Human Rights Violations of Peacekeeping Troops: Accountability of the UN and the Relationship to the ECHR

Anna Helmner

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Examinator: Anna Gustafsson
Tutor: Cristina Trenta
Abstract
This paper examines the legal consequences resulting from human rights violations committed by United Nations peacekeeping troops, in combination with how it has been addressed by the European Court of Human Rights (ECtHR or the Court). The topical issue is critical concerning the immunity and accountability of the UN, which creates impediments to individuals’ rights of access to court. The situation is also harmful in regards of individuals’ possibility of obtaining redress, due to the lack of effective dispute settlement procedures within the internal system of the organisation. The harmful situation is further problematized by the ECtHR not being competent to review the acts of the UN, since the organisation is not a party the European Convention on Human Rights. Hence, the Court is not competent *ratione personae* to adjudicate on cases concerning violations committed by UN peacekeeping troops, which it declared in the joined cases of *Behrami and Saramti*. The decision demonstrates a pressing problem, namely the balancing of interests between the autonomy of international organisations and the protection of human rights, a balance which the Court has tried to establish in its previous case-law, but deterred from in *Behrami and Saramati*. The combination of the existing problems regarding the accountability, immunity and available means of settlement procedures in terms of violations committed by peacekeeping forces, together with the development of the ECtHR case-law, have resulted in a human rights vacuum. Consequently, the situation is harmful for individuals’ rights, and in addition to examine the legal problems, this paper will also present a discussion on some proposed solutions to the topical situation. The suggestions are both in terms of accountability of the UN and the role of the ECtHR, which could enhance the clarity of the legal situation.
# Table of contents

**List of abbreviations** .................................................................................................................. 3

**1. Introduction** .......................................................................................................................... 4

1.1 Intention of the paper and research questions ....................................................................... 4

1.2 Delimitations ............................................................................................................................ 5

1.3 Research method and disposition ......................................................................................... 5

**2. The current legal situation of UN’s accountability in regards of peacekeepers** ............ 7

2.1 The legal status and functioning of the UN ............................................................................ 7

2.2 Immunity of the UN ................................................................................................................ 10

2.3 Accountability for wrongful acts .......................................................................................... 13

2.4 Internal means of dispute settlement ..................................................................................... 16

**3. Jurisdiction of the ECtHR in regards of the UN** ................................................................. 19

3.1 The overall jurisdiction of the Court ...................................................................................... 19

3.2 Jurisdiction in regards of IO’s ............................................................................................... 22

3.3 Jurisdiction in regards of the UN ........................................................................................ 24

**4. Proposed solutions** ............................................................................................................... 27

**5. Conclusion** ........................................................................................................................... 30

**List of references** .................................................................................................................... 34
### List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art</td>
<td>Article</td>
</tr>
<tr>
<td>Blue Helmets</td>
<td>Peacekeeping troops</td>
</tr>
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<td>CDU</td>
<td>Conduct and Discipline Unit</td>
</tr>
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<td>DARIO</td>
<td>Draft Articles on Responsibility of International Organisations</td>
</tr>
<tr>
<td>DPO</td>
<td>Department of Peacekeeping Operations</td>
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<td>ECHR or the Convention</td>
<td>Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECtHR or the Court</td>
<td>European Court of Human Rights</td>
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<td>ESA</td>
<td>European Space Agency</td>
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<td>EU</td>
<td>European Union</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>Immunity Convention</td>
<td>United Nations Convention on Privileges and Immunities</td>
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<tr>
<td>IO</td>
<td>International Organisation</td>
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<td>OIOS</td>
<td>Office of Internal Oversight Services</td>
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<td>SC or the Council</td>
<td>Security Council</td>
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<tr>
<td>SG</td>
<td>Secretary General</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UN Charter</td>
<td>Charter of the United Nations</td>
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1. Introduction

1.1. Intention of the paper and research questions

The United Nations (UN) has as its main purpose to maintain international peace and security,¹ and has through its peacekeeping operations contributed to secure and prevent serious crisis and conflicts throughout the world.² However, the peacekeeping troops (or Blue Helmets), as seconded by the member states under the command of the Security Council (SC or the Council), have been the perpetrators of serious human rights violations, such as sexual violence and abuse³, torture, and arbitrary detentions against local populations.⁴ The numbers of allegations increased last year, and as reported by the Secretary General (SG), UN peacekeeping personnel has taken advantage of situations in countries torn by conflict, poverty, and sexual exploitation.⁵ The situation is made complicated by the immunity granted to the UN and its peacekeeping personnel, which creates obstacles for individuals seeking redress. Another impediment is the question of accountability, which is not clearly settled. This has been the case in the jurisprudence of the European Court of Human Rights (ECtHR, or the Court), in which the aggrieved applicants have complained of violations committed by UN peacekeeping troops, and in which the Court found itself not being competent *ratione personae* to review the acts.⁶ In other words, the acts were not attributable to a contracting state, which is a prerequisite in the determination of whether a case is admissible or not.⁷ The lack of competence by the Court to review the acts of the UN, coupled with the internal complications of the organisation, has created a legal vacuum in the protection of human rights.

Due to the alarming reports of human rights abuses by the Blue Helmets, it is likely that this will continue to be subject to proceedings in human rights courts, such as ECtHR.⁸ It is therefore crucial that the legal circumstances regarding accountability are clarified. The intention of this paper is to investigate the current legal situation in regards of the immunity and accountability of international organisations (IO’s), and how this affects the possible breaches against human rights. The focus will be on the UN and omissions committed by Blue Helmets, which will further be elaborated to investigate how this is reflected in the case-law of the ECtHR. Moreover, this study will put emphasis on the consequences that these violations have for the aggrieved individuals, and the available means of redress. The result of this paper aims to give a better understanding of the legal circumstances created by this situation, and particularly the effects on human rights. The chosen research questions are: what is the current legal situation in regards of the UN and its peacekeeping troops in terms of immunity and accountability, and

⁵ UN Secretary-General ‘Special measures for protection from sexual exploitation and sexual abuse’ (2016) UN Doc A/70/729, 7.
⁶ Behrami and Behrami v. France and Saramati v. France, Germany and Norway [GC], nos. 71412/01, 78166/01, ECHR 2007; Stichting Mothers of Srebrenica and Others v. the Netherlands (dec.), no. 65542/12, ECHR 2013 (extracts).
what are the available remedies and dispute settlements for victims? Moreover, what is the jurisdiction of the ECtHR concerning the UN, and what are the legal consequences of its recent judgement concerning peacekeeping forces, in which the Court was not competent to hear the claim? The last question to be answered is if there are any proposed solutions on how to solve this situation created by the UN and the ECtHR?

1.2 Delimitations

The decision to only consider the UN and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention) has been made as an essential delimitation in order to enable a more thorough investigation of the subject, instead of just touching the surface of a wider spectrum. The reasoning behind the determination to only consider this specific relationship is based on the existing legal gap regarding accountability, and the Courts jurisdiction as seen in the judgement of the joined cases Behrami and Behrami v. France and Saramati v. France, Germany and Norway. Moreover, this relationship is of particular interest since it addresses a crucial question in a global society where the influence of IO’s increases, namely the balancing of interest between the autonomy of IO’s and the protection of human rights. Furthermore, this paper will concentrate on the peacekeeping troops, and not on other SC sanctions. The focus will be on breaches of human rights conducted by peacekeepers outside combat situations, and not such crimes committed during armed conflict. This choice is made in order to delimit the focus to examine humanitarian law. Moreover, the complaints regarding the acts of Blue Helmets usually occur during circumstances in which the troops are acting outside combat situations, thus not invoking questions of humanitarian law. This paper will not discuss in deep the substantive human rights affected, because the attention will be on attribution of conduct and jurisdiction, and not the specific rights concerned. Furthermore, the focus will be on the accountability of the UN, thereby not putting as much emphasis on the responsibilities of troop contributing states in regards of Blue Helmets.

1.3 Research method and disposition

The method which will be applied in this paper is the lege lata and the lege ferenda, i.e. to investigate the topical legal situation by examining legal sources, and also address recommendations for the future. Within the sphere of international law, which is the direction of this paper, the primary sources of law could arguably be found within Art 38(1) of the Statute of the International Court of Justice (ICJ Statute), which contains applicable sources of law for the ICJ. The provision acknowledges treaties and conventions, together with rules of customary international law and general practice, as primary sources of law. As subsidiary sources, the provision also recognises judicial decisions and legal doctrine. There is an important division between hard law and soft law, to which treaties are recognised as hard law, and is considered to be of highest authority. In addition, jus cogens norms are one of the most

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9 ECHR (n 7).
10 Behrami and Saramati (n 6).
11 Andrew Clapham, Human Rights Obligations of Non-State Actors, (OUP 2006) 120; Verdirame (n 4) 203.
13 Statute of the International Court of Justice ( adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 933 (ICJ Statute).
15 This is regulated in art 53 and 64 of Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT); jus cogens norms has for example been defined by the UN Human Rights Committee to include prohibition of torture, slavery, arbitrary deprivation of life etc. United
authoritative sources of international law, and binds all subjects thereto. Soft law, which could be defined as non-binding legal instruments, such as resolutions, principles and guidelines, and documents created by international bodies, such as the General Assembly (GA) of the UN, have a lower level of legal authority than hard law. However, it is still considered as authoritative material, especially if the institution or organisation behind the documents are regarded as important actors, and are being supported by states. It is the opinion of legal scholars that the leverage behind soft law documents originates from the pressure that the documents put on states, and the willingness to adhere to them. Although it is not legally binding, soft law is of great influence, since it represents the evolution of law, and may later reform into customary law or become codified in treaties. In regards of judicial decisions, they could be of enormous importance, and this paper will use the jurisprudence of the International Court of Justice (ICJ) and the ECtHR. The ICJ is the principal judicial organ of the UN, and has the authority to interpret the UN Charter. However, the case-law of the ICJ is not considered a binding source of law for the ICJ itself, only for the concerned parties to the dispute, and is rather an explanation or restatement of existing law. The ICJ may also submit advisory opinions, which are generally not legally binding, but are an important influence which may contribute to the evolution of law. Regarding the case-law of ECtHR, it is an essential part of, and complement the minimum standards of human rights as contained in the ECHR. The judgments are both binding for member states, and also function as an influential factor in domestic legislation. Although, it is within the discretion of the member states to decide how it will be implemented. The intention of this paper to address the practice of the UN and peacekeeping missions, makes it necessary to use documents from its organs as a vital source. Furthermore, articles and legal doctrine will form an integral part of this study, since they form a significant part of international sources, by clarifying and structuring existent law and practice. Moreover, it highlights flaws within the international legal system, and makes future recommendations as to its improvement.

The research questions will be answered separately, and a critical analysis will be presented continuously throughout the text. Initially, in order to give a full understanding of the topical situation, chapter 2 will begin with a presentation of the legal functioning of the UN and the SC to give a basic understanding of its power and mandate to authorise peacekeeping operations, and continue to examine the formation and purposes of peacekeeping troops. Next section is focusing on the immunity of the organisation, and the legal consequences which derives from it. Thereafter, the notion of accountability of the organisation, especially in regards of Blue Helmets and human rights, will be addressed. The last section of chapter 2 will scrutinise the options for individuals to complain about omissions committed by Blue Helmets, and the prospects of obtaining compensation from the UN. Chapter 3 is dedicated to clarify the jurisdiction of the ECtHR, and the situation concerning acts attributable to the UN. The first

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17 Malcome N Shaw, International Law (7th edn, OUP, 2014) 84.

