



Koninklijke Nederlandse Vereniging voor Internationaal Recht
NEDERLANDSE GROEP VAN DE INTERNATIONAL LAW ASSOCIATION | OPGERICHT 28 NOVEMBER 1910

**PROCEEDINGS OF THE PUBLIC PART
OF THE ANNUAL GENERAL MEETING**

Refining Human Rights Obligations in Conflict Situations

7 November 2014

**held in the Raadzaal of Utrecht University,
Achter Sint Pieter 200, 3512 HT Utrecht**

PRESENTATION PREADVIEZEN

**International Responsibility for Conduct of UN Peacekeeping Forces:
The Question of Attribution**

Prof.dr P. Palchetti

In my introduction I will address two points: first of all, the criteria of attribution which can be applied in relation to the conduct of the peacekeeping forces and secondly dual attribution with regard to the harmful conduct of the United Nations ("UN") and the sending state. The purpose of this speech is to give a rapid overview of different positions and arguments regarding this doctrine. First, I will address the rule of attribution which applies to the conduct of military contingents in peacekeeping. There are two opposite views in this matter.

The first view is the position of the UN at one side of the spectrum. The UN keeping forces have the status as an UN organs and their conduct must be attributed to the United Nations according to art. 6 Draft Articles on the Responsibility of International Organizations ("DARIO"), adopted by the International Law Commission ("ILC") in 2011. The status of peacekeeping forces, as organs of the UN, would be decisive for purposes of attribution. The consequence would be that as an organ of the UN, all the conduct taken by the peacekeeping forces would be attributed to the UN including the ultra vires conduct.

The second view, on the other side of the spectrum, is that a certain conduct of peacekeeping forces can be attributed to the UN only if the UN had effective control over that conduct. This effective control test is based on a very restrictive interpretation according to art. 7 DARIO. Effective control is control over each and every conduct of the organ. This control is difficult to prove because there are many cases in which the conduct can be attributed to the sending state, because the troops remain organs of the State and therefore according to art. 4 DARIO it has to be attributed to the State.

I think both views are at least partly correct, and it is true that once national troops are placed at the disposal of the UN, it can be assimilated as the organ of that international organisation. In particular, if there is a presumption that these troops are exercising their functions on behalf of

the organisation, their conduct must be attributed to that organisation, with regard to the ultra vires conduct as well.

The general rule of attribution only helps when an entity is an organ of the organisation. This formal element is hardly decisive because for this conduct effective control is much more important. In my view it is difficult to reconcile art. 6 DARIO, especially in this area of factual control.

The other view, which relies on the existence of effective control has a great merit on placing emphasis on control. But it is wrong to assume that in order to attribute, it must be proved that every conduct is taking under effective control of the international organisation, because there is room for a presumption when the troops act in performance of orders, entrusted by the international organisation.

To summarise: the purpose of this paper is to give an intermediate position between these two different approaches. In my view attribution depends on two different elements. First of all, if the troops are performing functions under the international organisation and secondly whether they are acting under instructions of the sending State. These two elements are intertwined in my view, particularly when conduct is taken by the national contingent in performance of functions entrusted to them by the organisation, where exclusive and effective control can be assumed to exist. This can be rebutted when demonstrated, they were acting under instructions from the sending State. When troops are placed at disposal of an international organisation, effective control is decisive for the purpose of attribution.

The next topic I would like to address is dual attribution. There are several reasons why I do not think this can be regarded as the default rule. Perhaps the basic point is that the view of dual attribution as a general rule does not find support in practice. Some judgments have recognised the possibility, such as the Dutch Supreme Court in the Nuhanovic case, but these judgments do not clarify the specific conditions to justify why this rule must be seen as the default rule. Instead, only in specific situations dual attribution applies.

This can be explained by the fact there is a lack of judicial practice with regard to attribution in domestic courts because of the immunity of international organisations, making it impossible for individuals to make complaints against both the international organisation and the sending State. Still, in my view this can be regarded as a third rule which can apply in every situation. This is based on policy rules that avoid dual attribution.

Having said this, I think there is some room for the possibility of dual attribution. The criteria in art. 7 DARIO are not incompatible with dual attribution. However, in my view dual attribution should only be applied in specific, restricted circumstances. A situation which can lead to dual-attribution is when it is unclear if the national contingent was acting according to orders of the sending State or the international organisation. Srebrenica is a good example, because it was unclear who, the UN or the Netherlands, had control and authority over Dutchbat. Dutchbat was withdrawing and the State has the power to withdraw. It was unclear who had formal authority over the troops, but both the State and the UN had factual control over the troops. In this case it would be fair to say the conduct can be attributed to both the sending State and the international organisation.

The Role of Human Rights Law in Private International Law Cases in Matters Related to Tort

Dr L.R. Kiestra

In our contribution we have dealt with two aspects of the role that human rights law may have in private international law cases. On the one hand there is the aspect of the impact of human rights on private international law. Particularly, the rights guaranteed in the European Convention on Human Rights increasingly impact issues of private international law. This impact may be discerned with regard to all three main issues of private international law. For example, with regard to the issue of jurisdiction in private international law the fundamental right of the right to access, as derived from the right to a fair trial, may impact jurisdictional rules. Human rights may also impact the issue of choice of law: What if the choice of law rules of the forum State resulted in the application of foreign law violating a human rights norm? A similar issue can be raised in relation to the recognition and enforcement of foreign judgments. What to do when the recognition and enforcement of a foreign judgment may result in a human rights violation? An example of such a situation would be the recognition and enforcement of a foreign judgment where the preceding proceedings in the foreign country were clearly unfair – violating the rights guaranteed in Article 6 ECHR. In light of relatively new case law of the ECtHR one could, however, also ask the reverse question: Could the refusal to recognise or enforce a foreign judgment by a State not result in a violation of the one of the rights guaranteed in the ECHR?

These are but some of the issues pertaining to the impact of human rights on private international law. It is a broad subject. I should know, as I have written my PhD thesis on the impact of the ECHR on private international law. Due to space constraints, in our paper we have limited ourselves to the impact of human rights – and in this regard we have focused particularly on the rights guaranteed in the ECHR and the EU Charter – on two issues of private international law: the issue of jurisdiction and the issue of choice of law.

