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Prof. Dr P. Palchetti
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Refining Human Rights Obligations in Conflict Situations

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INTERNATIONAL RESPONSIBILITY FOR CONDUCT OF UN PEACE-KEEPING FORCES: THE QUESTION OF ATTRIBUTION*

Paolo Palchetti**

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ABBREVIATIONS

Commission	International Law Commission
ECtHR	European Court of Human Rights
ILC	International Law Commission
UN	United Nations
UNMIK	UN Mission in Kosovo

1. INTRODUCTION

Resort to domestic courts to obtain reparation for damages occurred in the course of multinational peace operations is not a novelty of the last few years. Already in 1969 the House of Lords was called upon to adjudge whether the United Kingdom had to pay compensation for acts of the British forces participating in the United Nations Peace Keeping Forces in Cyprus (UNFICYP).[1] Ten years later the *Oberlandesgericht Wien* had to rule on a similar claim made against Austria in relation to the conduct of a member of the Austrian Contingent participating in the United Nations Disengagement Observer Force.[2] It is true, however, that in the last decade there has been a significant increase in the number of cases submitted to domestic courts and dealing with claims for compensation for the damage caused by national contingents employed in the context of multinational peace operations. This situation probably reflects the more prominent role played by international organizations, particularly by the United Nations (UN), after 1990 in the field of the maintenance of international peace and security. The expansion of the scope of activities of the UN in the last two decades may explain the larger number of cases which raise the question of the responsibility of that organization or of the states participating in peace operations. At the same time, there is nowadays a greater awareness of the need of designing ways to make international organizations more accountable.[3] While a few decades ago the legal regime governing the responsibility of international organizations (or of states acting within the framework of an international organization) was regarded as a rather obscure area of law, things have considerably changed. In this respect, the recent work of the International Law Commission (ILC) on the topic of the responsibility of international organizations has contributed to shedding some light on the matter.

Claims for reparation are sometimes brought directly against the organization. One may mention, for instance, the case recently filed before a United States court against the UN for its alleged responsibility for an epidemic of cholera that had broken out in Haiti in 2010 as a consequence of the presence of Nepalese peacekeepers who were members of the United Nations Stabilization Mission in Haiti (MINUSTAH).[4] In most cases, however, such claims are directed against troop-contributing states, on the assumption that such states are to be held responsible for the conduct of their troops acting in the context of a multinational peace op-

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1 House of Lords, *Attorney General v. Nissan*, 11 February 1969, All England Law Reports, 1969-I, p. 646.

2 Oberlandesgericht Wien, *N.K. v. Austria*, 26 February 1979, International Law Reports, Vol. 77, p. 470.

3 See generally J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', 8 *International Organizations Law Review* (2011) p. 285 et seq.

4 District Court (Southern District of New York), *Georges et al. v. UN*, October 2013. For an assessment of the responsibility of the UN, see F. Mégret, 'La responsabilité des Nations Unies au temps du cholera?', 47 *Revue belge de droit international* (2013) p. 161 et seq.; J. Alvarez, 'The United Nations in the Time of Cholera', *AJIL Unbound*, available at <http://asil.org/remedies-harm-caused-un-peacekeepers>.

eration. The reason why these types of cases are generally submitted against the troop-contributing state, and not against the organization, is easy to explain. International organizations enjoy a sweeping immunity before domestic courts, as a string of recent cases testifies.[5] Individuals cannot bring complaints against them before international human rights tribunals or other monitoring bodies, as they are not parties to human rights conventions. In principle, there might be the possibility of resorting to internal mechanisms set up by the organization for the purposes of redressing individuals injured by conduct during a peace operation. However, with rare exceptions,[6] mechanisms of this kind are generally lacking. In every Status of Force Agreement concluded by the UN with states hosting peacekeeping operations, it is provided that any dispute or claim of a private law character to which the UN peacekeeping operation is a party must be settled by a standing claims commission. In practice, no such commissions have ever been set up.[7] Thus, submitting the case against the troop-contributing state often constitutes for the injured individuals the only possible means for obtaining redress.

While claims of reparation are normally brought against the troop-contributing state, the question concerning the responsibility of the organization which promoted and conducted the operation resurfaces in most of these cases. This is so because the main argument usually advanced by the defendant states to rule out their responsibility is that the wrongful conduct at stake was not their own but the organization's. In other words, before addressing the substance of the claims brought by the plaintiffs, a judge is usually called upon to assess whether the conduct at stake is to be attributed to the organization or to the respondent state. Attribution is thus one of the core issues in these kinds of cases.

The present article aims at studying the international rules which have to be applied for the purpose of determining whether a certain conduct taken in the context of a multinational operation must be attributed to troop-contributing states or to the international organization. I will also consider whether, and under what circumstances, the same conduct may be attributed to both subjects. The analysis will mainly rely on the interpretation of the rules of attribution set forth in the ILC's articles on the responsibility of states, adopted in 2001, and in the articles on the

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5 See, for instance, Court of Appeal of The Hague, *Mothers of Srebrenica v. Netherlands and the United Nations*, 30 March 2010, 49 *International Legal Materials* (2010) p. 1021 et seq.; Supreme Court of the Netherlands, *Mothers of Srebrenica Association et Al v. The Netherlands*, 13 April 2013, 51 *International Legal Materials* (2013) p. 1327 et seq.

6 For an analysis of a special and innovative mechanism set up in relation to the activity of the UN Mission in Kosovo (UNMIK), see P. Klein, 'Le panel consultatif des droits de l'homme (*Human Rights Advisory Panel*) de la MINUK: une étape dans le processus de responsabilisation des Nations Unies?', in *Perspectives du droit international au 21e siècle – Liber Amicorum Christian Dominicé*, Leiden/Boston, Martinus Nijhoff 2012, p. 225 et seq.

7 For an examination of the position of the UN on this issue, see T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', 51 *Harvard International Law Review* (2010) p. 141 et seq.

responsibility of international organizations adopted in 2011.[8] While the latter text has been criticized for not finding support in international practice,[9] such criticism does not seem to be well founded as far as the question of attribution is concerned. The fact that a significant number of cases have been brought against states for their participation in multinational operations has led to the development of a substantial amount of judicial practice in relation to this issue. The ILC gave due consideration to this practice when drafting the text on the responsibility of international organizations. Significantly, the European Court of Human Rights (ECtHR) and a number of domestic courts took the ILC's work into account when determining the rules of attribution to be applied in relation to the conduct of troops of a state employed in a multinational peace operation.[10]

Before entering into the merits of the problem of attribution, a few preliminary remarks have to be made in order to further clarify and delimit the scope of the present analysis.

In the first place, it is all too well known that it is difficult to classify in rigid terms the various types of multinational operations conducted under the aegis of an international organization. These operations may differ considerably one from another and such differences may have important implications as far as the question of attribution is concerned.[11] For this reason, the present article will limit its analysis to the problems of attribution arising in connection with the activities of UN peacekeeping operations. While certain variations may exist within the context of specific operations, they normally present some basic common features.[12] In particular, peacekeeping missions are characterized by the fact that troop-contributing states normally retain only limited powers over their troops while the UN is given operational command and control. By contrast, this article will not address questions of attribution concerning the conduct of UN-authorized missions (or UN-mandated peace enforcement operations), in which the authorized forces remain under the command and control of the state, the UN power being limited to the

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8 See 'Articles on the responsibility of states for internationally wrongful acts', annexed to UN General Assembly resolution 56/83, UN Doc. A/RES/56/83, 12 December 2001, and 'Articles on the responsibility of international organizations', annexed to UN General Assembly resolution 66/100, UN Doc. A/RES/66/100, 9 December 2011.

9 For such criticism, see J. Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility', 105 *American Society of International Law Proceedings* (2011) p. 345; G. Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press 2011, p. 700-701.

10 See ECtHR (Grand Chamber), *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 2 May 2007, and *Al-Jedda v. United Kingdom*, 7 July 2011; House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, 12 December 2007; Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović*, 6 September 2013.

11 See generally T.D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations', 42 *Netherlands Yearbook of International Law* (2011) p. 37 et seq.

12 On this point, see Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* 2008.

possibility of withdrawing the authorization or delimiting its scope. Much has been written about this issue, particularly after the decision rendered by the ECtHR in the *Behrami* and *Saramati* cases. As it is well known, the ECtHR found that, since the Security Council retained 'ultimate authority and control' over the activities of KFOR, the conduct of KFOR was to be attributed to the UN, and not to the troop-contributing state.[13] There is very little to be added to the widespread criticism addressed against the 'ultimate authority and control' test resorted to by the ECtHR, a test which ends up attributing to the organization the conduct of the troops even if they substantially remain under the complete control of the sending state.[14] It suffices here to note that, in its subsequent decisions, the ECtHR appears to have abandoned this test or, at least, to have narrowed down significantly its scope of application.[15]

Secondly, reference must be made to the possibility that in this context the question of attribution is governed by special rules whose content differs from the general rules of attribution set forth in Articles 4-11 of the articles on state responsibility and Articles 6-9 of the articles on the responsibility of international organizations. Both texts contain a provision on *lex specialis* and therefore recognize the possibility of special rules of attribution applying to specific situations.[16] With regard to the responsibility of international organizations, special rules of attribution may include rules which apply to a particular category of organizations or to a particular organization.[17] Admittedly, when considering the practice concerning the attribution of the conduct of UN peacekeeping operations, it is hard to find elements supporting the view that the matter is governed by special rules of attribution. This the more so since some of the general rules contained in the 2011 articles, particularly the one set forth in Article 7, have been drafted with mainly the situation of UN peacekeeping forces in mind. A brief examination of the ILC's

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13 ECtHR (Grand Chamber), *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 2 May 2007, para 133.

14 See, among others, P. Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considerations critiques sur l'arrêt Behrami et Saramati', 53 *Annuaire français de droit international* (2007) p. 55; L.A. Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de securité de recourir à la force', 339 *Recueil des Cours* (2009) p. 376; P. Palchetti, 'Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati', 90 *Rivista di diritto internazionale* (2007) p. 689-690. In mild criticism, the ILC observed that 'when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question'. Report of the International Law Commission on the work of its sixty-third session, UN Doc. A/66/10, p. 23.

15 See, in particular, ECtHR (Grand Chamber), *Al-Jedda v. United Kingdom*, 7 July 2011, paras. 84-85.

16 See, respectively, Art. 55 of the 2001 text and Art. 64 of the 2011 text (the latter provision is reproduced later, at para. 6 of this book).

17 As the ILC's Commentary to Art. 64 puts it, 'special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations'. Report of the International Law Commission, *supra* n. 14, p. 100.

Commentary to that provision is sufficient to confirm it.[18] Yet, the possibility that special rules govern the question of attribution with regard to peace operations possessing features similar to that of UN peacekeeping forces but operating under the aegis of a different organization cannot be ruled out. While practice in this respect is rather scarce, it may be interesting to investigate the conditions that are required for the determination of the existence of special rules of attribution. This issue will be briefly addressed later on in this article.[19]

Finally, a few words must be said about the distinction between attribution of conduct and attribution of responsibility. While the present article will only focus on the criteria for determining when a given conduct is attributable to a state or to an organization, or to both, under specific circumstances a state or an organization may be held responsible even if the conduct amounting to a breach of an obligation is not attributable to it. Situations of this kind may also arise in relation to the activity of multinational peace operations. Thus, the fact that, contrary to the view held by the ECtHR in its *Behrami* and *Saramati* decisions, acts of a national contingent in the context of a UN-authorized operation are to be attributed to the sending state does not exclude the possibility that the same act could also give rise to the responsibility of the organization. Article 17, paragraph 2, of the 2011 articles provides that, under specific conditions, an organization has to bear responsibility for having authorized a state to commit an act that would be wrongful for that organization.[20] Thus, if the Security Council authorizes states taking part to a multinational operation to take measures of extrajudicial detention which may be contrary to the basic requirements of human rights law or international humanitarian law, also the UN may be held responsible for any unlawful measures of this kind adopted by states in the course of the multinational operation. In this or other similar situations, the organization may therefore be held responsible together with the state to which the wrongful conduct is to be attributed. While this joint responsibility should enhance the possibility for the affected individuals to obtain reparation, in practice the absence of effective means of redress against international organizations renders the case that claims are brought simultaneously against the two subjects involved in the commission of the wrongful conduct extremely unlikely.

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18 Report of the International Law Commission, *supra* n. 14, p. 85-91. See also A.N. Pronto, 'An Introduction to the Articles on the Responsibility of International Organizations', 36 *South African Yearbook of International Law* (2011) p. 119.

19 *Infra*, para. 6.

20 Art. 17, para. 2, provides that '[a]n international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization'.

2. THE COMPLEX LEGAL STATUS AND COMMAND STRUCTURE OF UN PEACEKEEPING FORCES

A number of elements must be taken into account when addressing the question of attribution with regard to the conduct of UN peacekeeping forces. While each element contributes to determining who is responsible for the conduct of peacekeeping forces, some of them have been considered as more relevant. However, views diverge on the elements that should play a paramount role. This explains at least in part why different positions have been expressed over time on this matter.

The first element concerns the legal status of these forces under the rules of the organization. The UN has consistently recognized that forces placed at the disposal of the organization by member states and forming part of a peacekeeping force established by the Security Council or the General Assembly are subsidiary organs of the UN.[21] In the UN's view, the legal status of organs of the organization would have legal implications going beyond the question of attribution for the purposes of international responsibility. Thus, for instance, according to Article 15 of the Draft Model Status-of-Forces Agreement between the United Nations and host countries, '[t]he United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations'.[22]

Despite their status as organs of the UN, national contingents do not cease to act as organs of their respective states while they are assigned to the peacekeeping force. National contingents are not placed under the exclusive authority of the UN and to a certain extent remain in their national service. As was observed by Lord Morris of Borth-y-Gest in the judgment rendered by the House of Lords in the *Nissan* case, 'though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British soldiers continued, therefore, to be soldiers of Her Majesty.'[23] Indeed, in the case of UN peacekeeping forces, the UN has operational command over the forces but some important command functions (such as the exercise of disciplinary powers and criminal jurisdiction over the forces, and the power to withdraw the troops and to discontinue their participation in the mission) 'remain the purview of their national authorities'.[24] This latter point is normally specified in the agreement that the UN concludes with contributing states. By establishing which powers are transferred to the organization and which are retained by the sending state, this agreement substantially testifies to the dual nature of a force as an organ of both the UN and the sending state.

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21 See the view expressed on this point by the UN in its comments to the work of the ILC on the responsibility of international organizations, UN Doc. A/CN.4/545, p. 17.

22 Draft Model Status-of-Forces Agreement between the United Nations and host countries, UN Doc. A/45/594, para. 15.

23 House of Lords, *Attorney General v. Nissan*, 11 February 1969, All England Law Reports, 1969-I, p. 646.

24 Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Report of the Secretary-General, UN Doc. A/49/681, 21 November 1994, p. 3.

A last element relates to the command and control structure of UN peacekeeping operations. Unlike UN-authorized operations, UN peacekeeping operations are conducted under the exclusive command and control of the UN. As the UN puts it in a comment sent to the ILC,

> [m]embers of the military personnel placed by Member States under United Nations command [...] are considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the interests of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be.[25]

However, the chain of command of UN peacekeeping forces is more complex than may appear at first glance. An important feature of this command structure is that, while national contingents are placed under the operational control of the UN force commander, they are not under UN command.[26] The orders and instructions of the force commander must be transmitted to the contingent through the national contingent commander, which is appointed by the sending state.[27] The role played by the national contingent commander is a very delicate one. It has been observed that, through the national contingent commander, the sending state can exercise, at least potentially, a form of control over its contingent and, in fact, can decide whether to agree with (or to decline) instructions given to its contingent by the UN force commander.[28] The fact that the sending state is in a position that enables it, in fact, to interfere with the chain of command leading to the UN, may evidently have an impact in the overall assessment of the question of attribution.

3. CAN ATTRIBUTION BE BASED ON THE STATUS OF PEACEKEEPING FORCES AS ORGAN OF THE UN?

When an individual or an entity has the status of organ of a state, or agent or organ of an international organization, such status is generally decisive for the purpose of attribution. This reflects a general rule according to which an entity – be it a state or an international organization –must bear responsibility for the acts of its agents or organs. Both the articles on state responsibility and the articles on the responsibility of international organizations refer to this rule as the main criterion for attribution. Indeed, Article 6 of the articles on the responsibility of international organizations, which corresponds to Article 4 of the articles on state respon-

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25 UN Doc. A/CN.4/545, p. 17.

26 Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, p. 68.

27 Ibid.

28 *Infra*, para. 5.

sibility, provides that '[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization'. Article 2(c) identifies 'organs' of an international organization as 'any person or entity which has that status in accordance with the rules of the organization'. Article 2(d) further specifies that '"agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.

