Cooperation of international organisations in peacekeeping operations and issues of international responsibility

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Chapter III: The Law Applying in Peacekeeping Operations

3.1. International organisations: Definition, classification, legal personality

This Chapter explores the law applying to the conduct of peacekeeping operations during deployment in a conflict situation. The multidimensional nature of current peacekeeping operations means that peacekeeping troops engage in a variety of different activities of which many involve direct interaction with the local population. It was established in the previous chapters that current peacekeeping doctrines emphasise the protection of individuals as well as their basic rights, particularly under human rights and humanitarian law. Nevertheless, violations of international law occur as the following examples from practice illustrate. In 1999, three British soldiers serving in KFOR were investigated for the murder of two men and the malicious injury of three others.[1] In the same year, German soldiers were attacked by two Serbs riding in a passenger car and they killed one and wounded another in self-defence. Several British soldiers were attacked by a Ministry of the Interior police man.[2]

In 2000, the US authorities conducted an investigation regarding abuse committed by members of the 504th Parachute Infantry Regiment which was deployed as part of KFOR. Whereas one Staff Sergeant was sentenced in Germany to life in prison for the murder and rape of an 11 years old girl, the classified report also contains the information that several other members of the platoon beat, threatened and illegally detained civilians in Kosovo; acts which were accepted as facts by both the prosecution and the defence.[3]

[1] N. Wood, 'Kosovo's love affair with Nato keeps tempers down', *The Guardian*, 4 December 2000, available at: http://www.theguardian.com/world/2000/dec/04/balkans1 .

[2] Annex, letter dated 17 June 1999 from the Secretary-General of the North Atlantic Treaty Organization addressed to the Secretary-General, Letter dated 17 June 1999 From the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/692 (1999), 4, para.1 (e).

[3] *Washington Post*, 'Ohio GI Gets Life Sentence for Killing in Kosovo', 2 August 2000; *Washington Post*, 'Army Report Says Soldiers Abused Civilians in Kosovo', 17 September 2000. The arbitrary detention of 43 Serbs was also alleged in a Letter by Yugoslavia to the Security Council, Letter dated 17 April 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/325 (2000), 1. In another letter Yugoslavia stated that three Serbs had been arrested and detained by KFOR in an its underground military headquarters, questioned and not be released for over 90 minutes, Letter dated 26 May 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/497 (2000), 1, para.2. See also the Newspaper articles of the NY Times and Washington Post, Annexes I and II to Letter dated 18 September 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/877 (2000), 2-3.

In Darfur, peacekeepers of UNAMID have been directly attacked and killed,[4] on 17 October 2012 a UNAMID patrol was attacked by unidentified armed men using mortars, resulting in the death of one peacekeeper and a further three being wounded.[5] In other instances, UNAMID convoys carrying civilian and military staff were attacked, leading to the death of one peacekeeper and to two peacekeepers being injured; another attacked was executed by armed men dressed in civilian clothes, also killing two peacekeepers.[6] In South Sudan, a Misseriya youth opened fire on a UNISFA convoy killing the Ngok Dinka Paramount Chief and a UNISFA peacekeeper, the assailant was killed in the ensuing exchange of fire and three other UNISFA peacekeepers were wounded.[7] Finally, regarding Mali, the report of the Secretary-General speaks of attacks on AFISMA and Malian Armed forces.[8]

The law applicable to the conduct of peacekeeping operations constitutes the primary rules upon which the law of international responsibility, as a system of secondary rules, is based. Therefore, any analysis of the international responsibility of a state or an international organisation requires an examination of the applicable primary rules. Consequently, this chapter examines the specific bodies of law applicable in peacekeeping operations and some of the intrinsic problems regarding their application.

An analysis of the law that applies in peacekeeping operations presupposes an examination of the notion of "international organisation" under international law as well as its special characteristics.

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[4] The Guardian, ‚Seven UN peacekeepers killed in Sudan ambush', 13 July 2013, available at: http://www.theguardian.com/world/2013/jul/13/seven-un-peacekeepers-killed-sudan .

[5] Report of the Chairperson of the Commission on the African Union-United Nations Hybrid Operation in Darfur, PSC/PR/2.(CCCXLVIII) (2012), 5, para.22.

[6] Report of the independent expert on the situation of human rights in the Sudan, Mohammed Chande Othman, UN Doc. A/HRC/14/41 (2010), 14-15, para.58. Yet another attacks on peacekeeping convoys led to several wounded and 11 dead peacekeepers, Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2013/607 (2013), 7-8, paras. 29-33.

[7] Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/294 (2013), 3, para.9. This incident actually resulted in the establishment of a joint investigation following the 374th meeting of the AU PSC composed of the Governments of Sudan and South Sudan, the AU and the UN, Report of the Secretary-General on the situation in Abyei, UN Doc. S/2013/450 (2013), 2, para.5.

[8] "These [extremist armed] groups are, however, increasingly resorting to asymmetric tactics, including suicide bombings. The Mouvement unicité et jihad en Afrique de l'Ouest and other extremist groups have carried out a number of suicide attacks throughout the north. On 30 March, a suicide bomber struck a Malian armed forces checkpoint in Timbuktu, followed a few hours later by an insurgent attack on the city. On 12 April, a suicide bomber detonated his explosive device in a marketplace in the city of Kidal, killing four AFISMA Chadian soldiers and injuring another three. On 4 May, a complex attack involving a vehicle laden with explosives, small arms fire by the passengers in the vehicle and a motorcyclist wearing a suicide vest targeted a Malian armed forces convoy north of Gao, killing two soldiers. On 10 May, another suicide vehicle-borne improvised explosive device attack took place at the entrance of the camp of the Niger contingent of AFISMA in Ménaka", Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/338 (2013), 5, para.19; 6, para. 24.

When the ILC started working on the Articles on the Responsibility of International Organizations, it had to define "international organisations" as a legal term for the purposes of the project. According to the Articles, the term international organisation refers to "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."[9] A similar definition is proposed in a book by Schermers and Blokker, which defines international organisations as "forms of cooperation founded on an international agreement usually creating a new legal person having at least one organ with a will of its own, established under international law."[10] The common feature in these various definitions is the criteria of "international legal personality" of international organisations.[11]

[9] G. Gaja, First Report on responsibility of international organizations, UN Doc. A/CN.4/532 (2003), 18. This definition was not changed in the following years, cf. International Law Commission, Report on the work of its sixtieth session (5 May to 6 June and 7 July to 8 August 2008), General Assembly Official Records, Sixty-third session, Supplement No.10 (A/63/10) (2008), 263. This definition is in contrast to the original proposition of Special Rapporteur Gaja which was as follows "an organization which includes states among its members insofar it exercises in its own capacity certain governmental functions", cf. H. G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 32, para. 29; Gaja, *ibid.,* 18. In contrast, the *Institut de Droit International* limited its definition "international organisations" in its Resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties" to "an international organization possessing an international legal personality distinct from that of its members" (Session of Lisbon – 1995), the resolution is available online at: http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf. It has to be kept in mind, as emphasized by the International Law Commission that "The definition of "international organization" given in article 2, subparagraph (a), is considered as appropriate for the purposes of draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following articles apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations", International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), General Assembly, Official Records, Sixty-fourth Session, Supplement No. 10, UN Doc. A/64/10 (2009), 44, para.1. The reason for this limitation was previously laid down in the report of the Commission in 2002 in which it said "The definition of international organizations (…) comprises entities of a quite different nature. Membership, functions, ways of deliberating and means at their disposal vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all intergovernmental organizations, especially with regard to the issue of responsibility into which States may incur for activities of the organization of which they are members. It may be necessary to devise specific rules for different categories of international organizations.", International Law Commission, Report on the work of its fifty-fourth session (29 April - 7 June and 22 July - 16 August 2002), General Assembly Official Records, Fifty-seventh session, Supplement No. 10 (A/57/10) (2002), 230, para. 470.

[10] H. G. Schermers, N. M. Blokker, *International Institutional Law* (2004), 26, para. 33. A very similar definition was proposed by Virally: "[u]ne organisation international est une association d'Etats établie par accord entre ses membres et dote d'un appareil permanents d'organes chargés de poursuivre la realization d'objectifs d'intérêts communs par une cooperation entre eux", M. Villary, 'Définition et classification des organisations internationals: approche juridique', in G. Abi-Saab (ed.), *Le concept d'organisation international* (1980), 45, 52. See generally on this issue, M. Mendelson, 'The Definition of 'International Organization' in the International Law Commission's Current Project on The Responsibility of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005), 371-389.

[11] One can argue that it is implied in the definition provided by Schermers and Blokker as "creating a new legal person" and "one organ with its own will" implies, the creation of a separate legal entity, Schermers, Blokker, *ibid*., 21, para. 29A; H. G. Schermers, N. M. Blokker, *International Institutional Law* (2011), 37, para. 33. The

International organisations can be subdivided into universal and non-universal organisations. The latter group includes regional, subregional and other organisations. Two criteria allow differentiating between these two types of international organisation; a criterion *ratione personae* and a criterion *ratione materiae*. Universal organisations are generally open to all states if not even to other entities. Universal also means that these organisations act in the interests of the international community of states, even if their competences are limited to a certain specific area.[12]

Universal organisations are consequently relatively homogenous in contrast to the heterogeneity of regional organisations whose conditions for membership and whose competences may be more diverse. It is also difficult to conceptualise regional organisations because the relations they entertain with universal and other regional organisations cannot be analysed from one point of view alone, but necessitate a comprehensive examination;[13] which is reaffirmed by the dynamic and evolving character of these relations.[14]

The definition of international legal personality is important as

> [r]esponsibility is at one and the same time an indicator and the consequence of international legal personality: only a subject of international law may be internationally responsible; the fact that any given entity can incur responsibility is both a manifestation and the proof of its international legal personality."[15]

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focus on legal personality, especially in the definition of the International Law Commission is due to its trigger mechanism of responsibility given that "responsibility under international law may arise only for a subject of international law", Gaja, First Report, *supra* note 9, 8-9. Thus, a breach of an international obligation entailing international responsibility presupposes international legal personality of the breaching entity.

[12] Cf. L. Boisson de Chazournes, *Les relations entre organisations régionales et organisations universelles*, Recueil des cours de l'Académie de La Haye, Volume 347 (2010), 79, 102. Virally prefers a categorisation according to « organisations universelles » and « organisations partielles » as the term "regional" would be misleading and imprecise, e.g. other factors may be also determinative as the basis for the existence of "regional" organisations, M. Virally, *L'Organisation Mondiale* (1972), 294-95.

[13] The different kinds of relations can include elements of cooperation or coordination, autonomy, supervision up to control, interdependence etc., Boisson de Chazournes, *ibid, 104.*

[14] *Ibid.*, 103. The emergence of regional organisations on the international level contains ramifications for the whole international order. An important point is the question as to whether the increased emergence of regional cooperation contributes to global governance or whether it weakens the coherence of the international order and its universalization (*ibid.*, 104); a trend which can be witnessed similarly in a purely legal sphere through the creation of new, not necessarily regional, legal institutions and the so-called fragmentation of international law. Equally the formation of regional alliances can be seen as an expression of strengthening the diplomatic, economic and other influence and weight of the concerned states at the international level, *ibid.*

[15] A. Pellet, 'The Definition of Responsibility in International Law', in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 3, 6; See also R. Kolb, G. Porretto, S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales. Forces de paix et administrations civiles transitoire*s (2005), 321 ; Schermers, Blokker (2011), *supra* note 11, 1008, para. 1583; N. M. Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law

The first time the question of the international legal personality of international organisations was dealt with by the International Court of Justice was in the advisory opinion submitted to the Court by the General Assembly concerning *Reparation for Injuries suffered in the service of the United Nations*. After an analysis of the intention of the founders as well as the text of the United Nations Charter, the International Court of Justice said

> the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.[16]

The Court then continued to conclude that "it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[17] In its advisory opinion concerning the *Interpretation of the Agreement of 25*

commission take international organizations seriously? A mid-term review', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011), 313, 316 ; J. Crawford, *Brownlie's Principles of Public International Law* (2012), 203; J. D'Aspremont, 'The Limits to the Exclusive Responsibility of International Organizations', in (2007) 1 *Human Rights & International Legal Discourse*, 217, 218; For a quite comprehensive examination of the question of legal personality and examples, cf. C. Eagleton, *International Organization and the Law of Responsibility,* Collected Courses of the Hague Academy of International Law, Vol. 076 (1950), 320, 326-45.

[16] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* (11 April 1949), 9. That international organisations possess international legal personality was already recognised earlier. In Oppenheim's treatise on international law, it was stated that "the conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. And since now the Family of Nations has become an organised community under the name of the League of Nations with distinctive international rights and duties of its own, the League of Nations is an International Person sui generis besides the several States. But apart from the League of Nations, sovereign States exclusively are International Persons – i.e. subjects of International Law", R. F. Roxburgh (ed.), '*International Law: A Treatise. Vol. 1 - Peace'* by L. Oppenheim (1920), 125, para. 63. But Oppenheim nevertheless held on to a state-centric system of international law with the League of Nations as the only exception: "Since the Law of Nations is based on the common consent of Individual States, and not of individual human beings, States solely and exclusively (apart from the League of Nations) are the subjects of International Law", *ibid.* 17-18, para. 13. The accompanying footnote qualifies the League as a bearer of rights and duties. The slow emergence of international organisations as legal persons on the international level is equally illustrated in Oppenheim's work, as the first edition of the Treatise omits the qualification in brackets regarding the League of Nations (1st edition, 18, para. 13).

[17] *Reparation, ibid.,* 9. Possession of international legal personality also entails an autonomous position of the international organisation towards its member States. The ICJ declared in this matter that the "object [of constituent instruments] is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals", *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion* (8 July 1996), para. 75; See generally, see T. Gazzini, 'Personality of International Organizations', in J. Klabbers, A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011), 33-40 and especially, 38. It is therefore also generally accepted that international organisations are bound by customary international law, C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (2012), 424. Several cases of human rights abuses in the past years committed by staff of international organisations also raise the question as to whether such independence is necessary or desirable, see generally, N. M. Blokker, 'International Organisations as Independent Actors: Sweet

March 1951 between the WHO and Egypt, the Court, while referring to the *Reparations* decision, elaborated upon this and commented that "International organizations are subjects of international law, and as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"[18], thus recognising explicitly that international organisations have obligations under international law and implicitly that those obligations can be invoked by an injured party.[19]

Nevertheless, the specific features of the international legal personality of international organisations have to be kept in mind while analysing their responsibility under international law. The International Court of Justice declared in its *Reparation* advisory opinion that the fact that an international organisation has legal personality is "not the same thing as saying that it is a State, which it is certainly not, or that its legal personality and rights and duties are the same as those of a state"[20] and "[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[21] In this sentence the Court developed two fundamental principles applicable to international organisations. First of all, the ICJ established the "principle of speciality" which is the limitation of the powers of an international organisation to those enshrined in its constitutive instruments.[22] The doctrine of "implied powers" is connected to the principle of specialty; the powers of international organisations on the basis of their constitutive instruments include these implied powers as well, which are necessary for an international organisation to exercise its functions.

Memory or Functionally Necessary?', in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 37-50.

[18] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion* (20 December 1980), para.37.

[19] The concept of an obligation comprehends the invocation of the non-respect of the obligation by the injured party, cf. B. Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-keeping Forces', (1976) 32 *Revue Egyptienne de Droit International*, 59, 374-5. The Court left open the extent and identity of norms by which an international organisation is bound, which has often been misinterpreted in practice, cf. B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen* (2006), 55-56.

[20] *Reparation, supra* note 16, 9.

[21] *Ibid.,* 10.

[22] P. Daillier, A. Pellet, *Droit international public* (2002), 593. The first time the ICJ explicitly referred to it as the "principle of speciality" was in the *Legality of the Use, supra* note 17, para. 25.
The notion of personality is merely descriptive, "neither rights nor obligations flow automatically from a grant of personality", J. Klabbers, *An Introduction to International Institutional Law* (2002), 57. Generally on the issue of international legal personality, see A. Clapham, 'The Subject of Subjects and the Attribution of Attribution', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowland-Debbas* (2010), 45, especially 47-53.

However, the attribution of responsibility in a specific situation has to be distinguished from the determination of the legal personality of the respective entity: "[S]eparate personality is [not] necessarily determinative of whether member states have a concurrent or residual liability."[23] On the basis of the fact that the UN and the four regional organisations which are part of this study possess international legal personality,[24] the following parts will examine the extent to which and in what ways they are bound by international norms during the deployment of peacekeeping operations.[25]

3.2. The applicable international law to peacekeeping operations of international organisations

1. Introduction: the dual nature of peacekeeping operations

In the case of peacekeeping and peace enforcement operations under the authority of international organisations, members of the military personnel are under "double control" as troop contributing states retain their control and authority regarding matters of discipline, finances, promotions and punishment, despite having transferred operational command and control over their troops for the conduct of the operation to the respective international organisation. Therefore, the "organic link" between the peacekeeping forces and their sending states is normally not completely dissevered and the troops remain bound by the international law obligations of their state even while exercising functions of the international organisation, as long as the former continues to exercise this form of limited control.[26] The fact that peacekeeping forces possess this dual nature does not have an immediate bearing upon the question of responsibility, as the attribution of conduct has to be distinguished from the applicable legal framework.[27]

The dual nature of peacekeeping operations results from the

> historical development of international law, its primary subjects are States. It is on States that most obligations rest and on which the burden of compliance principally lies. For example, human rights treaties, though they confer rights upon individuals, impose obligations upon States. If other legal

[23] Cinquième Commission [R. Higgins], 'The Legal consequences for member-states of the non-fulfilment by international organizations of their obligations towards third parties', (1995) 66 Part I Yearbook Institute of International Law, 249, 257.
[24] *Infra*, Chapter II.
[25] In practice, one would normally first of all examine the attribution of conduct to an entity, in order to establish its responsibility, and then seek to determine the infringed legal norm. However, as the methodology of this study is a top-down approach according to which the analysis of specific case-studies is at the very end, it appears preferable to analyse the applicable law in peacekeeping operations at this point.
[26] Kolb, Porretto, Vité, *supra* note 15, 252.
[27] As a set of secondary rules, the attribution of conduct is based on the violation of primary rules in the form of the applicable legal framework to peacekeeping operations.