There is, however, also another aspect of the role of human rights law in private international law cases. International civil litigation is increasingly used to attempt to hold parties accountable for – alleged - human rights violations. This is the second aspect of the role of human rights law in cases of private international law we have examined in our paper. In such cases private international law invariably has an important role. Important questions concerning issues of private international law have to be answered before one can answer whether a party could held responsible for a human rights violation. For example, it may be difficult in such cases to find an internationally competent court. It is easy to imagine in certain cases that the courts of a country where an alleged human rights violation has occurred are not ideal to pursue such a case. For example, if one alleges that one has been tortured by State officials, one may have little faith in the impartiality of the courts of said State. But could or should it then be possible to pursue such a case in the courts of another country? And when one has found a court to hear a case, how should the human rights norms be applied to the case? In international tort cases human rights law may impact the merits of the case, but how exactly do human rights in such cases have an effect on the applicable (foreign) law? These are some of the questions we have taken a closer look at in this regard.

In conclusion, it is interesting to note that these two discussions concerning human rights in private international law sometimes intersect. For example, if one argues that Article 6 ECHR,

which, inter alia, guarantees the (plaintiff's) right to access to a court, may also prescribe that there is a link between the case and the forum (favouring a defendant), it may also become more difficult to find a competent court in a case where one attempts to hold a party accountable for a human rights violation.

Human Rights Obligations in Peace Operations: The Perspective of the European Convention on Human Rights

Prof.dr W. Vandenhole

I would like to take you through the four discussion points and some of the key points I am trying to make in my paper.

- (a) During peace operations, human rights law and international humanitarian law will often apply simultaneously. How they relate to each other cannot be determined in an abstract way, but needs to be established case by case and right by right.

The first point I make is that during peace operations humanitarian law and human rights law apply simultaneously. What kinds of obligations apply when we talk about peacekeeping operations? Should we focus primarily on human rights law or on humanitarian law or both? And how do these relate? Here my position is that we cannot give black-or-white answers in the sense that one always prevails. We cannot decide that relationship abstractly but have to do so case by case, obligation by obligation and right by right.

- (b) The scope of human rights obligations incumbent on States contributing troops to peace operations will vary depending on inter alia the degree of control that is exercised, the nature of the right (absolute or relative), and the nature of the obligation (negative or positive).

My second submission is the question what is the scope of human rights obligations. There are two important elements to be taken into account. First of all the dimension of extraterritoriality of human rights and secondly the presence of an armed conflict.

Since I completed the text the European Court of Human Rights ("ECtHR") has issued an important new judgment, *Hassan v. UK* (16 September 2014), where the Grand Chamber deals with the question of the relationship between international human rights and international humanitarian law. The Court accepted for the first time that it was a case about armed conflict. It examined whether art. 5 ECHR (right to liberty) prevails or whether standards of humanitarian law apply or whether there is a third way. The Court stated that human rights law is to be applied "against the background of" humanitarian law. A couple of dissenters think this means displacement of human rights law to the benefit of humanitarian law.

- (c) Troop-contributing States are not the only actors who have human rights obligations during peace operations. The peace force itself, which is considered to be a subsidiary organ of the UN if authorised by the UN, has human rights obligations analogous to those of the troop-contributing States.

Secondly, I argue that, drawing on ECtHR case law, there are some parameters. There are a number of ECtHR cases that define the scope of human rights obligations that can be attributed to a State. To a large extent this has to do with the degree of control, i.e. control over the situation or individuals instead of over troops. To what extent control is exercised is important. The nature of the right matters as well: Is it an absolute right or a relative right with regard to which limitations are possible? Is it a negative or positive obligation? We also have to look at the development in time in a certain peace operation.

To decide on the relationship between human rights and humanitarian law one must look right by right. What I will not develop here is what this means for each specific right. By way of illustration I focus on those that are most relevant: the right to life and the right to liberty, because these two human right standards have a strong corollary in humanitarian law. In the case law of the ECtHR with regard to the right to life the Court strongly applies the right to life on armed conflict as well, despite humanitarian law and the admissibility of the use of force under certain conditions. Some flexibility must be taken into account with regard to the procedural obligation (to ensure an independent and effective investigation) and with regard to positive obligations.

Considering the right to liberty: given the wording of art. 5 ECHR and its limited, exhaustive, list of conditions, there is hardly any space to take into account the realities on the ground, such as the existence of a conflict (factual or legal). My submission in the text was that there is little space for a contextual approach, but it is qualified strongly by the ECtHR in the *Hassan v. UK* (September 2014) judgment, where it has applied the contextual approach. The Court wants to preserve the basic idea that there is no arbitrary deprivation of liberty, but is otherwise happy to allow for considerable “accommodation”.

- (d) There may exist joint human rights obligations and human rights obligations that apply in parallel to troop-contributing States and a peace force itself. These joint and parallel obligations require further research. Equally, the implications for responsibility in case of violations of these obligations need to be examined.

My last submission is that for the peace force itself as an UN subsidiary organ, we can and should identify the scope of human rights obligations as we did for the troop-contributing states. Human rights law is to be applied very strictly concerning negative obligations, and more flexibility and a contextual approach can be adopted with regard to positive obligations. I am drawing on the Human Rights Advisory Panel, which was established to monitor the human rights of UNMIK in Kosovo. Even though it is advisory, it draws heavily on the ECHR and the members have close ties with the ECtHR (one is now a judge of the ECtHR and one past-judge became a member of the panel). The Panel assesses the human rights obligations of the UN civil mission in Kosovo. Their work is quite instructive for human rights obligations in peacekeeping operations. The Court has identified some minimum standards, such as minimum humanitarian standards, as well, leading to a best efforts’ obligation.

What I have not covered is how to imagine that troop-contributing states and the UN have obligations together. On the responsibility for wrongful acts and human rights

violations, my argument is that there are some joint and some parallel obligations. I have some general ideas on how to define the relationship and the responsibility that flows from it, but these need further elaboration for application on peace operations.

QUESTIONS, ANSWERS AND DEBATE

Dr O. Spijkers

Assistant Professor of Public International Law, Utrecht University

Addressed to prof. Palchetti

Did you read the Mothers of Srebrenica judgement of the Dutch district court? What do you think of the way they dealt with the ultra vires issue? I thought it rather unpersuasive, in the sense that I think ultra vires acts should normally be attributed to the UN and not the Netherlands, unless the latter had effective control over these acts.

