether other entities (not only states) can be "Powers", the choice of the word "Powers" instead of "states" does not exclude any other

¹⁰ See Anne Ryniker, «Respect du droit international humanitaire par les forces des Nations Unies: quelques commentaires a propos de la Circulaire du Secetaire general des Nations Unies du 6 aout 1999», 81 *Revue internationale de la Croix-Rouge* 795 (1999), at 796

¹¹ As Glick points out, "[t]he term 'party to the armed conflict' is deemed to encompass any *de facto* authority exercising command and control over military forces." (Glick, Richard D., "Lip service to the laws of war: humanitarian law and United Nations armed forces", 17 *Michigan Journal of International Law* 53 (1995-1996), at 74).

¹² In this sense Opie points out that "the contributing states retain responsibilities as prescribed in their national laws and international obligations, and it is that law which is applicable to each contingent." Rachel Opie (2003), at 25.

subject of international law, such as IOs, from becoming a party to conflict.¹³ The fact that API extended the application of CA2 to armed conflicts involving national liberation movements (even though PSFs does not fall under this category), may be indicative to the possibility of interpretation of the word “Power” to include not only states but also non-state entities (as pre-existing subjects of international law).¹⁴ The UN, having legal personality and being subject of international law, can also be considered a “Power” in the meaning of CA2.¹⁵ If it becomes involved in an armed conflict with state forces, such conflict must be of no less international character than those where national liberation movements participate.¹⁶

Moreover, the UN accepts the application of the GC provisions to the PSOs (or at least some of them) within the meaning of GC CA2(3). It follows from the following. The UN included in the model agreement between the UN and TCCs a provision that “[PSOs] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel”, including GC.¹⁷ The S-G’s Bulletin also

¹³ See, for instance, Commentary to Article 43(1) of API, para. 1661, which provides in the discussion of whether an entity (not a state) may be a “Power” or a “Party to an armed conflict” in the meaning of CA2(3) GC and Article 1(4) API, that it is not “out of the question that the United Nations could be a “Party to an armed conflict” in the material sense, although the problem of the accession of the UN to the GC and the Protocol remains a delicate question which has not yet been resolved.” See also Marten Zwanenburg (2005), at 136; see also Claude Pilloud, Yves Sandoz, Christophe Swinarski, Bruno Zimmerman, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross: Martinus Nijhoff, 1987), at 507.

¹⁴ Claude Pilloud (1987), at 507; Commentary to API, Article 1(4), para. 90.

¹⁵ Finn Seyersted, , *United Nations forces in the law of peace and war* (A. W. Sijthoff, 1966), at 350, 201, see also Edward Kwakwa, *The international law of armed conflict: personal and material fields of application* (Kluwer Academic Publishers, 1992). Kelly also suggests that the term “Power” could be argued to encompass UN forces as a “military power”, party to a conflict, or occupying power, because the UN’s capacity to deploy force and engage in conflict or occupy territory brings it within the scope of the GC and AP as potential adherent (Michael Kelly (1999), at 175).

¹⁶ As Seyersted submits, it would be contrary to the purpose of the GC, if the GC “were considered to be inapplicable to armed conflicts of an international character, because one of the parties, although a subject of international law, was not a state. Such conflicts could not be allowed to fall between two stools because they are neither internal nor between states” (Finn Seyersted (1966), at 350). Moreover, the fact of participation in the conflict of another subject of international law may exclude the conflict from qualifying as purely “internal” one. See discussion of international/non-international armed conflicts in the next section of this chapter.

¹⁷ Report of the Secretary-General, Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, Comprehensive review of the whole question of peace-keeping operations in all their aspects, 23 May 1991, A/46/185, para. 28.

confirms that IHL norms (at least those mentioned in it) are applicable to the UN PSOs.¹⁸ Although the UN's acceptance of the GC does not mean that it is bound by them not being a contracting party, CA2 requires other contracting parties to be bound by the GC in relation to PSOs and therefore IHL applies between them.

Thus, the UN can be considered a "Power" in the meaning of CA2 and can become a "party" to the conflict to which most of the GC provisions having customary status apply.

However, for the UN/TCCs to become a party to the conflict, for the purposes of IHL, they must be considered participating in the conflict. Although it may sound obvious, it should be established that the PSFs participating in the armed conflict "belong to" the UN/TCC for the purposes of IHL. This analysis is separate from the one in the previous chapter on the attribution of the conduct to the UN/TCCs. The present analysis is conducted on the basis of IHL rules, and not under the secondary rules of international responsibility, as this chapter deals with the substantive obligations of states and IOs under IHL.

To establish whether the PSF "belong to" the UN/TCC, we can refer to GCIII Article 4, which provides a prisoners-of-war ("POW") status to certain categories of persons. The most interesting for the present analysis are the following: (1) members of armed forces of a party to the conflict (having a *de jure* link to the state as being its organ); (2) members of militia and volunteer corps (not forming part of the armed forces), including organised resistance movements "belonging to" a party to the conflict and fulfilling certain conditions. This category would have a *de facto* link to the party concerned. As ICRC submits, the

¹⁸ Marten Zwanenburg (2005), at 173. See The Secretary-General's Bulletin on the observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, 6 August 1999. See the discussion on this issue further in this Chapter.

concept “belonging to” requires a *de facto* relationship between organised armed group and a party to the conflict.¹⁹

API combines both categories and broadening the notion of “armed forces of a party to a conflict”, which includes any organised group or unit under command responsible to a party of the conflict for the conduct of its subordinates and subject to an internal disciplinary system.²⁰

The application of these provisions of GCIII and API to the PSFs is not straightforward. National contingents remaining in military service have a *de jure* link with their TCC and are in fact its armed forces notwithstanding the international status of the UN forces. They must be fully discharged from their active military duty to cease to be members of armed forces,²¹ which is not the case with the members of PSFs. Conversely, they are considered to be UN forces and UN’s subsidiary organ. Although they are not strictly “armed forces” of the UN (and it is doubtful at all whether it may have a regular army), they have *de jure* and *de facto* link with the UN which makes them “belonging to” it.

Therefore, regarding the definition of armed forces under Article 43 API,²² for the purposes of IHL the PSFs can be considered “armed forces” of both the UN and TCC. The PSFs consist of organised groups of national contingents subordinated to the internal disciplinary system. This system includes internal organisation of the national units

¹⁹ ICRC, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under international Humanitarian Law”, 90 *International Review of the Red Cross* 991 (2008), at 999.

²⁰ API, Article 43(1). The British Military Manual explains that the requirement of being under command responsible to a party of the conflict is satisfied if “the commander is regularly or temporarily commissioned as an officer or is otherwise recognised as a commander by the party concerned.” It further states that “the essential feature of the requirement is that the commander should accept responsibility for the acts of his subordinates and equally his responsibility to, and his duty of obedience to the orders of, the power or authority upon which he depends.” Great Britain, Ministry of Defence, *The manual of the law of armed conflict* (Oxford University Press, 2004), at 39, para. 4.3.3.

²¹ See ICRC Interpretive Guidance (2008), at 1001.

²² The ICRC considers that the rule based on Article 43 API, which provides that “The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, “ is of customary status. See Jean-Mare Henckaerts and Louise Doswald-Beck, Vol. I, Rule 4, at 14

themselves and a UN superior-subordinate system in general under UNFC or S-G Special Representative. It is for TCCs to discipline and enforce compliance with the rules of international law. However, the PSFs are also under command responsible to the UN for the conduct of its subordinates, but separately members of national contingents are under command of their national contingent commanders responsible for the conduct of their subordinates not only before the UNFC but also their TCCs.

API Article 43 explicitly provides that a party to the conflict can also be an authority not recognised by the adverse party (not only government).²³ The Commentary to this article suggests that under API entities, which are not states, but which are, at least to some extent, subjects of international law, may become parties to the conflict and may take the form of an authority not recognised by the adversary.²⁴ If interpreting broadly this provision, the UN may be such a party or authority, representing PSFs. Moreover, as the Commentary suggests, the possibility that the UN could be a party to an armed conflict is not excluded.²⁵

The analysis demonstrates that the PSFs can be considered simultaneously as armed forces of TCCs and *de facto* UN “forces”. For the purposes of IHL, the connection with two entities makes the PSFs joint armed forces of the TCC and UN. Commanded by the UN official in general and national commanders for each contingent, the PSFs can be regarded as coalition forces for the purposes of IHL. Similarly, if the whole PSF becomes involved in the armed conflict, all TCCs and the UN may be considered as a joint party to that conflict.²⁶ They would be bound to respect and ensure the respect of the law of armed conflict.²⁷ The

²³ API, Article 43 (1).

²⁴ Commentary to Article 43(1), API, para. 1663.

²⁵ *Ibid*, para. 1661.

²⁶ See the next subsection for the analysis of the situations when not the whole PSF, but only some units participate in the armed conflict.

²⁷ See also Laurence Boisson de Chazournes, Luigi Condorelli (2000), at 3, who argues that as the TCCs do not relinquish control over their national contingents forming part of PSFs and retain at the very least disciplinary command over their personnel, the dual link with the UN and TCCs “entails a two-pronged responsibility as to compliance with international humanitarian law.” (Boisson de Chazournes, Laurence, Condorelli, Luigi,

British Military Manual also confirms that the “responsibility for ensuring compliance with the law of armed conflict by the members of a PSO force is divided between the national authorities of each contingent and the [UN] or other [IO] under whose auspices the operation is conducted.”²⁸ That, however, concerns states’ substantive obligations under IHL and is without prejudice to the finding of international responsibility of the UN/TCCs, where the attribution of particular conduct of PSOs under secondary rules, becomes involved.

This conclusion is in line with the ICRC position that TCCs remain individually responsible for the application of the GC whenever they provide contingents for the PSFs and should issue appropriate instructions to their contingents’ members, whereas the UN is responsible to issue the appropriate instructions (compatible with IHL obligations) to the PSFs’ unified command.²⁹ Both TCCs and the UN may become responsible for the violations of IHL, committed by peacekeepers. However this question depends on whether TCCs/UN exercise effective control over particular conduct of PSFs, dealt with in the previous chapter.

B) Under which circumstances do the UN and TCCs become a party to an armed conflict?

i) How can the UN and TCCs become a party to an armed conflict?

The question when the UN and TCCs become bound by IHL obligations depends on purely factual circumstances. IHL applies to PSFs if there was in fact an armed conflict and

“Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, 837 *International Review of the Red Cross* (2000), available at <http://www.icrc.org/eng/resources/documents/misc/57jqcp.htm>.

²⁸ British Military Manual, at 379, para. 14.8.

²⁹ See, Umesh Palwankar, “Applicability of international humanitarian law to United Nations peace-keeping forces”, *International Review of the Red Cross* 227 (1993), at 230, 231.

the PSFs participated in it. It is irrelevant under which mandate the PSO was acting or under which chapter of the UN Charter it was established.³⁰

The UN/TCCs may become a party to an armed conflict, if PSFs take direct part in hostilities.³¹ What is significant is the fact of participation in hostilities, not the existence of authority to do that.³² PSFs, being joint armed forces of the UN and TCCs by their conduct (namely participation in hostilities) can involve their TCCs/UN in the armed conflict. However, pure deployment of PSFs in the territory of the host state with the mandate to maintain peace without use of force may not be considered as amounting to participation in hostilities. Only when they start to use force beyond self-defence, they may be considered taking part in hostilities.³³ Having their armed forces participating in hostilities, the TCCs/UN become a party to the conflict.

For them to become a party to an armed conflict, two possible situations may exist: 1) there was already a recognised armed conflict in the territory of the host state/states and once the PSFs were deployed, they started to participate as a third party to that conflict; 2) PSFs may become involved in a separate armed conflict with a host state or a non-state actor in the territory where there was no pre-existing armed conflict. It is necessary to analyse when the existence of armed conflict can be recognised and under which circumstances PSFs become involved in it.

According to the Commentary to CA2, an armed conflict between states is defined as “any difference arising between two States and leading to the intervention of members of the

³⁰ See also Christopher Greenwood (1998), at 11, 22, who also suggests that the application of the IHL to a particular PSO will depend on the existence of an armed conflict in which the PSF participates and not on the legal character of the force’s mandate or how the PSF was classified for the UN purposes. See also Keiichiro Okimoto (2005), at 207.

³¹ See also British Military Manual, at 378-379, para. 14.5.

³² Christopher Greenwood (1998), at 11, 22. He actually considers that the UN forces become a party to the conflict. See also Murphy, Ray, "United Nations peacekeeping in Lebanon and Somalia, and the use of force", 8 *Journal of Conflict & Security Law* 71 (2003), at 168.

³³ See discussion in detail about the relevance of self-defence further in this section.

armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war.”³⁴ The occurrence of *de facto* hostilities (or any hostile act) would be sufficient.³⁵ The Commentary continues by stating that “it makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.”³⁶ ICRC considers that the international armed conflict (“IAC”) occurs, “when one or more states have recourse to armed force against another state regardless the reasons or the intensity of this confrontation.”³⁷ This definition seems to be very broad as to include even small incidents of use of force during the presence of some units of armed forces of one state on the territory of another state. However the ILA disagrees with this definition by stating that the “organised armed forces are only recognised as engaged in armed conflict when fighting between them is more than a minimal engagement or incident.”³⁸ According to the ILA, a certain level of intensity of fighting should be reached in order to qualify a situation as an armed conflict irrespective of its nature.³⁹

The *Tadić* Appeals Chamber defined interstate conflicts not less broadly than ICRC, stating that “an armed conflict exists whenever there is a resort to armed force between States.”⁴⁰ Internal armed conflicts were defined as “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.” While for the interstate armed conflict, it is necessary to prove only the “resort to armed force”, or occurrence of the hostilities between two/more states, for the recognition of internal

³⁴ Commentary to CA2(1) of GC.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ ICRC, Peacekeeping operations: ICRC statement to the United Nations, 26-10-2010, at 1; see also Christopher Greenwood (1998), at 23.

³⁸ International Law Association (ILA), Final Report on the Meaning of Armed Conflict in International Law, The Hague Conference, Use of force (2010), at 2.

³⁹ See ILA (2010), at 30, 32, see also Dieter Fleck, Michael Bothe, *The handbook of international humanitarian law* (Oxford University Press, 2nd ed., 2008), at 48 for the same view.

⁴⁰ *Prosecutor v Tadić*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (“*Tadić* Appeal Decision on Jurisdiction”), 2 October 1995, para. 70.

armed conflict, two criteria need to be fulfilled: the violence must reach certain level of intensity and the groups participating in it must be sufficiently organised.⁴¹

The criterion of “protracted armed violence” refers to the intensity of the armed violence, rather than to its duration.⁴² What matters is whether the acts are perpetrated in isolation or constituted part of a protracted campaign entailed engagement of both parties in hostilities.⁴³ Some factors indicate the “intensity” criterion was satisfied (although not essential): number, duration and intensity of individual confrontations; type of weapons; number and calibre of munitions fired; number of persons and type of forces partaking in the fighting; number of casualties; extent of material destruction; UNSC’s involvement.⁴⁴

For recognition of an armed conflict the participating parties must be sufficiently organised to confront each other with military means.⁴⁵ Governmental armed forces are presumed to satisfy this criterion,⁴⁶ whereas other armed groups are sufficiently organised if they have some hierarchical structure and its leadership have the capacity to exercise control or authority over its members to implement basic obligations of CA3.⁴⁷

It follows that an armed conflict would exist where the organised groups or military units use armed force in fighting. The assessment is done on factual basis.⁴⁸ The fighting must be of a collective nature,⁴⁹ and does not constitute separate hostile acts of individual persons.⁵⁰ The use of force must be of such intensity and such duration as to go beyond law

⁴¹ See, *Prosecutor v Tadić*, Case No. IT-94-1-T, Judgement, ICTY, 7 May 1997 (“*Tadić* Trial Judgement”), para. 562; *Prosecutor v Limaj et al.*, Case No. IT-03-66-T, Judgement, ICTY, 30 November 2005 (“*Limaj* Trial Judgement”), para. 84; ICRC Opinion Paper (2008), at 3, 5.

⁴² *Prosecutor v Haradinaj*, Case No. IT-04-84-T, Judgement (“*Haradinaj* Trial Judgement”), 3 April 2008, para. 49.

⁴³ *Prosecutor v Boškoski*, Case No. IT-04-82-T, Judgement (“*Boškoski* Trial Judgement”), 10 July 2008, para. 185.

⁴⁴ *Haradinaj* Trial Judgement, para. 49.

⁴⁵ *Ibid.*, para. 60.

⁴⁶ *Ibid.*

⁴⁷ *Boškoski* Trial Judgement, paras. 195-196.

⁴⁸ See ICRC Opinion Paper (2008), at 1.

⁴⁹ See also ICRC Opinion Paper (2008), at 3.

⁵⁰ Claude Pilloud (1987), at 512.

enforcement actions of police forces (e.g. against insurgents) so that the military forces are used.⁵¹

To recognise an armed conflict between a PSF and host government forces or organised groups of insurgents, these criteria must be fulfilled. The PSF must act collectively and the use of force must reach such level as to exceed what is normally considered law enforcement action. However, unlike the use of force against insurgents, which may be considered internal affair of the state and where the government can use law enforcement or military forces, the use of force against PSF, can be an entirely different action, as they are external or foreign forces irrespective the characterisation of armed conflict of international or internal nature.⁵² This external nature of one of the parties may render irrelevant the difference in use of law enforcement and military force and the scale of use of such force. The PSFs' involvement in the armed conflict of any nature may be closer to the definition proposed in *Tadić* for IACs (i.e. “an armed conflict exists whenever there is a resort to armed force between States”) and occur when the PSFs and another organised armed group resort to armed force.⁵³

The other criterion of collective character of the use of armed force may be more important for the situation of PSOs. An individual, unauthorised act of a peacekeeper against insurgents or government armed forces cannot make the whole operation participate in the armed conflict.⁵⁴ An act of individual peacekeeper would be his own action and would not represent an action of the whole PSO. The situation is different if the whole operation

⁵¹ See also ICRC Opinion Paper (2008), at 3.

⁵² This issue will be discussed further in this Chapter.

⁵³ *Tadić* Appeal Decision on Jurisdiction, para. 70. See also Christopher Greenwood (1998), at 23, who also suggests that if a broad interpretation of the “armed conflict” “were to be applied the activities of [UN] forces, then the threshold of armed conflict would be passed as soon as any fighting which went beyond purely sporadic acts of violence occurred between the members of the [UN] forces and organised armed forces.”

⁵⁴ See also Michael Cottier, “Article 8 para. 2(b)(iii)”, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, (Beck, 2008), at 337.

participated in hostilities. This would be a collective action and can be attributed to the PSO itself and therefore it may render the UN/TCC a party to the conflict.

The question is how many peacekeepers must participate in the conflict to represent a sufficient indication of PSO's collective action. The response to this question must not depend on the exact number of those who actually used force but on the circumstances where it was used. Unauthorised actions of several peacekeepers may not be sufficient. However, if they received an order from their superiors to participate in hostilities and to render an attack on opposing armed groups, this indicates a collective action as sanctioned by superiors acting on behalf of the UN/TCCs. Everything also depends on the position of those superiors in the military hierarchy of the particular PSO, namely whether the order was issued by the UNFC or by the national contingent commander. The following situations are possible.

The most straightforward case is where the PSO had a mandate to participate in the armed conflict. If they used force against the other party to the conflict in pursuance of their mandate, the collective nature of their participation can be presumed. If participation in the armed conflict was not explicitly provided for but could be implied from the nature of mandate itself or from the scale of hostilities in the territory where the PSFs are deployed, and the PSFs in fact participated in hostilities, this may also render the UN/TCC a party to the conflict.

If the mandate is silent about PSFs' participation in conflict, the characterisation of the UN/TCC as party to the conflict depends on the factual situation of the use of force. For example, if the UNFC ordered armed force to be used against insurgents or government forces and the order was executed, the UN/TCC may be considered a party to the conflict. If there was no such order, but his actions were understood by the national contingent commanders as

the armed force should be used, this can also amount to the collective action of the PSF and its participation in the conflict.

However, if only one national contingent commander orders the use of force in spite of the contrary instructions by the UNFC, it may be difficult to say that the UN becomes a party to the conflict. Presumably, if such an order was made and executed only by one particular contingent deployed in separate territory from the others and their acts can be distinguished from the acts of other PSO contingents, then only a particular TCC of that contingent would become involved in the conflict and not other TCCs, because only its armed forces acting on the order of the national commander (or on the instructions of TCCs), participates in hostilities. However, it is not always possible to distinguish acts of each contingent if they act jointly. Then the “coalition” of TCCs/UN as a whole may be considered as involved in the conflict.

If the criterion of collective action has been fulfilled, it is necessary to establish which acts amount to participation in armed conflict. As discussed above, the characterisation of a situation as an armed conflict requires not only organisation and collective action from the parties, but also a degree of intensity of fighting between them. Therefore the level of use of force must be sufficiently high to characterise situation as an armed conflict.

The same is true for an armed confrontation between PSFs and organised armed groups, if the existence of the armed conflict in a territory was not recognised before. However, for the most part, the PSF are deployed already in the zones of existing armed conflicts of international or internal nature. If the armed conflict was already recognised (and achieved the necessary level of intensity in case of internal conflicts), the norms of law of armed conflict are already applicable there. There is no need to prove again the intensity of fighting, if some other forces or groups become another party to the conflict, under the

condition that these groups are sufficiently organised and capable of becoming a new party of the existing armed conflict. The same may be said about the PSFs that are deployed and start to participate in the already existing armed conflict. While the criterion of intensity may be used to characterise that conflict as an armed conflict for the application of IHL, there is no need to prove the same intensity for the PSFs' actions for the UN/TCCs to become a separate party to that conflict. The PSFs can be considered an organised group with the internal hierarchical military structure under responsible command. The fact of their collective participation in combat must be enough to render the UN/TCCs a party to the existing armed conflict.

ii) How can PSFs participate in an armed conflict?

The discussion so far concerned the question of how the UN/TCCs may become a party to an armed conflict by virtue of the PSFs' participation in it. It was concluded that the criterion of PSFs' collective participation in the armed conflict is crucial. The next step is to analyse what actions of the PSFs can amount to their participation in the armed conflict. This issue depends on the question which acts amount to the direct or active participation in hostilities.⁵⁵ This analysis is firstly based on the discussion of direct participation in hostilities by civilian population. Further remarks are made regarding the participation of PSFs in hostilities.

According to Dinstein, the term "hostilities" encompasses all types of acts of violence, meaning acts that cause injury to human beings (physical or mental harm) or destruction or damage to property, subject to two caveats: 1) hostilities exclude acts of violence, committed

⁵⁵ See also Geer-Jan Alexander Knoops, "The transposition of inter-state self-defence and use of force onto operational mandates for peace support operations", in Roberta Arnold, *Law enforcement within the framework of peace support operations* (Martinus Nijhoff, 2008), at 9, who points out that the question of whether and when PSFs engaged in combat may run parallel to the question when civilians take directly part in hostilities.

by belligerent parties, not related to military operations (law enforcement measure against common criminals); 2) hostilities include certain non-violent acts directly connected to military operations against the adversary (logistics or gathering intelligence about the enemy).⁵⁶ The Commentary to Article 51(3) API provides that “hostile acts [are] acts which by their nature and purpose are *intended* to cause actual harm to the personnel and equipment of the armed forces.”⁵⁷ Almost the same wording was used to describe hostilities by the Commentary to Article 43(2) (with inclusion of “acts of war” instead of simply “acts”).⁵⁸ The Commentary to Article 51(3), described “direct” participation in hostilities as “acts of war which by their nature or purpose are *likely* to cause actual harm to the personnel and equipment of the enemy armed forces.”⁵⁹

This difference in wording may lead to different results. If a person does not want to cause actual harm to the armed forces by his acts and even unaware that his acts would do that, he cannot “intend” to cause actual harm, but his acts (even without awareness of the person) may be actually “likely” to cause such harm. This issue was discussed in several ICTY judgements. While judgements in *Galić* and *Kordić* simply adopted the definition of acts, which are “likely” to cause actual harm,⁶⁰ without pursuing any discussion, the *Strugar* Appeals Chamber discussed more this issue.⁶¹ Having reiterated the version used by *Kordić* Appeals Chamber, the *Strugar* Appeals Chamber after an extensive analysis adopted the definition of participation in hostilities as a participation in the “acts of war which by their

⁵⁶ Dinstein, Yoram, *The conduct of hostilities under the law of international armed conflict* (Cambridge University Press, 2nd, 2010), at 1-2.

⁵⁷ Commentary to API, Article 51(3), para. 1942 (emphasis added).

⁵⁸ *Ibid*, Article 43(2), para. 1679.

⁵⁹ *Ibid*, Article 51(3), para. 1944 (emphasis added).

⁶⁰ Prosecutor v *Galić*, Case No. IT-98-29-T, Judgement, (“*Galić* Trial Judgement”), 5 December 2003, para. 48; Prosecutor v *Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement (“*Kordić* Appeal Judgement”), 17 December 2004, para. 51.

⁶¹ Prosecutor v *Strugar*, Case No. IT-01-42-A, Judgement, (“*Strugar* Appeal Judgement”), 17 July 2008, paras. 172-179.

nature or purpose are *intended* to cause actual harm to the personnel or equipment of the enemy's armed forces.”⁶²

The ICRC Guidance provides for more detailed approach to the definition of “direct participation in hostilities” by introducing three conditions to be fulfilled (note that the ICRC Guidance cannot be legally binding and constitute more a recommendation by the ICRC to the states rather than a compilation of state practice).⁶³ According to it, first element is a threshold of harm, meaning that “act must be likely to adversely affect the military operations” of a party or to “inflict death, injury, or destruction on persons or objects protected against direct attack.”⁶⁴ Therefore this act can be directed either against military objects or personnel of a party to the conflict or against the civilian population or objects. However, it seems that the acts against military objects can be less serious (as can only “adversely affect” them) than against civilians (where the inflictions of death, injury or destruction is required to be proved).

The second element is a direct causation, where there is a “direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.”⁶⁵ The third element is a belligerent nexus, meaning that “the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”⁶⁶

The latter criterion may be difficult to fulfil for the PSFs. If the PSF uses force against one party to the conflict to prevent an armed attack on the military objects of another party to the conflict or to stop violence between the parties in order to maintain peace between them,

⁶² *Strugar* Appeal Judgement, para. 178 (emphasis added).

⁶³ See Nils Melzer, “Direct participation in hostilities: operationalising the International Committee of the Red Cross’ Guidance”, 103 *American Society of International Law Proceedings* 299 (2009), at 306, 301; Pomper, Stephen, Remarks to “Direct participation in hostilities: operationalising the International Committee of the Red Cross’ Guidance”, 103 *American Society of International Law Proceedings* 307 (2009), at 307.

⁶⁴ ICRC, *Interpretive Guidance* (2008), at 1016.

⁶⁵ *Ibid*; see also Claude Pilloud (1987), at 516.

⁶⁶ *Ibid*.

the use of force may be considered an act likely to adversely affect military operations of the first party, but it would not be specifically designed to support one of them in detriment of the other. If the PSF directs the attack against a party to the conflict, because it uses prohibited means of warfare and commits war crimes, this attack maybe considered as designed to inflict harm to the detriment of that party in support of adversary.⁶⁷ Although the aim of the attack seems to be legitimate (to disable the party which commits war crimes), the attack may affect the military situation between two parties of the conflict.

Three criteria envisaged by the ICRC in order to define “direct participation in hostilities” cannot be entirely adopted for the situation of PSOs as these criteria apply to qualify civilians as directly participating in hostilities. If the PSF does so, it will participate in the armed conflict on behalf of either of the parties and not becoming a party by itself. The PSF already has the *de jure* link with the potential party to the conflict (UN/TCCs) and if the PSF directly participates in the conflict, the UN/TCCs become a party to it.

Here the element of collective action/participation is important, otherwise individual peacekeeper’s participation may be equated to the participation of individual civilian and all the criteria of direct participation of civilians in hostilities need to be fulfilled. However, for the collective actions it may not be so. A third party to the conflict do not need to act on behalf of both original parties; therefore the belligerent nexus in the sense of civilians’ participation in hostilities is not required. Although the ICRC states that regarding civilians’ participation when the belligerent nexus is not proved, the acts are not of belligerent nature, unless the existence of separate armed conflict is proved,⁶⁸ this does not mean that the PSF’s hostile acts have to reach certain level of intensity required to qualify the situation as an

⁶⁷ See also Geert-Jan Alexander Knoops (2008), at 10, who states that “peacekeepers may be considered as taking part in an armed conflict whenever providing causally linked military support to any of the fighting forces.”

⁶⁸ ICRC, Interpretive Guidance (2008), at 1026.

armed conflict. As mentioned above, if the PSF acts in collective way in the territory where the armed conflict is already recognised, there is no need to prove the existence of a separate armed conflict and they may be considered a third party to the existing armed conflict.

iii) PSFs acting in self-defence

However, the relaxation of the requirement of belligerent nexus to be proved for the participation of PSFs in the armed conflict does not mean that all hostile acts can amount to direct participation in hostilities and therefore render the UN/TCCs a party to that conflict. There is a category of acts excluded from direct participation in hostilities: acts of individual self-defence. They are allowed by ordinary criminal law, and peacekeepers not involved in hostilities have the right like every other person to defend themselves by using force provided that it does not go beyond reasonable self-defence.⁶⁹

The ICRC considers that the act of individual self-defence lacks belligerent nexus.⁷⁰ In the absence of the need to prove the belligerent nexus for PSFs, the self-defence acts must be still excluded from the acts of direct participation in hostilities, as it is normally legitimate for civilians (who have no right to participate in hostilities) to defend themselves from direct attack. Moreover, if we adopt the definition of “direct participation in hostilities” proposed in *Kordić* on the basis of the Commentary to Article 51(3) API (namely, that a person needs to participate in the acts of war, which by their nature or purpose are intended to cause actual harm to armed forces), such acts will not include acts of self-defence, as those acts would not be intended to cause harm, but would be intended to protect a person (or property) against the

⁶⁹ Arnold, Roberta, “The application of the law of occupation to peace support operations”, in Arnold, Roberta, Knoops, Geert-Jan G. J., *Practice and policies of modern peace support operations under international law* (Transnational Publishers, 2006), at 94.

⁷⁰ ICRC, *Interpretive Guidance* (2008), at 1016.

attack.⁷¹ However, the scope of those acts of self-defence for PSOs is not obvious especially considering the UN's position on that.

Although PSOs can be regarded very important for maintaining peace, this does not mean that they are exempt from IHL obligations binding all other states and persons. The beginning of their participation in the armed conflict is governed by the same rules as applicable to other entities/states (reflected in *jus in bello*) irrespective of whether they are aggressors or victims of aggressions (question of *jus ad bellum*) as this threshold of participation in the armed conflict (under *jus in bello*) denotes the applicability of the norms of humanitarian character and binding nature of those norms to all participants in the armed conflict irrespective of the reasons of their participation in it (which may have been considered for *jus ad bellum*).⁷² As CA2 makes IHL rules applicable to any situation of commencement of the hostilities automatically irrespective of whether one party is aggressor or the victim, PSO's status and mandate should not matter for the application of IHL to its activities.

The Preamble to API further reaffirms that GC and API fully apply in all circumstances irrespective of nature, origin or which party caused the armed conflict to all participating parties. As Commentary to API explains, this confirms that *jus ad bellum* cannot affect *jus in bello* and IHL applies irrespective of which party was an aggressor.⁷³ Applying this principles to the situation of PSO, any arguments about special norms and deviation from the norms, which should be applicable to the factual situation of their participation or non-

⁷¹ See also *Prosecutor v Sesay et al.*, Case No. SCSL-04-15-T, Judgement (“*Sesay Trial Judgemnet*”), 2 March 2009, para. 233, where the Chamber considered that the peacekeepers could be considered civilians and not combatants till the time they participate in hostilities and their civilians and as with all civilians their protection would not cease if they use armed force only in exercising their right to individual self-defence.

⁷² See also Robert Kolb (2005), at 181, pointing out that the application of IHL does not depend on legality of the operation or its objectives envisaged by the parties, but on the existence of hostilities. To state otherwise is to confuse motives of the conflict which are relevant to *jus ad bellum* and the existence of hostilities covered by *jus in bello*.

⁷³ See Commentary to the API, Preamble, at 28-29, paras. 30, 32.

participation in the armed conflict, because of their international status and their good intentions to maintain peace (by using any means), should not be considered as sustainable as they would blur the distinction between the *jus ad bellum* and *jus in bello* for the purposes of protection of people and right to self-defence as it is understood in the *jus ad bellum* comparing to the right to self-defence of each individual.

Similarly, the fact that PSFs' status or mandate presupposes that PSFs can use force only in self-defence does not by itself mean that PSFs would never use force beyond self-defence as it is understood under IHL and therefore would never participate in hostilities. The focus must not be on a particular mandate or status but on the factual circumstances of the use of force by PSFs.⁷⁴ Moreover, the UN claims that the PSF's right to self-defence extends to the use of force to resist any attempts to prevent them from discharging their mandate⁷⁵ does not necessarily mean that such use of force would not be considered participation in hostilities.⁷⁶ As discussed above, the applicability of IHL to a particular situation depending on the PSFs' participation in hostilities and the definition and extent of self-defence exception (from such participation) depends on rules *jus in bello* and not on the status of PSFs. Any

⁷⁴ Even if the PSFs have defensive mandate, it does not mean that they are still acting in self-defence. See Article 31(1)(c) ICC Statute, which provides that the fact that a person is involved in a defensive operation conducted by forces shall not in itself constitute self-defence.

⁷⁵ See, for instance, with regard to the UNIFIL, Report of the Secretary-General on the implementation of Security Council resolution 425, 19 March 1978, S/12611, para. 4(d); with regard to the UNEF II, Report of the Secretary-General on the Implementation of Security Council resolution 340, 27 October 1973, S/11052/Rev.1, para. 4(d); with regard to the UNPROFOR, Report of the Secretary-General on the situation in Bosnia and Herzegovina, 10 September 1992, S/24540, para. 9.

⁷⁶ See Michael Cottier (2008), at 336, who submits that "self-defence" is used and understood by the UN in its application to the PSFs in a substantially broader sense than strict self-defence permitted to protected persons under IHL. See also Ola Engdahl, *Protection of personnel in peace operations: the role of the 'Safety Convention' against the background of general international law* (Martinus Nijhoff, 2007), at 102, who points out that the UN interpretation of the UN PSF's right to self-defence is extensive, as it repeatedly stated that self-defence includes "resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the [UNSC]." As PSOs often involve an explicit mandate to protect civilian population, this "further blurs the distinction between self-defence and actions taken in an armed conflict."

claims to take into account the PSFs' mandate or their defensive purpose/nature is not relevant for the rules of *jus in bello* and permitted scope of self-defence under them.⁷⁷

Individual or personal self-defence should not be confused with the right of a state to self-defence under Article 51 UN Charter. The fact of participation of a person/group in hostilities must be established on individual basis. If a person used force in particular circumstances, it must further be analysed whether the force was used in individual self-defence. As the jurisprudence of international courts/tribunals shows,⁷⁸ the question of participation of a particular person in hostilities, likewise the question whether a person exercised individual self-defence for the purposes of ICL, is of *jus in bello*. The question whether a particular armed force was involved in a defensive operation conducted by the state exercising legitimate self-defence is governed by the *jus ad bellum*.⁷⁹ Given that the ICL scope of the right to self-defence is closer to the question of determination of the question of civilians' participation in hostilities because they operate under *jus in bello* rules, the scope of self-defence may be considered in the light of ICL.

This question could be considered under general or domestic criminal law, however that would lead to discrepancies between different terms and categories. ICL being itself based on humanitarian law rules would serve a good reflection of the principles of the latter and contribute to the interpretation of IHL rules applicable to self-defence exception from participation in hostilities. Clearly, the question of self-defence cannot be analysed on the basis of the same category under *jus ad bellum* rules (as explained above) and therefore this

⁷⁷ See also Gadler, Alice, "The protection of peacekeepers and international criminal law: legal challenges and broader protection", 11 *German Law Journal* 585 (2010), at 591. See also Michael Cottier (2008), at 336, considering that PSFs are entitled to use self-defence only to the extent other protected persons are permitted to use it under IHL without forgoing the protection they are entitled to as civilians.

⁷⁸ See *Prosecutor v Boškoski and Tarčulovski*, Case No. IT-04-82-A, Judgement, ("*Boškoski* Appeal Judgement"), 19 May 2010, paras. 44, 51; Commentary to Article 51 AP1, paras. 1927-1928; see also *Prosecutor v Marić*, Case No. IT-95-11-A, Judgement, ("*Marić* Appeal Judgement"), 8 October 2008, para. 268;

⁷⁹ See Commentary to Article 51 AP1, paras. 1927-1928; *Boškoski* Appeal Judgement, paras. 44, 51; see also *Kordić* Appeal Judgement, para. 812; *Kordić* Trial Judgement, para. 452.

category as enshrined in general or PIL cannot be considered and should be distinguished as inapplicable. Therefore the subsequent analysis follows ICL rules applicable to the self-defence category.

The application of ICL rules on self-defence to the PSF must be done in the same manner as to other civilians to establish whether use of force was used in the scope of the right to individual self-defence or goes beyond it and therefore may amount to participation in hostilities (if the aforementioned conditions are fulfilled).

The *Kordić* Trial Chamber defined the notion of “self-defence” as “a defence to a person who acts to defend or protect himself or his property (or another [...]) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.”⁸⁰ The ICC Statute defines “self-defence” in the same way.⁸¹ To constitute “self-defence” the acts of a person must be in response to an imminent and unlawful use of force directed against protected person/property being reasonable and proportionate to the degree of danger to that person/property.⁸²

Several international courts referred to the scope of permitted self-defence to establish whether the peacekeepers can be considered either participating in hostilities and therefore not protected by IHL and ICL from the attacks, or used force only in self-defence (if used at all) and therefore must be granted protection afforded to civilians.

In case of UNAMIR, the ICTR *Bagosora* Trial Chamber considered the status of UNAMIR as UN peacekeepers and the fact that they were disarmed and concluded that the

⁸⁰ *Prosecutor v Kordić and Cerkez*, IT-95-14/2-T, Judgement (“*Kordić* Trial Judgement”), 26 February 2001, para. 449.

⁸¹ See ICC Statute, Article 31(1)(c).

⁸² See *Kordić* Trial Judgement, para. 451, ICC Statute, Article 31(1)(c). See further discussion on the inclusion of “property” in this definition. See also Onder Bakircioglu, *Self-defence in international and criminal law: the doctrine of imminence* (Routledge, 2011), at 38-39, who states that there are three inherent limitations to the right of self-defence: “the act must reasonably believe that there is a present or ‘imminent’ danger of grave physical harm, that the use of lethal force is absolutely ‘necessary’ and that the use of lethal force is ‘proportionate’ toward off the threat.”

peacekeepers from the Belgian contingent could not be considered as combatants.⁸³ To come to this conclusion, the Chamber enquired to the nature of UNAMIR's mandate and whether they were authorised to use force and weapons only in self-defence.⁸⁴ However, according to their mandate the peacekeepers were able to use weapons, including deadly force, not only to exercise personal right to self-defence but also to prevent crimes against humanity.⁸⁵ Although the Chamber relied mostly on the factual circumstance of the use of force by peacekeepers, the fact of inclusion in the mandate of a possibility to use force to prevent crimes against humanity goes further than the exercise of individual right to self-defence.

Although the right to self-defence covers also defence of another against an unlawful attack, it is confined to the cases of imminent attack and is exercised on the individual basis. The possibility of using deadly force to prevent crimes against humanity under the mandate can be interpreted broadly and understood in different ways. If peacekeepers use weapons against a particular attacker⁸⁶ to protect a group of civilians from imminent and unlawful attack, this can amount to self-defence, but if they use force against other armed forces only because they may commit crimes against humanity, this is related to the purpose of peacekeeping operation and does not amount to individual self-defence under *jus in bello* rules and is not covered by Article 31(1)(c) ICC Statute, which excludes the situations when a person is involved in a defensive operation conducted by force from the scope of self-defence. It concerns individual self-defence not collective self-defence, governed by Article 51 UN Charter.⁸⁷

⁸³ *Prosecutor v Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, (“*Bagosora* Trial Judgement”), 18 December 2008, para. 2175.

⁸⁴ *Ibid.*, para. 185.

⁸⁵ *Ibid.*

⁸⁶ The use of force in self-defence should be directed against the original attacker with the purpose to repel the attack. See Hannah Tonkin, “Defensive force under the *Rome Statute*”, 6 *Melbourne Journal of International Law* 86 (2005), at 104 and 106.

⁸⁷ See Kai Ambos, “General principles of criminal law in the Rome Statute”, 10 *Criminal Law Forum* 1 (1999), at 27.

In *Abu Garda*, the ICC Pre-Trial Chamber considered the mandate of AMIS peacekeepers and factual circumstances of use of force and found that there was no evidence to suggest that AMIS personnel took any direct part in hostilities or used force beyond self-defence.⁸⁸ Their mandate authorised them to use force in self-defence only in very limited circumstances, to protect civilians whom AMIS encounters under imminent threat and in the immediate vicinity, and to use force to protect themselves and their installations and equipment.⁸⁹ The mandate drafted in such a way confines the used of force to the cases of individual self-defence (or of another person) permitted under ICL. If the peacekeepers in fact follow their mandate, they would not be considered as participating in hostilities.

The SCSL *Sesay* Trial Chamber, however, approached the problem differently. It considered that it is settled law that the concept of self-defence for PSOs includes the “right to resist attempts by forceful means to prevent the [PSO] from discharging its duties under the mandate of the [UNSC]” and that “the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.”⁹⁰ The Chamber referred to UNAMSIL’s mandate to use force only in “specific and defined circumstances”, such as to ensure the security of its personnel and the freedom of movement of its personnel and to protect civilians under threat of physical violence and found that UNAMSIL peacekeepers were prohibited from engaging in hostilities under their mandate.⁹¹ Comparing the actual use of force with the one permitted under their mandate, the Chamber found that the force used by the peacekeepers was not beyond their mandate and therefore could not be constructed as taking part in hostilities.⁹²

⁸⁸ *Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (“*Abu Garda* Pre-Trial Decision”), 8 February 2010, paras. 130-131.

⁸⁹ *Ibid*, paras. 115-116.

⁹⁰ *Sesay* Trial Judgement, paras. 228, 233, 1925.

⁹¹ *Ibid*, paras. 1908 and 1917.

⁹² *Ibid*, para. 1941.

Such focus primary on the mandate of the forces and extension of the right to self-defence to the situations where the PSFs use force against those who prevent them to discharge their mandate under the UNSC resolution, disregards the distinction between *jus ad bellum* and *just in bello*.⁹³ Supposedly the UNSC resolution contained a mandate for the PSF to fight against a party to the ongoing conflict, then under such construction, the PSF would act in self-defence, if that party tries to prevent them to discharge their mandate under the UNSC resolution to fight against them, which seems to be absurd. Therefore the focus must not be on the fact that PSFs use force in discharging their mandate, but on whether they in fact use force (complying with that mandate or not) in the scope of self-defence, in the way it is understood in ICL.

For the application of self-defence to PSFs' acts, it should be further analyse to what extent they can use force to protect their property. The inclusion of property and not only persons protected by violent acts in the exercise of the right to self-defence can be problematic. The *Kordić* Trial Chamber mentioned protected property following definition of "self-defence" provided in Article 31(1)(c) ICC Statute, allowing a person to defend himself or another person and in case of war crimes, a property "which is essential for the survival of the person or another person" or "for accomplishing a military mission."⁹⁴ Although Article 31(1)(c) may be regarded as constituting to a large extent CIL,⁹⁵ the inclusion of clause about the lawful defence of property may not sufficiently reflect a customary rule.⁹⁶ The defence of property, which is essential for the survival of the person/another person, due to its indiscriminate scope of application, seems to extend not only to civilian property but also to

⁹³ See also Marco Sassòli, "The role of human rights and international humanitarian law in new types of armed conflicts", in Orna Ben-Naftali, *International humanitarian law and international human rights law: pas de deux*, (Oxford University Press, 2011), at 43.

⁹⁴ ICC Statute, Article 31(1)(c), *Kordić* Trial Judgement, paras. 450-451.

⁹⁵ *Kordić* Trial Judgement, para. 451; Antonio Cassese, *International criminal law* (Oxford University Press, 2nd ed., 2008), at 261.

⁹⁶ Antonio Cassese (2008), at 261.

military equipment. Moreover, the provision explicitly mentions the property which is essential for “accomplishing a military mission”.⁹⁷

The question is whether peacekeepers are permitted to act in self-defence, when using force to protect the property, attack on which would otherwise amount to an international crime. The ICC Statute makes a war crime “intentionally directing attacks against personnel, installations, material, units or vehicles” involved in PSOs “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”⁹⁸ The inclusion of installations, materials and vehicles (apart from personnel) in the list of the objects protected against the attack may mean that peacekeepers using force to protect their property may be considered as acting in self-defence. The prohibition of attack on these objects might not protect the property itself but personnel who may be harmed by that attack while remaining in installations or vehicles. A more general word “property” (essential for the mission or the survival of peacekeepers) was not mentioned in the provision. The clause about the entitlement to the protection given to civilians/civilian objects confirms that peacekeepers may have no more/no less protection against a direct attack as civilians/civilian objects have.

The Convention on the safety of UN and associated personnel criminalises intentional attacks upon the personnel or liberty of UN or associated personnel and also “a violent attack upon the official premises, the private accommodation or the means of transportation of any [UN] or associated personnel likely to endanger [their] person or liberty.”⁹⁹ Therefore the attack not on the PSO’s property itself is a crime, but only when the attack on that property

⁹⁷ The inclusion of the property, which is essential for accomplishing a military mission, appeared to be a very controversial issue, which provoke a considerable debate. The discussion on this issue falls beyond the scope of this thesis. For further discussion on this issue see Antonio Cassese (2008), at 261-262; Kai Ambos (1999), at 26-27.

⁹⁸ ICC Statute, Article 8(2)(b)(iv) for international armed conflicts and (e)(iii) for non-international armed conflicts.

⁹⁹ Convention on the safety of United Nations and associated personnel (“UN Safety Convention”), Article 9(1)(a) and (b).

can endanger peacekeepers' life or liberty. Therefore, the peacekeepers using force to protect themselves or these objects can be considered acting in self-defence.

iv) Other criteria of PSFs' participation in hostilities

However the fact that peacekeepers used force beyond self-defence does not necessarily mean that they actively participated in hostilities and that IHL immediately applies to them. If peacekeepers used force disproportionately but their actions do not qualify as participation in hostilities according to the analysis below (and therefore IHL does not apply), their actions must be justified under rules of IHRL and criminal law and not under IHL,¹⁰⁰ which provides for combatant privilege and applies the notion of military necessity to justify collateral damage.

As discussed above, the definition of participation in hostilities presupposes that there are certain hostile acts which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces.¹⁰¹ What is important is not only that certain acts are hostile acts likely to adversely affect the position of a party to the conflict, but that they were specifically done with intention to harm that party to the conflict and not just happened to harm other party, therefore persons who performed the hostile acts intended to be in conflict with the other party. The fact that those persons did not want to have open, large scale confrontation with the other party does not mean that they did not intend to harm the other party by their actions. Any reasons (even legitimate) advanced to justify the intention to harm the party must not affect the determination of the matter.

¹⁰⁰ McLaughlin, Rob, "The legal status applicable to use of lethal force when operating under a United Nations Security Council Chapter VII mandate authorised "all necessary means", 12 *Journal of Conflict & Security* 389 (2007), at 396-397.

¹⁰¹ See discussion in Chapter III, section 1 (b).

For a TCC to become a party to the ongoing conflict, its contingent needs to perform certain hostile acts, which are likely to adversely affect a party to the ongoing conflict and are intended to cause harm to personnel or equipment of that party. The intention to harm a party to the conflict needs to come from a national commander of a particular contingent (to render the TCC a party to the conflict) or from the UNFC (or other UN organs). In the latter case, the UN becomes a party to the conflict together with the respective TCC.

The intention can be evident from different factors, but primarily from the nature of the PSO's mandate under the UNSC resolution. If the PSO's mandate is to use force against a particular party to the conflict (even if pursuant to the legitimate reasons), this is a direct indication of the intention to cause harm to that party and to be in conflict with it. If the UNSC resolution does not provide a mandate to use force against a particular party, but envisages the use of force in certain circumstances, the analysis shifts to the actual situation on the ground. If the PSF uses force directed against a party to the conflict with intention to cause harm to it (even if this party was not mentioned in the UNSC resolution), the PSF can be considered participating in the armed conflict. Forceful disarmament may provide one of such examples. If a PSF is mandated to use all necessary means (i.e. including use of force) to disarm parties to the conflict, and in fact it uses substantive amount of force to disarm a party and the situation leads to the fighting, the PSF can be considered as participating in hostilities.