18 According to Shaw, judicial decisions could be of enormous importance, as stated in ibid 78.

19 UN Charter (n 1) art 92.

20 ICJ Statute (n 13) art 59.


23 ECtHR (n 7) art 1, 46(1).

24 Popovic (n 22) 22, 49, 58.

25 Shaw (n 17) 80.
section will put emphasis on the evolution of the Court’s case law regarding extra-territorial jurisdiction of states, and the subsequent section will concern the jurisdiction of IO’s, followed by the examination of the case Behrami and Saramti, and its legal consequences. The intention is to give a better understanding of the Court’s objective, and the problematic outcome resulting from the last developments. In the final chapter, a discussion regarding possible solutions to the situation created by the UN and the ECtHR will be presented, which will address opinions raised by legal academics and reports. Finally, there will be a conclusion containing the answers to the posed research questions.

2. The current legal situation of UN’s accountability in regards of peacekeepers

2.1 The legal status and functioning of the UN

The UN was founded in order to “save the succeeding generations from the scourge of war”,26 and was officially established by the ratification of the Charter of the United Nations (UN Charter) on 24 October 1945.27 Article (Art) 1 of the UN Charter, which is the constitutional instrument of the UN, proclaims its main purposes, which can be summarised as maintaining and promoting peace and security, and to develop friendly relationships and international cooperation among states. The wording of the principles contained in the provision do not imply that they give rise to legal obligations. However, several elements, including the prohibition of aggression and other breaches of peace, the requirement to settle disputes by peaceful means, adherence to respect for human rights and equal rights, and self-determination of peoples, can be considered binding under customary international law.29 According to Art 2(1) and 2(4) of the UN Charter, the principles should be complied with by the member states, which are obliged to refrain from the use of force and threats against other member states, coupled with a duty of loyalty towards the organisation. The main goal of maintaining peace and security is also highlighted by Art 2(6), which states that the UN shall ensure, as far as may be necessary, that non-member states of the organisation acts in accordance with the listed principles as well.30 The ICJ has stated in one of its advisory opinions, that the preservation of peace and security is the primary purpose of the organisation, since the fulfilment of the other principles will be dependent upon the procurement of that condition.31 The international status of the organisation as a subject under international law, is found in Art 1 of the Convention on Privileges and Immunities of the United Nations (Immunity Convention), which states that it possess a juridical personality. This has further been proclaimed by the ICJ, stating that the UN possesses international legal personality as a necessary factor to perform the proper fulfilment of its functions.33 By virtue of being a subject under international law, this means that the UN has the capacity to conclude treaties and obtain privileges and immunities, and that the organisation

26 UN Charter (n 1) preamble.
28 Shaw (n 17) 876.
30 UN Charter (n 1) art 2.
33 Reparations for Injuries suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 179; See also Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66, para 25, in which the ICJ stated “The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.”.
can be held accountable for the non-fulfilment of its obligations. The special nature and power of the UN is proclaimed by the supremacy status of the Charter as regulated in Art 103, which states that it prevails over all other international agreements between member states in case of conflict. It is generally accepted that the provision also covers secondary rules stemming from the Charter, which includes binding decisions from UN organs. Additionally, the UN has been considered to have implied powers, i.e. powers which are not explicitly provided for in the Charter, but which are accorded to it in order for the effective performance of its responsibilities. Hence, the organisation exercises a broad range of authority.

The SC is the organ within the UN which possesses the primary responsibility of maintaining peace and security, and is composed of nine members, out of which five are permanent. The SC has one of the most powerful positions within the UN system, by being able to recommend the admission, as well as the suspension and expulsion of member states to the GA. Moreover, the Council, together with the GA, elects the judges of ICJ and recommends the selection of the SG for appointment of the GA. The power of the SC is further proclaimed in Art 25 of the UN Charter, which states that any decision taken by the Council is binding upon the member states. In accordance with the primary responsibility of maintaining peace and security, the Council has the power to investigate whether a dispute or situation could be a possible endangerment to a stable world order. Moreover, in case of possible endangerment, the SC may call upon the member states to settle their disputes, for instance, by the means of negotiation, conciliation, or judicial settlement. The Council may also intervene and issue a recommendation of an appropriate method or settlement of the dispute, if the parties are unable to resolve it. Furthermore, the SC has great powers stemming from its possibilities to take enforcement actions when it has determined that there is an existence of threat to the peace, in pursuance to Art 39 of the UN Charter. The measures involve economic sanctions, interruption of communication, and severances of diplomatic relations, and if such measures are found to be inadequate, the SC can issue military enforcement actions. These powers have, according to Simma, given the SC a more far-reaching power than any other international organ, and it gives a perspective of the international position of the SC, which is the main establishing organ

34 Reparation for injuries suffered in the service of the United Nations, ibid 179; see also Council of Europe (Committee on Legal Affairs and Human Rights) ‘Accountability of international organisations for human rights violations’ (17 December 2013) Doc 13370, 7.
35 UN Charter (n 1) art 103.
37 Reparation for injuries suffered in service of the United Nations (n 33) 182; The doctrine of implied powers is somewhat debated, for a closer discussion see Verdirame (n 4) 75-82.
38 UN Charter (n 1) art 24.
39 The permanent members are the Republic of China, France, Russia, the United Kingdom, and the United States of America, as regulated in UN Charter (n 1) art 23; According to UN Charter (n 1) art 27(3), the five permanent members has greater influence due to their veto-powers, which can be used to quash a decision.
40 UN Charter (n 1) art 4-6.
41 ICJ Statute (n 13) art 4.
42 UN Charter (n 1) art 97.
43 ibid art 34.
44 ibid art 33.
45 ibid art 36(1); see also ibid art 37 which imposes a duty of the member states to refer the salvation of a dispute to the Council.
46 ibid art 41-42.
47 Simma et al Vol 2 (n 36) 1239.
concerning peacekeeping actions. Seemingly, the SC has a unique position in the world, and has a huge power over both UN member states and third states by being able to take the ultimate decisions over international conflicts, which could constitute threats to the global peace.

One of the main instruments to restore peace and security is the usage of UN peacekeeping operations, which has grown immensely over the past decades, in both size and importance. Peacekeeping operations contain three different stages, namely prevention of conflict, actions during conflict, and post-conflict peacebuilding. The form of the operations has developed over time as a response to political changes, and were from the beginning performing a stabilising role through military oversight of cease-fires and peace arrangements. Today, the missions revolve around a multiple of different areas and responsibilities, such as facilitating political processes, assisting in disarmament, and protecting civilians. The peacekeepers could be defined as actors, such as soldiers, police, and civilians, which purpose is to maintain and restore peace, and an operation often involves different kinds of personnel in order to manage the different aspects of the missions. A peacekeeping operation is distinguishable from an enforcement action by being authorised not solely by a UN decision, but together with the consent of the relevant parties, such as the host state of the operation. Moreover, the possibilities to use force are restricted, ordinarily to only include self-defence. There is no explicit legal basis for peacekeeping operations contained in the UN Charter, but rather a mixture of different proceedings regulated therein. The SC has the mandate to conduct the operations, and is not obliged to invoke a specific chapter when passing a resolution regarding a peacekeeping mission. Although, the power of the Council to adopt binding decisions is found within Art 25 of the Charter. The operations are established as subsidiary organs under the specific UN organ mandating the mission, which is either the SC or the GA. However, the SC has been the establishing organ of all peacekeeping operations since 1963. Furthermore, a special department of the UN Secretariat, namely the Department of Peacekeeping Operations (DPO), is managing the overall operation of peacekeeping missions, under the authority of the Under-Secretary-General. Below, there are the national military troops, which are under the disposal of the member states to the UN.

When mandating an operation, the Council has the authority to set up the specific orders for every operation, which differs depending on the nature of the conflict, and the needs of the current situation. Peacekeeping often involves several elements of peace and security measures,

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48 Simma et al Vol 1 (n 29) 1186.
49 Currently, there are 16 peacekeeping operations around the world with 122,788 individuals serving as personnel, including uniformed (troops, police and military observers), international and local civilian, and volunteers, as provided in UN Peacekeeping, ‘Peacekeeping Fact Sheet’ <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml> (latest access 18 April 2016).
50 This is envisaged in the ‘Report of the Secretary-General, ‘An Agenda for Peace’ (1992) UN Doc A/47/277, paras 20-22.
51 Verdirame (n 4) 196.
52 Peacekeeping Operations: Principles and Guidelines (n 2) 6-7; This document has been described as “the key doctrinal document” for peacekeeping by Bruno Simma in Simma et al Vol 1 (n 29) 1181.
54 Peacekeeping Operations: Principles and Guidelines (n 2) 22.
55 Simma Vol 1 (n 29) 1175.
56 Peacekeeping Operations: Principles and Guidelines (n 2) 13-14.
57 UN Charter (n 1) art 22 and 29 grants these organisational power to the SC and GA; Simma et al Vol 1 (n 29) 1183.
58 Simma et al Vol 1 (n 29) 1186.
where peacekeeping is only one part which specifically work with the preservation of peace, and helps with the implementation of peace agreements. Other elements involve conflict prevention, peace enforcement, and peace building, which for example involves promoting the rule of law and human rights, and assisting the host state in restoring its ability to maintain security and public order. There are three principles which have been part of, and still guides the UN peacekeeping operations, namely the non-use of force, except in self-defence and defence of the operational mandate, consent of the main parties to the conflict, and impartiality. Furthermore, the DPO stresses the importance of the operations to obtain legitimacy and credibility. The missions acquire legitimacy by being mandated by the SC, in combination with the operations being conducted with the assistance and funding of a broad range of different states. To uphold this perception, the personnel of the operations must respect and behave in accordance with the local customs, and the credibility of the operation is dependent on the successful conduct by the peacekeepers.  

As presented, the operations are mandated with a duty to reinforce peace and stability, and among that to uphold human rights. By violating these responsibilities through human rights breaches, the whole idea behind the operations is damaged, together with the trust and credibility of the UN. The power and influence of the UN and the peacekeeping missions, calls for accountability and controlling mechanisms to ensure that the powers are not abused, which is needed in order to establish the essential trust and legitimacy of the operations. However, the subsequent section will address the immunity of the UN and the peacekeeping troops, which complicates the notion of enforcement, and thereby also impedes the access to available remedies for aggrieved individuals.