The UN has consistently held the view that, since UN peacekeeping forces have the status of UN organs, their conduct must be attributed to the organization on the basis of the general rule now set forth in Article 6 of the articles on the responsibility of international organizations. This view was recently reiterated in a note sent to the ILC in the following terms:

> It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are 'transformed' into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, 'effective'.[29]

The application of the general criterion of attribution set forth in Article 6 finds some support in legal literature.[30] In the same vein, in its decision in the *Behrami* and *Saramati* cases, the ECtHR found it sufficient to refer to the status of UNMIK as 'a subsidiary organ of the UN created under Chapter VII of the Charter' to justify its finding that the acts of UNMIK were attributable exclusively to the UN.[31] It must be noted that, while relying on the status of organ of the UN to justify in general terms attribution of all conduct of the force to the organization, the UN did not exclude the possibility that, under certain circumstances, certain conduct of a national contingent has to be attributed to the sending state. In particular, referring to the control exercised by the sending state in matters of disciplinary and criminal prosecution, the UN observed that the retention of such powers is of no relevance for the purpose of attribution as long as it 'does not interfere with the United Nations operational control', thereby admitting that, if, to the contrary, the state interferes with the operational control of the UN, the conduct is to be attributed to

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29 UN Doc. A/CN.4/637/Add.1, p. 13.

30 See F. Seyersted, 'United Nations Forces: Some Legal Problems', 37 *British Yearbook of International Law* (1961) p. 429; A. Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link', 9 *International Organizations Law Review* (2012) p. 77 et seq.; A. Sari and R.A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren et al. (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press 2013, p. 126 et seq.

31 ECtHR, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 2 May 2007, para. 143.

state.[32] Similarly, according to a view recently advanced by an author, while the criterion set forth in Article 6 would in principle apply to peacekeeping forces, the conduct of national contingents should be attributed to the sending state if they in fact acted under the control of that state. In particular, it is said that the status as organ of the UN would create a presumption that their conduct is to be attributed to the organization but this presumption is rebuttable.[33]

While it is understandable that for policy reasons – namely 'for the sake of efficiency of military operations'[34] – the UN may wish to be regarded as the only entity that is responsible for the conduct of peacekeeping forces, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purpose of attribution. This view does not explain why one should only give relevance to the status as organ of the organization and disregard the fact that the force also continues to act as organ of the sending state.[35] It is this dual institutional link that justifies the application of a special rule of attribution which is not based on the formal status of peacekeeping forces within the UN system, but rather on the effective control exercised over the conduct of such forces. Moreover, it is difficult to reconcile the application of the rule of attribution set forth in Article 6 with the idea that, if the national contingent acts under the instructions of the sending state, its conduct must be attributed to that state: either the decisive criterion is the status as organ or it is the control over the troops. Nor can one read Article 6 as a rule establishing a rebuttable presumption. If the status as organ of the organization is decisive, then all conduct taken in that capacity, including those which contravene instructions, are to be attributed to the organization.

Finally, the view which relies on the status as organ to justify attribution finds limited support in international practice. Significantly, in its decision in the *Nuhanović* case, the Supreme Court of the Netherlands expressly rejected the argument submitted by the Dutch government, according to which, since peacekeeping forces are subsidiary organs of the UN, their conduct must be attributed exclusively to the organization on the basis of the rule set forth in Article 6 of the articles on the responsibility of international organizations.[36]

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32 UN Doc. A/CN.4/637/Add.1, p. 14.

33 A. Sari, *supra* n. 30, p. 82-83.

34 Report of the International Law Commission, *supra* n. 14, p. 90.

35 The Commentary does not exclude that the conduct of an organ placed at the disposal of the organization can be attributed to the organization on the basis of the criterion set forth in Art. 6 but limits this possibility to the case when an organ of a state is fully seconded to the organization. Report of the International Law Commission, *supra* n. 14, p. 19-20. On this possibility, see P. Jacob, 'Les définitions des notions d'"organe" et d'"agent" retenues par la CDI sont-elles opérationnelles?', 47 *Revue belge de droit international* (2013) p. 24-25.

36 *State of the Netherlands v. Nuhanović*, 6 September 2013, para. 3.10.2.

4. THE CRITERION OF EFFECTIVE CONTROL UNDER ARTICLE 7 OF THE ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

4.1 **The requirements that must be met for Article 7 to apply**

Determining who must bear responsibility for wrongful acts committed in the course of UN peacekeeping operations is generally assessed on the basis of Article 7 of the articles on the responsibility of international organizations. Under this provision, 'the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'. This test has been applied by a number of judgments of domestic courts dealing with the problem of attribution with respect to acts of UN peacekeeping forces.[37]

Two conditions must be met for the conduct of a lent organ to be attributed to the receiving organization. First, the organ must be 'placed at the disposal of the organization'. Secondly, the organization must exercise 'effective control' over the conduct of the organ placed at its disposal. While most commentators place emphasis almost exclusively on the latter condition, the former one is equally important for understanding the content and scope of application of the criterion of attribution set forth in Article 7.

The Commentary to Article 7 does not clarify the meaning of the words 'placed at the disposal'. However, the ILC addressed this issue in the Commentary to Article 6 of the articles on state responsibility, which corresponds to Article 7. The point made by the ILC in the context of Article 6 may equally be used to interpret Article 7.[38] In a lengthy passage, which deserves to be quoted in full, the Commission observed:

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37 For an analysis of the relevant practice, see Report of the International Law Commission, *supra* n. 14, p. 88-91. However, for the view that 'the test adopted by the Commission constitutes progressive developments', see B. Montejo, 'The Notion of "Effective Control" under the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Leiden-Boston, Martinus Nijhoff 2013, p. 404. A more radical view is expressed by D. Shraga, 'ILC Articles on responsibility of international organizations: The interplay between the practice and the rule (a view from the United Nations)', ibid., p. 205: 'The interpretation by regional and national courts of "effective control", as a test of attribution of conduct and responsibility and its apportionment between the troop-contributing state and the United Nations, has no direct legal effect on the United Nations – a non-party to any of these proceedings.'

38 As the ILC noted in the Introduction to the Commentary to the Articles on the responsibility of international organizations, '[i]n so far as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles'. Report of the International Law Commission, *supra* n. 14, p. 70.

> The words 'placed at the disposal of' in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ 'placed at the disposal of' the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State.[39]

Thus, according to the Commission, for an organ of a state to be considered as placed at the disposal of another state, there must be a double link between the lent organ and the receiving state. On the one hand, there must be an 'institutional link': the organ must perform functions entrusted to it by the receiving state in conjunction with the machinery of that state. It is to be noted that the Commission does not require that the lent organ be given the status of organ of the receiving state. Whether the lent organ acquires that status or not is not relevant for the purpose of applying the criterion of attribution set forth in Article 6.[40] On the other hand, the lent organ must act under the exclusive direction or control of the receiving state, 'rather than on instruction from the sending state'. This must not be taken as meaning that the sending state cannot retain some powers over the lent organ.[41] It only means that, for a conduct of a lent organ to be attributed to the receiving state, the organ must have acted under the control of that state.

Since the requirement that the lent organ be 'placed at the disposal' of the receiving organization presupposes that the organization exercises a degree of factual control over that organ, one may ask why the text of Article 7 also contains a reference to the requirement of 'effective control'. This latter requirement may appear to be superfluous.[42] While the Commentary does not address this issue, a

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39 *Yearbook of the International Law Commission* 2001, Vol. 2, Part. II, p. 44.

40 This point was addressed by the Special Rapporteur, Roberto Ago, in his Third report on state responsibility. Ago observed that, irrespective of whether the lent organ acquires the status of organ or not, 'the basic conclusion is still the same: the acts or omissions of organs placed at the disposal of a state by other subjects of international law are attributable to that state if in fact these acts and omissions have been committed in the performance of functions of that state and under its genuine and exclusive authority'. *Yearbook of the International Law Commission* 1971, Vol. 2, Part I, p. 199.

41 See G. Gaja, 'Second Report on the Responsibility of International Organizations', *Yearbook of the International Law Commission* 2004, Vol. 2, Part I, p. 14.

42 It must be noted that Art. 6 is differently worded as it requires that 'the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. According to the ILC, while differently worded, the approach is the same as in Art. 7: the use of a different expression ('effective control' rather than 'exercise of governmental authority') is justified 'because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations'. Report of the International Law Commission, *supra* n. 14, p. 86. On the solution retained by the ILC see however the critical remarks by F. Messineo, 'Multiple Attribution of Conduct', *SHARES Research Paper* No. 2012-11, p. 38.

possible explanation can be found in the views expressed by the Special Rapporteur, Giorgio Gaja, in his Second Report. Referring to the abovementioned passage of the ILC's Commentary to Article 6, and in particular to the point where it is said that the lent organ must act under the exclusive direction and control of the receiving state, he observed that '[t]his point could be made more explicitly in the text, in order to provide guidance in relation to questions of attribution arising when national contingents are placed at an organization's disposal and in similar cases'.[43] To that end, the Special Rapporteur proposed to include the notion of 'effective control' directly in the text of the provision.

If the reference to 'effective control' contained in Article 7 serves the purpose of rendering explicit what was already implicit in the requirement that the organ be 'placed at the disposal' of the organization, one may reasonably conclude that the conditions for attribution under Article 7 of the 2011 text are substantially the same as under Article 6 of the 2001 text. This means, in particular, that attribution under Article 7 would depend on the existence of both an 'institutional' and a 'factual' link between the lent organ and the receiving organization.[44] This preliminary conclusion, however, is subject to a further investigation as to the degree of control required for an act of a lent organ to be attributed to the organization. Under Article 6 of the articles on state responsibility, the test of control is relatively straightforward. As we have seen, it is required that, when performing the functions entrusted to it by the receiving state, the lent organ must act 'under its exclusive direction and control, rather than on instructions from the sending State'. It must be asked whether the same test applies in the context of placing an organ at the disposal of an organization.

4.2 Does effective control require control of the organization over every single act of the national contingent?

Article 7 does not clarify the degree of control required to reach the threshold of 'effective control' and therefore to attribute the conduct of the lent organ to the organization. Several commentators hold the view that a very high threshold is required: the conduct of a lent organ can be attributed to the organization only if the organization exercised a control over each specific conduct of that organ.[45] Two

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43 See G. Gaja, 'Second report', *supra* n. 41, p. 14.

44 Similarly F. Salerno, 'International Responsibility for the Conduct of "Blue Helmets": Exploring the Organic Link', in M. Ragazzi (ed.), *Responsibility of International Organizations*, *supra* n. 37, p. 424, who observes that, while Art. 7 does not make any reference to the functions performed by the lent organs, 'nothing prevents us from considering that the attribution of the conduct of organs placed at the disposal of the organization depends on the fact that they effectively exercise the "governmental" functions of the organization'.

45 For the view that, in providing the standard of effective control, the Articles on the responsibility of international organizations 'codified what was already a longstanding principle for the attribution of wrongdoing at international law', as recognized, among others, by the International Court of Justice, see T. Dannenbaum, 'Translating the Standard of Effective Control', *supra* n. 7, p. 141. See also Ch. Leck, 'International Responsibility in United Nations Peacekeeping Op-

distinct arguments are usually put forward to justify this view. The first is based on a textual element: by establishing that the receiving organization must 'exercise effective control over that conduct', Article 7 seems to require from the organization a control over every single act of the organ placed at its disposal by a state. The second argument is based on the view that the notion of effective control referred to in Article 7 has the same meaning as the notion used in the context of the law of state responsibility. As it is well known, an 'effective control' test was employed by the International Court of Justice in the *Nicaragua* and the *Genocide Convention* cases in order to determine whether the conduct of groups of individuals, who were not organs of a state and who were connected to the state only on the basis of a *de facto* link, was to be attributed to that state. According to the International Court of Justice, in order for the state to be legally responsible for the conduct of such individuals, it would have to be proved that the state had effective control over the operations during which the wrongful conduct occurred.[46] The same test was subsequently adopted by the ILC in Article 8 of the articles on state responsibility.[47]

To interpret the notion of effective control in Article 7 as requiring such a high threshold of control would significantly complicate attribution of an act to the organization, as in many cases it would be extremely difficult to prove the existence of such an 'effective control'. This could lead to the unreasonable result that in many cases the sending state could risk bearing responsibility for acts of its national contingent in the performance of functions of the organization. This would be so because attribution of the conduct to the state would not depend on proof that that state exercised effective control over the conduct at issue.[48] Once it is determined that the conduct of a national contingent cannot be attributed to the organization for lack of effective control, attribution to the sending state would be justified by the status of the contingent as organ of that state.

However, it does not seem that Article 7 requires such a high threshold of control for the purpose of attribution of the conduct of lent organs. As the Commentary to this provision makes clear, the notion of 'effective control' as used in Article 7

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erations: Command and Control Arrangements and the Attribution of Conduct', 10 *Melbourne Journal of International Law* (2009) p. 348-349.

46 See International Court of Justice, 'Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*)', *ICJ Reports* 1986, para. 115; 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)', *ICJ Reports* 2007, paras. 399-400.

47 Art. 8 provides that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

48 As rightly observed by P. d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct', *QIL-Questions of International Law*, Zoom-in 1 (2014), p. 26 (available at <www.qil-qdi.org>), '[i]t is indeed superfluous to assess whether the State exercised effective control since the person placed at the disposal of the organization is its organ and that State responsibility for conduct of organs is not conditioned by the positive assessment of any effective control by the State over the conduct of its organ'.

does not play the same role as in the context of the law on state responsibility. The ILC was careful to specify that control within the context of Article 7 does not concern 'the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct is attributable'.[49] Thus, the ILC seems to be aware of the fact that, if one requires a high threshold of control for attributing the conduct of lent organs to the organization, the result would be that in most cases the conduct of such organs would have to be attributed to the sending states. While the ILC does not say so expressly, the fact that it stresses the different meaning of the notion of effective control in the context of placing an organ at the disposal of an organization seems to imply that, unlike under the rules on state responsibility, the attribution of a certain conduct to the organization under Article 7 does not necessarily depend on proof that the conduct took place on the instruction of, or under the specific control of, the organization. This suggests, at least indirectly, that a lower degree of control may also be sufficient to justify attribution to the organization.

4.3 What elements are to be taken into account for the purpose of determining whether the UN exercises effective control over the conduct of national contingents?

It is submitted that the degree of control required for an act of a lent organ to be attributed to a receiving organization is not different from the control required under Article 6 of the articles on state responsibility. In this respect, the requirement of effective control under Article 7 has to be assessed in the light of the other requirement which is implicit in the fact that the lent organ has to be placed at the disposal of the organization, namely the existence of an 'institutional link' between the organ and the organization. Once there is proof of conduct by the organ in the performance of functions entrusted to it by the organization and in conjunction with the machinery of that organization, there is little reason for requiring a higher degree of control for justifying attribution to the organization. As the Commentary to Article 6 seems to suggest, when the lent organ acts in the exercise of the functions of the receiving organization, the condition of the exclusive direction and control of the organization may be presumed to be met unless it is demonstrated that the organ was acting on instructions from the sending state. This interpretation of the notion of effective control is not inconsistent with the views expressed by the ILC according to which '[t]he criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to Article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'.[50] Factual control over the specific conduct is certainly decisive for the

[49] Report of the International Law Commission, *supra* n. 14, p. 88.
[50] Report of the International Law Commission, *supra* n. 14, p. 87.

purpose of attribution, but this does not mean that, in the absence of different instructions from the sending state, the existence of control by the organization cannot be simply presumed.

If one considers the question of attribution of acts of UN peacekeeping forces in the light of these elements, it becomes clear that the first point to be addressed is to determine whether the force was acting in the performance of functions entrusted to it by the UN. It seems that, in order to answer this question, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state. As we have seen, the agreement concluded by the UN with troop-contributing states normally provides that the UN has operational command over the forces while troop-contributing states retain the disciplinary powers and criminal jurisdiction over the forces, as well as the power to withdraw the troops. It can be held that, depending on the manner in which the transfer of authority over the forces is arranged, a presumption may arise that certain conduct is attributable to the organization rather than to the contributing state. Indeed, by identifying the functions that formally fall under the authority of the UN and those that remain within the troop-contributing state, these agreements provide a key indication as to the subject on whose behalf members of the force were supposed to exercise a certain function. If the force is supposed to perform certain functions on behalf and under the formal authority of the organization, and not of the contributing state, it can be presumed that its conduct took place under the exclusive direction and control of the organization and is therefore attributable to it. In other words, the formal transfer of powers giving authority to the organization entails a presumption that the conduct is to be attributed to the organization, without the need to demonstrate that the conduct was the result of specific instructions or effective control over the specific conduct. Such a presumption should not be confused with the status as subsidiary organ of the organization.[51] What matters here is not so much the status of the force under the rules of the organization but the agreement between the organization and the sending state, as one may presume that the delimitation of the respective powers agreed upon by the two parties provides an indication as to which entity, in principle, has control over the troops in relation to a given conduct.[52] Obviously, this presumption may be rebutted. It may happen that a force, while acting under the formal authority of the UN (for instance, because it is engaged in combat-related activities falling in principle under the operational control of the UN) has undertaken a certain conduct because of the instructions given to it by the

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51 See however A. Sari, *supra* n. 30, p. 82, who, while recognizing the possibility of having recourse to a rebuttable presumption, places emphasis on the status of peacekeeping forces as organs of the UN and identifies the legal basis for attribution in Art. 6, and not in Art. 7.