> persons have obligations in the field of human rights, it is by derivation or analogy from the human rights obligations that States have.[28]

Thus, the emergence of international organisations led to the continuing transfer of competences from states to these bodies, but in the majority of cases, states retain some form of control as they are unwilling to completely transfer certain aspects of their sovereign rights. It is particularly in the context of their armed forces and the broader but related areas of defence and security that states are inclined to safeguard their sovereignty, and thereby also their national interests.

Consequently, it is not surprising that several arguments brought forward and theories developed to determine the law applicable to international organisations, particularly in the human rights law context, rely on derivation or analogy; binding the international organisation indirectly through the obligations of states. Other approaches seek to bind international organisations directly, on the basis of their own international legal personality. In addition to human rights law, international humanitarian law is also relevant insofar as it may be applicable during the specific context of a peacekeeping operation.[29] The next part examines the application of human rights law to international organisations.

2. Application of International Human Rights Law to International Organisations

1. International organisations as bound by the human rights obligations of their members

There are different doctrinal approaches used to argue for international organisations to be bound by the human rights of their member states' obligations. The majority of states have ratified international and regional human rights treaties, including the ICCPR, the ECHR, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[30] The above-mentioned doctrinal approaches seek to overcome the principle of relativity as it applies to international treaties on the basis of Article 34 VCLT and thus also for the various human rights

[28] J. Crawford, 'The system of international responsibility' in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility* (2010), 17, 17.

[29] Refugee law might also be relevant, but its scope of application is limited to people having fled their home countries and it contains obligations for these states on whose territories these people have fled. It could therefore only be applicable if people were to have fled to a country on which a peacekeeping operation is deployed and unless the peacekeeping operation in question were to administer this country, the peacekeeping operation could simply not be bound by the provisions contained of refugee law which presuppose the exercise of governmental authority, see Article 1 and, e.g. Article 18 of the 1951 Refugee Convention.

[30] Another relevant instrument is the Universal Declaration of Human Rights which although it is not a treaty has at least partially become customary international law, see, *infra* 3.2.2.4.

treaties of which states exclusive are members.[31] One doctrinal approach is to consider international organisations as successors or substitutes for the international human rights instruments to which their member states are parties.[32] In other words, the question is whether international organisations can be and are bound by the existing international obligations of their members or "whether, since they are separate subjects of international law, they may in principle disregard any such pre-existing obligations."[33] In its judgments in the cases of *Kadi* and *Yusuf,* the Court of First Instance ruled on this very specific question that

> unlike its Member States, the Community as such is not *directly bound* by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law[34] [Emphasis added].

The Court then concluded that the obligation to implement the Security Council Resolutions is not derived from the basis of general international law, but from internal EU law.[35] Another problem with

[31] As a fundamental principle of international law, it is also arguably in any case valid on a customary law basis.

[32] See, in this regard, T. Ahmed, I. de Jesùs Butler, 'The European Union and Human Rights: An International Law Perspective', (2006) 17 *The European Journal of International Law*, 771-801; Critical of this theory, F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations' in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 129, 132.

[33] O. De Schutter, 'Human Rights and the Rise of International Organisations : The Logic of Sliding Scales in the Law of International Responsibility in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51, 58.

[34] T-135/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005], para. 192; T-306/01, Ahmed Ali Yussuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, [2005], para. 242. The legal office of the United Nations held an identical view regarding the question as to whether the United Nations is bound by the *Convention Concerning Freedom of Association and Protection of the Right to Organise* (1948), Legal Aspects of the Establishment of a Trade Union at the Geneva Office of the United Nations, *United Nations Juridicial Yearbook* (1973), 171, 171, para.2. Interestingly, the Legal Office however, submits that the Universal Declaration of Human Rights is "an instrument that is, as far as relevant, applicable to the United Nations itself.", *ibid.*, 171, para.3. This *primary facie* contrary argumentation is arguably due to a different legal underpinning of the UDHR which was adopted as a Declaration by the General Assembly and is therefore also part of internal UN law. Generally, any binding effect upon the United Nations necessitates an act of implementation as is evident from Judgment no.15 of the United Nations Administrative Tribunal to which the memorandum refers, *Robinson v. the Secretary-General of the United Nations*, Judgment no. 15 (1952), paras. 11-12. Moreover, the right to assembly concerns the relationship between the United Nations and its personnel, the internal sphere of the organisation, which corresponds to the classic relationship between state and its citizens. It leaves unanswered the question of obligations of members of staff of the UN which includes peacekeeping forces toward third persons and thereby the external sphere.

[35] *Yassin Abdullah Kadi, ibid*., para. 207; *Ahmed Ali Yussuf, ibid.*, para. 257. To this end "the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was

the theory of succession is that it requires all member states of a given organisation to be bound by the very same obligations which are supposed to be imposed on the organisation; a requirement which becomes more and more theoretical, the more members a given organisation has.[36] Otherwise, there might be cases in which the nationality of the peacekeeper, be it for example French or Nigerian, would determine the applicable law. This theory is also problematic as it does not resolve the problem of international organisations not possessing territories of their own. [37]

Another attempt to make the obligations of member states applicable to international organisations is on the basis of the principle of *nemo plus juris transferre potest quam ipse habet*.[38] The idea is that "as no one can transfer more powers than he has, the Member States were not competent to transfer any powers conflicting with (…) treaties" concluded prior to the establishment of the international organisation.[39] As such international organisations never had the power to contravene the respective treaty or to act against it.[40] However, this argument is problematic for the following

established, to adopt all the measures necessary to enable its Member States to fulfil those obligations", *ibid.*, para. 204, respectively para. 254.

[36] P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (1998), 342; in favour of this opinion, see M. Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales ', in Société française pour le droit international/Institut International des droits de l'homme, Journée d'études de Strasbourg. La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme (2009), 7, 25-8 ; An opposing opinion was issued, e.g. by the Venice Commission, European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo : Possible Establishment of Review Mechanisms, Opinion no. 280/2004, CDL-AD (2004)033, 15, para.78.

[37] L. Cameron, 'Human Rights Accountability of International Civil Administrations to the People Subject to Administration', in (2007) 1 *Human Rights & International Legal Discourse*, 267, 279.

[38] Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales', *supra* note 36, 7, 24. He specifies that according to this theory an international organisation can either be directly bound or at least be obliged to exercise due diligence which implies an interdiction to put their member states in a situation contrary to their treaty obligations ; See also De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 62; Dold, *supra* note 19, 53-54; A. Peters, 'Article 25', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), The Charter of the United Nations. A Commentary. Volume I (2012), 787, 820 mn. 105.

[39] H.G. Schermers, 'The European Communities Bound by Fundamental Human Rights', (1990) 27 *Common Market Law Review*, 249, 251; H. G. Schermers, N. M. Blokker, *International Institutional Law* (1995), 988 § 1578. The very same opinion as applying in respect of the United Nations was expressed by Judge Fitzmaurice in his dissenting opinion to the *Namibia* Advisory Opinion: "[F]or derived powers cannot be other or greater than those they derive from.", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971)* (Judge Fitzmaurice, Dissenting Opinion), para. 65. In his dissenting opinion, Judge Fitzmaurice refers to the previous case-law of the Court, especially its decisions in the *Voting Procedure* and the *Oral Petitions* case, but the statement has nevertheless to be read with caution as all these cases concern powers of the United Nations as deriving from the League of Nations which is either, depending on one's perspective, a case of succession or a case of an indirect transfer of competences by the member-states – via the previously established League of Nations.

[40] The same position is taken by Tondini who equally writes that "it is logically sound (…) that an international organisation should be held accountable in respect of the violations of the human rights standards it promotes and universalizes.", M. Tondini, 'The 'Italian Job' : How to Make International Organisations Compliant With Human Rights and Accountable For Their Violation by Targeting Member States' in J. Wouters, E. Brems, S. Smis

reasons. First of all, it applies only when the respective international organisation is established after the ratification of the treaty in question. [41] Even more crucial is that this doctrine "should correspond to any international obligation of any Member State of the organisation, without it being necessary that all Member States are bound by the said obligation."[42] It is, as a result, not working in practice, especially for those organisations with an evolving membership such as the European Union.[43] Supporters of this theory argue, however, that international organisations – as entities of delegated power – cannot dispose of a decision-making authority to define autonomously their position regarding the application of general international law.[44]

In the *Reparations* case, the ICJ also held that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights." [45] Moreover, on the basis of the principle of speciality (*infra* 3.1.), there will be cases in which international organisations simply lack the competence to act in the field of human rights. Explicitly referring to the principle of speciality, the ICJ declared that "international organizations (…) do not, unlike States possess a general

(eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 169, 192-3. He criticizes, however that "this theory hardly explains the concrete level of protection to be granted and does not eventually solve *the problem*, i.e. the exercise of accountability, not simply the mere confirmation of its existence." (ibid., 193); For the latter, see also E. Abraham, 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo', (2002-2003) 52 *American University Law Review*, 1291, 1312-3; H. Ascensio, 'Le Règlement des différents liés à la violation par les organisations internationales des normes rélatives aux droits de l'homme', in Société française pour le droit international/Institut International des droits de l'homme, *Journée d'études de Strasbourg. La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (2009), 105, 119-20; L. Condorelli, 'Conclusions générales', in Société française, *ibid.*, 127, 129.

[41] Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales', *supra* note 36, 7, 25.

[42] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 64; also F. Naert, 'Binding International Organisations to Member State Treaties', *supra* note 32, 129, 134; Forteau, *ibid.*, 7, 25. Forteau also points out that this theory has not been accepted in jurisprudence so far (*ibid.*, 24).

[43] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 65-66. It is also argued that the principle of relativity of treaties as enshrined in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Article 34 and also Article 35) finds itself in tension with the application of this principle. However, as rightly pointed out by Klein, this Convention applies only to international agreements concluded between international organisations and states or concluded between international organisations, Article 2 (1) a. of the Convention; Klein, *supra* note 36, 344. The Convention leaves, however, unaffected any customary rule as pertaining to the principle of relativity of treaties as applying to international organisations; furthermore it has not (yet) entered into force.

[44] Klein, *supra* note 36, 346; Also B. Rouyer-Hameray, *Les compétences implicites des organisations internationales* (1962), 12 ; also N. B. Krylov, 'International Organizations and New Aspects of International Responsibility', in W. E. Butler (ed.), *Perestroika and International Law* (1990), 221, 221-2; This view seems to be based on the view that sovereignty corresponds to "freedom within the law (including freedom to seek to change the law", cf. J. Crawford, 'Sovereignty as a legal value', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 117, 122. Also for a broader discussion of sovereignty of international organisations, M. Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', (1995) 36 *Virginia Journal of International Law*, 53, 61-65. However, as an actor in its own right under international law, it appears questionable why an international organisation could not persistently object to be bound by a specific rule.

[45] *Reparation, supra* note 16, 8.

competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[46] Finally, this theory is completely impractical in its concrete application, as the nationality of a peacekeeper would also determine the applicable law.[47]

The problems related to these particular theories support the analysis of the obligations of international organisations by human rights obligations through other methods.

2. The specific case of accession to human rights treaties

The accession of international organisations to human rights treaties[48] also raises its own problems.

The absence of a real territorial basis, and of an administrative structure similar to governmental structures and the general limitation of powers of international organisations to those necessary for the fulfillment of their mandates, renders the conformity of action by the international organisation with conventional requirements very difficult, if not impossible.[49] It means that "whereas the organisation may be obliged to adopt certain measures, to the extent that human rights treaties impose certain positive obligations, it would only have to do so to the extent that this does not lead the organisation to go beyond the principle of speciality."[50] It is debated in the doctrine what kind of obligations an accession to an international human rights treaty would entail for an international organisation.

On the one hand, it is suggested that accession to an international human rights instrument would not lead to a transfer of additional powers to the international organisation, however it could affect

[46] *Legality of the Use, supra* note 17, para. 25
[47] Cameron, *supra* note 37, 267, 279.
[48] So far, it is only possible for the European Union under the European Convention on Human Rights. It is suggested that "[t]he fact that human rights conventions are not open to international organisations shows the persistence of the conviction that international organisations are not concerned by the questions of violations of fundamental rights of individuals", L. Condorelli, 'Le Conseil de Sécurité, les sanctions ciblées et le respect des droits de l'homme', in L. Boisson de Chazournes, M. Kohen (eds.), *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowland-Debbas* (2010), 73, 75.
[49] Klein, *supra* note 36, 319. This is also an argument raised by the UN against its non-accession to the Geneva Conventions, notwithstanding the question of the possibility for non-states to accede to these instruments (*ibid.*). A specific argument raised by the UN is its incapacity to satisfy the requirement as regards the repression of grave violations of the Conventions, however as argued also by other authors, the United Nations could establish a judicial organ charged with that function similarly to the ICTY and the ICTR (*ibid.*, 320); See R. D. Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', (1995) 17 *Michigan Journal of International Law*, 53, 68-9.
[50] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 114. On this specific point see also, *infra* 3.2.2.6.

the exercise of any powers which had been attributed by the states to the extent that the organisation has positive obligations to protect the human rights which are enshrined in the treaty. The other view is that due to the principle of specialty, the accession to human rights treaties would only impair negative obligations on the acceding international organisation as it should not lead to the transfer of additional powers to the organisation.[51] The argument made for the second view is that otherwise the international organisation would exercise powers which were not attributed to it, and that it should also only use the powers for the purposes for which they have been attributed. According to this view, the accession is equivalent to a change of the mandate of the organisation.[52]

In the near future, the EU will accede to the ECHR and it can be expected that the jurisprudence of the European Court of Human Rights will shed some light on these briefly mentioned and other related issues, (see also *infra* 3.2.2.6.2.2.).

3. Human rights obligations of international organisations as part of general international law

Apart from the theories which rely on binding international organisations through the obligations of their respective members, international organisations can be bound directly by human rights obligations as part of general international law. This includes, "general principles of (international) law" as well as customary international law. In contrast to the previously analysed theories, this approach has the advantage that the respective norms are directly applicable and that there is no need to use analogies or other legal methods. In contrast to the Bulletin on International Humanitarian law issued by the Secretary-General, there is not such a bulletin on human rights law which would have also facilitated the identification of certain human rights norms which could be applicable to peacekeeping forces.[53]

[51] The European Convention, The Secretariat, Report from Chairman of Working group II "Incorporation of the Charter/accession to the ECHR to Members of the Convention", CONV 354/02 (2002), 115.

[52] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 115-6; Similarly, while referring explicitly to the EU, A. von Bogdandy, 'The European Union as a human rights organization? Human rights and the core of the European Union', (2000) 37 *Common Market Law Review*, 1307, 1317. One has, however, to keep in mind that In order to accede to a Human Rights treaty, the international organisation does not need to possess competence in this specific area. Moreover, this argumentation fails to oversee the principle of implied powers as applicable to international organisations.

[53] K. Grenfell, Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 57, 58. Statements by political or political bodies are limited to human rights obligations of States participating in a UN operation, *ibid.* In the "Brahimi Report", it was held that the carried out peacekeeping missions would have been easier with a "common United Nations justice package" consisting of an "interim legal code", Panel on United Nations Peace

4. Human rights obligations of international organisations on the basis of customary international law

In order for a customary law norm to exist, there has to exist state practice and the belief that certain conduct is obligatory due to the existence of a rule of law requiring this very conduct (*opinion iuris sive necessitatis)*.[54]

In the Nicaragua case, the ICJ held that

> this opinion juris may, though with all due caution, be deduced from, inter alia (…) the attitude of States towards certain General Assembly resolutions (…) The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[55]

Specifically in the field of human rights, it has also been suggested that official declarations and participation in the negotiation of human rights conventions should be included as practice of States.[56] In favour of this proposition, it is suggested that one can hardly distinguish between the state practice and *opinion iuris*; the relevant state practice is legally significant as testifying to the emergence of a rule and the *opinio iuris* can only be detected and recognised on the basis of the state practice.[57]

Operations, Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 and S/2000/809 (2000), 14 para. 81.

[54] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands),* Judgment (20 February 1969), para. 77.

[55] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment (27 June 1986), para. 188. One has to note, however, that in this case, the Court was dealing with the identification of a negative customary law obligation: the prohibition of the use of force (*ibid.*), for which the examination of *opinio iuris* is more important as state practice cannot consist in active acts.