2.2 Immunity of the UN

Art 105 of the UN Charter promulgates that the UN shall enjoy such privileges and immunities in the territory of its member states, which are needed in order for the fulfilment of its purposes. The regulation further states that similar privileges should be granted to the members and officials of the UN, in order to enable them to carry out the functions accorded to them on behalf of the organisation. Nevertheless, the provision is not exhaustive, and due to difficulties in interpretation it has been complemented with a convention, namely, the Immunity Convention, which states that immunity shall be granted to the UN, its properties and funds. Furthermore, personal immunity should also be conferred to representatives of UN organs, officials, and experts on missions authorised by the UN. According to the ICJ, the provisions in the Immunity Convention provides the UN with full immunity from any legal process in domestic courts, for acts attributable to the organisation. Regarding immunity of peacekeeping forces under UN command, theoretically they ought to be granted the same

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61 Accountability of international organisations for human rights violations (n 34) 6; Dannenbaum (n 3) 113.
63 Immunity Convention (n 32); Even though not technically a party to the Convention, the UN has stated that it is the applicable law on immunity on all situations where the UN is the ruling authority, as stated in Frederick Rawski, ‘To waive or not to waive; immunity and accountability in UN peacekeeping operations’, (2002) 18 Connecticut Journal of International Law 102, 109.
64 Immunity Convention (n 32) section 2.
65 ibid section 11, 17, 22.
66 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62, 66; The Convention has seemingly expanded the functional immunity granted in UN Charter (n 1) art 105 to include all acts, hence granting the organisation an absolute immunity character, as stated in Rawski (n 63) 111.
Functional immunity as other members of the UN staff. Practically, they often enjoy absolute immunity as a result of the status of forces agreements between the UN and the host countries of the military forces, which gives the contributing states exclusive jurisdiction to institute legal processes of their own military or civil personnel. It is important to annotate that immunity is not granted in order to absolve the troops of criminal liability; it rather safeguards the peacekeeping staff from any actions taken by the host state. The perception of immunity granted to peacekeeping forces has been similarly approved by the ICJ, which for instance has stated that the acts by armed forces performing a duty abroad is covered by absolute immunity. A problematic aspect in regards of such immunity as established in status of forces agreements, is that the sending states seldom prosecute its seconded troops for crimes committed in the host state.

An exception is provided in the Immunity Convention, which states that the SG has the discretion to waive immunity in cases when he, or she, deems that immunity would hamper the course of justice, and when it will not contradict the interests of the UN. There have been instances where immunity of UN personnel has been waived by the SG, for example in regards of rape and murder committed by a UN civilian police, or in cases regarding sexual abuse of children. This demonstrates a possible alternative, and it could be argued that it is a plausible option to secure the protection of human rights. Furthermore, to relinquish immunity in cases of human rights violations would enhance the legitimacy of the UN, and is needed in order to strengthen the trust among the local people living in areas where a peacekeeping operation is mandated. It would also facilitate the peacekeeping work, which is envisioned to improve the situation in the current area. On the opposite side, the waiving of immunity impedes the functionality of the UN, and could deter the will of member states to contribute peacekeeping forces. However, according to a report of the Council of Europe, IO’s are inclined to not relinquish their immunity in cases of controversial issues, decided in high positions regarding civil and human rights matters. This seems to have been the ordinary practice of the UN, which has declined to waive its immunity in several cases regarding its peacekeeping operations.

The far-reaching immunity of the UN could be displayed by the rulings of a case before a Dutch court in regards of the Srebrenica genocide, namely Mothers of Srebrenica et al v. the state of

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67 Functional immunity derives from the authority granted by the member states to the IO, as stated in Jan Klabbers, International Law, (OUP 2013) 98.

68 Lewis (n 62) 263.

69 Absolute immunity could be defined as immunity from all jurisdiction, regardless of situation, as stated in Shaw (n 17) 509.

70 UN Secretary-General, 'Draft Model Status of Forces Agreements for Peace-keeping Operations’ (1990) UN Doc A/45/594 (Model SOFA) art 47 (b); Model agreement with troop contributing states (n 59) art 25; Rawski (n 63) 109; see also Fleck who states that UN peacekeeping troops are accorded full immunity from host state jurisdiction, which is crucial for a successful mission, in Dietrich Fleck, ‘The legal status of personnel involved in United Nations peace operations’, (2013) 95 International Review of the Red Cross 613, 616-617.

71 Fleck (n 70) 616.

72 Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (judgment) [2012] ICJ Rep 99, para 9978.


74 Immunity Convention (n 32) section 2, 14, 20, 23; When immunity derives from the status of forces agreement, the sending state has the authority of waiving immunity. However, this only applies to military contingents, and no other peacekeeping personnel, as provided for in Model SOFA (n 70) para 27.

75 Rawski (n 63) 119-120.

76 ibid 127.

77 Accountability of international organisations for human rights violations (n 34) 12-13.

78 The “Srebrenica Massacre” caused the lives of 7000 Bosnian men and boys, due to the actions of the Serb paramilitaries as we can see in Stichting Mothers of Srebrenica v. the Netherlands (n 6) para 19.
the Netherlands and United Nations. The allegations were directed against the Dutch government and the UN for not preventing the gross violations, but the Dutch Supreme Court declined to review the case based on the rationale that the UN enjoys the most far-reaching immunity, thus cannot be subjected to review in a national court.\(^79\) Moreover, the Supreme Court stated that the UN Charter prevails over other international obligations, and that the actions taken by UN member states under the authority of a SC resolution, cannot be held under scrutiny by the court in question.\(^80\) The case was later brought before the ECtHR, which concurred with the decision of the Dutch court, and declared the application to be inadmissible.\(^81\) Furthermore, the Court stated that due regard must be taken to the role of the SC to restore international peace and security, and that the Convention cannot be interpreted in a way that would subject the acts of the SC under the jurisdiction of national courts without the consent of the UN.\(^82\) This demonstrates the range of immunity enjoyed by the organisation, and also the problematic aspects concerning the balancing of interests between the UN and individual rights.

As displayed by the ruling, the rights of individuals were set aside in favour of the effective functioning of the UN, and for the maintenance of peace and security. Conclusively, immunity in national courts is an essential part of the functioning of the organisation. However, it is arguably violating human rights concerning the right of access to an impartial tribunal.\(^83\) A further endangerment to individual rights is the current view that has been held in the case-law of ICJ, in which the ICJ stated that rules of immunity are only procedural, hence violations of jus cogens is not a question of norm conflict and would therefore not affect the application of immunity\(^84\), a finding which was adhered to by the ECtHR in Stichting Mothers of Srebrenica.\(^85\) Consequently, a breach of jus cogens norms does not preclude that immunity is granted in the specific case. Moreover, the possibility of the UN to waive its immunity cannot be relied upon, which contributes to the problem of victims being unable to seek redress.\(^86\) In case immunity is not waived, the ECtHR has stressed the need for an alternative forum for individuals to have their rights to a fair trial as provided in Art 6 ECHR.\(^87\) However, as will be further discussed in the paper, the available options for individuals to seek redress from the UN are limited, and arguably not reaching the threshold of being effective alternative means.\(^88\) Next section will address the accountability of the UN, which is a prerequisite in order to amend any violations. However, as will be presented, it is not completely clarified in regards of the organisation and the Blue Helmets.

\(^79\) Supreme Court of the Netherlands, Mothers of Srebrenica et al v. State of the Netherlands and United Nations, judgment of 13 April 2012 as quoted by the ECtHR in Stichting Mothers of Srebrenica v. the Netherlands (n 6) para 94.
\(^80\) ibid para 94.
\(^81\) Stichting Mothers of Srebrenica v. the Netherlands (n 6) para 169.
\(^82\) ibid para 154.
\(^83\) See for example Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 10; ECHR (n 7) art 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14; See also Accountability of international organisations for human rights violations (n 34) 9.
\(^84\) Jurisdictional Immunities of the State (n 72) paras 81-97.
\(^85\) Stichting Mothers of Srebrenica v. the Netherlands (n 6) paras 158-159.
\(^86\) Simma et al Vol 1 (n 29) 1185.
\(^87\) See Waite and Kennedy v. Germany [GC], no. 26083/94, ECHR 1999-I, para 68, in which the Court stated” For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention”.
\(^88\) See Accountability of international organisations for human rights violations (n 34) 12.
2.3 Accountability for wrongful acts

As demonstrated, the UN is a powerful organisation enjoying a wide-spread immunity, which is shielding it from national jurisdiction. However, when possessing such powers, it is crucial that the organisation can be held accountable for any omissions for which it is responsible.  

The first step to establish accountability is the prerequisite of having a legal personality, hence having rights and duties. A core question in this sense, is whether the UN is subject to human rights obligations, and as highlighted in the report by the Council of Europe, IO’s are generally not members of human right treaties. However, as stated by the ICJ, IO’s are subjects of international law, hence obliged to respect responsibilities under common rules of the global legal order. It has been argued that human rights are part of general rules of international law, and that it also forms part of customary international law as a result of being implemented in a great number of legal systems, hence binding IO’s. At the very least, the UN and other IO’s are bound by jus cogens norms, which constitutes an integral part of the global legal order, and which must be complied with under all circumstances. Arguably, the UN is also bound by human rights by reference to the principles contained in the Charter. In other words, if the UN acted without regard to human rights, this would not be coherent with the principles of freedom and justice.

In regards of the UN peacekeeping forces, international human rights law is considered to apply to them as well by virtue of being subsidiary organs of the organisation. The UN has implemented rules and standards regarding the conduct of peacekeeping personnel as a response to the alarming reports of human rights abuses, which have allegedly been committed by such forces. To cite but one example, rule number 5 of the ‘Ten Rules – Code of Personal Conduct for Blue Helmets’ compel peacekeepers to respect and adhere to human rights. One of the human rights violations most rigorously addressed by the UN in regards of Blue Helmets, is sexual exploitation and abuse, and it has been reported that the arrival of peacekeeping troops could increase, and have increased child prostitution.

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90 Accountability of international organisations for human rights violations (n 34) 6-7.
94 Verdirame (n 4) 75; Mégret, Hoffman (n 92) 318.
96 Clapham (n 11) 113.
99 A country study on sexual exploitation showed that child prostitution increased in 6 out 12 countries, as seen in Note by Secretary-General, ‘Promotion and Protection of the Rights of Children in, Impact of armed conflict on children’ (1996) UN Doc A/51/306, para 98.

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regarding sexual exploitation, presents the effort of the Council to eradicate the misconduct by UN peacekeeping personnel, and calls upon the member states and the SG to take adequate steps to prevent and combat sexual abuse. The resolution requires that member states conduct proper investigations and holds perpetrators accountable for violations, alongside securing that their military personnel are educated and well-informed of these matters. Furthermore, the resolution requests that the SG replace peacekeeping troops which are subject to allegations of sexual abuse, if the troop-contributing country has failed to take adequate steps to investigate such crimes.\(^{100}\) The UN has also through a resolution\(^ {101}\) implemented a strategy concerning remedial actions for victims of sexual abuse, committed by UN personnel. The strategy seeks to support victims in a timely manner, and includes assistance in form of medical care, legal services, and help with the processing of the psychological and social effects resulting from the abuses. Moreover, the strategy also involves assistance to children born as a result of exploitation.\(^ {102}\) However, the resolution clearly states that any support as provided for by the provisions in the strategy, does not purport the responsibility of the perpetrators, validate any allegation, or form part of redress for the violations.\(^ {103}\) Even though this strategy seeks to amend omissions caused by the UN, and implicates that the UN takes responsibility for such omissions, it does not entail the legal responsibility of the organisation. Hence, the perpetrators are not held to account, and the victims will not have any restitution. Furthermore, according to a report from 2015 by the Office of Internal Oversight Services (OIOS), the remedial actions have not been effective. Only a few victims have received help as a result of slow enforcement procedures, and from the absence of resources.\(^ {104}\)