52 This does not mean that the rules of the organization are irrelevant. They may serve to delimit and further identify the functions entrusted by the organization to the lent organ.

contributing state. In such circumstances, the conduct must evidently be attributed to the state and not to the organization.[53]

The recent judgment of the Court of Appeal of The Hague in the *Nuhanović* case appears to support the view that, for purpose of attribution, account must be taken of a combination of legal and factual elements.[54] The Court of Appeal found that the criterion for determining whether the conduct of the Dutch troops in Srebrenica had to be attributed to the UN or to the Netherlands was the effective control test now set forth in Article 7 of the articles on the responsibility of international organizations.[55] According to the Court, when applying this criterion, 'significance should be given [not only] to the question whether that conduct constituted the execution of a specific instruction, issued by the United Nations or the state, but also to the question whether, if there was no such specific instruction, the United Nations or the state had the power to prevent the conduct concerned'.[56] While this statement is not free from ambiguities and may be interpreted in different ways,[57] a possible interpretation is that, when mentioning 'the power to prevent the conduct concerned' the Court of Appeal intended to refer to those powers which each contributing state formally retains over its troops. The Court makes the point that, for purpose of attribution, relevance must be given not only to factual control but also to the formal authority of the organization or of the contributing state over

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53 In its judgment of 16 July 2014 in the *Stichting Mothers of Srebrenica* case the District Court of The Hague applied this test to justify its conclusion that certain acts taken by Dutchbat in the period prior to the fall of Srebrenica had to be attributed to the Netherlands. In particular, it observed that '[w]hat is decisive here is that the State in giving Dutchbat this instruction interfered with the management of the operational implementation of the mandate by Dutchbat that it had already transferred to the UN'. District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.66. In the same judgment, the District Court also held the view that 'in order to accept effective control there would be no requirement for the State in giving instructions to Dutchbat to have broken the structure of the chain of command at the UN or exercised independent operational authority to give orders'. Ibid., para. 4.46. However, this statement appears to refer to situations – such as the transitional period after the fall of Srebrenica – in which peacekeepers act under the formal authority of the sending state, or of both the UN and the sending state.

54 This aspect was duly stressed by A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', 9 *Journal of International Criminal Justice* (2011) p. 1143-1157.

55 This 'reciprocal' reading of Art. 7 has been criticized by P. d'Argent, *supra* n. 48, p. 26.

56 Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, Oxford Reports on International Law in Domestic Courts 1742 (NL 2011), para. 5.9.

57 One possible reading is that the Court of Appeal applied the test proposed by Dannenbaum, *supra* n. 7, p. 141, according to which '"effective control," for the purpose of apportioning liability in situations of the kind addressed by Draft Article 5 [now Article 7], is held by the entity that is best positioned to act effectively and within the law to prevent' a breach of international obligations. According to B. Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping', 25 *Leiden Journal of International Law* (2012), p. 531, '[w]hen asking whether the state had had "the power to prevent the alleged conduct", the Court in effect determined that the conduct was *caused* by the state'.

the acts concerned.[58] This appears to find confirmation in the reasoning followed by the Court of Appeal in order to justify its findings that the conduct concerned was to be attributed to the Netherlands. The Court relied heavily on the fact that, during the evacuation from Srebrenica, the Dutch government had control over Dutchbat 'because this concerned the preparations for a total withdrawal of Dutchbat from Bosnia and Herzegovina'[59] – the power to withdraw the troops being a power belonging to the sending state. The Court also referred to the fact that the Dutch government 'held it in its power to take disciplinary actions' against the conduct concerned.[60] The formal authority retained by the state over its troops during the evacuation period and the control it had actually exercised at that time were the two elements on which the Court of Appeal relied in order to justify its conclusion that the conduct in question had to be attributed to the Netherlands.[61]

4.4 Effective control and *ultra vires* acts

The manner in which the transfer of powers is arranged between the organization and the troop-contributing state appears to be relevant for the attribution of responsibility for an *ultra vires* conduct in the context of the peacekeeping operation. No doubt, the fact that certain conduct was carried out by peacekeepers exceeding their authority or contravening instructions does not exempt the sending state or the organization from bearing responsibility. This principle is clearly stated in Article 8 of the articles on the responsibility of international organizations and in Article 7 of the articles on state responsibility.[62] However, these provisions address, respectively, the situation of an organ or agent of an international organization and

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58 The District Court of The Hague took an even clearer stand on this point when it observed that '[s]ince the dispute is related to a UN peacekeeping operation to implement a UN mandate when attributing Dutchbat's actions to the State it is important to know what powers the State still had and what powers it had transferred to the UN'. District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.36.

59 Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, para. 5.18.

60 Ibid.

61 Ibid., paras. 5.18-5.20. See also the judgment of the Court of First Instance of Brussels, where the conduct of the Belgian contingent taking part in the United Nations Assistance Mission for Rwanda (UNAMIR) peacekeeping force was considered to be attributable to Belgium since such conduct took place at a time when the Belgian government had decided to withdraw from the peacekeeping operation: Court of First Instance of Brussels, *Mukeshimana-Ngulinzira and others v. Belgium and others*, 8 December 2010, Oxford Reports on International Law in Domestic Courts 1604 (BE 2010), para. 38.

62 Art. 8 of the articles on the responsibility of international organizations provides that '[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'. According to Art. 7 of the articles on state responsibility, '[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

of an organ of a state. They do not refer specifically to the case of an organ of a state which has been placed at the disposal of an international organization or of another state. Given that peacekeepers are placed under the authority of both the UN and the sending states, it seems that, in order to determine the entity to which the *ultra vires* conduct must be attributed, the capacity in which the person in question was acting during such conduct has to be established. For these purposes, account must primarily be taken of the functions the peacekeeper was performing when engaging in the wrongful conduct and of the respective powers of the organization and of the state with respect to the exercise of this function. Here again, if a peacekeeper was performing functions under the formal authority of the organization (such as engaging in combat-related activities falling under the operational control of the UN), it can be presumed that the *ultra vires* conduct must be attributed to the organization. This presumption can be rebutted if it is demonstrated that the peacekeeper had acted on the instructions of the sending state.

A different view was recently held by the District Court of The Hague in its judgment of 16 July 2014 in the *Stichting Mothers of Srebrenica* case. According to the District Court *ultra vires* conduct of peacekeeping troops must be attributed to the sending state, irrespective of whether this state had given any instruction or order relating to the *ultra vires* conduct. This would be so because that 'state has a say over the mechanisms underlying said *ultra vires* actions'.[63] In particular, the effective control of the sending state over such conduct would result from the fact that the state has a say in the 'selection, training and the preparations for the mission of the troops placed at the disposal of the UN', as well as from the fact that, by retaining control over disciplinary and criminal matters, the state has the power 'to take measures to counter *ultra vires* actions on the part of its troops'.[64] However, it is one thing to say that the conduct is to be attributed to the state when the state is aware of the fact that its troops are going to contravene the instructions of the UN and does nothing to prevent the *ultra vires* conduct. Indeed, one may argue that under certain circumstances lack of prevention may be regarded as amounting to a form of tacit instruction. It is a totally different matter to say that every *ultra vires* conduct must invariably be attributed to the state because it retains disciplinary powers or the power to exercise criminal jurisdiction over the troops. The retention of such powers does not imply that the state exercised factual control over the specific *ultra vires* conduct of peacekeepers. For the purpose of attributing *ultra vires* conduct, what is decisive is whether peacekeepers were 'purportedly or apparently carrying out their official functions',[65] and not whether the state (or the organization) was formally endowed with powers which, in principle, would have allowed it to prevent such conduct from occurring. It might be that the sending state is under an international obligation to punish peacekeepers who, by contravening instructions from the UN, committed breaches of human rights or

63 District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.57.

64 Ibid., para. 4.58. For a similar view, see Dannenbaum, *supra* n. 7, p. 159.

65 Report of the International Law Commission, *supra* n. 14, p. 92.

humanitarian law. While lack of punishment may entail the international responsibility of the sending state, responsibility would arise as a consequence of the omission of state authorities, and not as a consequence of the wrongful conduct of peacekeepers.

While the manner in which the transfer of powers is arranged may create a presumption which also applies to attribution of *ultra vires* conduct, the agreement that the UN concludes with the troop-contributing state can hardly be regarded as decisive for the purpose of determining to whom the *ultra vires* conduct of peacekeeping troops must be attributed. Since Article 9 of the model contribution agreement excludes responsibility of the UN for injury arising from 'gross negligence or wilful misconduct of the personnel provided by the Government',[66] the view was advanced that, when the conduct resulted from gross negligence or occurred in wilful disregard of UN instructions, then the conduct must be attributed to the sending state and not to the UN.[67] However, such an agreement can only apply in the relation between the organization and the sending state. It cannot exclude the application of the general rule set forth in Article 8 in the relation between these two subjects and any third party.[68]

5. IS THERE ROOM FOR DUAL ATTRIBUTION OF THE SAME CONDUCT TO THE UN AND TO THE TROOP-CONTRIBUTING STATE?

In its Commentary to the articles on the responsibility of international organizations, the ILC recognized the possibility that the same conduct may be simultaneously attributed to a state and to an international organization. According to the Commentary, 'although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded'.[69] While the Commentary does not say anything about the possibility of dual or multiple attribution in situations such as those characterizing UN peacekeeping operations, the work of the ILC seems to lend little support to this possibility. The ILC's approach appears to be premised on the idea that, when an organ of a state is placed at the disposal of an international organization, it will have to be determined whether the conduct of such an organ must be attributed to the organization or, alternatively, to the contributing state. This having been said, it is true that the criterion of attribution set forth in Article 7 is not incompatible with the possibility of dual attribution.[70]

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66 Art. 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

67 For this view, see Gill, *supra* n. 11, p. 19-20.

68 See also Report of the International Law Commission, *supra* n. 14, p. 87.

69 Report of the International Law Commission, *supra* n. 14, p. 83.

70 See, however d'Argent, *supra* n. 48, p. 31, who held the view that 'Article 7 ARIO is a provision which is designed to help identify one responsible entity, not several, the very notion of effective control being exclusive rather than cumulative.' For a more nuanced view see Messineo, *supra* n. 42, p. 41-12, who, while recognizing that in principle Art. 7 is an exception to multiple attribution, admits the possibility of dual attribution when peace support operations are concerned.

Interestingly, Special Rapporteur Gaja recognized that, with regard to the activities of organs placed at the disposal of an organization, 'dual attribution of certain conducts' cannot be ruled out.[71]

Admittedly, practice supporting dual attribution is scarce. Such a view is diametrically opposed to the one defended by the UN. '[K]een to maintain the integrity of the United Nations operation *vis-à-vis* third parties',[72] the UN strives to be considered as the sole actor responsible for the conduct of peacekeeping forces operating under its command and control. In this respect, recognition of dual attribution would increase the risk of sending states interfering with the UN chain of command. An implicit recognition of this possibility was contained in the ECtHR's judgment in the *Al-Jedda* case, which however concerned the conduct of a UN-authorized mission.[73] A more explicit endorsement of this view was contained in the judgments rendered by the Dutch Court of Appeal and by the Supreme Court of the Netherlands in the *Nuhanović* case. The Court of Appeal admitted that the actions taken by a national contingent in the course of a peacekeeping operation might be simultaneously attributed to the sending state and to the UN. It observed that 'the Court adopts as a starting point that the possibility that more than one party has "effective control" is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party'.[74] However, apart from recognizing this possibility, the Court of Appeal did not clarify the specific conditions which may justify dual or multiple attribution. Consequently, the contribution given by this judgment to the identification of cases of dual or multiple attribution is rather limited. Similarly, in its judgment of 6 September 2013 in the same case, the Supreme Court of the Netherlands limited itself to admitting that 'international law, in particular Article 7 of the draft articles on the responsibility of international organizations in conjunction with Article 48(1) of the same draft articles, does not exclude the possibility of dual attribution of given conduct', without providing any further indication on

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71 See Gaja, *supra* n. 41, p. 14. See also N. Tsagourias, 'The Responsibility of International Organizations for Military Missions', in M. Odello and R. Piotrowicz (eds.), *International Military Missions and International Law*, Leiden, Martinus Nijhoff 2011, p. 245 et seq.

72 UN Doc. A/CN.4/637/Add.1, p. 14.

73 ECtHR (Grand Chamber), *Al Jedda v. United Kingdom*, 7 July 2011, para. 84. See M. Milanovic, 'Al Skeini and Al Jedda in Strasbourg', 23 *The European Journal of International Law* (2012) p. 136.

74 Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, para. 5.9. As noted by L. Condorelli, 'De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlandais', *QIL-Questions of International Law*, *Zoom-in* 1 (2014), p. 10-11 (available at <www.qil-qdi.org>), 'la Cour d'appel est sans doute allée bien vite en besogne quand elle a affiché la conviction que la possibilité […] d'une double attribution (aux N.U. et à l'État d'envoi) des agissements des FMP serait « generally accepted », alors qu'en vérité rares sont les auteurs qui l'admettent'.

this issue.[75] Apart from the brief statements contained in these judgments, judicial practice appears to be substantially lacking.

Dual attribution of the conduct of UN peacekeeping forces found some support in legal literature. The most coherent and forceful argument in support of dual attribution is the one which relies on the role played by the national contingent commander within the command and control structure of UN peacekeeping operations. The basic premise of this argument is that the sending state cannot avoid responsibility since, through the national contingent commander, it exercises a form of control over each and every conduct of its contingent, irrespective of whether such conduct was prompted by an order coming from the UN force commander or not. Because of this control, it has been argued that the conduct of a peacekeeping force must be jointly attributed to the UN and to the contributing state – the UN for being the originator of the instructions, and the contributing state for having concurred in the instructions.[76]

In placing emphasis on the control that the sending state, at least potentially, may exercise over its contingent, this view certainly raises an important point. However, one may doubt that this 'potential factual control' is sufficient to justify attribution. As noted above, in the case of UN peacekeeping operations attribution mainly depends on the fact that the national contingent was placed at the disposal of the UN and therefore acted in the exercise of functions entrusted to it by the organization. It is not so much the control, which may be presumed, but the functions actually exercised by the force that matter for the purpose of attribution. Thus, the conduct of a national contingent is to be attributed to the organization if the contingent was acting in the exercise of functions appertaining to the organization and under a chain of command leading to the UN. The fact that the national contingent commander agreed with the instructions of the UN force commander does not appear to be sufficient to justify the conclusion that the contingent was also acting under the effective control of the state. Significantly, this view appears to have been expressly upheld by the District Court of The Hague in its 2008 judgment in the *Nuhanović* case. According to the District Court, the fact that a state's authorities agree with the instructions from the UN does not amount to an interference with the UN command structure and therefore does not justify the attribution of the conduct to the state. The Court observed: 'If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient

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75 Supreme Court of the Netherlands, *State of the Netherlands v. Nuhanović*, 6 September 2013, para. 3.11.2. See also District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.34. The reference made by the Supreme Court and by the District Court to Article 48 of the Articles on the responsibility of international organizations does not appear to be a pertinent one as Article 48 concerns cases of joint responsibility for the same wrongful act, and not dual attribution of the same conduct. See Condorelli, *supra* n. 74, p. 9, n. 10.

76 See the view expressed on this issue by Luigi Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire', 78 *Rivista di Diritto Internazionale* (1995) p. 893; and more recently Condorelli, *supra* n. 74, p. 1 et seq. See also Leck, *supra* n. 45, p. 1 et seq.

grounds to deviate from the usual rule of attribution.'[77] Admittedly, the decision of the District Court was later reversed by the Court of Appeal of The Hague. In particular, while the District Court had expressly excluded the possibility of dual attribution,[78] the Court of Appeal admitted that possibility. However, there are no elements in the Court of Appeal's decision which may suggest that it endorsed dual attribution in case of parallel instructions. As we have seen, attribution to the Netherlands of the conduct of Dutchbat was not based exclusively on factual control.