Prof. Palchetti

Ultra vires acts are the most interesting. There is no law on ultra vires in peacekeeping missions. I disagree with the approach taken by the district court, which says that the sending state has to bear responsibility for ultra vires conduct by national troops. In my view one must take into account whether the troops were performing on behalf of functions of the organisation: if these are combat related, the UN must bear responsibility. Secondly, one must assess if the conduct was on instructions of the State. This would shift the responsibility from the UN to the state, but only if it can be proven that the conduct was on instruction of the state. The recipient powers can only be relevant to establish responsibility as well, but this is a distinct wrongful conduct. That is not about the act itself, which must always be attributed to the UN, but about an omission.

I think it is the UN who should bear responsibility and the State can be held responsible for the omission because it did not exercise its power. So on the one hand there is not exercising the power and on the other hand the ultra vires act itself. In my view it must be attributed.

Mr B. Punt

Addressed to prof. Palchetti

My question concerns the 2014 judgment of the District Court of The Hague. Maybe, the fact that the Dutch State had disciplinary powers over Dutchbat is not a very convincing argument. If I am right, though, the Dutch government was informed about the separation of men from women and children on the very afternoon that the men were transported elsewhere. This was, of course, a very alarming signal, which called for government action and instructions, so one might argue.

Prof. mr dr N.J. Schrijver

Professor of Public International Law, Leiden University

Addressed to prof. Palchetti

I agree with prof. Palchetti's balanced findings on the issue of dual attribution. In order to assess the more precise scope and extent of the responsibility of the international organisations and the

sending State, respectively, it may be necessary to study precisely the terms of the Status of Force Agreement (“SOFA”) or Status of Mission Agreement (“SOMA”) between the UN and the troop contributing State. Do you happen to know whether these agreements can differ indeed and, if so, whether this could have an impact on the extent of the attribution? Furthermore, if the responsibility of the international organisation cannot be fully established and hence the ‘effective control’ test of article 7 DARIO is not met, does the author agree that this should not automatically result in the full responsibility of the troop contributing State since this would be unreasonable?

Prof. Palchetti, responding to both questions

With regard to intricacy, I did not enter into the details of the Srebrenica case. The case should obviously take into account the situation on the ground. We took into account all the different elements: Lack of instructions of the Dutch government, where it had the obligation to intervene. The withdrawal falls within the authority of the state as well. The court in the Nuhanovic case stressed this as well, correctly in my view. The State had regained authority, because the State has the power to withdraw. Because of that power, it is not only factual but also formal authority. One can identify the possibility of wrongful act by omission. The State can be responsible if omitting to act. I must admit that I address the issue from a very general level. I did not look at the SOFA agreement. The agreement may say what the functions entrusted to the UN are, what powers the UN has over the troops, and what possibility there is for the State to obtain factual control. At the same time I agree with the commission that SOFAs do not have legal effect for third parties because they are agreements between the UN and sending States. Ultra vires acts cannot be attributed to the UN because the UN is not responsible for wrongful conduct. This does not affect the problem of attribution of ultra vires acts. This must be assessed on the basis of the general role of attribution, not in relation to third parties. I agree with you, but one should take into account the difference between the vires models of agreement. I only checked the basic parameters.

Ms. M. Schaap, LL.M.

Addressed to prof. Palchetti

What are the implications for applying rules of attribution and the concept of dual attribution when we look at a particular obligation, such as the duty to prevent genocide? When we take as point of departure the responsibility to protect, particularly the third pillar, under circumstances it could result in a duty to intervene for states sending troops. How should we situate this with factual control requirement of conduct and general concept of responsibility in relation to rules of attribution or international wrongful acts?

Prof. Palchetti

I do not know if the problem of attribution is relevant. You are referring to obligations of international organisations. When is an act attributable to an international organisation? This is a distinct issue. That is about ‘What are the primary norms for the international organisation’, while I deal with attribution. There are connections, but an important parameter to determine to which entity the conduct must be attributed is: Who has formal authority of the troops? On whose behalf are certain functions performed? In principle everything must be attributed to the

UN because the international organisation has an obligation to prevent certain acts because they impose an obligation to prevent certain conduct. If the same conduct applies to a state but the State has no formal authority over the troop you cannot ask the State to interfere with the chain of commands. When you have an obligation to intervene, there would be continuing interferences with the chain of commands of the UN. Art. 7 DARIO says that when troops are placed at the disposal of the international organisation and the State does not interfere with the chain of command the conduct (omission or act) must be attributed to the international organisation.

Prof.dr R.A. Wessel

Professor of Public Administration, University of Twente

Addressed to prof. Palchetti

I think that your description of the issues is one of the clearest I have seen over the past years. My question relates to the distinction you make between the factual and institutional relationship between Member States and their organisation. You rightfully state that we all have a tendency to focus on the effective control element, whereas art. 7 of the Articles on the Responsibility of International Organizations (“ARIO”) also refers to the notion that the state organ in these situations is placed at the disposal of an international organization. It is this latter element that may be different for different international organisations. While realising that your paper is about the UN, I would like to challenge you to stretch the argument to see whether the ‘institutional’ element would not play out differently in organisations in which the relationship between the organisation and its Member States is more intense. The obvious example would of course be the European Union. Although it did not succeed in getting a special position in the ARIO, one may argue that the role of the Member States in the European Union is different from that in most other international organisations and that therefore for instance the military and civilian missions that are deployed are much more part of the organisations’ institutional framework – which would perhaps point to a lesser relevance of the factual or effective control element. Would you agree with this approach to the two elements in art. 7 of the ARIO?

Prof. Palchetti

Paragraph 6 deals with military support which has never been addressed. The rules that you apply to the UN are not *lex specialis*, in a way these rules extend to any organisation. The ILC only relied on UN practice when it formulated art. 7 DARIO and thereby extended to every international organisation what applies to the UN. I did not have the possibility to address the practice of the EU. To quote Pieter Jan Kuijper: “When it comes to peacekeeping and policy missions the EU is a classical intergovernmental organisation.” It shows that things are very complex. My impression is that when it comes to these kinds of operations, the situation is not much different from the UN. I must admit that I did not work on this area, I would like to ask Pieter Jan Kuijper for more information with regard to the responsibility of the EU.