Acts of pure self-defence and defence of others may not amount to the participation in hostilities because the intention to harm a party to the conflict will lack. Supposedly, a contingent (which is under the mandate not to use force against a particular party to the conflict), is attacked by a party to the conflict (an armed group) and responds in self-defence against the attack. Its response is necessary and proportionate. The PSF cannot be considered participating in hostilities for the purposes of IHL, as it does not intend to cause harm to the

armed group, but simply defend its personnel or equipment. If the PSF responds disproportionately to the attack: both alternatives are still possible. They may be considered as participating in hostilities if they used the right to exercise self-defence as a pretext to inflict actual harm to the group. They can be considered being in conflict with the group. If, however, the excessive use of force was not because of a hidden intention to harm the armed group but because of circumstances of the attack or simple negligence from the part of the commander or soldiers, then they may not be considered participating in the conflict with the group.

Another more difficult scenario is when the PSF protects not only themselves from the attack, but also civilians from violence of armed groups. The right to exercise self-defence applies also when they protect the others from imminent violence. In this case, everything depends on the particular circumstances. If the peacekeepers use force to protect civilians from attacking armed groups and use only necessary and proportionate force to achieve this result, they cannot be considered as participating in hostilities. However, if the PSF attacks armed groups pre-emptively because those groups have committed violence against civilians in the past and may do so in the future, but there is no actual threat of violence against civilians at particular moment, this may be indicative for the intent to harm a party to the conflict. The criterion of imminence of the attack (or use of force) acquires particular importance.

The intention to cause harm to the armed group and be in conflict with it does not necessarily mean that this intention will be present during the time when the operation is completed. If the intention to cause harm is present during series of subsequent operations (where the force is used), it is indicative to an existing pattern of the PSF's involvement in the conflict with an armed group. The PSF can be considered participating in the conflict with that group for continuous period of time during which those operations last. Therefore the

PSF will be a party to the conflict not only during a particular operation but also in the intermediate period between those operations, when the active hostilities are present, because the intention to cause harm to the adverse party is present during the whole period of continuing armed operations, even if at certain point there is a break between them. This intent can be also evident from the PSF's mandate or from the UNFC's orders/instructions.

Therefore for IHL to apply to the PSF, it is necessary to consider the mandate provided by the UNSC, UNFC' of UN's orders in relation to the use of force during the PSO. They may or may not indicate intention to cause harm to the adverse party to the conflict. It is further necessary to look at particular circumstances, when the force was used. If it was used in the series of operations, IHL may apply to the whole period of involvement of the PSF in the conflict. If it was used only randomly, IHL may apply only during those operations, provided that the force was not used only in self-defence.

2. IHL framework applicable to PSO

A) The status of the peacekeepers in IHL

The status of the forces deployed for enforcement action where the use of force is permitted, is not difficult to determine. They are considered armed forces of the foreign state involved in the armed conflict and therefore they would be combatants under Article 4 GCIII/Article 43 API. However the status of the UN PSFs mandated to maintain peace using force only in self-defence is less clear. As discussed above, factual situation of their participation in the armed conflict rather than a definition of their mandate should be considered.

IHL divide persons into two groups: combatants (or members of armed forces of the party to the conflict) and non-combatants, including some members of the armed forces (chaplains, medical personnel and those *hors de combat*) and all civilians.¹⁰² If peacekeepers are not combatants, the question is which category of non-combatants they can belong to. The peacekeepers might also be considered civilians under IHL.¹⁰³

The difficulty with considering them ordinary civilians lies in their connection with the UN and TCC, because PSFs can be considered their *de jure* or *de facto* armed forces. Under the preliminary view, such forces of external or foreign entities present in the territory, where the armed conflict is going on, should be regarded as combatants. However, if they are not participating in hostilities, the UN/TCC will not be a party to the conflict. That means that the PSFs' connection with the UN/TCCs is of no relevance for their status (unless their mandate is an enforcement action). They will be neutral nationals to the existing parties to the conflict (they are not nationals of one of the parties to the conflict because otherwise would undermine their impartiality as UN international force). They will be civilians of neutral states with the norms of IHL applicable to them under such status.¹⁰⁴ Moreover, they will be protected by the UN Safety Convention, if the host state is a party to this convention.¹⁰⁵ The ICRC also states that PSFs, who are professional soldiers, are treated as civilians, as long as they are not taking direct part in hostilities, because they are not members of a party to the conflict and are entitled to the same protection against attack as that of civilians.¹⁰⁶

¹⁰² Leslie C. Green (1993), at 85-86.

¹⁰³ It can be pointed out that apart from members of the armed forces of the party to the conflict, everybody physically present in a territory is a civilian. See Claude Pilloud (1987), at 511.

¹⁰⁴ Neutral nationals in the territory of a party to the conflict enjoy the same rights granted to protected persons under GCIV, but if their home state maintains normal diplomatic representation in that territory, they remain under diplomatic protection. See Leslie C. Green (1993), at 264. See also Walter Gary Sharp (1996), at 123, pointing out that "the armed forces of states not a party to the conflict operating in areas of armed conflict are protected persons under [GCIV] and are not lawful targets." See also Paolo Benvenuti (1995), at 118.

¹⁰⁵ See further the discussion on the exact application of this convention.

¹⁰⁶ ICRC, Jean-Marie Henckaerts et al. (2005), at 112.

However, if PSFs take direct part in hostilities, this will render the UN/TCCs a party to the armed conflict. Under Article 4 GCIII/Article 43 API they can be considered combatants.¹⁰⁷ Consequently, their status will change from civilians to combatants. One may argue, nevertheless, that according to their mandate of non-use-of-force, they still should be considered non-combatants. Two objections to this can be put forward.

Firstly, their mandate and reasons for their participation in the armed conflict should not affect the factual situation of application of IHL to the parties of that conflict, namely, any legitimate use of force in *jus ad bellum* should not affect equal application of the *jus in bello* norms to the parties of the conflict.¹⁰⁸ Secondly, although the armed forces of the party to the conflict may consist of combatants or non-combatants (besides medical and religious personnel having special status), for the purposes of IHL, the fact that their states' internal law prohibits some of the members of armed force from participation in hostilities, will not mean that such non-combatants under the internal law would receive the protection given to civilians by IHL.¹⁰⁹ All members of armed forces are combatants for the purposes of military

¹⁰⁷ See also Richard D. Glick (1995-1996), at 106, who also considers that if the UN forces engage in armed conflict, the UN qualifies as a "party to armed conflict" under IHL and its troops become "combatants" under IHL. See also Worster, William Thomas, "Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement", 47 *Military Law and the Law of War Review* 3 (2008), at 316.

¹⁰⁸ See also Benvenuti, Paolo, "The implementation of international humanitarian law in the framework of United Nations peace-keeping operations", in Commission of the European Communities, *Law in humanitarian crises Vol. 1: How can international humanitarian law be made effective in armed conflicts?* (Office for Official Publications of the European Communities, 1995), at 90; ICRC opinion (29.10.2010). See also Okimoto, Keiichiro, "Violations of international humanitarian law by United Nations forces and their legal consequences", 6 *Yearbook of International Humanitarian Law* 199 (2003), at 208, who points out that whether or not UN forces are authorised to use force is a matter of *jus ad bellum* (and it is for the UNSC to decide), but whether or not IHL applies is a matter of *jus in bello* and is guided by the factual existence of an armed conflict in the battlefield. Rachel Opie (2003), at 25, also considers that there should not be any exception for the PSOs to qualify them as combatants, otherwise any such exception would jeopardise the principle of the equal application of IHL. She further argues that any such argument "fails to take account the fact that no matter what the moral justification for conflict is, all conflicts have broadly the same effects and thus need to be regulated in all circumstances." This argument is also in line with the general construction and wording of the SG's Bulletin.

¹⁰⁹ See ICRC Interpretive Guidance (2008), at 1011; Dieter Fleck (2008), at 99.

attack. Therefore the general distinction made in Article 3 HR that the armed forces consist of combatants and non-combatants, is no longer used.¹¹⁰ The same applies by analogy to PSFs.

The S-G's Bulletin is in line with this interpretation of PSFs' status. According to Section 1 it applies both to enforcement actions and to peacekeeping operations (when the use of force is only permitted in self-defence), "when in the situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement."¹¹¹ However it does not affect the status of members of peacekeeping operations as non-combatants, "as long as they are entitled to the protection given to civilians under the international law of armed conflict."¹¹² This means that peacekeeping forces (even with mandate to use force in self-defence only) may be considered combatants, if they are actively engaged in armed conflict (the bulletin applies to them), or if they do not participate in the conflict. The existence of the bulletin should not mean that they are regarded as combatants, so that they retain their status of non-combatants being entitled to the protection given civilian. The application of the bulletin and the PSFs' status depend on their participation in the armed conflict.

The UN Safety Convention clearly applies to the UN operations conducted under UN authority and control.¹¹³ However it does not apply when the UN operation is authorised by the UNSC as an enforcement action under Chapter VII UN Charter "in which any of the personnel are engaged as combatants against organised armed forces and to which the law of IAC applies."¹¹⁴ This provision can be interpreted that the convention protects UN operations depending on their mandate and not on the factual situation of involvement of the forces in the armed conflict.

¹¹⁰ Claude Pilloud (1987), at 515.

¹¹¹ The SG's Bulletin, Section 1, para. 1.1.

¹¹² Ibid, para. 1.2.

¹¹³ Convention on the safety of United Nations and associated personnel, 1994, Article 1(c) and Article 2(1).

¹¹⁴ Ibid, Article 2(2).

The convention assumes that the UN forces authorised under Chapter VII as an enforcement action (where the use of force is presumably permitted) are combatants for the purposes of IHL. It gives protection to the forces under UN authority and control without mentioning any conditions on their factual non-use of force and non-participation in the armed conflict. This distinction is not based on factual situation on the ground important for the application of IHL. It does not take into account that the operations not established under Chapter VII may become involved in hostilities and use of force beyond self-defence and therefore become subject to IHL.¹¹⁵ The operations established under Chapter VII will not necessarily use force beyond self-defence. The mere fact that the operation is authorised and controlled by the UN will protect UN forces by the convention from the attack even though they factually may be combatants under IHL.

The convention, however, contains a saving clause that it does not affect the protection of UN operations under IHL and IHRL and the responsibility of UN personnel to respect such law and standards.¹¹⁶ The first phrase can mean that the UN forces already having civilian protection would not lose it on the application of the convention. The latter phrase implies that the application of the convention would not discharge UN forces from responsibility to observe IHL/IHRL. However, it does not mean that the responsibility of UN forces to observe IHL indicates that the UN-controlled forces may have a combatant status. It seems that the convention assumes that due to their mandate the forces under UN authority and control are not combatants (irrespective any factual situation) and therefore they are protected against any attack.

In fact there may be situations where the UN-controlled forces not authorised by the UNSC as an enforcement action, participate in the armed conflict. As discussed above, that

¹¹⁵ Marten Zwanenburg (2005), at 169.

¹¹⁶ UN Safety Convention, Article 20(a).

would render them combatants under IHL. The UN Safety Convention can still apply according to its scope of application. The UN forces as combatants would receive protection against an attack from adverse party, whereas the adverse party would not. This would violate the principle of equality of parties of the conflict and “combatants privilege”.¹¹⁷

The UN Safety Convention is not a part of IHL and cannot change the status of UN forces participating in hostilities from combatants to civilians. As Bouvier submits, “the convention must be regarded as coming under *jus ad bellum*, which absolutely prohibits attacks on [UN] forces, not under *jus in bello*”, and such prohibition of attacks on UN personnel “does not preclude such personnel from the coverage – or from obligations – of [IHL] if that prohibition is violated.”¹¹⁸ Even if it could do the, that would lead to more serious consequences, such as UN forces becoming unlawful combatants (comparing to civilians participating in hostilities), loss of combatant privilege and possible prosecution for the conduct of hostilities and loss of most safeguards in the event of capture (except for the protection of the UN Safety Convention). Moreover, it is questionable whether the UN Safety Convention with its broad scope of application reflects CIL.¹¹⁹ It does not have even close to universal number of ratifications from states and therefore could be potentially applied in very limited cases of deployment of UN operations.¹²⁰ Even the provisions of the ICC Statute provide that an attack against peacekeepers is a war crime, only so where they are entitled to the protection given to the civilians by IHL.¹²¹ No such condition is mentioned in the scope of application of the Convention.

¹¹⁷ See Rachel Opie (2003), at 22, who states that “this approach differs from IHL, where there is no distinction made between types of combatants on the basis of the nature of the authorisation for the operation; [i]t is rather lawful to attack a person on the basis of his combatant status.”

¹¹⁸ Antoine Bouvier, “Safety of United Nations personnel ‘Convention on the Safety of United Nations and Associated Personnel’: presentation and analysis”, *International Review of the Red Cross* 638 (1995), at 664.

¹¹⁹ See, for instance, Ola Engdahl (2007), at 213, 292, 294, 306, 321.

¹²⁰ See Keiichiro Okimoto (2005), 215-216 in this regard.

¹²¹ ICC Statute, Article 8(2)(b)(iv) and (e)(iii).

In practice, the UN Safety Convention will apply to UN-controlled forces participating in the armed conflict (notwithstanding their mandate) in such a way as to provide them with protection from attack by the government forces of a particular state-party to that Convention.¹²² It will not bind states-non-parties. It will not bind the non-state organised groups with whom UN forces may be engaged in hostilities. Although such groups may be bound by the national norms and prosecuted under national law for the attacks on peacekeepers, if the state made it a crime under national law (according to Article 9), everything would depend on the state actions which may not be able to fulfill all its obligations under the Convention because of being in situation of armed conflict with those groups. Therefore the UN Safety Convention will have limited scale of application for the protection of the UN forces. If it protects them, other parties to the conflict may be put in disadvantage in relation to the UN forces as they are not able to attack adversary combatants (UN forces involved in hostilities) lawfully and use their “combatant privilege”.¹²³ Given such consequences, it is reasonable if the UN Safety Convention and IHL are mutually exclusive: the former regime applies to non-conflict situations, whereas the latter one applies to any situation where the existence of armed conflict is recognised and the UN forces will be protected only when they are not acting as combatants.¹²⁴

¹²² See Rachel Opie (2003), at 23. However, some authors think (and consider that it was an intention of the drafters) that the UN Safety Convention will cease to apply when the UN forces are in fact engaged in combat, even if according to their mandate, they do not fall in the exclusion category of forces (namely those which were created as an enforcement action under Chapter VII). See, for instance, Keiichiro Okimoto (2005), at 215; Ray Murphy (2003), at 182-183; 186; Marten Zwanenburg (2000), at 22.

¹²³ See Marten Zwanenburg, “The Secretary-General’s bulletin on observance by United Nations forces of international humanitarian law: a pyrrhic victory?” 39 *The military law and law of war review* 15 (2000), at 22; Rachel Opie (2003), at 23. As Murphy also submits, such a situation could undermine the GC, “which rely in part for their effectiveness on all forces being treated equally, [and] if it became a crime to engage in combat with the [UN] forces acting as combatants, this could have a dramatic impact on other parties willingness to adhere to accepted principles of humanitarian law” (Ray Murphy (2003), at 183).

¹²⁴ Ray Murphy (2003), at 185-186; Marten Zwanenburg (2000), at 21.

B) Nature of the armed conflict with participation of PSF

Although in recent years a clear distinction between customary norms applicable to IAC and non-international armed conflicts (“NIAC”) has become blurred and there is a tendency to disregard the differences between the two regimes,¹²⁵ it is still necessary to analyse whether such a conflict is international or internal to delineate the precise scope of norms of the law of armed conflict applicable to PSFs. No doubt if PSFs participate in the armed conflict occurring between two/more state, this conflict is international.¹²⁶ It is more difficult to qualify an armed conflict, in which PSFs get involved and which is initially of internal character.

As discussed above, PSFs represent the UN/TCCs as a party to the conflict. Therefore PSFs cannot be considered as an organised non-governmental group participating in an armed conflict. PSFs would represent a foreign actor becoming involved in the internal armed conflict.¹²⁷ Moreover, as the UN is subject of international law, the conflict which PSFs involve in against another subject of international law is covered by the international regime.¹²⁸ In this way PSFs may internationalise the armed conflict.¹²⁹

For the situations of internationalised armed conflict, it is common to divide a single conflict into different armed conflicts.¹³⁰ The exact norms of IHL applicable to the parties depend on who their adversaries are. Initial parties to the conflict will still be in NIAC

¹²⁵ Theodor Meron, “The humanisation of humanitarian law”, 94 *American Journal of International Law* 239 (2000), at 261; Lindsay Moir, *The law of internal armed conflict* (Cambridge University Press, 2002), at 51; Marten Zwanenburg (2005), at 182.

¹²⁶ See CA2 to the GC.

¹²⁷ Greenwood considers that “under customary law, it is not a precondition of the existence of an international armed conflict that all the parties must be states, although it is necessary that they possess some kind of international status, at least *de facto*.” (Christopher Greenwood (1998), at 7).

¹²⁸ Marten Zwanenburg (2005), at 184.

¹²⁹ See Jelena Pejic, “Status of armed conflicts”, in Wilmshurst, Elizabeth, Breau, Susan Carolyn, British Institute of International and Comparative Law., *Perspectives on the ICRC study on customary international humanitarian law* (Cambridge University Press, 2007), at 92.

¹³⁰ See, for instance, ICRC (2011), at 33; Bierzanek, Remigiusz, « Quelques remarques sur l’applicabilité sur droit international humanitaire des conflits armés aux conflits internes internationalisés », Swinarski, Christophe, Pictet, Jean, International Committee of the Red Cross, *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet* (Martinus Nijhoff, 1984), at 285.

between them.¹³¹ If the foreign state acts on behalf of insurgents, against governmental armed forces, this conflict between the foreign state and the government is international as involves two states.¹³² However, if the foreign state acts on behalf of the government against insurgents, the conflict between them is regarded as NIAC, because the foreign state literally acts against a non-state actor, rather than against another state and two states are not in conflict with each other.¹³³

It may be possible to apply the same logic to the participation of PSFs in NIAC regarding them as a foreign state. And some authors argue for this.¹³⁴ However this reasoning would not take into account a specific nature of PSFs and of their involvement in armed conflict.

There may be different situations of involvement of PSFs in the armed conflict. PSFs may act/use force in favour of opposition group(s) against governmental forces pursuant to their mandate, for example, when the government represents a dictatorship regime and commits grave human rights violations. They may also act in favour of the governmental forces against insurgents and help the government to restore its control and public order in its territory. In these situations the PSFs' participation in hostilities against either of them may be qualified according to the aforementioned rules of IAC/NIAC.

However because of special nature of PSOs, the situations where they participate in the armed conflict may not be clear-cut. PSFs participating in the armed conflict may not act on behalf of either party to the existing armed conflict. If they use force to fulfill their mandate which does not provide for the aim to defeat one party of the conflict in favour of

¹³¹ See *Nicaragua* case, para. 219; Remigiusz Bierzanek (1984), at 285.

¹³² Remigiusz Bierzanek (1984), at 285; see also Jelena Pejic (2007), at 92, who states that “there is generally no dissent either in jurisprudence or in doctrine that third state intervention in a civil war on the side of the rebels against a government gives rise to an international armed conflict between the states in question.”

¹³³ See Lindsay Moir (2002), at 51, see also Jelena Pejic (2007), at 92; Remigiusz Bierzanek (1984), at 285.

¹³⁴ See, for instance, Jelena Pejic (2007), at 94.

another one, they are not acting on behalf of one party to the conflict. They act on the basis of the UN mandate and therefore their participation in that armed conflict makes the UN/TCCs a separate (third) party to that conflict.¹³⁵ Therefore in the potential situation of a NIAC, the PSFs' participation means that there are at least three parties to that conflict: governmental authorities of the host state, armed organised group (or groups), and UN/TCCs represented by the PSFs. In this situation the PSFs would not be considered acting against or on behalf of particular party to the conflict and therefore the normal rules of application of IHL in internationalised armed conflict would not fully apply in such situations. A further question is, however, what rules will then apply.

As PSFs represent foreign actors (UN/TCCs), in a situation where they use force against governmental forces (even without support to opposition groups), the rules of IAC apply between them.¹³⁶ Both parties must respect all the provisions of IHL applicable in this type of conflicts vis-à-vis each other.

A more difficult situation is where the PSFs use force against insurgents or organised non-state groups (and not acting on behalf of the government). In this case the foreign status of PSFs must also play a major role. As discussed above, they would not act in support/on behalf of the governmental forces. As a foreign third party, they are expected to respect the IHL norms applicable to IAC, because their actions cannot be compared with the actions of governmental forces dealing with the internal situation of fighting against insurgents. They do not act in the territory of their national state but of a foreign state and do not act to help that foreign state to suppress the opposing groups. Therefore their relations with those groups cannot be considered internal but rather of an international nature. The applicable IHL norms must also be of international nature. Some authors also support this conclusion, arguing that

¹³⁵ See Finn Seyersted (1966), at 213-214.

¹³⁶ See, *mutatis mutandis*, *Nicaragua* case, para. 219.

when PSFs engage in armed conflict with irregular armed forces, the conflict between the UN and rebel forces is IAC and respective norms of IHL apply.¹³⁷

Therefore in the circumstances of fighting between governmental forces and opposition groups, where the PSFs may become involved, it is for the PSFs to apply the full list of IHL provisions applicable to IAC to both parties, if they are not acting in support/on behalf of the government in suppressing opposition groups.

C) Applicability of the law of occupation to the situation of PSO

i) Circumstances triggering the application of the law of occupation

The GC, containing IHL norms applicable to the situations of occupation, do not provide for a definition of occupation. For such a definition one needs to refer Article 42 HR, proving that “territory is considered occupied when it is actually placed under the authority of the hostile army” and such occupation “extends only to the territory where such authority has been established and can be exercised.” As the ICJ stated, it must be proved that the military forces were not only stationed in particular locations of the territory of another state, but also that they had substituted their own authority for that of the territorial state.¹³⁸ Two criteria must be fulfilled: the presence of the hostile army in the territory of another state and the ability and actual exercise of the authority by that army.

There is no requirement that there must be a certain degree of fighting between the “hostile” army and the governmental forces. Moreover, as CA2 provides, occupation may

¹³⁷ Richard D. Glick (1995-1996), at 90; Keiichiro Okimoto (2005), at 211; Ray Murphy (2003), at 184. Seyersted points out that as long as the UN forces pursue independent aims from the host government or act as an independent force which takes its orders from the organisation and not from the host government, any armed conflict occurring between the UN force and non-state organised groups cannot be considered of an internal nature. See Finn Seyersted (1966), at 213.

¹³⁸ *Congo* case, para. 173.

exist even when it meets with no armed resistance. The question further arises whether the “hostile army” means the armed forces of any foreign state appearing in the territory of another state or both states must be in the state of armed conflict and be therefore adversaries before the law of occupation applies.

The construction of CA2 supports the former proposition. It firstly mentions that the GC apply to the situations of armed conflict between two High Contracting Parties, then stating that the GC *also* apply to all cases of partial or total occupation of the territory of a Party without making a connection with the existence of an armed conflict between two parties mentioned in the previous paragraph. The semi-official ICRC Commentary to the GC states that the paragraph concerning occupation does not refer to cases where the territory is occupied during hostilities, because then the Convention would have been in force since the outbreak of hostilities; it only refers to cases where the occupation has taken place without hostilities or declaration of war.¹³⁹ Therefore for GCIV it is irrelevant whether occupying armed forces are “hostile” or not.

The question is whether the occupation may exist where the territorial state explicitly or implicitly consented to the presence of foreign forces in its territory. The notion of pacific occupation can be relevant. Academic opinion supports the existence of such type of occupation.¹⁴⁰ It is also supported by the terms of GCIV, and in particular CA2, which applies not only to the occupations arising from the armed conflict, but also in other case of

¹³⁹ Commentary to CA2, para. 2, at 21.

¹⁴⁰ As Kwakwa submits, “if occupation is a result of an invitation from, or agreement with, the state to which the territory belongs, the occupation is regarded as a pacific one,” but it still remains an occupation. (Edward Kwakwa (1992), at 46-47; see also Yutaka Arai, *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law* (Martinus Nijhoff Publishers, 2009), at 41). Roberts considers that in the situations where the host government invited foreign troops for taking over important administrative functions in the host state, “the result may be so similar to a foreign occupation that it might reasonably be so viewed and the law on occupations might reasonably be regarded as applicable.” (Roberts, Adam, “What is a Military Occupation?”, 55 *British Yearbook of International Law* 249 (1985), at 278).

occupation, even if the occupation meets with no armed resistance.¹⁴¹ GCIV covers the relationship between foreign forces, present on particular foreign territory and a local population which could arise either in context of the existence of an armed conflict (belligerent occupation) or where no armed conflict existed (non-belligerent occupation), including occupations by agreement (pacific occupation).¹⁴²

One of the reasons for this is that as GCIV contains important general rules for the protection of civilians from a foreign military power in whose hands they are, these rules must be faithfully observed irrespective of whether the situation is designated as an “occupation” or something else.¹⁴³ Accordingly, the focus is on the factual needs to protect civilian population and to apply certain rules of GCIV to them, rather than on the recognition or definition by parties of that situation as an “occupation”.

It seems logical to disregard the importance of the consent from the territorial state as long as it can be proved that the authority of the territorial state was substituted by the authority of the foreign armed forces as in this case it would assume responsibility for the people and territory which it occupies irrespective of whether the territorial state voluntarily provided such authority to the armed forces of another state. The issue of authority exercised over population is more important rather than the issue of consent. The exercise of authority by the foreign armed forces over population distinguishes the situations of occupation from simple stationing of foreign armed forces by agreement. In the latter situation the law of

¹⁴¹ See Adam Roberts (1985), at 274.

¹⁴² See Michael Kelly (1999), at 227, who also argues that GCIV was “part of an attempt by the 1949 Conventions to overlook some of the finer points of legal debate on the application of the laws of war and to concentrate instead on the factual circumstances where the need for regulation arises.”

¹⁴³ Adam Roberts (1985), at 279.

occupation does not apply.¹⁴⁴ The stationing armed forces do not substitute the territorial state authority with their authority over a part or the whole territory of the host state.¹⁴⁵

ii) Application of the law of occupation during an armed conflict

The previous discussion concerned the question of when the law of occupation starts to apply irrespective of the existence of the armed conflict, as an alternative to it under CA2. Another question is in what circumstances the particular provisions of GCIV on the occupation (for instance, contained in Section III GCIV) since the outbreak of hostilities become applicable. The circumstances of their application do not necessarily coincide with the circumstances when a general application of all GC is triggered.

The “occupation” provisions remain an integral part of GCIV and therefore must be analysed in its context. Any finding of the application of the “occupation” provisions in a broader context within the framework of GCIV does not change the previous analysis of application of the GC and IHL to the particular situations under CA2, namely when there is an armed conflict or where there is an occupation without armed conflict. Therefore the following analysis refers to the obligations of the parties under the law of occupation, when GCIV is found to be already applicable.

There are two possible interpretations of “occupation”. The stricter approach closely follows the text of Article 42 HR which would apply to the situations where a party to the conflict is in a position to exercise the authority over the territory to be able to discharge all

¹⁴⁴ See Adam Roberts (1985), at 298.

¹⁴⁵ Roberts argues that there may be specific circumstance, which might trigger the application of the law of occupation, such when the stationing agreement was achieved through duress against the host state, or the agreement was concluded after an invasion and occupation had already begun, or where the foreign forces, whose functions were initially presented as limited, come to exercise much more extensive powers. See Adam Roberts (1985), at 398.

the obligations imposed by the law of occupation.¹⁴⁶ Under this approach the responsibilities of the occupying army under the law of occupation depends on the actual control it is capable to exercise over particular territory.¹⁴⁷

Such approach is followed by some military manuals.¹⁴⁸ According to the British Military Manual the state of occupation is recognised if “the former government has been rendered incapable of publicly exercise its authority in that area” and “the occupying power is in a position to substitute its own authority for that of the former government.”¹⁴⁹ Accordingly, the law of occupation applies to the territory where the territorial government cannot exercise the authority, but the foreign armed forces stationing on such territory are capable to do that, as that territory is under their control.

Under this strict approach the rules of occupation would not apply during the invasion phase and in battle areas,¹⁵⁰ because in the areas of battle the authority may not be established or exercised. Therefore, no GCIV provisions concerning occupation would apply during this stage. This approach, however, does not consider the protective nature of GCIV towards civilian population and the fact that some of the provisions related to the law of occupation may become relevant even before the authority of the occupying party was established and can be exercised.

Another less restrictive approach to the interpretation of occupation can be adopted. It focuses on the authority and control not over the territory but over the protected persons falling in hands of the adverse party.¹⁵¹ This interpretation is provided in the Commentary to

¹⁴⁶ See ICRC, Official Statement (2005), section 1.

¹⁴⁷ See Zwanenburg, Marten, “Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation”, 86 *International Review of the Red Cross* 745 (2004), at 748, who argues for this approach; see also Green, Leslie C., *The contemporary law of armed conflict* (Manchester University Press, 1993), at 247; Dieter Fleck (2008), at 274.

¹⁴⁸ See ICRC, Official Statement (2005), section 1.

¹⁴⁹ British Military Manual, at 275, para. 11.3.

¹⁵⁰ ICRC, Official Statement (2005), section 1.

¹⁵¹ See *ibid*, section 2.

Article 6 GCIV. It suggests that for GCIV the interpretation of “occupation” should be wider than that contained in Article 42 HR. It applies to civilians of a territory in their relation with the troops advancing into that territory, whether fighting or not.¹⁵²

The essence of this approach lies in the division of provisions not according to the particular stage of the presence of the one state on the territory of another (e.g. the stage of invasion, stage of battle, stage of establishment of the authority, stage of occupation), but depending on the need to protect persons finding themselves in the hands of the foreign army. This is because many IHL rules applying in occupations also apply in other situations, for example, in combat areas, or in the territory of a party to the conflict.¹⁵³

However, Zwanenburg argues that this approach “appears to conflate the determination of ‘protected person’ with the determination of an occupation, and does not recognise that [GCIV] contains a number of provisions that apply specifically to occupied territories.”¹⁵⁴ Contrary to his argument, although there are provisions that can be applicable only where the state of occupation was established according to the authority exercised over the territory by the occupier, this gradual approach permits to differentiate factual situations of different degrees of control exercised by armed forces over the population of particular territory and apply provisions of the law of occupation depending on the need of protection for protected persons. Not all provisions of the law of occupation become applicable immediately when protected persons fall in the hands of foreign armed forces (e.g. Articles 52, 55, 56 GCIV are supposed to be applied for a longer period of occupation) but only some of them which can be feasibly applied in those circumstances.¹⁵⁵ If the circumstances trigger the application of certain provisions, related to the relationship between the foreign armed forces

¹⁵² Commentary to Article 6, para. 1 of the CG IV, at 60.

¹⁵³ Adam Roberts (1985), at 250.

¹⁵⁴ Marten Zwanenburg (2004), at 749.

¹⁵⁵ See with regard to concrete provisions the Commentary to Article 6, para. 1 of the CG IV, at 60-61.

and civilian population, those provisions will apply,¹⁵⁶ otherwise the state will be able to violate those provisions claiming that its authority over a particular territory has not been established or cannot be exercised.

A party to the conflict must not violate any of the GCIV provisions, when this convention becomes applicable (in the situation of the armed conflict or occupation). Once the convention applies, the party is bound by all of its provisions. This specifically applies to the provisions regarding negative obligations for the states to refrain from particular conduct. If, for example, a party finds itself in the position of forcibly transferring or deporting protected persons, it is precluded from doing so under Article 49 (subject to its conditions), and the fact that it did not exercise authority over the territory does not matter. While certain positive obligations of the state under some articles of GCIV may be triggered only by the circumstances of the established authority of the state over the territory, negative obligations must not be confined to any phase of the state's presence in the territory and apply regardless the place of those provisions under any GC heading. This follows from the nature of CA1, which requires the parties to respect and ensure respect for the GC provisions "in all circumstances".¹⁵⁷

The application of positive obligations is similar. They apply as soon as a party appears in a position to fulfill those obligations. Not all positive obligations apply simultaneously, but only those that the party is able to fulfil at a particular moment. Positive obligations by their nature require a state to take measures only as far as possible to fulfill those obligations. Consequently, if a party is found in a position to fulfil a positive obligation, it must do so as far as possible, but if it does not have sufficient means or control to do that, it cannot be required to do that. For example, a duty of a party to ensure the food and medical

¹⁵⁶ See the examples of such provisions provided in the Commentary to Article 6, para. 1 of the CG IV, at 60-61.

¹⁵⁷ See also Hannah Tonkin (2009), at 781, arguing that the obligations under Common Article 1 are binding on states in the time of peace and of armed conflict.

supplies of population under Article 55 arises only under certain circumstances and only if it has sufficient means available, but need not be specifically linked to the fact that the party established and can exercise its authority over a particular territory. GCIV does not provide for such a requirement, unlike HR, which specifically mention that in order to apply provisions of the law of occupation over a particular territory, it must be actually placed under the authority of the armed forces and that such authority was established and can be exercised. Therefore for the purposes of application of GCIV, the gradual approach to the application of certain provisions depending on the factual circumstances must be adopted.

A relatively similar approach was chosen by the *Naletilić* Trial Chamber. However it interpreted the Commentary differently. It distinguished between situations where the law of occupation deals with individuals as civilians protected under GCIV and situations where it deals with property and other matters.¹⁵⁸ The Chamber considered that the law of occupation would apply to individuals when they fall into “the hands of the occupying power”, thus following Commentary’s approach,¹⁵⁹ whereas the application of the law of occupation to the property (or “other matters”) would depend upon the fulfilment of the requirements of Article 42 HR, namely the exercise of the authority over the territory by the occupying power.¹⁶⁰ However such an interpretation would lead to awkward results, when the provisions of GCIV on occupation would protect civilians from physical harm by the occupying power but not from the destruction of their property in the intermediate period before the authority is established. This would be contrary to the very nature of GCIV protection and would contradict CA1 (to respect the provisions in all circumstances). Therefore the scope of

¹⁵⁸ *Prosecutor v Naletilic and Martinovic*, IT-98-34-T, Judgement (“*Naletilic* Trial Judgement”), 31 March 2003, paras. 221-222.

¹⁵⁹ See *ibid*, para. 221.

¹⁶⁰ See *ibid*, para. 222.

application of the law of occupation does not depend on the subject matter of their regulations (persons or property), but on the factual situation where such protection is needed.

The gradual approach better applies to the specific situation of PSOs. The UN exercising formal command and control over PSOs cannot be regarded the only occupying power. It lacks the capacity to implement some of the provisions of the law of occupation. Therefore the responsibility for complying with the rules of the law of occupation is shared between the UN and TCCs. The protected persons under authority and control of PSFs must not be deprived from the protection given to other persons finding themselves in the hands of normal occupying powers, only on the basis of special status of PSOs. Thus, the provisions of GCIV on the law of occupation apply as far as possible in the situations of PSOs depending on the factual circumstances when protected persons find themselves in the hands of the PSFs.¹⁶¹ Especially it concerns negative obligations under the law of occupation which must be respected by PSFs.

According to academic opinion, it is possible that UN PSFs can occupy part or the whole territory of state.¹⁶² It is when they displace their authority with the one of the host state. By virtue of displacement of the authority of the host state, UN PSFs may find themselves face to face with local people who in most of the cases did not give their consent for the PSFs' authority to govern them instead of the host state. Some of those persons being in the

¹⁶¹ See also Siobhán Wills, "Military interventions on behalf of vulnerable populations: the legal responsibilities of states and international organisations engaged in peace support operations", 9 *Journal of Conflict & Security Law* 387 (2004), at 328, who suggests that because the rules of occupation are well known, "it should be possible to apply the principles of occupation law by analogy even if there is dispute as to whether the facts fit occupation law criteria."

¹⁶² See Christopher Greenwood, at 28. Roberts also suggests, "it is just conceivable [...] that in different circumstances a peacekeeping force could find itself organising some kind of 'occupation by consent', [and] if central authority in the host state were to collapse, a peacekeeping force might find itself extending its authority and taking full charge of such matters as public order and safety" (Adam Roberts (1985), at 291 and 289). Kelly also considers that the application of the law of occupation to PSFs depends on the fact of the presence of PSFs on foreign territory where they are the sole or primary effective authority (Michael Kelly (1999), at 178). See also Derek William Bowett (1964), at 490, who considers that in some circumstances the UN may be in actual "belligerent occupation" of territory or may exercise a civil affairs administration subsequent to hostilities and therefore the customary and conventional laws of war are relevant to UN forces.

military groups may also resist PSFs' authority over them (even if this resistance does not amount to the full armed conflict situation). By that the local population may be adverse or even hostile to the PSFs and the application of the law of occupation is triggered, even without full recognition of the armed conflict as the civilian population needs protection from the foreign entity. Therefore the law of occupation in the PSFs' context needs to apply depending on the factual circumstances, in the same way as it applies when not PSFs but a state is an occupying power.

The following factual situations may involve the application of most of the provisions of the law of occupation: when there is no other governmental authority on the particular territory and the PSFs' authority is the only authority that can exist; there are persons in the need of protection and they find themselves in the hands of PSFs. In such situations the law of occupation applies to PSFs and the UN and TCCs are required as far as possible to respect and ensure respect for provisions of GCIV.¹⁶³ Obviously, in any context including in the situations where the law of occupation is applicable, the PSFs are bound to respect human rights law.¹⁶⁴

iii) Application of the law of occupation to the UN territorial administrations

An example of potential application of the law of occupation can exist in the situations when the UN established a territorial administration, e.g. UNMIK (United Nations Interim Administration Mission in Kosovo) or UNTAET (United Nations Transitional Administration in East Timor). Although it is beyond the scope of this study to discuss the responsibility of all UN missions other than military contingents of PSOs, some of the arguments related to the application of IHL to the UN administration can be addressed here.

¹⁶³ The reasons for such an application are discussed below in relation to the UN territorial administration.

¹⁶⁴ See next chapter, Chapter IV, for the further discussion on the concurrent application of the international humanitarian and human rights law.

Although the UN rejects the application of the law of occupation to its territorial administrations for political reasons,¹⁶⁵ it does not necessarily mean that it cannot in principle apply to the international territorial administrations, if the conditions for its application are fulfilled, namely that the territory is placed under the authority of the PSO.¹⁶⁶

It was mostly argued against the application of the law of occupation to UNMIK and UNTAET for various reasons, including: 1) the UN as an IO and not a state cannot be an occupying power;¹⁶⁷ 2) it does not participate in the armed conflict against the states where it established its administration and the administration is pacific in nature;¹⁶⁸ 3) the territorial states normally give implicit/explicit consent to the UN;¹⁶⁹ 4) the termination of a territorial administration differs from usual situations of occupation;¹⁷⁰ 5) unlike any other occupation, where status quo of the territory after occupation is preserved, the UN administration may transform the status of the territory in a separate state (e.g. East Timor for instance).¹⁷¹

These arguments can be disproved. As discussed above, the UN as a subject of international law is bound by the rules of CIL, including the law of occupation.¹⁷² The law of occupation is based on the exercise of factual control irrespective of the status of the occupying entity.¹⁷³ As it was discussed above, there is no need for a power to be in conflict

¹⁶⁵ See Steven Ratner, "Foreign occupation and international territorial administration: the challenges of convergence", 16 *European Journal of International Law* 695 (2005), at 703; Carsten Stahn, *The law and practice of international territorial administration: Versailles to Iraq and beyond* (Cambridge University Press, 2008), at 472.

¹⁶⁶ They were previously discussed in this section.

¹⁶⁷ See Ralph Wilde, *International territorial administration: how trusteeship and the civilizing mission never went away* (Oxford University Press, 2008), at 354; Carsten Stahn (2008), at 467.

¹⁶⁸ Carsten Stahn (2008), at 473; See Ralph Wilde (2008), at 355.

¹⁶⁹ See Carsten Stahn (2008), at 471; Steven R. Ratner (2005), at 698. See also Lindsey Cameron, Rebecca Everly (2010), at 236, who argue that the applicability of the law of occupation to international territorial administration highly depends on the presence or the absence of the consent.

¹⁷⁰ See Steven R. Ratner (2005), at 699, 702; Ralph Wilde (2008), at 316.

¹⁷¹ See Knoll, Bernhard, *The legal status of territories subject to administration by international organisations*, (Cambridge University Press, 2008), at 244-245. As Ratner points out, for international organisations missions, "the status quo is a problem to be overcome, not a situation to maintain." See Steven R. Ratner (2005), at 700.

¹⁷² See also Carsten Stahn (2008), at 469.

¹⁷³ Carsten Stahn (2008), at 469-470.

with a territorial state to become an occupying power.¹⁷⁴ This is expressly provided by CA2, which may govern peacetime occupations.¹⁷⁵ The existence of consent of the territorial state does not necessarily exclude the existence of occupation. Although formal consent may have been obtained from a nominal government, it does not necessarily mean that it was obtained from the population itself.¹⁷⁶ The government might be under pressure to give such consent, which makes it invalid.¹⁷⁷ As discussed, a “pacific occupation” exists when there is consent of the territorial state.¹⁷⁸ It is important that the UN administration substitutes the authority of the territorial state with its own authority, then whether the state formally consented.

Although the annexation of territory or any change to its status after the end of occupation is not permitted, it does not mean that such consequences would prevent the application of the law of occupation in the first place. This would contradict the very logic of the law of occupation designed to protect civilian population from the occupying power. The law of occupation depends on the existence of factual situation which triggers its application.¹⁷⁹ If the law of occupation were not applied to the occupying power, which prepares to change the status of the territory under its occupation, civilian population would be deprived from the essential guaranties provided by GCIV. Therefore the law of occupation

¹⁷⁴ See also Ralph Wilde (2008), at 310-311.

¹⁷⁵ See also Carsten Stahn (2008), at 471-472; Michael Kelly (1999), at 227.

¹⁷⁶ See Steven R. Ratner (2005), at 698. Lindsey Cameron and Rebecca Everly also point out that for instance Serbia continued to consent to the presence of UNMIK in Kosovo long after local authorities in Kosovo stopped consenting to it. See Lindsey Cameron, Rebecca Everly “Conceptualising the administration of territory by international actors”, 21 *European Journal of International Law* 221 (2010), at 236. See also John Cerone “Minding the gap: outlining KFOR accountability in post-conflict Kosovo”, 12 *European Journal of International Law* 469 (2001), at 484, who argues that the presence of a formal consent may be insufficient to overcome the presumption of occupation which arises from the circumstance of particular case (he was discussing the consent to the presence of KFOR).

¹⁷⁷ See Gregory Fox *Humanitarian occupation* (Cambridge University Press, 2008), at 110-111, 177-179.

¹⁷⁸ See also Michael Kelly (1999), at 227.

¹⁷⁹ See also See Lindsey Cameron, Rebecca Everly (2010), at 239; Carsten Stahn (2008), at 470, 472; Stadlmeier, Sigmar, Leidenmuehler, Franz, “The law of occupation and peace support operations – at odds?”, in Arnold, Roberta, *Law enforcement within the framework of peace support operations* (Martinus Nijhoff Publishers, 2008), at 24, 31

might apply to the UN territorial administration, if the conditions for such application (discussed above) exist.¹⁸⁰

Furthermore, there may be more arguments in favour of the application of the law of occupation to the UN administrations rather than against it. Firstly, the application of the law of occupation is crucial, when the UN displaced the authority of the territorial state and there is no other state authority over that territory.¹⁸¹ Civilian population in that territory finds itself in the hands of foreign authority or occupying power, no matter how benevolent its mandate is. The GCIV provisions apply in this type of situations to adequately protect civilians.¹⁸² Secondly, if the law of occupation is not to apply to the situation of the UN administration, there will be a legal vacuum in the protection of population from the actions of the foreign authority.¹⁸³ Either the UN/TCCs will have to recognise the extraterritorial application of IHRL and their obligations under it (in case of the UN only those which become a part of customary IHRL)¹⁸⁴ or civilian population may find itself without any legal protection. In these circumstances the law of occupation and its detailed provisions may provide necessary protection to civilian population.¹⁸⁵ Thirdly, the gradual approach to the application of the law of occupation advocated in this section appears to be the most suitable for the situations where the UN finds itself in the occupation of territory.¹⁸⁶ The UN is not required to fulfil all

¹⁸⁰ See also Sigmar Stadlmeier, Franz Leidenmuehler (2008), at 27; Roberta Arnold (2006), at 113.

¹⁸¹ See also Carsten Stahn (2008), at 474, who states that “the purpose of the laws of occupation is to provide a supplementary legal regime for such cases, which establishes a minimum normative framework for the maintenance of law and order and the protection of individuals.”

¹⁸² Roberta Arnold (2006), at 113.

¹⁸³ See also Lindsey Cameron, Rebecca Everly (2010), at 239.

¹⁸⁴ See the next chapter for the detailed discussion.

¹⁸⁵ See Carsten Stahn (2008), at 476; See also Bruce Oswald “The creation and control of places of protection during United Nations peace operations”, 83 *International Review of the Red Cross* 1013 (2007), at 320, who argues that reasons for using the law of occupation during PSO include “the really that as a specialised regime of law created to meet the requirements of military forces interacting with civilian population, it is a more context sensitive legal regime to apply during peace operations than [...] human rights law.”

¹⁸⁶ See also *ibid*, at 474, who states that “it is [...] plausible to argue that some provisions of the Hague and the Geneva law may apply by way of analogy to certain territorial administrations.”

positive obligations contained in the law of occupation provisions.¹⁸⁷ What is more important is that it does not act in contravention of those provisions breaching its negative obligations. This will insure at least minimum protection given to civilians.

Conclusion

The analysis in this chapter has shown that the UN and TCCs can be bound by the rules of IHL by PSOs' participation in the armed conflict. The UN being bound by the rules of customary IHL and TCCs as parties to the GC can become a joint party to the armed conflict. Their obligations under IHL become applicable when there is an armed conflict and the PSFs participate in it. If the PSFs' participation was of collective nature, both the UN and TCCs become a joint party to the conflict. If only one contingent participated in the conflict, only its respective TCC becomes a party to it. Participation in the conflict is understood as taking direct or active part in hostilities. Not only must PSFs use force against one of the parties to the conflict, they also must have intention to harm that party and to be in conflict with it. The force used for individual self-defence cannot be considered taking direct part in hostilities as lacking necessary intent. For the acts done beyond individual self-defence, the intention to harm the opposite party must still be proved.

Being deployed in a host state with a mandate not to use force beyond self-defence, the members of PSFs can be considered as civilians of neutral states, as their TCCs are not parties to the conflict. However, once PSFs start to directly participate in hostilities, they become combatants by virtue of them being armed forces of the TCCs/UN. Their participation in hostilities may internationalise an internal armed conflict in a host state. The application of the law of IAC or NIAC depends on whether they were deployed to support

¹⁸⁷ See also *ibid*, at 477.

governmental forces or opposition groups or with purely neutral mandate and become occasionally involved in hostilities with either party to the conflict.

The law of occupation may be applicable to the situation of PSOs. The application of the GCIV provisions on occupation must be done on factual basis depending on the circumstances of the case. They apply as soon as civilians find themselves in the hands of foreign forces and certain provisions of the law of occupation start to apply as soon as circumstances so demand. The PSFs must not act in contravention of any provisions of the GC, no matter which part of the conventions it is. The UN/TCCs are obliged to respect their IHL obligations.

IV. United Nations and troop-contributing states' obligations under international human rights law during PSOs

Peacekeepers committing crimes during their deployment in a host state can violate not only IHL but also IHRL. This chapter analyses the UN and TCCs' obligations under IHRL. The discussion does not cover substantive obligations under particular IHRL instrument but aims to explore the situations where IHRL becomes applicable. It examines two particular problems: extraterritorial application of IHRL and simultaneous application of IHRL and IHL.

Both issues are equally important for defining legal framework applicable to PSOs. The first issue is important because peacekeepers commit their crimes outside their home state's territory. The question is whether their TCCs are bound by IHRL when their organs act in the territory of another state. The notion of jurisdiction under IHRL will be discussed in this regard. The first section explores the jurisprudence of IHR bodies answering the question whether the notion of jurisdiction is interpreted as requiring an additional limitation to the human rights obligations of states/IOs or it essentially reflects the notion of attribution discussed in Chapter II.

Second issue arises in the situations when IHL starts to apply and the question is whether IHRL is suspended or it applies simultaneously with IHL and therefore peacekeepers who commit crimes violate not only IHL obligations, but also IHRL. Second section argues for simultaneous application of IHL and IHRL. It also analyses potential conflict between IHL and IHRL norms and how it can be overcome.

1. Extraterritorial application of the human rights law during PSOs

A) Are there any territorial limitations to the human rights obligations?

PSFs participate in the operations outside territory of their national states. Such situation leads to a possibility of extraterritorial application of IHRL norms to the conduct of PSFs. Some human rights treaties seem to establish limitations to the IHRL obligations of the states acting outside their territory by including the notion of “jurisdiction” as a condition for the states to be bound by IHRL obligations.¹ However other treaties do not contain such a limitation.² There is no consistency in the wording of provisions on jurisdiction in different legal instruments: some human rights treaties talk about jurisdiction only, others provide for territorial condition too.³

The problem of “jurisdictional” and “territorial” clauses in the human rights treaties concerns the application of IHRL to the UN which does not have a territory and depending on the interpretation of the notion of “jurisdiction” may not have it either. However, it does not mean that the UN is not bound by IHRL. As discussed above, the UN is bound by CIL, because it is a subject of international law. The UN is not a party to human rights treaties and is not bound by them, but its obligations can arise from CIL.⁴

¹ See, for instance, European Convention on Human Rights (1950), Article 1; Convention on the Elimination of Racial Discrimination (1966), Article 3; International Covenant on Civil and Political Rights (1966), Article 2(1); American Convention on Human Rights (1969), Article 1(1), etc.