Accordingly, the UN is bound by human rights to some extent, which means that they could also violate these responsibilities. However, as will be examined, there are difficulties in holding the UN to account for its omissions. In regards of accountability, the International Law Commission (ILC)\(^ {105}\) adopted the Draft Articles on the Responsibility of International Organizations\(^ {106}\) (DARIO) in 2011, which address the responsibility of IO’s when committing an international wrongful act.\(^ {107}\) According to the ILC, the articles are not part of primary international law, hence not binding on IO’s. Furthermore, it is expressed that the articles should be regarded as progressive development of law, rather than a codification of existent practice. Even though the articles only have the status as soft law, the texts of the ILC has great authority, and might contribute to the evolution of general customs.\(^ {108}\) According to Art 3 of DARIO, IO’s are responsible for every international wrongful act it commits. This general principle has been supported by the SG, stating that in line with state responsibility, which is generally accepted to apply to IO’s, violations attributable to the UN entails its international responsibility

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\(^{100}\) UNSC Res 2272 (11 March 2016) S/RES/2272.
\(^{102}\) ibid paras 1, 6, 8.
\(^{103}\) ibid paras 3, 14.
\(^{105}\) The ILC was created by the GA, and according to Art 1 of the Statute of International Law Commission (adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981), the Commission shall have as its object to codify and promote the progressive development of international law; see International Law Commission <http://legal.un.org/ilc/> (latest access 30 April 2016).
\(^{107}\) The articles apply to IO’s which are responsible for committing a wrongful act, as provided in ibid art 1.
\(^{108}\) Accountability of international organisations for human rights violations (n 34) 8.
and liability to grant compensation to victims.\textsuperscript{109} The ICJ has expressed a similar opinion regarding responsibility in an advisory opinion, stating that the UN may be obliged to bear responsibility for violations caused by the organisation, or by any of its agents acting in official capacity.\textsuperscript{110} To be regarded as having committed a wrongful act, Art 4 DARIO submits that two elements need to be fulfilled, namely that the act or omission is attributable to the IO under international law, and that it constitutes a violation of an international legal obligation. As expressed by the ICJ, IO’s are constrained by any responsibilities to which they are compelled to follow as parties to international agreements, rules under their constitutions, or any general rules of international law.\textsuperscript{111} Hence, the UN will deemed to have committed a wrongful act if it breaches any of its international obligations,\textsuperscript{112} for instance if the organisation breaches a SC resolution during a peacekeeping operation.\textsuperscript{113} Moreover, according to Art 6 DARIO, the acts of the organ or agents of an IO is attributable to that IO, irrespective of its position within the organisation. The article is also applicable to organs being seconded by a state,\textsuperscript{114} thus by being a subsidiary organ to the UN, the acts of peacekeeping troops are generally imputable to the organisation.\textsuperscript{115} Concerning the conduct of peacekeeping forces, Art 7 is specifically important, since it regulates that acts conducted by an organ of a state placed at the disposal of an IO, entails the responsibility of that organisation if it exercises “effective control” over the acts in question. According to the ILC, the criterion of effective control is specified as “factual control”, which is exercised over the specific conduct of the organ or agent seconded to the organisation. Moreover, the ILC has stated that due regard needs to be taken to the specific context and factual circumstances of the individual case, and consider whether the acts are attributable to the organisation or the contributing state.\textsuperscript{116} The UN Legal Council has expressed that an act of a peacekeeping force is in principle imputable to the organisation.\textsuperscript{117} This view was also reflected in the Report of the SG in 1996, stating that the UN bear responsibility for the actions of its forces as a consequence of its international legal personality, which grants it capacity to have rights and obligations under international law. However, it is dependent on the exclusive command and control of the UN, i.e. if effective command and control is conducted by a state during an operation, the state is responsible for any omissions.\textsuperscript{118} Moreover, the ILC has acknowledged that an act or omission may entail mutual responsibility of both a state and an IO, hence holding both entities to account.\textsuperscript{119}

The apportioning of effective control over peacekeeping troops is problematic in a sense that, even though the UN has exclusive control over the stationing of national troops, the contributing state still exercises criminal jurisdiction and control over disciplinary matters.\textsuperscript{120} Moreover,

\begin{itemize}
  \item \textsuperscript{109} UNGA 'Report of the Secretary-General’ (1996) UN Doc A/51/389, para 3.
  \item \textsuperscript{110} Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (n 66) 88–89, para 66.
  \item \textsuperscript{111} Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (n 91) 89–90, para 37.
  \item \textsuperscript{112} DARIO (n 106) 81, comment (2) of art 4.
  \item \textsuperscript{113} Verdirame (n 4) 98.
  \item \textsuperscript{114} DARIO (n 106) 86, comment (6) of art 6.
  \item \textsuperscript{115} Simma et al Vol 1 (n 29) 1184.
  \item \textsuperscript{116} DARIO (n 106) 85, comment (4) and (5) of art 7.
  \item \textsuperscript{117} ‘Unpublished letter of 3 February 2004 from the UN Legal Counsel to the Director of the UN Office of Legal Affairs’ in ILC ‘Report of the International Law Commission’ (3 May–4 June and 5 July – 6 August 2004) UN Doc A/59/10, 112.
  \item \textsuperscript{118} ‘Report of the Secretary-General’ (1996) (n 109) paras 6, 17–18.
  \item \textsuperscript{119} DARIO (n 106) 83, comment (4).
  \item \textsuperscript{120} ibid 86, comment (6) and (7) of art 7; Cedric Ryngaert, ‘Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the ‘Effective Control’ Standard After Behrami’, (2012) 45 Israel Law Review 151, 160; Sari (n 59) 159-160; See also Cedric Ryngaert, ‘The European Court of Human Rights’ Approach to the Responsibility of Member States in Connection with Acts of International Organisations’, (2011) 60 International and Comparative Law Quarterly 997, 1008.
\end{itemize}
states are often reluctant to abandon all power of its national contingents to the UN. Consequently, it is not completely clarified if it is the UN, or the troop-contributing states which have effective control over the troops. It is also questionable if the “effective control test” should be applied at all, since the attribution of conduct could be based on Art 6 of DARIO instead, which imputes responsibility to the UN based on the subsidiary nature of peacekeeping operations. Moreover, even though the UN has not been consistent on which ground it bases its responsibility, it seems decisive on its exclusive liability in regards of peacekeeping troops. The situation is further problematized by DARIO not being exhaustive, which for example is illustrated by the fact that the ILC do not clarify how effective control could be exercised in practice. Such uncertainties creates a problem of attribution, which leads to complications in regards of restitution for wrongful acts committed against individuals. In addition to the criticism of uncertainty regarding the notion of effective control, DARIO has also been blamed for not properly address the real impediments that individuals risk in their attempts to hold IO’s to account. However, even if DARIO would be amended by clarifying the precise scope of the articles, it still only possess the status as soft law. Thus, it is not legally binding, which renders the practice of the UN essential for clarifying the situation of accountability which, as demonstrated, is complicated in regards of Blue Helmets. Moreover, DARIO do not specify or regulate any accountability mechanisms, which are needed in order to provide remedies to victims. The available means of redress and settlement procedures as provided for by the UN will be examined in the next section, which seeks to demonstrate their lack of efficiency.

2.4 Internal means of dispute settlement

Besides ascertaining accountability for a violation, there must also be adequate means of enforcement mechanisms in order to enable individuals to seek redress. As previously mentioned, the sending states are responsible for enacting criminal proceedings if any of their national contingents has committed a violation. However, the contributing states do not always initiate proceedings, and victims only have recourse to a trial in a distant country abroad, which probably will not ascertain them with a sense of justice and security. Alongside criminal proceedings, compensation and redress is valuable for victims, and is also an important factor for the UN to demonstrate its responsibility and concern regarding violations committed by their personnel. In case of an international wrongful act committed of, and attributable to the UN, and immunity is not waived by the SG, there is a possibility of dispute settlement as provided for in section 29-30 of the Immunity Convention. The settlement only applies to private law disputes which, even though not explicitly defined by the UN, have been clarified by the SG to ordinarily revolve around third-party claims concerning compensation for personal injuries, deaths, or property loss, which for instance have been caused by UN peacekeeping operations. However, the notion of a private law dispute has been denied by the UN on several occasions regarding complaints by individuals. For example, the UN declined to review the petitions of 5000 applicants, whom allegedly been injured by a cholera outbreak caused by

121 Verdirame (n 4) 200.
122 Ryngaert 2012 (n 120) 160, 162.
123 ibid (n 120) 157.
124 Accountability for international organisations for human rights violations (n 34) 9.
125 Ryngaert 2012 (n 120) 168.
126 Verdirame (n 4) 208, 223.
127 Sweetser (n 89) 1661.
peacekeepers in Haiti, simply by stating that it did not revolve around a private law matter.\textsuperscript{129} According to Lewis, the situation in Haiti involves several elements which could be considered to be of a private law character, nevertheless, this was not the opinion of the UN.\textsuperscript{130} Consequently, the dispute settlement as provided for in section 29-30 of the Immunity Convention, is not an efficient, or reliable means of obtaining compensation. This perception is further reinforced by the circumstance that if there would be a dispute over any appropriate mode of settlement, the only option available under the Immunity Convention to the aggrieved party, is the possibility to ask for an advisory opinion of the ICJ.\textsuperscript{131} However, the request must be done through the means of the GA or the SC, hence individuals cannot get access the ICJ directly.\textsuperscript{132}

In accordance with Section 29-30 of the Immunity Convention, Art 51 of the Model-status-of-forces-agreement (Model SOFA)\textsuperscript{133} establishes that a standing claims commission should be created to specifically adjudicate situations where a peacekeeping troop, or a member thereof, is part of a private law dispute. The commission should exist of one member who is appointed by the SG, one member appointed by the local government, together with a final member jointly decided by the SG and the government. The procedure is conducted by the commission, and the final judgement shall be binding upon the parties. This creates a local dispute solution for any aggrieved individual, and since the commission is appointed by both the UN and the local government, the interests of both sides are represented, i.e. it constitutes an impartial procedure. Nevertheless, as acknowledged by the SG, this clause has never been used.\textsuperscript{134} Besides this procedure, the most commonly used internal dispute settlement in the context of complaints regarding Blue Helmets, is local claims review boards.\textsuperscript{135} In contrast to the standing claims commission, the procedure of the local claims review board is solely administered by the UN.\textsuperscript{136} Consequently, the process is not impartial. Moreover, the boards are ordinarily established during the missions, in which they are set up to investigate, accept or recommend a settlement of a dispute arising from a third-party claim regarding a violation committed by a peacekeeper. The board usually consist of three members of the mission staff, whom are in charge of important administrative tasks, for example the Chief Administrative Officer, the Legal Adviser, and the Financial Officer of the operation.\textsuperscript{137} When an agreement has been made regarding an economic settlement, and the offer of the financial sum is accepted by the claimant, the payment is made in return of the execution of a release form.\textsuperscript{138} This option of dispute settlement has been criticised on several grounds. For instance, it do not constitute a fair process, since the UN is adjudicating on a dispute to which it is also a party to, thus render it inconsistent with the requirement of being independent\textsuperscript{139}. Furthermore, the decisions of local claims review boards are not made publically, which is obstructing the fairness of the trial as

\textsuperscript{129}‘Letter from the UN Under Secretary General for Legal Affairs to Brian Concannon’ (Feb 1, 2013), <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> (latest access 5 May 2016); See Lewis (n 62) 269.

\textsuperscript{130} Lewis (n 62) 270.

\textsuperscript{131} Immunity Convention (n 32) section 30.