Prof.dr P.J. Kuijper

Professor emeritus of the Law of International (Economic Organisations)

Addressed to prof. Palchetti

About the responsibility of the EU, when we wrote the sentence we tried to get rid of a certain problem. It confirms some tendencies after the Lisbon treaty that the situation of the EU is quite different. If EU law is at the background of a certain responsibility, for instance when attacking a member State which implemented a law, it makes less sense because the law infringes an obligation. It is natural that the EU plays a certain role, if not a fully responsible role, in the conflict. That has only been reinforced by a tendency after the Lisbon Treaty to give clearer implementation and deleted legislative authorities to the Commission in art. 290 and 291 of the Treaty on European Union. When in the area of Common Foreign and Security Policy it is clearly said that there is no legislation possible: everything is now formulated as if they are resolutions of the UN. I think that what we said a few years ago has become even more true.

The question I wanted to ask Pontier and Kiestra is: You state at the beginning of your paper that “in these operations it is widely known that breaches occur”. I think there is one thing to be seen in practices of States at war that the lower agents of war take the rap. In humanitarian law and human rights law it is not the operational level that takes the rap. The problem is the immunity of the UN. When there is a double control from both UN and the member State at a lower level, you risk never getting into the command level of the UN, because it is shielded by immunity. I do not wish to do away with immunity, but it causes a problem. It becomes impossible to guarantee a forum when those high up in the UN hierarchy can never be judged for breaches of humanitarian law, which occurred down the chain of command. Is the ICC enough or should there be a special jurisdiction?

Prof. Palchetti

One remedy is where an entire constitution gets rid of the immunity. The Italian constitutional court said that the customary rule of State immunity breaches the right of access to a judge. This entails that Italian judges should not apply State immunity to Germany. They will not comply to the judgment of the International Court of Justice (“ICJ”) judgment in Italy v Germany, where the ICJ stated that States enjoy full immunity before domestic courts of other States. It added that this changes nothing about individual criminal responsibility. The Court then found that Italy was obliged to render the decisions of its courts against Germany without effect. There is the problem of remedy, but what is a solution? The problem of remedies is that the UN did not take care of providing victims of cholera with remedies (Haiti case). This results in the same remedies as in Italy: Domestic courts are the only remedy. In my view the UN should create an internal mechanism to deal with these kinds of problems. I have the impression that domestic judges are expanding the possibility to attribute conduct in peacekeeping missions to the State because otherwise victims have no remedies. If the UN does nothing, the effect is that the sending State is held accountable. The only possibility is to offer internal mechanisms. One solution from the rapport of Vandenhoe is the internal mechanism in Kosovo. That was the first time that anyone (an advisory body) took care of problem of UN.

Prof.dr C.M.J. Ryngaert

Professor of Public International Law, Utrecht University

Addressed to prof. Vandenhole

I am glad Vandenhole refers to the recent judgment of the European Court of Human Rights in *Hassan v. UK* (September 2014), in which the Court referred to international humanitarian law in the context of the right to liberty enshrined in art. 5 ECHR. This may render the application of art. 5 more flexible. In my view, this is indeed in keeping with art. 31 Vienna Convention on the Law of Treaties, which stipulates that account should be taken of other relevant rules of public international law when interpreting treaty provisions. Is the ECtHR giving enough guidance in your view? Do we need a more principled approach with respect to the blending of international human rights law and international humanitarian law in situations of armed conflict and, if so, what should it look like? Does the ECtHR currently take the situation on the ground sufficiently into account?

Prof. Vandenhole

I should add a disclaimer: I am a human rights fundamentalist. I personally do not agree with the majority position (of 14 of 17 judges), who interpret art. 5 ECHR in the light of international standards. I disagree there, because art. 5 ECHR has not been made by accident, but carefully and restrictedly worded which leads to creative interpretations of the court. It is a very specific provision, other provisions (such as the International Covenant on Civil and Political Rights) are more general, because the ECHR gives special grounds and an exhaustive list. I see the tension of the ECtHR when the State already has some judgments against it. There is a political and legal dimension that I wonder how to deal with. The majority said: We cannot apply art. 5 ECHR, because it was not meant to be applied in this situation, but States running into problems should use the derogation clause, if you fail to do that, you accept that art. 5 ECHR does apply. You have to apply art. 5 ECHR as it stands. Restraint is a downside of the judgment. I understand the concern and see the broader political context. Do we need a more principled approach? Yes, but not by clarifying but by using the derogation possibility and if not, by applying art.5 ECHR.

Prof.dr J.G. Lammers

Professor emeritus of International Environmental Law, University of Amsterdam

Addressed to prof. Palchetti

It seems to me that, in principle, the application of article 6 DARIO should apply to conduct of contingents put at the disposal of the UN for peacekeeping operations. The fact that the Dutch courts resorted to article 7 of the DARIO and their fairly unconvincing and artificial reasoning to attribute conduct of Dutch peacekeeping contingents to the Netherlands and not to the UN may have been motivated to a large extent by the awareness of the courts that attribution of that conduct of the UN in conformity with article 6 DARIO would have left the victims of that conduct without any compensation due to the full immunity claimed by the UN in proceedings before the Dutch courts and the absence of a special tribunal provided by the UN to which such victims could have resort. In fact, there exists a great contradiction between the claim of the UN that peacekeeping contingents are to be regarded as subsidiary organs of the UN on the one

hand and its refusal to provide for procedures to hold the UN liable for unlawful conduct committed by such contingents during peacekeeping operations on the other hand.

Prof. Palchetti

I am not convinced about art. 6 DARIO because the status of organ does not take care of everything. The UN stated that the State must bear the responsibility, because it had the troops under its control. Art. 6 is a mechanism based on rules within UN system, art. 7 DARIO mixes both elements of formal authority and factual control. Under art. 6 DARIO this is not a decisive criterion. When a troop acts under the action of a State this is an ultra vires action and falls under the responsibility of the UN. I prefer art. 7 DARIO because it uses both elements: formal responsibility and the possibility to shift the responsibility if the State gives instructions. It does not change everything because in principle the UN must take responsibility and the troops are an organ of UN. As far as remedies for victims are concerned I agree with you: If the UN creates no mechanism the only entity is the sending State. It is of course a healthy attitude to protect the victims.

Prof.dr K.C. Wellens

Professor emeritus of Public International Law, Radboud University

Addressed to prof. Palchetti and prof. Vandenhole

I should like to make one observation and then to raise one question. It is regrettable to note that as far as remedies against international organisations are concerned not much has been done within the UN since 2004 when the ILA Committee on accountability of international organisations submitted its final report. The establishment of the UN ombudsperson is merely a symbolic gesture; a lot of work still has to be done.