² See, for instance, African Charter on Human and Peoples’ Rights (1981); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of Discrimination Against Women (1979); Convention on the Prevention and Punishment of the Crime of Genocide (1948).

³ See difference in wording in the ECHR, Article 1 and ICCPR, Article 2(1). See further discussion in the next section on the interpretation of these provisions by the international bodies.

⁴ See also Frédéric Mégret, Florian Hoffmann “The UN and a human rights violator? Some reflections on the United Nations changing human rights responsibilities”, 25 *Human Rights Quarterly* 314 (2003), at 317; Julia Werzer “The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor”, 77 *Nordic Journal of International Law* 105 (2008), at 108-109; Robert Kolb (2005), at 257.

At least some fundamental provisions contained in the human rights treaties form part of CIL.⁵ There is no academic consensus on the precise scope of customary IHRL.⁶ Most of the debates on this point start from the discussion of binding nature of the rights provided in the Universal Declaration of Human Rights (UDHR), not binding *per se* but considered to reflect at least in part CIL.⁷ It was argued that certain fundamental rights contained in the UDHR now have acquired the status of CIL,⁸ however, it is disputed which rights contained in the UDHR acquired this status.⁹

It is beyond the scope of this thesis to discuss each particular right and its status, although some indications can be provided. The American Law Institute's Restatement (Third) of the Foreign Relations Law, Section 702 lists prohibitions of human rights violations forming part of CIL already in 1987: genocide, slavery, murder or causing disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or a consistent pattern of gross violations of internationally recognised human rights.¹⁰ Prohibition against slavery, arbitrary deprivation of life, torture, arbitrary detention, and racial discrimination are included in the UDHR.¹¹ Meron discussing customary IHRL agrees in general with the list provided in the Restatement but also includes some other rights: the core of due process guarantees (Article 14 ICCPR),

⁵ Andrew J. Cunningham "The European Convention on Human Rights, customary international law and the constitution", 43 *International & Comparative Law Quarterly* 537 (1994), at 542.

⁶ See Sigrun Skogly *Beyond national borders: states' human rights obligations in international cooperation* (Intersentia, 2006), at 110.

⁷ See also Melissa Robbins "Powerful states, customary law and the erosion of human rights through regional enforcement", 35 *California Western International Law Journal* 275 (2005), at 281. See also for the discussion of different authors views on whether the provisions of the UDHR have become part of CIL Hurst Hannum "Status of the Universal Declaration of Human Rights in National and International Law: The Status and Future of the Customary International Law of Human Rights", 25 *Georgia Journal of International and Comparative Law* 287 (1995-1996), at 322-234; Sigrun Skogly (2006), at 120-122.

⁸ See Richard B. Lillich "Growing Importance of Customary International Human Rights Law", 25 *Georgia Journal of International and Comparative Law* 1-30 (1995), at 5; Sigrun Skogly (2006), at 119.

⁹ See Theodor Meron *Human rights and humanitarian norms as customary law* (Clarendon, 1989) at 83-83.

¹⁰ See also Hurst Hannum (1996), at 341-342.

¹¹ See also *Ibid*, at 342-351 for the discussion of particular provisions of the UDHR as reflecting CIL.

right to human treatment of detainees (Article 10 ICCPR), right to self-determination, prohibition of retroactive application of penal measures (Article 15 ICCPR).¹²

Although the UN may be bound by at least some human rights obligations which gained status of CIL, the issue of jurisdiction may become an obstacle to apply human rights obligation to the UN and TCCs, when their peacekeepers commit crimes in the territory of the host state.¹³ The main question is how the “jurisdiction” is understood with regard to human rights treaties and whether it limits human rights states’ obligations.

From the preliminary point of view jurisdictional limitations in the treaties are necessary, because states cannot be responsible for all human rights violations in this world and can only be responsible for those which they could prevent. The international supervisory bodies by using the criterion of jurisdiction may limit the responsibility of states for particular human rights violations, that is to say that a state is not responsible for the breach of human rights obligations, unless it had jurisdiction over the acts leading to human rights violations.

As discussed above under the state responsibility rules, a state is responsible for an internationally wrongful act, only if it is attributable to it and constitutes breach of its international obligations.¹⁴ Applying this rule to the violations of human rights obligations, an act constituting a violation of IHRL must be attributable to the state in question in order for that state to become responsible for the wrongful act. The attribution also limits the responsibility of a state for a particular act constituting a human rights violation.

Although some treaties contain limitations on the basis of jurisdiction, they do not include a clause on attribution of particular acts to the state in question. However, this rule of attribution can be implied in respect to any wrongful act, including human rights violations.

¹² Theodor Meron (1989), at 95-97.

¹³ As Stahn points out, “the applicability of human rights standards to international organisations cannot be based on the concept of territory sovereignty, because international entities usually lack permanent ownership or title over territory. (Carsten Stahn (2008), at 489-490).

¹⁴ See, ASR, Articles 1 and 2.

Another possibility is that the notion of jurisdiction is used by human rights bodies instead of the attribution for the same purpose, in this way giving the notion of “jurisdiction” the same meaning as an attribution has under the rules of international responsibility.

Therefore a further inquiry should be made regarding the scope of jurisdiction in the way it is interpreted by human rights bodies to find out whether the limitation on jurisdiction in IHRL treaties can potentially coincide with the condition of attribution of the wrongful act as part of state/IO responsibility under PIL. If they do not coincide in scope, there is a need to analyse whether the jurisdictional condition constitutes an additional limitation to the international responsibility comprised by the requirement to prove a breach of international obligations (i.e. without a proof of state’s jurisdiction, an act would not constitute a breach of IHRL obligations).

B) In which circumstance do individuals become subject to states’ jurisdiction under human rights treaties?

i) Notion of “jurisdiction” in human rights treaties

In discussing the notion of “jurisdiction” in human rights treaties, it should be firstly noted that it is different from a classic concept of jurisdiction under general international law. The latter concerns the power or authority of the state under international law to regulate or otherwise impact upon persons, property and circumstances in accordance with its municipal law.¹⁵ What the state is entitled to do under general international law does not necessarily coincide with what it actually does exercising its “jurisdiction”. The question of whether the state’s actions are in conformity with the rules of general international law and within its

¹⁵ See Roger O’Keefe "Universal jurisdiction: clarifying the basic concept", 2 *Journal of International Criminal Justice* 735 (2004), at 736. See further discussion on jurisdiction in the next chapter.

authority to regulate or impact upon persons or property does not affect the fact that it performed certain actions (within or outside its authority). These actions, performed by the state, are subject to the human rights scrutiny and whether or not they violated IHRL does not depend on whether the state's actions went beyond its authority under general international law. Therefore "subject to states' jurisdiction" does not refer only to the state's actions authorised under general international law but includes any actions that the state performs exercising its "jurisdiction" whether or not they were within its authority under general international law.

Another question is in which circumstances a person becomes "subject to state's jurisdiction" (ICCPR, ACHR) or falls "within its jurisdiction" (ECHR). He may become subject to its jurisdiction, when a state acts against a person whether or not these acts performed abroad. The analysis of states' responsibility would include the question of attribution of conduct to the state and of substantive breach of IHRL obligations. If, however, to become "subject to state's jurisdiction" a person needs to have a link with a state concerned, the analysis of state's responsibility would include the attribution of conduct and finding on substantive breach of IHRL obligations, and a separate analysis on the existence of the link between the state and individual.

The following discussion of the jurisprudence of human rights bodies and the ICJ aims to demonstrate whether these international institutions in their findings on the states' violations of IHRL examine the notion of "jurisdiction" from the perspective of "attribution" of conduct to the state concerned or they undertake an additional analysis on whether a person had another link with the state in addition to being affected by the act attributed to the state. The following discussion does not aim to address the wrongfulness/correctness of the analysis

of the question of attribution or to examine in detail the reasoning of the courts/bodies on every case and therefore has a limited purpose to verify the aforementioned proposition.

Notably the normative status of practice of different courts and human rights bodies is different. The ICJ judgements are binding upon the parties.¹⁶ The ECtHR judgements have binding authority for the parties.¹⁷ Although the practice of the HRC is generally considered not to be binding,¹⁸ the “views” of the Committee on individual communications may have some legal force.¹⁹ The judgements of the Inter-American Court are legally binding,²⁰ unlike reports and recommendations of the Inter-American Commission on Human Rights. Despite the highlighted difference in their normative status, all the decisions will be equally analysed.

The ICJ discussed the extraterritorial application of the ICCPR in the *Wall* case, where the Court relying on the object and purpose of the ICCPR considered it “natural” that when the states parties exercise their jurisdiction outside their territory, they should be bound to comply with its provisions.²¹ The Court noted that “the drafters of the Covenant did not intend to allow states to escape from their obligations when they exercise jurisdiction outside their

¹⁶ See Article 94 of the UN Charter.

¹⁷ It follows from Article 46, para. 1 ECHR on binding force and execution of the judgements, which states that “the High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties.” See also Elisabeth Lambert-Abdelgawad *The execution of judgments of the European Court of Human Rights* (Council of Europe Pub., 2002), at 7; see also Henry J. Steiner, Philip Alston, Ryan Goodman *International human rights in context* (Oxford University Press, 3d ed., 2007), at 965.

¹⁸ See Dominic McGoldrick *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (Clarendon, 1991), at 151; Kerstin Mechlem *Treaty Bodies and the Interpretation of Human Rights*, 42 *Vanderbilt Journal of Transnational Law* 905 (2009), at 909.

¹⁹ Although there is no provision in the Optional Protocol to the ICCPR which would indicate a precise legal effect of the “views” or on the enforcement of the Committee’s “views”, if a state does not comply with them (see Henry J. Steiner, Philip Alston, Ryan Goodman (2007), at 892; Dominic McGoldrick (1991), at 151), the “views” of the Committee can serve as an authoritative interpretation of the ICCPR, by itself legally binding, and states not complying with the “views” of the HRC, violate the ICCPR itself (See also discussion in Henry J. Steiner, Philip Alston, Ryan Goodman (2007), at 915-916; Kerstin Mechlem “(2009), at 925). The Concluding Observations are not legally binding (Kerstin Mechlem (2009), at 924). Although General Comments of the Committee are not binding, some national courts use selected General Comments in their judgements discussing international standards (see Henry J. Steiner, Philip Alston, Ryan Goodman (2007), at 874) and therefore the General Comments can “exert considerable persuasive force on decision makers in domestic legal systems and national courts” (Kerstin Mechlem (2009), at 927-928).

²⁰ See Henry J. Steiner, Philip Alston, Ryan Goodman (2007), at 1027, 1029.

²¹ *Legal consequences of the construction of a Wall in the Occupied Palestinian territory*, ICJ, Advisory Opinion, 9 July 2004 (“*Wall case*”), para. 109. The Court also noted that the practice of the Human Rights Committee (HRC)²¹ and the *travaux préparatoires* of the ICCPR confirm this.

national territory.”²² The Court further adopted the HRC’s view that the state becomes responsible for all the conduct by its authorities or agents that affects the enjoyment of rights enshrined in the ICCPR.²³ It concluded that the ICCPR is applicable “in respect of acts done by a state in the exercise of its jurisdiction outside its own territory.”²⁴

The Court adopted the approach under which the acts performed by state (and therefore attributed to it) in breach of the ICCPR will entail state’s international responsibility under the Covenant. No additional link between the state and persons concerned was needed and therefore no additional limitation was envisaged for the finding of international responsibility of that state. Notably, the Court used the word “jurisdiction” in the sense that the state in fact carried out certain acts outside state’s territory and not in the sense of its authority under general international law to perform those acts.

However, when the ICJ further analysed the application of the ICESCR, the reasoning was different. While noting that the ICESCR contains no provision on its scope of application and that it guarantees rights which are essentially territorial, the Court considered that “it is not to be excluded that it applies both to territories over which a state party has sovereignty and to those over which that state exercises territorial jurisdiction.”²⁵ It concluded with respect to Israel that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the [ICESCR].”²⁶

²² *Ibid.* The Court explained, that it was only intended to “prevent persons residing abroad from asserting, vis-à-vis their states of origin, rights that do not fall within the competence of that state, but of that of the state of residence.”

²³ *Ibid.*, para. 110, Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, “Concluding observations of the Human Rights Committee: Israel”, 21 August 2003, CCPR/CO/78/ISR, para. 11.

²⁴ *Wall* case, para. 111.

²⁵ *Ibid.*, para. 112.

²⁶ *Ibid.*

The Court found that violations of the ICESCR dependent on the state's exercise of "territorial jurisdiction". The rights guaranteed by the ICESCR are "territorial" because the Covenant requires the states to take positive actions rather than not to violate rights. While the state may be required to comply with the latter obligations everywhere (inside or outside its jurisdiction), the positive obligations must be linked to the territory, over which the state has "territorial jurisdiction". Accordingly, the state has "territorial jurisdiction" over the territory it occupies. However, for ICCPR no territorial jurisdiction was required. Therefore there are certain obligations which require the establishment of "territorial jurisdiction" of the state to find its violation of those obligations, whereas other obligations become applicable irrespective territorial jurisdiction of the state only because they are attributed to it.

The Court followed the same logic in the *Congo* case. Its finding of attribution of the conduct of its soldiers to Uganda and of the breach by that conduct of relevant provisions of the IHR instruments was enough to hold the state responsible without conducting additional analysis on the state's jurisdiction under each of the human rights instruments violated by the state.²⁷ The Court dealt with the issues of state's conduct in occupied territories and other acts of state's organs separately and in both occasion found state's responsibility for human rights violations.²⁸ Moreover, the ICJ deployed a single standard for all human rights treaties that it mentions in the judgement and did not refer specifically to the ICCPR, mentioning "international human rights instruments" that are applicable in those circumstances.²⁹

Therefore the Court used the same approach to jurisdiction as it did in *Wall*, although not specifically referring to the notion of jurisdiction. According to the Court in *Congo*, there are certain human rights obligations binding upon the states by virtue of the attribution of the conduct of their organs to those states and there are other human rights obligations binding

²⁷ See, *Congo* case, in particular, paras. 213, 215-217, 219-220.

²⁸ See, *ibid.*, para. 220. See also John Cerone (2006), at 1477.

²⁹ John Cerone (2006), at 1477; see *Congo* case, para. 216.

state because it occupies a particular territory of another state. As the Court did not explain which obligations come to the second category, the further analysis of the case-law of human rights bodies is needed.

The human rights bodies do not always strictly follow the reasoning of the ICJ on the issue of jurisdiction of human rights treaties. While the practice of the HRC and Inter-American Commission on Human Rights (IACHR) is generally in line with the ICJ approach, the European Court of Human Rights (ECtHR) has applied distinct reasoning on the matter of jurisdiction. The following analysis will firstly discuss their practice.

ii) Interpretation of jurisdiction by the HRC and IACHR

The approach taken by the HRC on the interpretation of Article 2(1) on jurisdiction has been relatively broad. This is significant because unlike the ECHR (containing the obligations of the states to secure to everyone “within their jurisdiction” the rights), the ICCPR provides that the states must respect and ensure the rights to all individuals “within its territory and subject to its jurisdiction.”³⁰ In *Saldias de Lopez* concerning the arrest and initial detention and mistreatment of the victim in the foreign territory by Uruguayan agents, the HRC held that it could consider the allegations despite jurisdictional provisions, inasmuch as the alleged acts were perpetrated by Uruguayan agents acting on foreign soil.³¹ The HRC interpreted the notion of “jurisdiction” as referring “not to the place where the violation occurred, but rather to the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred,”³² because it

³⁰ ICCPR, Article 2(1).

³¹ *Saldias de Lopez v Uruguay*, Communication No. 52/1979, 29 July 1981, HRC, CCPR/C/OP/1 at 88 (1984) (“*Saldias de Lopez* case”), para. 12.2. See also *Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 July 1981, HRC, CCPR/C/OP/1 at 92 (1984), para. 10.1.

³² *Ibid*, para. 12.2. See also *Celiberti de Casariego* case, para. 10.2.

would be “unconscionable” to permit a state party to perpetrate in the territory of another state the human rights violations, which it could not perpetrate on its own territory.³³

The HRC in its General Comment No. 31 stated that the state must respect and ensure the rights of the Covenant to any one within the power or effective control of the state’s forces acting outside its territory, “regardless of the circumstances in which such power or effective control was obtained such as forces constituting a national contingents of a state party assigned to an [PSO].”³⁴ In its Concluding observations on Israel, the Committee held that the provisions of the ICCPR “apply to the benefit of the population of Occupied Territories, for all conduct by the state party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant fall within the ambit of state responsibility of Israel under the principles of [PIL].”³⁵ The ICJ approved this statement in *Wall*.³⁶

The HRC in the Concluding observations on Israel found that jurisdiction depends on the rules of state responsibility, namely on the attribution of particular acts to that state. It does not need to be established the state exercised effective control over the territory or over the persons in detention. What must be established is that the acts breaching human rights obligation of the state under the ICCPR were performed by state’s organs or agents and attributable to it. Therefore the finding of attribution of conduct to the state would encompass the finding on state’s jurisdiction for its responsibility for breach of human rights obligations.

The approach of the IACHR to the interpretation of “jurisdiction” is similar to the HRC,³⁷ and also quite broad.³⁸ The IACHR stated that in the finding of state’s jurisdiction, the

³³ *Ibid*, para. 12.3.

³⁴ Human Rights Committee, General Comment No. 31, “The nature of the general legal obligations imposed on states parties to the Covenant”, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 10, see also Human Rights Committee, Consideration of reports submitted by states parties under Article 40 of the Covenant, “Concluding observations of the Human Rights Committee: Belgium”, 12 August 2004, CCPR/CO/81/BEL, para. 6.

³⁵ Concluding observations on Israel, CCPR/CO/78/ISR, para. 11.

³⁶ See *Wall* case, para. 110.

³⁷ See also Joanne Williams “A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya”, 16 *European Journal of International Law* 741 (2005), at 719.

victim's nationality or presence on the particular geographic area is not important, what is important is whether under specific circumstances, the state observed the rights of a person subject to its "authority and control" usually exercised through the acts of the state's agents.³⁹ Moreover, in *Alejandro* the Commission held that when a state's agents exercise power and authority over a person outside national territory, the state's obligation to respect human rights continues.⁴⁰ The Commission applied the American Declaration to the situation, where the military aircraft belonging to Cuba downed two unarmed civilian airplanes in international airspace and therefore the agents of Cuba, although outside their territory, placed the civilian pilots under their authority.⁴¹ Although the Cuban pilots did not exercise physical control over the civilian airplane and the acts occurred outside Cuban territorial control, the state was responsible for those acts because its agents committed them. This approach to the notion of "control" suggests that where state's agents are able to kill a person outside its territory, the state exercises sufficient control over that person to be responsible for violating his rights.⁴²

This case of the IACHR had very similar facts to *Banković* before the ECtHR, but in spite of their similarity, the ECtHR came to a completely opposite conclusion regarding the question of jurisdiction. If the ECtHR in *Banković* took the same approach as the IACHR, its outcome could have been different.⁴³ The Court would have to discuss whether the air strikes conducted by NATO member states were attributable to NATO or to its member states.⁴⁴

³⁸ Christine Byron "Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies, A", 47 *Virginia Journal of International Law* 839 (2007), at 878; see also John Cerone (2006), at 1478.

³⁹ *Coard et al. v. United States*, Case 10.951, Report N° 109/99, IACHR, 29 September 1999 ("Coard case"), para. 37; see *Saldano v. Argentina*, Report No. 38/99, IACHR, 11 March 1999, para. 19; *Ferrer-Mazorra et al v United States*, Case 9903, Report No. 51/01, IACHR, 4 April 2001, paras. 179, 182; *Alejandro and others v Cuba*, Case 11.589, Report No. 86/99, IACHR, 29 September 1999, para. 23.

⁴⁰ *Alejandro* case, para. 25.

⁴¹ *Ibid*, para. 25.

⁴² Douglass Cassel "Extraterritorial application of Inter-American human rights instruments", in Coomans, Fons, Kamminga, Menno T., *Extraterritorial application of human rights treaties*, (Intersentia, 2004), at 177.

⁴³ See Christine Byron (2007), at 878.

⁴⁴ See the discussion below.

iii) Interpretation of jurisdiction by the ECtHR

The ECtHR in general adopted the most stringent approach to the notion of “jurisdiction” as compared to other human rights bodies and the ICJ. Such approach was mainly advanced by the Court in *Banković* which influenced the development of consequent jurisprudence by the ECtHR. In this case the Court confined the recognition of extraterritorial jurisdiction of states to the cases where the state “through its effective control over the relevant territory and its inhabitants abroad as a consequence of military occupation or [...] exercises all or some of the public powers normally to be exercised by that government.”⁴⁵ The Court consequently did not find a jurisdictional link between the victims of the NATO air strikes and NATO MSs participated in them.⁴⁶ The ECtHR also mentioned *obiter* that it is prepared to recognise the extraterritorial jurisdiction of a state, in the cases involving activities of diplomatic agents abroad or on vessels registered in the state, as these situations were recognised by CIL and treaty provisions as involving exercise of states’ extraterritorial jurisdiction.⁴⁷

The problem with reasoning in *Banković* is that the Court started to analyse the question of jurisdiction under Article 1 ECHR in the light of the “jurisdictional competence” of the state.⁴⁸ It focused not on whether the state in fact exercised “jurisdiction”, but whether it had “competence” to exercise “jurisdiction.”⁴⁹ As discussed above, the question whether or not the state is allowed to exercise jurisdiction under general international law does not affect the question whether it actually exercised it and whether while exercising its jurisdiction, it violated human rights. Pursuing its analysis from the wrong proposing the Court fell in its

⁴⁵ *Banković and others v Belgium and others*, Application No. 52207/99, 12 December 2001 (Admissibility), para. 71.

⁴⁶ *Ibid*, para. 82.

⁴⁷ *Ibid*, para. 73.

⁴⁸ See *ibid*, paras. 59-60.

⁴⁹ *Ibid*, paras. 59-60.

own trap when started to discuss its previous jurisprudence. While discussing *Loizidou*, it recognised that the focus in that case was on “effective overall control” which Turkey exercised in fact over a part of the territory of Cyprus.⁵⁰ It did not focus on whether or not Turkey was permitted under general international law to exercise such control over the territory of another state violating its sovereignty. Moreover, it mentioned that the responsibility of states can be engaged when as a consequence of military action (lawful or unlawful) it exercised effective control over an area outside its territory,⁵¹ which means that even if the military operation was unlawful under general international law, the Court is prepared to find that acts were within states jurisdiction.

By starting with the wrong proposition on the notion of jurisdiction, the Court further developed very limited circumstances under which the persons may find themselves “within state’s jurisdiction” for the purposes of Article 1 ECHR. The Court’s approach may be explained by the fact that the ECHR contains positive obligations of the states parties and the states cannot be required to fulfill those obligations vis-à-vis persons unless the states are permitted to take actions under general international law. However this approach omits to consider that by their actions, the states may have already acceded the limits of their “jurisdictional competence” under general international law (for example establishing its control over particular place or part of the territory of another state without its consent), but it does not mean that already committing those acts in contravention of general international law they should be exempt from their obligations under the Convention. The fact of them exercising jurisdiction must be taken into account and not whether or not it was lawful under general international law.

⁵⁰ See also Marko Milanović “Norm conflict, international humanitarian law, and human right law”, in Ben-Naftali, Orna, *International humanitarian law and international human rights law: pas de deux*, (Oxford University Press, 2011), at 27.

⁵¹ See *Banković* case, para. 70.

Another problem of this decision is that the Court refused to “divide and tailor” the obligations of the states under the Convention, in particular with respect to positive obligations, which by their nature depend on particular facts of a case. The problem is not that the Court relied on the notion of “effective control” when finding extraterritorial jurisdiction of states, but failed to recognise that there may be different aspects of such control which would not necessarily depend on the territorial control and may entail different scope of state’s obligations depending on the level of the factual control exercised by the state in particular situation or circumstances.⁵²

The approach taken by the Court in *Banković* was not supported by the case-law of other human rights bodies⁵³ and was progressively changed towards the broader approach to human rights violations beyond the states’ borders. There are no pre-*Banković* cases, providing for such a stringent approach to extraterritorial jurisdiction of states or requiring Article 1 ECHR apply extraterritorially only in the situations where a state exercises effective control over a territory.⁵⁴ In the recent (post-*Banković*) ECtHR jurisprudence there are more instances where the state is found to exercise extraterritorial jurisdiction. For most of them the key factor to be considered is the presence of effective control by state agents over either individual persons or territory.⁵⁵ The discussion below will firstly consider that ECtHR jurisprudence, where the extraterritorial jurisdiction of states was found on the basis of effective control over the territory of another state; then a place; and further individuals.

⁵² See Orna Ben-Naftali “The extraterritorial application of human rights to occupied territories”, 100 *American Society of International Law Proceedings* 90 (2006), at 93. See also Martin Scheinin “Extraterritorial effect of the International Covenant on Civil and Political Rights”, in Coomans, Fons, Kamminga, Menno T., *Extraterritorial application of human rights treaties* (Intersentia, 2004), at 77, who suggests that in this case the focus should have been made not on the effective territorial control of states over Belgrade, but whether the NATO states had effective control over the consequences of the air strike in respect of the individual complainants.

⁵³ See previous discussion on this issue.

⁵⁴ See Alexander Orakhelashvili “Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights”, 14 *European Journal of International Law* 529 (2003), at 546.

⁵⁵ See Shane Darcy “Human Rights Protection during the War on Terror: Two Steps Back, One Step Forward War on Terror Symposium”, 16 *Minnesota Journal of International Law* 353 (2007), at 363.

The ECtHR recognised that the state's extraterritorial jurisdiction may be found if it exercises effective control over an area outside its territory. This effective control may be established as a consequence of lawful or unlawful military action.⁵⁶ It can be exercised directly, through state's armed forces or through subordinate local administration.⁵⁷

In “pre-*Banković*” *Loizidou* the ECtHR considered that it is not necessary to determine that Turkey exercised detailed control over the policies and actions of the “TRNC” authorities and given the large number of Turkish troops engaged in active duties in northern Cyprus, its army exercised “effective overall control” over that part of the island and Turkey was obliged to secure the rights and freedoms of inhabitants of that area as coming within Turkish “jurisdiction”.⁵⁸ The ECtHR refused to follow the argument endorsed by Turkey that TRNC is an independent state⁵⁹ and concluded the alleged violations fell within Turkey's jurisdiction and thus imputable to Turkey.⁶⁰

The Court affirmed the extraterritoriality of human rights obligations using principles of attribution.⁶¹ Subsequent *Cyprus v Turkey* confirmed that the Court was referring to the attribution of conduct in the strict sense.⁶² In this case the ECtHR explained that Turkey must bear general responsibility under the Convention for all the policies and actions of the “TRNC” authorities (not only for the acts of its soldiers and officials) because of Turkish military and other support to the “TRNC”.⁶³ All the TRNC's acts were imputable to Turkey.⁶⁴

⁵⁶ *Loizidou v Turkey*, Application No. 15318/89, 23 March 1995 (Preliminary objections), para. 62; *Ilaşcu v Moldova and Russia*, Application No. 48787/99, 08 July 2004, para. 289.

⁵⁷ *Loizidou* (preliminary objections) case, para. 62; *Ilaşcu* case, para. 289.

⁵⁸ *Loizidou v Turkey*, Application No. 15318/89, 18 December 1996 (Merits), para. 56.

⁵⁹ *Ibid*, para. 56.

⁶⁰ *Ibid*, para. 57.

⁶¹ See Rachel Opie “Human rights violations by peacekeepers: finding a framework for attribution of international responsibility”, *New Zealand Law Review* 1 (2006), at 15.

⁶² John Cerone, “Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations”, 39 *Vanderbilt Journal of Transitional Law* 1447 (2006), at 1483.

⁶³ *Cyprus v Turkey*, Application No. 25781/94, 10 May 2001, para. 65.

⁶⁴ *Ibid*, para. 65.

The Court's finding of imputability of human rights violations to Turkey on such basis is controversial considering international law on state responsibility. The Court employed the lower standard of application of the rules of attribution than set in the ASR.⁶⁵ The ECtHR did not analyse whether "TRNC" can be considered a *de facto* state organ or if all its acts were done under effective control of the state under any ASR article on attribution. According to the Court, the state is responsible for all the acts of the entity because of its support to "TRNC" and its "effective overall control" over territory, which is not in line with the *Nicaragua* test.⁶⁶

Although such factors cannot be sufficient for attribution of conduct of entity under ASR Articles 4 and 8, under certain conditions this situation may be similar to ASR Article 9 on the attribution of conduct carried out in the absence or default of the official authorities. Article 9 may be relevant in the situations where the state loses control over part of its territory and private persons (e.g. irregulars) exercise elements of governmental authority in the area.⁶⁷ However this article entails the responsibility of the state that lost control over that territory, rather than to the foreign state (in this case it would be Cyprus rather than Turkey). However, if the foreign state establishes its authority over a part of another state's territory and replaces the authority of the territorial state as a result of occupation, it may entail responsibility of foreign states under Article 9 for the conduct of the entity exercising elements of governmental authority in the absence or default of authorities of the foreign state, if the territory is under foreign state's control.⁶⁸

⁶⁵ See John Cerone (2006), at 1483.

⁶⁶ See, *inter alia*, *Nicaragua* case, paras.115-116. See more detailed discussion on this issue in Chapter II of this dissertation. The discussion on the adoption of the *Loizidou* reasoning in the *Tadić* case, can be found in Chapter II, section 1(b), at IV.1. See also John Cerone (2006), at 1460, who also suggests that the ECtHR seems to adopt a lower standard for attribution than that employed by the ICJ in the *Nicaragua* case and set forth in ASR Article 8.

⁶⁷ See ASR Commentary to Article 9, paras. 4-6.

⁶⁸ This scenario was not envisaged in the ASR Commentary to Article 9, however, according to it, the situation described in Article 9 may happen during the foreign occupation (see, para.1).

Even if it is not the case, the foreign state may still be under obligation to prevent the human rights violations (i.e. to secure the rights and freedoms of the Convention) without attribution of particular conduct of the entity to the state, if the ECtHR finds jurisdiction of the foreign state, which it did in *Loizidou* and *Cyprus v Turkey*. However, in those cases the Court did not talk only about positive obligation of Turkey to prevent human rights violation over the territory under its effective control. Interestingly, the ECtHR equated the existence of jurisdiction of the state and imputability of the acts to the state,⁶⁹ using the notion of jurisdiction as the attribution and employing its own test of control over the acts. If for the Court jurisdiction and imputability (attribution) are the same things, there is no need to prove them both and the findings of attribution of particular conduct to the state and substantive breach of human rights obligations is enough to entail state's responsibility for the conduct.

In *Ilaşcu* the ECtHR continued same approach taken in the case-law concerning Northern Cyprus despite all its controversy and extended it to the situation with Transdniestria. The Court firstly reiterated its previous finding that if the state exercises overall control over the area outside its territory, it may engage its responsibility not only for the acts of its soldiers, but also for the acts of the local administration which survives there because of its military and other support.⁷⁰ It further found Russia responsible not only for the actions of its agents in arresting the applicants and transferring them into the hands of the Transdniestrian police and regime,⁷¹ but also for the acts of "MRT" in which Russia did not participate.⁷² The latter finding was based on the fact that "MRT" set up with the Russian support, remained under Russian "the effective authority, or at the very least under the

⁶⁹ See also John Cerone (2006), at 1483.

⁷⁰ *Ilaşcu* case, paras. 290-291.

⁷¹ See *Ilaşcu* case, para. 359.

⁷² *Ibid*, para. 368.

decisive influence” and survived by virtue of different types of Russian support.⁷³ The Court concluded that the applicants came within “jurisdiction” of Russia and its responsibility is engaged for the acts complained.⁷⁴

Interestingly, for this time the Court did not expressly find that Russia had “effective overall control” over the territory of Transdnistria (it found that the “MRT” had such control).⁷⁵ The Court instead focused on the military, political and financial support that Russia gave to “MRT” to ensure its survival.⁷⁶ It attributed the conduct of “MRT” authorities to Russia using rules of attribution of its own design.⁷⁷ Accordingly, the state may be responsible for the acts of the entity acting in the territory of another state if it renders support to this entity without a need of effective control to be exercised over its acts or territory where those acts took place. The establishment of jurisdiction substitutes the need to prove the attribution of the acts to states for the purposes of state responsibility according to Court.

The Court’s reasoning concerning Moldovan jurisdiction was even more interesting. It considered that even though Moldova did not and could not exercise its authority over the territory of “MRT”, the applicants were still within its jurisdiction for the purposes of Article 1 ECHR, but this situation “reduces the scope of that jurisdiction in that the undertaking given by the state under Article 1 must be considered by the court only in the light of the contracting state’s positive obligations towards persons within its territory.”⁷⁸ The Court considered that the state must use diplomatic, economic or other measures to continue to guarantee the enjoyment of rights under the Convention in its territory.⁷⁹ It follows that if a state does not

⁷³ *Ibid*, para. 367

⁷⁴ *Ibid*, para. 369.

⁷⁵ See *ibid*, para. 305.

⁷⁶ See *ibid*, para. 367.

⁷⁷ John Cerone (2006), at 1491; see also Marko Milanović (2011), at 49.

⁷⁸ *Ilaşcu* case, paras. 308, 310.

⁷⁹ *Ibid*, paras. 306, 308.

exercise authority over a part of its territory, it is bound only by limited positive obligations, but not negative obligations, which were omitted by the Court.

This can lead to a nonsensical result: if a state violates right to life of a person in its own territory under which it does not have authority (e.g. its agents killed a person in that territory), these acts do not fall within its jurisdiction as negative obligations, but it must use all its diplomatic means to influence members of the entity not to commit the same killing to fulfill its positive obligations. If the Court in *Ilașcu* wanted to find Moldova alongside with Russia responsible for the acts of “MRT”, it made no sense to reduce the obligations of Moldova to only positive obligations, excluding negative obligations. It could be stated that Moldova still had positive obligations, although limited, to protect persons in the territory over which it does not have authority. As for the finding Russia’s responsibility for “MRT”, this is even broader jurisdiction than ordinary rules of attribution of conduct under ASR.

According to the following Court’s jurisprudence there is no need to establish that a state had effective control over a territory in order to find that the state had jurisdiction under Article 1 ECHR. One of the situations where the ECtHR found that the state had jurisdiction, even though it did not have territorial control, is where the state exercised control over the premises and detention facilities located in any territory and individuals present there.⁸⁰

Further Court’s case-law shows that there is no need for the state agents to exercise control over the particular premises at all to bring about the authority and control over individuals necessary to establish state’s jurisdiction. Being held in the hands of the state’s

⁸⁰ In *Al-Saadoon and Mufdhi v the United Kingdom*, Application No. 61498/08, 02 March 2010, the Court found that the UK had jurisdiction over individuals arrested by it and transferred to the detention facilities run by it in Iraq, as the UK exercised control and authority over the individuals detained there (paras. 87-88).⁸⁰ The applicants, however, had to prove the state’s involvement in their arrest and its control over the premises. See also *Hussein v Albania and others*, Application No. 23276/04, 14 March 2006 (Admissibility). The authority and control need not be established over detention facilities only. It can be established over any particular place, for example over a ship. The court found *de facto* control over a ship intercepted by the state agents. The crew of the ship, according to the Court in the *Medvedyev* case, also fell within state’s jurisdiction (*Medvedyev and others v France*, Application No. 3394/03, 29 March 2010 (Grand Chamber), para. 59).

officials, according to *Öcalan*, is already enough.⁸¹ Accordingly, there is no need for control by the respondent state over the premises themselves, the control over a person is sufficient.⁸² In recent cases, the ECtHR expanded even further the notion of “jurisdiction, even in contravention to its own previous reasoning provided in *Banković*.”⁸³ The approach taken by the ECtHR in recent cases appears to be closer to the rules relating to the attribution of acts to a state for the purposes of establishing international responsibility of states.⁸⁴

In *Al-Skeini* the Court found that since the UK assumed the exercise of “some of the public powers” in Iraq (i.e. authority and responsibility for maintenance of security), the UK, through its soldiers engaged in security operations, “exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link” between the victim and the state for the purposes of Article 1 ECHR.⁸⁵ The deaths

⁸¹ In *Öcalan v Turkey*, Application No. 46221/99, 12 May 2005, para. 79, the Court found the applicant to be under Turkish authority and control and therefore under its “jurisdiction” from the moment he was handed over to the Turkish officials by Kenyan officials, even there Turkey exercised its authority outside its territory.

⁸² It is supported by the reasoning of the European Commission on Human Rights (ECmHR) in *M v Denmark*, Application No. 17392/90, 14 October 1992 (Admissibility), para. 1 that where it stated that the state agents, including diplomatic or consular agents, “bring other persons or property within the jurisdiction of that state to the extent that they exercise authority over such persons or property”, and “[i]n so far as they affect such persons or property by their acts or omissions, the responsibility of the state is engaged”.

⁸³ In *Pad*, the ECtHR concluded that the victims of the alleged incident fell within jurisdiction of Turkey on because it admitted that the fire discharged from the Turkish helicopters caused the death of the victims, although the incident happened in the territory of Iran (*Pad and others v Turkey*, Application No. 60167/00, 28 June 2007 (Admissibility), paras. 54-55). The Court did not discuss whether the victims at that moment were under authority or control of Turkish agents, probably because Turkey did not dispute its jurisdiction (para. 54). However notably the Court found Turkish jurisdiction not only where after helicopter’s landing the victims were surrounded by the Turkish forces and therefore physically came into their control, but also where the fire was discharged from the flying helicopter. This approach completely departs from reasoning in *Banković* (see also Marko Milanović (2011), at 185). The test of jurisdiction also seems to turn to the attribution of conduct to the state’s agents than to the fact that they exercised physical control over the persons or territory.

⁸⁴ See also *Isaak v Turkey*, Application No. 44587/98, 28 September 2006 (Admissibility), at 19-21, where the ECtHR held that a state can be responsible for violations of human rights of persons outside its territory who are found to be under this state’s authority and control through its agents lawfully or unlawfully operation in the other state, because Article 1 ECHR cannot be interpreted to allow the state to perpetrate human rights violations in the territory of another state which it could not perpetrate in its own territory. Moreover, the events took place in the territory of the neutral UN buffer zone, therefore outside the territorial control of Turkey. The Court, however, found that the applicant came under the Turkish authority/effective control and therefore within jurisdiction as a result of the acts of Turkish and “TRNC” soldiers and officials (at 21). The Court focused on the fact that human rights violations were committed by state’s agents (including by the “TRNC” authorities, whose acts are considered by the Court to be imputable to Turkey) rather than on the control over the territory.

⁸⁵ *Al-Skeini* case, para. 142.

occurred during such security operations resulted from either acts of British soldiers or unidentified gunmen fell within the UK jurisdiction.⁸⁶

It is possible to interpret *Al-Skeini* in the light of the concurrent opinion of Judge Bonello who advocated for the “authority and control” test (he calls it “functional test”) according to which if the perpetrator of human rights violations was within the state’s authority and control or the ability to investigate, punish and compensate for the human rights violations was within state’s authority and control, the violations would fall within that state’s jurisdiction.⁸⁷ Accordingly, the Court applied the test of “authority and control” finding the UK’s jurisdiction over the individuals killed during the UK operations. The fact that it was done “during the security operations” and that the UK exercised “some of the public powers” in Iraq were factors (as opposed to requirement) leading the court to conclude that the violations were within the state’s authority and control and in other cases there may be other factors which could contribute to the finding of authority and control for the purposes of state’s jurisdiction.

Another view was expressed that the Court did not fully depart from *Banković* and still requires to prove the exercise of “some of the public powers” by the state.⁸⁸ Accordingly, what was said in *Banković* is still valid and transposed through “public powers” requirement which constitutes “exceptional circumstances” of finding of “authority and control” over the victims located extraterritorially.⁸⁹ This approach suggests that the Court will find state’s

⁸⁶ *Al-Skeini* case, para. 143.

⁸⁷ *Al-Skeini* case, concurring opinion of Judge Bonello, paras. 11, 12, 14, 19.

⁸⁸ See, for instance, Marco Milanović (2012), at 130; Anna Cowan (2012), at 224-225; Conall Mallory “European Court of Human Rights *Al-Skeini and Others v United Kingdom* (Application No 55721/07) judgment of 7 July 2011”, 61 *International & Comparative Law Quarterly* 301 (2012), at 309, 311; Max Schaefer (2011), at 579.

⁸⁹ See Marco Milanović (2012), at 130, who points out that “the Court applied a personal model of jurisdiction to the killing of all six applicants, but it did so only exceptionally, because the UK exercised public powers in Iraq. But, *a contrario*, had the UK not exercised such public powers, the personal model of jurisdiction would not have applied. In other words, *Banković* is, according to the Court, still perfectly correct in its result. While the

“authority and control” outside the state’s territory only when that state exercises “some of the public powers”. That retains *Al-Skeini* still within *Banković* and does not allow the ECtHR jurisprudence to progress further in relation to extraterritorial jurisdiction.⁹⁰

However *Al-Skeini* should not be interpreted in such a restrictive way. In fact, the Court did not need to explicitly overrule *Banković* in order to make a shift to another jurisdictional test. According to Judge Bonello, the Court previously adopted different tests depending on the circumstances of the case and that diminished the human rights protection.⁹¹ He advocated for the “authority and control” test (“functional test”) to be the only one the Court applies.⁹²

The “authority and control” test does not need to be restricted by the “public powers” requirement. Although the UK exercised some “public powers” in Iraq, the Court did not analyse whether a particular territory was under the UK “effective overall control”.⁹³ The Court did not suggest that those public powers would necessarily derive from the occupation of the territory. The Court did not provide any explanation for the scope of public powers. The exercise of “some of the public powers” is already enough and there is no need to exercise all of public powers of sovereign state. Anything that is normally done by a state on its own territory and instead done by another state extraterritorially can be considered “public powers”, including as in this case participating in a security operation and therefore it is likely

ability to kill is ‘authority and control’ over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft.”

⁹⁰ See also Conall Mallory (2012), at 310, who considers that “*Al-Skeini* is a progressive judgment for the understanding of article 1 jurisdiction in the [ECtHR]. However it could be argued that the extent of the progression is strongly hindered by the finding being based on the exercise of public powers as opposed to the specific action of the UK forces.”

⁹¹ *Al-Skeini* case, concurring opinion of Judge Bonello, paras. 17-18.

⁹² *Ibid*, paras. 19-20, who rather colourfully describes that “this would be my universal vision of what this Court is all about – a bright line approach rather than case by case, more or less inspired, more or less insipid, improvisations, cluttering the case-law with doctrines which are, at best, barely compatible and at worst blatantly contradictory – and none measured against the essential yardstick of the supremacy and universality of human rights anytime, anywhere.”

⁹³ See also Max Schaefer (2011), at 579; Anna Cowan “A new watershed? Re-evaluating *Banković* in light of *Al-Skeini*”, 1 *Cambridge Journal of International and Comparative Law* 213 (2012), at 224.

that the Court may qualify “public powers” broadly and apply rather “authority and control” test without considering “public powers” as an absolute requirement.

Apart from “public powers” qualification, it was enough for the Court that the acts occurred during the operations conducted by British soldiers. The fact that the acts were committed by the state’s agents was not decisive (the jurisdictional link was established even where an act was committed by an unidentified person). The physical control over the victims by the state’s agents was not necessary to establish (as most of the victims were not detained by the British soldiers).⁹⁴ Such relaxed conditions to establish a jurisdictional link can be explained by the fact that the applicants did not complain about the acts themselves which resulted in death, but about the adequacy of the investigation conducted by the UK in the result of those acts, which is by itself a positive obligation rather than a negative one not to violate the right to life. The situation may be different if the complaint was that the state directly violated the substantial (as opposed to procedural) right to life, as that would require to establish whether the acts were committed by its agents or someone else.⁹⁵

Even if the criteria of “the exercise of some of the public powers” and engagement in “security operations” are maintained for finding “authority and control” over individuals suffered a violation of their rights during security operations, they can easily be applied to the PSOs situations when they are deployed to maintain security in particular area (one of the “public powers” according to the Court)⁹⁶ and conduct their security operations. According to such reasoning, the UN/TCCs would be responsible for the violations of human rights committed during their PSOs.

⁹⁴ See also Max Schaefer (2011), at 579.

⁹⁵ See also See Marco Milanović (2012), at 131.

⁹⁶ See *Al-Skeini* case, para. 149.

C) *Is the concept of “jurisdiction” to be considered in the light of the rules of attribution?*

As discussed above the jurisprudence of the HRC and IACHR supports that jurisdiction is to be interpreted as to cover the acts of the state’s agents which violate human rights obligations of that state and there is no need for the state’s control to be established over the foreign territory or physical control over persons in order to make a finding of state’s violation of its negative obligations through its agents. This is mostly evident from *Alejandre* of the IACHR. However the approach of the ECtHR on this issue is not straightforward. Its jurisprudence was mostly influenced by the controversial case of *Banković*, where the Court confined the exercise of extraterritorial jurisdiction to the cases of established effective control over the foreign territory. The subsequent jurisprudence, nevertheless, provided for a more expanded approach, where the state exercises either control over premises or physical control over a person during their arrest or abduction by that state’s agents. More recent *Al-Skeini* may align the approach taken by the ECtHR with those of the HRC and IACHR.⁹⁷ *Al-Skeini* provides for the establishment of jurisdiction of the state by the way of effective control based on the fact that the human rights violations were committed by British soldiers during their security operations. This interpretation is close to the one of the HRC and IACHR.

The argument that the finding of state’s jurisdiction in *Al-Skeini* must be based on the fact that the UK exercised some public powers in Iraq cannot be sustained. It can lead to an absurd situation where the persons killed by the state’s agents during security operations conducted in the territory where the state exercises some public powers would fall within state’s jurisdiction, whereas those killed during operations conducted in the territory where the state refused to exercise public powers would not. Similarly, the persons killed or

⁹⁷ See also John Cerone (2006), at 1486, who also suggests that “the Court’s recent judgements show a more fluid approach to extraterritorial application of the European Convention, projecting a trend toward convergence (or re-convergence) with the approach of the Human Rights Committee and IACHR.”

mistreated during their detention by the state's agents would be under state's jurisdiction, whereas those who were killed or mistreated on spot without being arrested or taken to the detention facilities would not and the state would avoid responsibility by asking its agents to perform any prohibited acts outside its detention facilities.⁹⁸

As such situations are unsatisfactory, the approach taken by the ICJ in the *Wall* and *Congo* cases and by the HRC and IACHR is a preferred approach. The finding that the state exercised jurisdiction must be based on the rules of attribution of the conduct, rather than on whether or not the state had effective overall control over a territory. The "jurisdiction" clause in human rights treaties is not a separate/additional condition for the establishment of state responsibility. The finding that the state in fact exercised its jurisdiction in any territory (i.e. performed certain conduct) and actual human rights violations by that conduct leads to the responsibility of that state, in the same way as the attribution to the state of the conduct and the breach of international obligations leads to the finding of state responsibility under ILC articles.⁹⁹ Even if the state performed acts which it had no authority to perform in foreign territory under general international law (it had no jurisdiction in the sense of general international law), this does not exempt it from responsibility under human rights law for the acts that were actually performed.

While the rules on attribution act as a condition or limitation to the responsibility of the state for particular breach of negative obligations, in order to find a breach of positive obligations, there is no need to establish the attribution of acts of private persons to the state.

⁹⁸ See also Loukis G. Loucaides "Determining the extra-territorial effect of the European Convention: facts, jurisprudence and the *Banković* case", 4 *European Human Rights Law Review* 391 (2006), at 400; Marko Milanović "From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties", 8 *Human Rights Law Review* 411 (2008), at 426. See also concurring opinion of Judge Bonello, *Al-Skeini* case, where he gives an example of absurdity of application of this principle, when two civilians were killed by a British soldier in a street in Basrah together, but one before the arrest and the second one after the arrest, then according to that principle, the second one would be within the UK jurisdiction and the first one would not (para. 15).

⁹⁹ See ASR Articles 1 and 2.