[56] Cf. also, for a similar theory, Tondini, 'The 'Italian Job': How to Make International Organisations Compliant With Human Rights', *supra* note 40, 169, 191-192.

[57] De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 69. As explained by Dupuy: "La seconde observation est celle de l'interdépendance manifeste sinon même de l'union inextricable entre l'un et l'autre élément [du droit coutumier]. La pratique n'est, dans la grande majorité des cas, qu'abstraitement et artificiellement distinguable de l'*opinio juris.* Elle en est, *elle-même*, la manifestation tangible : l'élément matériel n'est pas un préalable à l'apparition de l'élément psychologique parce que, lui-même, il constitue la preuve de la conviction juridique des Etats. La coutume est l'expression d'une *opinio juris* manifestée dans et par une pratique", P.-M. Dupuy, *L'unité de l'ordre juridique international*, *Cours général de droit international public*, Recueil des cours de l'Académie de La Haye, Volume 297 (2002), 9, 166. In the Nicaragua case, the ICJ effectively accepted votes and statements made by states in the GA condemning the use of force as both state practice and *opinio iuris*, H. Charlesworth, 'Law-making and sources', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 187, 194. In the end, as Charlesworth asserts, the definition of *opinion iuris* is circular as "it seems to require that states believe (mistakenly) that something is already law before it can become law", *ibid.*

Besides, human rights are traditionally concerned with the relationship between states and their nationals. The international community, and thereby the other states, have therefore normally reacted less frequently to violations of these rights than to violations of rules directly pertaining to inter-state relations as the latter directly touch upon their interests.[58] This argument might have lost a degree of its pertinence due to the development of the concepts of humanitarian intervention and the responsibility to protect.

Other authors argue for a shifting of the importance of state practice or *opinio iuris*; the more strongly one is identified, the weaker the other may be.[59]

Several human rights have without doubt a customary status, such as the prohibition of torture or prolonged arbitrary detention. Equally, the UDHR, or at least part of it, has been transformed into customary law.[60]

The proof of an existing customary norm on the basis of state practice and *opinio iuris* is nevertheless problematic in the context of the present study. As human rights primarily address states and have attained customary status because of State practice and *opinio iuris*, "the question (…) remains whether an international organisation can be bound by customary norms, which have become binding because of *State* practice."[61] One can argue that the substance of each customary norm indicates its addressees; human rights law was conceived as binding states in the exercise of their power towards their citizens so that it would be – following this doctrine – not applicable to international organisations which are not in direct contact with human beings.[62] In response, it can be said that this doctrine blurs the difference between customary and treaty norms, as it applies the principle of relativity de facto to the formation of customary law. It therefore appears that, in

[58] O. Schachter, *International Law in Theory and Practice. General Course on Public International Law*, Recueils des cours de l'Académie de La Haye, Volume 178 (1982), 12, 334. Schachter also writes that "Arbitral awards and international judicial decisions are rare except in tribunals based on treaties such as the European and Inter-American courts of human rights", *ibid.*; Similarly, C. Tomuschat, *Human Rights. Between Idealism and Realism* (2003), 34. He adds that in the field of human rights, the identification of certain basic, fundamental rights as customary law "is not so much based on actual stocktaking of the relevant state practice but rather on deductive reasoning: if human life and physical integrity were not protected, the entire idea of a legal order would collapse", *ibid.*, 35.

[59] F. Kirgis, 'Customs on a Sliding Scale', (1987) 81 *The American Journal of International Law*, 146, 149.

[60] E. De Brabandere, 'Human Rights Accountability of International Administrations : Theory and Practice in East Timor' in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 331, 336; J. Wouters, E. Brems, S. Smis (eds.), 'Introductory Remarks', in J. Wouters, E. Brems, S. Smis (eds.), *ibid.*, 1, 6; Tomuschat, *supra* note 58, 4.

[61] Brabandere, *ibid.*, 331, 337; B. Fassbender, 'Sources of human rights obligations binding the UN Security Council', in P. H. F. Bekker, R. Dolzer, M. Waibel (eds.), *Making Transnational Law work in the Global Economy* (2010), 71, 79-80.

[62] A. Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen', (1977) 37 *Heidelberg Journal of International Law*, 107, 110-13.

practice, customary law is binding on all legal entities, including international organisations as long as there is no formal objection.[63]

Moreover, evolutionary interpretation has always been used in international law and it is now accepted that international organisations are bearers of rights and obligations under international law and this includes customary international law.[64] The fact of their coming into being later than states, and their resulting non-participation in the formation of certain rules, should not be decisive.[65] Any newly created state, such as the recent example of South Sudan shows, would be deemed bound by the whole body of customary law and there is no reason why it should be different for an international organisation.[66] The only legitimate argument to restrict the application of customary human rights law to international organisations cannot be derived from the customary nature of the norm, but is based on the principle of speciality; international organisations operating in specific fields which do not come into contact with individuals may not be bound by human rights. If their constituent instruments do not contain competences to operate in such a field,[67] the international organisation will be prevented to act[68] and it is on the basis of these internal rules of

[63] Cf. De Brabandere, 'Human Rights Accountability of International Administrations', *supra* note 60, 331, 337; C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law*, Recueil des cours de l'Académie de La Haye, Volume 281 (1999), 9, 134-135 ; see also B. Kondoch, 'Human rights law and UN peace operations in post-conflict situations', in N. D. White, D. Klaasen (eds.), *The UN, human rights and post-conflict situations* (2005), 19, 36-41; V. Gowlland-Debbas, The Security Council and Issues of Responsibility under International Law, Recueil des cours de l'Académie de La Haye, Volume 535 (2012), 185, 366; F. Naert, *International Law Aspects of the EU' Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights* (2010), 394; A similar opinion is expressed by F. Morgenstern, *Legal Problems of International Organizations* (1986), 32.

[64] Cf. equally *Interpretation of the Agreement, supra* note 18, para.37.

[65] On the "modernisation" and application of customary human rights law to international organisations in light of the fact they did not participate in the development of previously existing customary norms, cf. I. R. Gunning, 'Modernizing Customary International Law: The Challenges of Human Rights', in (1990-1991) 31 *Virginia Journal of International Law*, 212, 213, 221-27. Alvarez also points out – correctly – that the formation of customary law has be transformed and institutionalised due to the participation of international organisations, J. E. Alvarez, 'International Organizations: Then and Now', in (2006) 100 *American Journal of International Law*, 324, 332.

[66] Against such a view, J. Klabbers, 'International Institutions', in J. Crawford, M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 228, 235.

[67] The same argument is also made by G. Porretto, S. Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organizations*, Research Paper Series No.1, CUDIH, Geneva (2006), 45-46, and N. Quénivet, 'Human Rights Law and Peacekeeping Operations', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 99, 125. Cf also F. Mégret, F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', in (2003) 25 *Human Rights Quarterly*, 314, 317. For a contrary view, Peters, 'Article 25', *supra* note 38, 787, 824 mn. 119. Clapham and Cameron assert likewise that customary (human rights) law binds international organisations on the basis that international organisations are bearers of rights and obligations, combining thus legal personality with the principle of specialty, A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), 69; Cameron, *supra* note 37, 267, in particular 275-277.

[68] Of course, there would always be the possibility of acts *ulta vires* by an agent or organ of the organisation.

the organisation that human rights law would not be wholly or partially applicable.[69] In other words, it is argued that, human rights can only bind an organisation so far as it has relevant competences.[70] It also has to be strongly emphasised that in peacekeeping operations another limitation arises in the form of the mandate handed out by the Security Council. More broadly, and taking into account domestic legal theory, this interpretation also conforms to the idea of "*Funktionsnachfolge*."[71] Another approach in doctrine relies on an argument similar to the transfer of power of states to international organisations, stating that customary law applies to all subjects of international law, and consequently to international organisations which possess international legal personality.[72]

Moving away from the application *in abstracto* of human rights law, it is noted that an international organisation is only bound in a specific situation to the extent that the organisation "exercises

[69] As the articles on the responsibility of international organisations illustrate rules of an international organisation may have an external effect (*Außenwirkung*) to the extent that they contain obligations under international law. A disposition of a constituent instrument of an international organisation granting that organisation the competence to engage with human beings will consequently be coupled with the corresponding obligation under international law. Another specification which has to be made is that in the scenario of an international organisation possessing competence under human rights law, one has equally to distinguish between rights and obligations. Prohibitive norms such as the prohibition of torture will obviously entail an obligation not to torture which does not exclude the possibility that the organisation is equally bound by a positive obligation to prevent torture; O. Engdahl, Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 66, 69.

[70] De Brabandere, 'Human Rights Accountability of International Administrations', *supra* note 60, 331, 338.

[71] See e.g. W. Hummer, 'Untergang, „Entkernung" und Funktionsnachfolge Internationaler Organisationen – dargestellt am Beispiel der EGKS und der WEU', in F. Zehetner (ed.), *Festschrift für Hans-Ernst Folz* (2003), 117 – 144. This theory has been criticised as lacking a legal basis in both treaty and customary international law, Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 121.

[72] H. G. Schermers, 'The Legal Bases of International Organization Action', in R.-J. Dupuy (ed.), *Manuel sur les organisations internationals – A Handbook on International Organizations* (1998), 401, 402. According to Schermers it is based on three different strings of argumentation: "It can safely be submitted that international organizations are bound by international customary law, either on the ground that all subjects of international law are so bound, or on the ground that the member States were bound by international customary law when they created the organization and thus may be presumed to have created the organization as being so bound, or on the ground that the rules of customary law are at the same time general principles of law to which international organizations are bound" (*ibid.*). The second element of his argument is however problematic regarding specific rules of customary law, as under this hypothesis an international organisation would not be bound by a specific rule of customary law which did not exist at the time of foundation of the organisation which however does not impair upon the international organisation being bound by these specific rules if they are to all subjects of international law. A similar argument is elaborated up by Tomuschat who says that "customary international law has evolved through practice in dealings between States. Consequently, it could be argued that international organizations, being autonomous subjects of international law, cannot be bound by such rules in whose foundation they did not participate (...) Substantively, international organizations may be characterized as com[mon] agencies operated by States for the fulfillment of certain common tasks. Now, if States acting individually have been subjected to certain rules thought to be indispensable for maintaining orderly relations within the international community, there is no justification for exempting international organizations from the scope *ratione personae* of such rules. International organizations cannot have more or more extended rights than States.", Tomuschat, *supra* note 63, 9, 134-5.

functions in a way that can be equated with the exercise of jurisdiction by a State."[73] This is less problematic for international organisations which administer a territory because they exercise functions and powers which are traditionally prerogatives of states and these comprehensive powers facilitate the establishment of jurisdiction.[74] In contrast, the establishment of jurisdiction for situations in which an international organisation is not administering a territory is complex.[75] It is also important to consider customary human rights norms as being part of the customary law of the international organisation itself, and particularly of the United Nations. This proposition is however problematic as the relevant practice by international organisations since the foundation of the UN is limited, and comprises only two cases of international administration.[76]

Further controversy has arisen from the identification of the specific norms which are part of customary human rights law. In some parts of legal scholarship it is opined that the whole corpus of human rights law as incorporated in the Universal Declaration on Human Rights is applicable,[77] while others are of the view that only a few specific fundamental norms are part of customary human rights law.[78] In any case, it is not disputed that the most fundamental norms are deemed to be of a customary nature, for example, violations of the rights of life through murder, torture and arbitrary detention.[79] Other authors suggest that even the right to an effective remedy is of a customary

[73] J. F.Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in T. D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 51, 67.

[74] Cf. also Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales', *supra* note 36, 7, 14-16.

[75] As the jurisprudence on extra-territorial application of human rights instruments to states shows, there is no consensus on the exact requirement, but it is a rather casuistic assembly. An additional layer of difficulty resides in the mere fact that this jurisprudence cannot be transferred and applied, *mutatis mutandis* to international organisations, *infra* 3.2.2.6.

[76] De Brabandere, 'Human Rights Accountability of International Administrations', *supra* note 60, 331, 337.

[77] B. Simma, P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', in (1988-1989) 12 *Australian Yearbook of International Law*, 82, 84-85; M. G. Kaladharan Nayar, 'Introduction: Human Rights: the United Nations and United States Foreign Policy', in (1978) *Harvard International Law Journal*, 813, 816-817; T. Buergenthal, 'The Evolving International Human Rights System', in (2006) 100 *American Journal of International Law,* 783, 787.

[78] Supporters of this restrictive view include, for example the relatively persuasive arguments by Schachter, *supra* note 58, 12, 333-342; O. Schachter, 'New Custom : Power, *Opinio Juris* and Contrary Practice', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st century : Essays in honour of Krzystof Skubiszewski* (1996), 531, 538-40 ; also R. K. M. Smith, *Textbook on International Human Rights* (2012), 38-39; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 82 – 89; Rehman considers the majority of the dispositions in the UDHR to be representing customary human rights law , J. Rehman, *International Human Rights Law. A Practical Approach* (2010), 80-81.

[79] A. Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution', in (1994) 43 *International and Comparative Law Quarterly,* 537, 544; C. Bongiorno, 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor', *in (2002) 33 Columbia Human Rights Law Review*, 623, 644-45. De Schutter takes an intermediate position and considers the UDHR to be applicable to international organisations as an expression of general principles of law as well as emerging customary obligations, O. De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of

nature and applicable to international organisations, which would presuppose a previous violation of another right.[80]

5. Human rights obligations of international organisations on the basis of general principles of law

Human rights obligations also stem from general principles of law. Although they are not a subsidiary source of international law[81], they are less relevant in practice due to their often rather vague nature. Indeed, legal certainty is lacking in "elementary considerations of humanity." [82] Furthermore, many norms considered as falling in this category will simultaneously constitute customary norms, so that the consideration of general principles of law in the present study will rather be limited.[83] The acceptance that general principles are one of the foundations of international law also leads to the conclusion that certain equally fundamental human rights norms must play an equal part.[84] Other

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Sliding Scales in the Law of International Responsibility in J. Wouters, E. Brems, S. Smis (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), 51, 72-3.

[80] Presupposing a previous violation of another right, K. Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap', in (2004) 25 *Michigan Journal of International Law*, 1159, 1162; D. Shelton, *Remedies under International Human Rights Law* (2006), 123-30, 181-82.

[81] Judicial decisions and the "teaching of the most highly qualified publicists of the various nations" constitute subsidiary sources of international law, according to Article 38 of the statute of the ICJ.

[82] Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 130. The citation is from the *Corfu Channel* Judgment of the ICJ, *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of April 9th, 1949, 22. The Court recognised "obligations (…) based on certain general and well-recognized principles, namely: elementary considerations of humanity." The ICJ referred to this particular quote in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), para. 79. It held that "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case, that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." As correctly observed by De Schutter, these statements have to be read with caution as they refer to general principles of international law as well as to customary law but arguably these statements qualify "human rights among the 'general principles of law recognized by civilized nations'", De Schutter, 'Human Rights and the Rise of International Organisations', *supra* note 33, 51, 72.

[83] The ICJ referred e.g. to the fundamental principles enunciated in the UDHR, *The Corfu Channel Case, ibid.*, 22. The ILA emphasises equally this interface between the different sources of law, International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, Third Report consolidated and enlarged version of recommended rules and practices ("RRP-S"), 11. Customary IHL is deemed to apply, *mutatis mutandis*, to take into account of the competences and resources of international organisations, *ibid.*, 14. In the 2004 report, the ILA goes further and states that ""Human Rights (…) becom[e] increasingly an expression of the common constitutional tradition of States, [and] can become binding upon IO-s in different ways; through the terms of their constituent instruments; as customary international law; or as general principles of law (…) The consistent practice of IO-s points to a recognition of this.", International Law Association, Berlin Conference (2004), Accountability of International Organisations, 22.

[84] M. Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces', in (1998) 11 *Leiden Journal of International Law*, 229, 236

arguments present general principles of international law as a tool to fill gaps in the law, so-called *non liquet* situations, equating them therefore with something akin to a *technique juridique* than with primary rules of international law.[85]

It is suggested that general principles are used to promote "values that international law seeks to promote and protect,"[86] focusing on human dignity and its position under international law.[87]

Other approaches suggest that certain procedural rights, for example the presumption of innocence and the right to a fair trial, are included, but it remains unclear what this entails.[88] Oswald suggests that there are certain criteria to comply with in relation to the treatment of detainees, including dignity and humanity.[89] However, as has been pointed out, these principles are derived from various human rights and IHL treaties.[90]

Arguments of legal theory are equally important while trying to connect general principles and the United Nations Charter as the constitution of the international order.[91] Brownlie submits that the Security Council is limited in its actions under Chapter VI and Chapter VII as human rights "form part of the concept of international public order."[92]

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[85] A. Boyle, C. Chinkin, *The Making of International Law* (2007), 285-86; H. Thirlway, 'The Sources of International Law', in M. Evans (ed.), *International Law* (2010), 99, 108-109;

[86] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (8 July 1996) (Judge Higgins, Dissenting Opinion), para. 41. Judge Tanka was even more explicit, he wrote in his dissenting opinion in the *South West Africa Judgment "*the concept of human rights and their protection is included in the general principles mentioned in that Article [38]*", South West Africa Case (Ethiopia v. South Africa),* Judgment of 18 July 1966, Second Phase (Dissenting Opinion, Judge Tanaka), 296.