My question is the following. Let us take the example of an international obligation for States to interfere, an obligation which is unqualified, a direct one, and an obligation of conduct to employ all means available to it. The ICJ in the Bosnia cases ruled that it is sufficient for a State that it had the means to do so and wrongfully refrained from using them. The yardstick will be whether the State made minimum efforts when absolute rights are at stake. If a troop contributing State is unable to influence the UN to prevent genocide (the minimum effort), the ICJ expects that State to interfere with the chain of command; so there is, in such circumstances, a duty to interfere. It would be a reversed application of the Responsibility to Protect. If we talk about an obligation for States to interfere and which is unqualified and direct the ICJ in the Bosnia case said that it is enough for States to have the means to do so and that they nevertheless refrained from doing so. The minimum effort yardstick is used here. If a troop contributing State is unable to influence the decision of the UN not to take action to prevent genocide the minimum effort is to interfere with the chain of command. Is that in your view a duty to interfere because you were reluctant about this?

Prof. Palchetti

I would say that if we accept a duty to interfere, to prevent a genocide, this would have the effect of continuing interference with the chain of command. This must go through the national contingent of command, which means that the State can always interfere. Once a State has

placed troops at the disposal of the international organisation, the troops are performing on behalf of the international organisation and the State has no obligation. In the end we always have dual attribution of the same conduct which should be reserved to extreme circumstances. The only entity that has the obligation to prevent is the international organisation. You cannot ask the State to intervene.

Prof. Wellens

Peremptory obligations travel with troop admitting states whenever they go; they are not being suspended for the time being during the UN mandated peacekeeping operation. In your view, do not peremptory norms travel with the troops? Are you saying the international organisation has the duty to prevent?

Prof. Palchetti

The State providing troops always has the power to withdraw them, but this does not mean that the act is attributable to the State. The wrongful conduct can be that you did not withdraw the troops, which is different from not-interfering. If you are aware that breach of ius cogens is taking place, you have the obligation to withdraw troops.

Prof. mr dr W.J.M. van Genugten

Professor of International Law, Tilburg University

Addressed to prof. Palchetti

Would it help to withdraw the troops? Would that not be too late or give a wrong signal?

Prof. Palchetti

Withdrawing is not necessarily leaving the ground but stating you do not take part in this. States can always say they do not agree with the UN and continue to act of their own accord. This means the State is getting out of the participation. The acts become action of a State instead of action as a peacekeeping mission.

Prof. Vandenhole

I tend to disagree. This would qualify as a candidate for joint obligation of both the State and the international organisation. If I draw by analogy of work by the human rights advisory panel and the obligations of UN Interim Administration Mission in Kosovo ("UNMIK"): There is a strong best efforts obligation. You have to take all steps possible to influence the behaviour. I do not think you have the duty to interfere with the chain of command, but you must have taken all efforts possible. In Srebrenica I would say that withdrawing is what Belgium did and what caused a problem. But distancing yourself and becoming a State that is present, politically speaking could be very tricky. It would have been tricky to say that they are no longer functioning as a troop contributing State but as a State. Politically speaking, it is not very feasible to become a sovereign State and thus change hats.

Dr O.M. Ribbelink

Senior Researcher, T.M.C. Asser Institute

Addressed to prof. Palchetti and prof. Vandenhole

Would you please clarify your choice of terminology. Palchetti, in proposition 1 (page 28) speaks of “the formal status of peacekeeping forces” as an “organ of the UN”, while Vandenhole in his proposition 3 (page 60) speaks of “the peace force itself which is considered to be an international organisation of the UN”. This is not exactly the same. Can you please clarify why you chose these different qualifications? Has it to do with the fact that Vandenhole’s proposition is in relation to human rights-obligations, while Palchetti’s proposition relates to attribution, although he then relates that to responsibility of international organisations. What is the reason behind this difference?

Prof. Palchetti

I use the terminology of DARIO and the terminology of the UN when it characterises the peacekeeping forces. They see the peacekeeping forces as an organ.

Prof. Vandenhole

I use the term ‘organ’ in the paper itself. I do not think it matters on a substantive level because as an organ of an international organisation or a State, the international organisation is fully responsible for its organs. In the end it would not make a difference for me when I take the perspective of human rights. Still this text could have been drafted more carefully.

Dr P.J. van Krieken

Former special advisor to the Government of The Netherlands on refugee issues

Addressed to prof. Vandenhole

I note a “humanrightisation” of war and peace, and I think that human rights experts and the human rights lobby interfere in International Humanitarian Law issues where they should abstain (this is, for instance, also true for the Human Rights Council). Is humanitarian law not sufficient to deal with these questions? Secondly, is it worth looking into the difference between ‘peacekeeping’ and ‘peace-enforcement’? There might be a legal difference. Finally, Vandenhole mentions art. 15 (the derogation clause), which is somewhat remarkable as it may result in States saying “thanks but no thanks”.

Prof. Vandenhole

I would like to start with the differentiation: Firstly, I tried to understand the notion of peace-operations and the typology surrounding it. I finally decided to get away from that because it was blurred and there was a pattern in literature in which they use strange concepts which are too far from real life. A primary criterion is to decide on the scope of the exercise.

On your point about derogation: It is interesting that it has never been used so far. The explanation in literature is quite convincing, that when a State invokes the derogation clause, it would be very contradictory. It also seems politically quite difficult to use these derogation clauses when we see in other contexts that States have never used the derogation clause and

refused to label the situation under art. 15. It may change if States give up the battle on jurisdiction. If States accepted jurisdiction they would more accept the derogations clause.

More generally with human rights we see a resistance when a human rights body is pushing it too far. I do not know if that is enough reason to keep silent about human rights during peace operations. There is so much in human rights law that could mitigate and contextualise obligations. It is not too demanding, if accepting human rights at home, to accept these in peace operations. In terms of negative obligations I am hesitant to give up too much in order to get political bias.

Prof. Van Genugten

Addressed to dr Kiestra and prof. Pontier

I think the question also relates to the horizontal effect of human rights as discussed in the context of private international law. Could I ask the pre-advisers to elaborate upon that?