As the state cannot be responsible for all the acts of private persons committed beyond its national territory, the “jurisdictional” limitation can usefully restrict state’s positive obligations to certain situations. Some authors are of the opinion that a mere presence of state organs or agents in some location (without exercise of any authority or ability to prevent violations) cannot be sufficient for establishing state’s positive obligations over the persons happened to be nearby.¹⁰⁰ The finding of effective control over a territory or persons may be a useful element to establish jurisdiction of state with regard to its positive obligations.¹⁰¹ Although it is enough to find that an act complained was attributed to the state for the purposes of state responsibility (the state breached negative obligations), in the circumstances where the acts cannot be attributed to the state (as it was done by a private party), the state may be still in violation of its positive obligations, but only if it had control over that act.¹⁰²

Supposedly, state agents killed a person outside state’s territory and violated the right to life of that person. The argument is that if the act of killing is attributed to the state (because it was done by its agents), the person killed was subject to that state’s jurisdiction by virtue of state’s agents performing this act. If a state’s agent was simply present somewhere outside that state’s territory and a person was killed by another private person, the state cannot be responsible for it. If however a person was killed by a private person but in the place over which that state exercised effective control outside its territory (e.g. in detention facilities run by the state), the state can be responsible for violations of its positive obligations to prevent

¹⁰⁰ As Cerone points out, without exercising any control, “the mere extraterritorial presence of a state agent in the same physical location as an individual would not be sufficient to bring that individual within the jurisdiction of that state party for the purpose of applying positive obligations, e.g., the duty to protect that individual’s right to life from violation by a third party.” See John Cerone (2006), at 1506. King also suggests that “a state will rarely owe positive duties to persons outside the scope of its lawful authority: rather the state will need to refrain from interfering with people’s rights.” See Hugh King (2009), at 551-552. Scheinin also argues that a state cannot be said to be responsible for a violation, “unless it had some factually possible and meaningful way to prevent the violation.” See Martin Scheinin (2004), at 75.

¹⁰¹ See also Marko Milanović (2011), at 18, 119.

¹⁰² See also *Al-Skeini* case, concurring opinion of Judge Bonello, para. 19.

killing and protect the person and this person falls within that state's jurisdiction by virtue of its exercise of effective control over the place.

The situations where the state has positive obligations to protect individuals from the third parties may include those where the state exercises effective control over particular territory (where the state has to ensure the fulfilment of its negative and positive obligations towards the inhabitants of that territory, e.g. to establish public order and to protect them from acts of private parties); or exercises physical control over the persons when arresting, capturing or detaining individuals (where the state must not only avoid violating their rights in detention but also protect them from such violations by others).¹⁰³

Such an interpretation in separating negative and positive obligations of the state according to its involvement into the situation in question, may not have been supported by the earlier ECtHR jurisprudence.¹⁰⁴ In *Banković* the Court held that there is no support in Article 1 ECHR that the positive obligations can be divided and tailored in accordance with the particular circumstances of the extraterritorial act.¹⁰⁵ However, this approach was not maintained by the further ECtHR jurisprudence.

In *Ilaşcu*, analysing the scope of the positive obligations binding Moldova in the territory of Transdnistria, which according to the Court, is out of Moldova's effective control, the ECtHR held that "such a factual situation reduces the scope of that jurisdiction in that the

¹⁰³ See Rick Lawson "Life after Banković: on the extraterritorial application of the European Convention on Human Rights", in Coomans, Fons, Kamminga, Menno T., *Extraterritorial application of human rights treaties*, (Intersentia, 2004), at 106, who argues that "to the extent that [the state agents] assume de facto control over individuals and interfere with their lives, they should take 'measures within the scope of their powers which, judged reasonably, might have been expected' to take to avoid violations of these individual's rights." See also Marko Milanović (2011), at 210.

¹⁰⁴ The Court stated, for example, in the *Cyprus v Turkey* case (para.65) that the in the areas where the state exercises effective overall control, its jurisdiction under the Convention must be considered to extend to securing the entire range of substantive rights set out in the Convention, even where those acts are done by local administration, and not directly by the state's agents. The Court earlier suggested that the state's obligations are confined to the particular territorial scope (under state's effective control) and are exercised in its entire range and their scope cannot be adjusted to the different situations on the basis of the ability to prevent a particular result or conduct. In such a case it would be feasible to limit them by the stringent concept of jurisdiction to be exercised in certain, well defined circumstances.

¹⁰⁵ *Banković* case, para. 75.

undertaking given by the state under Article 1 must be considered [...] only in the light of the Contracting state's positive obligations towards persons within its territory".¹⁰⁶ The Court found that Moldova should have used all the legal and diplomatic to guarantee the rights and freedom under the Convention.¹⁰⁷ In this way the Court "divided and tailored" positive obligations of Moldova.¹⁰⁸ It required the state to fulfill its obligations as far as possible using all means available to it, even though it did not require Moldova to fulfill the entire range of positive obligations because it did not have control over the "MRT" territory.

In *Al-Skeini*, the ECtHR explicitly overruled its finding in *Banković* stating 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 [...] of the Convention that are relevant to the situation of that individual. In this sense [...] the Convention rights can be 'divided and tailored'."¹⁰⁹ The Court adopted case-by-case approach to the finding of state's jurisdiction over a particular human rights violation. The state is required to secure only those rights which can be violated by the acts (or in the situations) over which the state exercises effective control. The scope of state's obligations depends on the scope of authority and control exercised by the state and the range of rights the state bound to respect is dependant upon the level of that state's control established on case-by-case basis.¹¹⁰

Analogous test was proposed by Judge Bonello in his concurrent opinion in *Al-Skeini*. He considered that as the state's jurisdiction arises from the fact of assuming the obligations under the Convention (when signing and ratifying it) and from having the capability to fulfil

¹⁰⁶ *Ilaşcu* case, para. 308.

¹⁰⁷ *Ibid.*

¹⁰⁸ See also John Cerone (2006), at 1504.

¹⁰⁹ *Al-Skeini* case, para. 130.

¹¹⁰ See John Cerone (2006), at 1497; Martin Scheinin (2004), at 76; Rick Lawson (2004), at 84, 120; See also Marco Sassòli (2011), at 65, proposing "functional approach" which would distinguish the degree of control necessary according to the right to be protected.

them under the circumstances of the case, both for the intra-territorial and extraterritorial situations, the Court should consider whether the commission of the alleged violation depends on the state's agents and whether it was within the State's power to punish the perpetrators and to compensate the victims and therefore when the observance or the breach of human rights is within its authority and control.¹¹¹ The "authority and control" test is also applicable to the finding of whether the state had positive obligations in relation to the violation of human rights in issue: if the state is not in a position of authority and control to ensure extraterritorial fulfilment of its positive obligations, then its jurisdiction is excluded in respect to those positive obligations.¹¹²

The question however is what would trigger the authority and control that the state exercises extraterritorially in respect of positive obligations. The state's control over individual or territory can be particularly relevant for its ability to take such measures to enable it to fulfill its positive obligations and to protect persons from human rights violations committed by particular acts. The focus is on the establishment of factual control over the territory or persons. The examination of the degree of this control will be able to delineate the state's responsibility for the violations of its positive obligations. The degree of control depends on the state's ability to prevent the particular conduct, even if it entails positive obligations of states to prevent the conduct committed by private persons.¹¹³ As for the finding of state's responsibility over the acts committed by its organs, the state clearly has ability to prevent them.

The jurisdictional analysis of the state's responsibility for the human rights violations, must be done in the light of the rules on attribution of conduct to states. Most of the jurisprudence of the human rights bodies supports this conclusion. While it was not expressly

¹¹¹ *Al-Skeini* case, concurring opinion of Judge Bonello, paras. 11, 13, 16.

¹¹² *Ibid*, para. 19.

¹¹³ See also Rachel Opie (2006), at 22.

acknowledged, the analysis on establishment of state's jurisdiction is in line with the rules on attribution. Any additional condition introduced in the second limb on the breach of international obligations of states (one of the conditions to establish state responsibility) would either be equal in scope with the first limb on attribution or unduly restrict the scope of states' human rights obligations under human rights treaties allowing the states to escape the responsibility for their acts on the sole basis of their extraterritorial conduct.

As for the IHRL obligations of TCCs in the situations where PSFs commit human rights violations in the territory of host states, they are still valid and untouched according to the conclusion stated above, because they would not be barred by the "jurisdictional" limitation of human rights treaties. The rules on attribution described in Chapter II are applicable to find TCCs responsible for PSFs' conduct.

It should be pointed out that the *Behrami* case discussed in Chapter II with regard to the attribution of conduct of PSOs cannot change this conclusion either. Even though the Court found the case inadmissible, it clearly focused its analysis on the rules of attribution of conduct of peacekeepers to the states and IOs and not on the issue of jurisdiction under Article 1. The Court left this issue untouched and therefore the question of jurisdiction needs to be seen in the light of the subsequent jurisprudence of the Court (including *Al-Skeini*) rather than *Behrami* which does not provide a relevant authority for that.

The exact scope of human rights obligations of TCCs which constitutes breach of human rights obligations by the state should be further analysed with regard to the concurrent applicability of IHRL and IHL to the situation of PSFs when they participate in the conflict.

2. The relationship between human rights and international humanitarian law obligations of states and the UN during PSOs

A) Interpreting IHL and IHRL in the light of their concurrent application

As discussed above, in some circumstances PSFs may participate in the armed conflict and the IHL rules apply and bind the UN and TCCs. The question is whether IHRL obligations continue to bind the UN and TCCs too in whole or in part.

This question was dealt with by the ICJ on several occasions. The Court showed little hesitancy in holding states responsible for violations of their extraterritorial human rights obligations during times of armed conflict.¹¹⁴ In *Nuclear Weapons* (GA), the ICJ observed that the protection of the ICCPR does not cease in times of war.¹¹⁵ Being concerned in particular with Article 6 ICCPR, the Court stated that “the right not arbitrarily to be deprived of one’s life applies also in hostilities” and that in such situations the test of what is “arbitrary” deprivation of life is to be determined by the applicable *lex specialis*, i.e. law applicable in armed conflict.¹¹⁶

This paragraph provoked different interpretations. It is sometimes argued that the Court meant that IHL rules will displace IHRL rules by virtue of operation of *lex specialis*.¹¹⁷ This cannot be the case. The ICJ clearly states that the protection of the ICCPR continues in times of war. The Court’s reasoning is specifically focused on the particular article of the Covenant – Article 6. The Court does not state that in times of war the rights of the whole Covenant must be displaced by IHL as a *lex specialis*, nor does it say that in general that all

¹¹⁴ Shane Darcy (2007), at 357.

¹¹⁵ *Nuclear Weapons* case (GA), para. 25.

¹¹⁶ *Ibid*, para. 25.

¹¹⁷ This was the position of the US that the human rights treaties, in particular the ICCPR would not apply during armed conflicts. See for discussion, Patrick Walsh "Fighting for Human Rights: The Application of Human Rights Treaties to United States' Military Operations", 28 *Penn State International Law Review* 45 (2009), at 53.

the articles of the ICCPR must be interpreted by the rules of IHL. It states that in a particular article (Article 6), the finding on “arbitrariness” must include the analysis of the laws of armed conflict. It does not say either that the right to life is no more protected, but the examination of any violations of this right must be conducted in the light of IHL applicable to the particular situation of armed conflict. Therefore the right to life still applies in hostilities.¹¹⁸

Wall confirms this approach. In this case having reiterated that the protection offered by the human rights conventions does not cease in case of armed conflict, the Court observed that there are three possible situations in the relationship between IHL and HRL: some rights may be exclusively matters of HRL, some other rights may be exclusively matters of IHL, others may be matters of both of them.¹¹⁹ Unfortunately the Court did not give any examples of the rights falling under each of three categories. However this reasoning confirms that IHL rules will not displace IHRL, but IHRL will even complement IHL rules in the situations not covered by IHL. Particular articles of IHRL will not be abandoned because of the application of IHL rules, but IHL and IHRL will both regulate particular situations during the armed conflict.

As the Court further explained in *Congo*, both IHL and IHRL must be taken into consideration.¹²⁰ The Court did not mention that the conflict between them must be resolved according to the *lex specialis*, like it stated in the previous cases.¹²¹ The Court did not explore

¹¹⁸ See Christopher Greenwood "Human Rights and Humanitarian Law - Conflict or Convergence Frederick K. Cox International Law Center Lecture in Human Rights and Humanitarian Law", 43 *Case Western Reserve Journal of International Law* 491 (2010), at 501.

¹¹⁹ *Wall* case, para. 106.

¹²⁰ *Congo* case, para. 216.

¹²¹ See also Paul Eden, Matthew Happold “Symposium: the relationship between international humanitarian law and international human rights law”, 14 *Journal of Conflict & Security Law* 441 (2009), at 442.

when both IHL and IHRL are applicable, which of them would be preferred in case of a clear conflict of norms.¹²²

The HRC also stated that the ICCPR applies in the situations of armed conflict noting that “while, in respect certain Covenant rights, more specific rules of [IHL] may be specifically relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”¹²³

It can be concluded that IHL and IHRL norms apply concurrently during armed conflicts and they are not mutually exclusive.¹²⁴ The norms of both branches of international law complement each other in armed conflicts and the relationships between states and individuals involved. Any reference to the *lex specialis* rule is to be made in the sense of harmonisation and interpretation of a more general rule by a more specific one and not by a simple substitution of IHRL rules by IHL norms as more specific to all situations arising from the fact of existence of the armed conflict.¹²⁵

As stated above, a state is responsible for the acts of its troops abroad and during armed conflicts, because the human rights treaties generally do not confine their scope of applications to the time of peace, in the same manner as IHL treaties for the time of armed conflict.¹²⁶ Such a situation would be able to provide protection not only to the population of the adverse party to the conflict, but also to the nationals of the co-belligerent states and

¹²² See also Laura M. Olson "Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law - Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict Security Detention: The International Legal Framework", 40 *Case Western Reserve Journal of International Law* 437 (2009), at 445.

¹²³ General Comment No.31, para. 11.

¹²⁴ As Cassimatis points out, “it is a generally accepted principle that when several norms bear on a single issue they should, to extent possible, be interpreted so as to give rise to a single set of compatible obligations.” (Anthony E. Cassimatis “International humanitarian law, international human rights law, and fragmentation of international law”, 56 *International & Comparative Law Quarterly* 623 (2007), at 626). See also Christopher Greenwood (2010), at 503.

¹²⁵ See also Marko Milanović “A norm conflict perspective on the relationship between international humanitarian law and human rights law”, 14 *Journal of Conflict & Security Law* 459 (2009), at 476; Yutaka Arai (2009), at 421.

¹²⁶ See also Laura M. Olson (2009), at 444.

neutral states due to the application of IHRL irrespective of the nationality of the persons protected.

In the situations where both IHL and IHRL govern particular conduct one type of norms can be interpreted in the light of another including not only treaty norms but also customary norms of both IHL and IHRL.¹²⁷ For example, the right not to be arbitrarily deprived from life can be interpreted in the light of IHL rules on distinction between civilians and combatants, where the killing of a combatant in the course of combat using allowed methods and means of warfare may not be considered “arbitrary” for the purpose of Article 6 ICCPR or Article 4 ACHR.¹²⁸

Regional human rights bodies on some occasions also had to deal with the question of interrelationship between IHL and IHRL. The IACHR in *Coard* recognised that IHL and IHRL may substantially overlap in some situations.¹²⁹ The Commission noted that if the test of observance of a particular right, e.g. right to liberty, is distinct from that applicable in the time of peace, the applicable standards must be deduced by reference to the applicable *lex specialis*, i.e. IHL.¹³⁰ The Commission considered IHL to be “a source of authoritative guidance” for the interpretation of the provisions of the Convention.¹³¹ In the present case, the Commission interpreted the provisions of the American Declaration on prohibition of arbitrary detention (Articles I and XXV) in the light of IHL standards (Article 78 GCIV) and found state’s actions incompatible with the terms of the Declaration.¹³²

¹²⁷ See also Anthony E. Cassimatis (2007), at 634.

¹²⁸ See for the interpretation of Article 4 of the ACHR *La Tablada* case, paras. 188-189, 327-328.

¹²⁹ *Coard* case, para. 39.

¹³⁰ *Ibid*, para. 42.

¹³¹ *Ibid*, para. 42.

¹³² *Ibid*, paras. 42 and 57. Curiously, the IACHR also stated that in the situations where IHL and IHRL “provide levels of protection which are distinct, it is bound by its Charter-based mandate to give effect to the normative standards which best safeguard the rights of the individual”(para. 42). It is interesting to see whether this statement could resolve any potential conflict of norms of IHL and IHRL as to provide maximum protection to the individuals. If this statement is taken literally, it would follow from it that in the situations of armed conflict

In *La Tablada*, the Commission noted that the American Convention contains no rules that define or distinguish civilians from combatants, so it had to apply IHL rules as sources of authoritative guidelines.¹³³ While finding that the rules of NIAC applicable, it concluded that the right to life of the persons participating in the attack was not violated by the state, as they were legitimate military targets during the time of participation in the fighting.¹³⁴ Although both IHL and IHRL were applicable there, the Commission did not apply the Convention only. It applied more specific rules dealing with particular type of situation, namely, with NIAC, expressly referring to IHL rules. The Commission applied IHL as a method of interpretation of provisions in the Convention itself.¹³⁵

The ECtHR approaches the issue of interpretation of ECHR norms in the light of IHL rules with more caution. It did not expressly state that it would apply IHL rules to find a violation of the Convention. Moreover, some of the relevant provisions of the Convention are drafted in a more exhaustive way which does not leave much room for interpretation.¹³⁶ The Court interprets the ECHR on its own terms, even though it has borrowed some rules and terminology from IHL, without specifically mentioning it.¹³⁷

However, the ECtHR reasoning supports the idea that IHL should be at least taken into account in the interpretation of particular provisions of the Convention. For example, the Court requires states to take all feasible precautions in choosing means and methods of their

the combatants may be also protected from the attack and deprivation of life, as in this case IHRL would provide better protection to them rather than IHL.

¹³³ *La Tablada* case, para. 161.

¹³⁴ *La Tablada* case, paras. 188-189, 327-328.

¹³⁵ See also Vera Gowlland-Debbas "The relevance of paragraph 25 of the ICJ's Advisory opinion on Nuclear Weapons", 98 *American Society of International Law Proceedings* 358 (2004), at 361.

¹³⁶ See, for example, Article 2 on the protection of the right to life, the text of which does not use the word "arbitrary" (that can be interpreted in different ways) and instead provides an exhaustive list of circumstances, when the deprivation of the right to life may be permitted. See also Article 5 for the same construction.

¹³⁷ Louise Doswald-Beck "Human Rights and Humanitarian Law: Are There Some Individuals Bereft of All Legal Protection Proceedings of the Ninety-Eighth Annual Meeting of the American Society of International Law", 98 *American Society of International Law Proceedings* 353 (2004), at 355.

security operations with a view to avoid or minimise incidental loss of civilian life.¹³⁸ The Court looks at the type of weapons used in the security operations and can find a state violating the right to life, if the state among other factors used heavy and indiscriminate weapons.¹³⁹

The ECtHR also considered that Article 2 ECHR extends so far as to require states to take steps to protect the lives of those not/no longer, engaged in hostilities (wounded, prisoners of war or civilians).¹⁴⁰ The Court stated that Article 2 “must be interpreted in so far as possible in light of the general principles of international law, including the rules of IHL which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict.”¹⁴¹ The ECtHR interpreted the provisions of the Convention (at least Article 2) in the light of IHL rules, although the text of the provisions does not provide much room for interpretation. The Court prefers not to focus on the discussion whether the state invokes the correct aim for use of force, but rather discusses the state’s use of force in the scope of “absolute necessity” requirement implicitly incorporating principles and rules of IHL in the discussion of IHRL norms. By that the ECtHR started to develop its own IHRL rules applicable to the conduct of hostilities.¹⁴²

B) Possible solutions to the potential conflict of the IHL and IHRL norms

As discussed above the human rights bodies tend to interpret their respective treaties in the light of IHL rules. However, not all the provisions of human rights treaties can be

¹³⁸ See *Ergi v Turkey*, Application No. 23818/94, 28 July 1998, para. 74, *Isayeva v Russia*, Application No. 57950/00, 24 February 2005, para. 168.

¹³⁹ *Isayeva* case, para. 183-185.

¹⁴⁰ *Varnava and others v Turkey*, Application Nos. 16064/90, etc., 10 January 2008. 118; *Varnava and others v Turkey*, Application Nos. 16064/90, etc., 18 September 2009 (Grand Chamber), paras. 155, 166.

¹⁴¹ *Varnava* (appeal) case, para. 166.

¹⁴² See William Abresch (2005), at 748.

reconciled with IHL rules.¹⁴³ It is possible to explore potential solutions to the conflict of norms of IHL/IHRL.

It is possible to invoke the derogations provisions of the human rights treaties to solve conflict of norms of IHL/IHRL. This can be a solution for the conflict of norms between IHL rules and derogable rights of human rights treaties. The derogation provision is relevant to the right to life under the ECHR, as it provides that the derogation from the right to life is possible in respect of death resulting from the lawful acts of war.¹⁴⁴ Thus, if the state invoked derogation while being involved in the armed conflict, its acts would not violate right to life if they were in conformity with IHL, even though these acts did not fall within one of the legitimate aims provided by Article 2.

However the application of derogation provisions is not a solution for any situation involving concurrent application of IHL/IHRL norms. One of the problems of reliance on derogation provisions is that different human rights treaties place stringent restrictions on the possibility for states to derogate from their human rights obligations and some human rights can never be derogated from during a state of emergency.¹⁴⁵ There are certain conditions to be fulfilled before the state may invoke the derogation clause. Under the ICCPR there needs to exist a situation of public emergency “which threatens the life of the nation and the existence of which is officially proclaimed.”¹⁴⁶ While the existence of the armed conflict can be considered a situation of public emergency, the HRC explicitly stated that even during an armed conflict, “measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.”¹⁴⁷

¹⁴³ See the examples of such norms in the discussion below.

¹⁴⁴ See ECHR, Article 15 (2).

¹⁴⁵ See also Shane Darcy (2007), at 358.

¹⁴⁶ ICCPR, Article 4(1). See also Louise Doswald-Beck (2004), at 354.

¹⁴⁷ Human Rights Committee, General Comment No. 29, “States of emergency (Article 4)”, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 3.

Regarding the armed conflict where PSFs become involved in, it can hardly threaten the life of the nations of TCCs. As noted by Lord Bingham in *Al-Jedda*, “it is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw.”¹⁴⁸ There may be few, if any, such public emergency situations which could be officially proclaimed by TCCs to PSOs. Although the conditions of Article 15 ECHR are less stringent,¹⁴⁹ any state would hardly proclaim “war” the situation of armed conflict between its contingent forming part of the PSO and their adversaries in the host state. Moreover, states cannot derogate from all the provisions of a human rights treaty, just because of state of emergency. States can only take derogating measures to the extent “strictly required by the exigencies of the situation”,¹⁵⁰ meaning that they can only derogate from particular provisions, by showing the reasons for such derogations.¹⁵¹ Therefore although the use of derogation clauses may solve some of the conflicts of norms, it is not available in all circumstances, especially with regard to PSOs.

Another possible solution is to apply *lex specialis* rule in the way proposed in *Nuclear Weapons* (GA), i.e. the provisions of IHRL can be interpreted in the light of the norms of IHL. The discussion below addresses the potential conflicts of IHL and IHRL norms from the position of application of *lex specialis*. This discussion primarily focuses on the text of particular provisions of IHRL that may be in conflict with IHL rules and how the differences can be overcome. It does not concern the provisions that are not directly in conflict with each other and can be interpreted in the light of one another.

¹⁴⁸ *Al-Jedda* (House of Lords) case, per Lord Bingham, para. 38.

¹⁴⁹ Article 15 of the ECHR requires the existence of “war or other public emergency threatening the life of the nation.”

¹⁵⁰ See ICCPR, Article 4(1); ECHR, Article 15(1); ACHR, Article 27(1).

¹⁵¹ See General Comment No. 29, para. 4.

One example of potential conflict of norms is the rules relating to preventive detention and judicial review of detention. Article 9 ICCPR provides that “no one shall be subject to arbitrary arrest or detention”. This open-ended wording permits to interpret “arbitrary” in terms of IHL rules in relation to the detention of combatants or civilians.¹⁵² Article 5 ECHR contains a closed list of grounds on which a person may be deprived of his liberty.¹⁵³ None of these grounds can be interpreted in an open-ended way as to encompass the detention of POWs under Article 21 GCIII or interment of civilians for security reasons under Articles 41-43 GCIV. If we apply *lex specialis* rule to Article 9 ICCPR, the detention of combatants or civilians during the armed conflict in conformity with Article 21 GCIII and Article 41-43 GCIV respectively will not be considered arbitrary.

For the application of *lex specialis* rule to Article 5 ECHR (even in conformity with the aforementioned IHL norms) the court have to disregard the closed list of grounds for detention. There is no legal test to apply against the facts of a case on deprivation of liberty under Article 5 ECHR (like e.g. the test of “arbitrary” detention). According to this provision, if a person was deprived of his liberty on any ground other than six ones provided in para.1, the right to liberty of this person was violated.¹⁵⁴ If a PSF from a ECHR MS decides to intern persons from the host state for security or other reason without a trial under Article 21 GCIII or Article 41-43 GCIV and the case reaches ECtHR, the Court will have to introduce a “necessity” test in the analysis under Article 5, as it does not provide for one or directly transpose IHL rules to the right to liberty discussion without adopting them in the language of the ECHR. However the latter option does not seem to reflect the usual Court’s approach to

¹⁵² See also Marko Milanović (2009), at 474-475.

¹⁵³ See Article 5, para. 1 for the list of 6 grounds: detention after the conviction by court; detention for non-compliance with a court order; detention of suspects in commission of offences; detention of minors; detention on health reasons, and detention for illegal entry into the country.

¹⁵⁴ This follows from the text of the article, which provides that: “no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law” and follows by the list of six grounds.

the interpretation of the ECHR.¹⁵⁵ The state may derogate from Article 5 ECHR if the state of emergency was recognised under Article 15, although it may not always be the case.

The construction of Article 5 ECHR differs from Article 2 ECHR (right to life) which provides for the “absolutely necessary” test, although containing a closed list of grounds under which a person may be deprived of his life. The list of grounds is even more limited (contains only three grounds), but may be interpreted broadly as to include the instances of armed conflict, especially the ground of “defence of any person from unlawful violence.”¹⁵⁶ However, this ground covers only the case of pure individual self-defence and not actions done during defensive or offensive operations. The application of “absolute necessity” test may be problematic here, because under IHL there is no need to prove necessity in killing combatants (excluding *hors de combat*).¹⁵⁷ Notably, the “derogations” provisions under Article 15 envisage the derogations from the right to life on the basis of lawful acts of war, but for application of those derogations the state of emergency threatening the life of the nation must be recognised. According to the previous discussion, this may be problematic especially with regard to PSOs’ situation, because the involvement of PSFs in armed conflict is unlikely to be considered state of emergency for their TCCs and without application of derogation provisions, killing of a person by PSFs must be justified as absolutely necessary.

Regarding judicial review of the detention under Article 5(4) ECHR and Article 9(4) ICCPR, everyone deprived of this liberty is entitled to take proceedings to have the lawfulness of his detention reviewed by court. In case of combatants, IHL rules do not require any review of detention of POWs (Article 21 GCIII). Although Article 5 GCIII provide for the determination by a “competent tribunal” of the status of persons (whether they are lawful

¹⁵⁵ See the discussion in the previous subsection on the case-law of the ECtHR in this regard.

¹⁵⁶ See the discussion in the previous subsection. The other two grounds provided in Article 2 ECHR are: the deprivation of life in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and action lawfully taken for the purpose of quelling a riot or insurrection.

□ See also Marko Milanović (2009), at 478-479.

or unlawful combatants and therefore entitled to the protection of GCIII), it does not deal with the question of review of combatants' detention. The internment of civilians can be reviewed by a court *or* "administrative board" under Article 43 GCIV, whereas Article 5(4) ECHR and Article 9(4) ICCPR both provide for the lawfulness of detention to be challenged in a court.

One more example of the potential conflict of norms may exist where the ECHR imposes some positive obligations upon the states requiring them, e.g. to introduce substantial changes to the law in force in the territory, where they are bound to apply the Convention, for instance, in the occupied territories.¹⁵⁸ If the laws in force contravene the obligations of the state under IHRL, requiring it to execute persons for their political views, the state may be required to introduce changes in existing laws of states. Article 43 HR requires the occupying states to respect, unless absolutely prevented, the existing laws in force in the occupied territory. The state may not be considered as "absolutely prevented" to respect such laws, when restoring and ensuring public order and safety in the occupied territory. However, this would contradict its human rights obligations to respect right to life and freedom of expression of those persons. The problem is whether the *lex specialis* will still work in favour of IHL and not IHRL in the occupied territories. Or in such kind of situations it is possible that the IHL "absolutely prevented" test is interpreted in the light of IHRL.

Conclusion

This chapter showed that the rules of IHRL apply to PSOs even though peacekeepers act outside their home countries and in the circumstances of existing armed conflict. It was argued that in order to find that the UN or TCCs violated human rights obligations of customary (for the UN and TCCs) and treaty (for TCCs) nature, one needs to prove the

¹⁵⁸ See Christopher Greenwood (2010), at 507; see also Guglielmo Verdirame "Human rights in wartime: a framework for analysis", 6 *European Human Rights Law Review* 689 (2008), at 700; Marko Milanović (2009), at 480.

general test of international responsibility, namely that peacekeepers breached human rights obligations of their respective states and they were attributed to their states (or to the UN). There is no need to prove an additional link of their victims with the TCCs/UN. This statement is true for the violation of negative obligations under IHRL, namely when peacekeepers themselves commit wrongful acts. It is also possible that the UN/TCCs are found in violation of their positive obligations if certain conditions are met. If they exercise effective control over particular territory or place (e.g. detention facilities), they may be also required to ensure that the rights of the persons residing on that territory or detained in that place are not violated and have positive obligations to prevent acts of violence against them.

IHRL continues to apply not only in peacetime but also during armed conflicts and occupation together with IHL. IHL rules do not displace IHRL rules, but IHRL complements the protection provide by IHL. In the situations where both of them regulate the same subject matter they will be interpreted in the light of each other. Where, however, it is not possible due to the potential conflict of norms of IHL and IHRL the *lex specialis* rule starts to operate. Therefore the norms of IHRL contained in human rights treaties have to be interpreted by the rules of IHL, especially it concerns the situations where the wording of provisions leaves some possibility for interpretation. In the circumstances where no such interpretation is possible, the derogation clauses of the treaties may be important in order to reconcile different approaches of IHRL and IHL to a particular situation.

V. Individual criminal responsibility of peacekeepers

This chapter discusses individual criminal responsibility of peacekeepers over crimes committed by them during PSOs. As before, the focus is made on military personnel of national contingents of PSOs. The chapter aims to prove that despite broad immunity provided to them by the UN in its UN SOFAs concluded with host states peacekeepers may be subject to jurisdiction of different states depending on the category of crimes they commit. The chapter also demonstrates that UN SOFAs will not preclude the ICC from exercising its jurisdiction over the crimes committed by peacekeepers.

For these purposes, the chapter firstly discusses the jurisdiction and immunities of peacekeepers in national courts and then in the ICC. Section 1, firstly, explores international law on criminal jurisdiction and obligations of states under international conventions. Secondly, the relevant UN SOFA provisions are analysed. Thirdly, the enquiry is made to the possibility of peacekeepers committing international crimes and whether obligations of the host states under UN SOFAs and international conventions may be in conflict. Fourthly, the immunities of peacekeepers under UN SOFAs are discussed. In Section 2, the possibility of exercise of jurisdiction by the ICC over peacekeepers is analysed and then further enquiries are made to the possible immunities provided to peacekeepers under the ICC Statute.

1. Criminal jurisdiction of states over crimes committed by peacekeepers and immunities attached to their status

A) Is the establishment of criminal jurisdiction and prosecution of alleged offenders an obligation or permission?

It is important to distinguish between jurisdiction and immunities from jurisdiction. As ICJ stated in *Arrest Warrant*, only where a state can establish jurisdiction the question of immunities with regard to exercise of that jurisdiction can be considered.¹ The jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.² The distinction between jurisdiction and immunities will be further addressed with regard to the wording used by UN SOFAs.

Regarding criminal jurisdiction over crimes committed by peacekeepers in the territory of host states two questions can be considered: 1) whether the host state and TCCs are entitled to exercise their jurisdiction over peacekeepers; 2) whether they are obliged to do that under international law. The present discussion focuses on the analysis of prescriptive jurisdiction (as opposed to enforcement jurisdiction)³ which concerns state's authority under international law to regulate particular conduct in accordance with its national law⁴ and can be

¹ *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgement, ICJ, 14 February 2002, para. 46. Even though the ICJ declined to consider the question of jurisdiction of Belgian courts in this case due to the fact that the Congo ultimately abandoned its arguments in this regard, the distinction between jurisdiction and immunities was spelled out by the Court.

² *Ibid*, para. 59.

³ Unlike prescriptive jurisdiction, which can be extraterritorial, enforcement jurisdiction is strictly territorial, because a state is only permitted to enforce its laws within its own territory, unless it obtains another state's consent to act in its territory (e.g. a state's police are not allowed to arrest suspects in the territory of another state without its consent). See Roger O'Keefe (2004), at 740; Memorandum by the Secretariat, Immunity of State officials from foreign criminal jurisdiction, International Law Commission, 31 March 2008, A/CN.4/596 ("UN Secretariat Memorandum (2008)"), at 12, fn.16.

⁴ See Karinne Coombes *International organisations and peace enforcement: the politics of international legitimacy* (Cambridge University Press, 2007), at 423; Roger O'Keefe (2004), at 736.

based on the following principles: territorial principle, principle of nationality, passive personality, protective principle, and universal jurisdiction.⁵

According to *Lotus*, the states are not prohibited by international law to exercise prescriptive jurisdiction unless there is a rule to the contrary.⁶ Therefore any type of prescriptive jurisdiction is, in principle, permitted and the states in their territory may criminalise any conduct or may indict a person or convict him. Any arguments against exercise of prescriptive jurisdiction can be made only by showing that there is a clear rule prohibiting a state to establish jurisdiction over the conduct committed abroad.⁷ Such a rule regarding PSOs is contained in UN SOFAs.

Another question is whether the exercise of jurisdiction and in particular universal jurisdiction can become an obligation. For response, it is necessary to refer to the text of conventions providing for such universal jurisdiction.

The CAT provides that each state party must take necessary measures to establish its jurisdiction over the offence of torture in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.⁸ No other connection with the state is required. It clearly provides for the obligation to establish universal jurisdiction.⁹ This obligation conditioned to the presence of the accused in the territory of the state, but this is the

⁵ This principle is proved to be controversial and provoked substantial academic discussion not only on the possible limitations in its application (with regard to the so-called “universal jurisdiction *in absentia*”), but also on the ability of the states at all to exercise universal jurisdiction.

⁶ *Case of S.S. Lotus (France v Turkey)*, Judgement, PCIJ, 7 September 1927, (“*Lotus case*”), at 18-19. See also Cedric Ryngaert, *Jurisdiction in international law* (Oxford University Press, 2008), at 23-24; dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case, para. 50.

⁷ See, dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case, paras. 54-55, who points out that there is no such rule either in conventional international law, nor in customary international law.

⁸ CAT, Article 5, para. 3.

⁹ See also Committee against Torture, Communication No. 181/2001, *Suleymane Guengueng et al. v Senegal*, Communication No. 181/2001, Judgement, CAT, 19 May 2006, CAT/C/36/D/181/2001, para. 6.3; International Law Association, “Final report on the exercise of universal jurisdiction in respect of gross human rights offences”, Committee on international human rights law and practice, London Conference (2000), at 6.

only condition for exercising universal jurisdiction.¹⁰ The case of Nepalese Col. Kumar Lama currently being tried in the UK courts may be able to confirm this principle.¹¹

Unlike the obligation of states exercising universal jurisdiction, the obligations under territorial and active and passive personality principles are not conditioned on the presence of the accused.¹² The question then is whether those states are under an obligation to take all possible measures to establish jurisdiction and seek to prosecute the alleged offender, even where he is not present in their territory, by the way of issuing international arrest warrants and extradition requests. The response to this question depends on the nature of the obligations provided by Article 5 and subsequent articles.

From preliminary view, the states must take all necessary measures to establish jurisdiction including legislative measures, executive and judicial, such as arrest, investigation, prosecution and extradition.¹³ The territorial state is obliged to conduct investigations *ex officio* or on the basis of a complaint by the victim under Articles 12, 13 CAT.

¹⁰ Manfred Nowak and Elizabeth McArthur *The United Nations Convention against Torture: a commentary* (Oxford University Press, 2008), at 255.

¹¹ Nepalese Col. Kumar Lama was arrested by the UK police in 3 January 2013 under the suspicion of commission of torture in Nepal in 2005. At that moment he was also a UN observer in South Sudan. Despite protests by the Nepalese government the UK courts proceed with his prosecution, as the UK was bound by the CAT to prosecute him exercising universal jurisdiction with the suspect being present in its territory. The Nepalese government invoked different arguments in favour of his release, including that his arrest violates state sovereignty, Col. Lama's diplomatic immunity as being UN observer and principle of dual jeopardy. It remains to be seen how the issue will be resolved by the UK courts. See in particular: Robert Booth, "UK defends decision to prosecute Nepalese colonel accused of torture Charges against Colonel Kumar Lama spark diplomatic row between Britain and Nepal", *The Guardian*, 6 January 2013, <http://www.theguardian.com/law/2013/jan/06/uk-defends-prosecute-nepalese-colonel> (last visited on 11/08/2014); Lekhanath Pandey, "UK court seeks amicus curiae in Col Lama's case," *Himalayan Times*, 27 February 2014, <http://www.thehimalayantimes.com/fullNews.php?headline=UK+court+seeks+amicus++curiae+in+Col+Lama's+case&NewsID=407275> (last visited on 11/08/2014); Chiran Sharma, "London court concludes hearing on case against Col Lama", *Republica*, 4 August 2014, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=80306# (last visited on 11/08/2014).

¹² It needs to be firstly specified that in relation to the passive personality principle, the CAT provides states with the margin of discretion, mentioning that if the state considers it appropriate, it shall take necessary measures to establish jurisdiction when the victim is a national of that state, basically converting obligation to establish jurisdiction into a simple permission to do so. For the territorial and national states this obligation is unconditional. See CAT, Article 5, para. 1(3). See also Manfred Nowak and Elizabeth McArthur (2008), at 255.

¹³ See Amnesty International, "Universal Jurisdiction: The duty of states to enact and enforce legislation: Chapter 9: Torture: The legal basis for universal jurisdiction", IOR 53/012/2001 (2001), at 4. See also Manfred

In *Habré*, the ICJ did not directly deal with the scope of the obligation under Article 5, as not disputed between parties, and the breach had been already remedied by the respondent state (Senegal).¹⁴ However, it mostly focused on the adoption of legislative measures (or presumably any other measures) to enable the state to exercise the forms of jurisdiction (including universal jurisdiction) mention in Article 5 and those obligations are mostly of preventive character.¹⁵ As for the obligation to investigate, according to the Court, it falls under Article 6(2), which requires the states to make preliminary inquiry into the facts of the case.¹⁶ This obligation relates only to the situations where the suspect is already present in the territory of the state and not where a suspect is absent.¹⁷

Nowak and McArthur consider that if the suspected offender is outside the territory of the state which started investigations, its authorities “may request extradition from another state, where this person is present, in accordance with Article 8 CAT.”¹⁸ However Article 8 provides only basis and facilitates possible extradition, it does not obliges the states to issue extradition request.¹⁹ Nowak and McArthur do not suggest that the state is under obligation to issue an extradition request either.²⁰ Article 5 imposes obligations to the territorial and national states to adopt certain measures, and does not give them discretion in doing so (only for the state, whose national was a victim of alleged torture).

Nowak and Elizabeth McArthur (2008), at 255, considering that apart from legislative measures to establish jurisdiction, territorial and national states must also take administrative and judicial measures, such as to start criminal investigations, as soon as the state authorities have sufficient information to assume that an act of torture is committed on their territory or by their national, even if the alleged offender is not present in their territory.

¹⁴ See *Question relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Judgement, ICJ, 20 July 2012 (“*Habré case*”), para. 55.

¹⁵ See for instance *ibid*, paras. 75, 76, 87.

¹⁶ See *ibid*, paras. 83, 86.

¹⁷ See CAT, Article 6(1).

¹⁸ Manfred Nowak and Elizabeth McArthur (2008), at 255.

¹⁹ See also CAT, *Roitman Rosenmann v Spain*, Communication No 176/2000, Judgement, CAT, 12 June 2002, CAT/C/28/D/176/2000, para. 6.7.

²⁰ See Manfred Nowak and Elizabeth McArthur (2008), at 346

The Committee against Torture analysing this question, did not pronounced directly on the issue whether Article 5(1) must be interpreted as requiring states to issue extradition requests, where there are sufficient evidence to do that. Discussing the obligation of a state to demand extradition of a person suspected of torture, when the victim had the nationality of that state, the Committee in *Roitman Rosenmann* stated that the corresponding provision of Article 5(1)(c) (requiring the state to establish jurisdiction, “when the victim is a national of that State if that State considers it appropriate”) “establish[es] a discretionary faculty rather than a mandatory obligation to make, and insist upon, an extradition request.”²¹

The problem is that this provision provides for discretion to take measures to establish jurisdiction anyway. Whether such discretion to issue an extradition request would exist for territorial and national states under Article 5(1), when the alleged offender is not present on their territory, is not clear from the Committee’s reasoning. This issue was not discussed in *Habré* either.²²

While it is accurate to impose on the territorial state an obligation to conduct investigations into the allegations of torture, especially on the basis of Articles 6(2), 12, 13, it may be too brave to require the territorial and national states to initiate preliminary proceedings for issuing arrest warrant and extradition requests if the offender is not present in their territory. Such a broad interpretation of the measures would make the obligations provided in Article 5 intertwine with the obligations provided by subsequent Articles 6, 7, which condition the obligations of taking an alleged offender into custody, making preliminary inquiries and prosecution on the presence of the offender in the state’s territory.²³

If a state were required under Article 5 to issue an arrest warrant and an extradition request for a person who allegedly committed torture in its territory and who is not present

²¹ *Roitman Rosenmann* case, para. 6.7.

²² See, for instance, *Habré* case, para. 74.

²³ See CAT, Articles 6, para.1 and Article 7, para. 1.

there, there would be no need to limit the obligation of that state to prosecute and arrest the offender to the presence of the offender in its territory under Articles 6, 7, as the issue of arrest warrant and extradition request are done in order to ensure the arrest and prosecution of the person. One would have to talk about the obligation of territorial and national states to prosecute the offenders wherever they are found in this world. This would be a far-reaching obligation, but seems not to be supported by Article 7.

Therefore the obligation to take measures necessary to establish its jurisdiction under Article 5 must be interpreted as an obligation of the state to provide under its national law a basis for exercise of territorial, national or universal jurisdiction, should the occasion arise that a perpetrator of torture offences is found on its territory. If the offender is present on the territory of a state party, two further obligations start to apply: 1) the state must take him into custody or take other legal measures to ensure his presence under Article 6; 2) either extradite or prosecute the offender under Article 7. There is no obligation to extradite *per se* (to comply with extradition request),²⁴ however the state must choose between two alternatives: either extradite or prosecute.

Aut dedere aut judicare obligation provided by Article 7 clearly depends on the presence of the alleged offender in the states territory. The principle requires the states to prosecute offender in its custody or extradite him to another state having links with the offender or the crime.²⁵ However, as stated by the Committee against Torture and ICJ, the obligation to prosecute the alleged perpetrator for acts of torture does not depend on the prior

²⁴ Manfred Nowak and Elizabeth McArthur (2008), at 346, 360, 364; Carlo Tiribelli "Aut Dedere Aut Judicare: A Response to Impunity in International Criminal Law", 32 *Columbian Journal of Transnational Law* 133 (2009), at 255-256, 259.

²⁵ Ademola Abass "International Criminal Court and Universal Jurisdiction", 6 *International Criminal Law Review* 349 (2006), at 353.

existence of a request for his extradition.²⁶ The prosecution is not subject to any condition other than the presence of the alleged offender in the territory of the state.²⁷ Therefore if no other state issued an extradition request, the state where the perpetrator is found, is obliged to submit the case for the competent authorities for the purpose of prosecution, which may or may not result in institution of proceedings.²⁸

Only if a request for extradition has been made, there is the other alternative for the state to proceed with extradition or still to submit the case to its own authorities for prosecution, as the objective of this provision is to prevent any act of torture from going unpunished.²⁹ The extradition is an option for the state, whereas prosecution is an international obligation.³⁰ The state is not obliged to prosecute an alleged offender only if it can be shown that there is no sufficient evidence to prosecute,³¹ but still have to extradite that person, if any extradition request was made.³² Therefore there is no option for the state not to prosecute the person if there is sufficient evidence that he committed acts of torture or that evidence can be easily obtained.³³ Especially this would concern the states in which territory the crime was committed, as they are in the best position to obtain such evidence. A state cannot be obliged to prosecute a person against whom it does not have sufficient evidence.³⁴

²⁶ *Habré* case, para. 94.; *Suleymane Guengueng et al. v Senegal*, para. 9.7, see also Herman Burgers and Hans Danelius *The United Nations Convention against Torture: a handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Norwell, MA, 1988), at 133, 137.

²⁷ Manfred Nowak and Elizabeth McArthur (2008), at 360.

²⁸ See also *Habré* case, paras. 90, 94.

²⁹ *Suleymane Guengueng et al. v Senegal*, para. 9.7; *Habré* case, para. 95.

³⁰ *Habré* case, para. 95.

³¹ *Suleymane Guengueng et al. v Senegal*, para. 9.8.

³² See *ibid*, para. 9.11.

³³ See Raphael Van Steenberghe "The obligation to extradite or prosecute: clarifying its nature", *Journal of International Criminal Justice* 1089 (2011), at 1114, who points out that states bound by the obligation to prosecute or extradite, "have a free choice between prosecution and extradition, while emphasis is put on prosecution since extradition appears only as a means at the disposal of the custodial state for complying with its obligation to prosecute."

³⁴ See also *ibid*, at 1091, 1108, who argues that the obligation of the state is to submit the case to the competent authorities for the purpose of prosecution, not automatic punishment, judgement or prosecution is required. See also Roger O'Keefe "The grave breaches regime and universal jurisdiction", *Journal of International Criminal Justice* 811 (2009), at 816.

Similar obligations are provided in the GC regarding the crimes constituting grave breaches, although the language used is different.³⁵ The obligation of states to search for alleged perpetrators of grave breaches of the GC corresponds to the obligation of states to take offenders into custody provided by Article 6 CAT. The same is true for the obligation to bring such persons before the state's own courts, or alternatively to hand the persons over for a trial to another state party, which corresponds to a similar obligation to prosecute or extradite under Article 7 CAT.

The provisions of the GC, however, are not explicit on the conditions under which this obligation is not to be exercised, nor provide for any guidance to the circumstances of establishment of jurisdiction, including universal jurisdiction, but such conditions may be implied. Accordingly, the state must "bring before its courts" the same persons, whom it must "search for". The nationality of those persons does not have any significance. The state may not be obliged to "search for" any persons not present in its territory (i.e. exercise enforcement jurisdiction), otherwise it violates another state's sovereignty, if acting without its consent.

Therefore the state is required to search for (and potentially arrest) and prosecute the persons who are present in its territory.³⁶ It may also choose to extradite this person, if it

³⁵ GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146, which reads as follows: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [grave breaches of the 1949 Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

See also below the discussion on which crimes amount to grave breaches of the GC.

³⁶ See also Roger O'Keefe (2009), at 828, who points out that in the context of grave breaches provision, the obligation of state party to bring the suspect before its courts obviously presupposes that the suspect is present on its territory: the provision does not oblige states parties to try such persons *in absentia*. The obligation to prosecute or extradite applies only when the suspect is present in the territory of state party, as the state cannot extradite a person who is not under its custody (at 829). See also Claus Kress "Reflections on the *iudicare* limb of the grave breaches regime", 7 *Journal of International Criminal Justice* 789 (2009), at 800, who states that "while the power to initiate an investigation on the basis of universal jurisdiction over war crimes exists irrespective of the location on the alleged offender, the duty to act under the grave breaches regime comes into

prefers to. If there is no extradition request or the state is unwilling to extradite the person, its obligation to prosecute is still valid, as the extradition is simply an alternative for a state, but does not affect its primary obligation to prosecute under this article.³⁷ As the Commentary to Article 146 GCIV provides, “as soon as a Contracting Party realises that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.”³⁸

This provision applies to all High Contracting Parties and not only to states in which territory the crime was committed or which nationality the perpetrator was. Moreover, it specifically mentions that the nationality of alleged perpetrator is irrelevant. If any state party is obliged to search for and prosecute any alleged perpetrator present in its territory, the obligation to establish jurisdiction (by analogy with Article 5 CAT) can be implied.³⁹ The provision makes no difference between territorial, national or other states, but rather envisages universal jurisdiction of states to prosecute for grave breaches. It is an obligation for a state party to vest its courts with jurisdiction on the basis of universality in the absence of any other ground for jurisdiction, since there is no point in bringing suspects before its courts unless those courts have competence over the impugned conduct.⁴⁰

play only where there are reasons to believe that the alleged offender is present on the territory of the state concerned.”

³⁷ See also Claus Kress (2009), at 796; dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case, para. 62; see also Commentary to Article 9 of the Draft Code of Crimes against the Peace and Security of Mankind, para. 7, stating that in the absence of an extradition request, “the custodial state would have no choice but to submit the case to its national authorities for prosecution [and] this residual obligation is intended to ensure that alleged offender will be prosecuted by a competent jurisdiction, that is to say, the custodial state, in the absence of an alternative national or international jurisdiction.”