[87] Boyle, Chinkin, *supra* note 85, 289; Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 130.

[88] Rehman, *supra* note 78, 24.

[89] B. Oswald, 'The Treatment of Detainees by Peacekeepers: Applying Principles and Standards at the Point of Detention' (2008) in R. Arnold (ed.), *Law Enforcement Within The Framework of Peace Support Operations* (2008), 197, 206-08.

[90] Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 130; The Martens Clause is illustrative of similar concerns in the field of international humanitarian law, should parties denounce the Geneva Conventions, they will still be bound "by principles of the law of nations, as they result from the usages established among civilized peoples, the laws of humanity (…) This provision thus guarantees that *international customary law* will still apply for states no longer bound by the Geneva Conventions as treaty law." [Emphasis added], T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 *American Journal of International Law*, 78, 80.

[91] Cf. Fassbender, 'Sources of human rights obligations binding the UN Security Council', *supra* note 61, 71-92. It is also assumed that, International organisations have to apply the main substantive dispositions of general law-making treaties such as the Geneva Conventions, and regional organisations have to obey with the main substantive dispositions of regional law-making treaties such as the European Convention on Human Rights. The legal foundation of these obligations is not their treaty character, "but rather in its character as a general principle of law codified by treaty". Schermers, Blokker (2011), *supra* note 11, 998, para. 1575; 1001, para. 1577.

[92] I. Brownlie, 'The Decisions of Political Organs of the United Nations and the Rule of Law', in R. St. J. MacDonald (ed.), *Essays in Honour of Wang Tieya* (1993), 91, 102.

Facing all these difficulties and taking into account that these principles are inferred from human rights and humanitarian law, it is therefore preferable to discard any further attempt to apply human rights norms as being solely based on general principles. As it was pointed out, general principles are often intertwined with customary law, so that an implicit application to the conduct of international organisations, particularly in the field of human rights and humanitarian law cannot be excluded, but legal certainty, which itself could possibly be considered as a general principle, supports a restrictive approach. Therefore, the analysis of the applicable law to international organisations will be limited to customary international law. The analysis also showed that customary international law contains some problematic features such as the identification of state practice and *opinio iuris*, but there is general agreement concerning the most fundamental human rights norms which are also accepted in practice by international organisations.

6. The "territorial problem" of human rights application and their extraterritorial application

The application of human rights to international organisations is problematic for another reason which is the application *ratione loci* or the territoriality of human rights. Human Rights were traditionally granted by states to their citizens to give those rights against the state and also protection by the State, and thus they are based on a vertical relationship between the bound human rights granting entity and the individual on the basis of the territory over which states exercise jurisdiction. A state may also have to respect its human rights obligations outside its own territory if it

> through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory].[93]

With regard to the application of human rights law to international organisations,

> large areas of international law are patently inapplicable to international organizations, which have no territory, confer no nationality and do not exercise jurisdiction in the same sense as States. Other rules (…) either lack relevance (…) or meet practical difficulties of implementation.[94]

[93] *Bankovic and others v. Belgium and others*, Admissibility, Decision of 12 December 2001, para. 80.
[94] Morgenstern, *supra* note 63, 4.

Consequently, the traditional application of human rights *ratione loci* is impossible in the context of international organisations, which *per se* are aterritorial, and rather operate on the territories of states, except in circumstances where there is territorial administration by an international organisation in which they exercise competences and rights similar to a state.[95]

Nevertheless, "the territorial-extraterritorial divide [of states] (…) [is] useful, since it concerns a situation where states do not exercise the same powers that relate to their own territories – a situation similar to that of international organizations leading peace operations."[96]

It is therefore that the exercise of jurisdiction by international organisations under human rights law can be compared to the extra-territorial exercise of jurisdiction under human rights law by states. Excluding the scenarios of complete occupation of another territory by a state or international administration of a territory, both a state and an international organisation consequently exercise jurisdiction in very specific circumstances if they operate extraterritorially; the extent of their power over the population is limited.

Thus, it appears possible to apply the jurisprudence of international courts and tribunals for the extraterritorial exercise of jurisdiction by states in analogy to international organisations. However, it has to be emphasised that it is unclear whether this nexus in the form of "jurisdiction" applies first of all under customary law and secondly to international organisations. Engdahl suggests that the practice of the European Court of Human Rights perhaps reflects – at least – regional customary law and that "[t]he applicability of human rights for international organizations would most certainly require some form of nexus towards individuals, and possibly also a requirement established with regard to some sort of effective control in customary law."[97]

The question is how to apply "jurisdiction" as it has developed in a territorial context to international organisations. One possibility is to interpret "jurisdiction" in a functional sense. As argued by Besson, jurisdiction is both a normative threshold, triggering the application of human rights, but it also provides the conditions for the corresponding obligation to be feasible for the duty-bearer (functional element), although it has territorial, temporal and personal dimensions which are derived from the exercise of jurisdiction.[98] Peacekeeping operations normally operate in certain defined

[95] G. Verdirame, *The UN and Human Rights. Who Guards the Guardian?* (2011), 235.
[96] Engdahl, Applicability/Application of Human Rights Law to IOs involved in Peace Operations', *supra* note 69, 66, 69.
[97] In his view, it is less clear "whether or not the requirement of effective control also applies to the African Union", Engdahl, *ibid.*, 66, 70.
[98] S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amount to', in (2012) 25 *Leiden Journal of International Law*, 857, 863.

areas of a state and although they do not normally assume all governmental powers in these areas they will exercise these functions under their mandate to guarantee peace and security for the local population. Therefore, as is also suggested by Naert, it has been proposed to equate the territory of an international organisation with that of its Member States.[99] In addition to this interpretation, Naert, however, argues that the notion of jurisdiction in its traditional conception is inapplicable and must be replaced by a criterion of functional jurisdiction.[100]

The analysis will therefore proceed on the basis of the case-law of international courts and tribunals as developed in the *contexte étatique.*

1. Extraterritorial jurisdiction under human rights law

Generally speaking, the application of international humanitarian law as well as international human rights are triggered through factual considerations on the basis of human interaction, "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction."[101]

Whereas the threshold for the application of IHL is comparatively simple, consisting in the existence of an armed conflict of either an international or an internal character;[102] to define the threshold for the application of human rights law is more complicated. On the one hand, this is due to conceptual misunderstandings, on the other hand it is by reason of divergent judgments between international human rights bodies or even within the very same – the European Court of Human Rights offers a prime example of the diversity in the jurisprudence on this issue.[103]

Regarding extraterritorial jurisdiction, one can distinguish between two principal models of the exercise of jurisdiction. Under the first model, extraterritorial jurisdiction is based on the factual connection between the state and the territory in which the relevant act took place – a spatial

[99] If one state acts extra-territorially, it is also exercising jurisdiction on the territory of another international entity and in that sense, the state also appears to be acting aterritorially – regarding its own territory outside of which it is acting.
[100] Naert, *supra* note 63, 525-526, 545; J. Lett, 'The Age of Interventionism: The Extraterritorial Reach of the European Convention on Human Rights', in R. Arnold, G.-J. A. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International* Law (2006), 111, 120.
[101] *Case of Al-Skeini and Others v. The United Kingdom,* Grand Chamber, Judgment 7 July 2011, para.137.
[102] Cf. M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2011), 66-69.
[103] Quénivet, 'Human Rights Law and Peacekeeping Operations', *supra* note 67, 99, 116. The extra-territorial effect of human rights is increasingly recognised also for economic, social and cultural rights, see Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2012); Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012).

connection.[104] According to the second model, there is a factual connection between the state and the individual – a personal connection due to the exercise of state agent authority.[105] Both models rely on the specific circumstances in question.[106]

In this context, the exercise of jurisdiction in a form of authority or control over the person or a given territory has to be distinguished from the attribution of conduct, two different overlapping concepts which are often conflated in practice.[107] Jurisdiction for the purposes of human rights must also be distinguished from state jurisdiction to prescribe and enforce its domestic law.[108]

Territorial jurisdiction in the form of the first model amounts, according to the ECtHR in *Al-Skeini*, to "the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government."[109]

In contrast, "personal jurisdiction" is tantamount to "the use of force by a State's agents operating outside its territory [which] may bring the individual thereby under the control of the State's authorities."[110]

The European Court of Human Right's jurisprudence has stretched the spatial model to ever diminishing areas including mere places[111] and thereby has often even relied on a simultaneous

[104] See, e.g., *Legal Consequences*, *supra* note 127, paras. 107-13; Human Rights Committee, General Comment No. 31 (80), The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.10; *Case of Loizidou v. Turkey* (Preliminary Objections), Grand Chamber, Judgment, 23 March 1995, para.62; *Case of Loizidou v. Turkey*, Judgment, Grand Chamber, Merits, 18 December 1996, para.52; *Case of Issa and Others v. Turkey*, Second Section, Judgment, 16 November 2004, paras.69-70.

[105] *Issa, ibid.*, para. 71. It was confirmed in several other casees, i.e. *Case of Pad and Others v. Turkey*, Third Section, Decision as to the Admissibility, 28 June 2007, paras. 53-54; *Isaak and Others v. Turkey*, Third Section, Decision as to the Admissibility, 28 September 2006, under the heading 2. (b) (ii); *Case of Solomou and Others v. Turkey*, Fourth Section, Judgment, 24 June 2008, paras. 44-45, 51; M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', in (2012) 23 *European Journal of International Law*, 121, 122.

[106] Cf. Naert, *supra* note 63, 645-46.

[107] K. M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (2012), 186.

[108] M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', in (2012) 23 *European Journal of International Law*, 121, 123. For an overview of the different definitions/concepts of jurisdiction, see Gondek, *supra* note 102, 47-54, 56-57.

[109] *Al-Skeini*, *supra* note 101, 135.

[110] *Ibid.*, para.136.

[111] The test thereby becomes very artificial, Cf. M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011), 128-30; 151-60; 171. The Committee against Torture specified in its General Comment 2 that territory includes smaller places as well: "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. (…) during military occupations or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control". Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/CG/2 (2008), 5 para. 16

application of both models of jurisdiction. In the case of *Medvedyev and Others*, involving a captured Cambodian ship on the high seas by a French navy vessel, the Court considered that France had "full and exclusive control over the *Winner* [the ship] and its crew, at least *de facto.*"[112] In similar fashion, the Court also relied in the previously mentioned *Al-Skeini* case of a mixed model of jurisdiction, adding that "the UK exercised authority and control over individuals killed in the course of such security operations."[113]

As regards the detention of Iraqis by British soldiers being part of the Multi-National Force (MNF), the Court held likewise that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction."[114]

The Court therefore limited the exercise of jurisdiction to cases based on a mixed model of jurisdiction;[115] on the basis of public powers and in the exercise of specific security operations which is not only at odd with previous jurisprudence of the Court but equally illogical[116] if "simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first."[117] However, in the case of *Andreou v. Turkey*, the ECtHR was seized by the case of Mrs. Andreou who was hit by a bullet in the abdomen during a manifestation outside the UN buffer zone near Dherynia, close to the Greek-Cypriot National Guard checkpoint emanating from Turkish Armed Forces. She was injured severely and lost one of her kidneys in the following surgery.[118] The Court held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the jurisdiction]' of Turkey."[119]

The threshold for the spatial test also covers a spectrum, "ranging from the more entrenched and visible exercise of de facto government, administration, or public powers, to the more borderline

[112] *Case of Medvedyev and Others v. France*, Judgment, Grand Chamber, 29 March 2010, para.67.
[113] *Al-Skeini*, *supra* note 101, 60, para.149.
[114] *Case of Al-Saadoon and Mufdhi v. The United Kingdom,* Fourth Section, Decision as to the Admissibility, 30 June 2009.
[115] *Al-Skeini*, *supra* note 101, 58-59, paras. 141-142; 60, para.149; A. Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?', in (2013) 18 *Journal of Conflict & Security Law*, 233, 249.
[116] Larsen, *supra* note 107, 211.
[117] H. Hannum, 'Bombing for Peace: Collateral Damage and Human Rights. Remarks', in (2002) 96 *American Society of International Law Proceedings*, 96, 98. See also A. Orakhelashvili, 'Human rights protection during extra-territorial military operations: perspectives at international and English law', in N. White, C. Henderson (eds.), *Research Handbook on International Conflict and Security Law* (2013), 598, 608.
[118] *Georgia Andreou against Turkey*, Fourth Section, Decision as to the Admissibility, 3 June 2008, 2-3.
[119] *Ibid.*, 11, 2nd paragraph.

cases of less permanent or overt state control as in Issa and Ilascu."[120] The jurisprudence of the ECtHR regarding the exercise of personal jurisdiction is equally wide and varied which led Milanovic to conclude that it "simply boils down to the proposition that a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate."[121]

The jurisprudence of the Court further shows that its notion of "jurisdiction" depends on the specific circumstances of a case; so the Court decided in *Al-Skeini* that "in determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area."[122] In *Issa*, the Court considered that "as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq."[123]

According to the jurisprudence of the Human Rights Committee under the ICCPR, the Covenant can be applicable extraterritorially as "it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State."[124] In its General Comment No. 31 the Committee further elaborated the notion of jurisdiction and held that "[t]his principle [of jurisdiction] also applies to those within the *power or*

[120] Milanovic, *supra* note 111, 141.

[121] His entire critique reads as follows: "What, then, have we learned about the personal model? It cannot be limited to physical custody. It cannot be limited on the basis of nationality or some special status of the victim, or indeed of the perpetrator. It cannot be limited only to lawful exercises of state power over individuals, nor to extraterritorial acts to which the host state consents, nor indeed to acts committed under the colour of law. It cannot, in short, be limited on the basis of any non-arbitrary criterion. 'Authority and control over individuals' as a basis for state jurisdiction simply boils down to the proposition that a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate.
In other words, the main feature of the personal model of jurisdiction — its ability to cover individuals who would be unprotected by the spatial model — is also its main fault. It quite literally collapses, and serves no useful purpose as a threshold for the application of human rights treaties. Unless the personal model is limited artificially on the basis of some essentially arbitrary criteria, there is no threshold", Milanovic, *supra* note 111, 207; also M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans, M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 73, 75; U. Karpenstein, F.C. Mayer, *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar* (2012), 48-49, mn. 24.

[122] *Al-Skeini*, *supra* note 101, para.139.

[123] *Case of Issa, supra* note 104, para.74.

[124] Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.12/52, López Burgos v. Uruguay, Annex XIX to Report of the Human Rights Committee, Supplement No. 40, UN Doc. A/36/40 (1981), 182-183, para.12.3; Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.13/56, Celiberti de Casariego v. Uruguay, Annex XX, *ibid*, 188, para.3; Appendix, Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure, Communication No. R.13/56, Christian Tomuschat, *ibid.*, 189, 2nd paragraph; D. McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in F. Coomans, M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 41, 55. The validity of such an interpretation can be already inferred from the travaux préparatoires, Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General, UN Doc. A/2929 (1955), chapter V, 48, para.4.

effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation"[125] [Emphasis added].

The distinction between "power or effective control" suggests that the Human Rights Committee subscribes to both the spatial and the personal model of jurisdiction, but the Committee has never properly elaborated further upon its interpretation of "jurisdiction".[126] The ICJ endorsed the view of the Human Rights Committee regarding the extraterritorial application of the ICCPR in its *Wall Case* advisory opinion.[127] The Human Rights Committee pronounced itself briefly and indirectly on the question of jurisdiction of international organisations in the case of *H.v.d.P. v. the Netherlands*, an employee of the European Patent Office who had claimed to be a victim of discrimination. The Committee said that "the author's grievance (…) cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or any other State party."[128]

The Inter-American Commission on Human Rights likewise held that jurisdiction "may, under given circumstances, refer to conduct with an extraterritorial locus where the person is concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad."[129] Also in other cases, the Commission has adopted a wide approach to jurisdiction. It held in *Alejandre* that the shooting down of two civilian light aeroplanes in

[125] Human Rights Committee, General Comment No. 31 (80), *supra* note 104, para.10. In its Concluding Observations regarding the Fourth Periodic Report submitted by Belgium, The Commission stated: "The State party should respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for example in the case of peacekeeping missions or NATO military missions, and should train the members of such missions appropriately.", Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Belgium, UN Doc. CCPR/CO/81/BEL (2004), 2, para.6.

[126] Larsen, *supra* note 107, 181.

[127] Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel, UN Doc. CCPR/C/79/ADD.93 (1998), 3, para.10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004), 47-48, paras. 110-111.

[128] V. Considerations of Communications under the Optional Protocol, in Report of the Human Rights committee, UN Doc. A/42/40 (1987), 107, para.403. A vaguely similar case was brought before the European Court by the wife of Rudolf Heß against his continued detention following his conviction in the Nurnberg Trials. The Commission declared the application inadmissible because changes to the administration of the prison " can only be made by the unanimous decision of the representatives of the Four Powers in Germany or by the unanimous decision of the Four Governors. Administration and supervision is at all times quadripartite, including the day to day "civil administration" of the prison and the responsibility for providing the military guard (…) The Commission concludes that the responsibility for the prison at Spandau, and for the continued imprisonment of Rudolf Hess, is exercised on a Four Power basis and that the United Kingdom acts only as a partner in the joint responsibility which it shares with the three other Powers", *Ilse Hess v. United Kingdom*, Commission, Decision on the admissibility of the application, 28 May 1975, 73-74.