\textsuperscript{132} Mahnoush Arsanjani, ‘Claims Against International Organizations: Quis Custdiet Ipsos Custodes’ (1981) 7 The Yale Journal of Wold Public Order 131, 172; see also Lewis (n 62) 266.

\textsuperscript{133} Basic model for individual agreements between the UN and host states of peacekeeping troops, which outlines the core rights and obligations of such forces, as regulated in Model SOFA (n 70) para 1.

\textsuperscript{134} ‘Report of the Secretary-General’ (1996) (n 109) para 22; see also Dannenbaum (n 3) 126; Lewis (n 62) 268.

\textsuperscript{135} ‘Report of Secretary General’ (1996) (n 109) para 22.

\textsuperscript{136} ibid para 20.

\textsuperscript{137} ibid 13, ref 6.

\textsuperscript{138} ibid para 23.

\textsuperscript{139} An independent court is a requirement of most human rights treaties regarding the right to a fair trial, see for example UDHR (n 83) art 10; ECHR (n 7) art 6; The International Law Association has also raised concern over the objectivity and independence of the local claims board, as stated in the ILA Report 2004 (n 93) 39.
well. In addition, the boards are established only when there is need for it, which could create a possible gap concerning available complaints mechanisms when an individual requires it. The amount of complaints against the UN has also increased, which had led to delays in the settlement of disputes, and thereby resulted in many unresolved claims after the end of the peacekeeping missions. Moreover, the International Law Association (ILA) has stated that the local claims review boards could not be considered as an acceptable mechanism to protect the rights and interests of individuals. Another alternative is the mass tort claims, which is settled through negotiation with the host government, which is then responsible for distributing an agreed lump sum to the individual claimants as it considers appropriate. According to a report of SG, this approach has several advantages. These includes the avoidance of the costly and lengthy proceedings that would have to been initiated to handle all cases individually. Moreover, it would put a limit to the financial responsibility of the UN, since the settlement would be final in regards of all claims. Nevertheless, mass tort claims are mostly dependent on the willingness of the host government to advocate the petitions of its nationals, which is further problematized if the state does not have sufficient resources or adequate institutions in order to distribute the lump sum. The process is also highly dependent on the government’s willingness to allocate the sum fairly among its citizens, which is likely to be problematic in post-conflict states where the population may be divided or unstable.

In addition to the aforementioned modes of settlement, which seems to be marked with flaws and problems, third-party claims have further been restricted through Resolution 52/247, in which the GA has adopted principles regarding temporal and financial liability of the UN, in regards of third-party claims against acts committed during peacekeeping operations. The compensation provided for an injured person is restricted to only include economic losses, hence not including pain, suffering, or moral damages, and the amount of compensation is strictly determined to not exceed 50,000 U.S. dollars. Moreover, the time limit for claims of compensation is fixed to six month after the damage was discovered by the injured party, and not more than one year after the end of the mandate of the peacekeeping operation. However, the SG may under exceptional circumstances accept claims after the expiration of the deadline. Even though compensation may be rewarded, it is narrowed by these criteria, and the time limit may result in that redress are not provided at all. The resolution also concedes that liability will not be invoked in regards of acts attributable to UN peacekeeping troops, if such acts arise from “operational necessity”. These criteria set out a high barrier for applicants, and further complicates the procedure of obtaining redress. In addition, another obstacle to the effectiveness of the internal dispute mechanisms, is the scarce financial situation

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140 Dannenbaum (n 3) 126; Lewis (n 62) 271.
142 Dannenbaum (n 3) 127; Lewis (n 62) 271.
143 'Report of Secretary General’ (1996) (n 109) paras 26, 28; Lewis (n 62) 272.
144 ILA Report 2004 (n 93) 39.
145 ILA Report 2004 (n 93) 39.
146 Dannenbaum (n 3) 128; Lewis (n 62) 272-273.
148 ibid para 9 (a)-(b), (d).
149 ibid para 8. 
150 “Operational necessity” has been defined by the Secretary General to occur “where damage results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates”. Furthermore, the scope of the term must be decided by the force commander, as stated in ‘Report of Secretary General’ (1996) (n 109) paras 13-14. 
151 Res 52/247 (n 147) para 6.
of the UN, which directly affects the possibilities of redress, since is to be payed from UN funds.\(^{152}\)

Ombudsperson offices have been established as another means of internal mechanisms, in order to deal with the reported abuses and lack of transparency within the peacekeeping operations. Nevertheless, these institutions have not been effective due to the lack of material support and enforcement powers. Ombudsperson offices have only had the power to issue recommendations regarding any findings of violations or misbehaviour, hence not being able to guarantee any remedies to victims.\(^{153}\) Further internal supervising mechanisms within the organisation are the OIOS and the Conduct and Discipline Unit (CDU), which are organs empowered with internal oversight responsibilities. The OIOS is not endowed with any criminal jurisdiction, but can recommend sanctions such as the exclusion of personnel, or payment of remedies.\(^{154}\) The CDU is mandated to control the conduct of peacekeepers through the means of policies, training, and manuals for managing allegations of misconduct.\(^{155}\) These institutions are of great importance, but are not sufficient due to the lack of enforcement powers, which is a common trace regarding internal mechanisms of IO’s.\(^{156}\)

As presented, the UN is aware of, and is concerned over the omissions of its peacekeeping troops. The organisation stresses the need for enforcement mechanisms, and upholds policies of no-tolerance regarding abuses. However, the possibilities for individuals to obtain redress are very scarce, and not effective, and by only helping victims through remedial assistance will not end the harmful situations. The means of settlement procedures for third-party claims is either not used by the UN, or not effective due to complications or the lack of enforcement powers.\(^{157}\) The limited options of remedies are further complicated by the immunity of the UN and the peacekeeping troops, in combination with the uncertainties regarding the attribution of conduct. These difficulties have created severe gaps of human rights protection regarding victims of acts attributable to the UN. This grievous situation is especially precarious since the acts are committed by Blue Helmets, whom are missioned to specifically maintain and establish peace and security, alongside a duty of respecting and advocating human rights. As one of the main purposes of the UN, the maintenance of peace and security is damaged by the very guards of it, and in summation, all aspects of the situation are problematic. As will be further elaborated in the next chapter, the human rights gap existent within the UN have been even more impeded through the jurisprudence of the ECtHR, despite the Courts rigours attempts to safe-guard the Convention rights.

3. Jurisdiction of the ECtHR in regards of the UN

3.1 The overall jurisdiction of the Court

The ECHR was drafted as a response to the horrendous human rights violations which occurred during World War II.\(^{158}\) It has since its adoption in 1950, by the members of the Council of

\(^{152}\) Dannenbaum (n 3) 128; see also Christine Gray, ‘The Use of Force and The International Order’ in Malcom Evans (ed), *International Law*, 3rd edn, OUP 2010) 641.

\(^{153}\) Rawski (n 63) 116; For example, the Office of Ombudsperson, established by the UNSC Res 1904 (17 December 2009) S/RES/1904 as a complaint mechanism to which individuals could request to be delisted from the UN black-list of Al-Qaeda members, was criticised for having limited powers, as stated in Accountability of international organisations for human rights violations (n 34) 15.

\(^{154}\) Verdirame (n 4) 217.

\(^{155}\) Conduct and Discipline Unit ‘About CDU’< https://cdu.unlb.org/AboutCDU/OurMandate.aspx> (latest access 20 April 2016).

\(^{156}\) Accountability of international organisations for human rights violations (n 34) 17.

\(^{157}\) See ibid 18; Dannenbaum (n 3) 128.

\(^{158}\) Popovic (n 22) 4.
Europe, been continuously developed through the adoption of additional protocols and case-law. The ECHR has had a major impact on the implementation of human rights in the legislation and legal practices of its member states, and has been proclaimed as one of the most prominent human rights instruments in the world, which is foremost due to its enforcement procedures. The ECHR was established to adjudicate on human rights complaints of individuals within the jurisdiction of the ECHR, and its judgments forms a vital part of, and complements the Convention. The Court is not bound by its own decisions, nevertheless, it usually applies, and follows its own precedents in order to safeguard that legal certainty is sustained within its practice. The jurisdiction of the Court is regulated in Art 1 of ECHR, which secures the rights of all individuals within the territory of a member state. Furthermore, Art 32 proclaims that the Court only has jurisdiction to review alleged violations of a contracting state, and Art 34 further states that the Court may hear petitions from individuals, a group of individuals, or non-governmental organisations. Moreover, in order for the case to be examined on the merits, the claims are required to pass the admissibility criteria as set out in Art 35 of the Convention. Moreover, the Court is determining its jurisdiction in line with international law, thus meaning that it ordinarily base its jurisdiction on territorial grounds. However, the Court has in certain cases extended its jurisdiction to review complaints made by applicants within the extra-territorial jurisdiction of a member state. In Loizidou v. Turkey, the Court held that Turkey was responsible for the protection of individuals outside its national territory, namely in the area of northern Cyprus, since it exercised effective overall control through its military forces. The Court further stated that extra-territorial obligations also arise through the performance of direct, or local administrative effective control, besides from military control. The expanding interpretation of Art 1 by the Court demonstrates its concern to not allow any legal vacuum to occur, in regards of human rights protection within the territories of member states. This was for example the case in Ilascu and others v. Russia and Moldova, in which the Court applied two different standards to the question of jurisdiction, depending on the territorial relationship of the responding states in question. In the case at hand, two member states, Moldova and Russia, were held accountable for the same violation under the Convention regarding illegal detention and torture. Moldova failed to accurately fulfil its positive obligations to ensure the rights of individuals within its territory, and Russia was held accountable for not fulfilling its responsibilities in an area where it exercised effective control.
The approach of the Court to expand its scope of jurisdiction, was redirected to a more restrictive interpretation in Banković and Others v. Belgium and Others. The case concerned the NATO-bombings of Belgrade 1999 on the territory of Federal Republic of Yugoslavia (FRY), in which several member states to the Convention were involved. However, the applicants of the case were not within the jurisdiction of any of the accused member states in terms of Art 1, and the Court needed to determine whether the acts placed them within the jurisdiction of the respondent states. The Court reiterated that the ordinary meaning of jurisdiction, as termed in Art 1, is the same as in public international law, i.e. primarily territorial. In line with international law, it was further argued that the basis for exercising extra-territorial jurisdiction are delineated by the territorial rights of other states. Moreover, the Court conceded that extra-territorial acts only fall within the ambit of a Contracting state in exceptional situations, for example when a state, as a result of a military occupation, perform public powers normally exercised by the government of the occupied territory. Such an extraordinary situation was acknowledged by the Court in the current case. However, the ECtHR further held that the Convention was not designed to be applied all over the world, even in regards of the action of member states. Conversely, the ECHR operates in a “legal space” which the FRY was clearly not within. Hence, the applicants could not be considered to be within the jurisdiction of the respondent state.

Interestingly, the Court has acknowledged that jurisdiction arose from extra-territorial acts in the cases of Öcalan v. Turkey and Issa v. Turkey, which questions the decision of Banković. In the former case, jurisdiction was invoked when agents of the Turkish Security forces arrested a Kurdish separatist in Kenya. The Court contrasted the case from its reasoning in Banković by noting that the Turkish agents had effective control of the applicant since after his arrest and during his forced return home, he was under Turkish authority, hence under Turkish jurisdiction.