³⁸ GC IV, Article 146, at 593.

³⁹ See also Raphael Van Steenberghe (2011), at 1105, who states that “the obligation to extradite or prosecute is often viewed as entailing a correlative obligation to establish the necessary extraterritorial jurisdiction over the prohibited conduct” and therefore provides for an implicit obligation for the custodial state to vest its courts with jurisdiction over grave breaches on the basis of, *inter alia*, universality.” See also Rober O’Keefe (2009), at 817; Jean-Marie Henckaerts “The grave breaches regime as customary international law”, 7 *Journal of International Criminal Justice* 683 (2009), at 698.

⁴⁰ Roger O’Keefe (2009), at 817.

B) Allocation of criminal jurisdiction between the national courts of states as provided by the UN SOFA

Territorial principle constitutes a traditional ground for criminal jurisdiction under international law and extraterritorial jurisdiction is an exception.⁴¹ However, in case of PSOs, the host state is precluded from exercising its criminal jurisdiction over the offences committed by military forces in its territory by virtue of UN SOFAs. UN SOFAs are bilateral agreements between the UN and host states on the status of PSOs. Although for each PSO a separate SOFA is normally concluded, they are usually based on the UN Model SOFA.⁴² Sometimes PSFs are deployed even before a SOFA was negotiated,⁴³ however, the UNSC may include in its resolution that the UN Model SOFA is applicable as the default regime governing the situation of PSO, until a specific SOFA is signed.⁴⁴ The present analysis focuses on the UN Model SOFA (here and after “UN SOFA”).

UN SOFA provides that “military members of the military component of the [UN PKO] shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country/territory].”⁴⁵ It should be firstly noted that the UN SOFA excludes territorial jurisdiction of the state over particular acts, and not simply provides for immunities for military components of PSOs. Moreover, the language used suggests that the UN SOFA may also exclude jurisdiction of any other state, except for the state of nationality. It does not permit the host state to exercise jurisdiction over any criminal offences committed in the

⁴¹ Manfred Nowak and Elizabeth McArthur (2008), at 308; Lee A. Steven, Christine E. Cervasio "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", 39 *Virginia Journal of International Law* 425 (1998), at 432.

⁴² See Gabrielle Simm "International law as a regulatory framework for sexual crimes committed by peacekeepers", 16 *Journal of Conflict & Security Law* 473 (2012), at 500.

⁴³ Gabrielle Simm "International law as a regulatory framework for sexual crimes committed by peacekeepers", 16 *Journal of Conflict & Security Law* 473 (2012), at 501.

⁴⁴ Anthony J. Miller (2006), at 81; see also Zeid Report, para. A.2.

⁴⁵ UN Model SOFA, para. 47(b).

territory of the host state, even if the most serious crimes were committed by PSFs. As this provision precludes jurisdiction of the state *per se* and not grants immunities, there is no possibility for a waiver of this rule (cf. immunities).⁴⁶

The consequences of operation of this provision may be far-reaching, especially because this provision is not conditioned on the state of nationality exercising jurisdiction over a particular offence. A proper operation of this provision may result in impunity of military peacekeepers committing most serious crimes of international law, if their state of nationality for any reason fails to prosecute them.⁴⁷ There may be plenty of reasons why a TCC may do that.⁴⁸ If for any reasons a TCC fails to prosecute its own peacekeepers, there could be a jurisdictional gap leaving the alleged offenders unpunished,⁴⁹ as the host state cannot prosecute them either.

However, there are some limitations to this provision. Firstly, the UN SOFA provides that the S-G will obtain assurances from TCCs that they will be prepared to exercise jurisdiction over the crimes committed by the military members of PSOs in the host state.⁵⁰ This provision attempts to fill in a jurisdictional gap created by the provision on exclusive

⁴⁶ See also D.W. Bowett (1964), at 441.

⁴⁷ See also Gabrielle Simm (2012), at 506; Roisin Burke "Status of forces deployed on UN peacekeeping operations: jurisdictional immunity", 16 *Journal of Conflict & Security Law* 63 (2011), at 92.

⁴⁸ Among them, those reasons could be: the existence of internal laws, not providing for extraterritorial jurisdiction, inability to gather sufficient evidence and to call/find witnesses located in remote areas of the host state, or any political reason and shame for the conduct of its peacekeepers, who were supposed to protect local population and not to perpetrate unlawful acts against it. See Zeid Report (2005), at 29; Gabrielle Simm (2011), at 481-482. TCCs are often reluctant to admit publicly the existence of wrongful acts committed by the members their national contingent. See Zeid Report (2005), at 24.

⁴⁹ Marco Odello (2010), at 365.

⁵⁰ UN Model SOFA, para. 48.

jurisdiction of TCCs.⁵¹ The problem of this safeguarding provision was that those assurances were not often obtained.⁵²

The amended Model MoU⁵³ includes a new provision requiring TCCs to assure the UN that they will exercise jurisdiction over crimes and offences committed during PSOs and further reiterates that PSFs are subjected to TCCs' exclusive jurisdiction.⁵⁴ It also places the primary responsibility for conducting investigations of misconduct by members of national contingents with TCCs and obliges them to forward the case to their appropriate authorities for due action, if suspicions of misconduct are well founded.⁵⁵

It does not, however, make the exclusive jurisdiction of TCCs conditioned on the actual exercise of the jurisdiction by TCCs over the crimes committed during PSOs and on fulfilment of other obligations by TCCs under the MoU. Irrespective of whether TCCs violate their promises to the UN to exercise jurisdiction over crimes committed by their national contingents in the territory of the host state during PSOs, the host state cannot in any case exercise its jurisdiction over PSFs.

The problem is by virtue of the existence of two separate documents – UN SOFA and MoU – TCCs and a host state owe obligations to the UN, but not to each other. If a TCC does not exercise its jurisdiction, the host state cannot claim that it does that. Similarly, if a TCC contributes very undisciplined and badly trained contingent, committing crimes, and whose national commanders do not take any measures to discipline the members of the contingent in

⁵¹ Model MoU is used as a basis for the MoU concluded between the UN and TCCs, which are binding in nature and covering military personnel of TCCs. Zsuzsanna Deen-Racsmany "The amended UN model memorandum of understanding: a new incentive for states to discipline and prosecute military members of national peacekeeping contingents?", *Journal of Conflict & Security Law* 321 (2011), at 329.

⁵² The provisions on agreement from the part of TCC to exercise jurisdiction over their military personnel appeared in the earlier Troop-Contributing Agreements which preceded the Memoranda of Understanding, however, this practice was changed after introducing in 1996 MoU, where that provision did not reappear. See Zsuzsanna Deen-Racsmany (2011), at 329-330; see also Roisin Burke (2011), at 72.

⁵³ Zsuzsanna Deen-Racsmany (2011), at 335.

⁵⁴ Revised MoU, Article 7*quinqüiens*, para. 1.

⁵⁵ Model MoU, Article 7 *quarter* and 7*séxiens*; see also Zsuzsanna Deen-Racsmany (2011), at 337, 340.

violation of several provisions of the MoU,⁵⁶ the host state cannot require such contingent to be removed from its territory, nor can it prosecute them for any misconduct.

The only way for the host state to require at least some action from the UN would be by virtue of the violation of the para.6 UN SOFA, which provides that the UN PKO “shall refrain from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements. The [UN PKO] and its members shall respect all local laws and regulations. The Special Representative/Commander shall take all appropriate measures to ensure the observance of those obligations.” The host state may either argue that the UN violates its obligations under the UN SOFA because the UNFC did not fulfil its duties to ensure the observance of local laws and regulations or that the UN infringes the provision of the SOFA, because its PSO’s activities resulted in the commission of crimes are inconsistent with the spirit of the SOFA or because they do not respect all local laws and regulations. As a result the host state may withdraw its consent for the PSO, if this consent was ever obtained by the UN. However, the fact that the TCC violated the assurances given to the UN or its obligations under the MoU can hardly play any role for the host state claiming its rights under the SOFA.

Even the UN SOFA in force may not preclude other states (than the host state) asserting jurisdiction over the crimes committed by PSFs on the basis of passive personality principle for example, as the victim of the crime may have nationality of the neighbouring state.⁵⁷ Other states are not parties to the UN SOFA (only the host state and the UN are parties). The host state may be more willing to extradite a peacekeeper to the neighbouring

⁵⁶ See Revised MoU, Article 7bis, 7ter.

⁵⁷ See Zsuzsanna Deen-Racsmany (2011), at 353, see also Rain Liivoja *An Axiom of Military Law: Applicability of National Criminal Law to Military Personnel and Associated Civilians Abroad* (Doctorial dissertation submitted to the University of Helsinki, 2011), at 151, who argues that the UN SOFA provisions on the exclusive jurisdiction of the sending state over its armed forces has no impact on the jurisdiction for any state other than the host state.

state, should it decide to issue an extradition request, than to wait for the TCC to take any action.

Another question is whether the host state is allowed to extradite a military member of PSFs to the third state. Although the host state does not need to establish jurisdiction over the offence committed by the peacekeeper in order to extradite him to the state which already established its jurisdiction, subject to the double criminality rule, the decision to extradite may violate other provisions of the UN SOFA concerning immunities (para.46)⁵⁸ or the provision regulating arrest of peacekeepers by the host state (paras.42(b) and 43), which provide that the members of PSO, if arrested, should be immediately transferred to the representatives of PSO.⁵⁹ Therefore even if any other state established jurisdiction over particular offence committed by the military member of PSF and requested extradition from the host state, the host state may be precluded from complying with that request because of the provisions of the UN SOFA (other than the one envisaging exclusive jurisdiction of TCCs) concerning further immunities of PSOs.

Despite relatively limited scope of application of the provision on exclusive jurisdiction in the UN SOFA, it may still shield perpetrators of the crimes from any kind of prosecution. The host states are unlikely to request subsequent extradition of peacekeepers from TCCs, and the TCCs are highly unlikely to actually extradite their on nationals back to the state where the PSO was deployed. Any other state would hardly be able or willing to establish jurisdiction based on principles other than territorial/active personality. The TCC is the only state which can prosecute their peacekeepers in practice. If it declines to do that, the impunity will be a direct consequence of operation of the UN SOFA provisions.

⁵⁸ For more detail see discussion below.

⁵⁹ See below.

The construction of the provision on the unconditional total exclusion of host state jurisdiction in the UN SOFA is unprecedented comparing it to similar provisions in SOFAs of other IOs.⁶⁰ The relatively old text of the NATO SOFA (1951) and recently drafted text of the EU SOFA (2003) use an almost identical approach to the allocation of criminal jurisdiction between their members. They do not provide for the unconditional exclusive jurisdiction for the sending state, but rather regulate the matter depending on nature of offences committed by the forces in the territory of the receiving (host) state.

Under the NATO and EU SOFAs both sending and receiving state have a right to exercise jurisdiction over members of military forces.⁶¹ Both states have exclusive jurisdiction with respect to the offences relating to their national security and not punishable by the law of the other state (sending or receiving), such as treason, sabotage, espionage, etc.⁶² The sending and receiving states have concurrent jurisdiction over other offences: the sending state has primary jurisdiction in relation to the offences committed by its forces solely against its property or security or against person or property of military or civilian state or the state and in relation to the offences arising out of actions or omissions done in the performance of official duty, whereas the receiving state has primary jurisdiction in relation to any other offences.⁶³ Notably, the SOFAs also provide that the state which does not exercise primary

⁶⁰ See also Roisin Burke (2011), at 84.

⁶¹ 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 (EU SOFA), (2003/C 321/02), 31 December 2003; Article 17, paras. 1 and 2; Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (NATO SOFA), 19 June 1951, Article VII, para. 1(a) and (b).

⁶² EU SOFA, Article 17, paras. 3 and 4; NATO SOFA, Article VII, para. 2 (a) and (b).

⁶³ Ibid, para. 6 (a) and (b); Ibid, Article VII, para. 3 (a) and (b).

jurisdiction must notify the other state about it.⁶⁴ They also provide for the state the possibility for a waiver of primary jurisdiction in favour of the other state.⁶⁵

Such a construction of provisions on jurisdiction in the EU and NATO SOFAs ensures right balance between the national interests of both sending and receiving state and fills jurisdictional gaps related to the acts of the visiting military forces, which may result from inability or unwillingness of any state to exercise jurisdiction over the offences committed. This scheme may be easily adopted by the UN SOFA. Any concerns about usual weakness of the host state judicial system and inability to ensure fair trial to the military members of PSFs cannot take the effect of absolute exclusion of jurisdiction of the host state over military contingents, firstly because not all host states have badly functioning judicial systems, and secondly, the fact that members of civilian component of PSOs can actually be prosecuted according to the UN SOFA, when the UNFC agrees on it with the host state,⁶⁶ does not support the proposition that any host state cannot be trusted in terms of conducting criminal proceedings over international personnel.⁶⁷

The unconditional exclusion of host state's jurisdiction over military members of PSOs must be replaced by either case-by-case approach, as with regard to the civilian component of PSOs, or by the system of allocation of jurisdiction between states as envisaged by the EU and NATO SOFAs. Only then the impunity can be prevented. Otherwise the rule on exclusive jurisdiction of the national states may leave unpunished even the perpetrators of the most serious international crimes.

⁶⁴ Ibid, para. 6 (c); *ibid*, Article VII, para. 3 (c).

⁶⁵ Ibid, Article 17, para. 6 (c); *ibid*, Article VII, para. 3 (c).

⁶⁶ See, UN Model SOFA, para. 47 (a).

⁶⁷ See D.W. Bowett (1964), at 440, pointing out that "there is no justification, apart from the purely political justification, that it is only upon this basis that states will provide contingents."

C) Jurisdiction of states over international crimes committed during PSOs

Members of PSFs may commit international crimes in host states. There were already some allegations of torture and killing committed during PSOs, many instances of commission of rape and other sexual violence against local population by peacekeepers.⁶⁸ The most probable international crimes to be committed by peacekeepers are provided by the CAT and GC as part of grave breaches regime.⁶⁹

For the CAT to apply the acts of perpetrators must intentionally inflict severe pain or suffering on a person for specific purposes (such as obtaining information or concession, punishment, intimidation, coercion or discrimination) and these acts must be committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁷⁰

While there were instances where peacekeepers committed acts which were characterised as pure torture,⁷¹ it is more common that they commit rape or other sexual violence,⁷² which according to ICTY and ICTR jurisprudence may amount to torture.⁷³ While

⁶⁸ See, in particular Zeid Report (2005), at 8-9.

⁶⁹ This section primarily focus on the widely reported cases of commission of various unlawful acts, which (upon the fulfilment of all the elements of crimes) can be considered as international crimes, such as covered by the CAT and grave breaches regime of the GC. Although one may not exclude any other international crimes envisaged by different international conventions (like terrorism, piracy, genocide, etc.) their commission may be only a theoretical possibility.

⁷⁰ CAT, Article 1(1).

⁷¹ For example, the soldiers from Canadian contingent of the UNOSOM tortured and killed a teenage boy: see, for instance, <http://www.nytimes.com/1994/11/27/world/torture-by-army-peacekeepers-in-somalia-shocks-canada.html>

⁷² See Zeid Report (2005), at 8-9.

⁷³ In the *Furundžija* case, the Trial Chamber extended the possibility for the acts of torture to include not only rape but also all serious abuses of a sexual nature inflicted upon physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. See Ken Roberts (2009), at 757, citing *Prosecutor v Furundžija*, Case No: IT-95-17/1-T, Judgement, ("Furundžija Trial Judgement"), 10 December 1998, para. 186.

before ICTY jurisprudence provided that only in some instances rape may amount torture,⁷⁴ more recent cases suggest that rape constitutes torture *per se*.⁷⁵

According to the definition of torture given in Article 1 CAT, the infliction of severe pain or suffering must be done with specific purpose. All purposes listed in Article 1 refer to a situation in which a victim of torture is a person “at least under factual power or control of the person inflicting the pain or suffering,” as the torture presupposes a situation of powerlessness of the victim.⁷⁶ ICTY jurisprudence suggests that the list of prohibited purposes is non-exhaustive the conduct does not need to solely serve a prohibited purpose.⁷⁷ ICTR/ICTY cases confirm that like torture defined in the CAT, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person and can constitute torture.⁷⁸

However, another important condition for the crime of torture to be a crime under the CAT is that the acts of torture were committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁷⁹ This requirement distinguishes cases considered as violation of Article 1 CAT and cases of violation of Article 7 ICCPR: for the former the link of torture with official capacity is

⁷⁴ *Prosecutor v Kvočka et al.*, Case No. IT-98-30/1, Judgment, (“*Kvočka* Trial Judgement”), 2 November 2001, para. 145; also cf. *Furundžija* Trial Judgement, para. 163; *Delalić* Trial Judgement, para. 496.

⁷⁵ As it was pointed out by the *Brđanin* Trial Chamber, “severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.” *Brđanin* Trial Judgement, para. 485. See also *Kunarac* Appeal Judgement, para. 150; See also Christoph Burchard “Torture in the jurisprudence of the ad hoc tribunals: a critical assessment”, 6 *Journal of International Criminal Justice* 159 (2008), at 166, 175.

⁷⁶ Manfred Nowak and Elizabeth McArthur (2008), at 75-77; Herman Burgers and Hans Danelius (1988), at 120.

⁷⁷ *Prosecutor v Delalić et al.*, Case No. IT-96-21-T, Judgement, (“*Delalić* Trial Judgement”), 16 November 1998, para. 470; *Prosecutor v Kunarac et al.*, Case No. IT-96-23/1-A, Judgement, (“*Kunarac* Appeal Judgement”), 12 June 2002, para. 155; *Prosecutor v Brđanin*, Case No. IT-99-36, Judgment, (“*Brđanin* Trial Judgement”), 1 September 2004, paras. 487. See also Ken Roberts (2009), at 757.

⁷⁸ *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, (“*Akayesu* Trial Judgement”), 2 September 1998, para. 687; *Brđanin* Trial Judgement, para. 485; *Delalić* Trial Judgement, para. 496.

⁷⁹ CAT, Article 1(1).

required, whereas for Article 7 ICCPR failure of the state to protect against private persons committing torture is enough.⁸⁰

The military members of PSOs may be considered as public officials, as they retain their status as members of armed forces of their national state.⁸¹ That is even more the case if the acts of torture were committed with the explicit/implicit consent of their superior which can be inferred from the knowledge of the superior or his presence on the scene when the acts were committed and no action was made to prevent the acts from commission or to punish the perpetrators afterwards. It is because the terms “consent or acquiescence” used in Article 1 CAT are broad and can be interpreted to cover various actions committed by private person if a public official somehow permits such acts to continue.⁸² Therefore it is possible that the acts of torture committed by peacekeepers may attract the obligations of the states parties to the CAT.

One should distinguish between torture as a separate transnational crime (relating to the CAT), torture as a war crime and torture as a crime against humanity.⁸³ The latter two do not need to contain the same requirements as provided by the CAT.⁸⁴

Although it is improbable that peacekeepers ever commit crimes against humanity,⁸⁵ they may commit war crimes in the territory of the host state. They may become involved not only in torture, but other crimes constituting grave breaches such as other inhuman treatment,

⁸⁰ See Manfred Nowak and Elizabeth McArthur (2008), at 78 arguing that it would be difficult for the Committee against Torture to interpret the state obligations deriving from the CAT in the same broad manner in which the Human Rights Committee interprets the obligations of states deriving from Article 7 ICCPR, including in the situations where the acts prohibited by Article 7 were inflicted by people “acting in their official capacity, outside their official capacity or in a private capacity.” See also HRC General Comment No. 20, para. 2.

⁸¹ They may also be considered as persons acting in official capacity if they indeed act in that capacity when committing acts of torture. See on the discussion of “official capacity”, Chapter II, Section 1(c)

⁸² Manfred Nowak and Elizabeth McArthur (2008), at 78.

⁸³ See Christoph Burchard (2008), at 161; Paola Gaeta “When is the involvement of state officials a requirement for the crime of torture?”, 6 *Journal of International Criminal Justice* 183 (2008), at 187.

⁸⁴ See Paola Gaeta (2008), at 189, pointing out that “it would be fallacious to reach the conclusion that the ‘criminal’ definition of torture as a discrete crime, in particular the requirement of the involvement of state officials, must perforce apply to torture as a war crime or a crime against humanity.”

⁸⁵ See discussion in the next section below.

wilful killing, causing serious injuries or unlawful confinement.⁸⁶ As for the definition of torture in the context of armed conflict, as suggested by ICTY jurisprudence, there is no need to prove that the perpetrator of the crime of torture was a public official or that the torture was committed in the presence of public official for the torture outside of the framework of the CAT.⁸⁷

However, in order for an offence to qualify a war crime, it must have a nexus with the armed conflict. According to the ICTY/ICTR jurisprudence the nexus exists when the armed conflict plays a substantial part in the perpetrator's ability to commit the crime, his decision, manner or purpose for which it was committed.⁸⁸

It follows that if a peacekeeper was able to commit a particular crime against a member of local population because they were affected by armed conflict or the armed conflict made them particularly vulnerable to enable him to commit such crime, that crime may amount to a war crime. However this must be established on particular facts to avoid situations where the crimes committed had no connection with the armed conflict but only coincided with it in time.

⁸⁶ See GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147. For the consequent analysis of grave breaches regime only articles of GC IV will be mentioned as it is more often that the peacekeepers commit crimes against civilian population. However, the provisions of other GC can be applied *mutatis mutandis*.

⁸⁷ See Ken Roberts (2009), at 758; Christoph Burchard (2008), at 171; See also *Kunarac* Appeal Judgement, paras. 146-148, reaffirmed in *Prosecutor v Kvočka*, Case No. IT-98-30/I-A, Judgement, (“*Kvočka* Appeal Judgement”), 28 February 2005, para. 284. Gaeta also points out that “the definition of the crime of torture under the UN Convention is narrower than that of torture as a war crime or as a crime against humanity simply because it is necessary not to ‘trivialise’ the ‘intrusion’ of the international community into realm of criminal law by imposing the criminalisation of every single instance of wicked conduct of an entirely private nature.” See Paola Gaeta (2008), at 191.

⁸⁸ The Appeals Chamber in *Setako* gave a summary of the ICTY/ICTR jurisprudence with regard to the requirement of the nexus with the armed conflict:

The required nexus need not be a causal link, but that the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed. The Appeals Chamber has thus held that “if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.” To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict

Setako v Prosecutor, Case No. ICTR-04-81-A (“*Setako* Appeal Judgement”), Judgement, 28 September 2011, para.249.

There is also no need to prove that a person allegedly committed a war crime was a combatant to establish a nexus with the armed conflict. The Appeals Chamber in *Akayesu* held that the perpetrator of the crime does not need to have a special relationship with one party to the conflict in order for the nexus between violations and the armed conflict to be established.⁸⁹

Special jurisdictional regime provided by the GC applies only to those war crimes, which constitute GC grave breaches. Although such crimes as torture, inhuman treatment or rape may constitute grave breaches, they must fulfil an additional condition: there must be a nexus with the IAC. This would be the case if the PSO is either deployed where the IAC is taking place or the PSF themselves take part in hostilities in originally NIAC against governmental forces. Their participation will convert the armed conflict in international one.⁹⁰

Grave breaches regime does not apply to crimes committed during NIAC.⁹¹ Therefore although it is not strictly necessary that peacekeepers are to be considered combatants in order to establish the nexus with an armed conflict to qualify their acts as war crimes, it may be necessary in order to consider the crimes which they committed as amounting to grave breaches. If the nexus between IAC and the crimes committed by peacekeepers is established, the states (including the host state) will be bound by the provisions of GC concerning jurisdiction and prosecution for grave breaches.⁹²

For the sake of the present analysis, supposedly, that those requirements were satisfied, and the CAT and GC apply to certain crimes committed by peacekeepers. The UN SOFA

⁸⁹ It is because IHL “would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility [...] under the pretext that they did not belong to a specific category.” *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, (“*Akayesu* Appeal Judgement”), 1 June 2001, paras. 443-444.

⁹⁰ See discussion in Chapter III.

⁹¹ See, for instance, *Tadić* Appeal Judgement, para. 80; see also William Schabas *An introduction to the International Criminal Court* (Cambridge University Press, 4th, 2011), at 132.

⁹² See also Geert-Jan G. J. Kooops *The prosecution and defence of peacekeepers under international criminal law* (Transnational Publishers, 2004), at 250.

does not address this situation and all the provisions of the UN SOFA concerning exclusive jurisdiction of TCCs continue to apply to any offences committed by military personnel of PSOs. However, both the CAT and GC provide for separate obligations for the state in relation to the jurisdiction and prosecution for international crimes which may contradict the provisions of the UN SOFA.

In relation to jurisdiction the CAT explicitly requires the state parties (if the host state is a state party) to take such measures as may be necessary to establish jurisdiction over offences of torture when the offences are committed in their territory (i.e. territory of the host state).⁹³ If a peacekeeper commits a crime of torture falling under the provisions of the CAT in the territory of the host state, because of the existing UN SOFA the host state may find itself violating international law in either way: if it fails to establish jurisdiction over the crime of torture committed by the military member of the PSF, because the UN SOFA basically excludes its jurisdiction, it violates the CAT (if it is a party to the CAT), but if it nevertheless establishes jurisdiction over such conduct, it violates the UN SOFA provisions. Therefore the conclusion of the UN SOFA *per se* may amount to the violation of obligation of the host state to take measures as may be necessary to establish jurisdiction over the acts of torture.

It is because the UN SOFA provides for exclusive jurisdiction of TCCs and in this way excludes the exercise of jurisdiction by the host state. It would be a different situation if the UN SOFA provided just for immunities for peacekeepers and not excluded the jurisdiction itself. The exercise of jurisdiction can coexist with the immunities and not to be in conflict with it as these are separate regimes. However in case of the UN SOFA it is the jurisdiction

⁹³ CAT, Article 5, para. 1(1).

which is excluded and therefore this provision is in conflict with the provisions of the CAT requiring states to establish jurisdiction over crimes of torture.

The convention also provides for obligations to take necessary measures to establish such jurisdiction for a state of nationality of the perpetrator and the victim, and for any other state in which territory the offender is present, if it does not extradite him.⁹⁴ However, this does not require them to issue an extradition request or arrest warrant (unless the perpetrator is present on their territory). Similarly, the fact that any other state may establish its jurisdiction over the crimes perpetrated in the territory of the host state will not free it from its obligation to prosecute the offender present in its territory.

The next question is whether the obligations of the host state will be fulfilled if TCCs assure the UN that they will generally exercise jurisdiction over any offence committed by their personnel. It seems it is not enough. The text of Articles 5 and 7 CAT does not condition the obligation of the territorial state or any other state to exercise its jurisdiction and prosecute the offender found in its territory on the fact that other state may do so in the future. The construction of the provisions implies that the host state must establish its jurisdiction and prosecute the offender for the acts of torture committed in its territory. The same is true for the obligations under GC grave breaches regime, which clearly requires states to search for and bring the alleged perpetrators regardless their nationality before their own courts.

The UN SOFA does not absolve the host state from its obligations under the GC, since the UN SOFA cannot modify provisions of the GC and the host state is still bound to search for and try perpetrators of grave breaches.⁹⁵ Accordingly, the obligation to prosecute for war crimes or torture cannot be nullified by a bilateral agreement between two parties to the CAT

⁹⁴ CAT, Article 5, para. 1(2) and (3) and para. 2.

⁹⁵ Keiichiro Okimoto (2003), at 228.

or GC, and therefore a SOFA would violate their obligations under those treaties.⁹⁶ This is because the CAT and GC are treaties of humanitarian character. They cannot be terminated or suspended under Article 60 VCLT 1969 as a consequence that one of the parties breached it.⁹⁷ A treaty in conflict with a treaty of humanitarian character has no effect and is unenforceable, because humanitarian treaties cannot reciprocally be terminated nor can their breaches be excused on a bilateral basis.⁹⁸ The provisions of the UN SOFA may be disregarded by the host state if they conflict with its obligations under the CAT and GC.

Only if any other state issues an extradition request, the host state may avoid the conflict of its obligations by complying with that request and actually extraditing the persons concerned. Otherwise, if there is no such request, the host state is under obligation to prosecute a peacekeeper. The possibility that some other state issues an extradition request is very improbable in practice. The nationality of most victims tends to be the one of the host state, the offender may still be present in the territory of the host state, whereas the state of nationality – the TCC may decide not to exercise its jurisdiction until the offender is repatriated or returned to the TCC from the mission.

Even if the state of nationality decides to exercise its jurisdiction over those crimes when it gets to know about them and issues an extradition request to the host state, the host state may be prevented from complying with this request. Firstly, by complying with the request for extradition even to the TCC, the host state violates the provisions of the UN SOFA due to their inflexibility. The host state issuing and executing an arrest warrant violates immunities and inviolability provisions of the UN SOFA. It has to transfer the offender to the custody of the UN PSO under the UN SOFA. There may, however, be proper arrangements

⁹⁶ Steffen Wirth “Immunities, related problems, and Article 98 of the Rome Statute”, 12 *Criminal Law Forum* 429 (2001), at 452.

⁹⁷ See VCLT 1969, Article 60, para. 5.

⁹⁸ Alexander Orakhelashvili “Article 30 Convention of 1969” in Corten, Olivier, Klein, Pierre, *The Vienna Convention on the Law of Treaties*, Vol. I (Oxford University Press, 2011), at 793.

made between the host state, the UN and the TCC to surrender the person to the TCC's authorities by-passing the provision of the UN SOFA, if indeed the TCC issues such request on extradition.

This may be almost the only way for the host state not to violate its obligations under the UN SOFA and requirements of the CAT and GC: namely the TCC instituting proceedings and requesting the extradition of the member of its national contingent and the UN acting in collaboration with the host state and the UN delivers the perpetrator to the TCC for the further criminal action. Nevertheless, such situation is almost impossible in practice and TCC is unlikely to start proceedings and issue extradition request, while the person is still a member of the PSO.

The TCC's obligations to prosecute the alleged offender appear, when the member of national contingent is repatriated or returned to the TCC, as this obligation depends on the presence of the offender in state's territory. Once the offender no longer participates in the PSO, the territorial state or any other state which decides to establish jurisdiction may, if they prefer to, issue an extradition request for the TCC and the TCC will be under obligation to prosecute or extradite the offender. The obligation to prosecute or extradite by other states, including the host state, arises, when the alleged offender (if not prosecuted by the TCC) decides to travel to any state party to the convention. This obligation derives from the mere fact that the alleged offender is present for whatever reason in any territory under the jurisdiction of a state party.⁹⁹ But those situations are no longer covered by the UN SOFA.

⁹⁹ Manfred Nowak and Elizabeth McArthur (2008), at 345.

D) Immunities of peacekeepers in domestic courts

i) Immunities ratione personae

Article 105 UN Charter and the UN Convention on the privileges and immunities (1946) provide for privileges and immunities for the UN. However, the military members of PSOs are not covered by these instruments. They are not officials of the UN.¹⁰⁰ Unlike military observers, they are not provided with the status of experts on mission.¹⁰¹ Therefore the UN Immunities Convention is not applicable to the military members of PSOs and therefore is not relevant for the present analysis. The only document providing military members of PSOs with the privileges and immunities is the UN SOFA.¹⁰²

The UN SOFA divides PSOs' personnel into four categories: 1) high-ranking members of PSOs, including Special Representative, UNFC and the head of the UN civilian police; 2) members of the UN Secretariat assigned to the civilian component, who remain officials of the UN; 3) military observers, UN civilian police and other civilian personnel; and 4) military personnel of national contingents.¹⁰³ The first three categories are covered by the UN Convention. High-ranking officials are given immunity accorded to diplomatic envoys.¹⁰⁴ They have status similar to Assistants S-G under Article V, Section 19 Immunities Convention. The second category remains covered by the immunities given to the officials of the UN under Article V,¹⁰⁵ whereas the third category is granted the status of experts on mission under Article VI.¹⁰⁶ The fourth category (military personnel PSOs) is covered by the

¹⁰⁰ See discussion in Roisin Burke (2011), at 88-89.

¹⁰¹ See for further details *ibid*, at 90-91.

¹⁰² See also *ibid*, at 91.

¹⁰³ UN SOFA, paras. 24-27.

¹⁰⁴ *Ibid*, para. 24.

¹⁰⁵ *Ibid*, para. 25

¹⁰⁶ *Ibid*, para. 26.

privileges and immunities provided by the UN SOFA.¹⁰⁷ These immunities somewhat different from those accorded to other categories. This analysis discusses only immunities that may affect criminal responsibility of the military personnel of PSOs.

There are no immunities *ratione personae per se* for military personnel provided by the UN SOFA. However, jurisdiction of the host state is excluded by a provision of the UN SOFA, which states that the military personnel are subject to the exclusive jurisdiction of the TCC.¹⁰⁸ This has more far-reaching effect than ordinary immunities do. As discussed above the exclusion of jurisdiction of the host state is not conditioned on particular circumstances and applies irrespective of the seriousness of crimes committed or the willingness of national states to establish their jurisdiction and prosecute peacekeepers. Similarly, the exclusion of host state's jurisdiction, unlike ordinary immunities, cannot be waived in the interests of justice.

This provision is comparable with the immunity from criminal jurisdiction afforded to the diplomatic envoys by the Vienna Convention on diplomatic relations of 1961 (VCDR 1961) (as the UN Immunities Convention does not provide the provisions on such immunity). Article 31(1) VCDR 1961 provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. However Article 32(1) further states that the immunity from jurisdiction of diplomatic agents may be waived by the sending state. Although it is highly improbable that the TCC would ever wish to waive immunity, even if it decides to do that, it would not be able to waive its jurisdiction in favour of the host state, as the UN SOFA is very inflexible and does not provide them with such an option. Controversially, the UN itself (namely, the S-G) cannot waive immunity from jurisdiction in

¹⁰⁷ Ibid, para. 27.

¹⁰⁸ Ibid, para. 47(b).

the host state,¹⁰⁹ mainly because it is not immunity at all but exclusion of jurisdiction, and secondly such possibility was not provided by the UN SOFA, unlike in the UN Immunities Convention, where the S-G has not only a right but also a duty to waive immunities, if the immunities would impede the course of justice.¹¹⁰

Another option provided by the VCDR 1961 that is available for states bound by immunities from criminal jurisdiction for diplomatic agents, is to declare any member of diplomatic staff a *persona non grata*.¹¹¹ The receiving state may notify the sending state about its decision anytime and without having to explain its decision. The sending state may recall the person concerned or terminate his functions.¹¹² This option can be used by the receiving state including in the cases where the person is suspected of having committed a crime and the receiving state may not prosecute that person because of the immunities from criminal jurisdiction applicable to him. This possibility is clearly unavailable to the host state under the UN SOFA. Only the UN may be able to repatriate the person concerned under special procedures and after conducting its investigations.¹¹³ Moreover, unlike under the VCDR 1961, there is no possibility for the host state to declare any military member of PSO unacceptable before arriving in his territory of the host state.¹¹⁴ Accepting them to their territory under the provisions of the UN SOFA, the host state never knows whether members of military personnel may undermine its security and cannot be prosecuted for this.

In such a situation the UN is given a leading role to take at least some actions against alleged perpetrators of the crimes. It can ensure that the person is returned to his TCC from

¹⁰⁹ See also Roisin Burke (2011), at 91.

¹¹⁰ See similar provisions with regard to representatives of states (Article IV, Section 14), officials (Article V, Section 20) and experts on missions (Article VI, Section 23) of the UN Immunities Convention.

¹¹¹ Vienna Convention on Diplomatic Relations, 1961 (“VCDR”), Article 9.

¹¹² *Ibid*, Article 9.

¹¹³ See DPKO, “Directives for Disciplinary Matters Involving Military Members of National Contingents” (2003), DPKO/MD/03/00993, paras. 13, 16, 28; see also Zeid Report, para. A.35; see also Zsuzsanna Deen-Racsmany (2011), at 331.

¹¹⁴ See for the diplomatic staff VCDR, Article 9; see also Roisin Burke (2011), at 83.

the host state that does not have any of such powers. Its powers are only limited to the possibility to take into custody a member of the PSO apprehended in the commission or attempted commission of a criminal offence.¹¹⁵ However, in this case that person must be immediately delivered to the representative of the PSO.¹¹⁶ After that the host state may conduct investigation into offences,¹¹⁷ but no other actions can be taken by the host state beyond that, because as soon as a suspected offender is transferred to the UN, the provision on jurisdiction, which provides for exclusive jurisdiction of the TCC, starts to apply.¹¹⁸ It is for the UN to take any further actions in respect of such a person.

ii) Immunities *ratione materiae*

The UN SOFA also provides for immunities *ratione materiae* for all members of PSOs.¹¹⁹ Under this provision, all members of a PSO, including military members, are immune from legal process in respect of words spoken or written and all acts performed in their official capacity.¹²⁰ Similar provisions are provided by the UN Immunities Convention regarding UN officials and experts on missions.¹²¹ This immunity has limited effect for military members of PSOs. Any possible civil proceedings are already covered by subsequent more extensive provision and must be discontinued if the UNFC certifies that the proceedings are related to the official duties of the members of PSO.¹²² The criminal jurisdiction of the host state is already excluded, which implies impossibility of instituting any kind of criminal proceedings.

¹¹⁵ UN SOFA, para. 42(b).

¹¹⁶ Ibid, para. 42(b).

¹¹⁷ Ibid, para. 44.

¹¹⁸ Ibid, para. 42; para. 47.

¹¹⁹ See Ibid, para. 46.

¹²⁰ UN SOFA, para. 46.

¹²¹ UN Immunities Convention, Article V, Section 18(a) (for the UN officials); Article VI, Section 22(b) (for the experts on missions).

¹²² UN SOFA, para. 49.

The provisions of the UN SOFA are not binding on other states, apart from the host state and therefore such immunities would not extend beyond the borders of the host state, should any other state decide to exercise its jurisdiction over the military member of PSO. Especially it is possible due to the fact that unlike the UN officials and or any members afforded the status of experts on mission, who are covered by the corresponding provisions of the UN Immunities Convention, the military members of PSO enjoy only those immunities provided by the UN SOFA, which is a bilateral agreement between the UN and the host state. The nature of the UN SOFA does not provide the immunity provision with a binding effect not only for other states, which may decide to establish jurisdiction but also for TCCs not parties to the UN SOFA.

Therefore the only visible effect to the status of the military personnel of PSO that the provision of the UN SOFA on immunities *ratione materiae* may have is, paradoxically, when the other provisions of the UN SOFA (i.e. provision on exclusive jurisdiction of the TCC) terminate, namely when the PSO members returned to their TCCs. The host state may be prevented from making any extradition request or issue an arrest warrant in relation to the conduct covered by the immunity *ratione materiae*, namely the official acts of the military members of PSO. Only under such limited scenario which is by itself very unlikely to happen, the provision has its practical effect for military members of PSO who are covered by much more far-reaching provision on exclusive jurisdiction of their respective TCCs.

In those very limited situations where the provision might still apply the host state may not be able to issue an arrest warrant or extradition request to the TCC or any other state where the person allegedly committed a crime is found, until it is sure that the immunity *ratione materiae* does not apply. The question is whether a state may violate its obligations under the SOFA, if it actually issues an arrest warrant/extradition request, without

consideration of the question concerning immunities of the former military personnel of the PSO. This question was analysed by the ICJ in *Arrest Warrant* but in relation to the immunities *ratione personae* for certain high-ranking state officials under CIL.¹²³ In this case the ICJ held that by issuing and circulating an international arrest warrant against incumbent Minister for Foreign Affairs of the Congo, Belgium violated his immunity from criminal jurisdiction and his inviolability under international law.¹²⁴ This pronouncement cannot be taken to mean that the same would be true for immunities *ratione materiae*, as the Court discussed personal immunity of the incumbent Minister for Foreign Affairs.

The ICJ in *Mutual Assistance* briefly dealt with this question discussing immunities *ratione materiae* of the officials of Djibouti, when France issued summons against them.¹²⁵ The ICJ, however, preferred to deny the claim without going into substance of the matter. The Court considered that Djibouti at no stage informed the French courts that the acts concerned performed by its officials were acts of Djibouti.¹²⁶ According to the Court, the state seeking to claim immunity for its organ must notify the other state concerned that the judicial process must not proceed against its organs to ensure that the latter state respects any such immunity, and by doing so the notifying state assumes responsibility for any internationally wrongful act in issue committed by such organs.¹²⁷

The same seems to be true for international organisations. The ICJ held in *Special Rapporteur* that the UN Secretary-General has the authority and responsibility to inform the member state of his finding as to whether a UN agent enjoys immunity and to request it to act

¹²³ The immunities *ratione personae* are not discussed here as irrelevant in relation to the military members of PSOs.

¹²⁴ See *Arrest Warrant* case, paras. 70-71.

¹²⁵ See *Case concerning certain questions of mutual assistance in criminal matters (Djibouti v France)*, Judgement, ICJ, 4 June 2008, paras. 181-197.

¹²⁶ *Ibid*, para. 196.

¹²⁷ *Ibid*, para. 196.

accordingly.¹²⁸ Following this reasoning, if the host state decides to institute proceedings against a former military member of PSO and to issue an arrest warrant/extradition request, the UN would be expected to notify the host state about the fact that the acts of that peacekeeper which form the subject of the proceedings, were the acts of the UN and then the host state may not proceed with such a request, if the UN certifies so. The UN will assume responsibility for the internationally wrongful act committed by peacekeepers.¹²⁹ If the UN does not notify the host state, it can proceed with the extradition request. It does not mean that the TCC has to respond to such a request.

Another question is whether crimes committed by peacekeepers can be at all covered by immunity *ratione materiae* as official acts of the UN. Notably, the acts must constitute the official acts of the UN, and not TCCs as it is the UN which grants immunities to PSOs' personnel under the UN SOFA. This question should be analysed with regard to the UN functional immunities *ratione materiae* and not state immunities *ratione materiae* for which different considerations apply.

Under Article 105 UN Charter the UN enjoys only those immunities that are necessary for the fulfilment of its purposes. The UN officials and experts on missions are given only the immunities which are necessary for the independent exercise of their functions.¹³⁰ The immunities enjoyed by the UN and its organs and agents are confined to those which are strictly necessary to the exercise of functions in fulfilment of its purposes.¹³¹ This is reflected

¹²⁸ *Special Rapporteur* case, para. 60.

¹²⁹ See for instance *ibid*, para. 66.

¹³⁰ See UN Charter, Article 105 in relation to the UN officials and UN Immunities Convention, Section 22 in relation to the experts on missions.

¹³¹ *The legal position of intergovernmental organizations: a functional necessity analysis of their legal status and immunities* (Martinus Nijhoff, 1994), at 152, 165; August Reinisch "Securing the Accountability of International Organizations", 7 *Global Governance* 131 (2011), at 136; See also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, 11 April 1949, at 180, 184; *Special Rapporteur* case, paras. 56, 60; *Nuclear Weapons* case (WHO), at 78-79; *Jurisdictional immunities of the state (Germany v Italy: Greece intervening)*, Judgement, ICJ, 3 February 2012, at 196. See further discussion of these cases below.

in the principle of functional necessity¹³² which services as the criterion to determine the extent of privileges and immunities.¹³³ As this reflects a general scope of the UN immunities, the same is true for the peacekeepers (although they are not granted experts' or officials' status but provided with similar immunities under the UN SOFA).

The scope of functional immunities of IOs is different from the scope of states' *ratione materiae* immunities as they (unlike IOs) have general competences and functions not limited by the principle of speciality.¹³⁴ This means that the acts that are covered by the IOs' immunities would be confined to only those which are necessary to exercise the IOs' functions. As for both states and IOs the acts that are covered by the immunities *ratione materiae* are "official acts", the latter category of "official acts" is different for states and IOs given that "official acts" of IOs' officials/agents must also be necessary for the fulfilment of IOs' functions. Therefore any instances where the state could potentially claim immunities for its officials do not result for the same consideration to be applicable to the IOs' immunities. The following analysis addresses the meaning of "official acts" of IOs only.

In order to understand which acts are covered by the IO's official acts, the official acts for the purposes of their attribution to IOs and official acts for the grant of IOs' immunities should be compared. This question is considered in the light of the distinction between *intra vires* and *ultra vires* acts.¹³⁵

¹³² See Peter Bekker (1994), at 39, who defines the functional necessity as the entitlement of the IO to what is strictly necessary for the exercise of its functions in the fulfilment of its purposes. See *Nuclear Weapons* case (WHO), at 78-79.

¹³³ Peter Bekker (1994), at 166, August Reinisch (2011), at 136; Ola Engdahl (2007), at 134.

¹³⁴ See *Nuclear Weapons* case (WHO), at 78, para. 25, where the ICJ stated that "international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

¹³⁵ See also ILC 3080th meeting report, A/CN.4/SR.3080, at 8 concerning the discussion on this issue in the ILC in the scope of consideration of responsibility of IOs for *ultra vires* acts, where it was pointed out that the official acts for the purposes of IOs' responsibility cannot be compared with the official acts for the purposes of IOs' privileges, as the latter law is more restrictive towards *ultra vires* acts and would not mean that *ultra vires* acts should not be covered by the former.

As discussed above, *ultra vires* acts of IO's agents/officials acting in official capacity can be attributed to the IO.¹³⁶ Although those acts must be “within overall functions” of an IO, they do not need to be necessary for the fulfilment of functions of the IO, unlike those acts qualifying for the application of immunities. Therefore the situation may be different for the definition of official acts for the immunities purposes.

For that the *intra vires* acts would fall in the category of necessary acts for the performance of the IOs' functions. This is because *intra vires* acts by definition being within authority of the organ/agent provided in the constituent instrument of the IO cannot be unnecessary, as the IO's constituent instrument would not provide organs/agents with the authority to take unnecessary actions. This may not be true in respect of *ultra vires* acts of the organ/agent, i.e. those which are performed in excess of the authority or in contravention to instructions.¹³⁷ A further question therefore is whether *ultra vires* acts can be considered necessary for the functional immunity of the IO to apply.

As the ICJ stated in *Reparations*, IOs have only those powers that are essential to the performance of their duties.¹³⁸ Further in *Nuclear weapons* (WHO) the ICJ considered that the IOs are vested by states with the powers, “the limits of which are a function of the common interest whose promotion those states entrust to them.”¹³⁹ It is evident from those statements that IOs have only those powers (which can be either expressed in the constituent instrument or implied) that are necessary for the performance of their functions. Therefore when the IO's

¹³⁶ See Article 8 ARIO.

¹³⁷ See also August Reinish (2011), at 139. Cf. United Nations, Report of the International Law Commission, Sixty-third session (26 April–3 June and 4 July–12 August 2011), A/66/10, at 225, para. 135 re the discussion in the ILC on the immunities of states, where some members of the commission expressed the view that the *ultra vires* acts should not be covered by immunity *ratione materiae* “since, in those situations, the official is acting neither under the instruction of the state nor under the authority of his functions.” This consideration was not, however, supported by the Special Rapporteur (see ILC Report (2011), A/66/10, at 219, para. 108).

¹³⁸ *Reparations* case, at 182.

¹³⁹ *Nuclear weapons* case (WHO), at 78, para. 25.

acts exceed its powers (i.e. being *ultra vires*), they would not be necessary for the performance of IO's functions.

That was also confirmed in *Certain expenses*, where the Court stated that where an IO takes actions which are appropriate for the fulfilment of one of its purposes, the presumption is that such action is not *ultra vires* the IO.¹⁴⁰ Conversely, those acts which are *ultra vires* would not be appropriate for the fulfilment of the IO's purposes.

This confirms that whenever the acts of an IO's organ/agent are *ultra vires* the IO, they are not necessary for the performance of the IO's functions and therefore cannot be covered by the functional immunity of the IO. Moreover, in another case the ICJ stated that all the UN agents, "in whatever official capacity they act, must take care not to exceed the scope of their functions."¹⁴¹ This statement shows that in order for the immunities to become applicable, a UN agent must act "in official capacity" and not exceed the scope of his functions.

Therefore the acts to be covered by immunity must be official acts *intra vires*. This would be different from the question of IO responsibility which can be incurred even when the acts are *ultra vires*.¹⁴² As the Court noted, "the question of immunity from legal process is distinct from the issues of compensation for any damage incurred as a result of acts performed by the [UN] or by its agents acting in their official capacity,"¹⁴³ separating the notion of official acts for the purposes of immunities from the official acts for the purposes of the IO's responsibility for damages.

The official acts for the purposes of state responsibility and for the purposes of immunities cannot be compared because they originate from different perspectives: while the

¹⁴⁰ *Certain expenses* case, at 168.

¹⁴¹ *Special Rapporteur* case, at 89, para.66.

¹⁴² See for instance *Certain expenses* case, at 168, ARIO, Article 8.