[129] Case 10.951, Coard et al. v. United States of America, September 29, 1999, para.39.

international airspace by a Cuban military aircraft "agents of the Cuban State, although outside their territory, placed the civilian pilots (…) under their authority."[130] In a case concerning the US military action in Panama, the Commission had decided likewise in a very short and unequivocal comment "[w]here it is asserted that a use of military force has resulted in noncombatants deaths, personal injury, and property loss, the human rights of noncombatants are implicated."[131]

The border between the exercise of jurisdiction and the attribution of conduct can be rather fluid as "often in order to assess jurisdiction, the link between the acts or omissions at stake and state agents needs to be assessed at once and at the same time, hence the difficulty in keeping them apart."[132] For the purposes of applying the law of responsibility, a distinction is rather simple. Whereas any human rights body starts its analysis with establishing whether jurisdiction is given in the respective case, the law of responsibility starts with the attribution of conduct and, thus, jurisdiction will be dealt with in the following requirement which is the breach of an international obligation.[133]

Jurisdiction under human rights law has also to be distinguished from jurisdiction under general international law:[134] "It is this notion of jurisdiction—not the jurisdiction to prescribe rules of

[130] Case 11.589, Alejandre Jr., Costa, De la Peña, Morales v. Cuba, September 29, 1999, para.25.

[131] Case No. 10.573, Salas and others v. United States [US Military Action in Panama], October 14, 1993, Analysis, para. 6.

[132] Besson, 'The Extraterritoriality of the European Convention on Human Rights', *supra* note 98, 857, 877. One can distinguish between the two in the following way: "[S]tate jurisdiction and attribution are distinct concepts. Ultimately, the latter is an issue of state control over the perpetrators of human rights violations, while the former is a question of a state's control over the victims of such violations through its agents, or, more generally, control over the territory in which they are located.", Milanovic, *supra* note 111, 51-52. Cf. also L. Boisson de Chazournes, V. Pergantis, 'À propos de l'arrêt Behrami et Saramati: Un jeu d'ombre et de lumière dans les relations entre l'ONU et les organisations régionales ', in M. Kohen, R. Kolb, D. L. Tehindrazanarivelo (eds.), *Perspectives of International Law in the 21st century/Perspectives du droit international au 21e siècle* (2011), 191, 196.

[133] Indeed, attribution may even be a requirement to assess jurisdiction as correctly explained by the example of Cyprus by Milanovic: "As a matter of principle or logic, there is no hierarchical relationship between the issues of attribution and state jurisdiction—they are conceptually independent of each other. In some cases, however, attribution can actually be a prerequisite or a preliminary question for the existence of state jurisdiction. When a state exercises jurisdiction, i.e. control over a foreign territory or individuals, it by definition needs to do so through its own agents, i.e. persons whose acts are attributable to it. Turkey could not have had jurisdiction over northern Cyprus without having its soldiers there, nor could Russia have had jurisdiction over a part of Moldova without a military presence. For example, had it been disputed in Loizidou that Turkey had soldiers at all in northern Cyprus; the Court would first have had to establish whether this was the case before examining whether Turkey had control over that part of the island.
In that sense, attribution of the conduct of Turkish troops in Cyprus to Turkey was a question that logically preceded the issue of Turkey's jurisdiction over northern Cyprus", Milanovic, *ibid.*, 51-52; Cf. O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', in (2006) 6 *Baltic Journal of International Law*, 185, 188-192.

[134] Larsen, *supra* note 116, 173; Milanovic, *ibid.*, 27. In other words, jurisdiction under general international law has the function to determine whether a claim made by a state to regulate some specific conduct is lawful or unlawful, B. H. Oxman, 'Jurisdiction of States' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008-), online edition, [www.mpepil.com], paras. 1, 9; De Schutter, *ibid.*, 185, 195-197. The

domestic law and to enforce them, but control over a territory and persons within it—that pervades international human rights treaties."[135] Hence, in a certain way, one can apply "jurisdiction" *mutatis mutandis* to international organisations.[136] The Draft Accession Agreement of the EU to the ECHR likewise foresees the application of the same standard of jurisdiction to the EU for acts outside the territories of member states of the EU as for extraterritorial acts of a member state to the Convention.[137]

In summary, the practice of international courts and tribunals in defining "extraterritorial jurisdiction" is very varied and arguably also based on pragmatic reasons. If one bears in mind that at least in part of the jurisprudence, "territorial jurisdiction" has been shrunk to include small geographical areas or even conflated with the personal notion of jurisdiction, it so appears that "jurisdiction" is, indeed, used rather functionally. Consequently, there are no arguments against an application of both models of jurisdiction to international organisations whereby the exact threshold for the exercise of jurisdiction will depend on the specific circumstances of the case.[138] The limitation of extraterritorial jurisdiction to certain specific circumstances is based on the idea that there has to be a sufficient nexus between the state, or in the case of the present study the international organisation, and the local population. Therefore, the question arose as to whether the human rights

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ICJ also held that the basis of state liability for acts affecting other states is "physical control" over territory and not sovereignty, *Legal Consequences for States, supra* note 39, para. 118.

[135] Milanovic, *supra* note 111, 32. Also L. G. Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case', in (2006) 4 *European Human Rights Law Review*, 73, 91. For a comprehensive analysis and several examples of this notion of jurisdiction, in treaty law, see *ibid.* 32; See also H. Lauterpacht, *International Law and Human Rights* (1968), 317, 364. For a codification in treaties, cf. e.g. Article 5 (2) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997); Principle 2 of the Rio Declaration on Environment and Development (1992).

[136] Cf. Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012), in (2012) 34 *Human Rights Quarterly*, 1084, 1122. Specifically for the context of a peacekeeping operation, cf. A. Tzanakopoulos, *Disobeying the Security Council. Countermeasure against Wrongful Sanctions* (2011), 28.

[137] "Insofar as the term 'everyone within their jurisdiction' appearing in Article 1 of the Convention refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons within the territories of the member States of the European Union to which the TEU and the TFEU apply. Insofar as that term refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons which, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.", EU/Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg, 5 April 2013, 5-6, para. 6. See generally, M. den Heijer, A. Nollkaemper (eds.), 'SHARES Briefing Paper – A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights (2014)', available at www.sharesproject.nl.

[138] Further light will be shed upon this issue by the jurisprudence of the European Court of Human Rights once the EU has officially become a party to the Convention.

to be protected extraterritorially are also limited to these rights which would be relevant in the exercise of extraterritorial jurisdiction.

2. The tailored application of human rights law to peacekeeping forces

1. From Bankovic to Al-Skeini

The applicants in the Bankovic case before the European Court of Human Rights argued that the extraterritorial application of human rights obligations of states can be "divided and tailored." Although the Court in *Bankovic* denied any such application of the European Convention,[139] this topic has since then been discussed rather extensively in academic writing and the discussion was rekindled following the judgment of the European Court of Human Rights in Al-Skeini.[140] Referring to *Bankovic*, the Court held that

> whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are *relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be "divided and tailored[141] [Emphasis added].

Interestingly, the ECtHR had already cited extensively in its *Beric* judgment[142] from a report of the Venice Commission in which it was stated "[i]t would have been unrealistic to have insisted on immediate full compliance with all international standards governing a stable and full-fledged democracy in a post-conflict situation such as existed in BiH following the adoption of the [Peace] Agreement"[143] so that one might be inclined to think that the Court was slightly testing the water in *Beric*.[144] Nevertheless, the cryptic formulation of the ECtHR has already instigated a debate about the

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[139] *Bankovic, supra* note 93, para.75.
[140] *Al-Skeini*, *supra* note 101.
[141] *Ibid.*, para.137.
[142] *Berić and others v. Bosnia*, Fourth Section, Decision as to the Admissibility, 16 October 2007, para.17.
[143] European Commission for Democracy Through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, Venice, 11 March 2005, 23, para.97. According to an interesting example of state practice, customary human rights law are not only all binding on US forces but also on all "U.S. forces during all overseas operations.", A. Gillman, W. Johnson (eds.), Operational Law Handbook, The Judge Advocate General's Legal Center & School (2012), 47-48, paras. III. A.-B.; 51 D. 1. In similar fashion Cerone questions the validity of the territorial limitation for states to be bound by human rights law under customary human rights law, J. Cerone, 'Legal responsibility framework for human rights violations post-conflict', in N. D. White, D. Klaasen (eds.), *The UN, human rights and post-conflict situations* (2005), 42, 48.
[144] One author asserts that a tailored application of the ECHR can be drawn from the Cyprus v. Turkey case as the Court based its opinion that Turkey has to guarantee the entire range of substantive rights on the fact that Turkey was also controlling the local administration which was surviving by virtue of Turkish military support, *e contrario*, in other cases, the application would be limited, O. Engdahl, 'The Future of Human Rights Law in

interpretation; whether the judgment of the Court allows the "cherry-picking" of rights or not.[145] The concurrent opinion by Judge Bonello and the follow-up judgment in *Hirsi Jamaa* confirm that the Court did have "cherry-picking" in mind.[146] However, if one distinguishes between the obligations of a state on a general level and in a specific given case of alleged violations, *Al-Skeini* fits very well within the general practice of the Court as in any given case of alleged violations of human rights, the only human rights which actually matter are those which have allegedly been infringed. The Court also limited its view to the cases of people being under the authority of a state agent, so that, as it is also suggested by Miltner, for cases of control over a territory (territorial jurisdiction), a state party still has to guarantee all substantive rights of the Convention.[147]

Perhaps the Court had also the pending accession of the EU to the Convention in mind, while elaborating its judgment. The accession will extend the jurisdiction of the Court to cover acts of the EU and its organs and, as has been established (*infra* 3.1.), the competences of international organisations are limited due to their own respective constitutive framework so that a tailored application of human rights is the only feasible option to apply human rights obligations to international organisations without exposing them to the risk of acting *ultra vires*. It is therefore submitted that, notwithstanding the cryptic judgment of the ECtHR in *Al-Skeini*, human rights can only be applied in a tailored and divided fashion to international organisations.

Peacekeeping operations generally elude, in a certain way, the regulation of human rights. They are established to promote peace and security, but they are not "human rights protecting operations" despite the recent emphasis on the protection of civilians in the mandates of operations. Hence, there may be a certain dichotomy between the human rights obligations of the peacekeepers and

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Peace Operations', in O. Engdahl, P. Wrange (eds.), *Law at War: The Law as it Was and the Law as it Should Be. Liber Amicorum Ove Bring* (2008), 105, 109.

[145] Against: A. Cowan, 'A New Watershed? Re-evaluating *Banković* in Light of *Al-Skeini*', in (2012) 1 Cambridge Journal of International and Comparative Law, 213, 222. In contrast, Miltner asserts that the judgment amounts to cherry-picking of Convention rights, B. Miltner, 'Revisiting Extraterritoriallity After *Al-Skeini*: The ECHR and Its Lessons', in (2012) 33 *Michigan Journal of International Law*, 693, 697. Cf. also F. Naert, 'The European Court of Human Rights' *Al-Jedda* and *Al-Skeini* Judgments: an Introduction and Some Reflections', in (2011) 50 *Military Law and the Law of War Review*, 315, 317; Larsen, *supra* note 107, 81; R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', in (2007) 40 *Israel Law Review*, 503, 519-20; M. Szydlo, 'Extra-Territorial Application of the European Convention on Human Rights after *Al-Skeini* and *Al-Jedda*', (2012) 12 *International Criminal Law Review*, 271, 290.

[146] *Case of Hirsi Jamaa and Others v. Italy*, Grand Chamber, Judgment, 23 February 2012, para.74; *Case of Al-Skeini and Others v. The United Kingdom,* Grand Chamber, Judgment 7 July 2011 (Judge Bonello, Concurring Opinion), paras. 32-33. In his view, however, the State has the obligation to ensure the observance of these rights which it is in a position to ensure, instead of the relevant rights. As he asserts: "Extraterritorially, a Contracting State is obliged to ensure the observance of all those human rights which it is in a position to ensure (…) I believe that it ill suits the respondent Government to argue, as they have, that their inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all."

[147] As confirmed in *Case of Hirsi Jamaa, ibid.*, para.74. Miltner, *supra* note 145, 693, 697-698.

their mandate on the basis of a Security Council resolution.[148] Germany observed in the *Behrami/Saramati* case that "account must be taken of the special difficulties under which such operations are normally deployed."[149] Furthermore,

> [m]ore often than not, peace operations start after an armed conflict has brought death and destruction. Governmental institutions may not function properly, the infrastructure has suffered heavy damage, law and order have broken down, and the economic situation is disastrous (…) Accordingly, everyone knows that when a peace operation is launched the situation in the country concerned normally does not correspond to the standards of the International Covenant on Civil and Political Rights or those of the European Convention (…) In conclusion, it must be acknowledged quite frankly that at least during a first stage of a peace operation, the standards of the Convention can hardly ever be maintained to a full extent.[150]

Other arguments raised are that a limited application of human rights law would prevent peacekeeping forces from being exposed to "unworkable burdens with "undue risk", thereby compromising any "effective protective action" and consequently the whole mandate of the operation.[151] The very same arguments are invoked for a similar limited application of IHL to peacekeeping forces.[152] A wider debate has arisen as regards the possibility of a "sliding scale of obligations" for armed groups whom, in contrast to states, are unable to respect all rules.[153]

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[148] It is suggested by Larsen that a potential conflict arising out of a mandate to "protect civilians under immediate threat" with the human rights obligations of the peacekeepers has to be considered as two non-related issues as the mandate in the form of a resolution is nothing more than an authorisation to use force to protect civilians but not an obligation to do so, Larsen, *supra* note 107, 392.

[149] Observations of the Federal Republic of Germany concerning application no. 78166/01: Saramati v. France, Germany and Norway, 18, para.38.

[150] *Ibid.*, 18, paras. 38-39; 19, para. 42.

[151] R.O. Weiner, F.N. Aolain, 'Beyond the Laws of War: Peacekeeping in Search of a Legal Framework', in (1995-1996) 27 *Columbia Human Rights Law Review*, 293, 320, 352-353. See also D. Lorenz, *Der territoriale Anwendungsberich der Grund- und Menschenrechte – zugleich ein Beitrag zum Individualschutz in bewaffnete Konflikten* (2005), 105; U. Erberich, *Auslandseinsätze der Bundeswehr und Europäische Menschenrechtskonvention* (2004), in particular 5-31; See also especially Naert, *supra* note 63, 556-557; 564-565; Clapham, *supra* note 67, 68.

[152] Excluding e.g. the dispositions on mandatory jurisdiction, Weiner, Aolain, *ibid*., 293, 320, 352-353.

[153] As Sassòli points out, equality of the parties engaged in an internal armed conflict is a fiction and applying a sliding scale does not diminish the level of protection provided to civilians in armed conflict as most violations are violations of the most fundamental norms that "every human being can respect in every situation", M. Sassòli, 'Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?', in (2011) 93 *International Review of the Red Cross*, 426, 430-31. Opponents such as Yuval Shany acknowledge that the diffusion of IHL norms applicable in international armed conflicts to internal armed conflicts has set the normative bar higher and thereby increased the compliance gap of belligerents, but a capacity-based criterion of application is nevertheless false. It should be focused on the main *raison d'être of IHL* which is the "protection of humanitarian values" and not "full compliance with its norms" which is a mere means to an end. The problem with a capacity-driven application of IHL is that it fails to incentivise belligerent parties to actually increase their compliance with the framework of IHL, Y. Shany, 'A rebuttal to Marco Sassòli', in (2011) 93 *International Review of the Red Cross*, 432, 432-33. Shany concedes that IHL standards should be

Regarding the precise obligations of international organisations, some authors submit that the Security Council, for example, would only have "due diligence" obligations regarding the application of human rights law,[154] and as such could not be held responsible for a failure to prevent a massacre or genocide, but only for the failure to conduct itself adequately.[155] In academic writing it is also suggested that it is necessary to distinguish between positive and negative obligations depending on the degree of control exercised over a given territory; negative obligations can always be respected by the control exercised by a state over its agents. [156]

2. *Derogations under human rights law as another method to divide and tailor the application of human rights law*

Other arguments for a limited application of human rights law to international organisations rely on the possibility of derogations under human rights treaties. In *Al-Skeini*, the European Court of Human Rights implicitly opened the door for extraterritorial human rights law derogations, referring to the

realistic and "in touch with battlefield conditions and material capacities." Thus, he suggests a "common but differentiated framework for some IHL standards", *ibid.*, 434. On this matter, see generally, G. Blum, 'On a Differential Law of War', in (2011) 52 *Harvard International Law Journal*, 163, esp. 185 – 216. As Blum rightly points out certain standards in IHL actually provide for a common but differentiated responsibilities framework; a technologically advanced country will be judged on a higher threshold for taking all "feasible precautions" to prevent or reduce the loss of civilian life in an armed attack, for example, one could imagine the use of satellite images or the use of drones, whereas these means will not be available to a developing country, cf., *ibid.*, 194. See also, R. Provost, 'The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany', in (2011) 93 *International Review of the Red Cross*, 437, 438-441. A symmetric application of IHL to all participants has also been challenged by legal philosophers on moral grounds. Cf. e.g. H. Shue, 'Laws of War, Morality and International Politics: Compliance, Stringency, and Limits', in (2013) 26 *Leiden Journal of International Law*, 271-292.