While it seems excessive to link dual attribution to the role played by the national contingent commander within the UN command structure,[79] dual attribution might be admitted in those cases where it is not clear whether the national contingent was acting in the exercise of functions of the sending state or of the organization. In particular, a situation of this kind may arise where, with regard to the conduct concerned, both subjects were formally entitled to exercise their authority over the contingent and the conduct was in fact the result of instructions taken by mutual agreement between the organization and the state. One may refer, for instance, to the situation described by the Court of Appeal of The Hague with regard to the evacuation of Dutchbat from Srebrenica. As the Court put it, during the transition period following the fall of Srebrenica, it was hard to draw a clear distinction between the power of the Netherlands to withdraw Dutchbat from Bosnia and the power of the UN to decide about the evacuation of the United Nations Protection Force (UNPROFOR) unit from Srebrenica.[80] Since during that period both the Netherlands and the UN appeared to be formally entitled to exercise their respective powers over Dutchbat, and since in fact they both exercised their actual control by issuing specific instructions, dual attribution might be regarded as justified.

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77 District Court of The Hague, *HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, 10 September 2008, Oxford Reports on International Law in Domestic Courts 1092 (NL 2008), para. 4.14.1.

78 Ibid., para. 4.13.

79 Significantly, in its 2014 judgment the District Court of The Hague held the view that 'the mere fact that Dutch military personnel were appointed to UNPROFOR does not mean per se that the State exercised effective control. Dutch officers worked in the UN chain of command whence operational implementation of the mandate was directed'. District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, para. 4.50. It also observed that '[n]or does the fact that Dutch officers in the UN chain of command maintained contact with The Hague constitute grounds for assuming effective control'. Ibid. para. 4.52. It must be noted, however, that, according to the District Court, when the state interferes with the UN chain of command by giving instructions to the troops, the resulting conduct must be attributed to the state even if 'the instruction matches up with the immediately preceding general instruction of the UN'. Ibid., para. 4.66.

80 Court of Appeal of The Hague, *Nuhanović v. Netherlands*, 5 July 2011, para. 5.18. See also District Court of The Hague, *Stichting Mothers of Srebrenica et al. v. the Netherlands*, 16 July 2014, paras. 4.80-4.85.

6. STATE ORGANS PLACED AT THE DISPOSAL OF AN ORGANIZATION, EFFECTIVE CONTROL AND *LEX SPECIALIS*

The general rules of attribution contained in Articles 6 to 9 of the articles on the responsibility of international organizations apply only residually. They may be derogated from by special rules of attribution. According to Article 64 of the 2011 text,

> [t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Thus, one cannot rule out the possibility that the conditions for the attribution to an organization of the conduct of contingents placed at its disposal by states are governed by special rules whose content differs from the criterion of effective control provided under Article 7.

Special rules of attribution may be contained in the rules of the organization.[81] Examples of these kinds of rules are difficult to identify. In any case, such rules would only apply in the relation between the organization and its members or between the members and would not be opposable to third states or third organizations.

The UN has frequently referred to rules contained in agreements concluded with troop-contributing states in order to exclude its responsibility for certain categories of acts committed by peacekeeping forces.[82] Special rules of attribution may certainly be contained in treaties that the organization concludes with member states or with third states. However, as the ILC's Commentary specifies, treaties of this kind may govern 'only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules'.[83]

It may be that special rules of attribution apply to a particular category of organizations or to a particular organization. Thus, for instance, the European Union constantly advocated the inclusion in the articles on the responsibility of international organizations of a provision recognizing that special rules apply to regional economic integration organizations.[84] Exploring whether special rules of attribution

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81 Under Art. 2(b), '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.

82 See, for instance, A/CN.4/637/Add.1, p. 12.

83 Report of the International Law Commission, *supra* n. 14, p. 87.

84 Report of the International Law Commission, *supra* n. 14, p. 168.

apply to EU peacekeeping missions is beyond the scope of the present article. It must be noted, however, that even those authors who most forcefully supported the view that special rules of responsibility apply to the EU are ready to admit that, when it comes to peacekeeping and police missions, 'the European Union is in many ways a classical intergovernmental organization with problems similar to the UN'.[85]

7. PROPOSITIONS AND POINTS FOR DISCUSSION

1. Because of their dual status as organs of both the UN and the sending state, the formal status of peacekeeping forces within the UN system can hardly be regarded as decisive for purpose of attribution. Such dual status justifies the application of a special rule of attribution, such as the one set forth in Article 7 of the articles on responsibility of international organizations, which is based not on the formal status of peacekeeping forces within the UN system, but rather on the effective control exercised over such forces.

2. Two conditions must be met for the conduct of a lent organ to be attributed to the receiving organization under Article 7. First, the organ must be 'placed at the disposal of the organization'. Secondly, the organization must exercise 'effective control' over the conduct of the organ placed at its disposal. This means, firstly, that the lent organ must perform functions entrusted to it by the receiving organization in conjunction with the machinery of that organization and, secondly, that that organ must act under the exclusive direction or control of the receiving organization, rather than on instruction from the sending state.

3. The requirement of effective control under Article 7 must not be interpreted as meaning that the conduct of a lent organ can be attributed to the organization only if the organization was exercising a control over each specific conduct of that organ. A lower degree of control may be sufficient to justify attribution.

4. When applying the criterion of attribution set forth in Article 7 to UN peacekeeping forces, importance must be attached in the first place to the manner in which the transfer of powers was formally arranged between the organization and the troop-contributing state. It is submitted that, if the force is supposed to perform certain functions on behalf and under the formal authority of the organization, and not of the contributing states, it can be presumed that its conduct was taken under the exclusive direction and control of the organization and is therefore attributable to it. This presumption may be rebutted if it

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85 See E. Paasivirta and P.J. Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations', 36 *Netherlands Yearbook of International Law* (2005) p. 174. The same conclusion is shared by G. Marhic, 'Le régime de responsabilité des opérations de paix de l'Union européenne: quelles règles applicables?', 47 *Revue belge de droit international* (2013) p. 137 et seq., and by Sari and Wessel, *supra* n. 30, p. 126 et seq.

is demonstrated that the force, while acting under the formal authority of the UN, has undertaken certain conduct because of the instructions given to it by the contributing state.

5. If peacekeepers perform functions under the formal authority of the organization, this creates a presumption that all their conduct, including *ultra vires* conduct, must be attributed to the organization. This presumption can be rebutted if it is demonstrated that the peacekeepers had acted on the instructions of the sending state.

6 While the purpose of the rule of attribution set forth in Article 7 is to establish whether the conduct of an organ of a state placed at the disposal of an organization must be attributed to the organization or, alternatively, to the contributing state, dual attribution of the same conduct to the UN and to the sending state might be admitted in those (rather exceptional) cases where it is not clear whether the national contingent was acting in the exercise of functions of the sending state or of the organization.

7. Although the existence of the special rules governing the question of attribution with regard to the activities of military contingents placed at the disposal of the UN or of other international organizations cannot be ruled out, examples of such special rules are hard to find.

HUMAN RIGHTS OBLIGATIONS IN PEACE OPERATIONS: THE PERSPECTIVE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

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ABBREVIATIONS

CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC rights	economic, social and cultural rights
EU	European Union
EULEX	European Union Rule of Law Mission
HRAP	Human Rights Advisory Panel
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHL	international humanitarian law
MMP	missing and murdered persons
OSCE	Organization for Security and Co-operation in Europe
PMSC	private military and security company
UK	United Kingdom
UN	United Nations
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council

1. INTRODUCTION

There is ample evidence that (individuals serving) peace operations violate human rights or are complicit in human rights violations, ranging from sexual abuse to lack of protection, arbitrary killing or indefinite detention, and support to armed forces that commit serious human rights violations.[1] Beyond the question of individual criminal responsibility, troop-contributing States and/or the United Nations (UN)[2] may bear responsibility. Three basic questions arise in order to assign responsibility for human rights violations to a State or an international organisation like the United Nations:

1. the *attribution of conduct* to the State(s) and/or the UN;
2. the determination of human rights *obligations* and their allocation to the State(s) and/or the UN;
3. the *attribution of international responsibility* to the State(s) and/or the UN.

This paper focuses on the second question, and more in particular on which human rights obligations States and/or the UN have in the context of peace operations. The other questions are by and large addressed in the paper by Paolo Palchetti, and have been explored extensively in literature (and case-law).[3] Nevertheless, I will briefly touch on these questions to the extent that they are relevant for my key concern, i.e. which human rights obligations State(s) and/or the UN have in the context of peace operations.

Peace (support) operations cover a very wide and diverse range of operations. In a very general way, peace operations often also pursue a democracy and human rights agenda, and are triggered at least partly by human rights concerns in the first place.[4] Of relevance for my purposes is the question whether a situation of armed conflict prevails once the peace keepers have been deployed, as this may have a

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1 See e.g. Scott P. Sheeran, 'A Constitutional Moment?: United Nations Peacekeeping in the Democratic Republic of Congo', 8 *International Organizations Law Review* (2011) p. 55-135, at p. 57; Róisín Burke, 'Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets', 16 *Journal of International Peacekeeping* (2012) p. 1-46.

2 Peace operations that are authorised by the UN are sub-organs of the UN. I focus in this paper on UN authorised peace operations only.

3 For an introduction to the case-law of the ECtHR and the views of the Human Rights Committee, see *inter alia* Magne Frostad, 'The Responsibility of Sending States for Human Rights Violations during Peace Support Operations and the Issue of Detention', 50 *Mil. L. & L. War Rev.* (2011) p. 127-188. See also e.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press 2011. Boris Kondoch (ed.) *International Peacekeeping*, Ashgate 2007.

4 Diego Garcia-Sayan, 'Human Rights and Peace-Keeping Operations', 29 *U. Rich. L. Rev.* (1994) p. 41-65. Compare Dannenbaum, who submits that eight of the eleven peace operations that were on-going at the time had been at least partially justified by reference to human rights, Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', 51 *Harvard Journal of International Law* (2010) p. 113-192, at p. 137.

decisive impact on the scope of human rights obligations (infra) of troop-contributing States and/or the UN.

Attribution of conduct has a bearing on establishing who a potential duty-bearer is under human rights law. Military peace operations authorized by the UN typically have a dual nature: they are 'national contingents within an international presence':[5] the peace force itself is a subsidiary organ of the UN, but the troops remain organs of the State(s).[6] Civilian administrations hire individuals, so that their conduct is in principle only attributable to the UN.[7] Notwithstanding complex and varying command and control structures of UN peace operations,[8] the UN can be said to have operational command or control, whereas troop-contributing States retain a significant degree of control *de jure* or *de facto*, *inter alia* disciplinary control[9] and control over the selection, training and promotion of their troops.[10] Hence, it is necessary to identify and define the human rights obligations incumbent on both types of actors (i.e. troop-contributing States and the UN), as conduct and responsibility may be attributable to one of them, or to both.[11] Dannenbaum has developed a five-category responsibility scheme in which (a) troop-contributing State(s) feature(s) in three categories: in case of human rights violations *ultra vires*; human rights violations within the authorized sphere of discretion by the UN, but not pursuant to a UN order; and human rights violations pursuant to an UN order, which also amount to a war crime. If peacekeepers act contrary to UN orders (the first category), he suggests exclusive state responsibility, whereas for the second and third category mentioned here, he proposes joint and severable responsibility of the troop-contributing State(s) and the UN.[12] The nature and degree of control will also be relevant for tailoring the scope of human rights obligations (and the degree of responsibility for violations).

Methodologically, I will present the law as it is where possible (*de lege lata*), but often, I will have to rely on reasoning by analogy, and provide more the *de lege ferenda* arguments. With regard to the human rights obligations of troop-contributing States, I will predominantly draw on the European Court of Human Rights' (ECtHR) case-law. Two caveats are to be made though. First of all, human rights

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5 Claire Breen, 'The Edges of Extraterritorial Jurisdiction: The Integration of Economic, Social and Cultural Rights into Peace Support Operations', 16 *Journal of International Peacekeeping* (2012) p. 47-83, at p. 75.

6 Burke, *supra* n. 1, at p. 15. Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', 19 *European Journal of International Law* (2008) p. 509-531; Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', 10 *Melb. J. Int'l L.* (2009) p. 346-364.

7 Dannenbaum, *supra* n. 4, at p.115.

8 Frostad, *supra* n. 3, at p. 164 ff. and p. 172-173.

9 Burke, *supra* n. 1, at p. 3-15.

10 Ibid., p. 35. Compare Breen, *supra* n. 5, at p. 74; Tom Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', 61 *International and Comparative Law Quarterly* (2012) p. 713-728, at p. 715; Dannenbaum, *supra* n. 4, Part 3.

11 Frostad, *supra* n. 3, at p. 171.

12 Dannenbaum, *supra* n. 4, at p. 117 and p. 158-183. Dannenbaum, *supra* n. 10, at p. 726-727.

obligations in peace operations arise per definition from the exercise of extraterritorial jurisdiction. The ECtHR's cases on extraterritorial jurisdiction take therefore prime importance, but they do not often concern a UN authorised peace operation. They may be helpful, however, in identifying the scope of human rights obligations in settings of varying degrees of control (ranging from occupation, decisive influence over a regime or effective control over territory, to authority over individuals). An important element in the delineation of human rights obligations in peace operations is whether or not the situation can be defined as one of armed conflict. If a situation amounts to an armed conflict legally speaking, international humanitarian law will (also) apply (see paragraph 2.1). The ECtHR's most relevant case-law on situations of *de facto* armed conflict mainly deals with the exercise of territorial jurisdiction or occupation, and may therefore not be directly transposable to extraterritorial peace operations, in which the degree of jurisdiction will typically be more limited.

In what follows, I will first address some preliminary issues, such as human rights law in armed conflict (para. 2); extraterritorial jurisdiction (paragraph 3), and derogation (para. 4). In paragraph 5, the scope of troop-contributing States' human rights obligations in peace operations is examined. Paragraph 6 sets out the contours of a multi-actor approach, and zooms in on the human rights obligations of the UN. Conclusions are drawn and propositions presented in paragraphs 7 and 8.

2. HUMAN RIGHTS LAW IN ARMED CONFLICT

A preliminary question is whether human rights law applies to peace operations at all. In fact, most peace operations occur in the context of low or high-intensity conflict. Legally speaking, it could be argued that given the context of conflict, only international humanitarian law applies, as the *lex specialis*.[13] However, the applicability of human rights law in times of armed conflict is nowadays widely recognized, and no longer a key issue in the debate.[14] As the International Court of Justice (ICJ) has held in the Advisory Opinion on the Wall in the Occupied Palestinian Territory, the protection by human rights treaties does not cease in armed conflict.[15]

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13 See ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 8 July 1996, § 25. For theories on the relationship between the two branches of international law, see Hans-Joachim Heintze, 'Theories on the Relationship between International Humanitarian Law and Human Rights Law', in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, 2013, p. 53-64.

14 Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', 87 *International Review of the Red Cross* (2005) p. 737-754, at p. 738.

15 ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, § 106. For some background, see e.g. Robert K. Goldman, 'Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict', in Robert Kolb and Gloria

However, it is not because human rights law continues to apply in settings of armed conflict that the meaning and scope of the obligations will be the same. For there may be a tension between international humanitarian law (IHL) and human rights law.[16] For instance, IHL applicable to international armed conflicts provides combatants a licence to kill or the possibility of indefinite detention, which human rights law does not allow. It is therefore important to establish whether or not there is, legally speaking, an armed conflict in the first place.[17] IHL does not offer very strong guidance on this question. Article 1 of Additional Protocol II to the Geneva Conventions makes clear that it is not applicable to internal disturbances and tensions,[18] and thereby defines negatively when there is no armed conflict from a legal point of view. The ECtHR has so far refrained from legally qualifying a *de facto* situation of armed conflict in these terms, so that its position on the scope of human rights obligations in the context of *de jure* armed conflict is not clear. In any event, IHL can be seen as an interpretative tool for human rights norms in the context of armed conflict (for the ECtHR, see below; for the Inter-American Commission on Human Rights, see Lubell[19]). Further questions arise, though, as from an IHL point of view, rules differ depending on the qualification of occupation, international or non-international armed conflict. Moreover, IHL works with different regimes for different categories (combatants, civilians).

In case of peace operations, the law of occupation, strictly speaking, does not apply. Often though, it is applied by analogy. Because of that application by analogy, no automatic priority should be given to IHL.[20] As Krieger submits, 'international humanitarian law does not per se override human rights law where humanitarian law itself only applies by analogy'.[21] 'Since the rationale of the *lex specialis* principle is based on the appropriateness of the more specific rule, the principle itself must be understood as contextual.' [footnote omitted].[22]

An alternative to the occupation analogy qualification could be, that peace operations take place in the context of a non-international armed conflict, insofar as the armed forces of the peace operation fight non-state armed groups. In that hypothesis, common Article 3 Geneva Conventions (on conflicts of a non-international character), Additional Protocol II and customary international humanitarian

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Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* 2013, p. 111-112; Lindsay Moir, 'The European Court of Human Rights and International Humanitarian Law', in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* 2013, p. 480-502, at p. 480.

16 Heike Krieger, 'After Al-Jedda: Detention, Derogation and an Enduring Dilemma', 50 *Mil. L. & L. War Rev.* (2011), p. 419-445, at p. 421.