¹⁴³ *Special Rapporteur* case, at 89, para.66.

international responsibility is a factual question of international law arising from application of rules on international responsibility, the question of application of immunities depends on internal rules of the organisation¹⁴⁴ and it is for the IO to make a decision on their application to the particular conduct.¹⁴⁵ Unlike the international responsibility arising independently from the IO's wish for the acts attributed to it and which are internationally wrongful, the immunities must be claimed by the IO. As the ICJ stated regarding the UN, it is for the Secretary-General to "assess whether his agents acted within the scope of their functions and where he so concludes, to protect these agents [...] by asserting their immunity."¹⁴⁶ Accordingly, when the immunity is not asserted by the UN, the agent may not be able to claim it himself.¹⁴⁷ In this way the acts for which the immunity was claimed cannot be the only acts which the IO is responsible for, as otherwise any IO may not assert immunities in order to avoid its international responsibility for them.¹⁴⁸ This also confirms that the official acts for the purposes of international responsibility would be broader in scope than those that the IO asserted the immunity for.

The immunity can be waived for the acts which are covered by the IO's immunity. By waiving immunity the IO would not avoid responsibility either. Unlike state immunities, with the UN, the Secretary-General has not only a right but also a duty to waive any immunity where it would impede the course of justice (without prejudice to the UN interests).¹⁴⁹ Even if at any point the immunity is applicable to the acts of peacekeepers, the Secretary-General

¹⁴⁴ See also Rosanne Van Alebeek (2008), at 247

¹⁴⁵ Peter Bekker (1994), at 174.

¹⁴⁶ *Special Rapporteur* case, at 87, para.60.

¹⁴⁷ See also ILC Report (2011), A/66/10, at 230, paras. 164, 167 for similar situation with regard to the states' immunity, which must be involved by the state and not the official himself (on which the ILC was in agreement (see also the opinion of the Special Rapporteur in this regards (ILC Report (2011), A/66/10, at 277, paras. 144, 147)).

¹⁴⁸ See also, for instance, Cortés Martín (2008), at 216. See ILC Report (2011), A/66/10, at 225, para. 135 for similar arguments in relation to states' immunity.

¹⁴⁹ See UN Immunities Convention, Section 20 (officials), Section 23 (experts). See also Peter Bekker (1994), at 192, who states that an IO "should feel compelled to waive its immunity in situations where the immunity is not strictly necessary for the exercise of [its] function sin the fulfilment of its purposes."

must consider whether such immunity would impede the course of justice. It is likely that immunity applicable to any act of peacekeepers potentially amounting to a crime for which he can be prosecuted must be waived by the Secretary-General.

The crimes committed by peacekeepers may be considered *ultra vires* acts and not covered by the UN immunities as they are not necessary to perform the UN functions. The peacekeepers acting for the UN purpose to maintain international peace and security do not need to commit crimes against the very people they are deployed to protect. It is not the function of the UN or PSO to commit crimes against the local population. Therefore it would not be possible for them to claim UN immunities from legal process for the crimes they have committed.

It is especially so for international crimes threatening international peace and security rather than maintaining it. Therefore there is no doubt that international crimes committed by the peacekeepers cannot be covered by the UN immunities. Although there is an academic debate regarding whether the immunity of state officials *ratione materiae* can cover acts amounting to international crimes committed by state officials,¹⁵⁰ this cannot be the same in

¹⁵⁰ The debate is was especially heated by the *Arrest Warrant* case, in which the ICJ may have suggest that immunities *ratione materiae* provided to state officials apply even with regard to international crimes. The Court stated that a former Minister for Foreign Affairs can be tried by a court of another state in respect of acts committed prior or subsequent to his/her period of office and in respect of acts committed during that period of office in a private capacity (para. 61). As this case concern the commission of international crimes and the Court did not make a specific comment on this issue, there were some concerns that it could be interpret as application of immunity *ratione materiae* to the commission all crimes, including international crimes, provided that they were perpetrated in the official capacity. It should be noted however that in that case the Court examined the question of the application of immunity *ratione personae*, and not *ratione materiae*. Its reasoning, therefore, may be interpreted in a more discreet way, which does not entail far-reaching consequences. The ICJ may have implicitly excluded international crimes from the ambit of official acts of state and therefore the immunity *ratione materiae* would not apply. It may have been a general statement on the issue of immunities *ratione materiae*, which did not specify that it relates to international crimes (See Chanaka Wickremasinghe “Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), preliminary objections and merits, judgment of 14 February 2002”, 52 *International & Comparative Law Quarterly* 775 (2003), at 781). It may also be that the Court decided not to pronounce on this issue at all and this omission does not mean that one must interpret it *a contrario*. Given the ambiguity of the Court’s words pronounced obiter (Claus Kress (2009), at 803), this passage cannot be construed in favour of one or another position.

Another judicial position was expressed in the *Blaškić* case, in which the ICTY Appeals Chamber considered that although there is a well-established general rule under international law that each State is entitled to claim that acts performed by one of its organs in its official capacity be attributed to the State, so that the individual

relation to the UN immunities as they require an additional element, namely that the acts should be necessary for the fulfilment of the UN functions. The state immunity has no bearing on that.

Thus, it can be concluded that the peacekeepers will not enjoy the UN immunity from legal process for the crimes committed during PSOs as these are the acts which are not necessary for exercise of the UN functions and even contrary, contravene the purposes of the UN and PSOs in maintaining peace and security.

2. Jurisdiction of the International Criminal Court over peacekeepers and immunities related to PSOs

A) Jurisdiction of the ICC

Not all serious crimes fall under jurisdiction of the ICC: it is limited to the most serious crimes of concern to the international community as a whole.¹⁵¹ These are the crimes of genocide, crimes against humanity, war crimes and crimes of aggression. The crime of genocide can be only committed with specific “intent to destroy, in whole or in part, a

organ may not be held accountable for those acts and this rule is based on the sovereign equality of States, there are few exceptions related to one particular consequence of the rule: “these exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide”, under which “those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity” (*Prosecutor v Blaškić*, IT-95-14-AR108bis, “Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997” (“*Blaškić* Appeal Decision”), 29 October 1997, para. 41). The issue of application of state immunities to the international crimes received a widespread response from academic word but a definite conclusion on this issue does not seem to exist (see further Dapo Akande, Sangeeta Shah, “Immunities of state officials, international crimes, and foreign domestic courts”, 21 *European Journal of International Law* 815 (2010), at 839-840; see also resolution of Institut de Droit International Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, resolution, Session of Vancouver (2001), Article 13(2); Antonio Cassese (2008), at 1088. Claus Kress (2009), at 804; Steffen Wirth (2001), at 451; International Law Association (2011), at 14).

¹⁵¹ Rome Statute of the International Criminal Court, 1998 (“ICC Statute”), Article 5, para. 1.

national, ethnic, racial or religious group, as such”.¹⁵² The crime of aggression can be only committed by a person “in a position effectively to exercise control over or to direct the political or military action of a State.”¹⁵³ It is difficult to imagine how these crimes can be applicable to peacekeepers.

As for the crimes against humanity, although the acts constituting these crimes can be committed by peacekeepers (such as rape, torture, unlawful deprivation of liberty or murder), there is an additional *chapeau* requirement: the acts must be committed “as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”¹⁵⁴ Widespread attack refers to the large-scale nature of the attack and to the number of victims, while systematic attack indicates the organised nature of the acts of violence, and the improbability of their random occurrence.¹⁵⁵ Random or isolated acts of violence are excluded.¹⁵⁶ The ICC Statute further defines attack directed against any civilian population as “a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.”¹⁵⁷ It is difficult to imagine that PSFs would have a policy to commit an attack against civilian population.¹⁵⁸

Therefore with regard to the specific situation of PSOs the most probable crimes that may be committed by peacekeepers are war crimes, as they may cover isolated acts committed by individual peacekeepers acting without direction or guidance from superiors or

¹⁵² Ibid, Article 6.

¹⁵³ Ibid, Article 8*bis*.

¹⁵⁴ Ibid, Article 7.

¹⁵⁵ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, “Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir”, 4 March 2009, para. 81; see also Machteld Boot *Genocide, crimes against humanity, war crimes: nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court* (Intersentia, 2002), at 478.

¹⁵⁶ *Al Bashir* Pre-Trial Decision, para. 81; see also Marten Zwanenburg (1999), at 134; Machteld Boot (2002), at 479.

¹⁵⁷ ICC Statute, Article 7(2)(a).

¹⁵⁸ Marten Zwanenburg (1999), at 134.

outside widespread or systematic patterns.¹⁵⁹ As discussed above, in order to qualify for war crimes the acts committed by peacekeepers must have a nexus with an armed conflict.¹⁶⁰ War crimes do not need to be committed only in the context of IAC. While this requirement is still valid for the first group of crimes,¹⁶¹ including grave breaches of the GC,¹⁶² the second group of war crimes provided by the ICC Statute may be committed in NIAC.¹⁶³ Although the list of crimes committed in NIAC is shorter, their inclusion in the ICC Statute makes determination of status of particular armed conflict (international or non-international) not so significant, unlike crimes under grave breaches of the GC for the purpose of establishing compulsory universal jurisdiction and *aut dedere aut judicare* principle.

The *chapeau* of Article 8 ICC Statute provides for the Court's jurisdiction for war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹⁶⁴ This formulation may significantly reduce the list of crimes over which the Court has jurisdiction and make application of the ICC Statute to the crimes committed during PSOs very rare. However, the use of word "in particular" does not exclude other crimes from the cover of the ICC Statute but establishes a priority for the crimes committed on a large-scale. The Pre-Trial Chamber in *Bemba* considered, "the term 'in particular' makes it clear that the existence of a plan, policy or large-scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court."¹⁶⁵ In practice, however, the Pre-Trial Chambers have

¹⁵⁹ William Schabas (2011), at 127; Geert-Jan G. J. Knoops (2004), at 252, see also Antonio Cassese (2008), at 1086.

¹⁶⁰ See Section 1 of this chapter in relation to the discussion on what constitutes a nexus to the armed conflict.

¹⁶¹ ICC Statute, Article 8, para. 2 (a) and (b).

¹⁶² *Ibid*, para. 2 (a).

¹⁶³ *Ibid*, para. 2 (c) and (e).

¹⁶⁴ ICC Statute, Article 8.

¹⁶⁵ *Prosecutor v Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ("*Bemba* Decision on Charges"), 15 June 2009, para. 211.

virtually ignored Article 8(1) requirement in their decisions for issuing arrest warrants and confirmation of charges.¹⁶⁶

The Court may have jurisdiction over the crimes committed by peacekeepers only when the host state is a state party to the ICC Statute or their TCC is a state party or either of them accepted the ICC jurisdiction.¹⁶⁷ The only exception to this rule is if the UNSC refers to the prosecutor of the ICC the situation, in which crimes under the Court's jurisdiction have been committed.¹⁶⁸ In such a case, neither territorial nor national state needs to be a party to the ICC Statute.¹⁶⁹ In other cases, when a territorial state or national state is a state party, a prosecutor of the ICC can initiate an investigation of a crime under Court's jurisdiction¹⁷⁰ or any state party may refer a situation to the prosecutor.¹⁷¹ Self-referrals are not excluded.¹⁷²

The UNSC or any state party may refer a situation, and not a particular crime to the prosecutor of the ICC.¹⁷³ In practice this may mean that even if the crimes which were committed by peacekeepers in the territory of the host state are not directly referred by the UNSC or a state party, they may also appear among those investigated and possibly prosecuted by the Court, when the UNSC or a state party refers a general situation of the host state to the prosecutor. It is especially the case, when many serious crimes are committed on the territory of the host state by governmental or non-governmental forces and not by

¹⁶⁶ William Schabas (2011), at 128. This criterion may constitute guidelines for the prosecutor to establish priority in its policy, if the Court is overloaded with cases, because no such requirement exists in IHL. *Machteld Boot* (2002), at 548.

¹⁶⁷ See ICC Statute, Article 12, para. 2(a) and (b) and para. 3.

¹⁶⁸ *Ibid*, Article 13(b).

¹⁶⁹ See, *mutatis mutandis*, *Ibid*, Article 12, para. 2.

¹⁷⁰ *Ibid*, Article 13(c).

¹⁷¹ *Ibid*, Article 13(a).

¹⁷² The Appeals Chamber in the *Katanga* case confirmed the possibility for the states to refer their on situations to the ICC and that self-referrals are in conformity with the principle of complementarity under Article 17 of the Statute and general duty of the states to exercise their criminal jurisdiction over international crimes under sixth para. of the Preamble of the ICC Statute. See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, "Judgment on the appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ("*Katanga* Appeal Admissibility Decision"), 25 September 2009, paras. 85-86.

¹⁷³ See ICC Statute. Article 13(a) and (b).

peacekeepers. PSOs are normally deployed in such situations. The fact of referral of situation in the territory of the host state does not exclude particular group of persons from the possible prosecution,¹⁷⁴ even if these persons are peacekeepers who also committed crimes under subject-matter jurisdiction of the Court. Unable to conduct its own investigations or prosecutions, the host state itself may refer the situation to the ICC prosecutor and cannot exclude any person or group of persons from the ICC jurisdiction.¹⁷⁵

The question, however, is whether the jurisdiction of the ICC or self-referral by the host state is precluded by reason of the UN SOFA provision on exclusive criminal jurisdiction of TCCs. The UN SOFA cannot bind any other state or entity apart from the UN and the host state. Therefore the ICC can exercise its jurisdiction anyway. If the host state and a TCC are state parties to the ICC Statute, there is no question of jurisdiction. If the host state is a state party but not the TCC, the situation is the same, because although the host state jurisdiction is excluded by the UN SOFA, the ICC is not a party to the UN SOFA and therefore its jurisdictional provisions operate independently from the UN SOFA. The UN SOFA is binding only on the actions of the UN and the host state and not to other entities.

Regarding self-referrals, the UN SOFA does not explicitly prohibit any referral of the situation to an international court. It excludes jurisdiction of domestic courts of the host state, and not jurisdiction of other courts in the world. Moreover, the state would refer a “situation” and not a particular peacekeeper to the ICC. Neither would it be in a position to influence a choice of crimes under consideration by the ICC prosecutor. To consider a particular

¹⁷⁴ See William Schabas (2011), at 173-174. As Schabas suggests, that is why the concept of referrals in the ICC Statute relates to “situations” rather than to “cases”, as “this language was adopted to avoid the danger of one-side referrals, which could undermine the legitimacy of the institution” (at 174).

¹⁷⁵ When Uganda referred the “situation concerning the Lord’s Resistance Army” in northern and western Uganda to the ICC, the prosecutor concluded that “the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA” and notified Uganda about it. See *Situation in Uganda*, Case No. ICC-02/04-01/05, Decision to convene a status conference on the investigation on the situation in Uganda in relation to the application of article 53, (“*Uganda Decision*”), 2 December 2005, paras. 4-5. Therefore Uganda was not allowed to refer only crimes committed by the LRA, all other persons allegedly committing crimes in a particular territory may also be subject to the ICC jurisdiction.

provision of the UN SOFA as precluding the host states from referring its internal situation to the ICC would be too far to extend the reach of the UN SOFA provisions. Moreover, the UN-ICC Relationship Agreement explicitly provide for cooperation of two entities in relation to the crimes under the Court's jurisdiction.¹⁷⁶ Therefore the host state will not be precluded by the UN SOFA to refer its own situation to the ICC prosecutor.

Even if the host state or any other state refers a situation to the ICC prosecutor or they initiate the investigation *proprio motu*, the case may still be inadmissible.¹⁷⁷ This is because the Court's jurisdiction is based on the principle of complementarity provided under Article 17 ICC Statute.

Article 17 suggests that a case may be declared inadmissible if a state started investigation or prosecution or the case is not of sufficient gravity. If no state has started investigation, and accordingly no action was taken, the question of admissibility does not arise, as the situation does not fall under paragraphs (a), (b) or (c).¹⁷⁸ The inaction of state

¹⁷⁶ See in particular Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 2004 ("UN-ICC Relationship Agreement"), Article 19.

¹⁷⁷ Even with respect to self-referrals the Court conducts an admissibility analysis. See *Katanga* Appeal Admissibility Decision, paras. 80-83.

¹⁷⁸ See, *Katanga* Appeal Admissibility Decision, para. 78. The Appeals Chamber in the *Katanga* case stated that "in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse." See affirmation of this principle by the Appeals Chamber (*Prosecutor v Gaddafi and Al-Senussi*, ICC-01/11-01/11 OA 4, "Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", ("Gaddafi Appeal Judgement"), 21 May 2014, para. 213). See also Mohamed M. El Zeidy *The principle of complementarity in international criminal law: origin, development and practice* (Martinus Nijhoff, 2008) (2008), at 161; 6. Jann Kleffner *Complementarity in the Rome Statute and national criminal jurisdictions* (Oxford University Press, 2008), at 105.

makes the cases admissible,¹⁷⁹ and the unwillingness or inability of the state will be discussed only if the state started investigation or prosecution.¹⁸⁰

A question is whether the investigation conducted by the UN or the host state would be covered under Article 17, if neither of them would ever be able to prosecute peacekeepers (the UN, because it does not have such capacity,¹⁸¹ and the host state because of the UN SOFA). The UN investigation seems to be excluded, because the UN is not a state, and Article 17(a), (b) and impliedly (c) apply only to states' investigations. Moreover, the host state's investigation would also be excluded, because both paragraphs (a) and (b) and impliedly (c) refer to the investigation or prosecution by a state "which has jurisdiction over" the case. The host state's jurisdiction is excluded by the UN SOFA, therefore it does not have jurisdiction and its investigation unable to lead to any prosecution, cannot trigger the application of Article 17. Only the investigations or prosecution of TCCs may render a case against peacekeepers inadmissible. There may be situations where other states may initiate investigation or prosecution, but those cases would be very rare, especially regarding peacekeepers.

Therefore the ICC may step in, where TCC's inactivity on investigation or prosecution of the crimes committed by peacekeepers can be proved. However, where a TCC started investigation or prosecution of its peacekeepers, the ICC may be precluded from admitting the

¹⁷⁹ The Appeals Chamber explained that "in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction [...] renders a case admissible before the Court, subject to article 17(1)(d) of the Statute." *Katanga* Appeal Admissibility Decision, para. 78.

¹⁸⁰ In *Lubanga*, the Pre-Trial Chamber considered that if no state which has jurisdiction over the case is acting or has acted, there is no need to make any analysis on unwillingness or inability.¹⁸⁰ (*Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ("Lubanga Arrest Warrant Decision"), 10 February 2006, para. 40). Similarly the Appeals Chamber in the *Katanga* case stated that "the question of unwillingness or inability of a State having jurisdiction over the case becomes relevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears to be inadmissible." *Katanga* Appeal Admissibility Decision, para. 75.

¹⁸¹ The UN does not have a court martial or other integrated penal system to deal with crimes committed by peacekeepers. See Marten Zwanenburg (1999), "The statute for an International Criminal Court and the United States: peacekeepers under fire?", at 127-128.

case, if it is not proved that the state is unwilling or unable genuinely to carry out an investigation or prosecution.¹⁸² If the state has investigated the case, but decided not to prosecute, for the case to be admissible, it must be shown that the decision not to prosecute resulted from the unwillingness or inability of the state genuinely to prosecute.¹⁸³ When the person has already been tried by a national court for the same conduct, the ICC can only exercise jurisdiction if the proceedings in that court were for the purpose of shielding the person from criminal responsibility or otherwise were not conducted independently or impartially and in a manner inconsistent with intent to bring the person to justice.¹⁸⁴

State's inability genuinely to investigate or prosecute the case is less probable in relation to TCCs. It requires show that the state is unable to obtain the accused or necessary evidence and testimony (it may happen with TCCs due to the remoteness of the case occurred in the host state) and it was due to a total or substantial collapse or unavailability of its national judicial system.¹⁸⁵ It is highly unlikely that a state with such a collapsed judicial system will contribute personnel to the PSO.

Unwillingness of TCCs to prosecute their peacekeepers for political reasons is more probable. A TCC may decide to shield a person from criminal responsibility¹⁸⁶ to avoid the embarrassment for peacekeepers committing international crimes. It may also intentionally delay proceeding not to bring a peacekeeper to justice.¹⁸⁷ Although the proceedings against peacekeepers may not be conducted independently or impartially, it must also be shown that

¹⁸² ICC Statute, Article 17, para. 1(a).

¹⁸³ Ibid, para. 1(b).

¹⁸⁴ Ibid, para. 1(c) and Article 20, para. 3(a) and (b).

¹⁸⁵ Ibid, para. 3. See also *Prosecutor v Gaddafi and Al-Senussi*, ICC-01/11-01/11, "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" ("*Gaddafi* Admissibility Decision"), 31 May 2013, para. 205. See also *Prosecutor v Gaddafi and Al-Senussi*, ICC-01/11-01/11, "Decision on the admissibility of the case against Abdullah Al-Senussi" ("*Al-Senussi* Admissibility Decision"), 11 October 2013, para. 261, where the PT Chamber stated that "not simply any 'security challenge' would amount to the unavailability or a total or substantial collapse of the national judicial system."

¹⁸⁶ See ICC Statute, Article 17, para. 2(a).

¹⁸⁷ Ibid, para. 2(b).

the proceedings were inconsistent with intent to bring the person concerned to justice,¹⁸⁸ meaning that the proceedings were a sham leading to a suspect evading justice rather than to establish his criminal responsibility,¹⁸⁹ which is difficult to prove. Both of these elements must be proved.¹⁹⁰

Apart from complementarity, it must also be proved that the case is of sufficient gravity to justify further action by the Court.¹⁹¹ To determine that, the Court considers such factors as the scale, nature and manner of commission of the alleged crimes, their impact on victims, and the existence of any aggravating circumstances.¹⁹² The gravity of a case should not be assessed only from a quantitative perspective (i.e. by the number of victims), but rather the qualitative dimension of the crime should also be taken into account.¹⁹³ Other factors mentioned in Rule 145(l)(c) of the ICC Rules of Procedure and Evidence relating to the determination of sentence may be considered: extent of the damage or harm caused to victims and their families; nature of unlawful behaviour; means employed to execute the crime, etc.¹⁹⁴

In case of peacekeepers, although the crimes committed by them do not amount to a large-scale or widespread nature, the fact that international crimes are committed by a person entrusted with the mission to protect safety and security of local population and not to commit crimes against it, may be an additional factor to consider in relation to the impact of the

¹⁸⁸ *Ibid*, para. 2(c); see also Mohamed M. El Zeidy (2008), at 197. See *Prosecutor v Gaddafi and Al-Senussi*, ICC-OI/II-OI/IIOA6, “Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’” (“*Al-Senussi* Appeal Judgement”), 24 July 2014. For example, lack of representation of the suspect by a lawyer does not make the state unwilling to investigate or prosecute (*Al-Senussi* Appeal Judgement, para.192), unless “violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect” (para.3).

¹⁸⁹ *Al-Senussi* Appeal Judgement, paras. 2, 218, 221, 222. See also *Al-Senussi* Admissibility Decision, para. 235.

¹⁹⁰ *Ibid*, paras. 1, 218, 221; *Ibid*, para. 235

¹⁹¹ ICC Statute, Article 17, para. 1(d).

¹⁹² *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, “Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute”, (“*Kirimi Muthaura* Confirmation of Charges decision”), 23 January 2012, para. 50.

¹⁹³ *Prosecutor v Abu Garda*, ICC-02/05-02/09, “Decision on the Confirmation of Charges”, (“*Abu Garda* Confirmation of Charges decision”), 8 February 2010, para. 31.

¹⁹⁴ *Kirimi Muthaura* Confirmation of Charges decision, para. 50; *Abu Garda* Confirmation of Charges decision, para. 32.

crimes on victims for assessing the gravity of the crime.¹⁹⁵ The gravity of crimes lies in the breach of what is akin to a relationship of trust between the peacekeepers and the members of local population, whom they are sent to protect and assist.¹⁹⁶ Because the crimes committed by peacekeepers violate their role as protector performed by the mission as a whole, and the fact of this violation can be considered as sufficiently grave, the ranking of particular peacekeeper within his mission should not make any difference in the assessment of gravity threshold for peacekeepers.¹⁹⁷

B) Immunities under the ICC Statute

Article 27 ICC Statute provides for the irrelevance of official capacity and immunities attached to such official capacity for the ICC jurisdiction. Neither immunities *ratione materiae*, nor immunities *ratione personae* may exempt a person from criminal responsibility or from the ICC jurisdiction. The Pre-Trial Chamber in *Al Bashir* considered that “the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the [...] case.”¹⁹⁸

Applying this rule to the status of peacekeepers under the UN SOFA, any member of the PSO cannot claim immunity from the ICC jurisdiction on the basis of their actions amounting to the official acts of the UN and the immunity *ratione materiae* provided by the

¹⁹⁵ See also Melanie O'Brien "Prosecutorial discretion as an obstacle to prosecution of United Nations peacekeepers by the International Criminal Court", 10 *Journal of International Criminal Justice* 525 (2012), at 532, 543.

¹⁹⁶ Report of the Group of Legal Experts, Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, 16 August 2006, A/60/980, at 16, para. 55.

¹⁹⁷ See Melanie O'Brien (2012), at 533-534.

¹⁹⁸ See *Al Bashir* Pre-Trial Decision, 4 March 2009, para. 41. The PT Chamber, however, did not discuss the application of Article 98 at all. Although it may be correct to say that according to Article 27, the ICC has jurisdiction over the heads of state despite their immunities, it does not exhaust the immunity question and Article 98 may still be applicable. See Dapo Akande "The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities", 7 *Journal of International Criminal Justice* 333 (2009), at 336 and further discussion with regard to Article 98; see also Paola Gaeta "Does President Al Bashir enjoy immunity from arrest?", 7 *Journal of International Criminal Justice* 315 (2009), at 315, 322.

UN SOFA. The provision on the exclusive jurisdiction of TCCs over members of their national contingents is not relevant here, because it does not provide for any immunity, but rather excludes jurisdiction only of the domestic courts of the host state.

There are other provisions of the ICC Statute dealing with the question of immunities. Article 16 allows the UNSC to defer an investigation or prosecution of the ICC for a period of 12 months, if it requests the Court to that effect by adopting a resolution under Chapter VII UN Charter and this request is renewable.¹⁹⁹ The UNSC already used this possibility to exempt peacekeepers from the ICC jurisdiction. By issuing resolutions 1422 and 1487 (renewing the previous one) the UNSC requested the ICC to defer for 12 months any investigation or prosecution involving current or former officials or personnel from TCCs not parties to the ICC Statute over acts or omissions relating to a UN established or authorised operation.²⁰⁰ These resolutions provoked a lot of criticism for their widespread cover of the UN operations, in fact exempting the whole class of persons in any arising case from the ICC jurisdiction in contravention to the purpose of the ICC Statute.²⁰¹ The resolutions exempt not only ordinary peacekeepers from the ICC jurisdiction, but also almost all participants in the

¹⁹⁹ ICC Statute, Article 16.

²⁰⁰ SC Resolution 1422, S/RES/1422 (2002); SC Resolution 1487, S/RES/1487 (2003).

²⁰¹ See, for example Geert-Jan G. J. Knoops (2004), at 272, pointing out that Article 16 of the ICC Statute “was seen as a prudent mechanism only to be invoked on a case-by-case basis to a specific case or particular situation, rather than in a general way as a means of creating a general exception for certain groups of individuals” and that resolutions 1422/1487 “as such do not fit into the purposes that underlie Article 16” and may be disqualified by the ICC. See also Neha Jain “A separate law for peacekeepers: the clash between the Security Council and the International Criminal Court”, 16 *European Journal of International Law* 239 (2005), at 247; and at 250 (stating that the effect of the resolutions is “to carve out an exception from the Rome Statute for members of non-party states in UN peacekeeping operations”). See also Olufemi Elias and Anneliese Quast “Relationship between the Security Council and the International Criminal Court in the Light of Resolution 1422”, 3 *Non-State Actors and International Law* 165 (2003), at 176-177, who state that by resolution 1422, the SC “would exclude an unknown number of cases for an indefinite period of time, which would for all practical purpose amount to a redefinition of the jurisdiction of the Court” and that “the drafters of Article 16 did not have in mind a situation where a category of persons, regardless of the actual existence or particular circumstances of any alleged crime, would be granted immunity in the way suggested by resolution 1422.” See Carsten Stahn “The ambiguities of Security Council Resolution 1422 (2002)”, 14 *European Journal of International Law* 85 (2003), at 94, who states that “the introduction of a [...], quasi-permanent bar to the exercise of jurisdiction over peacekeepers on the basis of Art. 16 is [...] a critical step, which does not fit within the overall structure of the Statute” and that “the exception of peacekeepers from proceedings before the ICC is also difficult to reconcile with Article 27 of the Statute which rules out immunities based on official capacity.”

military enforcement operations conducted under authorisation of UNSC. The private acts of officials and personnel seem not to be exempt from the ICC jurisdiction, as the resolutions apply to the ICC investigation or prosecution of the acts or omissions “related to” the operations.²⁰² However they are now a part of history, as the UNSC did not agree on their renewal.²⁰³ Those resolutions are more *ad hoc* arrangement, requiring the UNSC to take positive action and to issue a resolution. When the UNSC does not adopt any resolution of such kind, peacekeepers may be prosecuted by the Court like any other person in the world.

Another provision of the ICC Statute, the immunities question, is Article 98. It relates to the state cooperation with the ICC and does not affect the ICC jurisdiction. It provides that the Court may not request surrender or assistance from the state which would have to violate its obligations under international law with respect to the state or diplomatic immunities²⁰⁴ or its obligations under international agreements, where the consent of a sending state for surrender is required.²⁰⁵ The existence of such immunities or international agreements may prevent the ICC from ordering a request for surrender of persons under Article 98, but they do not exclude persons’ individual criminal responsibility under the Statute.²⁰⁶

The question is whether the Court is precluded from issuing a request for surrender of peacekeepers by virtue of the UN SOFA. This concerns only the host states, and not any other states, as only the host state is bound by the UN SOFA. The Court is not precluded from issuing a request for surrender to any other state party, as they are not bound by the UN SOFA and therefore no situation envisaged by Article 98 in relation to peacekeepers may exist. The host state obligations may be covered only by Article 98, para.2, not para.1, as this paragraph talks about state immunities and diplomatic immunities attached to the person, and

²⁰² See SC Resolution 1422, S/RES/1422 (2002); SC Resolution 1487, S/RES/1487 (2003).

²⁰³ See Geert-Jan G. J. Knoops (2004), at 294-295, Keiichiro Okimoto (2003), at 231.

²⁰⁴ ICC Statute, Article 98, para. 1.

²⁰⁵ Ibid, para. 2.

²⁰⁶ Carsten Stahn (2003), at 96.

the UN SOFA does not provide for such immunities for military personnel of PSO (only regarding certain high-level officials, which is a separate issue).

However, Fleck, contends that Article 98(1) may fully apply to peacekeepers who are operate or not under the UN SOFA, as the peacekeepers still enjoy, as he suggests, functional immunities of their respective TCCs, as organs of their sending states.²⁰⁷ This argument cannot be approved. Article 98(1) deals with “state” and “diplomatic” immunity of persons. Neither of them is provided by the UN SOFA. It is the UN SOFA concluded between the UN and host state, and not between TCCs and a host state, which grants any kind of immunities and exclusion from jurisdiction of the host state and the UN is not a state and cannot grant state immunity for a PSO. Moreover, although the national contingents of PSOs remain in TCC’s national service, they also constitute an organ of the UN and normally act on its behalf. They perform functions of the UN and not of their TCCs and must obey the orders of the UNFC and not instructions from their TCCs. Therefore the rationale to grant them any sort of functional immunity of their respective states does not exist.

Even if it was true that the military members of PSOs remain covered by their TCCs’ immunities (which would make the UN SOFA provisions unnecessary), the applicability of their functional immunities to the ICC would make the ICC prosecution of any member of armed forces or any other official of any state impossible, unless their state of nationality decides to surrender him to the ICC by itself, as it will still be attached to the person even after this person ceased to be an official. Article 27 clearly excludes such possibility. Moreover, to hold a person immune for e.g. war crimes (one of the four categories of crimes under the ICC Statute) only because he was a member of armed forces would contravene the

²⁰⁷ Dieter Fleck "Are foreign military personnel exempt from international criminal jurisdiction under Status of Forces Agreements?", 1 *Journal of International Criminal Justice* 651 (2004), at 668-669.

very nature of the GC.²⁰⁸ Therefore Article 98(1) does not exclude the surrender of the military members of PSOs to the ICC as suspects in commission of international crimes on the basis of any functional immunity that may (or may not) be attached to them.

The application of Article 98(2) to the situation, where the host state is bound by the UN SOFA, is more complex. This provision was specifically drafted with SOFAs in mind.²⁰⁹

Even if Article 98(2) is applicable to the situations covered by the UN SOFA, its application has a limited effect. As discussed above, Article 98 does not affect ICC jurisdiction and a peacekeeper can still be indicted and prosecuted (once surrendered to the ICC), because the ICC Statute treats the question of immunities for peacekeepers under the heading of cooperation and surrender of persons to the court, and not as an issue of jurisdiction.²¹⁰ Any other state party must comply with the Court's request for cooperation and surrender such a person to the ICC, once it finds him present in its territory. This provision may prevent the surrender of nationals of non-parties only and does not apply where the TCC is a state party to the ICC Statute,²¹¹ or even if it applies, the Court may issue the same request to the TCC, and it will be obliged to cooperate with the Court.²¹² Therefore the

²⁰⁸ See also Michael Akehurst "Jurisdiction in international law", 46 *British Yearbook of International Law* 145 (1972-1973), at 241, pointing out that the act of state doctrine does not protect those who are charged with war crimes, crimes against peace, crimes against humanity or genocide.

²⁰⁹ Dapo Akande "The jurisdiction of the International Criminal Court over nationals of non-parties: legal basis and limits", 1 *Journal of International Criminal Justice* 618 (2004), at 644; Salvatore Zappala "The reaction of the US to the entry into force of the ICC statute: comments on UN SC Resolution 1422 (2002) and Article 98 agreements", 1 *Journal of International Criminal Justice* 114 (2003), at 124; William Schabas (2011), at 80; see also Legal Service of the EU Commission, "Effective functioning of the International Criminal Court (ICC) undermined by bilateral immunity agreements as proposed by the U.S.", Legal Service of the EU Commission, "Effective functioning of the International Criminal Court (ICC) undermined by bilateral immunity agreements as proposed by the U.S.", Internal opinion of the legal service of the EU Commission (2002), at 158.

²¹⁰ Carsten Stahn (2003), at 94.

²¹¹ See, for instance, Dapo Akande (2003), at 643; Dapo Akande (2009), at 339; see also Paola Gaeta (2009), at 328, who argues that by accepting the provision embodied in Article 27(2) the state-parties, unlike non-state parties (who are not bound by the ICC Statute), waived their rights for immunities before the ICC and therefore "the ICC Statute contains a derogation from the international system of personal immunities for charges of international crimes, but only among state parties to the Statute."

²¹² See also Dieter Fleck (2004), at 655.

only effect of this provision regarding the host state is when a peacekeeper of a non-party TCC is present there.

The obligations under the UN SOFA that the host state may infringe while complying with the Court's possible request for surrender, do not derive from the clause providing for the TCC's exclusive jurisdiction over the military personnel of the PSO,²¹³ as it regulates the question of allocation of jurisdiction between the host state's courts and TCC's courts, and does not affect the issue of surrender to the international court that already established its jurisdiction. Nor does it talk about international jurisdiction, as opposed to the national one.²¹⁴ The provision on *ratione materiae* immunity for official acts of members of PSOs²¹⁵ does not preclude the host state from surrendering a peacekeeper to the ICC, because it also relates to the question of jurisdiction, separately covered by Article 27 ICC Statute, and this immunity is expressly excluded by this article. Accordingly, the only obligation under the UN SOFA that may preclude the host state from surrendering a peacekeeper to the ICC is the obligation not to arrest members of PSO, except where requested by the UNFC or when a member is apprehended in the commission or attempted commission of a criminal offence, and if it did so, an obligation to deliver any member of PSO, arrested by the host state, to the representatives of the UN PSO.²¹⁶ Therefore if the ICC issues a request for surrender, the host state may be precluded to arrest a member of PSO or if arrested, must deliver him to the UN.

However, the UN SOFA does not expressly preclude the host state to comply with a surrender request issued by the ICC. Any such possibility depends on willingness of the UN to cooperate with the Court. Although the UN is not a party to the ICC Statute, it has obligations to cooperate with the ICC under a separate agreement – UN-ICC Relationship

²¹³ UN SOFA, para. 47(b).

²¹⁴ See also Dieter Fleck (2004), at 657 with regard to the NATO SOFA.

²¹⁵ UN SOFA, para. 46.

²¹⁶ See UN SOFA, para. 42.

agreement, Article 19 of which requires the UN to fully cooperate with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction for persons covered by privileges and immunities under UN Immunities Convention and the relevant rules of international law.

Although military members of PSOs are not covered by the UN Immunities Convention, they are covered by certain immunities under the UN SOFA. It is for the UN to waive such immunities (even though such possibility was not expressly provided in the text of the UN SOFA) and fully cooperate with the Court. In practice, it may mean that in order to cooperate with the Court's request for surrender of a peacekeepers issued for the host state, under the UN SOFA provision the UN UNFC may request the host state to take into custody the peacekeeper and further surrender him to the ICC or the UN may together with the host state transfer that person to the ICC.

One of the examples of such procedure is provided in the UN-ICC MoU concerning cooperation between MONUC and ICC, which provides in Article 16 that MONUC is prepared to help the DRC government in carrying out arrest and securing appearance of persons sought by the ICC.²¹⁷ This Article may encompass situations where the ICC issued a request to the host state for surrender of a MONUC peacekeeper. Unlike other articles of the UN-ICC MONUC MoU (e.g. Articles 11, 12 dealing with the ICC requests for interview and testimony of peacekeepers) containing safeguarding clauses of non-applicability of those articles to situations where peacekeepers may be charged by the ICC, Article 16 dealing with arrests does not contain such a clause, meaning that the requests for arrests of peacekeepers may also be included.

²¹⁷ Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court International Organizations, Article 16(1).

Although both the host state and the UN acting on request by the host state may deal with arrest and detention of its peacekeepers, it is for the UN to waive inviolability of peacekeepers, and not for the TCC, as the UN SOFA is concluded between the UN and the host state.

The ICC is not precluded from issuing a surrender request to the host state being under the obligations of the UN SOFA, because of specific nature of the UN SOFA it may not be covered by Article 98(2). There is no provision in the UN SOFA requiring the consent of a sending state to surrender a person of that state to the Court.²¹⁸ No provision of the UN SOFA is talking about the consent of the sending state, let alone the consent to surrender a person of that state to the Court.²¹⁹ There is no provision in the UN SOFA to explicitly prohibit the surrender of a peacekeeper, especially to an international court. Even if it could be inferred from the UN SOFA, that the consent of the UN is required to do so (as it is an agreement between the UN and the host state), it is not “a sending state”, as provided by Article 98(2).²²⁰ It follows that in principle Article 98(2) does not preclude the ICC to issue a request to surrender to the host state and the host state with the cooperation of the UN will be able to comply with it, if other conditions under the ICC Statute are satisfied.

Conclusion

²¹⁸ See text of Article 98, para. 2 of the ICC Statute.

²¹⁹ See also Dieter Fleck (2003), at 656 with regard to the NATO SOFA.

²²⁰ Tan points out, “the terms ‘international agreement’ used in Article 98(2) refer to agreements entered into between states, and cannot include agreements entered into between or including international organisations.” See Chet J. Jr. Tan "Proliferation of Bilateral Non-Surrender Agreements among Non-Ratifiers of the Rome Statute of the International Criminal Court", 19 *American University International Law Review* 1115 (2003), at 1141. Schabas also of the opinion that the reference to ‘sending state’ and ‘requested state’ suggests that these are agreements between states, and not with international organisations. See William Schabas *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press, 2010), at 1042. See also Legal Service of the EU Commission (2002), at 159, suggesting that Article 98(2) must apply only to the SOFAs, concluded between states parties to the ICC Statute. See also David Scheffer "Article 98(2) of the Rome Statute: America's original intent", 3 *Journal of International Criminal Justice* 333 (2005), at 346, who states that “the original intent behind Article 98(2) was relegated to persons acting at the *direction* of the ‘sending state’.” (emphasis preserved).

The analysis demonstrated that peacekeepers are provided by the UN SOFA with certain immunities will not be able to avoid criminal responsibility for the crimes they commit during PSOs in the territory of the host state. Although the UN SOFA provides for the exclusive jurisdiction of the host states over the acts committed by the military members of PSO, the UN SOFA remains a bilateral agreement between the UN and the host state concluded for the duration of PSO and binding only the host state while the peacekeepers are stationing there. The peacekeepers are not excluded from the jurisdiction of other states (including TCCs) and the host state after military members of PSO cease to be peacekeepers covered by the UN SOFA (subject to the immunity *ratione materiae*, not covering peacekeepers from jurisdiction of other states not bound by SOFA).

If peacekeepers commit international crimes (such as torture or GC grave breaches), all the states parties to the CAT and GC will have a duty to establish jurisdiction and prosecute peacekeepers for those crimes when perpetrators are present in their territory. If a perpetrator of an international crime is present on the territory of the host state, and the host state is a party to the convention, it will violate international law anyway: either violating the GC or CAT for not prosecuting that offender following the UN SOFA or violating the UN SOFA and prosecuting offender following the obligations under the GC or CAT. The mere fact of signing the UN SOFA including a provision on exclusive jurisdiction of TCCs amounts to the violation of its obligations under international law. It is because of total inflexibility of the UN SOFA provision on exclusive jurisdiction of TCCs which does not consider international crimes. It is unprecedented and leads to potential impunity of military personnel.

Under the ICC, Article 27 excludes any kind of immunities and therefore peacekeepers are not excluded from the ICC jurisdiction either. The provisions of the UN

SOFA do not bind the ICC. The UN SOFA provision excluding the host state jurisdiction over peacekeepers will make irrelevant host state's investigation for the principle of complementarity under Article 17, as the host state will be considered as a state not having jurisdiction over the case concerned.

The question of surrendering peacekeepers to the ICC under Article 98, (separate from the question of jurisdiction) is more controversial. Article 98(1) deals with the state or diplomatic immunities, not concerning peacekeepers having only with immunities under the UN SOFA. Under Article 98(2) only the host state (and not other state) may be precluded from surrendering a person to the ICC and only because of the UN SOFA provision on the inviolability of peacekeepers (no detention of peacekeepers). However, the UN is obliged to cooperate with the ICC by virtue of the UN-ICC Relationship agreement and therefore must facilitate any requested surrender. Moreover, Article 98(2) ICC Statute may not even cover the UN SOFA and the host state will be obliged to comply with the ICC request for surrender of a peacekeeper.

VI. Application of the system of international responsibility to the case-studies of peace support operations: UNOSOM and MONUC/MONUSCO

This chapter aims to illustrate the approach taken in the previous chapters to the system of international responsibility for UN PSOs. The norms of international law discussed in the previous chapters are applied to two examples of PSOs: the United Nations Operation in Somalia (UNOSOM), in particular UNOSOM II and the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) (renamed MONUSCO).

The analysis of this chapter is primarily based on different reports of NGOs, mass media, commissions of enquiry, Secretary-General's reports, etc. Some of these sources may not be seen as very reliable and may contain certain allegations and inconsistencies. However, the aim of this chapter is not to establish facts of what has happened in those missions and which crimes were definitely committed by peacekeepers (these questions are for the courts to decide). This chapter uses those materials as an illustration of how the findings of the previous chapters apply in the real situations of PSOs. Accordingly, this chapter will proceed with the assumption that the content of the documents referred to is accurate.

The first section of this chapter discussed individual criminal responsibility of peacekeepers for the offences committed during UNOSOM and MONUC, international status of the allegedly committed crimes and the possibility of the prosecution for them. The second section deals with the application of IHL to UNOSOM and MONUC and potential breaches of international obligations under IHL and IHRL committed by the TCCs and the UN. The third section addresses the attribution of conduct of peacekeepers to the UN/TCCs. If the attribution is possible, the UN/TCCs may be responsible for the crimes committed during MONUC and UNOSOM.

1. Individual criminal responsibility of peacekeepers for the offences committed during the PSOs

There are numerous reports indicating that PSFs in both missions might have committed different offences during the deployment of MONUC/MONUSCO and UNOSOM. Some offences were investigated by the UN and TCCs and the peacekeepers' involvement in their commission was officially accepted by the UN; the prosecutions conducted by the TCCs led to the convictions.¹ However, there are many more other offences allegedly have been committed by peacekeepers, but no sufficient evidence was gathered (due to different reasons)², or prosecutions in TCCs were not commenced or failed to prove the fault.³ It does not mean that those alleged crimes had never happened. The chapter will deal with both proved and only alleged acts possibly amounting to crimes.

A) Crimes allegedly perpetrated by MONUC

MONUC has got a bad reputation for numerous allegations of sexual abuses against the local population. Although only some allegations were substantiated, the number of the acts allegedly to have been committed by members of PSO demonstrates that the cases of sexual abuse and violence are not incidental. Even the UN recognised the existence of sexual

¹ See generally Report of the Secretary-General on the activities of the Office of Internal Oversight Services, "Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo", A/59/661, 5 January 2005 ("OIOS Report (2005)"); see also See Canada, Report of the Somalia Commission of Inquiry, available at <http://www.dnd.ca/somalia/somaliae.htm>, Chapter "The Somalia mission: post-deployment", the Court Marital: Investigations and Charges.

² OIOS Report (2005), A/59/661, at 1, which states that among 72 allegations only 6 were fully substantiated; in Report of the Secretary-General on the activities of the Office of Internal Oversight Services, "Report by the Office of Internal Oversight Services on its investigation into allegations of sexual exploitation and abuse in the Ituri region (Bunia) in the United Nations Organisation Mission in the Democratic Republic of the Congo", A/61/841, 5 April 2007 ("OIOS Report (2007)") among 217 allegations only 1 was substantiated (see para. 22).

³ See, for instance, See Report of the Somalia Commission of Inquiry, Chapter "The Somalia mission: post-deployment", the Court Marital: Investigations and Charges.

exploitation and incidents of rape by MONUC peacekeepers of local women and girls.⁴ Most of the reported cases concern peacekeepers' sexual contact with local girls as young as 12-16 years old in exchange of some food or small sums of money. The UN Office of Internal Oversight Services (OIOS) described five substantiated examples of sexual misconduct committed by peacekeepers with the girls who were 12-14 years of age.⁵ Most of the non-substantiated allegations were from girls 12-16 years old.⁶ Some girls as young as 13 were raped by MONUC soldiers.⁷ For example, one peacekeeper was arrested in the attempt to rape a 12-year-old girl making pornographic videos.⁸ There were cases, when the girls were raped and then given food or money to portray sex as consensual (so-called "rape disguised as prostitution").⁹ Some girls were subjected to bribes or intimidation by peacekeepers.¹⁰ Media reports describe other instances of rape and widespread sexual misconduct by peacekeepers.¹¹

Even if the girls engaged in sexual relationships with peacekeepers deliberately, for most of them this was the only possibility to survive – so-called "survival sex" – when they have sexual relations to get some food, money or protection.¹² It was because the civil conflict of 2004 in the DRC resulted in economic hardship, family breakdown and poor education.¹³ It

⁴ See, for instance, Secretary-General report, S/2004/650, at 8, para. 32.

⁵ See A/59/661, OIOS Report (2005), paras. 12-19.

⁶ OIOS Report (2005), para. 25.

⁷ Human Rights Watch, "MONUC: A Case for Peacekeeping Reform", Testimony of Anneke Van Woudenberg before the U.S. House Committee on International Relations, Subcommittee on Africa, Global Human Rights and International Operations, March 1, 2004, published on March 1, 2005, available at <http://www.hrw.org/news/2005/02/28/monuc-case-peacekeeping-reform>; Ray Murphy "An assessment of UN efforts to address sexual misconduct by peacekeeping personnel", 13 *International Peacekeeping* 531 (2006), at 535. See also Price Zeid's report, para. 9, who states that allegations of rape and sexual assault comprised 13 per cent and 5 per cent respectively of the all allegations of sexual misconduct.

⁸ See Clayton, Jonathan, Bone, James, "Sex scandal in Congo threatens to engulf UN's peacekeepers", Jonathan Clayton, James Bone, *Times Online*, December 23, 2004, available at <http://www.eyeontheun.org/articles-item.asp?a=406&id=329>.

⁹ See Prince Zeid's report, A/59/710, para. 6.

¹⁰ See OIOS Report (2007), para. 13.

¹¹ See Jonathan Clayton and James Bone (2004), describing concrete examples of misconduct by members of various national contingents of MONUC; see also Max du Plessis, Stephen Pete "Who guards the guards? The international Criminal Court and serious crimes committed by peacekeepers in Africa", ISS Monograph series, No. 121, February, 2006, at 6-7.

¹² Human Rights Watch (2005), Testimony of Anneke Van Woudenberg.

¹³ OIOS Report (2007), para. 26.

cannot be said that they did it of their own free will. Moreover, many girls are too young to give a valid consent for sexual intercourse. In some domestic jurisdictions the peacekeepers would be prosecuted for rape if engaging in sexual relationships with girls of that age. However, there are not many prosecutions of peacekeepers in their respective TCCs. In August 2006 the DRC made it a crime to have sexual relationships with a child less than 18 years of age (the age threshold was previously 14 years of age),¹⁴ meaning that any peacekeeper who has sex with girls under 18 violates criminal law of the host state in contradiction to para.5 MONUC SOFA, requiring them to observe local laws and regulations.