In the latter case, the Court took a more dynamic approach than it did in Banković, and expressed a more extended comprehension of the term “legal space” to comprise all territories where a contracting state exercises jurisdiction, including extra-territorial jurisdiction. In the examination of jurisdiction, the Court found that Turkey did not exercise “effective overall control” over the entire area by distinguishing from its reasoning in Loizidou. The Court also reiterated that Art 1 of the Convention cannot be interpreted to permit contracting states to commit violations, which they would not do on their own territory, in the territory of another state. The reasoning of the Court in these cases once again exhibit the concern to not allow for any gaps in the human rights protection of the Convention.
Furthermore, one could argue that it represents the importance of the interpretative function of the Court to be able to sidestep from decisions which could have had a negative impact on the human rights protection of the Convention. Conclusively, in regards of the acts of member states in other territories, it seems as the Court have taken an approach as to not allow for any unreasonable possibilities for member states to escape their ECHR obligations.

3.2 Jurisdiction in regards of IO’s

The above mentioned cases concerned acts committed by states, but the Court has also dealt with cases concerning the acts of IO’s to which a member state has transferred powers to. In the case of Matthews v. United Kingdom\footnote{Matthews v. the United Kingdom [GC], no. 24833/94, ECHR 1999-I.}, the applicant who was an inhabitant of Gibraltar had not been able to vote in the election of the European Parliament, since the respondent state\footnote{The EC Treaty was applicable to Gibraltar by virtue of the accession of the UK to EC (former EU), see ibid paras 11-14.} had not arranged for that possibility. The applicant claimed that her rights under Art 3 of Protocol 1, which oblige contracting states to hold free elections, had been breached. The Court stated that the legal acts of the European Union (EU, at the relevant time the European Community), which the respondent state had based it’s conduct on, cannot be subject to review before the Court because the organisation is not a contracting party to the Convention. However, the Court held that member states are still bound by their Convention obligations after the transfer of authority to an organisation, and that such transmission is compatible with the Convention only if the rights therein are still secured.\footnote{ibid para 32.} By virtue of these principles, the Court held that the respondent state was responsible to secure the rights of the applicant, since the effects of the EU instrument did not exempt it from complying with its obligations. Furthermore, this argument was due to the intention of the Convention to “guarantee rights that are not theoretical or illusory, but practical and effective”.\footnote{ibid para 34.}

In another case, Waite and Kennedy v. Germany\footnote{Waite and Kennedy v. Germany (n 87).}, the Court was adjudicating on the questions whether the applicants’ rights under Art 6 of the Convention had been violated by virtue of the respondent state granting immunity to an IO, namely the European Space Agency (ESA). The applicants brought a claim before a German Labour Court, alleging that the ESA had breached German labour laws, but the claim was held inadmissible because of the immunity enjoyed by the organisation.\footnote{ibid paras 15-17.} The Court stated that the immunity of ESA was a legitimate objective, and that immunity of IO’s is essential for their effective functioning, and to safe-guard them from the interference by individual governments. Furthermore, the Court stated that immunity of IO’s from the jurisdiction of states is a well-established practice, which attempts to strengthen the functioning of the IO and enhance international cooperation.\footnote{ibid para 63.} In determining the legality of the immunity under the Convention, the Court addressed the question of whether the applicants had access to “reasonable alternative means” to safeguard their Convention rights. The Court also acknowledged that when states accord certain competences and immunities to an IO, there may be complications regarding the protection of human rights. However, the Court further argued, in line with its judgement in Matthews, that the Convention is designated to secure practical and effective rights, and further stated that it would be incompatible with the object and purpose of the Convention, if member states were absolved from their...
responsibilities when attributing competences to an IO. In the case at hand, the Court found that the applicants had alternative means available to them, consequently there had been no violation of Art 6.

The responsibilities of member states in regards of acts conducted under the authority of an IO were further examined in Bosphorus v. Ireland. The applicant, an airline company, complained that an EU (at the relevant time European Community) sanctions regime, under which the Irish authorities had detained an aircraft leased by the company, had violated its right to property under Art 1 of Protocol 1 of the Convention. Since it was unquestionable that the act took place on Irish territory followed by a decision of an Irish governmental official, it fell within the jurisdiction of the respondent state in accordance with Art 1 of the Convention. The question before the Court was whether the acts, which stemmed from an obligation contained in an EU regulation binding on its member states, was coherent with the respondent states responsibilities under the Convention. Besides reiterating its reasoning in Waite and Kennedy, the Court elaborated on the responsibilities of member states acting in compliance with other international obligations originating from an IO. The Court stated that such conduct is justified as long as the IO in question protects human rights in an equivalent manner of the Convention, both regarding the substantive rights and the supervisory mechanisms. The Court further clarified that the protection only needs to be comparable to that of the Convention, because a requirement of identical protection could be harmful for the interest of international cooperation pursued by IO’s. Furthermore, such presumption of protection may be rebutted, if the Court finds that the protection in an individual case is “manifestly deficient”. In such a situation, the interest of international cooperation would be outweighed by the Convention. In the case at hand, the Court ruled that the protection of the EU was equivalent, thus no violation of the Convention was deemed to have occurred. The judgment provides that this test of “equivalent protection” only applies if the decision or act of an IO precedes state action. Thus meaning that an individual will not fall within the Art 1 jurisdiction of a member state regarding complaints of an IO, if the latter’s action was not intervened by the Member state. This reasoning by the Court reaffirmed its role as the guardian of human rights in Europe, and clearly represent its concern for the potential vacuum which could be created when member states are portioning out their sovereignty and powers to IO’s. It is also a plausible standard which encourage IO’s to strengthen their human rights protection and establish internal accountability mechanisms. However, the “equivalent test” as set out in Bosphorus is mainly applicable to private law disputes, and the Court has not ruled in accordance with this in cases concerning the UN-authorised peacekeeping missions, to which such a test could be improper because of the threat such claims could be to the effective functioning of such operations. As will be addressed in the next section, the Court has created a problematic approach regarding violations attributable to the UN, which could be harmful for the protection of human rights.

193 ibid paras 65, 67-68; see also Beer and Regan v. Germany [GC], no. 28934/95, 18 February 1999.
194 Waite and Kennedy v. Germany (n 87) paras 73-74.
195 Bosphorus v. Ireland (n 165).
196 ibid para 137.
197 ibid para 148.
198 ibid paras 154-156.
199 ibid paras 165-167.
200 Ryngaert 2011 (n 120) 1003-1004.
202 Ryngaert 2011 (n 120) 1016.
203 ibid 1006, 1009.
3.3 Jurisdiction in regards of the UN

In the joined cases of *Behrami and Saramti*\(^{204}\), the Court adjudicated on the applications of victims of KFOR troops\(^{205}\) operating under the deployment of UNSC Resolution 1244, which established an interim administration (UNMIK) in Kosovo to maintain and secure peace and security in the area.\(^{206}\) In *Behrami*, the applicant complained of a violation of Art 2 committed by French KFOR troops by virtue of their failure to defuse or mark unexploded cluster bombs, a task assigned to them within the area. It has caused the death of one of the applicant’s sons, and a serious injury of his other son.\(^{207}\) The applicant in *Saramati* alleged that KFOR troops were responsible for violating his rights under Art 5 in conjunction with 13, because of his extra-judicial detention. Furthermore, he complained under Art 6(1) for not having access to Court, and alleged that the respondent states had breached their positive obligations to secure the Convention rights for the people in Kosovo.\(^{208}\) The Court considered that the supervision of the demining of the bombs were attributable to UNMIK, and the extra-legal detention to KFOR.\(^{209}\) Since KFOR acted under lawfully delegated authority of the SC, and UNMIK was a subsidiary organ of the UN under the direct command of a Special Representative to the SG, in combination with the fact that the SC had retained “ultimate authority and control”, the Court argued that the impugned acts were attributable to the UN.\(^{210}\) The Court then continued with an examination on whether it was competent *ratione personae* to review the acts of the respondent states performed on behalf of the UN. In doing so, the Court addressed the relationship between the Convention and the UN Charter, and recalled that the Convention has to be interpreted in respect of any international agreement between the contracting states, which are all members to the UN, and must thusly have regard to Art 103 and 25 of the UN Charter. Furthermore, the Court stated that due regard must be taken to the special character of the UN as the main preserver of international peace and security, and the unique power of SC to fulfil that aim. By virtue of the role of operations established by SC Resolutions under Chapter VII of the UN Charter, and the reliance on member states for its effective functioning, the Court argued that the acts of member states covered by SC resolutions, cannot be subject to the inspection by the Court. The rationale behind this argument was, according to the Court, that such review would interfere with the effective functioning of peacekeeping operations, and more generally, with the main purpose of the UN. The Court further distinguished the case from its judgment in *Bosphorus*, by stating that in contrary to the case at hand, the omissions were attributable to, and occurred on the territory of the respondent state following a decision of the authorities. Furthermore, the Court argued that the present case was also distinguishable by virtue of the nature of the topical IO, and international collaboration as concerned for by the Court. On these grounds, the Court found that the case was inadmissible *ratione personae*.\(^{211}\)

This decision is problematic in several aspects, and has thusly been severely criticised. One of the opinions raised, is that the Court weakened the extra-territorial scope of the Convention in favour of collective security and the authority granted by the international community to the SC. Hence, the Court focused on the maintenance of the proper functioning of the UN instead of the effective protection of Convention rights.\(^{212}\) According to Forowicz, it could be argued

\(^{204}\) *Behrami and Saramti* (n 6).

\(^{205}\) International security force established by North Atlantic Agreement (NATO) under the delegated control of the SC, *ibid* para 135.

\(^{206}\) *ibid* paras 3-4.

\(^{207}\) *ibid* paras 5-7, 61.

\(^{208}\) *ibid* para 62.

\(^{209}\) *ibid* para 127.

\(^{210}\) *ibid* paras 120, 140-143.

\(^{211}\) *ibid* paras 146-152.

\(^{212}\) Watson (n 169) 587.
that the Court was treating the UN Charter as a constitutional instrument overriding the ECHR, hence treating it as a superior framework. Furthermore, the judgement gave reveal to member states to absolve from their Convention obligations in cases concerning actions involving a UN resolution, thus introducing an exception to its reasoning in Bosphorus. By distinguishing the judgement from Bosphorus based on the lack of a jurisdictional link and that the omissions were conducted in an international capacity by the UN, the Court created a gap in the Convention protection. This reasoning proposes that member states could confer all operational authority to an IO, and thereby avoid all responsibility for ECHR violations which their troops are committing in a non-member state. This is likely the human rights vacuum which the Bosphorus judgement tried to avoid.

The approach taken in Behrami and Saramati is more similar to the decision in Banković by concentrating on the attribution of conduct instead of jurisdiction, and also by applying a more restrictive approach regarding the scope of Art 1. The judgment at hand added to the confusion regarding extra-territorial application, which in Banković was narrowed to “a legal space”, and in Behrami and Saramati also added the criteria of attribution of conduct to the state in question. This approach has been criticised by Sari, arguing that the Court in effect disregarded the question of whether the applicants fell under the ambit of Art 1, which is a vital factor of the Court’s examination of attribution of conduct. By taking this approach, the Court circumvented the central issue of the case, namely whether the respondent states could be held responsible for the acts of its troops. Furthermore, the author argues that even though it is not likely that the Court would have found jurisdiction of the respondent states in the case at hand, the consequences of this judgment could be fatal if the approach is applied on all forthcoming cases concerning violations committed by peacekeeping troops. Sari further argues that in order to avoid this, the Court must examine every case separately, and consider whether the acts are committed in an international or national capacity, hence if it could be attributed to the UN or the state.