17 Lubell, *supra* n. 14, at p. 740-741.

18 On thresholds for conflict in IHL, see Moir, *supra* n. 15, at p. 481-482; Françoise J. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of A Human Rights Treaty Body', 90 *International Review of the Red Cross* (2008) p. 549-572, at p. 554-556.

19 Lubell, *supra* n. 14, at p. 742.

20 Krieger, *supra* n. 16, at p. 427.

21 Ibid., p. 431.

22 Ibid., p. 431.

law do apply.[23] However, with regard to non-international armed conflict, at least on the matter of detention, it has been argued that human rights law may be the *lex specialis*, for IHL is that in case 'more 'rudimentary"'.[24]

3. EXTRATERRITORIAL JURISDICTION

In literature[25] and case-law, the focus has been primarily on whether troop-contributing States may be responsible under human rights law for any violations committed by their troops. The Human Rights Committee considers a troop-contributing State clearly as a human rights duty-holder:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] This principle also applies to those within the power or 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.[26]

This position is also held consistently in the reporting procedure when the Committee engages with a State party on its implementation of the International Covenant on Civil and Political Rights (ICCPR). With regard to Belgium, e.g., it held:

> The Committee is concerned at the fact that the State party is unable to affirm, in the absence of a finding by an international body that it has failed to honour its obligations, that the Covenant automatically applies when it exercises power or effective control over a person outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace enforcement operation (art. 2).

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23 Ibid., p. 428.

24 Frostad, *supra* n. 3, at p. 160-161.

25 See *inter alia* F. Coomans and Menno Kamminga, *Extraterritorial Application of Human Rights Treaties*, Intersentia 2004; Larsen, *supra* n. 6; S. Besson, 'The Extraterritorialiy of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* (2012) p. 857-884; Anna Cowan, 'A New Watershed? Re-evaluating Bankovic in Light of Al-Skeini', 1 *Cambridge Journal of International and Comparative Law* (2012) p. 213-227.

26 Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, § 10.

> 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.[27]

In a grand chamber judgment, the ECtHR held in *El-Jedda v. UK* that the detention of Iraqis by UK forces as part of a multi-national force authorised by the UN Security Council (UNSC) was indeed attributable to the UK, and that the alleged victims fell within the jurisdiction of the UK.[28] Whether or not this judgment represents a reversal of its earlier case-law in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, in which the Court attributed the conduct exclusively to the UN, remains to be seen.[29] Formally, the ECtHR distinguished the two cases on the basis of the UN's role in guaranteeing security in both settings. With regard to the operation in Iraq (the *El-Jedda* case), the Court argued that the UN did not 'assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority'.[30] In Kosovo (the *Behrami and Saramati* case), it argued that the UNSC had ultimate authority and control over the operation,[31] and that the impugned actions were therefore attributable to the UN rather than to the States concerned. In any event, if States can be said to remain bound by their human rights obligations in UN sanctioned peace operations, they must be all the more so in the absence of UNSC approval.

The more important question for my purposes is whether troop-contributing States in peace operations remain bound by their human rights obligations in full. To this question I will turn after having examined the possibility of contracting out of or derogating from one's human rights obligations.

4. CONTRACTING OUT OF OR DEROGATING FROM HUMAN RIGHTS OBLIGATIONS

Human rights law, in principle, applies to troop-contributing States. However, these States could try to contract themselves out of their human rights obligations in an

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27 Human Rights Committee, *Concluding Observations of the Human Rights Committee: Belgium* (UN Doc. CCPR/CO/81/ BEL, 12 August 2004) § 6. Other, similar concluding observations include Human Rights Committee, *Concluding Observations of the Human Rights Committee: Poland* (UN Doc. CCPR/CO/82/POL, 2 December 2004) § 3; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Germany* (UN Doc. CCPR/CO/80/DE, 4 May 2004) § 11; and Human Rights Committee, *Concluding Observations of the Human Rights Committee: Iraq* (UN Doc. A/46/40, 1991) § 652, and (UN Doc. CCPR/C/SR.1080-1082); see also Norway NOR/CO/5; 79/Add. 99; Italy ITA/CO/5.

28 ECtHR, *Al Jedda v. UK*, 7 July 2011, § 80-86.

29 Compare Frederik Naert, 'The European Court of Human Rights' Al-Jedda and Al-Skeini Judgments: An Introduction and Some Reflections', 50 *Mil. L. & L. War Rev.* (2011), p. 315-320, at p. 317.

30 ECtHR, *Al Jedda v. UK*, 7 July 2011, § 80.

31 ECtHR (adm.), *Behrami & Behrami v. France, Saramati v. France, Germany and Norway*, 2 May 2007, § 133.

arrangement with the territorial state authorities. The ECtHR is not likely to accept such an arrangement. It has held that 'it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention'.[32] The Court repeated with regard to the role of the UK in the Multi-National Force in Iraq that the agreement between the Iraqi Government and the United States government, on behalf of other troop-contributing states, including the UK, 'could not override the binding obligations under the Convention'.[33]

States may also seek to contract out of their obligations by sub-contracting to private military and security companies (PMSCs).[34] It is generally accepted, however, that when a State entrusts a private actor with a state-like function or service, it keeps its human rights obligations. In particular, the obligation to protect will take prime importance.[35] This line of reasoning can by analogy also be followed with regard to extraterritorial States that are home to or hire PMSCs in the context of a peace operation.

An alternative approach could be to derogate from human rights treaties when engaging in peace operations. Derogation is only provided for under certain treaties (in particular on civil and political rights, see, e.g. Article 4 ICCPR[36] and Article 15 European Convention for Human Rights (ECHR)), and comes with substantive and procedural requirements. Derogation is only permissible in time of war or other public emergency threatening the life of the nation, to the extent strictly required by the exigencies of the situation and provided it is not inconsistent with other international law obligations. Moreover, derogation from the right to life is not possible (except for deaths resulting from lawful acts of war under Article 2 ECHR). The Human Rights Committee[37] has also held that at least some derogable rights have a 'non-derogable core'.[38]

With regard to peace operations, which typically occur extraterritorially, it may not always be possible to argue that there is an emergency that threatens the life of the nation.[39] And even when that argument can be sustained, it may be tricky in

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32 ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, § 138.

33 ECtHR, *Al Jedda v. UK*, 7 July 2011, § 108.

34 For an extensive discussion, see *inter alia* Corinna Seiberth, *Private Military and Security Companies in International Law: A Challenge for Non-binding Norms: The Montreux Document and the International Code of Conduct for Private Security Providers*, Intersentia 2013; Nigel D. White and Sorcha MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', 19 *European Journal of International Law* (2008) p. 965-988; Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies', 19 *European Journal of International Law* (2008) p. 989-1014.

35 Koen De Feyter and Felipe Gómez Isa, 'Privatisation and Human Rights: An Overview', in Koen De Feyter and Felipe Gómez Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation* 2005, at p. 3.

36 Human Rights Committee, *General Comment No. 29 on states of emergency (art. 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2004.

37 Ibid., § 13.

38 The concept is borrowed from Hampson, *supra* n. 18, at p. 563.

39 Goldman, *supra* n. 15, at p. 105. *Contra* Rowe, who argues that in the wake of El-Jedda, the Court is bound to accept that Art. 15 ECHR can apply to a non-international armed conflict extraterritorially, see Peter Rowe, 'Is There a Right to Detain Civilians by Foreign Armed

that a State by formally communicating a derogation, also accepts that, save for the derogation, it bears human rights obligations.[40] In cases of Security Council mandated operations, both the Court of Justice of the European Union (CJEU) and the ECtHR have made clear that they do not assume too readily that the Security Council permits or imposes derogations from human rights law, to which the courts should defer.[41]

5. SCOPE OF HUMAN RIGHTS OBLIGATIONS

5.1 **In general and in principle**

It has been argued in general, both with regard to extraterritorial human rights obligations and *de facto* non-international armed conflicts, and specifically with regard to peace operations that the scope of human rights obligations incumbent on States may vary.[42]

With regard to extraterritorial human rights obligations, I have argued elsewhere:

> However, the scope of the obligations is bound to be variable, not only for specific obligations (e.g. with regard to the obligation to fulfil *inter alia* commensurate with capacities, resources and influence; with regard to the obligation to protect commensurate with varying degrees of positions to regulate or influence), but arguably also more generally in light of the degree of control or influence exercised. [...] The variable scope of the obligations attributed to a duty-bearer cannot be insulated from the discussion on the attribution test for obligations [...].[43]

With regard to non-international armed conflict, Abresch has argued that the ECtHR operates a 'single regime of flexible rules',[44] whereby the rules are applied differently depending on the situation.

Forces During a Non-International Armed Conflict?', 61 *International & Comparative Law Quarterly* (2012) p. 697-711, at p. 710, footnote 79.

40 Therefore, '[...] a Member State may be reluctant to put its jurisdiction beyond dispute by issuing a declaration of derogation'. Krieger, *supra* n. 16, at p. 437.

41 Naert, *supra* n. 29, at p. 317-320.

42 For another and very different example in which a variable (*in casu*, reduced) scope of obligations has been accepted, see the decisions of the European Committee of Social Rights (ECSR) in cases on undocumented minors: some rights do not apply, some only to a certain extent or for some aspects (see, e.g. ECSR, Case No. 69/2011, *Defence for Children International (DCI) v. Belgium*, decision on the merits of 23 October 2012).

43 Wouter Vandenhole, 'Towards Foundational Principles for Attributing Obligations and Apportioning Responsibility in a Multi Duty-Bearer Human Rights Regime', in Wouter Vandenhole (ed.), *Challenging Territoriality in Human Rights Law: Foundational Principles for a Multi Duty-Bearer Human Rights Regime* 2015 (forthcoming).

44 William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *European Journal of International Law* (2005), p. 741-767, at p. 753.

Hampson has warned that human rights law should not be considered to apply only in case of occupation. If human rights were to apply only in case of occupation, 'this appears to necessitate the application of a black and white rule. It does not allow for the possibility that human rights law could be applicable to the extent that the state is able to exercise control over an activity, rather than over the territory as a whole'.[45] She pleads for a variable scope of human rights obligations depending on the degree of control, comparable to a tacit acknowledgement in IHL that 'occupation [consists] of different stages and [...] that the scope of the obligations will vary'.[46] Breen has argued likewise for variable human rights obligations for troop-contributing States in peace operations, depending on the level of control exercised by these States. She distinguishes peace-keeping, peace-building mandates and mandates that confer quasi-sovereign powers, in addition to the levels of authority exercised over a zone or territory, and ascribes to them respectively negative obligations, 'a greater degree of positive obligation' and 'the entire range of rights, with their negative and positive characteristics'.[47] Frostad favours a differentiated approach in time. He believes that to impose the full scope of human rights obligations *immediately* on peace operations, and hence on the States making them possible by contributing troops, may create 'insurmountable obstacles'.[48] Frostad suggests three progressive levels of application of human rights law, 'i.e. limited, medium and normal, with corresponding limitations on the applicable rights and freedoms'. The limited level would include the non-derogable obligations and 'other restrictions considered necessary [...]'.[49] with an automatic shift to a higher level at the time of renewal of the mandate.[50]

The ECtHR seems to take for granted that whenever a State exercises effective control over an area as a consequence of military action, it has the obligation 'to secure, within the area under its control, the entire range of substantive rights'.[51] This includes also the obligation to protect against violations by private individuals.[52] To the contrary, when jurisdiction is the result of State agent authority and control, i.e. through the exercise of physical power and control over a person, 'the State is under an obligation under Article 1 [ECHR] 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''.[53] In other words, depending on the way jurisdiction is exercised, i.e. through effective control over territory or State agent control and

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45 Hampson, *supra* n. 18, at p. 568.
46 Ibid., p. 568.
47 Breen, *supra* n. 5, at p. 71-72 and p. 76.
48 Frostad, *supra* n. 3, at p. 177.
49 The latter part is unclear. What may be meant is that the ordinary human rights regime would apply, save any restrictions generally considered necessary.
50 Frostad, *supra* n. 3, at p. 178-179.
51 ECtHR, *Al-Skeini et alii v. UK*, 7 July 2011, § 138; ECtHR, *Cyprus v. Turkey*, 10 May 2001, § 77.
52 ECtHR, *Cyprus v. Turkey*, 10 May 2001, § 81.
53 ECtHR, *Al-Skeini et alii v. UK*, 7 July 2011, § 137.

authority over a person, the scope of human rights obligations varies.[54] In the former case, the scope is comprehensive; in the latter case, it is limited to the relevant rights. With regard to peace operations, both hypotheses may apply. E.g., the exercise by the UK of some of the public powers normally exercised by the government prior to the establishment of the Interim Government in Iraq, i.e. the maintenance of security, was qualified as the exercise of jurisdiction through State agent authority and control over individuals.[55] This qualification can be read to suggest that the nature of the mandate or the actual powers exercised is decisive in establishing the lead for jurisdiction, but also for the scope of obligations held. That the question whether a State exercises effective control over an area outside its territory is a question of fact was emphasized in the case of *Catan and others v. Moldova and Russia*. The strength of the military presence is the primary yardstick for assessing whether a State has effective control.[56]

Establishing effective control over territory and jurisdiction with regard to the arrest, detention and ill-treatment of persons does not imply that other issues also come automatically within the jurisdiction of that State. In other words, the exercise of jurisdiction is not comprehensive, it is 'jurisdiction over certain events'.[57] However, it does shift the burden of proof to the State concerned to show that it did not exercise jurisdiction over particular events. So full jurisdiction is assumed unless the State can show the lack of jurisdiction over certain events. In the latter case, jurisdiction and the human rights obligations that follow from this are therefore also 'divided and tailored', although not automatically. However, when applying these principles to the case, the ECtHR seems to shift from jurisdiction over events to effective control and decisive influence over a puppet administration, i.e. an administration that only survives 'because of Russian military, economic and political support'.[58]

A further argument in support of a variable scope of human rights obligations can be found in the rare cases where the ECtHR was confronted with a territorial state that did not have effective control over part of its territory, like Moldova with regard to the Transdniestrian region. The Court accepted to take into account the *factual* situation, and to adjust the scope of obligations accordingly. Given the absence of effective control due to a constraining factual situation, it acknowledged the State's reduced scope of obligations, but argued that it still had a positive obligation to 'take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention'.[59] It also spelled out how the

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54 Lubell, *supra* n. 14, at p. 740.

55 ECtHR, *Al-Skeini et alii v. UK*, 7 July 2011, § 149.

56 ECtHR, *Catan et alii v. Moldova and Russia*, 19 October 2012, § 107.

57 Ibid., § 112.

58 Ibid., § 122.

59 ECtHR, *Ilaşcu v. Moldova and Russia*, 8 July 2004, § 331. In Catan, it justified that positive obligation with reference to a legal construct, i.e. that Transdniestria is recognized under public international law as part of Moldova's territory, see ECtHR, *Catan et alii v. Moldova and Russia*, 19 October 2012, § 110.

Court is to monitor abidance with these obligations that are reduced in scope: it verifies whether the measures taken were appropriate and sufficient in the case at hand, and when there is a failure to act, it has to examine 'to what extent a minimum effort was nevertheless possible and whether it should have been made'.[60] It also made clear that the examination of the minimum effort was particularly necessary with regard to the absolute rights, i.e. the right to life and the prohibition of torture.[61] So, the scope of the obligations seems to be determined by factual constraints, but also by legal constructs such as sovereignty and the legal qualification as absolute rights. Even so, the categorisation of civil and political rights on the one hand and ESC rights on the other seems less or not at all relevant: the Court has explicitly declared to see no grounds for distinguishing a case about the right to liberty from one on the right to education with regard to the existence of a positive obligation incumbent on the State that has lost control over part of its territory.[62]

In conclusion, the scope of a State's human rights obligations is divided and tailored in case of the exercise of extraterritorial jurisdiction through participation in peace operations. The precise scope of the obligations will depend on the question whether and to what extent jurisdiction is exercised *over the events concerned* or over a person. This is a factual matter, to be assessed in light *inter alia* of the military force present. Ideal-type categories may include: full control (similar to occupation), whereby the scope of obligations is the same as for a State's own territory[63]; and the situation in which *de facto* a State's position is challenged, and therefore it is not in a position to assume all obligations. In the latter case, whereas the factual constraints may be acknowledged, and hence the scope of human rights obligations be reduced, positive best or minimum efforts obligations continue to apply, comparable to the one with regard to the territorial state that has lost control over part of its territory.[64]

I now firstly turn to aspects of two human rights that are also covered by IHL,[65] i.e. the prohibition of arbitrary killing and detention (paras. 5.2. and 5.3), before I look into the implications for other rights (para. 5.4.).