Prof. mr dr J.A. Pontier

Your question, in principle, is out of the domain of private international law. Let me explain this. In our preadvies we started with a very broad perspective on private international law and the role of human rights in matters related to tort in international civil proceedings. At the end of this paper, the Srebrenica case was given as an illustration. The case contains a variety of elements in this regard, including the issue of the effect of human rights law in private law. Our starting point though was whether the ECHR has an impact at all on issues of private international law. Does the ECHR has an impact on issues of international jurisdiction, as for instance in matters related to tort, where the conduct concerned could be characterised as conduct in violation of the ECHR? In this regard, and among other *things*, we argued that Art. 6(1) ECHR at any rate plays a role when no court would be available for such proceedings. We also discussed the role of the ECHR when applying the law designated by rules of private international law (choice of law rules) would result into a violation of the ECHR. In this regard we held, among other *things*, that if the court of a Contracting Party to the ECHR applied the law of a foreign State, and where applying that law were to result into violation of the ECHR, this act of applying the foreign law is in itself an act that falls within the scope of Art. 1 ECHR.

In matters related to tort in international civil proceedings, a Dutch court, after having decided on the issue of international jurisdiction, has to give a decision as to the applicable law on the basis of the choice of law rules of the forum. In the Srebrenica case, for example, the applicable law had to be designated by the rules laid down in the Dutch International Torts Act of 2001. (The Rome II Regulation did not apply, it applies only to torts committed on or after 11 January 2009. Moreover it does not apply to *acta jure imperii*). After having determined which national law applies to the case at hand, a court then has to decide on the merits of the case by applying the foreign law (or for that matter the *lex fori*). One of the issues in cases that are concerned with a violation of human rights law is whether the designated (foreign) private law would give horizontal effect (direct or indirect) to human rights law. This is a matter of applying the foreign law, and does not directly concern issues of private international law. Nonetheless, under Dutch rules of private international law (nowadays, Art. 10:2 Dutch Civil Code) Dutch courts have an obligation to apply the foreign law, or at least an obligation to make an effort to do so. Would

the foreign law not admit horizontal effect of human rights law, and would applying that foreign law by a Dutch court, being a Contracting Party to the ECHR, result into a violation of the ECHR, the act of applying that law is to be considered as an act within the meaning of Art. 1 ECHR. However, where the conduct of (authorities of) States (Contracting Parties) is at stake in such international civil proceedings, the issue of the applicability of the ECHR, while taking account of the territorial scope of Art. 1 of the Convention, in our opinion, is not a matter of giving horizontal effect to human rights law in private law (whether that law is a foreign law or the *lex fori*), but a matter of giving direct vertical effect to the ECHR.

One could add that the issue of the horizontal effect of human rights in international tort cases between private parties, which we have discussed in our paper, essentially concerns the question of the manner in which human rights norms are applied to the merits of a case. How do human rights norms impact the applicable (foreign) law? This is, of course, in the end mostly a question of private law and thus depends on which law applies to the case. For example, in such cases under Dutch private law human rights norms are usually not relied on directly by the courts, but rather applied indirectly, as a source to fill in open-textured norms of private law, such as, for example, 'negligence.' However, the techniques used to incorporate human rights norms may differ depending on the applicable foreign law.

Prof. Van Genugten

One might also read human rights standards into contract law, especially in open texture norms of tort law. If contracts are excluding some responsibilities, can judges then read human rights into these contracts?

Dr Kiestra and prof. Pontier

Again the issue of the effect of human rights standards in private law in international cases is a matter of interpretation of the applicable law (whether that is a foreign law or the *lex fori*). The question of whether the exclusion of responsibilities in contracts with multinationals is contrary to human rights law in principle is not an issue of private international law, but an issue of the private law concerned. However, if applying that law by the court of an EU Member State being a Contracting Party to the ECHR were to result into a violation of the ECHR, these courts may follow two different routes, that of invoking the public policy exception (by virtue, for example, of Art. 21 of the Rome I Regulation, the foreign law may be refused if such application is manifestly incompatible with the public policy of the forum) or that of directly applying the ECHR (and in this regard one may even consider Art. 9 of the Rome I Regulation, regarding overriding mandatory rules).

Mr L. Roorda, LL.M.

Addressed to dr Kiestra and prof. Pontier

To what extent does the increased role of human rights in private international law affect the determination of what is considered an "appropriate" forum – does it include stronger obligations on the home states of multinational organisations? Is there a public policy exception where it is optional, or is there an obligation to do so?

Prof. Pontier

First of all, if the right to an ‘appropriate’ court is to be read into the right to access to a court, within the meaning of Art. 6 (1) ECHR, then indeed that right may affect the idea of an ‘appropriate’ forum. A court that has to decide whether it has jurisdiction, applying the rules of the Brussels I Regulation or of national procedural law, may have to take account of this concept of an appropriate court, as an obligation under the Convention or the EU Charter. Also, rules on international jurisdiction must meet the requirements under public international law. Although these latter requirements are rather vague, they at any rate entail that there must be a sufficient connection between the case and the court. Dwelling on the viewpoint that the right to an ‘appropriate’ court must not only meet the requirements of Art. 6 ECHR of fair trial and access to justice but also those of public international law, we took certain elements together from international discussions, and then concluded that these rules must be an expression of sound administration, equality of arms, party autonomy, and a sufficient connection with the forum, and so on, and that restrictions as to the assertion of jurisdiction must have a legitimate aim. Whether this right to an “appropriate” court would include ‘stronger obligations on the home states of multinational organizations’ is a matter of interpretation of these jurisdictional rules in the light of the requirements flowing from Art. 6 ECHR. How far Art. 6 ECHR can be stretched is a matter of construction. We did not elaborate on this specific issue. As regards the question of whether a court may invoke the public policy exception in this regard, or has an obligation to do so, the answer is that the public policy exception does not apply to issues of international jurisdiction and that the doctrine of forum (non) conveniens does not apply under the Brussels I Regulation.

Prof. Palchetti

In 2011, the ICJ rendered a judgment in *Macedonia v. Greece* where the problem was whether the conduct in Greece by NATO amounted to a breach of international obligations of Greece. When a State acts within a framework of an international organisation, is this State under a duty to comply with all obligations? When a State representative is under a duty to present something it might be said that that State breaches an international obligation. This could be worth studying in more detail. In Bosnia in 1993, the UK voted against a resolution that would lift the arms embargo in former Yugoslavia which violated Bosnia’s right to self-defence. My question relates to the content of the obligation to prevent. This must be answered by taking into account every primary obligation of the State. The ICJ, in 2007, interpreted the obligation to prevent, I remember that if a State votes against a resolution which enables the security council to prevent genocide taking place, it would breach the obligation of the State. To what extent is the State under a duty to prevent something from occurring? I think I gave the wrong answer to Karel Wellens. The State is not under a duty to take action, only very specific obligations may apply to such situations.