[154] K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (2004), 381-82. It is generally recognised under international law that due diligence obligations vary, depending on the particular circumstances as well as the means at disposable of the respective actor, i.e. precautionary measures before military attacks in the framework of IHL. For the context of peacekeeping operations, cf. Report from the Special Representative of the Secretary-General in the Congo on the Situation in Orientale and Kivu Provinces, UN Doc. S/4745 (1961), 7; Eagleton, *supra* note 15, 320, 400.

[155] A. Peters, 'Functions and Powers. Article 24', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I (2012),* 761*,* 774 mn. 38; See R. A. Opie, 'Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility', in (2006) *New Zealand Law Review*, 1, 22; Cf. also N. Elaraby, 'Some Reflections on the Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2 (4) Revisited in the Light of Recent Developments', in T. Eitel, J. A. Frowein, K. Scarioth et. al. (eds.), *Verhandeln für den Frieden. Liber Amicorum Tono Eitel* (2003), 41, 56, who argues that "benign neglect of breaches of the peace and acts of aggression" by the Security Council, could constitute a deviation from the rule of law. In contrast, Gaja argued in his third report that in such a scenario, the UN would also be responsible for the failure to act, G. Gaja, Third report on responsibility of international organisations, UN Doc. A/CN.4/553 (2005), 4, para.10. Peters responding to this argument says, that it is only a norm *lege ferenda* but that it is perfectly possible "that the Council's responsibility will harden into a legal obligation of conduct", Peters, *ibid.*, 761*, 774-75 mn. 40;* Peters, 'Article 25', *supra* note 38*, 787*, 850 mn. 199.

[156] Milanovic, *supra* note 111, 141; De Schutter, *supra* note 133, 185, 245. This reasoning can also be applied to international organisations. Excluded are, obviously, cases of acts contravening instructions by agents.

ICJ and its judgment in the *Wall Case*, stating "the International Court of Justice appeared to assume, that even in respect of extra-territorial acts, it would be in principle possible for a State to derogate from its obligations under the International Covenant on Civil and Political Rights."[157] As human rights law serves to protect the individual, it would be, indeed, illogical to allow states to further limit their obligations on their own territory than when they act extraterritorially.[158]

Of course, these arguments can be only transposed to a certain extent from the territorial context of states to the "aterritorial context" of international organisations, but the draft accession agreement of the EU to the European Convention on Human Rights provides likewise that the changes foreseen to the Convention "may be interpreted as allowing the EU to take measures in derogation from its obligations under the Convention in relations to measures taken by one of its member States in time of emergency in accordance with Article 15 of the Convention."[159] Hence, also from the perspective of derogations under human rights law, there are good arguments for limiting the application of human rights law to international organisations to what is feasible under their mandate and thereby also in the context of peacekeeping operations.[160] A particular problem is posed by the fact that the UN could invoke the Charter and Security Council resolutions "to the extent that they reflect an

[157] *Al-Skeini*, *supra* note 101, para. 90. Larsen concludes after a lengthy analysis that such a derogation is not *lex lata*, Larsen, *supra* note 107, 299-311. Furthermore, he asserts that the *travaux préparatoires* of the Convention do not mention the issue of extraterritorial derogations, *ibid.*, 306.

[158] K. M. Larsen, ''Neither Effective Control nor Ultimate Authority and Control': Attribution of Conduct in *Al-Jedda*',in (2011) 50 *Military Law and the Law of War Review*, 347, 362.

[159] EU/Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg, 5 April 2013, 19, para.28; EU/Council of Europe, Fourth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 8 January 2013, 5-6, para.23.

[160] F. Naert, 'Applicability/Application of Human Rights Law to IOs involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 45, 49-50; Naert, *supra* note 63, 584. Cf. House of Lords, R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), Decision of 12 December 2007, Opinion of Lord Bingham of Cornhill, para. 32; Lord Brown of Eaton-Under-Heywood, para. 150; *Bankovic, supra* note 93, para.62. It is argued in doctrine that rights which are non-derogable under human rights treaties are also non-derogable under customary human rights law, Seiderman suggests that the four non-derogable rights common to the main international human rights treaties are considered as including the same limitation under customary human rights law, I. D. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (2001), 81. Meron was a little more hesitant and held these rights might also be non-derogable under customary law, T. Meron, *Human Rights in Internal Strife: Their International Protection* (1987), 59. It would be unlikely that states take a more liberal approach regarding jurisdiction under customary law. Duffy also asserts that it is unlikely, in practice, that customary law is broader in scope than the non-derogable core of treaty rights. H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005), 296.

international law obligation – to justify what might otherwise be regarded as non-compliance."[161] The general and particularly the recent practice of the UN and regional organisations shows a strict adherence to international human rights standards,[162] but nevertheless the Security Council could at least theoretically derogate from these human rights in a resolution which does not involve rules of *jus cogens*.

In conclusion, the application of human rights law to international organisations is, indeed, tailored and limited to these rights as they are not only relevant in the specific circumstances, but as they may also be protected by the powers of the respective international organisations. This division of human rights law in its extraterritorial application is intrinsically linked to the question of jurisdiction. The following part of this chapter analyses the application of international humanitarian law into peacekeeping operations of international organisations. It illustrates very clearly that further difficulties arise in determining the applicable law in peacekeeping operations in addition to those encountered in the human rights law context. A particular problem is posed by the relationship between human rights and humanitarian law.

3. Application of International Humanitarian Law

International Humanitarian Law regulates the conduct of hostilities in armed conflict. The aim of international humanitarian law is to limit the effects of war on people and property and to protect particularly vulnerable persons.

[161] International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, UN Doc. A/CN.4/637/Add.1 (2011), 36, para. 3.

[162] An empirical analysis of the practice of the Security Council came to the conclusion that the UN is not only increasingly intervening in conflicts with high levels of violence against civilians but that it has also increased the protection standard accorded to the civilian population, L. Hultman, 'UN peace operations and protection of civilians: Cheap talk or norm implementation?', in (2012) 50 *Journal of Peace Research*, 59, 66-71. Moreover, there is an emerging convergence regarding the protection of civilian doctrines between the UN, the EU and the AU. In this context, the approach developed by the EU towards the protection of civilians has been heavily influenced by the practice of the UN and "is in accordance with UN doctrines", M. Dembinski, B. Schott, 'Converging Around Global Norms? Protection of Civilians in African Union and European Union Peacekeeping in Africa', in (2013) 6 *African Security*, 276, 282-284. The AU is currently developing an operational concept for the protection of civilians, in close cooperation with the UN and as funded by European and other donors, Dembinski, Schott, *ibid.*, 286. Interestingly, as noted by both authors, the approach of the AU for the protection of civilians "is notably robust" (*ibid*., 287) which could be seen as further proof of the emerging division of labour between the UN, the EU and the AU on the African continent.

1. Application ratione personae of IHL to activities of international organisations

The UN and the regional organisations which are part of the present study possess international legal personality and they therefore can be addressees of norms of international humanitarian law.[163] Regarding the United Nations particularly, the purposes and principles of the UN Charter, its mandate for maintaining international peace and security, and its competence to deploy military forces, which can become involved in conflict situations amounting to an armed conflict, lead to the conclusion that international humanitarian law is applicable.[164]

The *Institut de droit international* started to address in earnest the issue of the application of international humanitarian law in the context of the United Nations in 1971. The issued resolution considered humanitarian rules of international humanitarian law, including the Geneva Conventions, to be applicable "as of right" to the United Nations, entailing an obligation to comply with international humanitarian law in all circumstances when engaged in hostilities.[165]

Other international organisations are bound by international humanitarian law if they possess international legal personality, have the capacity under their respective constitutive instrument to deploy military forces[166] and if they do deploy military forces; a corollary of the capacity to use

[163] T. Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 15, 17. See generally, M. Zwanenburg, 'United Nations and International Humanitarian Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008-), online edition, [www.mpepil.com); J. Peck, 'The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?', in (1995) 21 *Syracuse Journal of International Law and Commerce*, 283-310.

[164] Kolb, Porretto, Vité, *supra* note 15, 124. In this regard, it does not matter if force is used; "la capacité matérielle d'avoir recours à des forces armées entraîne la capacité subjective d'être destinataire de normes du droit international humanitaire", (*ibid.*, 124-5.); See also Peters, 'Article 25', *supra* note 38, 787, 827 mn. 129 – 828 mn. 132.

[165] *Institut de Droit International*, Resolution (Session of Zagreb – 1971), Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Article 2. See also, *Institut de Droit International*, Resolution (Session of Wiesbaden – 1975), Conditions of Application of Rules Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May be Engaged and *Institut de Droit International*, Resolution (Session of Berlin – 1999), The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, notably paras. II, IX, and XI.

[166] K. E. Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 45, 53; E. David, *Principes de droit des conflits armés* (2008), 225-26, paras. 1.192–1.193; 234, para. 1.202. Thus, IHL applies to peacekeeping forces. Also, J. P. Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict', in (2001) 50 *Air Force Law Review*, 1, 37; The Secretary-General reconfirmed that the Bulletin on IHL "is binding upon all members of United Nations peace operations (…) [and]signal[s] formal recognition of the applicability of International Humanitarian Law to United Nations peace operations.", Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc. A/56/326 (2001), 9, para. 19 ; For the AU, Status of Mission Agreement (SOMA)

military force is to be titular of rights and obligations of international humanitarian law.[167] Therefore, the objective capacities of the organisations determine their subjective capacities to be bound by IHL and the precise legal content incumbent upon them.[168] Nevertheless, the UN Charter has also an effect on regional organisations deploying military troops as part of a UN operation or on the basis of a Security Council authorisation. The Charter confers on the United Nations both the responsibility to maintain international peace and security, and to develop and encourage the respect of human rights and fundamental liberties. Therefore, in practice, the mandates provided by the Security Council will contain the requirement to respect the applicable human rights and international humanitarian law.

2. Application ratione materiae of IHL

In contrast to human rights law, IHL does not presuppose the exercise of jurisdiction over a given territory; it is based on a predominantly horizontal relationship protecting the subjects of the parties to the conflict on the grounds of the mutual interest of all parties.

Depending on the nature of the conflict, different regimes of international humanitarian law are applicable. International armed conflicts are – under the Geneva Conventions – conflicts between opposing states,[169] whereas non-international armed conflicts covers all other cases of armed violence.[170] The regime applying to international armed conflict is the most developed, establishing categories of protected persons which do not exist in internal armed conflict.

In doctrine it is debated whether the involvement of international organisations in an armed conflict leads to a qualification of this particular conflict as international or as non-international. There is generally agreement that the law of international armed conflict is applicable if international troops

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on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC) (2004), para. 8 a), available online at: http://www.africa-union.org/Darfur/Agreements/soma.pdf ; for NATO, M. H. Hoffman, 'Peace enforcement actions and humanitarian law: Emerging rules for "interventional armed conflict"', in (2000) 82 *International Review of the Red Cross*, 193, 198-200; A Faite, J. L. Grenier (eds.), Report of the Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and Human Rights Law to UN Mandated Forces (Geneva, 11-12 December 2003), 24-26; Press Conference by NATO Spokesman, Jamie Shea and Air Commodore David Wilby, SHAPE, NATO HQ 26 March 1999, available online at: http://www.nato.int/kosovo/press/p990326a.htm.

[167] Kolb, Porretto, Vité, *supra* note 15, 127-8; this was equally recognised by the latest resolution of the *Institut de droit international*, cf. *Institut de Droit International, supra* note 165, para. II.

[168] V. Falco, 'The Internal Legal Order of the European Union as a Complementary Framework for Its Obligations under IHL', in (2009) 42 *Israel Law Review*, 168, 188.

[169] And certain specific exceptions under Article 1 of Additional Protocol 1 to the Geneva Conventions.

[170] Such as a state versus an armed group or armed groups against each other.

confront a state,[171] which would amount to an international conflict *sui generis*, because in the final analysis it is not very different from a group of states involved in an armed conflict against another state. [172]

The issue is unresolved if one takes the example of the use of force by an international organisation against an organised armed group. The predominant view extends the application of the law of international armed conflict in which an international organisation takes part, to the opponent, notwithstanding if it is a state or an armed group.[173] Some authors agree that the status of an

[171] Kolb, Porretto, Vité, *supra* note 15, 183; Sams, 'IHL Obligations of the UN and other International Organisations, *supra* note 166, 45, 63; Faite, Grenier, *supra* note 166, 63. As states contributing troops to a peace-keeping operation or a peace enforcement operation remain themselves bound in their obligations under IHL, an involvement in such a military operation will consequently also constitute an armed conflict between the troop contributing State and the targeted State, cf. H. P. Aust, 'Article 2 (5)', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 235, 247 mn. 26 with further references. For the general application of IHL to the United Nations and other international organisations, see, C. Wickremasinghe, G. Verdirame, 'Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations', in C. Scott (ed.*), Torture as Tort. Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 465, 473; F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), *International Law as Law of the European Union* (2012), 189, 197.

[172] Another argument made is that under an evolutionary interpretation of Common Article 2, an IAC exists "whenever two or more entities endowed with an international legal personality resort to armed force", Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 19. It is therefore also unproblematic if an International Organisation intervenes in a NIAC in favour of rebel armed forces against the government as the respective organisation would be opposed to the government of the state. Recent examples include NATO's Intervention in Kosovo and in Libya, see V. Koutroulis, 'International Organisations Involved in Armed Conflict: Material and Geographical Scope of Application of Humanitarian Law', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 29, 32; ICRC, Update no. 99/02 on ICRC activities in Kosovo, 24 March 1999, Kosovo crisis: ICRC transfers released detainees, 25 June 1999, especially last para.; *Prosecutor v. Vlastimir Đorđević*, Judgment, Case No. IT-05-87/1 "Kosovo", Tr. Ch. II, 23 February 2011, 629, para. 1580. In contrast, jurisprudence and the doctrine were quite hesitant regarding the application of IHL to the United Nations in the 1950's, cf. the jurisprudence of troop-contributing countries in the Korea Operation from 1950 on the basis of SC Resolution 84, as cited in Schmalenbach, *supra* note 154, 187-191; See Security Council Resolution 84, UN Doc. S/RES/84 (1950), Committee on Study of Legal Problems of the United Nations, 'Should the Laws of War Apply to United Nations Enforcement Action?', in (1952) 46 *Proceedings of the American Society of International Law*, 216, 220.

[173] Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63. Greenwood also speaks of an inherent tension between the understandable desire of the United Nations and contributor states to insist upon punishment of those who attack their personnel and the neutrality of the law of international armed conflict treating all parties to a conflict equally, C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', in (1998) 1 *Yearbook of International Humanitarian Law*, 3, 26. This view excludes the potential simultaneous application of the Convention on the Safety of United Nations and Associated Personnel but it is nevertheless a valid argument which is relevant for other international and regional organisations. However, the ICTY in Tadić held that: "The customary international law doctrine of recognition of belligerency allows for the application to internal conflicts of the laws applicable to international armed conflict, thus ensuring that even in a non-international conflict individuals can be held criminally responsible for violations of the laws and customs of war", *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1, Tr. Ch., 10 August 1995; See also, T. Meron, 'International Criminalization of Internal Atrocities', in (1995) 89 *American Journal of International Law*, 554, 564-65; A. Aust, *Handbook of International Law* (2010), 237-38.

international organisation is sufficient to elevate the conflict to an international armed conflict.[174] This view is popular from a human rights point of view as it increases the level of protection for all parties involved in the conflict.[175]

This approach might better be suited to accommodating the reality of a peacekeeping operation. Modern peacekeeping operations often operate in conditions between war and peace where there might be fighting in one part of a country and relative peace in other parts of the country perhaps with only very few skirmishes.[176] Therefore, under the law of internal armed conflict, one would arrive at the paradoxical situation that IHL might be applicable in one part of the territory, but not in the rest of the country.[177]

The opposing opinion is that "there is no reason to think that the involvement of a UN force in a situation of armed conflict will of itself render the conflict 'international' for the purpose of the application of the *ius in bello*."[178] They therefore argue for an application of the law of internal

[174] Kolb, Porretto, Vité, *supra* note 15, 184; Schmalenbach, *supra* note 154, 363. With regard to the two opposing opinions and with further arguments, see the debate between David and Engdahl, E. David, O. Engdahl, 'How does the involvement of a multinational peacekeeping force affect the classification of a situation?', in (2013) 95 *International Review of the Red Cross*, 659-679.

[175] But, as "attractive [it is] in terms of protection, since it means that victims of the armed conflict would benefit from the more detailed provisions of the law governing international armed conflicts, it may however be inconsistent with the operational and legal realities. In particular, it would require the assignment of duties to parties that are unwilling or unable to comply with some of those duties; to give just one example, there is nothing to suggest that international forces involved in a non-international armed conflict (NIAC) would be willing to grant prisoner of war status to captured members of organised non-State armed groups, as would be required under IHL applicable in international armed conflict (IAC)", C. Beerli, 'Keynote address', S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility* (2011), 9, 11.