5.2 **Right to life**

The right to life is a core human right, from which it is not at all allowed to derogate under the ICCPR, and only with regard to 'deaths resulting from lawful acts of war' under the ECHR. Article 2 ECHR prohibits the arbitrary deprivation of life, imposes positive obligations of protection and investigation, and allows the use of force that may lead to deprivation of life only if it is absolutely necessary

60 Ibid., § 334.
61 Ibid., § 334.
62 ECtHR, *Catan et alii v. Moldova and Russia*, 19 October 2012, § 110.
63 Compare Hampson, *supra* n. 18, at p. 567.
64 Compare Breen, who has argued that the gradual approach be balanced against the positive obligations a State has when it has lost control over part of its territory: Breen, *supra* n. 5, at p. 77.
65 Compare Hampson, *supra* n. 18, at p. 560.

in order to defend against unlawful violence, to effect a lawful arrest or prevent an escape, or in action lawfully taken to quell a riot. Do these standards fully apply during peace operations? As argued above, a distinction has to be made between the hypotheses of prevalence or absence of armed conflict.

Goldman has argued (albeit with regard to occupation) that the key variable is whether the situation is fairly calm or whether hostilities are on-going. In his view, human rights standards apply in the hypothesis of a calm situation, and the less protective standard of IHL in the hypothesis of hostilities.[66] A major implication of this reasoning is that civilians directly participating in hostilities during non-international armed conflicts become legitimate targets,[67] and are hence much less protected than they are under the human right to life. Goldman's position, while attractive for its theoretical clarity, may in practice be difficult to apply, as the situation may not be so clear-cut. Goldman's approach is also hard to maintain in light of the position that human rights treaties continue to apply in situations of armed conflict. So what are the other options?

Lubell has examined different solutions for the case of non-international armed conflicts, but considered them all less than satisfactory. If human rights law always prevails in case of non-international armed conflict, a hard case is those conflicts that are of high intensity, in which the strict human rights standards may be at odds with reality and military necessities. Alternatively, if human rights law standards on the use of force prevail in case of low-intensity conflict, and IHL rules once the conflict reaches a higher threshold (such as that of Additional Protocol II, i.e. beyond 'internal disturbances and tensions'), this may be counterproductive to efforts to make IHL protection applicable as early as possible, also with regard to armed groups (i.e. non-state actors that are typically considered not to be bound by human rights obligations).[68]

Moreover, the ECtHR seems reluctant not to apply human rights law in case of hostilities. Rather, the grand chamber has applied human rights law extraterritorially to a 'period when crime and violence were endemic',[69] and more generally the ECtHR has applied right to life standards in situations of non-international armed conflict.[70]

5.2.1 *Procedural obligations*

Notwithstanding the Court's general approach of applying Article 2 ECHR to situations of armed conflict, with regard to the procedural obligations it has left room for taking into account the specific circumstances of a military operation abroad: 'The Court considers that in circumstances such as these the *procedural* duty under Article 2 must be applied realistically, to take account of specific prob-

66 Goldman, *supra* n. 15, at p. 115.
67 Moir, *supra* n. 15, at p. 482.
68 Lubell, *supra* n. 14, at p. 749-750.
69 ECtHR, *Al-Skeini et alii v. UK*, 7 July 2011, § 161.
70 Abresch, *supra* n. 44, at p. 741-767.

lems faced by investigators (emphasis added).'[71] The procedural obligation under Article 2 ECHR implies that an effective official investigation is undertaken when an individual is killed through the use of force. An adequate official investigation must be independent and impartial; it must be capable of ascertaining the circumstances of the use of force, and of leading to the identification and punishment of those responsible. Promptness and reasonable expedition is required.[72]

In Krieger's view, to the extent that lowering human rights standards during military operations is permissible due to the necessities of the situation, IHL represents the minimum threshold, even if it does not apply directly.[73] For the Court, as a minimum, it is required that all reasonable steps are taken. This means that: 1. the authorities act of their own motion in initiating an investigation; and the investigation is; 2. effective, i.e. capable of determining whether the force used was justified and of leading to the identification and punishment of those responsible; and 3. institutionally and practically independent and prompt.[74] Hence, if the investigation process remains entirely within the military chain of command (§ 171) or if there is no operational independence from the military chain of command (§ 172), and when the investigation is limited to taking selected statements only from the soldiers who have used the lethal force, a violation of the procedural obligation under Article 2 ECHR has taken place. Similarly, if the soldier who shot is not questioned (§ 173); and if a long period of time elapses before a full investigation takes place, combined with a long period between the death and the court-martial, and with a narrow focus of criminal proceedings, Article 2 ECHR is violated (§ 174).[75]

5.2.2 *Substantive positive obligations*

With regard to non-international armed conflicts in, e.g. Chechnya or South East Turkey, the ECtHR has drawn on its case-law with regard to the obligation to plan and control operations that involve the use of force in the so-called law enforcement model, i.e. in the absence of armed conflict.[76] Despite significant battles or even aerial bombings, the Court has not acknowledged the existence of wartime.[77] This is easy to explain: none of the States concerned has ever admitted that an armed conflict was occurring on its territory, and the Court has 'collude[d] in the fiction'.[78] While it has been applauded in being right not to provide 'leeway that

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71 ECtHR, *Al-Skeini et alii v. UK*, 7 July 2011, § 168.
72 ECtHR, *Makaratzis v Greece*, 20 December 2004, § 73-74.
73 Krieger, *supra* n. 16, at p. 439.
74 ECtHR, *Al-Skeini et alii v. UK*, 7 July 2011, § 164-167.
75 A grand chamber judgment in another case on the investigation into the shooting by a soldier of the Stabilisation Force in Iraq is pending, see *Jaloud v. the Netherlands*, No. 47708/08.
76 Moir, *supra* n. 15, at p. 483-484.
77 Ibid., at p. 483-485.
78 Ibid., p. 496.

humanitarian law might offer',[79] it has also been criticized in that refusing to permit killings that would be lawful under IHL is unhelpful and unrealistic.[80]

With regard to peace operations, it can be argued that troop-contributing States are under the positive *substantive* obligation to protect civilians from their own use of force as well as that by the opposing forces. However, the ECtHR has been more flexible on planning requirements with regard to 'public order operations where the eruption of violence is unforeseeable [...]',[81] and a similar approach could be taken to peace operations, in particular when they take place in the context of armed conflict.[82]

In summary, rather than excluding the applicability of human rights law in a context of violence and armed conflict, the ECtHR has used a variable standard with regard to the applicable procedural obligations, and it has identified the minimum requirements. There is no indication that the ECtHR will take a different line with regard to peace operations. A similar logic of differentiation can be used for substantive positive obligations on the planning and control of operations. If the existence of an armed conflict is acknowledged, it is difficult to maintain the fiction that there is no armed conflict; and more flexibility may then be applied. However, with regard to the standard in Article 2 § 2 ECHR of strict necessity for the use of force that may unintentionally lead to the deprivation of life, it seems much more difficult to assert a contextual approach during peace operations.[83]

5.3 Right to liberty: detention (internment)

The right to liberty is a relative right and therefore open to derogation, provided that the procedural and substantive requirements are met. Nonetheless, the ECtHR

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79 Ibid., p. 496.

80 Ibid., p. 486.

81 Sandra Krähenmann, 'Positive Obligations in Human Rights Law during Armed Conflicts', in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar Publishing 2013, p. 170-187, at p. 171.

82 The Dutch Court of Appeal has been careful in not imposing a general duty to protect or to prevent genocide. It only found the Dutch State responsible for the eviction of Bosnian male Muslims from the UN compound once it knew about the risks, but did not accept an obligation to protect those who were already outside the compound. For an analysis of the Court of Appeal's judgment, see Dannenbaum, *supra* n. 10, at p. 718-719. *Contra* Siobhan Wills, 'The "Responsibility to Protect" by Peace Support Forces under International Human Rights Law', 13 *International Peacekeeping* (2006) p. 477-488. The July 2014 judgment of the District Court of The Hague equally confines state liability to the cooperation offered by Dutchbat with regard to the deportation of the male refugees who in the late afternoon of July 13th 1995 were deported from the compound under their control and who were subsequently killed (see District Court of The Hague, 16 July 2014, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>.

83 Compare Hampson on the limited number of grounds that can be invoked in justification: 'Article 2 [ECHR] list the only permitted grounds for opening fire. They are suited to a law and order paradigm, but not to an armed conflict paradigm. In order to bring into play the additional circumstances in which it is lawful to open fire in time of conflict, it would be necessary to derogate.' Hampson, *supra* n. 18, at p. 564.

considers it to be a fundamental human right.[84] Article 5 ECHR exhaustively lists the permitted forms of deprivation of liberty. Article 9 ICCPR prohibits arbitrary arrest and detention. As a minimum under human rights law, judicial review must be possible.[85]

In its case-law on Article 5 ECHR and derogation in a national emergency context, such as the threat of international terrorism in the UK, the ECtHR has first examined whether a detention could be justified under Article 5 § 1 ECHR, which lists the permissible grounds for deprivation of liberty. Only when it finds that detention cannot be justified on these grounds, it looks into the validity of the derogation.[86] Internment and preventive detention without charge have repeatedly been held to be incompatible with the right to liberty.[87] Hence, the validity of the derogation has to be examined. Whether there is a public emergency that threatens the life of the nation and whether the measures taken are strictly required by the exigencies of the situation is to be assessed by the national authorities, but they 'do not enjoy an unlimited discretion'.[88] The proportionality test (i.e. whether the measures are strictly required by the exigencies of the situation) involves an examination of the nature of the right affected and the circumstances leading to, and the duration of, the emergency situation.[89] If a 'fundamental Convention right, such as the right to liberty' is concerned, a threefold test applies: the derogation must be a genuine response to the emergency situation; it must be fully justified by the special circumstances of the emergency; and adequate safeguards must be provided against abuse.[90] As to judicial review of the lawfulness of detention, the Court believes that the requirement of procedural fairness 'does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances'.[91] Minimal guarantees have nevertheless been identified: the proceedings must have a judicial character, i.e. they must be adversarial, and equality of arms between the parties needs to be guaranteed.[92] Restrictions on the right to a fully adversarial procedure are acceptable if they are strictly necessary in light of a 'strong countervailing public interest'. These restrictions have to be sufficiently counterbalanced though 'by the procedures followed by the judicial authorities'.[93] If there is a strong impact of the (lengthy) deprivation of liberty on the fundamental rights of individuals, the same fair trial guarantees apply under Ar-

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84 ECtHR, *A. and others v. United Kingdom*, 19 February 2009, § 162 and 184.
85 Goldman, *supra* n. 15, at p. 117.
86 ECtHR, *A. and others v. United Kingdom*, 19 February 2009, § 161.
87 Ibid., § 172.
88 Ibid., § 173.
89 Ibid., § 173.
90 Ibid., § 184. For references to accepted forms of preventive detention in national emergency situations, see Krieger, *supra* n. 16, at p. 434, footnote 96, and the Turkish cases discussed on p. 438.
91 Ibid., § 203.
92 Ibid., § 203-204.
93 Ibid., § 205.

ticle 5 § 4 as under Article 6 § 1 (right to a fair trial) in its criminal aspect.[94] At the heart of the matter is that an individual needs to have the possibility to effectively challenge the allegations against him, which requires that the allegations are sufficiently detailed and specific.[95]

With regard to military operations abroad, the grand chamber of the ECtHR has been reluctant to allow security detention (internment) by troop-contributing States to the multi-national force in Iraq. Because the language used in the resolutions did not unambiguously indicate that the UNSC 'intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments [...]' (§ 105),[96] the Court held that Article 5 ECHR is violated 'where the provisions of Article 5 § 1 [are] not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) [apply]'.[97] Neither did it find a binding obligation incumbent on occupying powers under IHL to use internment. Rather, it held that internment is not an obligation, but a measure of last resort under the Fourth Geneva Convention.[98] Hence, as there was no conflict between the obligations under the UN Charter and under Article 5 § 1 ECHR, and since Article 5 § 1 ECHR does not allow for internment, the latter provision had been violated.[99] In other words, the Court does not apply a contextual approach to Article 5 § 1 ECHR, in which can be taken into account e.g. the fact that the deprivation of liberty occurs in the context of a peace operation, or in a situation of armed conflict.

Criticism on the Court's assessment in the *Al-Jedda* case did not concern its non-contextual application of Article 5 § 1, but rather its finding that the Security Council had not *ordered* to resort to internment. The criticism revolves around two issues. One is the requirement of an obligation imposed by the Security Council to resort to internment. It has been argued that the UNSC cannot use the language of obligations since it can only authorise but not order States to use military force in military or security operations. The second criticism is that the UNSC cannot be expected to explicitly spell out in advance every measure to be taken during a military operation. It has been argued that given the frequent use of internment in conflict situations and its solid acceptance under IHL, it can be assumed that internment is authorised.[100] The latter point seems questionable, or needs at least to be nuanced.[101]

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94 Ibid., § 217.
95 Ibid., § 218-224.
96 ECtHR, *Al-Jedda v. United Kingdom*, 7 July 2011, § 101 ff.
97 Ibid., § 110.
98 Ibid., § 107.
99 Ibid., § 109.
100 Ibid., partly dissenting opinion judge Poalelungi.
101 Goldman gives a detailed account of the IHL provisions that allow for internment. However, he points out that in the context of occupation, internment is only permitted as an exceptional measure for imperative reasons of security. Also, in situations of non-international armed conflict, no specific rules are available on detention under IHL (Goldman, *supra* n. 15, at p. 116-

In any event, the Court has set a very high threshold for IHL with regard to detention to prevail over the ECHR, since it focuses on the question whether there is an *obligation* to detain under IHL, whereas IHL is rather concerned with the question when there is a *power* to detain.[102] Hence, IHL provisions will not prevail in peace operations unless there is an explicit UNSC order to derogate from human rights obligations that prohibit security detention. Alternatively, States involved in peace operations need to derogate explicitly from Article 5 ECHR,[103] but the prospects for successful derogation with regard to an emergency outside one's own territory are doubtful. In principle, Article 5 ECHR will therefore apply in peace operations as it does in peace time. The strict grounds for deprivation of liberty listed in § 1 will have to be met.[104] The more contextual approach adopted with regard to the procedural fairness requirements mentioned in § 4 during domestic emergency situations, may be applied during peace operations too.[105]

The Copenhagen Process Principles and Guidelines, finalised in 2012, seek to offer guidance on detention in international military operations in the context of non-international armed conflict situations and peace operations. Central to the Principles and Guidelines is the notion of humane treatment. Principle 12 deals specifically with deprivation of liberty for security reasons, and provides for periodic review by an impartial and objective authority that is authorised to determine both the lawfulness and appropriateness of continued detention. It does not address the question under which conditions deprivation of liberty is permissible. It provides for extensive review, i.e. not only of lawfulness but also of appropriateness, but not necessarily by a judicial authority.[106]

5.4 Other rights

What are the implications of the above for the applicability and scope of other human rights than the right to life and the right to liberty during peace operations? Negative obligations may be said to apply as they do in situations of non-international armed conflict domestically, such as the security situation in South-East

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121). Rowe has argued that IHL does not give a specific legal power to deprive civilians of their liberty during a non-international conflict, see Rowe, *supra* n. 39, at p. 702.

102 Krieger, *supra* n. 16, at p. 422-423.

103 Naert, *supra* n. 29, at p. 318. If there is explicit authorisation by the UNSC to deviate from Art. 5 ECHR, there is an increased need for accountability of the UN itself, see Krieger, *supra* n. 16, at p. 434.

104 Hampson, *supra* n. 18, at p. 564.

105 A complaint about violations of Art. 5 § 1, 2, 3 and 4 concerning the arrest and detention by British armed forces in Iraq is currently pending with a grand chamber of the ECtHR, see *Hassan v. United Kingdom*, No. 29750/09.

106 <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/> (last accessed 24 June 2014). For a criticism on the principles and the process, See Frostad, *supra* n. 3, at p. 179-180.