Prof.dr V. Lazic

Associate Professor, Utrecht University

Addressed to dr Kiestra and prof. Pontier

My question concerns the understanding of the statement on page 82 of your Preadvies according to which it may be questioned whether human rights law might justify the use of

exorbitant jurisdictional grounds. Within that context it is questionable how that can be possible within the framework of the Brussels Regulation, in particular if one considers that the latter presumes that defendants domiciled in EU Member States are 'protected' against such exorbitant jurisdictional grounds (under art. 2, 3 and 4, in particular 4 (1) of the Regulation; the same holds true according the revised Regulation (Brussels I Recast) in art. 6 (1)). Could you please clarify this position, i.e., how this could be achieved within the framework of the Regulation and whether the references in your paper to the eDate-judgment of the European Court of Justice ("ECJ") is meant to suggest that the same or a similar line of reasoning could be applied with respect to human rights violations. Namely, the judgment relates to interpretation of art. 5(3). This provision offers an alternative jurisdictional ground for tort cases, and as such is not an 'exorbitant' jurisdictional ground. My question is just meant to ensure a proper understanding of the statement: It is thus not the ground as such, but rather the broad interpretation that may be given to that particular ground.

Dr Kiestra and prof. Pontier

Indeed, in matters related to tort, the issue of international jurisdiction, where the defendant is domiciled in the EU, is to be decided under the jurisdictional rules of the Brussels I Regulation (as from 10 January 2015, by Regulation EU 1215/2012, Recast). The judgment of the Court of Justice of the European Union (CJEU) in the eDate Advertising-case was concerned with the interpretation of Art. 5(3) Brussels I, the jurisdictional rule related to tort. In this case personality rights were involved and violated. The case was also related to information made public through the internet. To create a more appropriate court, the CJEU interpreted Art. 5(3) in a way that was not received well by many lawyers, where it created an additional forum for such cases that could even be characterized as an exorbitant forum. Our general viewpoint is that, in principle, exorbitant forums are not allowed under the Regulation and that interpretation of these jurisdictional rules in violation of public international law is to be avoided. Where these jurisdictional rules are part of EU law, however, the CJEU and the courts of the EU Member States also have an obligation to interpret and apply EU rules in a manner consistent with the principles and fundamental rights protected by EU Law, including human rights as laid down in the ECHR. From the perspective that public international law as well human rights law may have an impact on the interpretation of jurisdictional rules, it follows that courts may question certain common interpretations of existing rules or be more creative when human rights violations are involved in order to find an 'appropriate' court, assuming that the right to access to an 'appropriate court' in international civil proceedings can be read into the right to a fair trial, within the meaning of Art. 6 (1) ECHR. The eDate Advertising-case suggests that this is not at all impossible.

Prof. Ryngaert

Addressed to dr Kiestra and prof. Pontier

Does proposal 6 on page 98 support universal tort jurisdiction and do you actually support that proposition? I see an apparent contradiction to what you said elsewhere, e.g. on page 97 you reject such jurisdiction. As a related matter, you appear to imply that the Brussels Regulation supports necessity-based jurisdiction. So, in short, do you take the view that universal civil jurisdiction is authorised?

Addressed to prof. Palchetti

What are the consequences of a finding of dual attribution for responsibility and reparations in particular?

Dr Kiestra and prof. Pontier

With our proposition 6 we did not imply that universal tort jurisdiction, even where conduct against mankind is involved, would be in accordance with current public international law or flows from the right to access to an appropriate forum in international civil proceedings, assuming that such a right can be read into the right to a fair trial, within the meaning of Art. 6 (1) ECHR. We neither support the view that the Brussels I Regulation expressly provides for a necessity-based jurisdiction. Nonetheless, the construction of such jurisdiction in the light of Art. 6 (1) ECHR may lead to a broader perspective on the interpretation of the jurisdictional rules of the Brussels I Regulation, in this regard.

As follows from our study, Art. 6 (1) ECHR, containing the right to a fair trial, also plays a role in international civil litigation, particularly where the issue of international jurisdiction in civil proceedings is concerned. We established that the right to a fair trial, in Art. 6 (1) ECHR, implies the plaintiff's right to access to the courts of a Contracting Party to the ECHR, and that Article 6 (1) ECHR thus also helps to establish a forum for a plaintiff in international civil proceedings, particularly where there would be no other court available to the plaintiff in such a cross-border case (*forum necessitatis*). We furthermore argued that even if a foreign court would be available, it may follow from Art. 6 (1) ECHR that for a State to restrict access to its courts, the restriction concerned must not endanger the very essence of the right, must pursue a legitimate aim and must be proportionate to this legitimate aim pursued. There is no reason to argue that these requirements of Art. 6 (1) ECHR would not equally apply to international civil litigation. Art. 6 (1) ECHR thus may have a broader scope than that of just granting a *forum necessitatis* in certain international cases. From this point of view, the proposition that Art. 6 (1) ECHR merely requires a trial to be held somewhere, would appear to be rather odd. We then concluded that Art. 6 (1) ECHR might not only be invoked where the only available court (particularly, the court of a third state) would not meet the quality standards implied by the right to a fair trial, but also if the restriction of the right to access to a court, for example, would be unfair in light of the connection between the case and the court declining jurisdiction and the available other courts.

We furthermore argued that Art. 6 (1) ECHR is not only relevant for the plaintiff in cross-border litigation, but that it may also be relevant for the defendant, in that Art. 6 (1) ECHR could be invoked by the defendant against the (unreasonable) assertion of jurisdiction. Art. 6 (1) ECHR would thus function as a check (similar to the Due Process Clause of the US Constitution) on the assertion of jurisdiction by the courts of the Contracting Parties to the ECHR. In order for the assertion of jurisdiction in private international law to be reasonable or appropriate (and thus not contrary to Art. 6 (1) ECHR), firstly, due to requirements under public international law, there must be a sufficient link between the facts of the case and the forum in question, whereas other notions, such as the notion of equality of arms requiring a balance between the plaintiff and defendant, or sound administration of justice, etcetera, may also play a role here. Our viewpoints were partly based on decisions of the Strasbourg Institutions, but mainly presented as theoretical possibilities, since most of these topics concerning private international law up to now were not discussed before the Strasbourg Institutions.