[176] M. Odello, R. Piotrowicz, 'Legal Regimes Governing International Military Missions', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 25, 41; Contrary Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 19.

[177] Geographically limited armed conflicts can, of course, also arise in conflicts not involving international organisations on either side. Under the law of international armed conflict, the application of IHL is not restricted to the vicinity of actual hostilities, but it applies, arguably, to the whole territory of the parties to the conflict on the basis of Article 6 (2) Fourth Geneva Convention and Article 3 (b) of Additional Protocol 1, which both speak of "the territory of Parties to the conflict." Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 65; ICTR decided in Akayesu that "Common Article 3 must be also applied in the whole territory of the State engaged in the conflict", *The Prosecutor v. Jean-Paul Akayesu*, Judgment, Case no. ICTR-96-4-T, T. Ch. I, 2 September 1998, paras. 635-636.

[178] H. McCoubrey, N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1997), 172. However David argues that the governments as well as the rebels, being as they are part of the population, are constitutive elements of a state, so in a NIAC they can both claim to represent the state as the *de facto* government. Therefore there is some appeal for such a view in a case where the conditions on the ground do not allow a decision as to which side is effectively representing the government, David, *supra* note 166, 160-61, 179-80. This view can nevertheless also be problematic as Libya illustrates. France, Italy, Germany and Australia recognised the National Transitional Council (NTC) as the legitimate government of Libya (until July 2011), whereas other NATO members had not done so, giving rise to questions whether the conflict had multiplied on the level of the troop contributing states, to the NATO operation, depending on whether they

conflict if the conflict involves an international organisation on one side and an armed group on the other side.[179] Thus, one must analyse "each belligerent relationship to determine [the] applicable law."[180] Once again, it is however questionable whether such a view is compatible with modern armed conflicts. Such a distinction would lead to an obligation of any international organisation to provide different standards of treatment depending on the adversaries, which is impractical in modern armed conflicts. It would also emphasise the separation of the two legal regimes which is less relevant in customary humanitarian law.[181] On the other hand, if an armed conflict involves a state and an international organisation as a coalition and an armed group as an opponent, members of the latter would be exposed to different treatment depending on whether they are in the hands of

had already accepted the rebels as the new government or not, Koutroulis, 'International Organisations Involved in Armed Conflict', *supra* note 172, 29, 34-35.

[179] David, *supra* note 166, 177; J. Cerone, 'Legal responsibility framework for human rights violations post-conflict', *supra* note 143, 42, 69. This view should be qualified and the example should rather be an international organisation and a state involved jointly in an armed conflict against an armed group. Recent peacekeeping practice suggests that the United Nations and regional organisations rely on the consent of the host-state and act with its agreement if not in support of the government, cf. e.g. South Sudan or Mali. Naert subscribes to this view. He argues that the opponent of a peacekeeping operation defines the applicable law, if it is a state, it will be an international armed conflict, Naert, *supra* note 63, 483-484. In many NIAC between a state and an armed group, an international organisation will intervene on the government's side but they may limit their support to logistic support or intelligence activities as well as participation in the planning and coordination of military operations carried out by the government. The legal dilemma has been how to align these functions with the law of armed conflict. The ICRC therefore developed a functional approach of 4 conditions which complements the classic criteria for the determination of a NIAC:
1. There is a pre-existing NIAC,
2. The multinational forces' intervention is carried out in support of one of the parties engaged in the pre-existing armed conflict,
3. The support consists of actions objectively displaying the involvement of multinational forces in the collective conduct of hostilities,
4. The actions in question reflect the decision by the concerned TCCs or the IOs to support a party involved in the pre-existing NIAC
Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 21; Cf. also M. Zwanenburg, 'International Organisations vs. Troops Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict During Peace Operations?', in S. Kolanowski (ed.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility (*2011), 23, 25.

[180] Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63; Faite, Grenier, *supra* note 166, 63-64.The ICRC has consistently taken this position, ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts, Report for the 31st International Conference of the Red Cross and Red Crescent, Doc. 31IC/11/5.1.2. (2011), 31, last para.; also Ferraro, 'IHL Applicability to International Organisations Involved in Peace Operations', *supra* note 163, 15, 17-18; Naert acknowledges that a conflict opposing an international organisation and an armed group "does not really fit" within the categories of international or internal armed conflict, but that such conflict would fall within the category of an internal armed conflict, Naert, 'The Application of International Humanitarian Law and Human Rights Law', *supra* note 171, 189, 197-98.

[181] Cf. also Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63; also R. Kolb, *Droit humanitaire et opérations de paix internationale* (2006), 57-58.

forces of the organisation or of the state and there would be an application of the traditional rules of intervention by a third state.[182]

The practice seems to favour the application of the law of international armed conflict, thus the bulletin of the Secretary-General, which foresees the application of international humanitarian law, refers to the law of international armed conflict in Article 1 of bulletin.[183] In the same regard, the Convention on Safety of United Nations Personnel (1994), speaks of the law of international armed conflict (Article 2, para.2).[184] This disposition was specifically accepted during the negotiations as "il a été généralement admis qu'il était impossible à l'Organisation d'être impliquée dans un conflit armé interne, car une fois qu'elle ou le personnel associé s'engage dans un conflit contre une force locale, le conflit prend, par définition, une envergue 'internationale.'"[185] Other examples of practice are less clear. With regard to Somalia, the United Nations and the United States argued that the law of non-international armed conflict was applicable, but one has to keep in mind that Somalia was a so-called "failed state" with no effective government so that the armed opposition resembled an armed group rather than a government.[186] Concerning the Democratic Republic of Congo, the United Nations considered itself bound by the whole body of international humanitarian law.[187] However this particular question of the nature of an armed conflict between an international organisation and an armed group might be left undecided, as many treaty rules applicable in international armed conflicts, especially concerning the conduct of hostilities, are equally applicable in non-international conflicts on the basis of customary humanitarian law.[188]

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[182] Sams, *ibid*., 45, 63-64; *Military and Paramilitary Activities, supra* note 55, para. 219; *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 320.

[183] See also Article 2 (2). Kolb, Porretto, Vité, *supra* note 15, 186; Statements by several states during the elaboration of the 1994 Convention also indicate that a conflict involving UN troops falls under the regime of the law of IAC, Report of the Ad Hoc Committee on the Work Carried Out During the Period from 28 March to 8 April 1994, UN Doc. A/AC.242/2 (1994), 43, paras. 166-170.

[184] The application of both the bulletin as well as the Convention is not mutually exclusive. The legal determination whether an armed conflict exists is a factual consideration and taking into account the saving clause of the Convention in Article 20(a)), both regimes can apply.

[185] P. Kirsch, 'La Convention sur la sécurité du personnel des Nations Unies et du personnel associé', in C. Emanuelli (ed.), *Les casques bleus : policiers ou combatants ?/Blue helmets : policemen or combattants?* (1997), 47, 56.

[186] Kolb, Porretto, Vité, *supra* note 15, 187-188.

[187] Greenwood, supra note 173, 3, 26; Kolb, Porretto, Vité, *supra* note 15, 187-188; D. W. Bowett, *United Nations Forces: A Legal Study* (1964), 509-10.

[188] For instance, Article 3 is applicable in international as well as in non-international armed conflicts, *Military and Paramilitary Activities, supra* note 55, para. 218; *Prosecutor v. Dusko Tadić a/k/a "Dule*", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, App.Ch., 2 October 1995, para. 102. Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 63. Bothe does not even specify whether the law of international or internal armed conflict is applicable to the United Nations, but simply deems IHL applicable, M. Bothe, 'Peacekeeping', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume I* (2012), 1171, 1190 mn. 28; Beerli, 'Keynote address',

3. The relationship between human rights and international humanitarian law

In peacekeeping operations, situations may arise in which peacekeepers find themselves confronted with attacks involving the use of potentially deadly force. Such a scenario is independent from the question as to whether a peacekeeping operation has a mandate to use military force for purposes other than self-defence,[189] and it may trigger the application of international humanitarian law which therefore raises the question of the ways in which the two bodies of law, human rights law and international humanitarian law, can be reconciled in such a situation.

Although Grotius recognised that certain laws are not applicable in "the midst of Arms, provided they are only those Laws that are Civil and Judicial, and proper for Times of Peace", he nonetheless recognised that "there are some Things which it would be unlawful to practise even against an Enemy"[190] thereby "depicting international law as the graduate development of universal principles of justice."[191] Grotius referred to Seneca,[192] which illustrates that the legal regulation of warfare is not a particularly recent invention of mankind but can be traced back to ancient times. Justice is also one of the arguments presented to explain why human rights law is applicable in times of armed conflict. It is now generally understood that both IHL and human rights law are applicable during armed conflict; they are complementary and not alternative.[193] Whereas, mostly in Europe this view is not only accepted but also supported, in contrast the American and Israeli position is that human rights law does not or should not apply in times of armed conflict.[194] In cases of overlap, the American perspective is that IHL applies as *lex specialis*.[195]In the past decades, an approximation and

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supra note 175, 9, 11. Beerli qualifies her statement, asserting that there are differences in the law applicable to persons deprived of their liberty in the law applicable to IAC and NIAC, *ibid.* As the Geneva Conventions are not open to ratification by international organisations the majority of the legal analysis is based, should international humanitarian law be applicable, on the application of the customary humanitarian law study by the ICRC.

[189] One example of such a mandate is the mandate of the intervention brigade in MONUSCO

[190] H. Grotius, *De iure belli ac pacis (1625)* in the edition of R. Tuck (ed.), *The Rights of War and Peace. Book 1. Hugo Grotius* (2005), 102-103, para. XXVII.

[191] Crawford, *supra* note 15, 7.

[192] Grotius, *supra* note 190, 102-103, para. XXVII.

[193] Crawford, *supra* note 15, 654; O. Ben-Naftali, 'Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux', in 'O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011), 3, 4 – 6.

[194] G. D. Solis, *The Law of Armed Conflict. International Humanitarian Law in War* (2010), 24; F. J. Hampton, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', in (2008) 90 *International Review of the Red Cross*, 549, 550; L. Doswald-Beck, S. Vité, 'Le droit international humanitaire et le droit des droits de l'homme', in (1993) 75 *International Review of the Red Cross*, 99, 112. The Israeli position is probably based on political considerations regarding the Occupied Territories.

[195] Solis, *ibid.*, 24; M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', in (2005) 99 *American Journal of International Law*, 119, 133. The U.S. position seems to be adjusting; the Operational Law Handbook refers to an emerging view according to which

partial convergence of IHL and human rights law occurred;[196] both fields of law are concerned with the protection of the human person[197] which has become a major issue in international law, as well as in international relations.[198] This is despite the different origins of both fields. Human Rights have grown out of constitutional, and thereby domestic, law in contrast to international humanitarian law which has a firm foundation in international law.[199]

The International Court of Justice elaborated at length on the relationship between human rights law and international humanitarian law in the *Wall Case*:

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the application of both regimes is overlapping and complementary, A. Gillman, W. Johnson (eds.), *Operational Law Handbook, The Judge Advocate General's Legal Center & School* (2012), 46-47, paras. B. 1. – 3. A similar assessment was included in the Fourth Periodic Report of the USA to the United Nations ICCPR Committee: "Under the doctrine of lex specialis, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in international humanitarian law, including the Geneva Conventions of 1949, the Hague Regulations of 1907, and other international humanitarian law instruments, as well as in the customary international law of armed conflict. In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing", Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (2011), para. 507.

[196] It is not evident there is a "going back to a complete separation of the two realms.", C. Droege, 'Elective affinities? Human rights and humanitarian law', in (2008) 90 *International Review of the Red Cross*, 501, 548.

[197] There are of course, conceptual differences. Human Rights are primarily rights that individuals enjoy as a measure of protection against their own national state. International humanitarian law regulates the conduct of warfare and therefore includes many prohibitive norms, in other words, obligations for individuals. Whereas human rights law is also made up largely of general principles, IHL consists mainly of specific norms. Regarding their application, human rights law applies to all, within the territory and under the jurisdiction of a state, and IHL establishes different layers of protection depending on nationality, as well as special statuses such as combatant or civilian; Solis, *supra* note 194, 26.

[198] A noticeable paradigm shift can be traced within the United Nations, the concepts of "Human Security" and "Responsibility to Protect" made their appearance, General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), paras. 138, 143. The latter was endorsed by the Security Council in Resolution 1674 (2006), para. 4 and Resolution 1874 (2009), para. 4, Security Council Resolution 1674, UN Doc. S/RES/1674 (2006), Security Council Resolution 1874, UN Doc. S/RES/1874 (2009). The Council also increasingly recognised the need to protect civilians in times of armed conflict, see e.g. Resolution 1296, especially paras. 2, 5, and Resolution 1738, especially paras. 5-6, Security Council Resolution 1296, UN Doc. S/RES/1296 (2000), Security Council Resolution 1738, UN Doc. S/RES/1738 (2006). See also, N. Krisch, 'Article 39', in B. Simma, D.-E. Khan, G. Nolte et. al. (eds.), *The Charter of the United Nations. A Commentary. Volume II* (2012), 1272, 1284 mn. 22 – 1285 mn. 24. On human security, cf. C. True-Frost, The Security Council and Norm Consumption', (2007) 40 *New York University Journal of International Law & Politics,* 115, 138 – 74.

[199] A. A. Cançado Trindade, 'Desarrollo de las relaciones entre el derecho internacional humanitario y la protección internacional de los derechos humanos en su amplia dimensión', in (1992) *16 Revista Instituto Interamericano de Derechos Humanos*, 39, especially 45-49; R. Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?', in (2003) 14 *Criminal Law Forum*, 153, 156-157; J.-M. Henckaerts, 'Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum', in (2007) 1 *Human Rights & International Legal Discourse*, 95, 97-100. See also Henckaert for a compilation of state practice and UN practice acknowledging the application of human rights in times of armed conflict, *ibid.*, 106-09; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Administration of Justice, Rule of Law and Democracy, Working paper on the relationship between human rights law and international humanitarian law by Francoise Hampson and Ibrahim Salama, UN Doc. E/CN.4/Sub.2/2005/14 (2005), 12-14, paras. 41-50.

> the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[200]

This slightly cryptic judgment did not elucidate the position of the ICJ, but instead created confusion.[201] It was interpreted as a statement on the relationship between the two regimes *per se* and not as a pronouncement on how to establish the applicable legal framework in a specific context. In that regard, the advisory opinion of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons Case* was clearer. The Court explicitly examined the relationship between one specific norm, the right to life under the ICCPR, and its application in times of armed conflict under international humanitarian law.[202] This norm-by-norm approach is well justified, as one cannot automatically presume that a specific norm of international humanitarian law will be *lex specialis* as regards the corresponding human rights norm.[203] Given that there are different human rights instruments, one

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[200] *Legal Consequences*, *supra* note 127, para. 106. The Court reconfirmed its finding in *Congo v. Uganda*, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 216.

[201] A better analysis of the relationship is contained the *Abella Case* of the Inter-American Commission on Human Rights, Case 11.137, Juan Carlos Abella v. Argentina, November 18, 1997, paras. 157-170. For a good overview of the many inter-related intrinsic problems regarding the application of IHL and human rights law which cannot be addressed here, see D. Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', in (2013) 2 *Cambridge Journal of International and Comparative Law*, 180, 181-182.

[202] *Legality of the Threat or Use of Nuclear Weapons, supra* note 82, para. 25. The Court held: "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, *the right not arbitrarily to be deprived of one's life applies also in hostilities*. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex .specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."

[203] One example of where human rights law is *lex specialis* and thereby complementing the application of IHL is as follows: A detailed analysis of case-law shows that human rights law as informing IHL necessitates an arrest whenever possible, as well as to plan a military or police operation in a way which will increase the success of an arrest. As such, human rights law goes beyond the tests of necessity and proportionality in international humanitarian law. Lethal force has been seen as excessive when the suspects were seen as harmless, even in situations where arrest was not possible, but this test of proportionality is also intrinsic to IHL, L. Doswald-Beck, 'The right to life in armed conflict : does international humanitarian law provide all the answers ?', in (2006) 88 *International Review of the Red Cross*, 881, 883-87, 890; H. Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', in (2006) 11 *Journal of Conflict & Security Law*, 265, 280-81; Another example is the right of *habeas corpus* which is inexistent under IHL for detainees, but as derived from human rights law, it allows detainees to challenge their detention in court, Henckaerts, *supra* note 199, 95, 119; Certain armed related activities call, however, for a derogation

might also allow derogation in specific cases which would allow the application of IHL, whereas in another instrument the same right might be regulated more restrictively.[204] Furthermore, depending on the norms in question, an interpretation might also allow an alignment of the two norms, preventing a norm conflict according to which one norm is superseded by another.[205] Therefore, the norm deemed to be *lex specialis* is the norm with the "more precise or narrower material and/or personal scope of application that prevails", in other words the one which has the larger "common contact surface area" with the given situation.[206]

The nature of the armed conflict is also determinative for the relationship between two specific norms. Human rights are more likely to fill the lacunae in respect to the protection of persons in non-international armed conflict than in international armed conflicts.[207] There are also other areas of law which can be identified as falling more squarely under IHL or human rights law.[208] In relation to

from Article 5 of the ECHR, so it is submitted that it is generally accepted that IHL is *lex specialis* in international armed conflicts regarding the detention and internment of POWs and civilians, A. Reidy, 'La pratique de la Commission et de la Cour européennes des droits de l'homme en matière de droit international humanitaire', in (1998) 80 Revue Internationale de la Croix-Rouge, 551, 556-58, 561, 564; Erberich, *supra* note 151, 44-48; Krieger, *ibid*., 265, 271. Krieger also favours an analysis of the relationship between a norm of human rights and a norm of international humanitarian law in each individual case (*ibid.*). See also J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations', in (2006) 39 *Vanderbilt Journal of Transnational Law,* 1447, 1453-54; Milanovic, *supra* note 111, 232-235; Naert, 'The Application of International Humanitarian Law and Human Rights Law', *supra* note 171, 189, 208; R. Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY', in (2010) *Journal of Conflict & Security* Law, 511, 514. Cf. also *Case of Varnava and Others v. Turkey*, Grand Chamber, Judgment, 18 September 2009, para. 185; *Case of Al-Jedda v. The United Kingdom*, Judgment, Grand Chamber, Judgment, 7 July 2011, para. 107.