Furthermore, the Court’s decision has been criticised for not applying the “effective control” standard as subscribed for in DARIO, albeit it expressly invoked the Draft Articles in the judgment. Instead, the Court relied on the argument that the UN exercised “ultimate authority and control”, and by not examining the criterion of “effective control”, which has been the standard used by the ICJ in cases concerning state responsibility, the judgement is arguably not

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213 Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights (OUP 2010) 98.
214 Ibid (n 59) 169.
215 Watson (n 169) 587-88.
216 The Court invoked art 3 and art 5 (current Art 7) DARIO under Relevant law and Practice in Behrami and Saramati (n 6) paras 29-30; Ryngaert 2012 (120) 158; see also Mujezinović Larsen (n 218) 522; Lewis (n 62) 288.
in line with international customary law. According to some legal writers, this failure to apply international standards may have led to the wrong outcome since the UN was not exercising effective control over the conducts in question. This argument is based on the fact that the KFOR troops was not a peacekeeping organ, hence no subsidiary organ of the UN as UNMIK was, but only mandated by the SC resolution. Consequently, the acts of KFOR should in some opinions be attributed to NATO or the states. The Court also disregarded the question of mutual attribution between the UN and the sending states, which according to Larsen is surprising since the Court in other cases has been known to extend its interpretation regarding similar elements in order to ensure effective protection of the Convention rights. In conclusion, by applying a method inconsistent with the one in DARIO, the ECtHR further impeded the development of an international standard of responsibility of international organisations, which already is obscure.

In contrast to the criticism, Forowicz expresses a positive aspect concerning the judgment, namely that the reasoning of Court was made in order to safeguard the good functioning of the UN. Future peacekeeping operations could be hampered if the Court had decided that it could examine whether contracting states fulfilled their convention obligations during UN delegated missions, because of the probable outcome that states would be discouraged to contribute troops. Arguably, the restrained approach taken by the Court could be grounded in its previous case-law of Loizidou and Bosphorus. These decisions have been criticised for being controversial, which may have influenced the Court to take a more cautious approach in Behrami and Saramati. Moreover, the judgment could be considered plausible in a sense that it contributed to the coherent practice of international law on a regional level. Nevertheless, it was done on the expense of the effective functioning of the ECHR and individual rights.

The topical judgment diminished the effective functioning of the Convention, and was unsuccessful in finding a proper balance between maintaining the autonomy of the UN and the protection of fundamental rights. This consequence is particularly serious concerning that the Court had already tried to establish such a balance in its previous case-law, which the Behrami and Saramati judgment deterred from and made the legal situation more complicated. This delicate balance is a complex issue, which is still to be resolved by the Court. However, the human rights gap created in favour of collective security is critical for individuals seeking redress, whose possibilities are limited by the jurisdictional immunity of the UN, and lack of

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223 Watson (n 169) 589; Dannenbaum (n 3) 153; Verdirame (n 4) 111; Ryngaert 2012 (n 120) 170.

224 Council of Europe, European Commission for democracy through law (Venice Commission) ‘Opinion on Human Rights in Kosovo: possible establishment of review mechanisms’ (11 October 2004) Opinion nr 208, CDLAD (2004)033, para 79; This debate is out of scope of this paper, but for an extended discussion on the attribution in Behrami and Saramati see for example Dannenbaum (n 3).

225 Bell (n 215) 548.

226 Mujezinović Larsen (n 218) 524.

227 ibid 530; Sari (n 59) 170; Bell (n 215) 542; Forowicz (n 213) 104.

228 Forowicz (n 213) 98.


230 Forowicz (n 213) 101, 104.

231 Watson (n 169) 390.
efficient internal mechanisms within the organisation.\textsuperscript{232} The judgment also set the wrong standard for protection of human rights during peacekeeping missions, and has rendered it more difficult to review the acts of national troops being deployed by the UN. The decision to conclude that the acts were attributable to the organisation based on “ultimate authority and control”, and then declaring the case inadmissible \textit{ratione personae}, can in effect result in that the ECHR becomes inapt as a human rights mechanism during peacekeeping operations.\textsuperscript{233} The Court has continued to apply this reasoning in subsequent cases,\textsuperscript{234} which could be an indicator that the aforementioned scenario may be realised in the future. Another possible consequence is that the \textit{Behrami and Saramati} reasoning may influence other regional human rights courts in the same direction.\textsuperscript{235} In addition, if all acts committed by peacekeeping troops are attributed to the UN as a general rule, including harmful acts for which the national contingents have effective control, this may also have implications for the UN system. It could result in the organisation being unwilling to mandate any operations at all in fear of being held responsible for all acts committed by Blue Helmets.\textsuperscript{236} In conclusion, the \textit{Behrami and Saramati} decision has contributed to a critical situation which is in need of salvation, which will be the focal point of the next chapter.

4. \textbf{Proposed solutions}

Assuredly, the legal situation in regards of human rights violations committed by peacekeeping troops is highly problematic. The UN, having an outstanding position in the global community and being in possession of powerful functions, is in an ambiguous situation regarding accountability. In combination with its internal mechanisms, which is barely to consider as effective, and its far-reaching immunity, this creates a complicated situation for affected individuals. The problematic situation has further been impeded by the jurisprudence of the ECHR which has, in contrary to its previous case-law, made the protection of human rights less effective, and created a leap-hole for states to abandon their Convention obligations in regards of their contributed peacekeeping personnel. However, there are several suggestions as for the improvement of the situation, and this section will present some these proposals which are made by different reports and authors.

Legal scholars have argued that attribution of conduct in regards of peacekeeping forces, should be shared jointly by the UN and the contributing states in order to enable individuals to be granted more effective redress. By applying the proper “effective control” test as suggested by the ILC, this may assign responsibility where it is due and avoid the problems which occur when responsibility is only attributed to either of them.\textsuperscript{237} For instance, if responsibility is only attributed to the state it could result in a declined willingness to contribute forces in the future, and if only attributed to the UN, it could have the outcome of the organisation being hesitated to engage any missions at all.\textsuperscript{238} As presented in earlier sections, the situation regarding responsibility for peacekeeping troops is not completely clarified. The UN maintains it position of having responsibility for its peacekeepers, even though the sending states often retain some control in form of criminal jurisdiction and disciplinary measures. Nevertheless, the UN has

\begin{itemize}
\item \textsuperscript{232} Sari (n 59) 167.
\item \textsuperscript{233} Larsen (n 218) 531.
\item \textsuperscript{234} See for example \textit{Berić and others v. Bosnia and Herzegovina}, nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05, 25496/05, ECHR 2007; \textit{Gajic v. Germany}, no. 31446/02, ECHR 2007; \textit{Kasumaj v. Greece}, no. 6974/05, ECHR 2007.
\item \textsuperscript{235} Bell (n 215) 541.
\item \textsuperscript{236} ibid 544.
\item \textsuperscript{237} Leck (n 8) 364; Ryngaert 2012 (n 120) 166.
\item \textsuperscript{238} Leck (n 8) 364; Bell (n 215) 548.
\end{itemize}
acknowledged that situations may occur when states should be liable for omissions by their national contingents. This opens up for a possibility of shared responsibility, which would also allow the ECtHR to hold states responsible for the acts of their contributed peacekeeping troops, and thereby fill the human rights vacuum created. In order to make this possible, there must be clearer rules regarding mutual responsibility of peacekeeping troops, a method which could function as a compromise between different interests. Moreover, a clarification of the exact scope of effective control is needed, hence, the ILC must use its progressive function in developing and codifying legal practice.

One must keep in mind that DARIO is not legally binding, it is therefore vital that international bodies implement the rules, and that human rights courts such as the ECtHR apply this in a consistent manner in its case-law. The Court must also be more consistent in its practice in order to not impede the effective protection of the Convention rights, which calls for a clearer line between the balancing of interests regarding collective security and human rights. Arguably, the Court should apply its reasoning in Bosphorus on future cases concerning peacekeepers, since the judgement was designed to address the issue of state’s Convention responsibilities in relation to IO’s. However, this could be problematic if the UN is to be considered as having “equivalent protection”, since the internal mechanisms provided for by the UN has proven to be ineffective. Hence, it would not solve the primary issue of individuals being unable to seek redress, and the human rights gap would still exist. Another position is that in such cases, when the protection of the UN is not found to be “equivalent” of the Convention rights, the member states should be required to provide remedies. This is a plausible option in a sense that there are more enforcement mechanisms available for aggrieved individuals to hold states to account for violations committed by Blue Helmets. Regarding member states to the UN, this would consequently result in that the ECtHR would be applied as a subsidiary mechanism to the UN protection. However, the Behrami and Saramati judgement has proven that the Court is not ready to take on the role of reviewing the acts of peacekeeping troops. According to Brietagger, this result demonstrates that the responsibility must be entailed to the IO’s in question. However, this solution is also questionable, since, as discussed previously, appointing all responsibility to the UN could result in the hesitancy of the organisation to provide peacekeeping operations, which is harmful for the very maintenance of peace and security.

The Court in Behrami and Saramati was clear on that it cannot subject the SC to any review, however, an interesting development in the ECtHR case-law might open up for a possibility of indirect review. In Nada v. Switzerland, in which the respondent state was held accountable for violating the rights of the applicant by implementing a SC sanctions regime against him. The Court did not examine the hierarchal status of the UN Charter in relation to the ECHR, but addressed whether the respondent state have had some flexibility under the sanctions regime. Switzerland, which had a degree of flexibility, had failed to exploit it, which led to the finding of the Court that the state in question was in breach of the Convention. However, by applying this approach of indirect review to all cases concerning the UN, it could

239 Sari (n 59) 167-168.
240 Bell (n 215) 547.
241 Watson (n 169) 590.
242 Accountability of international organisations for human rights violations (n 34) 20; Breitegger (n 229) 182.
243 Ryngaert 2011 (n 120) 997.
244 Breitegger (n 229) 182-183.
245 Bell (n 215) 544.
246 Accountability of international organisations for human rights violations (n 34) 22.
247 Nada v. Switzerland [GC], no. 10593/08, ECHR 2012.
248 ibid paras 195-198.
have consequences such as UN member states being reluctant to obey their responsibilities stemming from a SC resolution in order to not violate their Convention obligations. This could be an endangerment to the effectiveness of the UN, and to the success of peacekeeping operations. Conversely, this could also lead to UN member states putting pressure on the organisation to make sure it has operative internal mechanisms. However, this solution would only be possible in situations where the member states have some flexibility, since as general rule, states cannot be held responsible by virtue of their membership to an IO alone. Nevertheless, as stressed by the ILA, IO’s should take precautionary measures prior to engaging in any operational activities, such as making an impact assessment of their intended missions.