From these different viewpoints, we launched the idea that Art. 6 (1) ECHR might imply the right to access to an appropriate forum in international civil proceedings. Would Art. 6 (1) ECHR indeed entail such a right, logically, due to the EU Charter, the jurisdictional rules of the Brussels I Regulation must be interpreted in the light of the principles flowing from that right. We then argued that the jurisdictional rules of the Regulation in general meet the principles underlying the right to an appropriate forum, as in Art. 6 (1) ECHR, and that they are in accordance with public international law. Where the Regulation does not expressly provide for a forum necessitatis, a forum can be guaranteed though in the EU, under the Brussels I Regulation, by means of interpretation of its jurisdictional rules. The *G/Cornelis Visser*-judgment of the CJEU, could be considered as an example.

Next, we put the question of whether inappropriate jurisdictions can be justified in international human rights litigation. As we argued from the *eDate Advertising v. Martinez*-case, it appeared that a prima facie inappropriate (exorbitant) jurisdiction (*forum actoris*) was, under the Brussels I Regulation, defended by the CJEU in a matter related to tort, in a case where personality rights were involved. Also, universal civil jurisdiction (contrary to universal criminal jurisdiction) is generally considered as an exorbitant jurisdiction and against the law of the nations, since there need not be any connection with the forum. We concluded that such a jurisdiction is not provided for under the Brussels I Regulation, not even in international human rights litigation, and not even in a case concerning a tort against mankind. We have pointed out though to Art. 5 (4) Brussels I, by virtue of which (criminal) courts of EU Member States, even where their (criminal) jurisdiction is based on universal jurisdiction, may also assert jurisdiction regarding civil claims seeking damages based on wrongful conduct against mankind. A restrictive interpretation of that jurisdiction might be contrary to an interpretation in the light of Art. 6 (1) ECHR.

Prof. Palchetti

As far as reparation is concerned my view is a joint responsibility regime. The other problem is procedural, the third indispensable parties can claim in only one of the two wrongdoing actors? A solution (ICJ *Nauru*) is that the same conduct simultaneously could be attributed to two States. My impression is that the monitoring principle does not apply in situations of dual attribution of the same conduct, but there is no procedural barrier.

Prof.dr N.M. Blokker

Professor of International Institutional Law, Leiden University

Addressed to prof. Palchetti and prof. Vandenhole

I have a general question: The law in this area is rather uncertain. To what extent do you think this is a problem in practice? E.g. for lawyers involved in military operations who play a role in targeting decisions: to what extent does human rights law apply? To what extent could issues arise in cases before the ECtHR? E.g. (to Prof. Palchetti): At least standards are available (DARIO), even though this is only partly codifying customary international law. There is much debate and uncertainty about art. 6 and 7. Should DARIO be revised and improved in some years from now?

Secondly, there is extensive UN practice in the area of peacekeeping where this practice departs from DARIO (e.g. in relation to qualifying operations as UN organs, see art. 6). To what extent could this practice be qualified as “established practice” or “rule of the organisation”, as *lex specialis* and thus override DARIO?

Prof. Palchetti

I certainly agree that an advantage is that at least we have point of reference. Dutch courts are using these and the ECJ is as well. The DARIO are used as an authoritative source.

Secondly, *lex specialis* is the most important aspect of the whole DARIO to escape from the framework by the ILC, the EU is the only regional organisation existing which made avail of *lex specialis* in this area. The problem of *lex specialis* is that it applies in relationships with member States as well. This may create confusion, these rules only apply between member States and international organisations, not toward third parties. In the UN where every State is a member State there is a tendency to use this towards everyone. But the UN has no *lex specialis* on responsibility which it must only apply when dealing with issues of responsibility. Particularly with regard to attribution in peacekeeping operations, there is no *lex specialis* because it was drafted for the UN, the ILC only refers to the UN, in that regard it only uses the practice of the UN because the general rule was made for it.

Mr Punt

Addressed to prof. Vandenhole

I have a question concerning your remark that, in case there is ground for derogation, States are reluctant to expressly derogate from the Convention, since such derogation can be construed as a recognition of jurisdiction of these States. This is an argument inspired by fear and this practice could somewhat maliciously be characterised as a diplomatic approach. This approach can and apparently does seduce the courts, which always tend to do justice to the particular circumstances of the case, to accept some sort of implicit derogation. Would it not be more appropriate for a State to declare in advance that it derogates from the relevant provisions of the Convention in the event its jurisdiction is established ?

Prof. Vandenhole

My point is that once we manage to create clarity that States have human rights obligations, we will have much more space to see what the extent of the obligations is, especially through the derogation clause. In my perception the court has toned down, because it deals less with jurisdiction and more with overall control. It becomes more manageable for States. I would not be in favour for explicit derogation, I would rather create clarity than by implicitness. In certain circumstances you can say it would not work because there is no threat to the nation itself. We need to modernise in situations when there is no threat to a nation. Once we have taken that hurdle, we may start clarifying more detailed obligations.

Mr W. van Reenen

Addressed to prof. Vandenhole

On page 56 at the top of the page you mention the European Union Rule of Law Mission in Kosovo (“EULEX”), but you create the impression that it is HRAP (the Human Rights Advisory Panel within the framework of UNMIK) which is responsible for reviewing human rights violations by EULEX. As a matter of fact, EULEX has its own human rights panel, HRRP, the Human Rights Review Panel, which is responsible for reviewing alleged human rights violations by EULEX in the exercise of its executive mandate.

Prof. Vandenhole

I was confused myself as well when I reread the text. I do not want to say that the UNMIK’s body also functions for EULEX, there is just no substantive case law of how it will develop towards EULEX and whether it will take the same activist line as the advisory panel has taken. What I find interesting is how the panel is now dealing with the violations of UNMIK, where it argues that some remedial action is to be taken. As EULEX you still have a (diplomatic) obligation to make efforts, to take people to justice etcetera, all these were given to EULEX. There is a connection but not the way in which it is laid down in the text.

Prof. Van Genugten

Let me thank the preadviseurs and the audience for their contributions to a very good and high-level discussion on difficult topics, in a domain full of ‘moving targets’. Hopefully the debate will inspire you to keep thinking about the materials at hand. Thanks again!