The described acts may also amount to international crimes under certain conditions. Rape and other forms of sexual violence can be a separate war crime or charged as a war crime of torture, cruel or inhuman treatment, or outrages upon personal dignity.

Even if the victim of such a relationship seems to be consenting because she expects to receive some money or food from the peacekeeper, her consent can still be vitiated by the presence of coercive circumstances or for the reasons of her age. The ICC Elements of Crimes provide that a war crime of rape will be committed, if a perpetrator took advantage of a coercive environment, or if a victim was incapable of giving genuine consent by virtue of natural, induced or age-related incapacity.¹⁵ Similarly, ICTY jurisprudence supports that. In the *Kunarac* case, the ICTY Trial Chamber concluded that commonly to different legal systems, serious violations of sexual autonomy are to be penalised, which is violated “wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”¹⁶ The crime of rape will be found if the sexual penetration occurred

¹⁴ See *ibid*, para. 4.

¹⁵ See ICC Elements of Crimes, Article 8(2)(b)(xxii)-1, para. 2 and accompanying fn., Article 8(2)(e)(vi)-1, para. 2.

¹⁶ *Kunarac* Trial Judgement, para. 457.

without consent of victim given voluntarily,¹⁷ and if a perpetrator took advantage of coercive circumstance without relying on physical force the consent may be negated.¹⁸

Applying this to the situation of MONUC, one may argue that the consent of the girls engaged in prostitution for survival may be negated by the coercive circumstances they live in and impossibility to find food or any other sources of income. They do this not by their free will and their sexual autonomy was violated. Moreover, when peacekeepers engage in sexual relationship with children, their consent is invalid due to their age-related incapacity to give such consent. Therefore, the widely reported acts of MONUC peacekeepers against local population may amount to rape, even if they pay for sex.

Those acts may also amount to cruel or inhuman treatment, if the perpetrator inflicted severe physical or mental pain or suffering upon the victim.¹⁹ There is no need to prove that the perpetrator took advantage of coercive circumstances. Such acts may also amount to outrages upon personal dignity, which will be committed if the perpetrator humiliated, degraded or otherwise violated the dignity of the victim and it was as severe as to become an outrage upon personal dignity.²⁰ Moreover, as discussed above, under certain circumstances those acts may amount to torture.²¹

However, these offences will only amount to international crimes, if certain additional elements are present. They may be considered war crimes, if nexus between the acts and armed conflict is proved. As discussed before, the nexus would be present if an armed conflict

¹⁷ *Kunarac* Trial Judgement, para. 460. Although the reasoning in *Kunarac* case can be criticised for not departing completely from the requirement of lack of consent to be shown, the focus on free will and sexual autonomy of the victim can be regarded a step forward for broadening the scope of the circumstances under which the crime can be found. See also Wolfgang Schomburg and Ines Peterson (2007), at 138-139, who also argue that if the international element of crime is established (with regard to the war crimes it is a nexus with the armed conflict), this would make the circumstances of crime “intrinsically coercive” and make genuine consent by the victim impossible anyway. In this way the proof of consent is not needed.

¹⁸ *Kunarac* Appeal Judgement, paras. 128, 129-130, 132-133.

¹⁹ See, for example, ICC Elements of Crimes, Article 8(2)(a)(ii)-2, para. 1; Article 8(2)(c)(i)-3, para. 1.

²⁰ See, ICC Elements of Crimes, Article 8 (2)(b)(xxi), paras. 1 and 2; Article 8(2)(c)(ii), paras. 1 and 2.

²¹ See discussion in Chapter V, section 1(c).

played a substantial part in the perpetrator's ability to commit a crime, his decision to commit it or the purpose for which it was committed.²²

In the present case, there was an armed conflict in the territory of the DRC, at least during the time when the majority of the reported offences were committed.²³ The fact that many girls were already raped by armed groups during the armed conflict and had no means to support themselves contributed to their decision to contact peacekeepers directly or indirectly. Some of them were brought by boys (often former child soldiers). Moreover, the decision to submit themselves to peacekeepers being the only possibility for them to survive is also a consequence of the armed conflict. The peacekeepers would not be able to so easily commit the offences and find girls (especially children) with whom they engage in sexual relationship for small amount of food or for providing them some protection but for the existence of the armed conflict. The armed conflict made the local population particularly vulnerable. Accordingly, in certain cases the armed conflict played a substantial part in the peacekeepers' ability to commit crimes and those crimes (especially committed against children) had a nexus with the armed conflict and therefore can amount to war crimes.

Although these crimes are grave enough to become GC grave breaches, the armed conflict where they were committed must be international.²⁴ As will be discussed below, it is only possible to consider conflict in the DRC international if the PSFs were involved in combat with the DRC armed forces (FARDC) and only for the time they participate in hostilities. Therefore it is highly unlikely that these crimes will be GC grave breaches.

There is a slight possibility to consider these crimes amounting to crimes against humanity. As previously discussed, although those crimes are sufficiently grave to fall under the category of crimes against humanity, they must satisfy an additional *chapeau* requirement

²² See discussion in Chapter V, section 1(c), citing the ICTY/ICTR jurisprudence in relation to this matter.

²³ See discussion in the next section below concerning the existence of armed conflict in the DRC.

²⁴ See Chapter V, section 1(c).

– they must constitute a widespread or systematic attack against civilian population.²⁵ Although the number of crimes allegedly committed by peacekeepers against civilians may show relatively systematic nature of crimes, it cannot be said that they were committed pursuant to or in furtherance of an organisation policy. The UN policy is definitely the opposite – it tries to prevent those crimes and not to encourage them. It does not seem that any of TCC pursues a contrary policy. Therefore, it those crimes cannot amount to crimes against humanity.

It may be possible for some acts of rape to amount to a separate crime of torture, although the rape must be committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁶ Although acts of rape allegedly committed by peacekeepers were mostly committed in their private capacity, the peacekeepers remain state organs. There were instances where their superiors were allegedly aware about their subordinates' acts and did nothing to prevent them and permitted them to continue.²⁷ Even if the acts may have been committed in private capacity, it was the official capacity of the military superiors to prevent those acts and punish perpetrators (or at least initiate investigations). If the superiors omitted to take measures intentionally, those acts under certain condition may amount to the crime of torture.

Apart from the sexual offences, other possible misconduct by the military peacekeepers in MONUC was discovered. There were allegations that peacekeepers were involved in gold and arms smuggling with armed groups in the DRC. In 2007 some international newspapers reported that Indian peacekeepers in Goma had swapped arms for

²⁵ See Chapter V, section 2(a).

²⁶ CAT, Article 1(1), see also discussion Chapter V, section 1(c).

²⁷ See next section of this chapter for further details.

minerals with rebel movement CNDP.²⁸ It was also alleged there was weapons trading in Ituri between Pakistani peacekeepers and FNI militia, responsible for some of the worst massacres in eastern Congo.²⁹ Although OIOS found no evidence to that effect, the Human Rights Watch (HRW) considers that there is clear evidence in this regard.³⁰ The HRW also considered that the gold trading and possible provision of arms and ammunition by the UN peacekeepers to militia groups served directly to stoke the violence that they were intended to prevent.³¹ While gold or armed smuggling *per se* cannot be considered a war crime/crime against humanity, those acts may amount to the assistance to the armed groups in the commission of their war crimes.

To be liable for aiding and abetting to a war crime, a person must carry out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime, which have a substantial effect on the perpetration of the crime, however it generally involves a lesser degree of directness of participation in the commission of crime than required to establish primary liability for a crime.³² These acts must be carried out with the knowledge that they assist the commission of the crime.³³ Moreover, the person does not need to know the precise crime intended to be committed, but must be aware of its essential

²⁸ See Julie Reynaert “MONUC/MONUSCO and Civilian Protection in the Kivus”, *International Peace Information Service* (2011), at 25; see also article La Libre Belgique (2007); see also Human Rights Watch (2008), Letter to Ban Ki-moon.

²⁹ Human Rights Watch, “UN: Hold Peacekeepers Accountable for Congo Smuggling”, Letter to Chief of UN Peacekeeping Urges Follow-Through, Letter to Mr. Jean-Marie Guéhenno, July 24, 2007, available at <http://www.hrw.org/news/2007/07/22/un-hold-peacekeepers-accountable-congo-smuggling>.

³⁰ Human Rights Watch (2007), Letter to Jean-Marie Guéhenno; see also OIOS Report on case no. 0151/06 (2007), paras. 22-25, 98.

³¹ *Ibid.*

³² *Vasiljević* Appeal Judgement, para. 102; *Blagojević and Jokić* Appeal Judgement, para. 127, 192. It should however be noted in the light of the recent *Perišić* Appeal Judgement that specific direction remains an important element of the actus reus of aiding and abetting and in the cases where an accused’s assistance is remote from the actions of principal perpetrators, specific direction must be explicitly established. See for instance *Prosecutor v Perišić*, Case No. IT-04-81-A, Judgement (“*Perišić Appeal Judgement*”), 28 February 2013, para. 73.

³³ *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 45.

elements.³⁴ Therefore, where peacekeepers smuggle arms to opposition groups, it must be established that the arms obtained from peacekeepers facilitated in a substantive way the commission of the crimes by those groups, and that peacekeepers knew about that and about the crimes that those groups were going to commit. If proved, peacekeepers involved in arms smuggling aided or abetted the commission of crimes.

B) Crimes allegedly perpetrated by UNOSOM/UNITAF

Many crimes were allegedly committed during UNOSOM, however some of them were committed not by the contingents of UNOSOM I or II but by those who were under the UNITAF command or US command outside the UN command.

There was a widely reported incident of the involvement of Canadian military contingent in the torturing and killing of a Somali teenage boy. This incident led to the prosecutions and some convictions in Canadian domestic courts.³⁵ This incident represents an example of commission of a transnational crime of torture by the peacekeepers. The elements of crime provided under Article 1 CAT could be established.³⁶ Severe pain and suffering were intentionally inflicted on the boy for the purpose of punishing him for the attempted theft which he was suspected of. The infliction of pain and suffering was done by one of the military members, who can be considered a public official (as he was in national military service of Canada) and it was not a private act. Moreover, there were other members of military contingent who were accuse and some were convicted for negligence performance of

³⁴ *Prosecutor v Nahimana et al.*, Case No. ICTR-99-52-A, Judgement (“*Nahimana* Appeal Judgement”), 28 November 2007, para. 482; *Blaškić* Appeal Judgement, para. 50.

³⁵ See Report of the Somalia Commission of Inquiry, Chapter “The Somalia mission: post-deployment”, the Court Marital: Investigations and Charges.

³⁶ See Chapter V, section 1(c), for the discussion of those elements.

duty³⁷ and the acts of torture were committed at the instigation of or with the consent or acquiescence of other public officials. Therefore the international crime of torture can be established.

There was another widely reported incident where two members of Belgian military contingent allegedly tortured a Somali civilian boy by dangling him over an open fire to teach him a lesson because he was suspected in attempting to steal.³⁸ On the trial they alleged that they were playing with the boy and were subsequently acquitted.³⁹ Depending on the evidence present during the trial, it was possible that such conduct may amount to the transnational crime of torture. If severe pain or suffering, physical or mental were inflicted and one of the purposes (not necessarily the sole purpose) of those acts was to punish a boy (or for any other prohibited purpose)⁴⁰ and the perpetrators were from the military contingent, the transnational crime of torture can be established. The same can be said about the incident when a Belgian soldier forced a Muslim Somali child to eat pork and saltwater and then eat his vomit.⁴¹ There were instances when without provocation, Belgian troops allegedly harassed, beat and killed many Somalis, many of whom were unarmed.⁴²

There were reports that the soldiers from Italian contingent tortured Somali civilians with electric shocks, burnt them with cigarettes, threw them into razor wire and left them in

³⁷ See Report of the Somalia Commission of Inquiry, Chapter “The Somalia mission: post-deployment”, the Court Marital: Court Martial proceedings in the torture and death of Shidane Arone. Sergeant Boland, the guard duty in the bunker, where the boy was tortured pleaded guilty to the charge of negligent performance of duty. Major Seward, who gave an order as the Officer Commanding 2 Commando to “abuse” intruders, was found guilty of negligent performance of duty.

³⁸ See Nieck Ammerlaan (1997); “Somalia – atrocities committed by UN troops”; CNN (1997); “Belgian UN troops admit to ‘roasting’ Somali boy”, *Electronic Telegraph*, 24 June 1997, available at <http://www.freerepublic.com/focus/f-news/1139565/posts>.

³⁹ Nieck Ammerlaan (1997).

⁴⁰ See Chapter V, section 1(c).

⁴¹ “Somalia – atrocities committed by UN troops”; Nieck Ammerlaan (1997); Robert Fox (1997).

⁴² Alex de Waal “U.S. War Crimes in Somalia”, 30 *New Left Review* 131 (1998), at 135, 137.

the sun for long periods without water.⁴³ They also allegedly tied a young Somali girl to the front of an armoured carrier and raped her while officers looked on.⁴⁴ The Italian paratroopers claimed that they were specifically trained in methods of torture to aid interrogation.⁴⁵ There were other military contingents involved in various atrocities committed against Somalis: beatings, looting, rapes, assaults, shooting down civilians, indiscriminate firing on crowds, etc.⁴⁶

In other instances, the members of military contingents locked children to closed metal containers for the attempts to steal something.⁴⁷ On at least one occasion a boy was found dead in from heat exhaustion and suffocation.⁴⁸ This may amount to a war crime of inhuman treatment or punishment and in case of death, a war crime of wilful killing. There were many more instances which can qualify as torture or inhuman treatment or punishment.⁴⁹

Furthermore, on some occasions soldiers from national contingents tried to prevent Somali people from stealing by shooting at them.⁵⁰ Moreover, there were orders, issued by superiors of national contingents to shoot or to use deadly force against civilians trespassing into the territory of compounds.⁵¹

⁴³ Robert Fox (1997); “Somalia – atrocities committed by UN troops”; William Norman Grigg, “Beasts in Blue Berets”; Natalia Lupi “Report by the enquiry commission on the behaviour of Italian peace-keeping troops in Somalia”, 1 *Yearbook on International Humanitarian Law* 375 (1998), at 378.

⁴⁴ Robert Fox (1997); “Somalia – atrocities committed by UN troops”; Natalia Lupi (1998), at 378.

⁴⁵ *Ibid.*

⁴⁶ See *Ibid.*; Alex de Waal (1998), at 137.

⁴⁷ *Ibid.*; Alex de Waal (1998), at 136; William Norman Grigg, “Beasts in Blue Berets”; CNN (1997); “Somalia – atrocities committed by UN troops”.

⁴⁸ Alex de Waal (1998), at 136.

⁴⁹ See *Ibid.*, at 135-136.

⁵⁰ See *Ibid.*, at 136; Canada Can't Shake Somali Scandal; New Military Chief Quizzed on Troops' 1993 Torture-Killing, Washington Post Foreign Service, Toronto, December, 29, available at <http://www.netnomad.com/canada.html>.

⁵¹ See Charles Trueheart. See also Report of the Somalia Commission of Inquiry, Chapter “The Somalia mission: post-deployment”, the Court Marital: Court Martial proceedings in the torture and death of Shidane Arone. In the case of Captain Rainville, the prosecution argued that he told his subordinates to use deadly force against fleeing Somalis, who attempted to trespass the compound. He received instructions from LCol Mathieu that any attempt to breach the camp perimeter would be considered a hostile act and that soldiers could shoot to wound thieves.

In all these situations the nexus of a crime with the armed conflict must be established. In the circumstances, where such crimes took place, there was an ongoing armed conflict in Somalia between different military groups, who did not exercise authority in the country.⁵² The law enforcement authorities were not available immediately to arrest and try those who commit theft. In such a situation members of national contingents tried to punish and detain trespassers by their own means and methods. Therefore the existing armed conflict played a substantial part in the perpetrators' ability to commit the crime or their decision to commit it⁵³ and the nexus between the crime and armed conflict can be established.

Moreover, crimes of torture, inhuman treatment or wilful killing can also fall under grave breaches provisions of the GC, if the nexus with international armed conflict is established. As will be argued below, there are reasons to believe that at the time of participation of UNITAF and UNOSOM II in hostilities, there was an international armed conflict present in the territory of Somalia and therefore the crimes committed by members of military contingents related to the armed conflict can amount GC grave breaches.

Other reports suggest that the national contingents attacked civilian objects, which resulted in large number of casualties. In the incident of 17 June 1993, the UN forces attacked Mogadishu's largest hospital suspecting that General Aidid had taken refuge there.⁵⁴ The staff and patients who could move sought safety in the basement, but not all could move and some doctors continued their operations.⁵⁵ Eleven artillery shells and helicopter rockets struck the hospital, but the exact number of casualties is unknown.⁵⁶ It was subsequently revealed that the attack was planned.⁵⁷

⁵² See discussion in the next section below.

⁵³ See Chapter V, section 1(c), for the definition of the nexus with the armed conflict.

⁵⁴ Alex de Waal (1998), at 138.

⁵⁵ *Ibid.*, at 138-139.

⁵⁶ *Ibid.*, at 139.

⁵⁷ *Ibid.*

Another attack happened on 12 July, when the US helicopters fired ten tow rockets into a building where members of Aidid's political movement were holding a mainly civilian meeting.⁵⁸ On the day of the attack, it was a meeting place for elderly, clansmen, intellectuals and militia leaders.⁵⁹ The ICRC estimates 54 people died during the attack (although the parties gave different estimations).⁶⁰ Another major incident happened on 3 October 1993, when several hundred people died in a series of battles near Olympic Hotel.⁶¹

Although some circumstances of the attacks are unclear, those attacks may amount to war crimes. War crimes of wilful killing or wilful causing great suffering may have been committed. The nexus with the international armed conflict is not difficult to establish. It may also be possible to establish war crimes of attacking civilians or civilian objects (including indiscriminate attack), depending on the proof of intention of perpetrators.⁶²

C) Criminal responsibility of the members of the national contingents

Military members of MONUC/MONUSCO are covered by the provisions of the UN SOFA concluded with the government of the DRC.⁶³ In relevant parts this agreement coincides with the UN Model SOFA discussed above (although the numbering of provisions differs).

⁵⁸ Ibid, at 140.

⁵⁹ Mats Berdal "Lessons not learned: the use of force in 'peace operations' in the 1990s", 7 *International Peacekeeping* 55 (2000), at 61.

⁶⁰ Alex de Waal (1998), at 140.

⁶¹ Ibid, at 142.

⁶² See, for instance, Article 8(2)(b)(i) and Article 8(2)(b)(ii) of the ICC Statute. However, according to the ICTY jurisprudence, at the time the crimes were committed (the events dealt with by the Tribunal took place in the same timeframes as in Somalia) it must also be established that the unlawful attack on civilian population or civilian object caused death, serious injury to body or health. See discussion in the *Kordić & Čerkez* Appeal Judgement, paras. 47-68.

⁶³ See United Nations and Democratic Republic of the Congo, Agreement between the United Nations and the Democratic Republic of the Congo on the status of the United Nations Mission in the Democratic Republic of the Congo. Kinshasa, 4 May 2000, United Nations Treaty Series, Vol. 210, No.36644.

Like the UN Model SOFA, the MONUC SOFA exempts peacekeepers from criminal jurisdiction only of the DRC and only during the period a particular peacekeeper is assigned to MONUC. Should a peacekeeper decide to travel to the DRC after his repatriation or termination of his assignment to MONUC or when he is present in any other country, he may be subject to criminal jurisdiction of the state which was capable to establish such jurisdiction, because the relevant provision of the MONUC SOFA (Article 51(b)) protects only military members of military contingents of MONUC and would not protect those who ceased to be a member. As MONUC SOFA was signed only by the DRC and the UN as a bilateral treaty, its provisions do not bind other states that may wish to establish jurisdiction over the conduct of peacekeepers (for example, if peacekeepers committed crimes against nationals of the neighbouring states).

It can be established in some instance that the rape or sexual violence committed by a MONUC peacekeeper amounts to the transnational crime of torture, any state party to the CAT in which the peacekeeper is present is under an obligation to establish jurisdiction and to prosecute or extradite the peacekeeper. The DRC will be under such obligation, as it became a party to the CAT in 1996 (before MONUC was deployed). Because of the MONUC SOFA, it may come across with the situation where it violates the CAT for not prosecuting the crime occurred on its own territory with the presence of the perpetrator. If it chooses to prosecute the perpetrator, it will violate the MONUC SOFA.

In such a situation the best choice for the TCC would be to issue an extradition request to the DRC and together with the termination of his duties as a peacekeeper. The DRC in collaboration with the UN could satisfy the extradition request by the TCC and send him back to the TCC for prosecution. In this way the host state would comply with its obligations under the CAT (either prosecute or extradite) by extraditing the peacekeeper to the TCC.

The collaboration of the DRC with the UN is essential in this case as the DRC is required under Article 46(b) MONUC SOFA after the arrest of a peacekeeper to immediately deliver him to the representatives of MONUC which means a violation of the CAT for not taking the peacekeeper into custody. However if the peacekeeper after the arrest of the DRC appears to be in the UN custody and then sent back in collaboration with the DRC to the TCC in compliance with an extradition request, DRC will comply with its obligations if the same result is achieved (a peacekeeper is sent to another state for prosecution). Nevertheless, if the TCC decides not to prosecute the peacekeeper for torture, and if he decides to further travel to a state party to the CAT, that state will also be obliged to establish jurisdiction and prosecute or extradite the peacekeeper.⁶⁴ The peacekeeper will not have immunity *ratione materiae* provided by Article 50 MONUC SOFA in any state as it does not cover *ultra vires* acts and in particular international crimes, as they are not necessary for any UN purposes, including for maintaining international peace and security in DRC.⁶⁵

The same system could work for UNOSOM, but the problem with Somalia was that there was no government in Somalia and no central authority with the responsibility to enter into international relations for Somalia.⁶⁶ Accordingly, there was no government to sign the SOFA.⁶⁷ There was no government able prosecute peacekeepers for the crimes committed. Although Somalia was during the UNOSOM's deployment a state party to the CAT and GC, there was no government to prosecute peacekeepers for the allegedly international crimes.

⁶⁴ See Article 5(2) and 7(1) of the CAT.

⁶⁵ See discussion in Chapter V, section 1(d).

⁶⁶ Report of the commission of inquiry established pursuant to Security Council resolution 885 (1993) to investigate armed attacks on UNOSOM II personnel which led to casualties among them, New York, 24 February 1994, UN Doc. S/1994/653, 1 June 1994, para. 31.

⁶⁷ See also Michael Kelly (1999), at 21.

There appeared to be such possibility, when the system of justice started to partially work in Somalia,⁶⁸ however, it was mostly supported and organised by UNOSOM itself and undoubtedly would not be able to prosecute the peacekeepers. Moreover, the mission was concluded in March 1995 and the peacekeepers left the country. The only real possibility for prosecution of peacekeepers could arise in their respective TCCs. It should not be forgotten that if a TCC refused to prosecute its peacekeepers for international crimes, any other state (if it is a party to the respective conventions), where they may be found, is obliged to establish its jurisdiction and prosecute (or extradite) perpetrators of grave breaches of the GC or transnational crime of torture under the CAT.

The events in which UNOSOM participated happened long before the ICC Statute came into force and therefore they do not fall under the ICC jurisdiction *ratione temporis*. The events occurred in the DRC while MONUC was deployed can fall under jurisdiction of the ICC. If MONUC peacekeepers committed crimes within the jurisdiction of the ICC (for example, war crimes), they can be prosecuted by the ICC. Indeed, the DRC is a state party to the Rome Statute since 2002 and the reported cases which may amount to international crimes were committed after this date. Moreover, the DRC referred to the ICC the situation of crimes within jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002⁶⁹ and several cases are already pending and concluded before the ICC. In principle, the prosecutor can open the case against anyone who has committed crime(s) within the jurisdiction of the ICC in the territory of the DRC, including peacekeepers.

The analysis confirms that some acts committed by peacekeepers may amount to the war crimes within jurisdiction of the ICC. If the TCC has not started investigation of those

⁶⁸ See next section for the details.

⁶⁹ See Office of the Prosecutor press release, "Prosecutor receives referral of the situation in the Democratic Republic of Congo", ICC-OTP-20040419-50.

crimes by the time the Pre-Trial Chamber issues a decision on admissibility (the investigation by the DRC and the UN will not count),⁷⁰ the case (if found of sufficient gravity) can be admissible. As discussed before, the only problem would be whether the peacekeeper who allegedly committed a war crime can be surrendered by the DRC bound by the MONUC SOFA. The argument was made that Article 98(2) may not cover the UN SOFAs and therefore the DRC in cooperation with the UN (bound by the UN-ICC Relationship Agreement) have to surrender the peacekeeper to the ICC upon its request.⁷¹

2. Breach of international obligations by peace support forces of MONUC and UNOSOM

A) Application of IHL during the deployment of UNOSOM

For the analysis of IHL application to UNOSOM, the first step is to identify whether at that time the armed conflict existed in the territory of Somalia independently from the participation of UNOSOM in it.

When UNOSOM was deployed in Somalia, there was no government in this country and several armed militia groups were acting in the Somali territory.⁷² Several attempts were made by the UN to achieve national reconciliation in Somalia by concluding agreements between leading warlords,⁷³ but they failed. Civil war and active fighting continued during the deployment of the UN. Clearly, there was no peacetime situation. There was no government

⁷⁰ See discussion in Chapter V, section 2(a).

⁷¹ Ibid, section 2(b).

⁷² See Samuel Makinda *Seeking peace from chaos: humanitarian intervention in Somalia* (Lynne Rienner, 1993), at 66.

⁷³ See Ioan Lewis and James Mayall "Somalia", in Berdal, Mats R., Economides, Spyros, *United Nations interventionism, 1991-2004* (Cambridge University Press, Rev. and updated, 2007), at 128, 132; Terrence Lyons, Ahmed I. Samatar *Somalia: state collapse, multilateral intervention, and strategies for political reconstruction* (Brookings Institution, 1995), at 44, 60.

to enforce peacetime laws Somalia. There was no international involvement of foreign states, other than by UNOSOM and UNITAF, to the territory of Somalia. Therefore the situation in Somalia could not be recognised as international armed conflict without considering the involvement of UNOSOM/UNITAF.

As previously discussed, the armed conflict exists between armed groups within a state, when there is a protracted armed violence.⁷⁴ Two conditions must be fulfilled: the violence must be of certain level of intensity and the participating groups must be sufficiently organised. The first condition was clearly fulfilled during that time in Somalia. The fighting between main groups resulted in killing of 15,000 – 40,000 people between January 1991 and August 1992.⁷⁵ The second condition was also fulfilled. There were two main groups fighting for the power: the Somali National Alliance (SNA) led by General Aidid and the Somali Salvation Alliance led by Ali Mahdi.⁷⁶ The fact that several other groups also participated in political reconciliation talks organised by the UN,⁷⁷ can demonstrate sufficient organisation of the fighting groups (at least some of them).

Moreover, UNSC resolutions started to mention the application of IHL in Somalia since the authorisation to deploy UNITAF.⁷⁸ It does not mean, however, that there was no armed conflict before that date. The gravest fighting and resulting casualties occurred before the deployment of UNITAF (see above).⁷⁹ Therefore the conflict was of sufficient intensity to

⁷⁴ See discussion in Chapter III, section 1(b), see also *Tadić* Trial Judgement, para. 562; *Lemaj* Trial Judgement, para. 84.

⁷⁵ Taylor B. Seybolt *Humanitarian military intervention: the conditions for success and failure* (Oxford University Press, 2007), at 53.

⁷⁶ Mats Berdal (2007), at 119; Taylor B. Seybolt (2007), at 53.

⁷⁷ Terrence Lyons, Ahmed I. Samatar (1995), at 44.

⁷⁸ See SC resolution 794(1992), at 2 and paras. 4, 5; SC resolution 814(1993), at 1 and para. 13.

⁷⁹ See also previous SC resolutions, which mention the existence of the conflict and great human suffering because of the hostilities: SC resolution 733(1992), 23 January 1992; SC resolution 751(1992), SC resolution 767(1992) at 1 and para. 8; SC resolution 775(1992) at 1.

recognise the application of IHL there.⁸⁰ Accordingly, at the moment of UNOSOM/UNITAF deployment IHL of non-international armed conflict was applicable in the territory of Somalia (Somalia has been a party to the GC from 1962).

The next question is whether UNOSOM and UNITAF became a party to the conflict and if so, what was the duration of their participation in it.

As discussed, participation in hostilities presupposes that there are certain hostile acts which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces.⁸¹ The finding on the use of force exceeding to certain extent the scope of permitted individual self-defence, may not be enough to render a PSO participating in hostilities. Intent to harm other party's armed forces and therefore to be in conflict with it must also be established. Moreover, for the finding on continuous participation in hostilities, the intent must be present during the whole period of the use of force. If the intent is present only during a particular operation, the PSO will be participating in the armed conflict only for the duration of that operation. Therefore to find a PSO participating in the conflict, one must establish that the force was used and there was intent to participate in the conflict and whether it was continuous or present only during a particular operation. This analysis needs to be applied to UNOSOM.

Originally UNOSOM I was deployed with consent of main armed groups operating in Somalia.⁸² In its resolution 751 (1992), the UNSC initially authorised the deployment of 50 observers to monitor the cease-fire in Mogadishu,⁸³ and was subsequently increased to 3,500

⁸⁰ See Ray Murphy (2007), at 274; Katia Boustany "Brocklebank: a questionable decision of the Court Martial Appeal Court of Canada", 1 *Yearbook of International Humanitarian Law* 371 (1998), at 372.

⁸¹ See discussion in Chapter III, section 1 (b).

⁸² There were leaders of factions that the UN considered in control of some parts of Somali territory and with whom the agreements were negotiated. See Sean D. Murphy *Humanitarian intervention: the United Nations in an evolving world order* (University of Pennsylvania Press, 1996), at 238. The consent was received from Aidid on 25 June 1992. Following this, the deployment of observers began in mid-July. See Jane Boulden *Peace enforcement: the United Nations experience in Congo, Somalia, and Bosnia* (Praeger, 2001), at 55.

⁸³ SC resolution 715 (1992), S/RES/751, para. 3

personnel.⁸⁴ It was apparent that UNOSOM I did not have robust mandate to use force beyond self-defence and was said to be ineffective to protect the delivery of humanitarian aid. Clearly, UNOSOM I had no intention to cause harm to either armed group participating in the conflict in Somalia and therefore did not participate in hostilities or become a party to the conflict in Somalia.

For securing the delivery of humanitarian aid the UNSC authorised the deployment of UNITAF, which was not a peacekeeping operation in any sense.⁸⁵ Its mandate was to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.⁸⁶ It was led by the US and predominately consisted of the military members of the US contingent (28,000 of 37,000 were from the US).⁸⁷ Other states also agreed to contribute their contingents to UNITAF, even those who originally contributed forces to UNOSOM I (among them Australia, Belgium, Canada, Egypt, Morocco, Pakistan, etc.). UNOSOM I and UNITAF were deployed simultaneously under close coordination of the activities.⁸⁸ UNITAF unlike UNOSOM I was equipped with the robust Chapter VII mandate and could use force beyond self-defence to secure the delivery of humanitarian assistance.⁸⁹ On different occasions it, indeed, used force against opposing armed groups.⁹⁰

The fact that the UNSC resolution specifically provided for such a mandate and that the force was actually used is *prima facie* evidence of the participation of UNITAF in the armed conflict in Somalia. UNITAF was not deployed with consent of the armed groups

⁸⁴ SC resolution 775, S/RES/775(1992), para. 3

⁸⁵ See also Serge Lalande "Somalia: major issues for future UN peacekeeping", in Warner, Daniel, *New dimensions of peacekeeping* (Martinus Nijhoff Publishers, 1995) (1995), at 76.

⁸⁶ See SC resolution 794, S/RES/794(1992), para. 10.

⁸⁷ Ved P. Nanda, Thomas F. Muther, Amy E. Eckert "Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention under International Law - Part II", 26 *Denver Journal of International Law & Policy* 827 (1997), at 835.

⁸⁸ Samuel Makinda (1993), at 75-76.

⁸⁹ Ruth Gordon "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond", 15 *Michigan Journal of International Law* 519 (1993), at 553.

⁹⁰ See Trevor Findlay *The use of force in UN peace operations* (Oxford University Press, 2002), at 174, 180.

operating in Somalia and was not under the UN command and control. Although UNITAF mandate was not to direct the force against particular group fighting in Somalia, for the purposes of IHL, UNITAF represented a coalition of the foreign states which intervened in the territory of Somalia (although legitimately and authorised by the UNSC) and participated there in hostilities.⁹¹ Therefore this situation amounts to IAC between the states contributing contingents to UNITAF and Somalia. No intensity of the conflict is needed to be proved.⁹² Even though there was no government in Somalia, organised groups fighting against a foreign enemy, may have been fighting on behalf of Somalia, being a party to the GC. UNOSOM continued to operate under its original peacekeeping mandate when UNITAF was deployed under close coordination with it.⁹³

The problem could be if the states contributed contingents to UNITAF and UNOSOM I at the same time. This may lead to unexpected results. Becoming a party to the conflict because of its armed forces fighting on behalf of UNITAF against organised groups, the state also contributed its armed forces to the peaceful UNOSOM I which under IHL may also be labelled as combatants because they remain members of armed forces of the state party to the armed conflict.

UNOSOM I became known as UNOSOM II after 26 March 1993 and assumed the robust mandate of UNITAF and responsibility for all military and civil operations in Somalia.⁹⁴ The mandate was also pursuant to Chapter VII, under which UNOSOM was authorised to implement the arms embargo, provide security and assist in the repatriation of

⁹¹ See also Ray Murphy (2007), at 272, who argues that it must surely be the case that the rules of humanitarian law were applicable, when UNITAF intervened, as to accept anything less would be to adopt a minimalist view that denies the clear international character of the mission.

⁹² See discussion in Chapter III, section 1(b).

⁹³ See Ioan Lewis and James Mayall (2007), at 125.

⁹⁴ See Michael Kelly (1999), at 15.

refugees, to assume responsibility for the consolidation, expansion and maintenance of secure environment throughout Somalia.⁹⁵

The formal transition from UNITAF to UNOSOM II took place on 4 May 1993.⁹⁶ UNOSOM II was given broader mandate than UNITAF or UNOSOM I, as it was involved in all possible peace activities – additionally to its peace-enforcement mandate, it was responsible for several ordinary peacekeeping activities: monitoring cease-fire, assistance in repatriation of refugees, etc.⁹⁷ As new mandate authorised the use of force against those militia who refused to disarm, such action could directly challenge the military power of political movements and unless they decide to disarm, a collision between the militia and UNOSOM II was inevitable.⁹⁸ In May 1993 the UNFC issued Fragmentary Order 39, which stated that “organised, armed militias, technicals, and other crew seed weapons are considered a threat to UNOSOM forces and may be engaged without provocation.”⁹⁹ Next fragmentary order of 8 July included a reference to “enemy forces”.¹⁰⁰ They reflect a general situation of UNOSOM being in armed conflict with SNA.¹⁰¹

UNOSOM II must be regarded as an enforcement measure, albeit under the command and control of the UN.¹⁰² It represents the first peacekeeping operation in UN history that has been given the mandate to use force not only in self-defence but to pursue its mission.¹⁰³ It became apparent that with the expanded mandate, a confrontation between UNOSOM II and armed militia is inevitable.¹⁰⁴ This constitutes *prima facie* evidence of the involvement of

⁹⁵ SC resolution 814, S/RES/814 (1993), paras. 10, 12, 14.

⁹⁶ Jane Boulden (2001), at 63.

⁹⁷ Serge Lalande (1995), at 81.

⁹⁸ Lessons Learned Report, S/1994/653, para. 45.

⁹⁹ Trevor Findlay (2002), at 192.

¹⁰⁰ *Ibid*, at 196.

¹⁰¹ Lessons Learned Report, S/1994/653, para. 152.

¹⁰² Katherine E. Cox "Beyond Self-Defense: United Nations Peacekeeping Operations & (and) the Use of Force", 27 *Denver Journal of International Law & Policy* 239 (1998), at 260.

¹⁰³ Samuel Makinda (1993), at 76.

¹⁰⁴ *Ibid*, at 80.

UNOSOM in the conflict with the armed groups, but further inquiries must be made regarding the actual participation of the UNOSOM forces in hostilities.

It is unclear whether the participants of UNITAF and UNOSOM II can be considered participating in the conflict in the intermediate period of March 1993-May 1993, when following the peace talks in Addis Ababa, the situation was relatively stable. However by mid-May tensions started again.¹⁰⁵ In the incident on 7 May 1993 the Belgium contingent became involved in fighting with one of the militia groups loyal to SNA, which caused serious casualties.¹⁰⁶ Given that the actual transition from UNITAF to UNOSOM II took place from 4 May 1993, it is possible that UNOSOM II participated in the conflict during the operations, where it used force beyond self-defence. Moreover, the subsequent events escalated the confrontation between the UNOSOM and armed groups even further.

On 5 June 1993, during the inspection of armed depot belonging to SNA and possibly the attempting to destroy anti-UNOSOM radio station, the Pakistani contingent was attacked, allegedly by the members of SNA led by General Aidid, killing over 20 soldiers, wounding over 50 and some were missing.¹⁰⁷ Other contingents which came to help Pakistani troops were also attacked.¹⁰⁸ Following these events, the UNSC adopted resolution mandating UNOSOM II basically to use force against SNA and its leader General Aidid. It condemned the attacks on UNOSOM peacekeepers on 5 June 1993 launched “apparently” by SNA¹⁰⁹ and referring to UNOSOM mandate provided by previous resolution (814(1993)), reaffirmed its authorisation for UNOSOM to “take all necessary measures against all those responsible for the armed attacks [...], and establish the effective authority of UNOSOM II throughout

¹⁰⁵ Terrence Lyons, Ahmed I. Samatar (1995), at 57.

¹⁰⁶ Lessons Learned Report, S/1994/653, para. 71.

¹⁰⁷ Ruth Gordon (1993), at 555; Samuel Makinda (1993), at 80.

¹⁰⁸ Jane Boulden (2001), at 67.

¹⁰⁹ SC resolution 837, S/RES/837 (1993), at 1.

Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment.”¹¹⁰

As was recognised by the UN Commission of Inquiry, the resolution resulted in a virtual war situation between UNOSOM II and the SNA, as both sides attacked each other over a period of four months.¹¹¹ The full-scale participation of UNOSOM II in hostilities began from this date, as UNOSOM II stated to use force proactively.¹¹² UNOSOM’s offensive started on 12 June,¹¹³ when UNOSOM made combine air and ground attack against three weapon sites, including Radio Mogadishu,¹¹⁴ resulting in more dozen civilians being killed.¹¹⁵ On 17 June UNOSOM undertook major cordon and search operation in an SNA enclave and had to fight back against the attack lasting four hours.¹¹⁶ Five soldiers from Moroccan contingent were killed and 40 were wounded.¹¹⁷ On 12 July UNOSOM II attacked the place of the meeting of clan elders and militia leaders, killing around 50 and wounding 170 people, mainly civilians.¹¹⁸ On 9 September US and Pakistani forces opened fire on Somali men, women and children killing 60 people who, as contended by US officials, had attacked with grenades and gunfire.¹¹⁹

Some operations were undertaken by US forces. They comprised US Quick Reaction Force which was available to support UNOSOM II activities but under US command and control and not UNOSOM II UNFC.¹²⁰ However 3,000 US logistics personnel who also

¹¹⁰ SC resolution 837(1993), para. 5.

¹¹¹ Lessons Learned Report, S/1994/653, para. 125, 135.

¹¹² Jane Boulden (2001), at 68.

¹¹³ Gérard Prunier “The experience of European armies in Operation Restore Hope”, in Clarke, Walter S., Herbst, Jeffrey Ira, *Learning from Somalia: the lessons of armed humanitarian intervention* (Westview Press, 1997), at 143.

¹¹⁴ Lessons Learned Report, S/1994/653, para. 137.

¹¹⁵ Jane Boulden (2001), at 68.

¹¹⁶ *Ibid*, at 68.

¹¹⁷ Lessons Learned Report, S/1994/653, para. 142.

¹¹⁸ Trevor Findlay (2002), at 197.

¹¹⁹ Sean D. Murphy (1996), at 233.

¹²⁰ Jane Boulden (2001), at 69.

supported UNOSOM II were under its command and control.¹²¹ Therefore not all operations undertaken on behalf of the UNSC were clearly controlled or commanded by the UN. The degree of control which the UN could exercise over each operation remains obscure.

One such operation happened on 3-4 October 1993, when the US Army Rangers attacked the Olympic Hotel supposing that the top SNA leaders would be there.¹²² In this incident, 18 American soldiers were killed and 78 wounded, whereas the Somali death toll is estimated to be in the hundreds, even up to 1000.¹²³ The decision to launch an attack on 3 October was unilateral act of the US and was taken outside the UN chain of command without even informing other UN contingents – Malaysian and Pakistani contingents participated in the battle only later, when they were called to help US troops.¹²⁴

The involvement of international forces in the conflict led to a high proportion of the casualties, in particular during the hunt for Aidid: 625-1500 Somalis were killed by UNOSOM (the majority were women and children) and 1000-8000 were injured.¹²⁵ During the period following the attacks on Pakistani soldiers on 5 June 1993, the UN initiated almost all military actions and all casualties occurred as a result of UNOSOM II operations.¹²⁶ The main hostilities continued until 8 October 1993.¹²⁷

In February 1994, the UNSC adopted a resolution revising the mandate of UNOSOM II as a whole, which became less coercive and more in line with the one of ordinary peacekeeping missions.¹²⁸ It provided for UNOSOM II simply to encourage and assist the Somali parties in implementing peace agreements and the ongoing political process; to protect

¹²¹ Jane Boulden (2001), at 69.

¹²² Terrence Lyons, Ahmed I. Samatar (1995), at 59.

¹²³ Mats Berdal (2000), at 61.

¹²⁴ Alex de Waal (2008), at 135; Ray Murphy (2007), at 131; Boulden (2001), at 71.

¹²⁵ Taylor B. Seybolt (2007), at 59.

¹²⁶ Ray Murphy (2007), at 191.

¹²⁷ Lessons Learned Report, S/1994/653, para. 234.

¹²⁸ Inger Osterdahl "By All Means, Intervene - The Security Council and the Use of Force under Chapter VII of the UN Charter in Iraq (to Protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti", 66 *Nordic Journal of International Law* 241 (1997), at 258-259.

the UN and humanitarian relief personnel and major ports and essential infrastructure for humanitarian relief and assistance.¹²⁹

Although the mandate was provided under Chapter VII, the use of force would no longer be allowed in relation to disarmament and only for the force protection.¹³⁰ Therefore UNOSOM would abandon coercive means and revert to reliance on the cooperation with the Somali parties.¹³¹ Accordingly, after this date UNOSOM II was involved only in some incidental hostilities¹³² and not on such a large scale. In early 1994 the US and most European states withdrew their forces. The rest of the UNOSOM contingents were withdrawn by March 1995.

Analysing further the involvement of UNOSOM II in the armed conflict in Somalia, it can be said that in the period of June 1993-February 1994, the states contributing contingents to UNOSOM II and the UN which led almost all those contingents (except for the US troops which were under separate US command and independent of the UN chain of command but also participated in the conflict)¹³³ can be considered as a party to the armed conflict in Somalia. Like in the case of UNITAF, UNOSOM II involvement made the conflict in Somalia international. The troops participated in the robust Chapter VII mandate which expressly mandated them to use force beyond self-defence. The mandate was such as the impartiality of the mission was forfeited, as the resolution expressly directed peacekeepers to act against one of the major military groups in Somalia and its leader.

The disarmament efforts of UNOSOM coincided with military efforts to arrest Aidid, which often involved the use of force and which contributed to the perception that UNOSOM

¹²⁹ SC resolution 897, S/RES/897 (1994), para. 2.

¹³⁰ Jane Boulden (2001), at 63.

¹³¹ Trevor Findlay (2002), at 2002.

¹³² Five Nepalese soldiers and two Malaysian soldiers were attacked and killed in May 1994; in August seven Indian soldiers were killed. See *ibid*, at 203.

¹³³ Ray Murphy (2007), at 130.

was using force to bring about the desired outcome and direct force against Aidid and its SNA group.¹³⁴ The mission was deployed clearly without consent of the parties.¹³⁵ Even the Lessons Learned report recognises that the existence and application of IHL in the conduct of military operations involving the use of force was not fully understood by some military forces deployed in Somalia and that the troops must be aware of IHL and abide by those provisions during the exercise of their duties.¹³⁶ Therefore it is evident that UNOSOM participated in the armed conflict at this period of time.

More ambiguous situation existed after February 1994. UNOSOM was still deployed under Chapter VII mandate and without consent of the parties, but the mandate was reduced and was not any more directed against a particular armed group. There was incidental fighting between some of the contingents of UNOSOM II and armed groups but not on such a large-scale and of such a collective nature as to constitute a pattern of involvement of UNOSOM in the armed conflict. It is better to view the participation of UNOSOM II in the armed conflict only for the time and so far as it became involved in incidental hostilities with the major armed groups. Beyond those instances UNOSOM II may be regarded as non-participating in the conflict. Such an involvement would render only particular contingents a party to the conflict and not the rest of the mission.

It is also possible to argue that the law of occupation may be applicable to UNOSOM II and UNITAF. Firstly, it should be reiterated that the provisions of GCIV are applicable as soon as protected persons fall into the hands of the party to the conflict and Chapter III of this work advocated for gradual application of the provisions of the law of occupation.¹³⁷ The

¹³⁴ Jane Boulden (2001), at 75.

¹³⁵ See also Ved P. Nanda, Thomas F. Muther, Amy E. Eckert (1997), at 834.

¹³⁶ Lessons Learned report, para. 58.

¹³⁷ See discussion in Chapter III, section 2(c).

participation of the party to the armed conflict must also be established. Otherwise there is a need to prove that the PSO established its authority over a particular territory.

Applying this finding to the situation of involvement of UNOSOM II and UNITAF in the armed conflict, it is possible firstly to distinguish the requirement of GCIV in relation to the law of occupation which applies every time the protected persons fall into the hands of UNOSOM II and UNITAF and the requirements of application of GCIV to the occupied territories without the existence of armed conflict, and the requirements of HR which envisage the existence of authority of UNOSOM II and UNITAF over a part of territory of Somalia. For the application of the law of occupation during the armed conflict no analysis is needed and everything depends on the particular circumstances of the breach of GCIV and whether some provisions related to the law of occupation are violated. As for the application of GCIV without the existence of the armed conflict, the possibility of establishment of authority of UNOSOM should be discussed.

As mentioned before if a PSO occupies a particular territory as a sole authority, this fact can be indicative to the actual establishment of its authority over that territory.¹³⁸ UNOSOM II involvement in Somali conflict may be regarded as representing such a situation. As Kelly argues, UNOSOM was accepted by the majority of Somalis as being the primary authority in that area.¹³⁹ Osinbajo also points out, “Somali political leadership impliedly abdicated authority in Somalia or at least shifted the responsibility to UNOSOM and continued so to do in the absence of a government.”¹⁴⁰ The mandate given to UNOSOM by the UNSC also supports the assumption that UNOSOM exercised authority over the part of Somali territory. It authorised UNOSOM to assume responsibility for the consolidation,

¹³⁸ See Chapter III, section 2(c).

¹³⁹ Michael Kelly (1999), at 67.

¹⁴⁰ Yemi Osinbajo "Legality in a collapsed state: the Somali experience", 45 *International & Comparative Law Quarterly* 910 (1996), at 919.

expansion and maintenance of a secure environment throughout Somalia.¹⁴¹ It also mandated UNOSOM to assist in the re-establishment of national and regional institutions, civil administration and police in Somalia, and in the restoration and maintenance of law and order including in investigation and facilitating the prosecution of serious violations of IHL.¹⁴² UNSC resolution 865(1993) also mandated UNOSOM to re-establish the Somali police, judicial and penal systems.¹⁴³ The fact of giving to UNOSOM those functions presupposes its capacity to exercise its authority over the territory of Somalia.

It can be said that UNOSOM in fact exercised such authority. It was the political authority in Somalia, which can be shown by its actions taken to re-establish Somali judicial institutions and appointment of judicial personnel.¹⁴⁴ It was also the sole legislative authority in Somalia: it specifically provided that civil and criminal codes were to apply in the Somali courts.¹⁴⁵ For example, Special Representative Admiral Howe, empowered by UNSC resolution 814, declared that 1962 Somali penal code would be the law enforced by UNOSOM II in the territory of Somalia.¹⁴⁶ There was also an obligation of UNOSOM to enforce compliance with the decisions and orders of the courts,¹⁴⁷ and the operational control of the police was to be under the UNOSOM Forces Command until the UNOSOM civilian police assumed control.¹⁴⁸ UNOSOM's mandate envisaged *de jure* and *de facto* UNOSOM's legal authority to provide both factual and legal force for the Somali legal/judicial system and other re-established institutions,¹⁴⁹ and therefore UNOSOM became the only real political and

¹⁴¹ SC resolution 814, S/RES/814 (1993), paras. 10, 12, 14.