Another important aspect to address is the notion of immunity. As mentioned previously, the immunity of the UN is far-reaching, and conversely to states, IO’s are not under the same political scrutiny and accountability mechanisms. In order to adjust the problems created by the immunity of the UN, a plausible option would be to delimit it, at least in cases of violations of jus cogens norms. Another solution is that the UN member states align their obligation to respect immunity of the organisation in coherency with the ECtHR reasoning in Waite and Kennedy, thus only uphold immunity if the UN provides a proper dispute settlement procedure. This would put pressure on the UN to ascertain available accountability mechanisms. Furthermore, a plausible option would be that the UN is more consistent in waiving its immunity in situations when there is no real risk of endangering its autonomy, in conjunction with a requirement to provide up-dated and clear policies regarding this practice. In any situation, the UN must provide an independent, transparent, and effective alternative mechanism if it does not waive its immunity. Lewis suggests that the UN should, as a general practice, put up a standing claims commission as provided for in Art 51 of Model SOFA, during every peacekeeping mission. In case a host government could not be present as required by the provision, an independent panel of jurists should be appointed. This is agreed upon by Ryngaert, who also argues that such a claims board could be established on a permanent basis in the UN headquarters.

The last proposal to be discussed is the possibility of UN to become a member of a human rights body. As addressed in earlier sections, the organisation is bound to respect human rights to some extent. Nevertheless, the exact scope of this obligation has not been defined precisely. By adhering to a human rights treaty, this would outline and clarify this scope, and furthermore it would subject the UN to the accountability mechanisms of an international body. For instance, a possibility would be if the ICJ altered its Statute of the Court to allow for IO’s to be parties to proceedings. This was addressed by the ILA 2004, but the commission of the report was not unanimous on the question on whether the amendment of the ICJ Statute would have any practical, or desirable effects. However, this might be a future trend as shown by the EU, which has proclaimed in Art 6(2) Treaty of the European Union that shall accede to the

249 Accountability of international organisations for human rights violations (n 34) 20-21.
250 ILA Report 2004 (n 93) 21.
251 Accountability of international organisations for human rights violations (n 34) 10.
252 ibid 11-12.
253 Ryngaert 2012 (n 120) 169.
254 Accountability of international organisations for human rights violations (n 34) 22.
255 Lewis (n 62) 332.
256 Ryngaert 2012 (n 120) 169.
257 Accountability of international organisations for human rights violations (n 34) 13.
258 ILA Report 2004 (n 93) 49.
ECHR, which opens up a possibility for individuals to apply against the EU in the ECtHR. Even though this option may not be possible in the nearest future, there are still other means for the UN to strengthen its protection of human rights. One measure is to reinforce its own internal remedy system concerning the allegations of peacekeeping personnel, for which the SG stresses the need of transparency and accountability as necessary components in the provision of justice for victims. Non-judicial internal remedies, such as Ombudsperson offices or independent inquiries, provide an important first step towards accountability and has necessary preventative effects. It is therefore vital that these measures are developed and amended in order to be more effective. Moreover, the strategies pursued by the UN to combat the abuses by Blue Helmets are important measures which needs to be applied continuously. The presented options represent a difficult discussion on how to ensure accountability for IO’s, and the UN in particular, and measures to amend the human rights gap. The importance is not only reflected in the needs of the protection of human rights, but would also increase the legitimacy and credibility of the UN, which is crucial for the effectiveness of peacekeeping missions.

5. Conclusion

This paper has examined the legal consequences of human rights violations committed by Blue Helmets, resulting from the immunity, the uncertainties of accountability, and the poor internal settlement procedures by the UN. In addition, the weakened protection by the ECtHR within the sphere of the Convention has also been noted, which has contributed to the creation of the human rights gap. The methods of the lege lata and the lege feranda have been used in order to answer the research questions posed, and the results will be presented subsequently. In regards of the legal situation of the UN and the SC, they have enormous influence in the international community, and play a vital role as the main preservers of peace and security. Peacekeeping troops are one of the core instruments used by the organisation in the preservation of a stable world order, and has thusly been developed in order to manage the different spectrum of conflicts threatening peace and security throughout the world. The special mandate of the UN and SC, and the essential operations of Blue Helmets are dependent on jurisdictional immunity in domestic courts. Even though the intention of immunity is to safeguard the autonomy of the organisation from undue pressure by states, it could have devastating consequences for aggrieved individuals by denying them access to court. The exception of waiving immunity by the SG is not generally used, even in cases of human rights violations. Hence, it is not a reliable option.

In regards of the accountability of the organisation, the UN and the peacekeeping troops are bound by human rights to some extent, although not explicitly defined. The organisation has acknowledged its partaking in violations in form of peacekeepers abusing local populations, which have resulted in the establishment of counter-actions, such as proclaiming its non-tolerance towards misconducts, and urging the contributing states to provide for training of their seconded personnel. The UN has also displayed its concern by providing remedial action to victims of abuses, albeit, it has not turned out to be effective, and does not invoke the responsibility of the organisation. Moreover, the attribution of conduct is problematic and unsettled, in spite of the attempts of the ILC to provide a codification in DARIO. The “effective control” test as provided for in Art 7 of DARIO, which has been acknowledged by the

262 ILA Report 2004 (n 93) 45.
263 Accountability of international organisations for human rights violations (n 34) 5-6.
264 See chapter 2, section 1.
265 See chapter 2, section 2.
international community, is not completely clarified. Furthermore, it is unclear if the application of the criteria would attribute conduct to the UN or the contributing states, since the UN insists on having exclusive control even though the states often maintain authority in form of criminal jurisdiction and disciplinary measures. Arguably, accountability could also be grounded on Art 6 DARIO, indicating that responsibility lies with the UN as a result of the Blue Helmets being subsidiary organs to the organisation, which renders the legal situation concerning responsibility a contentious issue.266

Even though accountability would be settled, there are still problems in form of dispute settlement procedures, which have been the next focal point of inquiry. The topical processes, such as the local claims review boards, have been severely criticised for not providing injured individuals with an effective alternative means of settlement, or for not being established at all. Moreover, the dispute procedures are restricted through criteria such as the requirement of a private law dispute in the Immunity Convention, a term which is not entirely defined, and by not applying to cases which arise out of “operational necessity” in terms of conduct of Blue Helmets. By also limiting the redress on a financial level, and by excluding injuries of a psychological nature, the options for individuals are being narrowed even further. Adequate control mechanisms, which must be in place in order to assure accountability, such as the OIOS or Ombudsperson Offices, has no enforcement power, but only “softer” ways of ensuring oversight services. In sum, the situation of the UN is highly problematic concerning human rights violations of peacekeepers, both in terms of immunity, accountability and dispute settlement procedures. This leaves aggrieved individuals in a precarious situation, with few options of redress, hence a situation which does not seem to be in line with the aims and goals of the UN.267

In addition to the legal circumstances created by the UN, the case-law by the ECtHR in regards of Blue Helmets has further impeded the situation, and also evaded the Courts previous attempts of addressing the balance between IO’s and human rights in an adequate manner. The Court, as the adjudicator of the human rights obligations contained in the ECHR, has developed its case-law regarding the jurisdiction of member states to expand outside the territorial boundaries of the Convention. This progressive approach has been further applied and developed to concern acts committed in relation to an IO. The reasoning in these cases, such as Loizidou and Waite and Kennedy, has been to exclude the possibilities of any leap-holes in the Convention, and to not allow for contracting states to abandon their human rights responsibilities when acting outside its territory, or when transferring sovereign powers and granting immunity to an IO. In Bosphorous, the Court developed the test of equivalent protection as a standard to be applied in order to safe-guard that an IO, to which a member state has conferred authority to, does not provide any lesser protection than the Convention. Even though the Court has deterred from its expansive approach on some occasions, as it did in Banković, it has proven its concern for the protection of human rights, and has thusly applied different approaches in subsequent cases to avoid gaps in the Convention protection. The developed case-law clearly demonstrates the important role of the Court as the protector of the Convention, and the nature of the ECHR as a living instrument.268

However, in Behrami and Saramati, the Court deviated from its established standards regarding IO’s. Instead of addressing the question of jurisdiction of the respondent states, the Court was more concerned of attribution of conduct of the acts in question, which it deemed to be imputable to the UN. Hence, it declared the case to be inadmissible ratione personae. This

266 See chapter 2, section 3.
267 See chapter 2, section 4.
268 See chapter 3, section 1-2.
approach was problematic in several aspects, and has opened up for the possibilities of contracting states to absolve from their Convention obligations in regards of their seconded peacekeeping troops. Even though the judgement is plausible by safe-guarding the functions of the UN and SC, it has placed the ECHR rights secondary to the interest of international cooperation and the maintenance of peace and security. Hence, the Court did not find a proper balance of interest between the IO and the ECHR, which it has tried to establish in its previous case-law. However, one might argue that it is a plausible decision, since the maintenance of peace and security is a necessary component to uphold human rights, but it was done on the expense of individual protection. The decision has also made the question of attribution of conduct even more complicated by not applying the criteria of effective control as proclaimed by the international community, and created a problematic precedent for future cases. In summation, this decision has contributed to the human rights vacuum already existent by virtue of the UN.\(^\text{269}\)

As to the last question regarding proposed solutions, there are numbers of suggestions. As proclaimed by several authors, the notion of mutual accountability would allow for both the UN and the member states to be responsible for omissions committed by peacekeeping troops, and avoid the problems which could result from only attaching responsibility to one of them. However, this measure is dependent on a clarification of the existing rules, in which the ILC has an important role in amending DARIO to become more comprehensive. The international community, including states, IO’s and human rights bodies must also be more consistent in its practices regarding accountability, since the Draft articles are not legally binding, thus cannot impute any responsibility. Besides ascertaining attribution of conduct, the internal remedies provided for by the UN must be altered in order to be effective, otherwise the topical problem of individuals not obtaining compensation will not be amended. In addition to enable compensation and the right to an impartial court, it is important that the current problem is addressed in a preventative perspective as well. The UN and the sending states must continue to educate the peacekeeping personnel regarding human rights, and provide training to thwart future violations. Moreover, the ECtHR should arguably take the role as a subsidiary mechanism to provide remedies and access to Court for those individuals within the boundaries of the Convention whom are hurt by peacekeeping forces, and are not able to obtain redress in national courts or from the UN. Nevertheless, this does not seem as a likely future with regard to the Courts decision in \textit{Behrami and Saramati}, and its failure to demonstrate its proper role as a human rights court in the international forum.\(^\text{270}\)

An alternative solution would be that the UN acceded a human rights body which could function as an accountability mechanism for aggrieved individuals, as a supplement to the inadequate internal procedures of the organisation. Such an accession would also clarify the precise scope of the organisations’ human rights obligations, which are not entirely outlined. The aforementioned report of the ILA\(^\text{271}\) was conducted 12 years ago, which indicates that it might be time for the international community to address the issue once again. Moreover, the ECtHR must, in line with its previous case-law, interpret the Convention in the light of present-day society. Consequently, the Court must address the pressing problem of human rights violations committed by peacekeeping troops, and provide a proper balance of interest. In order to maintain its role as the guardian of the Convention, the ECtHR should apply a more human rights oriented approach in cases concerning the UN to be able to adequately protect the fundamental rights contained in the ECHR.\(^\text{272}\) In conclusion, the factors presented, both in a

\(^{269}\) See chapter 3, section 3.

\(^{270}\) See chapter 4.

\(^{271}\) See page 29, ILA Report 2004 (n 93) 49.

\(^{272}\) See chapter 4.
UN perspective and regarding the ECtHR, have created a gap in the human rights protection in regards of violations committed by Blue Helmets. This is a multifaceted problem which does not entail a simple answer, and even though the presented solutions could provide some guidance for future amendments, the situation is dependent on a comprehensive assessment in order to find an adequate solution.
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