Turkey with armed clashes between the army and the armed Kurdish resistance, or the Russian military activity and presence in Chechnya.[107]

A rare case in which violations of relative civil rights other than the right to liberty were found in the wake of extraterritorial military activity is *Cyprus v. Turkey*. In this case, the ECtHR examined *inter alia* alleged violations of the freedom of religion (Art. 9) and the freedom of expression (Art. 10). Without any reference to the specific context of conflict, it held that the 'restrictions placed on the freedom of movement [...] considerably curtailed [the enclaved Greek Cypriots'] ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life', which was said to amount to a violation.[108] The complaint about a violation of Article 10 due to excessive measures of censorship with regard to school-books destined for use in their primary school, was equally examined without any reference to the specific context.[109] The ECtHR has occasionally addressed violations of ESC rights in the wake of or during armed conflict, such as the right to housing and to education. The overall living conditions of the enclaved Greek-Cypriots in northern Cyprus were said to aggravate the violations of the right to respect for private and family life, without any acknowledgement of the specificity of the situation.[110] Similarly, the failure to provide Greek-language secondary schooling (while Greek-language primary schooling was provided) was held to be in violation of the right to education.[111] The denial to displaced persons to return to their homes and the very tight restrictions operated by the authorities on visits to the north by Greek Cypriots living in the south, which resulted in the physical prevention from visiting their homes was said to amount to a continuing violation of Article 1 of Protocol No. 1 (right to property).[112]

In instances of domestic military operations whereby homes and possessions were destroyed, the Court found grave and unjustified interferences with the right to respect for private life and the right to property, without any reference to the armed conflict context. Of course, as the State denied the military operation, the Court may not have found it easy to take into account the context in its assessment. On the other hand, as it explicitly acknowledged 'that the homes and certain possessions [...] were deliberately destroyed by the security forces',[113] it could as well

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107 It has to be remembered that these conflicts were never recognised as armed conflicts by the States involved, hence the applicability of IHL was denied, see Moir, *supra* n. 15, at p. 481. See also Bill Bowring, 'How Will the European Court of Human Rights Deal with the UK in Iraq?: Extra-Territorial Jurisdiction, Tensions between International Humanitarian Law and International Human Rights Law, and Lessons from Turkey and Russia', in Phil Shiner and Andrew Williams (eds.), *The Iraq War and International Law*, Hart Publishing 2008; Abresch, *supra* n. 44, at p. 741-767.

108 ECtHR, *Cyprus v. Turkey*, 10 May 2001, § 245.

109 Ibid., § 248-254.

110 Ibid., § 300-301.

111 Ibid., § 278.

112 Ibid., § 189.

113 ECtHR, *Orhan v. Turkey*, 18 June 2002, § 379.

have taken the context of armed conflict into account. The Court has equally held that the suffering caused by witnessing the killing of close relatives due to aerial bombing, witnessing the immediate aftermath of the bombing and the inadequate response by the authorities, i.e. their failure to 'offer even the minimum humanitarian assistance [...] in the aftermath of the bombing', amounted to inhuman and degrading treatment'.[114] Likewise, the deprivation of shelter and support, and being forced to leave the place where they had been living, was believed by the Court to have caused anguish and distress that was sufficiently severe to amount to inhuman treatment.[115]

Beyond the ECtHR and the Council of Europe, the ICJ has confirmed the applicability of ESC rights in situations of occupation. It held that the occupying power Israel was under a negative obligation 'not to raise any obstacle to the exercise of [ESC] rights in those fields where competence has been transferred to Palestinian authorities'.[116] In Breen's reading of the ICJ judgment in *DRC v. Uganda*, 'increased control on the part of the Occupying State brings with it an increased level of (positive) obligation both to protect and to ensure economic, social and cultural rights'.[117] Lubell argues that the same level of health care has to be guaranteed as provided to own nationals, at least in the case of prolonged occupation.[118]

Building on this case-law with regard to occupation and extraterritorial jurisdiction, it has been argued that troop-contributing States should be considered to be bound by their obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), e.g. with regard to the right to water, the right to education, and the right to health. These obligations are both of a negative and positive nature, and include obligations of fulfilment.[119] In light of my more general submission to define the scope of human rights obligations in peace operations in a variable way, depending on the mandate and degree of control, I submit that the scope of positive obligations will vary depending on the mandate and degree of control a troop-contributing State exercises (with a best efforts obligation as a basic floor). In addition, very often the standard of progressive realisation will apply,[120] and limitations will be possible just as they are for the State on whose territory the peace operation takes place.[121] Core obligations, which have been said

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114 ECtHR, *Benzer v. Turkey*, 12 November 2013, § 211.

115 Ibid., § 212.

116 ICJ, *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory*, 9 July 2004, § 112.

117 Breen, *supra* n. 5, at p. 67-68. Breen interprets the judgment as meaning that the ICESCR applies extraterritorially, and that positive obligations may apply beyond the situation of occupation.

118 Lubell, *supra* n. 14, at p. 752-753.

119 Breen, *supra* n. 5, at p. 78-79.

120 Art. 2 ICESCR imposes a general obligation to progressively realize the rights provided for in the Covenant.

121 Breen, *supra* n. 5, at pp. 79-80.

to be at the heart of extraterritorial obligations in the area of ESC rights,[122] may provide a basic floor.

An obligation that has received particular attention in the context of peace operations is the positive obligation to protect, in particular against sexual abuse by military or humanitarian staff of the peace operation.[123] This obligation is not about protection against third parties, but against a State's agents. As a State is assumed to be in full control of its agents, the obligation to protect is not qualified by reference to the degree of control that is exercised.

In conclusion, in cases on extraterritorial military action or non-international domestic armed conflict, the ECtHR has not taken a contextual approach to alleged violations of human rights, thereby applying less exacting standards. By analogy, it can be assumed that it will not do so either with regard to peace operations to the extent that it concerns negative obligations. Where the troop-contributing States are the occupying power or exercise full control (comparable to the situation where a regime only survives through the military, economic or political support of a State), they will also have positive obligations, including with regard to ESC rights. But even if they do not exercise that degree of control, in light of a gradual approach to the level of control, some positive obligations will apply commensurate with the degree of control that is exercised, such as the obligation to protect or to offer minimum humanitarian assistance to victims of any violence, and a best efforts obligation.[124]

6. TOWARDS A MULTI-ACTOR APPROACH

So far, I have only analysed the human rights obligations of troop-contributing States to peace operations. In practice, the picture of human rights duty-bearers in the context of peace operations is more complex. One also has to look at the State on whose territory the peace operation takes place (I refer to this State as the territorial State). Usually, there will also be more than one troop-contributing State, and national contingents of different States may act together in a certain zone or territory. Finally, any UN mandated peace force is considered to be a sub-organ of the UN, and thus an international organisation. This raises again the three questions

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122 For further elaboration and references, see Wouter Vandenhole, 'EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights', in Margot Salomon et al. (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* 2007, at p. 95.

123 For a discussion of the issue, see Gabrielle Simm, *Sex in Peace Operations*, Cambridge University Press 2013. For an analysis in terms of attribution of responsibility to the UN and troop-contributing states, see Burke, *supra* n. 1.

124 Hakimi examines some ideal-type situations, i.e. complete territorial control; shared territorial control; no territorial control with regard to the obligation to protect extraterritorially, see Monica Hakimi, 'State Bystander Responsibility', 21 *European Journal of International Law* (2010) p. 341-385, at p. 378-379.

that I have introduced at the beginning, i.e. of attribution of conduct, ascription of human rights obligations, and apportioning of responsibility for violations.

In literature on extraterritorial peace and military operations, arguments have been developed in favour of dual or multiple attribution of conduct.[125] In addition, elaborate reasoning has been developed to show that human rights obligations are also incumbent on the UN under certain circumstances.[126] And thirdly, questions of shared responsibility for violations may arise.[127]

For the purposes of this paper, the scope of human rights obligations incumbent on the UN (or the EU, if the latter is the international organisation in charge of a peace operation) deserves more attention. A good entry point can be found in the human rights obligations of the UN in Kosovo. Admittedly, it is an extreme case in the sense that the UN took over all State powers in civil and military matters. Again, a more gradual approach to the scope of human rights obligations needs to be taken commensurate to the degree of control that is exercised. Some hints to that effect can be found in Kosovo, now that European Union Rule of Law Mission (EULEX) has taken over from United Nations Mission in Kosovo (UNMIK). Kosovo is instructive in particular because the UN acknowledged so clearly its human rights obligations. First of all, UNMIK has fulfilled the reporting obligations under the ICCPR and ICESCR *in lieu of* the State (Serbia).[128] Moreover, a Human Rights Advisory Panel (HRAP) was established to monitor human rights performance of the UN mission in Kosovo, so that 'case-law' is available.

6.1 The Human Rights Advisory Panel

In 1999, the territory of Kosovo was placed under international administration, i.e. the UNMIK. UNMIK had a very broad mandate to administer Kosovo: in addition to peace-keeping, it exercised legislative and executive powers and was responsible for the administration of justice.[129] The different mandates were brought under four so-called 'pillars'. In addition to pillar I on humanitarian assistance and pillar II on civil administration, other pillars included pillar III on democratisation and institution-building (led by the Organization for Security and Co-operation in Europe, OSCE) and pillar IV on reconstruction and economic development (EU). A NATO-led military force was in charge of security (KFOR). In December 2008,

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125 Burke, *supra* n. 1, at p. 724.

126 Dannenbaum, *supra* n. 4, at p. 134-139.

127 See Wouter Vandenhole, 'Shared Responsibility of Non-State Actors: A Human Rights Perspective', in Noemi Gal-Or et al. (eds.), *Responsibilities of the Non-State Actor in Armed Conflict: Theoretical Considerations and Empirical Findings* 2015 (forthcoming).

128 See e.g. CESCR, *Concluding Observations on UNMIK*, UN Doc. E/C.12/UNMIKCO/1 of 1 December 2008.

129 <www.un.org/en/peacekeeping/missions/unmik/> (last accessed 1 July 2014); Aleksandar Momirov, 'Local Impact of "UN Accountability" under International Law: The Rise and Fall of UNMIK's Human Rights Advisory Panel', 19 *International Peacekeeping* (2012).

the EULEX took over responsibility in the area of administration of justice. EULEX (rule of law) has an Executive Division and a Strengthening Division.[130]

The HRAP mandate was established in 2006 with regard to the Executive Division[131] and 31 March 2010 was made the cut-off date for complaints. Interestingly, the *de facto* end of the HRAP's mandate was justified by reference to 'UNMIK's diminished ability to effectively exercise executive authority in all areas from which the subject matter of human rights complaints have emanated'.[132] The HRAP has also brought acts of the OSCE mission under its mandate. It argued that although the OSCE constitutes a distinct pillar, it is derived from inclusion within the UNMIK administrative framework and UNSC Resolution 1244 (1999).[133] A similar argument could be made with regard to the EU-led pillar. Acts of the provisional institutions of self-government (PISG) have been attributed to UNMIK,[134] whereas acts of KFOR, i.e. NATO's military forces, have not.[135]

The HRAP's opinions are of an advisory nature. Whereas the HRAP has some built-in weaknesses, it remains an interesting and rare example of an accountability mechanism for a UN peace operation. I now turn to its case-law to clarify the scope of UNMIK's human rights obligations.

6.2 **Case-law**

6.2.1 *General*

The HRAP has explicitly examined 'whether the standards of Article 2 [ECHR] continue to apply in a situation of conflict or generalised violence and, whether such standards shall be considered fully applicable to UNMIK, in particular during the first phase of its mission'.[136] It answered both questions affirmatively. The Panel held that Article 2 ECHR remains applicable to situations of conflict or generalised violence, but was prepared to take into account the reality.[137] While it was ready to take into account 'UNMIK's interim character and related difficulties', it submitted that 'under no circumstances could these elements be taken as a justification for diminishing standards of respect for human rights' incorporated within UNMIK's mandate.[138] From 2003 onwards, the HRAP considered the police and justice system in Kosovo as 'a normally functioning law enforcement system'

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130 <www.eulex-kosovo.eu> (last accessed 1 July 2014).

131 <www.unmikonline.org/hrap> (last accessed 30 July 2014). The HRAP consists of three members, all international jurists with a demonstrated expertise in human rights.

132 UNMIK Administrative Direction 2009/1, 17 October 2009, <www.unmikonline.org/hrap/Documents%20HRAP/Regulations%20Eng/AD2009-01.pdf> (last accessed 1 July 2014).

133 HRAP, *Rajović v. UNMIK*, Case No. 308/09, decision of 31 January 2013, § 18-21.

134 HRAP, *Nexhmedin Spahiu v. UNMIK*, Case No. 02/08, 20 March 2009, § 28-30.

135 HRAP, *Brahim Sahiti v. UNMIK*, Case No. 03/08, decision of 10 April 2008, § 5.

136 HRAP, *C.S. v. UNMIK*, Case No. 45/09, opinion of 25 April 2013, § 67.

137 Ibid., § 69-73.

138 Ibid., § 68.

for the purposes of Article 2 ECHR.[139] It has expanded that reasoning to other treaty provisions as well.[140]

6.2.2 *Procedural obligations with regard to disappearances*

In the HRAP's view, reasonable steps that have to be taken to ensure an effective investigation into disappearances go beyond establishing the location of the mortal remains of the disappeared; they also include the obligation to clarify the circumstances of the disappearance and death, and to bring perpetrators to justice.[141] Serious deficiencies with respect to 'reasonable investigative steps and [...] obvious lines of enquiry' equally violate the procedural obligation.[142]

With regard to the burden of proof, since documentation was under the full and exclusive control of UNMIK, the principle that strong inferences may be drawn from lack of documentation on investigations in cases of disappearances has been applied.[143] Failure to hand over all relevant investigative material to EULEX,[144] failure to collect DNA samples[145] or to reach out to a victim's family in order to hold interviews with potential witnesses[146] have all led to findings of a violation of the procedural limb of Article 2 ECHR.

More generally, an effective and adequate investigation requires a 'properly coordinated system', so that separate investigations are linked into a missing person and an unidentified body.[147]

For the HRAP, the procedural obligation under Article 3 ECHR with regard to disappearances 'is more general and humanitarian' than the one under Article 2 ECHR. It relates to the reaction by UNMIK to the plight of the relatives of those who have disappeared or died.[148] Because UNMIK had never undertaken an investigation, it was found to have contributed, by its behaviour, to the distress and mental suffering of relatives of the disappeared, and hence to have violated Article 3 ECHR.[149]

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139 HRAP, *Buljević v. UNMIK*, Case No. 146/09, opinion of 13 December 2013, § 144.

140 With regard to Art. 3 ECHR for example, see HRAP, *Buljević v. UNMIK*, Case No. 146/09, opinion of 13 December 2013, § 144.

141 HRAP, *C.S. v. UNMIK*, Case No. 45/09, opinion of 25 April 2013, § 85. Compare HRAP, *Ž.I. v. UNMIK*, Case No. 145/09, opinion of 12 September 2013, § 92.

142 HRAP, *Todorovski v. UNMIK*, Case No. 81/09, opinion of 31 October 2013, § 119.

143 HRAP, *Ž.I. v. UNMIK*, Case No. 145/09, opinion of 12 September 2013, § 64. Compare Krähenmann who has argued that the reversed burden of proof is a corollary of the duty to account, see Krähenmann, *supra* n. 81, at p. 173.

144 HRAP, *B.A. v. UNMIK*, Case No. 52/09, opinion of 1 February 2013, § 73.

145 HRAP, *Buljević v. UNMIK*, Case No. 146/09, opinion of 13 December 2013, § 94-95.

146 Ibid., § 100-105.

147 HRAP, *Stojković v. UNMIK*, Case No. 87/09, opinion of 14 December 2013, § 164.

148 HRAP, *Buljević v. UNMIK*, Case No. 146/09, opinion of 13 December 2013, § 134.

149 Idem, § 153.

6.2.3 *Substantive obligations*

With regard to a complaint about the right of access to court (the complainant's judicial proceedings for the determination of paternity of her child had been pending before UNMIK was deployed, and were still pending), the HRAP opinion said that 'it is legitimate to expect that UNMIK's efforts towards the re-establishment of the rule of law and the organisation of the judiciary in Kosovo, should also entail policies to ensure the realisation of the fair trial guarantees, including the right of access to a court, for those whose judicial claims were pending at the time of UNMIK's arrival'. Given that no action had been undertaken, and no explanation offered whether a policy for a transitional system had been developed, a violation of the right to a fair trial was found.[150] In other words, the HRAP counts the right to a fair trial to the obligations incumbent on UNMIK, and expects it to make at least efforts to guarantee that right, and to develop a policy with regard to the right.

A complaint about a violation of the substantive obligations under Articles 2 and 3 ECHR, i.e. the excessive use of force by UNMIK police during a crowd control operation, is pending.[151]

With regard to the right to property, the Panel has found that the prolonged failure to enforce a decision of the Housing and Property Claims Commission, which created a right to either compensation or repossession of an apartment, amounts to a violation of the right to peaceful enjoyment of one's possessions.[152] The assessment of the occupation of the premises of a company without agreement and consent in light of the right to property is pending.[153]

The right to health is central to a complaint on lead poisoning and other health problems due to soil contamination in and/or due to generally poor hygiene and living conditions in the camps provided for by UNMIK to internally displaced.[154]

A complaint against UNMIK for failure to take appropriate measures to ensure regular payment of pension based on contributions made to the former Yugoslav Fund, has been declared admissible both under Article 1 Protocol 1 ECHR and Articles 9 and 11 ICESC. As the Fund was based in Belgrade, UNMIK had no direct say over it. However, the Panel held, referring to the *Ilaşcu* case of the ECtHR (see *supra*, footnote 59), that 'in the presence of a factual situation which reduces the scope of jurisdiction of the authority concerned – in this case UNMIK *vis-à-vis* the Belgrade authorities – "the state in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign states and international organisations, to continue to guarantee the enjoyments of the rights and freedoms guaranteed by the Convention"'.[155] Again, this finding illustrates the

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150 HRAP, *Lalić v. UNMIK*, Case No. 31/08, opinion of 14 March 2013, § 45-48.
151 HRAP, *Balaj v. UNMIK*, Case No. 04/07.
152 HRAP, *Nadica Kušić v. UNMIK*, Case No. 08/07, opinion of 15 May 2010, § 69-70.
153 HRAP, *Rajović v. UNMIK*, Case No. 308/09, decision of 31 January 2013, § 19.
154 HRAP, *N.M. et alii v. UNMIK*, Case No. 26/08, decision of 10 June 2012. The case is pending.
155 HRAP, *Krasniqi v. UNMIK*, Case No. 08/10, decision of 6 June 2013, § 30.

contextual approach that has been argued above with regard to troop-contributing States, but which is equally applicable to the UN.