¹⁴² Ibid, para. 4(c) and (d).

¹⁴³ SC resolution 865(1993), paras. 9 and 10.

¹⁴⁴ Yemi Osinbajo (1996), at 914.

¹⁴⁵ Ibid, at 915.

¹⁴⁶ Martin R. Ganzglass "The restoration of the Somali judicial system", in Clarke, Walter S., Herbst, Jeffrey Ira, *Learning from Somalia: the lessons of armed humanitarian intervention* (Westview Press, 1997), at 29.

¹⁴⁷ Yemi Osinbajo (1996), at 917.

¹⁴⁸ Martin R. Ganzglass (1997), at 29-30.

¹⁴⁹ Yemi Osinbajo (1996), at 918, 920, 922.

legal authority in Somalia since the UN intervention.¹⁵⁰ Kelly considers that UNOSOM was an occupying power to which at least some of the laws of occupation were applicable.¹⁵¹ In fact UNOSOM was capable to exert authority until March 1994 (when troops from Western countries left Somalia),¹⁵² and therefore the laws of occupation applied to UNOSOM II operations in southern Somalia between 4 May 1993 and March 1994,¹⁵³ although after this date until final withdrawal on 31 March 1995, the UNOSOM's authority was eroded.¹⁵⁴

This analysis confirms that in the situation, where there was no other entity able to exercise authority in Somalia apart from UNOSOM and where UNOSOM (not having a consent from Somali government which did not exist) was given a mandate to exercise such authority and certain functions of the government by the UNSC and indeed exercised them including by virtue of the enforcement actions, UNOSOM can be considered to have established authority and capable to exercise it and therefore the laws of occupation to some extent were applicable to it in certain period of time and in the particular part of the territory of Somalia.

B) Application of IHL during the deployment of MONUC

The application of IHL during the deployment of MONUC is more ambiguous. The DRC has central government, although certainly weak and not able to control the entire territory and exercise its law enforcement functions properly. There were armed hostilities between the governmental forces – FARDC and different armed groups mostly in eastern part of the country. Civilians continue to suffer from the atrocities committed by the armed groups and sometimes by security agents of the government.

¹⁵⁰ Ibid, at 920, 922.

¹⁵¹ Michael Kelly (1999), at 68.

¹⁵² Ibid, at 70.

¹⁵³ Ibid, at 89.

¹⁵⁴ Ibid, at 69.

Most of the UNSC resolutions concerning the DRC called the parties to refrain from the violation of IHL and IHRL and to end hostilities.¹⁵⁵ By specifically mentioning IHL, the UNSC recognised the application of IHL in the territory of the DRC. More recent resolutions started to omit mentioning IHL and provide reference only to IHRL, peace, stability and consolidation in the DRC,¹⁵⁶ which evidences the application of only peacetime IHRL norms is assumed. In 2010 MONUC was renamed to MONUSCO, which is also indicative of the stabilisation of the situation in the DRC and its transition into peace consolidation.¹⁵⁷ However the UNSC resolution which established MONUSCO still referred to IHL¹⁵⁸ and ongoing military operations¹⁵⁹ between the parties engaged in the conflict.¹⁶⁰

Accordingly, it is difficult to provide for a particular date when IHL ceased to apply, given that there have been still instances of armed clashes between governmental forces and rebel groups in certain areas. When MONUC was initially deployed, armed forces of foreign countries were still present in the DRC territory, but a cease-fire was proclaimed.¹⁶¹ Some incidents of fighting between foreign forces in the DRC still occurred.¹⁶² The foreign forces were gradually withdrawn by 2003.¹⁶³ Since this date apart from the deployment of MONUC,

¹⁵⁵ See SC resolutions: 1355 (2001), S/RES/1355 (2001), 15 June 2001 (which specifically mentions the application of GCIV (see para. 16)); 1445(2002), S/RES/1445(2002), 4 December 2002, para. 13; 1493(2003), S/RES/1493(2003), 28 July 2003, paras. 10, 16; 1565(2004), S/RES/1565(2004), 1 October 2004, at 1; 1592(2005), S/RES/1592(2005), 30 March 2005, at 1; 1649(2005), S/RES/1649(2005), 21 December 2005, at 1; 1856(2008), S/RES/1856(2008), 22 December 2008, at 2; 1896(2009), S/RES/1896(2009), 7 December 2009, at 2; 1906(2009), S/RES/1906(2009), 23 December 2009, at 1; 1925(2010), S/RES/1925(2010), 28 May 2010, at 2, para. 12(a), (c).

¹⁵⁶ SC resolution 1991(2011), S/RES/1991(2011), 28 June 2011, at 1, 2 and paras. 4(c), 18; SC resolution 2053 (2012), S/RES/2053(2012), 27 June 2012, at 1, 2, para. 17.

¹⁵⁷ See SC resolution 1925 (2010), at 3.

¹⁵⁸ Ibid, para. 12(c).

¹⁵⁹ Ibid, para. 6(i).

¹⁶⁰ Ibid, para. 12(a).

¹⁶¹ See Denis M. Tull “Peacekeeping in the Democratic Republic of Congo: waging peace and fighting war”, 16 *International Peacekeeping* 215 (2009), at 216.

¹⁶² See SC resolution 1304, S/RES/1304 (2000), paras.1-2 condemning renewed fighting between Ugandan and Rwandan forces in the DRC,

¹⁶³ Ugandan troops withdrew from Bunia in 2003.

there were no other foreign armed forces present in the DRC (only foreign armed groups). The conflict may be considered of non-international character.

The intensity of hostilities was quite high. In late 2004 armed groups in Ituri were engaged in frequent fighting between themselves as they battled for control over the resources.¹⁶⁴ The governmental forces (which are clearly sufficiently organised) were fighting against different armed groups. There were Kisangani massacre killing 180 people in 2002, the Bunia (Ituri) crisis in 2003, where 400 people were massacred in two weeks, the Bukavu (South Kivu) offensive in 2004, when 88 people lost their lives and about 25,000 were displaced, the Goma crisis and Kiwanja massacre in 2008, when at least 67 civilians were killed, systematic rape of civilians near Kibua Mpofi in North Kivu in 2010.¹⁶⁵

These groups can be distinguished: Democratic Forces for the Liberation of Rwanda (FDLR) consisting of about 6,000-8,000 and led by the most extremist leaders of the FDLR; the National Congress for the Defence of the People (CNDP), DRC-based rebel group, once led by Nkunda, who was arrested and after the Congo-Rwanda joint military offensive in 2009, no longer exists as a cohesive group; Allied Democratic Forces (ADF), Ugandan Muslim rebel group, which in June 2010 was dislodged by military operation of Congolese armed forces; Mai Mai militia, loosely grouped and with no unified or consistently articulated political demands; and the Lord's Resistance Army (LRA), Ugandan rebel group, active since 1980s which has been weakened significantly and lost a number of its top leaders.¹⁶⁶

At least some of those groups at certain periods of time may be considered sufficiently organised. Therefore there was an NIAC existing in the DRC during most of the time when

¹⁶⁴ Jim Terrie, "The use of force in UN peacekeeping: the experience of MONUC", 18 *African Security Review* 21 (2009), at 23.

¹⁶⁵ Reynaert, Julie, "MONUC/MONUSCO and Civilian Protection in the Kivus", *International Peace Information Service* (2011), at 9; see also Ted Dagne (2011), at 5.

¹⁶⁶ See Ted Dagne "The Democratic Republic of Congo: Background and Current Developments", *CRS Report for Congress*, April 29, 2011, at 7.

MONUC was deployed, at least at the time the reported offences were committed by the members of MONUC.

The next question is whether MONUC became a third party to the existing armed conflict between the government forces and armed groups or acted from the side of the government against those groups.

MONUC was firstly established on 6 August 1999 as an observer mission, but in 2002, its nature was changed and it became a multidimensional peacekeeping operation with a robust mandate.¹⁶⁷ In reality the mission continued to operate until late 2003 as observer mission.¹⁶⁸

MONUC was provided with Chapter VII mandate. The mandate did not explicitly require use of force beyond self-defence by MONUC and mostly was left open for interpretation by the commanders on the ground and in the UN headquarters.¹⁶⁹ Already in 2003 the UNSC resolution 1493 provided that MONUC is mandated to use all necessary means to protect civilians and humanitarian workers under imminent threat of physical violence.¹⁷⁰ Subsequently, MONUC was tasked to use all necessary means to deter use of force to threaten political process, still to protect civilians, to seize or collect arms from armed groups, to support governmental forces in its operations to disarm foreign combatants.¹⁷¹

UNSC resolution not only called on the government to develop with MONUC a joint concept of operations for the disarmament of foreign combatants but also stressed that MONUC may use cordon and search tactics to prevent attacks on civilians and disrupt the

¹⁶⁷ Patrick Cammaert, "MONUC as a Case Study in Multidimensional Peacekeeping in Complex Emergencies", in The Diplomatic Academy of Vienna, *The UN Security Council and the Responsibility to Protect Policy, Process, and Practice*, Favorita Papers, 01/2010, 39th IPI Vienna Seminar (2010), at 103.

¹⁶⁸ Julie Reynaert (2011), at 15.

¹⁶⁹ Jim Terrie (2009), at 24.

¹⁷⁰ SC resolution 1493(2003), paras. 25-26.

¹⁷¹ See SC resolution 1565(2004), paras. 4(a), (b), (g), 5(c) and 6.

military capability of illegal armed groups.¹⁷² The UNSC further welcomed robust actions taken by MONUC against armed groups and militia.¹⁷³ Consequently, the UNSC gave priority to the protection of civilians in MONUC mandate and stressed the necessity of joint planning of operations of FARDC with MONUC in accordance with IHL, IHRL and refugee law.¹⁷⁴ The UNSC several times emphasised that support of MONUC to FARDC-led operations against armed groups was conditioned on FARDC's compliance with IHL, IHRL and refugee law and MONUC must be sure that FARDC had necessary training in the protection of civilians and if some units commit grave violations of such laws, support of MONUC to those units must be suspended or, if the situation persists, even withdrawn.¹⁷⁵

MONUC's mandate was further extended by requiring them to deter any attempt at the use of force to threaten Goma and Nairobi processes (on disarmament of armed groups or their joining of governmental forces and elimination of threats and stability in the DRC) from any armed group including by using cordon and search tactics and undertaking all necessary operations to prevent attacks on civilians and disrupt the military capability of illegal armed groups that continue to use violence in eastern DRC.¹⁷⁶ However, the resolution established MONUSCO unlike previously neither provided for the mandate to deter attempts of armed groups to breach the peace process, nor mentioned that the mission is to undertake preventive actions to protect civilians or to disrupt military capacity of armed groups.¹⁷⁷

Therefore although MONUC was not mandated to use force on a large scale against a particular party to the conflict and clearly beyond self-defence, as in the case of UNOSOM II, its mandate envisaged some proactive actions from the part of MONUC military forces going

¹⁷² SC resolution 1592(2005), paras. 5 and 7; SC resolution 1649(2005), paras. 9-11.

¹⁷³ SC resolution 1649(2005), at 1.

¹⁷⁴ SC resolution 1794, S/RES/1794 (2007), paras. 5 and 7.

¹⁷⁵ SC resolution 1906(2009), para. 22.

¹⁷⁶ SC resolution 1856(2008), para. 3(f); see also SC resolution 1906(2009), para. 20.

¹⁷⁷ Julie Reynaert (2011), at 20.

beyond simple personal self-defence. The fact that MONUC has a mandate to use all necessary means to protect civilians under imminent threat of violence and undertake cordon and search operations for that end is one of the examples. Another example is to deter use of force to threaten political process. Moreover, it could undertake preventive actions to disrupt military capacity of armed groups.

Depending on the interpretation of those ambiguous statements, MONUC may become involved in the armed conflict. Although the protection of civilians may presuppose pre-emptive offensive operations against armed groups, which will be beyond self-defence and can amount to the participation in the armed conflict, MONUC's mandate was limited by the fact that PSFs can use force to protect civilians only when they are under imminent threat of violence, which may not go beyond the use of force in self-defence in the own protection or protection of others.

However the most troublesome part of the mandate is to deter use of force by those who threaten process, especially coupled with undertaking preventive actions to disrupt military capacity of the armed groups. This wording can be interpreted as giving MONUC mandate to engage in confrontation with the armed groups and undertake offensive operations. This may evidence the intent of MONUC to direct actions specifically against a party to the conflict and to cause harm to that party. If MONUC undertakes such operations (irrespective of its motive), it would act beyond self-defence and engage in the armed conflict.

MONUC's mandate also provided that they would support and assist the governmental forces in their operations. As the DRC forces clearly used force beyond self-defence and conduct offensive operations, the involvement of MONUC in such operations would render them a party to the conflict. Everything depends on the degree of their involvement in the operations.

Despite that there are clear indications of potential involvement of MONUC in the armed conflict with opposition groups, its mandate, envisaged in the UNSC resolutions, does not permit to make a definitive conclusion on whether MONUC was actually a party to the conflict. Unlike in the case of UNOSOM it does not permit MONUC to get involved in large-scale military operations. MONUC was provided with the Chapter VII powers and may potentially use the force beyond self-defence. Accordingly it is better to refer to the factual situation and circumstances under which the force was in fact used by the peacekeepers.

Following the increase of fighting in late 2004 between armed groups in Ituri, MONUC began to shift from reactive to preventive actions using cordon and search operations.¹⁷⁸ The intensity of fighting between MONUC and armed groups increased in early 2005 and resulted in a number of casualties during the incidents.¹⁷⁹ There were reports that civilians were killed in fighting between MONUC and armed groups.¹⁸⁰ Indeed between 2005 and 2007 several offensive operations were deployed in eastern part of the DRC.¹⁸¹ MONUC conducted aggressive cordon-and-search operations intended to force armed groups to join disarmament programme and pre-empt attacks on local civilians.¹⁸² By June 2005, MONUC disarmed about 15,000 fighters in the region.¹⁸³ On 25 February 2005, during one of such operations an armed group (FNI) ambushed a group of UN peacekeepers and killed several soldiers. In response MONUC commenced extended security operations. On 1 March MONUC conducted a large-scale cordon-and-search operation carried out with infantry troops from Pakistan, Nepal and South African and use of Indian attack helicopters aiming to

¹⁷⁸ Jim Terrie (2009), at 23.

¹⁷⁹ Ibid, at 23.

¹⁸⁰ Julie Reynaert (2011), at 17; Jim Terrie (2009), at 24.

¹⁸¹ Ibid, at 16.

¹⁸² Victoria K. Holt, Tobias C. Berkman "The impossible mandate? Military preparedness, the responsibility to protect and modern peace operations", *The Henry L. Stimson Center*, September 2006, at 165.

¹⁸³ Ibid, at 165.

dismantle an FNI headquarters in Ituri.¹⁸⁴ This operation was a four-hour battle with the involvement of helicopter gun shops and reinforcements.¹⁸⁵ It resulted in killing 50-60 FNI militia by MONUC, which was regarded as if MONUC was acting punitively.¹⁸⁶ Several other operations were conducted by MONUC using force in November 2006 against rebels belonging to CNDP in support of governmental armed forces, where the use of attack helicopters and other means killed 200-400 fighters.¹⁸⁷

Accordingly, although MONUC used force against armed opposition groups, it did so against not only one particular group but against different groups. The force was used in some isolated instances against each fighting group and cannot constitute a pattern which would evidence permanent involvement of MONUC in the armed conflict with any of the armed opposition groups. In those instances where MONUC is engaged in hostilities against the armed groups (when not acting purely in self-defence) the IHL norms apply between them. IHL also apply during combined operations of MONUC and governmental forces against opposition groups, if MONUC's involvement presupposes its participation in hostilities. Beyond those operations MONUC's military members can be regarded as not participating in hostilities.

Furthermore, as MONUC following its mandate occasionally participates in hostilities on the part of governmental forces and against opposition groups and those groups cannot be regarded as representing a state government, the norms of NIAC apply between MONUC/governmental forces and opposition groups during the instances of active fighting. The norms of NIAC also continue to apply between the governmental forces and opposition

¹⁸⁴ Seventeenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2005/167, 15 March 2005, para. 19.

¹⁸⁵ Jim Terrie (2009), at 23.

¹⁸⁶ Ibid, at 23.

¹⁸⁷ See Victoria Holt, Glyn Taylor, Max Kelly (2009), at 271; Julie Reynaert (2011), at 16; Jim Terrie (2009), at 25.

groups during the period when the existence of armed conflict can be recognised, namely when there is a protracted armed violence considering the intensity of hostilities and organisation of groups.

C) Breach of IHL and IHRL obligations by military contingents of MONUC and UNOSOM

As discussed in Chapter IV, IHRL continues to apply during an armed conflict and states whose agents participate in any hostilities can be responsible for their violation of IHRL. A state is responsible for human rights violations during an armed conflict if the violations are attributed to it and therefore fall within its jurisdiction in the meaning of human rights treaties. Similarly, if peacekeepers commit violations of IHRL, the UN (if it is of CIL) and/or their TCCs may be responsible for those violations on the condition that they are attributable to one or the other. An offence committed by a peacekeeper may simultaneously lead to a violation of IHL and IHRL by the UN/TCCs, if IHL is applicable in those circumstances or only to a violation of IHRL, if the IHL norms are not applicable. Considering this, particular breaches of IHL/IHRL committed by MONUC and UNOSOM military contingents must be discussed.

The acts of sexual violence committed by the MONUC peacekeepers may result in the violation of IHRL norms on the prohibition of torture, inhuman or degrading treatment or punishment under Article 3 ECHR, Article 7 ICCPR, Article 5 ACHR and Articles 1, 16 CAT. Such acts violate GC CA3 as violence to life and person (para.1(a)) and outrages upon personal dignity (para.1(c)), if committed during an armed conflict.

Although the acts of some MONUC peacekeepers involved in arms smuggling cannot be considered as a direct breach of IHRL/IHL, they may still entail international responsibility

of their respective TCCs for the breaches of IHL/IHRL committed by the armed opposition groups, to whom the arms were smuggled.¹⁸⁸

Apart from committing acts or torture, inhuman or degrading treatment or punishment (including intentional wounding of civilians) prohibited under provisions mentions above and constituting GC grave breaches and violations of, *inter alia*, Article 12 GCI, Article 12 GCII, Article 13 GCIII, Article 27 GCIV for IAC and GCCA3 for NIAC, UNOSOM peacekeepers were also reportedly involved in unlawful killings of civilians, which is a breach of the same articles of GC. It is also a breach of IHRL (Article 2 ECHR, Article 6 ICCPR and Article 4 ACHR). Use of deadly force against civilians who attempted to steal something in the military compounds cannot be absolutely necessary or proportionate under IHRL or IHL.¹⁸⁹

Reportedly, operations conducted by UNOSOM led to significant civilian casualties.¹⁹⁰ It may be due to several reasons including deliberate targeting civilians or civilian objects, indiscriminate attack or disproportionate attack, etc. All these can lead to breaches of IHL. The prohibition of attack on civilian population and civilian objects is contained in Article 51(2) and Article 52(1) API. Moreover, Article 51(4) and (5) API provide for the prohibition of indiscriminate attacks. *Blaškić* Appeals Chamber considered that those principles reflect CIL,¹⁹¹ and therefore the UN and TCCs are bound by them.

Moreover, during an UNOSOM operation, reportedly, a civilian hospital was attacked which led to a large number of victims among doctors and their patients.¹⁹² Apart from the provisions mentioned above, Article 18 GCIV specifically provides that “civilian hospitals

¹⁸⁸ See the next section for further details.

¹⁸⁹ See, *mutatis mutandis*, Article 64 GCIV, which states that “protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed.”

¹⁹⁰ See Alex de Waal (1998), at 138, 140, 142.

¹⁹¹ *Blaškić* Appeal Judgement, paras. 157-159.

¹⁹² Alex de Waal (1998), at 138-139

organised to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the parties to the conflict.” Therefore if at least some of the reported cases are confirmed, UNOSOM’s military members committed violations of IHL and IHRL.

3. Attribution of conduct of military members of MONUC and UNOSOM to the UN and TCCs

A) Attribution of conduct of members of national contingents of MONUC

As discussed above, MONUC military members have been reportedly involved in the commission of sexual offences including rape against local women and girls. The question is whether this conduct can be considered *ultra vires* or done in private capacity and if the former, whether it can be attributed to the UN or TCCs.¹⁹³

The acts of sexual violence were clearly not committed as part of an official policy of the UN or TCCs, nor performed following the orders of the superiors. Contrary, there is a policy of zero-tolerance against acts of sexual abuse in the UN. Despite that, some national contingent commanders appear to tolerate such state of affairs without taking appropriate measures to prevent or punish for such conduct.¹⁹⁴ Although the majority of those acts are committed outside military camps, some of them were committed inside the camps or in the close vicinity to them.¹⁹⁵ As there was an order to wear uniform to easily identify peacekeepers outside the compounds, they may be uniformed when or before committing the

¹⁹³ See also discussion in Chapter II, section 4(c).

¹⁹⁴ See OIOS Report (2005), para. 34.

¹⁹⁵ The OIOS noted in its report that inadequate security perimeter fencing around the military camps enables the peacekeepers and their illegal visitors to move about the camp unnoticed by their supervisors or the few camp guards. See OIOS Report (2005), para. 34.

misconduct.¹⁹⁶ This can attest to the fact that the conduct of peacekeepers cannot be considered as private.

Peacekeepers remain in national service and at the time of commission of acts they are in service of the mission deployed in a foreign country. During the duration of their deployment they are obliged to obey the orders and instructions of their superiors and can be disciplined for disobedience. Therefore it cannot be said that they were acting in purely private capacity, while they were on mission and had to obey the orders and instructions of their superior commanders.

If members of military contingent being on mission disobey the orders of their superiors, they may be acting *ultra vires*. The *ultra vires* conduct can be attributable to a state or IO or both.¹⁹⁷ The conduct is *ultra vires*, if the agent exceeds their authority or contravenes the instruction but still acts within their apparent authority or uses means placed at his disposal by state/IO.¹⁹⁸

Peacekeepers committing acts of sexual abuse were deployed in the DRC by the UN and TCCs (which lent them to the UN). They were provided with the official functions to protect civilians and because of those official functions they got an access to the local population being in relationship of trust with them. Like in detention there is a professional relationship between peacekeepers and protected population which requires them respect the population and to avoid any abuse of power.¹⁹⁹ But for their deployment their functions and their position of power (reinforced by the UNSC mandate and possession of certain weapons), they would not be get access to vulnerable women and girls who see their sexual relationships

¹⁹⁶ See OIOS Report (2005), para. 34, stating that although the peacekeepers must wear uniforms outside the camp, they visit public places not always wearing uniform.

¹⁹⁷ See discussion in Chapter II, sections 1(c) and 2(c).

¹⁹⁸ See, for instance, discussion in Chapter II, section 1(c).

¹⁹⁹ Amnesty International, Rape and sexual violence: human rights law and standards in the International Criminal Court, IOR 53/001/2011, March 2011, at 26.

with the peacekeepers as means of survival, provision of food and protection from atrocities committed by armed groups.²⁰⁰ Most of them submit to peacekeepers because of the nature of their official capacity. Therefore those relationships went beyond purely private and therefore peacekeepers were acting within their apparent authority in its broad understanding.²⁰¹

A further question is whether sexual abuse committed by peacekeepers can be attributed to the UN or their TCCs. For the conduct to be considered *ultra vires* of an IO, it must fall within the overall functions of that organisation. It is difficult to image any function of the UN within which sexual abuse of local population during the PSO can fall. Quite contrary, the peacekeepers were mandated to protect the local population from such abuse and not to commit offences by themselves. The acts of peacekeepers cannot fall within the functions of the UN in maintaining international peace and security or promotion of human rights and humanitarian assistance. Therefore sexual abuse would be difficult to see as *ultra vires* acts of the UN.²⁰²

Moreover, it may be difficult to establish effective control exercised by the UN over the conduct of peacekeepers needed to prove its attribution to the IO.²⁰³ The UN engaged in a policy of zero-tolerance to prevent the sexual abuse from occurring. It took various measures which were available to it to prevent that conduct. However the conduct still continued and there were further allegations of peacekeepers being involved in the same conduct.²⁰⁴ The UNFC could have ordered to the national contingent commanders to take more effective measures to prevent widespread sexual abuse in the mission. Detailed instructions for the national contingent commanders addressing sexual abuse including potential sanctions could

²⁰⁰ See Human Rights Watch (2005), Testimony of Anneke Van Woudenberg.

²⁰¹ See also discussion in Chapter II, section 1(c).

²⁰² It is unless, as discussed before “within overall functions of the IO” is not interpreted as meaning that they were on mission at that moment. Then this requirement is fulfilled.

²⁰³ See discussion in Chapter II, section 4(b).

²⁰⁴ In spite of the OIOS Report of 2005, the 2007 Report indicated even more allegations: 217 instances comparing with 72 in 2005.

have been issued. Whether or not they would be implemented by the national commanders is another question related to the TCC's responsibility. Any failure to do that by the UNFC means that the UN failed to take appropriate measures to prevent the conduct and therefore its responsibility may be triggered.

However the UN cannot be solely responsible for it. Joint responsibility with TCCs is the most likely result of the situation. It is because all discipline powers are vested to the TCCs and national contingent commanders leaving the UN without any powerful means to control peacekeepers' conduct.²⁰⁵ It is for the national contingent commander to take appropriate measures to prevent sexual abuse from occurring. As such conduct was widespread,²⁰⁶ the national contingent commanders cannot be unaware about it and may have chosen to tolerate it. As OIOS notes in its report, "it is the demands and requirements of the contingent commanders that have the greatest impact on the conduct of the contingent troops."²⁰⁷ OIOS also assessed that the efforts of contingent commanders to enforce discipline were found to be inadequate.²⁰⁸ The fact of non-adoption of preventing measures or failure to punish and discipline the members of national contingents can indicate unwillingness from the part of state to deal with the conduct.

It is apparent that those measures could be effective in prevention of offences committed by members of national contingents. Reportedly in one national contingent preventing measures were adopted including establishing recreational facilities, installing wire mesh within the military camp perimeter fencing to prevent direct contact between peacekeepers and the local population, not paying to peacekeepers their mission allowances

²⁰⁵ See also Chapter II, section 4(b).

²⁰⁶ See Sandra Katrin Miller "Accountability for the conduct of UN-mandated forces under international human rights law: a case study concerning sexual abuse of the UN mission in the Democratic Republic of Congo (MONUC), in Arnold, Roberta, Knoops, Geert-Jan G. J., *Practice and policies of modern peace support operations under international law* (Transnational Publishers, 2006), at 267; Prince Zeid's report, para. 8.

²⁰⁷ OIOS Report (2005), para. 28.

²⁰⁸ Ibid, para. 34.

while deployed (for them not to have cash to pay for sex).²⁰⁹ In this contingent the instances of sexual abuse became very rare.²¹⁰

The national commander of another contingent failed to take any assigned measures for security and perimeter control and there were very limited or no recreational facilities,²¹¹ As a result most allegations received during the investigation were made against the peacekeepers from this contingent.²¹² This means that the measures adopted by the national commanders are able to prevent the conduct. Accordingly, national contingent commanders and their TCCs had a material ability to prevent the sexual abuse and therefore had effective control over the conduct of peacekeepers. If they did not take such measures available to them, having become aware about the conduct, TCCs may be responsible for the conduct of their organs (peacekeepers).

Another case of possible international responsibility is the assistance provided to the governmental forces of the DRC by MONUC following the UNSC mandate and assistance given to the members of armed opposition groups by some peacekeepers involved in arms smuggling. Reportedly, the violations of IHL and IHRL were committed from both sides (namely governmental forces and opposition groups).²¹³

In the case of assistance to the governmental forces, the UNSC resolution provides for the support by MONUC to FARDC-led operations against armed groups and joint planning of those operations in accordance with IHL, IHRL and refugee law.²¹⁴ MONUC and FARDC undertook several joint operations in 2009-2010. MONUC's mandate to support governmental forces evolved over time: starting from the mandate to support operations of

²⁰⁹ OIOS Report (2007), para. 17.

²¹⁰ Ibid.

²¹¹ Ibid, para.18.

²¹² Ibid.

²¹³ See Patrick Cammaert (2010), at 104.

²¹⁴ SC resolution 1794, S/RES/1794 (2007), paras. 5 and 7; SC resolution 1906(2009), para. 22.

disarmament led by the FARDC, and continuing with the mandate to develop a joint concept of operations with the FARDC and support operations jointly planned and led by the FARDC.²¹⁵

The FARDC is also considered a massive human rights violator.²¹⁶ It allegedly committed large number of rapes, torture, killings and other international law violations.²¹⁷ Although MONUC's duty is limited to providing logistical support including facilitating transport to FARDC, providing vital supplies, such as ammunition, weapons, food, and fuel and offering occasional fire support under strict conditions, the mission is sometimes considered as FARDC's accomplice.²¹⁸

The acts of assistance can be attributed to the UN. Firstly, the UNSC resolution itself provides for such a mandate. Secondly, the peacekeepers were acting pursuant to the order of the UNFC participating in the FARDC operations, their planning and supporting governmental forces. The TCCs could hardly say anything against it (even if they did, it would be in contravention of their role). Therefore the UN had ability to prevent and stop such assistance (which it indeed did at some point) and therefore could be considered as exercising effective control over the conduct.

The UN may be responsible for the assistance to the DRC under Article 14 ARIO, if it is proved that the forces of the DRC committed internationally wrongful acts and such conduct would be internationally wrongful, if committed by the UN and that the UN assisted the DRC forces with knowledge of the circumstances of the wrongful act. If alleged crimes committed by the FARDC were proved, they constitute a breach of IHL and IHRL. As the UN is bound by CIL including IHL and IHRL norms having customary status, the conduct is

²¹⁵ See Patrick Cammaert (2010), at 106.

²¹⁶ Julie Reynaert (2011), at 19; Patrick Cammaert (2010), at 104.

²¹⁷ Eirin Mobekk "Security sector reform and the UN mission in the Democratic Republic of Congo: protecting civilians in the east", 16 *International Peacekeeping* 273 (2009), at 277.

²¹⁸ Julie Reynaert (2011), at 19, 27.

internationally wrongful for the UN too. The most difficult limb of Article 14 ARIO is to prove that the UN assisted the DRC forces knowing that the DRC was committing crimes.

Although the UN reportedly withdrew some assistance to some of the FARDC forces at certain point,²¹⁹ it continued to support the others and their operations.²²⁰ Moreover, providing MONUC with the mandate to support the FARDC and to conduct joint operations with it, the UNSC in its resolutions expressed concern about grave misbehaviour and human rights violations by FARDC members.²²¹ Being aware about those violations, the UNSC nonetheless mandated MONUC to continue its assistance to the FARDC. If the UN became aware about crimes committed by the FARDC some time before it decide to withdraw the support or those whom it continued to support also committed crimes, it may be responsible for assistance in the commission of internationally wrongful acts committed by the DRC forces.

After the events in question (2009-2010), the UN established a due diligence policy in 2011, which if followed, would ensure that the UN is not responsible for the assistance to the commission of crimes by the forces it provides support to.²²² This policy provides that prior to engaging in supporting non-UN forces, a risk assessment will be conducted to identify whether there is a real risk of those forces committing grave violations of international law. If the UN concludes that such a risk exists, the support will not be provided or will be withdrawn (if it latter transpires that such violations are committed). This policy is to be welcomed and should be followed, if the UN does not want to be considered assisting in the commission of international law violations.

²¹⁹ See also Patrick Cammaert (2010), at 105.

²²⁰ See Julie Reynaert (2011), at 19.

²²¹ See Patrick Cammaert (2010), at 106.

²²² See Human rights due diligence policy on United Nations support to non-United Nations security forces (HRDDP) (2011), public version contained in the Annex to General Assembly, Security Council, "Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council", A/67/775-S/2013/110, 5 March 2013.

A more difficult question is whether the UN/TCCs may be responsible for the acts of peacekeepers assisting the opposition groups by virtue of their involvement in the arms smuggling. Even if the arms smuggling assisted opposition groups in the commission of crimes and that peacekeepers involved in it knowing about that, it will be difficult to find the UN/TCCs responsible for that. Firstly, the acts of assistance, namely, arms smuggling must be attributed to the UN or TCC. Although the UN became subsequently aware about that and initiated investigations, it could hardly prevent such conduct. The UN would not have effective control over such conduct, and it had contrary policy of stopping any arms smuggling and disarming armed opposition groups in accordance with the UNSC resolution. The TCCs may have an effective control over the conduct. The acts were done within the apparent authority and *ultra vires* and may be attributed to the TCC as it had capacity to prevent those acts exercising better discipline and training of the peacekeepers through the national commander. Although not clear, it seems that some superiors were involved in the smuggling, and this can indicate effective control of the TCC over the conduct.

Even if those elements were established, the responsibility of the TCC as a state assisting another state in the commission of a wrongful act under Article 16 ASR may not be triggered. This article envisages that a state assists another state and not groups opposing the state government. It may be, however, possible to attribute the conduct of the peacekeepers under Article 7 ARIO, as the TCC exercised effective control over the assistance given by its organs to the armed opposition groups in their commission of the wrongful acts. When approaching the situation from this angle, one needs to establish only that the assistance in the commission of international crimes or breaches of IHL and IHRL constitutes a breach of international obligations which is apparent from the text of GC CA1 and requires the states to respect and to ensure respect of the conventions in all circumstances. The same is true about

human rights obligations.²²³ Therefore if all elements are proved, it is possible that the TCCs of the peacekeepers involved in the arms smuggling to the opposition groups can be responsible for the assistance to those groups in their commission of international crimes.

B) Attribution of conduct of members of national contingents of UNOSOM

The question of attribution of conduct of UNOSOM peacekeepers is complicated by the existence of different command structures within UNOSOM itself. UNOSOM I was under command of the UN and was traditional peacekeeping operation. UNITAF was under unified command by the US, therefore any acts committed by members of the contingents forming part of UNITAF cannot be attributed to the UN.²²⁴ They are attributed to their respective TCCs, as UNITAF was a coalition of the states or there is in some occasion joint responsibility of the US and TCCs. UNOSOM I was not placed under the US command, instead a liaison mechanism between UNOSOM I and UNITAF was created.²²⁵

UNOSOM II was generally under UN command, closely supervised by S-G and UNSC and commanded by the UNFC.²²⁶ However, the US retained substantial influence over the operation, especially with regard to its troops.²²⁷ S-G's Special Representative was American retired Navy Admiral Howe who reported directly to the S-G and to whom the UNFC reported.²²⁸ The deputy UNFC of UNOSOM II was the US Major General Montgomery who was also the Commander of the US Forces, Somalia and the Commander of

²²³ See, for instance Article 2 ICCPR; Article 1 ACHR; Article 1 ECHR, using the word "secure".

²²⁴ The Security Council adopting SC Resolution 794 (1992) on the creation of UNITAF implicitly accepted that the US is going to exercise the command over it, even though it authorised the Secretary-General to participate in necessary arrangements for command and control of the forces (see Ray Murphy (2007), at 127; SCR S/RES/794, para.12). That does not however mean that the UN was in the position of exercising effective control over the operation itself or any particular contingent. The operation was under the US command and control irrespective of the UN's role devoted by the SC resolution in this regard.

²²⁵ See Ray Murphy (2007), at 127; SC resolution S/RES/794, para.15.

²²⁶ See Ibid, at 128.

²²⁷ See Jane Boulden (2001), at 68-69; Ray Murphy (2007), at 129.

²²⁸ See *ibid*.

the US Quick Reaction Force (the force under sole US command supporting UNOSOM II activities) and who directly reported to the US authorities – Commander in Chief, US Central Command.²²⁹ Given clear US domination in the command structure and potential major influence on the decision taken for the UNOSOM II, the responsibility of the US for the operational conduct of UNOSOM II is not excluded. It is especially so in relation to the US troops given that US Central Command considered that it retained full command over US forces.²³⁰

Accordingly, the acts performed by the US troops, most probably, trigger the responsibility of the US and not the UN, although under certain circumstances (e.g. the UN was able to prevent certain act) the UN's joint responsibility cannot be excluded. The conduct of other contingents of UNOSOM II will be considered under the normal rules of attribution of their conduct to the UN/TCC depending on effective control.

There were mainly two types of situation where violations of IHL and IHRL were committed: in some instances the acts of torture, inhuman or degrading treatment, killing and wounding were committed by the members of national contingents against civilians which tried to steal something in the military compounds and those disproportionate actions were taken by the peacekeepers following the order or indifference from the part of national contingent commander. In the second type of cases, killing and wounding of civilians and attacks on civilian objects were committed as a part of military operations undertaken by UNOSOM under the UN command.

In the first type of situations the UN seemed not able to exercise control over the wrongful conduct of members of national contingents. The UN may be unaware about such orders of the national contingent commanders or about the conduct itself (until it became

²²⁹ See *ibid.*

²³⁰ See Ray Murphy (2007), at 129.

widely known). Even if it knew about it, its powers to prevent that conduct were very limited. The TCCs and national contingent commanders were in the right position to take some actions to prevent the conduct. Even if it was not directly ordered by the commanders, it was tolerated by them or was not rightly addressed by issuing explicit instructions to the subordinates. Moreover, the soldiers were acting within apparent authority by shooting at civilians, detaining them and mistreating them. This cannot amount to private conduct. Therefore the conduct can be attributed to the TCCs and the TCCs will be responsible for the internationally wrongful acts committed by the military members of UNOSOM.

The situation is different with regard to the breaches of IHL committed during UNOSOM military operations. The operations were planned and ordered by the UN. UNOSOM contingents were acting collectively pursuant to the UN directions. This situation indicates that the UN had effective control over most of the acts committed during such operations. Unfortunately, there is no sufficient information to estimate the exact degree of control exercised by the UN over particular wrongful acts and to what extent its orders were obeyed on the ground, but it can be said that the UN had ability to better plan and execute the operations in which UNOSOM II members were participating and therefore to prevent most wrongful acts committed during them. It may be responsible for the breaches of IHL to the extent it had effective control over particular conduct in breach.

The TCCs' ability to prevent certain conduct is less clear. If the orders of the UN commander were not to commit breaches of IHL, but the national contingents still committed them, the TCCs may also bear responsibility for those violations, if they were able by disciplinary, training or other means to prevent them. If it is proved, the TCCs also had effective control over the conduct in breach of the IHL obligations and must be responsible

for it jointly with the UN. Everything depends on the particular factual circumstances in which the internationally wrongful acts were committed during UNOSOM military operations.

Conclusion

The discussion of UNOSOM and MONUC PSOs has shown that of their military members committed violations of international law and can be held responsible for them. The individual criminal responsibility of peacekeepers may arise for their commission of international crimes during MONUC. Although the existing SOFA precludes the DRC to exercise its jurisdiction over the MONUC troops, it cannot preclude the ICC to exercise its jurisdiction over certain crimes committed by peacekeepers, as some of their acts amount to war crimes. The ICC already investigates the situation in the DRC and potentially can exercise jurisdiction over war crimes committed by peacekeepers. The more difficult situation is with UNOSOM, as there was no government to prosecute the peacekeepers in Somalia and even some functions of the government were performed by UNOSOM itself.

The norms of IHL were applicable to UNOSOM II and partially to MONUC operations. UNOSOM II had the mandate to use force against parties of the conflict, which indicates the intention to cause harm to that party by the hostile acts and therefore UNOSOM was participating in hostilities, at least until February-March 1994. MONUC had the mandate to use force on certain strictly defined occasions, which, however, could be used beyond self-defence. IHL rules applied to MONUC for the time they participated in the operations directed to cause harm to the opposition groups. The UN and TCCs also were bound by the rules applicable during peacetime, i.e. by IHRL.

Most of the violations of IHL and IHRL are attributable to the TCCs or UN or both. The rape and other sexual violence can be attributed to the TCCs in certain circumstances (as

peacekeepers remain TCCs' organs and their national commanders are in the position to prevent those crimes). The TCCs/UN may also be responsible for assisting violations of international law performed by the parties to the conflict when they support government forces or smuggle arms.

Regarding UNOSOM forces, inhuman treatment and killings committed against civilian population in the military compounds can be attributed to the TCCs, as it was for them to prevent those acts. The violations of IHL committed during UNOSOM military operations are most probably attributed to the UN, as it planned and commanded most of them. Some violations may also be attributed to the national contingents, if PSFs disobeyed the UN orders and acted under the orders of their national contingent commanders.

VII. Conclusion

This thesis proved that the UN, TCCs and individuals will be responsible for the violations of international law committed during PSOs. This work advocates for a case-by-case approach to the international responsibility of the UN, TCCs and peacekeepers for the commission of international law violations. It argues against a blanket denial of their responsibility because of the unique nature of PSOs and inapplicability of certain norms. For this purpose, the thesis proceeded with the analysis of the issues comprising international responsibility: attribution of the conduct, applicability of international obligations, issues of criminal jurisdiction and immunities. It also tests the proposed legal model of international responsibility in two case-studies.

In case of attribution, the thesis argues that, despite peacekeepers being a subsidiary organ of the UN, under the rules of state responsibility the TCCs can also be responsible for the conduct of their peacekeepers, as they still remain in the national military service and therefore state organs. The further analysis confirms that particular conduct can be attributed simultaneously to states and IOs and they can be jointly responsible for it.

The best way to delineate international responsibility between the UN and TCCs for the PSFs' conduct was provided in Article 7 ARIO applicable in the situation where a state organ was placed at the disposal of an IO. A conduct is attributable to the TCC or UN if either of them have effective control. If they both have effective control over the conduct, it will be attributed to both of them.

The thesis proposes a legal test to identify whether the UN or TCC has effective control: the TCC or the UN will be responsible for the conduct of the peacekeepers if it had material ability to prevent certain conduct from occurring through their organs. This test is

taken from the test on superiors' liability under ICL but can be adopted in this situation, as the states and IOs act through their organs/agents and if their organs/agents had material ability to prevent certain conduct, the states and IOs were also able to prevent. Accordingly, the UN/TCCs will be responsible for the conduct of peacekeepers, if either the UNFC (or any other commanding UN organ) or national contingent commander (in case of TCCs) had a material ability to prevent that conduct. This depends on the factual situation on the ground.

The thesis disagrees with the position that IHL applies only to the operations authorised by the UNSC and led by other states, while not applying to the operations under UN command and control. This is not possible simply because IHL starts to apply in the situations where there is an armed conflict or an occupation of the territory in fact and does not depend on any justification to use force lawfully or unlawfully coming from *jus ad bellum*. Accordingly, as soon as a state or IO becomes a party to the armed conflict, they are bound by IHL.

The thesis concludes that, for the UN and TCCs to become a party to the conflict, the peacekeepers must participate in hostilities with another party to the conflict and they must do so collectively. One or two peacekeepers occasionally participating in hostilities will not suffice to render TCCs and the UN a party to the conflict. If a particular contingent participates in hostilities, only its respective TCC becomes a party to the conflict only for the period of their participation. For peacekeepers to participate in hostilities, two conditions must be satisfied: they performed hostile acts against an adverse party and did so with intention to cause harm to that party. Pure self-defence will not suffice because hostile acts done in self-defence will not be directed with intention to harm the adverse party. Participation of peacekeepers in hostilities continues only for the time they have the intent to harm the party

and will cease when there is no such intent. Their participation in hostilities depends on the factual situation on the ground.

The thesis further argues that peacekeepers participating in hostilities will become combatants. They cannot be considered civilians any more because their states are in conflict with other parties and they are members of the armed forces. To argue otherwise would lead to unfortunate results, as if they were not considered combatants and still participated in the armed conflict, they would become unlawful combatants with very arguable status under IHL. When they do not participate in hostilities, their states are not parties to the conflict and they are not considered armed forces and will be civilians of a neutral state.

If PSFs are involved in NIAC, their participation (representing an international actor) may convert that conflict in an IAC if they participate in hostilities against state armed forces or against an armed group in the state without a government and that group may pretend to act on behalf of the government. This thesis argues for a gradual approach to the application of the law of occupation under GCIV. If protected persons fall in the hands of peacekeepers and the application of any provision of GCIV is triggered, they must comply with it irrespective of the heading under which the provision is placed in GCIV. The whole GCIV may also apply to the peacekeepers, even if they do not participate in the conflict provided that they exercise the sole authority in the country.

In all cases whether IHL applies or not the TCCs and UN remain bound by IHRL obligations (the UN remains bound by customary IHRL). The thesis argues that IHRL does not cease to apply during the application of IHL, they apply concurrently. In any case of their conflict, it can be solved by interpretation of the one in the light of another. The thesis also contends that if the peacekeepers commit human rights violations and their conduct is

attributable to their respective TCCs, TCCs will be responsible for that conduct, even though it was committed beyond the territorial borders and territorial control is not needed.

The argument is made that the notion of jurisdiction, provided in human rights treaties, is not a condition additional to the attribution of the conduct to states but, in substance, represents the same limitation to state responsibility for the conduct performed abroad. The human rights bodies use the jurisdictional requirement to find the responsibility of the state in the same way as the attribution of the conduct is used to find the responsibility of that state. Therefore, the UN or TCCs can be responsible for the human rights violations committed by peacekeepers during PSOs if the conduct constituting human rights violations is attributed to either of them.

Regarding individual criminal responsibility of peacekeepers, the thesis argues that the SOFAs which the UN signs with the host states provide blanket exception from the host state jurisdiction for peacekeepers and may lead to the impunity of peacekeepers for the acts committed during PSOs. The host states signing such agreements may violate their obligations under the GC and CAT. Under those conventions, the host states are obliged to establish their jurisdiction over war crimes or crime of torture, if a perpetrator of those acts is present in their territory. They are also under obligation to take him into custody and prosecute or extradite. No such possibility is envisaged under the UN SOFAs and when a peacekeeper commits an international crime, the host state will be in violation of its obligations.

The UN SOFA provide not only for immunities *ratione materiae* from jurisdiction, but a total exemption from host state jurisdiction, it cannot be disregarded when international crimes are committed and cannot be waived by the UN Secretary-General (unlike other UN immunities).

Accordingly, members of PSOs military contingents appear to be above any international or host state domestic law. They can become accountable only before their national states' courts. However, after peacekeepers are repatriated, they may be prosecuted anywhere in the world. Other states (including TCCs) are obliged to prosecute or extradite former peacekeepers for the commission of international crimes, if those states are parties to the respective conventions. The UN SOFA does not preclude the jurisdiction of the ICC. The ICC is not a party to the UN SOFA and is not bound by it. The UN SOFAs will not fall under the exception provided by Article 98 on surrender of the persons to the ICC. Therefore the host state will be obliged to surrender a peacekeeper to the ICC, if the Court decides to establish jurisdiction over the conduct.

The thesis further applies the introduced system of international responsibility to two case-studies: MONUC and UNOSOM. It is possible that the peacekeepers of UNOSOM and MONUC may have committed crimes of torture, war crimes of rape, inhuman treatment, wilful killing etc. Because of the obligations under the MONUC SOFA, the DRC may find itself violating its obligations under the GC and CAT for not establishing jurisdiction and not prosecuting the peacekeepers. Moreover, the ICC which is currently dealing with the situation in the DRC may establish its jurisdiction over any MONUC peacekeeper, if it finds that some crimes were committed within its jurisdiction.

IHL applied in the situation of UNOSOM and may have applied in the situation of MONUC, when the peacekeepers undertook operations directed against armed opposition groups. Even if MONUC was participating in the armed conflict with armed groups, it is unlikely that this participation continued during all time when the mission was deployed in the DRC. It is more likely that they participated in the conflict only for the duration of those operations.

UNOSOM peacekeepers were involved continuously during a particular period of time in the armed conflict in Somalia. It is because they conducted offensive operations, their mandate was to direct force against an armed group in Somalia and they intended to cause harm to that group.

Peacekeepers indeed committed violations of IHL and IHRL and at least most of them (if not all) can be attributed to the UN or TCCs or both. The violations committed in the military compounds following the tolerance or instructions from the national contingent commanders can be attributable to the TCCs, as it was for them and their commanders to prevent those violations. It is likely that breaches of IHL committed during UN-led operations, may be attributed to the UN (or to the TCCs too, if the peacekeepers disobeyed the UN orders), as it was for the UN officials planning the operations to prevent the violations of IHL committed by peacekeepers.

It can be concluded that the responsibility of the UN, TCCs and peacekeepers depends on the factual circumstances of the commission of international law violations during PSOs. The TCCs hiding behind the veil of the UN and its immunities cannot avoid international responsibility for those crimes that they were able to prevent. The fact that the TCCs possess more powers than the UN (including disciplinary, prosecutorial and training powers) to prevent violations of international law contributes to their responsibility for those crimes. The UN should not bear the responsibility on its own. The UN should change its position with regarding the SOFAs that it signs with the host states, as by this act it may compel the host states to violate their obligations under international law. Although the UN tries to adopt certain measures and policies directed to prevent unlawful conduct of peacekeepers, it does not change its policy in shielding TCCs and their peacekeepers from any international responsibility and by that contributing to the sense of impunity among them. What should be

done is to recognise that the international responsibility for violations of international law committed during PSOs is shared between the UN, TCCs and peacekeepers and neither of them will avoid responsibility by reason of simple collaboration with the UN and authorisation by the UN Security Council.

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