[204] Cf. i.e. Article 7 ICCPR and Article 5 ECHR.

[205] The Nuclear Test Case is an example as IHL was used to interpret "arbitrary" in the context of the prohibition of arbitrary prevention under Article 6 ICCPR, M. Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law', in 2010 (14) *Journal of Conflict & Security Law*, 459, 468; Cf. Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 3; Human Rights Committee, General Comment No. 31 (80), *supra* note 104, para. 11;

[206] M. Sassòli, L.M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', in (2008) 90 *International Review of the Red Cross*, 599, 604.

[207] Solis, *supra* note 194, 25. However, differences exist there as well regarding the aim of the two regimes of laws. As Meron explains "significant differences remain. Unlike human rights law, the law of war allows (...) the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage (…) As long as rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.", T. Meron, 'The Humanization of Humanitarian Law', in (2000) 94 *American Journal of International Law*, 239, 240; Naert, *supra* note 63, 622-624; Krieger, *supra* note 203, 265, 274-75.

[208] Roberts considers the concurrent application of IHL and HR to be relevant in occupations or with respect to detention rather than in armed conflicts, A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in (2006) 100 American Journal of International Law, 580, 594-95, 599-601. Watkin, who also has recourse to a case-by-case approach, suggests that the use of force for policing in a situation of occupation would be rather subject to norms of human rights law, but that combat action is governed by IHL,

peacekeeping, it is argued that human rights apply in non-coercive operations and both bodies of law apply in coercive operations; however the correct criterion is an assessment of whether an armed conflict exists.[209]

The competences of all international organisations are determined by their constitutive instruments, and these may contain only limited competences in the area of human rights law, so that it is even more important to determine the normative relationship between IHL and human rights law on a case-by-case basis.

Finally, an issue which has been more or less neglected in academic writing is the distinction between jurisdiction under human rights and humanitarian law for international organisations. It appears from the very few publications on this topic that the application of the regime of human rights law may be simply dismissed due to a lack of jurisdiction under human rights law, which would leave IHL as the only applicable body of law.[210]

Naerts also asserts – on the basis of an analysis of the situation in Iraq in 2003 – that the Security Council can, by passing a resolution, set aside some provisions of IHL on the basis of Article 103 of the UN Charter.[211]

K. Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', in (2004) 98 *American Journal of International Law*, 1, 24-34, especially 26, 28.

[209] N. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus, N. D. White (eds.), *European Security Law* (2007), 102, 118.

[210] The example provided by Lattanzi is the *Bankovic* case. She argues that the case did not deal with the exercise of public authority, as a subject of domestic law over an individual which would correspond to extraterritorial human rights law jurisdiction, but rather the, "question de comportements lésant des droits individuels réalisés par l'Etat en tant que sujet du droit international et agissant donc sur le plan des relations internationales, c'est-à-dire dans l'exercise d'une prérogative souveraine ainsi dite externe (…) Il s'est agi, donc de l'exercice d'un pouvoir de gouvernement dans les rapports avec un autre Etat, tel que l'est certainement un acte de conduite des hostilités entre Etats – la nouvelle Yougoslavie et les Pays de l'OTAN – mais sans que, d'aucune façon, ne se soit réalisée une situation de 'persons in the power of a party to the conflict', voire de juridiction de la part des Etats membres de l'OTAN sur les résidents sur le territoire yougoslave." Thus, it was not about the application of converging rights of the two systems nor the specific rights of the human rights system, F. Lattanzi, 'La frontière entre droit international humanitaire et droits de l'homme', in E. Decaux, A. Dieng, M. Sow (eds.), *From Human Rights to International Criminal Law. Studies in Honour of an African Jurist, the Late Judge Laïty Kama/ Des droits de l'homme au droit international pénal. Etudes en l'honneur d'un juriste africain, feu le juge Laïty Kama* , 519, 569-70 ; Similarly, see Milanovic, *supra* note 205, 459, 461. The same problem is mentioned – in passing – by Doswald-Beck. Referring to the decision of *Issa* of the European Court, she says that human rights law, as laid down in treaties, may not apply due to a lack of jurisdiction if there is no actual control of the territory, *Case of Issa, supra* note 104, paras. 68-74; Doswald-Beck, *supra* note 203, 881, 899.

[211] Naert, *supra* note 63, 500-502; F. Naert, 'Detention in Peace Operations: The Legal Framework and Main Categories of Detainees', in (2006) 45 *Military Law & Law of the War Review*, 51, 54; M. Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', (2004) 86 *International Review of the Red Cross*, 745, 755-57, 763-68; The experts, by a wide margin, of the ICRC Report equally agree, ICRC, Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory, Report (2012), 83.

In summary, the relationship between IHL and HR has to be analysed in the context of a specific norm and the application of both fields of law may also be dependent on external factors – in terms of the respective norms – such as jurisdiction or the superseding powers of the Security Council.

4. Application of the law of occupation to peacekeeping operations

The law of occupation as a specific regime of international humanitarian law applies to situations in which a state exercises control and powers over a territory amounting to those of the government whose territory it occupies. As there have been instances where the United Nations has administered international territories,[212] the question of whether an international organisation could be falling under this particular regime of law is relevant. The application of the law of occupation is triggered by Article 42 of The Hague Convention (IV) Respecting the Laws and Customs of War on Land,[213] according to which a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."[214] The occupier assumes the role of sovereign of the territory but he is barred from changing the law in force and has to take all measures in his power to restore and ensure, as far as possible, public order and safety according to Article 43 of the Convention.[215]

These two articles demonstrate why it is highly doubtful that the law of occupation can be applied to an international organisation. First of all, international administration by an international organisation is normally based on cooperation with and consent of the government of the respective

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Another question that is beyond the scope of this study is how a Security Council derogation of human rights which involves the application of IHL in a given situation would affect the application of the "IHL component" as any effect of such a derogation on IHL could be seen as conflating jus ad bellum with jus in bello.

[212] e.g., East Timor, Kosovo.

[213] Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[214] Thus it is a question of fact: "The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.", United States Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others (the Hostages Trial)*, Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Vol. VIII WCR 34, 55. The UK Manual uses a two-step test to determine whether a state of occupation exists in a given area, of which the first part is that "the former government has been rendered incapable of publicly exercising its authority", The Joint Service Manual of the Law of Armed Conflict (2004), para. 11.3; G. H. Fox, *Humanitarian Occupation* (2008), 230; H. McCoubrey, N. D. White, *International Law and Armed Conflict* (1992), 280.

[215] Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. It therefore "serves as a restraint against occupiers assuming powers of the displaced sovereign", M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16 *European Journal of International Law*, 661, 671-72. For the present purposes, it is also not necessary to refer to further dispositions pertaining to the law of occupation.

state.[216] Therefore, under normal circumstances, an international organisation is not forcefully taking over a territory against the wishes of the government;[217] it is a situation of *occupatio pacifica* in contrast to *occupatio bellica*.[218]

Moreover, the mandate of an international organisation, for example, the mandate of UNMIK, expressly includes a mandate of transformative authority which goes beyond safeguarding the *status quo.*[219] Consequently, a large part if not the majority of doctrine denies an application of the law of occupation to international organisations.[220] As a reply to that argument, one can say that relying on "consent" corresponds to relying on an argument derived from *jus ad bellum*, and that the application of the law of occupation is determined by a factual analysis under *jus in bello.* This counter-argument is valid,[221] however many organisations are legally not able to occupy a territory in the absence of competences under their internal law;[222] any such act would correspond to the international organisation acting *ultra vires*.[223] It is also not convincing in this regard to argue that an

[216] Therefore the UK manual excludes the application of the law of occupation to cases of international administration of territory by the United Nations or another international organisation, The Joint Service Manual of the Law of Armed Conflict (2004), para. 11.1.2. The ICTY applied a similar test, demanding equally that "the occupied authorities (…) have been rendered incapable of functioning publicly." Additionally, the Tribunal's standards require the surrender, defeat or withdrawal of the forces of the occupied authority, *Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Stela",* Judgment, Case No. IT-98-34-T, T. Ch., 31 March 2003, para. 217. It is noteworthy that the Tribunal speaks of its criteria as "guidelines" (*ibid.*).

[217] Proponents of the responsibility to protect would argue differently.

[218] Schmalenbach, *supra* note 154, 358-362.

[219] Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 68; S. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', in (2005) 16 *European Journal of International Law*, 695, 700. It is difficult to compare the United Nations especially to an occupying force because of criteria such as the mission's legitimacy, its mandate and its mode of functioning, Sams, *ibid, 66.* Stahn observes correctly that the administration of a territory by an international organisation is *"*to some extent, a counter-model to the classic concept of occupation. It is not a state-centred form of administration which is triggered by factual events (i.e. the effective authority over territory), but an arranged form of authority that is carried out by or under the auspices of international actors", C. Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (2008), 155.

[220] The "generally accepted view is that occupation law does not apply to nation-building missions because the UN lacks the essential attributes of statehood necessary to comply with the law's many obligations.", Fox, *supra* note 214, 219; S. Wills, 'Continuing Impunity of Peacekeepers: The Need For a Convention', (2013) *Journal of International Humanitarian Legal Studies*, 1, 8-9.

[221] But it also should be noted that in academic writing there has been a debate that has endured for decades as to whether the distinction between *jus ad bellum* and *jus in bello* is always necessary and that arguments *of jus ad bellum* for the non-application of the law of occupation have been already raised in 1946, tracing the debate and arguments on the distinction between Jus ad Bellum and Jus in Bello, see J.H.H. Weiler, A. Deshman, 'Far Be It From Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus and Bellum and Jus in Bello', in (2013) 24 *European Journal of International Law*, 25-61. *In 1946 it was already questioned whether all Hague Rules on occupation should apply to peace-loving nations occupying an aggressor's country, Ibid.32;* E. A. Korovin, 'The Second World War and International Law', in (1946) 40 *American Journal of International Law*, 742, 753.

[222] Internal law means the Constituent treaty as well as other relevant documents pertaining to its functioning on an external level.

[223] From the perspective of the law of international responsibility, "consent" is a circumstance precluding wrongfulness.

international organisation may be bound by Security Council Resolutions and Article 103 of the United Nations Charter similarly to a state.[224] Under such an argument, the United Nations could – on the basis of a resolution under Chapter VII – compel another international organisation to act even if the act would be in violation of its own internal law.[225]

Furthermore, taking the example of UNMIK in Kosovo, the law of occupation simply does not cover *ratione materiae* cases of civil administration of a territory through peaceful means by an international organisation. On the basis that these administrations are civil, they already exclude the application *ratione materiae* of the law of occupation and the consent of the government on whose territory the operation is deployed would not amount to an argument *jus ad bellum* against the *jus in bello* body of the law of occupation.[226]

In practice, the United Nations has never acknowledged the application *de jure* of the law of occupation nor applied this body of law in practice, including situations where, arguably, the conditions for the application of the law of occupation were fulfilled. [227] A report of an expert

[224] International Law Commission, Report of the International Law Commission, Sixty-third session (26 April – 3 June and 4 July – 12 August 2011), General Assembly, Official Records, Sixty-sixth session, Supplement No. 10 (A/66/10) (2011), 170, para. 2.

[225] It is of course, only a hypothetical consideration and it does not touch upon any question of responsibility by the United Nations and/or the other organisation in question. The law of occupation can be also modified by the Security Council under Chapter VII of the Charter and the general principle of Charter supremacy arising from its Article 103, D. J. Scheffer, 'Beyond Occupation Law', (2003) 97 *American Journal of International Law*, 842, 852.

[226] Stahn, *supra* note 219, 473. KFOR was in charge of military tasks, thus unless one argues to extend the application of the law of occupation to all international organisations being involved in the administration of a territory, it is another argument against the application. Stahn argues for an application of the law of occupation by analogy, *ibid.* 474. Some expert also consider that the law can be de facto applicable – fulfilling the criteria under Article 42 of Hague Convention (IV) - if the international administration is split in a civil administration and affiliated armed forces), in such circumstances all the partners involved shall be considered as occupying powers for the purposes of IHL, ICRC, Expert Meeting, *supra* note 211, 79-80.

[227] On the contrary, regarding the administration of the Gaza Strip by UNEF, the UN has opined "The occupier has a duty (…) of administering the country according to existing laws and existing rules of administration (…) the forgoing is enough to indicate what the situation would be if the Force were an occupying army – which it is not, and which it has been stated explicitly it is not", Brief on UNEF Function in the Gaza Strip, 8 August 1957, UN Archives N.Y., File No. S-0530-0101, UN Emergency Force I, Box DAG-13/3.11.0.0-101; Sams, 'IHL Obligations of the UN and other International Organisations', *supra* note 166, 45, 68-69. Security Council Resolutions 1031 (1995), 1037 (1996), 1244 (1999), 1272 (1999) likewise do not contain any reference to the law of occupation, Security Council Resolution 1031, UN Doc. S/RES/1031 (1995), Security Council Resolution 1037, UN Doc. S/RES/1037 (1996), Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), Security Council Resolution 1272, UN Doc. S/RES/1272 (1999). The expert report of the ICRCR also states that the law of occupation was never applied de jure to the UN administration of territory, but the majority of experts believe that the law of occupation could be de jure applicable as the criteria listed in Article 42 of the Hague Regulations also do not list the objectives of the occupation as long as there is no consent by the sovereign, ICRC, Expert Meeting, supra note 211, 78-80, 84. Four possible scenarios were devised for the de jure application to United Nations administration of territory as a result of: "1) UN invasion of a territory, 2) UN intervention in a failed State, 3) the handover of territory by a coalition of States who had taken control of

meeting of the ICRC also showed the incertitude in legal scholarship regarding the application of the law of occupation to peace operations. Although the majority of experts agreed that in certain circumstances the law of occupation might be applicable to operations under UN command and control, they were equally divided on the details.[228]

In summary, the arguments against an application of the law of occupation to peacekeeping operations are convincing and in practice, the law of occupation has equally never been applied in the peacekeeping context.

3.3. Conclusions

The inquiry into the applicable law in respect to peacekeeping operations has shown that the legal framework is rather complex. Both international human rights and international humanitarian law can be applicable whereby both fields of law raise certain issues. Besides the debate over the applicable body of humanitarian law to peacekeeping operations, the exercise of jurisdiction by international organisations under human rights law is also problematic. It was argued that the two models of jurisdiction developed in the jurisprudence of international courts and tribunals are also applicable to international organisations. The unclear customary status of many dispositions further complicates the picture.

These two models of jurisdiction under human rights law may have a connotation in the context of the question of joint responsibility of international organisations for peacekeeping operations. It is imaginable that in the context of a specific peacekeeping operation deployed in the field, one organisation may be exercising territorial jurisdiction over a given area, whereas a second international organisation is exercising personal jurisdiction over one or several people within this area. Nevertheless, this exercise of jurisdiction by both organisations already presupposes that the conduct in violation of international law was in fact also attributed to both organisations. It therefore increases the potential for joint responsibility of two or several organisations as the attribution of

another State, or 4) the withdrawal of the host State's consent to UN presence on its territory", *ibid.,* 79. See also the background paper by Steven Ratner, *ibid.*, Appendix 2, 96 – 104.

[228] Some declared the law to be applicable in situations in which the UN missions exercise functions and powers of a territory similar to an occupant, however there was disagreement whether the law of occupation would be applicable *de jure* or *de facto*, and one expert also stated that the applicable law of a UN mission is primarily determined by the Security Council mandate. The Mandate and the SC Resolution were also seen by some experts as the determinative criteria for the application of the law of occupation, though this was disputed by the majority as it would be against the strict separation of *jus in bello* and *jus ad bellum*. Classic criteria should also be used for UN operations of which "effective control was the key concept." The experts also agreed that the SC could set aside at least these dispositions of the law of occupation – by the virtue of Article 103 – which were not pertinent for implementing the resolution and which are not contrary to *jus cogens*, ICRC, Expert Meeting, supra note 211, 33-34.

conduct could also be based on different violations of primary norms. In other words, one could imagine a scenario in which the Security Council – and thereby the UN – was bound to prevent a certain conduct based on an exercise of territorial jurisdiction and in which a regional organisation was obliged to abstain from a certain conduct on the basis of personal jurisdiction over a person.