A similar approach of a best efforts obligation can be found in the HRAP's recommendations to UNMIK when it finds a violation of the procedural obligation under Article 2 ECHR with regard to disappeared persons. As UNMIK no longer has responsibility with regard to the administration of justice – which was assumed by EULEX – and no longer performs executive functions following the declaration of independence, UNMIK itself is no longer in a position to directly take measures to end the violation and to offer redress. The Panel, however, has adopted the stance that 'UNMIK must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the requirements of [Article 2 ECHR].'[156]

7. CONCLUSIONS

This paper has examined, from the perspective of the European Convention on Human Rights, which human rights obligations States and/or the UN have in the context of peace operations. I have argued that human rights law applies during armed conflict, but that the meaning and scope of the obligations will not necessarily be the same as in peace time. Likewise, the fact that the extraterritorial jurisdiction of troop-contributing States is at stake does not free these States from their human rights obligations, but it does raise the question whether these States remain bound by their human rights obligations in full. I have argued that the scope of the human rights obligations of a troop-contributing States is divided and tailored in case of the exercise of extraterritorial jurisdiction through participation in peace operations. The precise scope of the obligations will depend on the question whether and to what extent jurisdiction is exercised over the events concerned or over a person, which is a factual matter. With regard to negative obligations, no differentiation of human rights obligations with regard to participation in peace operations is needed. With regard to positive obligations, these will, in principle, apply commensurate with the degree of control that is exercised, although some positive obligations will apply regardless of the degree of control, such as the obligation to protect or to offer minimum humanitarian assistance to victims of any violence, and a best efforts obligation. Similar reasoning can by analogy be applied to the human rights obligations incumbent on the peace force itself. This may raise questions of joint or parallel obligations, which require much more research.

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156 See, e.g., HRAP, *Ž.I. v. UNMIK*, Case No. 145/09, opinion of 12 September 2013, § 110-111. Similar wording can be found in a number of other cases.

8. PROPOSITIONS AND POINTS FOR DISCUSSION

1. 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.

2. 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).

3. 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 an international organisation if authorised by the UN, has human rights obligations analogous to those of the troop-contributing States.

4. 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 violation of these obligations need to be examined.

THE ROLE OF HUMAN RIGHTS LAW IN PRIVATE INTERNATIONAL LAW CASES IN MATTERS RELATED TO TORT*

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ABBREVIATIONS

ATS	Alien Tort Statute (United States of America)
Brussels I	Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition of foreign judgments
Brussels I (recast)	Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition of foreign judgments in civil and commercial matters (recast).
Brussels II-*bis*	Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1324/2000
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
ICCPR	International Covenant on Civil and Political Rights
Rome I	Council Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations
Rome II	Council Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations
Rome III	Council Regulation (EC) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
US	United States of America

1. INTRODUCTION

Human rights are becoming increasingly important in private international law cases. This increased role has two different aspects. First of all, the impact of human rights, and particularly the impact of the European Convention of Human Rights and Fundamental Freedoms (ECHR) on issues of private international law has received more attention over the years.[1] While the impact of the ECHR in this area may in the past have been underexposed, the European Court of Human Rights (ECtHR) has delivered a number of judgments on issues of private international law. The impact of the ECHR can be observed with regard to all three main issues of private international law, i.e., jurisdiction, choice of law, and the recognition and enforcement of foreign judgments.[2]

The second aspect of the increased role of human rights law in private international law cases is related to the use of international civil litigation to attempt to hold parties accountable for alleged human rights violations. In such cases tort law is usually relied on.

In international civil litigation in matters related to tort, individuals may hold other individuals accountable for alleged human rights violations. In this regard, private international law facilitates such international proceedings. An example of such proceedings follows from the case-law of the Court of Justice of the European Union (hereinafter the CJEU), which has dealt with cases concerning the violation of an individual's personality right on the internet, while at the same time these cases led to a request for a preliminary ruling of the CJEU with regard to issues of international jurisdiction.[3]

In recent years transnational civil litigation has also been employed to file complaints against multinational companies for international human rights violations.[4] A fairly recent example of such an attempt is a case before the United States Supreme Court, *Kiobel et al*. v. *Royal Dutch Petroleum et al.*,[5] in which twelve applicants sought to hold the major oil corporation responsible in the United States for human rights violations allegedly perpetrated in Nigeria. Proceedings against

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1 For example, edition 2013/1 of *Journal européen des droits de l'homme/European Journal of Human Rights* contained a number of contributions on this topic. See also the contributions in edition of 2011/1 of *NIPR* dedicated to this topic.

2 L.R. Kiestra, *The Impact of the ECHR on Private International Law*, The Hague, T.M.C. Asser Press 2014 (forthcoming). Parts of this contribution are based on this work.

3 See CJEU 25 October 2011, Joined Cases C-509/09 and C-161/10 (*eDate Advertising v. Martinez*), *ECR* 2011 I-10269; and, CJEU 15 March 2012, C-292/10 (*G v. de Visser*), *ECR* 2012, n.y.p.

4 See with regard to this topic, e.g. L.F.H. Enneking, *Foreign Direct Liability and Beyond. Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability*, The Hague, Eleven International Publishing 2012; V. van den Eeckhout, 'Corporate Human Rights Violations and Private International Law. A Facilitating Role for PIL or PIL as a Complicating Factor?', *Human Rights & International Legal Discourse* 2012, p. 192-218.

5 *Kiobel et al*. *v*. *Royal Dutch Petroleum et al.*, 133 S. Ct. 1659, 185 L.Ed. 2d 671 (2013) [2013 BL 103044].

this oil company with regard to oil leakages in Nigeria have also taken place before a Dutch court,[6] while similar cases were commenced in England as well.[7]

Apart from individuals and (multinational) corporations as actors, which can be called to account for alleged human rights violations in international civil litigation, states, their officials, and even international organisations, may be sued for alleged human rights violations. In these cases tort is also the most pertinent legal basis. The various cases related to the events in Srebrenica against both the United Nations and the Dutch State could be offered as an example of this.[8] Peace operations, which are the subject of the other two papers, may lead to violations of human rights, for which troop-contributing States and/or the United Nations may bear responsibility. But one could also think of the recent judgment by the ECtHR in *Jones v. the United Kingdom*,[9] which concerned the attempt by four British nationals, who had alleged that they had been tortured, to claim damages from Saudi Arabia and four named officials in proceedings before an English court.

All these proceedings may raise questions of private international law, including for example, under which circumstances courts may claim jurisdiction, and with regard to international torts how human rights law can be applied.

It should be clear from the examples cited above that the increased role of human rights in private international law raises a number of wide-ranging questions regarding the role of human rights law in private international law. In this paper we will attempt to analyse a number of these questions relating to these two aspects of the role of human rights with regard to international civil litigation in matters related to tort. However, as this topic is rather broad, we had to make some choices regarding what and what not to discuss. In order to make the subject more manageable we have, first of all, decided to focus mostly on the situation in the Netherlands and on the impact of the ECHR and to a lesser extent the Charter of Fundamental Rights of the European Union (hereinafter EU Charter). Furthermore, due to space constraints, it is not possible to extensively discuss the role of human rights law with regard to all three main questions of private international law. Therefore, we will only discuss questions relating to the issues of jurisdiction and choice of law in private international law.

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6 See, *inter alia*, District Court of The Hague (Rechtbank 's-Gravenhage), 30 January 2013, ECLI:NL:RBDHA:2013:BY9854. See also Y9850 en BY9845.

7 See [2014] EWHC 1973 (TCC) Case Nos. HT-13-295 and HT-13-339 to 350.

8 See, *inter alia*, Supreme Court of the Netherlands (HR) 6 September 2013, *State of the Netherlands v. Mustafić et al.*, *NJ* 2013/1974, ECLI:NL:HR:2013:BZ9228 (Advocate General's advisory opinion: ECL:NL:PH:2013:BZ9225; English text in *NILR* 2013 at p. 447-485); Court of Appeal of The Hague (Hof 's-Gravenhage) 5 July 2011, *Mustafić v. State of the Netherlands*, ECLI:NL:GHSGR:2011:BR0132; ECLI:NLGHSGR:2011:BR5386 (English text) and ECLI:NL:GHSGR:2011:BR0133; and ECLI:NL:GHSGR:2011:BR5388 (English text), *Nuhanović v. State of the Netherlands*; and *Mothers of Srebrenica Foundation v. the State of the Netherlands and the United Nations*, Supreme Court of the Netherlands (HR) 13 April 2012, *NJ* 2012/987, ECLI:NL:HR:BW1999. These cases will be discussed in more detail below.

9 *Jones and Others v. the United Kingdom*, 14 January 2014, Case No. 34356/06 and 40528/06, ECHR 2014.

It follows from the way we have organised of our paper that we will not examine the impact of human rights, and particularly the ECHR, on the recognition and enforcement of foreign judgments. The ECtHR has, of the three main topics of private international law, delivered by far the most decisions on the recognition and enforcement of foreign judgments.[10] While the impact of human rights, and particularly the ECHR, on the recognition and enforcement of foreign judgments is a very interesting topic, in this paper we will not only generally discuss some of the aspects of the impact of human rights, and particularly the ECHR, but also specifically some issues regarding the role of human rights in (international) tort law. While with regard to jurisdiction and choice of law specific questions regarding the role of human rights in tort law are raised, such questions hardly come up in relation to the recognition and enforcement of foreign judgments.

In section 2 we will discuss the applicability of the ECHR to issues of private international law, particularly in cases concerning the issue of jurisdiction and choice of law in private international law. The applicability of the EU Charter to EU rules of private international law will also be discussed here.

In section 3 the impact of human rights on the issue of jurisdiction will be further discussed. Firstly, the impact of the ECHR on the assertion of jurisdiction will be examined. It will be demonstrated that the impact of the ECHR on this issue of private international law is essentially limited to Article 6(1) ECHR. In the second part of this section we will turn to the role of Article 6(1) ECHR in jurisdictional issues in tort cases. We will conclude with a discussion of whether ordinarily inappropriate courts in international proceedings may play a role in cases concerning human rights litigation.

Section 4 concerns the impact of human rights on the choice of law question. We will commence our discussion on this topic with an overview of the possible impact of the ECHR on this issue of private international law. It will be demonstrated that the most important issue in this regard is the invocation of the rights guaranteed in the ECHR *against* the foreign applicable law, if applying that law would violate the ECHR. Furthermore, it will be examined whether the ECHR can also be invoked against the applicability of the *lex fori*, and whether the ECHR could thus also stimulate the application of foreign law. In the second part of this section the application of human rights in (international) tort law will be examined.

Finally, in section 5 we will evaluate the foregoing and draw some conclusions.

2. THE APPLICABILITY OF THE ECHR AND EU CHARTER IN ISSUES OF PRIVATE INTERNATIONAL LAW

2.1 **Introduction**

The Netherlands have a moderately monistic tradition regarding the relationship between international and domestic law. Furthermore, the Dutch Constitution guar-

[10] See generally on this topic Kiestra 2014, *supra* n. 2, chaps. 7 and 8.

antees a paramount position to international treaty law.[11] In short, this means that insofar as international treaties signed and ratified by the Netherlands are intended to create directly enforceable rights for individuals, and these rights are capable of being enforced directly, Dutch courts can directly apply such rights contained in international treaties. This applies to the rights guaranteed in the ECHR.[12] This means that, in principle, these rights can be applied to private international law cases. This, of course, also means that other human rights norms, which satisfy the same requirements, can be applied as well by Dutch courts in such cases. Examples of human rights instruments that Dutch court have applied in private international law cases include the United Nations Convention on the Rights of Children[13] and the International Covenant on Civil and Political Rights (ICCPR).[14] Incidentally, it should be remarked that there is a considerable overlap between the rights guaranteed in human rights instruments. There are therefore certainly cases, in which, for example, a right guaranteed in the ECHR is applied by a Dutch court, but where also a corresponding right in another human rights treaty could have been invoked.[15]

The applicability of the ECHR to private international law cases warrants a closer look though. By its very nature private international law introduces foreign elements to legal orders. These foreign elements, such as a foreign law or judgment, may even originate from a third country, i.e. a non-Contracting Party. If a Dutch court applies the law of a third country, can the ECHR be applied to this law? In this regard, we particularly focus on the act of courts applying foreign law (since the recognition and enforcement of judgments is not part of this paper). As regards the issue of jurisdiction we also focus on acts of courts asserting or denying jurisdiction in international proceedings.

In section 2.3 we will take a look at the applicability of the EU Charter. Many rules of private international law of EU Member States are actually EU rules. These rules include, for example, the Brussels I Regulation on jurisdiction and the rec-

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11 See Arts. 93 and 94 Dutch Constitution (*Grondwet*).

12 See e.g. E. de Wet, 'The Reception Process in the Netherlands and Belgium', in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press 2008, p. 235-236; A.W. Hins and A.J. Nieuwenhuis, *Hoofdstukken Grondrechten* [Chapters Fundamental Rights], Nijmegen, Ars Aequi Libri 2010, p. 61 et seq.

13 See e.g. District Court (Rechtbank) Rotterdam 26 September 2011, ECLI:NL:RBROT:2011:BT8220.

14 See e.g. Supreme Court of the Netherlands (HR) 6 September 2013, *supra* n. 8; see further with regard to this case section 4 *infra*.

15 For example, in a number of cases in the Netherlands concerning the judicial establishment of paternity Dutch courts have set aside the ordinarily applicable foreign law, because on the basis of these foreign laws it was not possible to judicially establish paternity. See, e.g. Court of Appeal (Hof) Amsterdam 9 February 2006, *JPF* 2006, 71 (note A.E. Oderkerk), *NIPR* 2006, 98; District Court of The Hague (Rechtbank 's-Gravenhage) 3 November 2008, *NIPR* 2010, 23; Court of Appeal (Hof) 's-Hertogenbosch 27 November 2008, *NIPR* 2009, 95; Supreme Court of the Netherlands (HR) 12 December 2008, *NIPR* 2009, 1 (in which the judgment of Court of Appeal of The Hague (Hof 's-Gravenhage) 3 October 2007, *NIPR* 2008, 7 was not overturned). However, it has been noted that this right to establish a paternity link may also be based on Art. 7 Convention on the Rights of the Child. See A. Bucher (ed.), *Loi sur le droit international privé. Convention de Lugano*, Basle, Helbing Lichtenhahn 2011, p. 588-589.

ognition of foreign judgments (hereinafter Brussels I),[16] the Rome I Regulation on the law applicable to contractual obligations (hereinafter Rome I),[17] and the Rome II Regulation on the law applicable to non-contractual obligations (hereinafter Rome II).[18] The EU legislator has also delved into the area of family law with the Brussels II-*bis* Regulation[19] and the Rome III Regulation.[20] Since the entry into force of the Lisbon Treaty[21] in 2009 the EU Charter has become a fully binding act of primary EU law.[22] It is therefore interesting to see what the added value of the EU Charter could be with regard to private international law.

2.2 The applicability of the ECHR to private international law

The scope of the ECHR is contained in Article 1 ECHR, which states that: 'The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

The answer to the question posed above on the extent to which the rights guaranteed in the ECHR apply to private international law cases ultimately lies in the clause 'to everyone within their jurisdiction'.[23] The interpretation of this phrase often has been discussed, particularly in the ECtHR's case-law on the extraterritorial application of the ECHR.[24]

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16 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), *OJ* 2001 L 12/1. This instrument already has a successor: Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial Matters (Recast), *OJ* 2012, L 351/1. The Recast will apply from 10 January 2015 (see Art. 81 of the Recast). Other EU rules pertaining to international proceedings, such as Regulation (EC) No. 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters, and Regulation (EC) No. 1206/2001 on the taking of evidence in civil or commercial matters, do not directly apply to issues of jurisdiction or choice of law, and for that reason are not discussed in this paper.

17 Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008 L 177/6.

18 Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), *OJ* 2007, L199/40.

19 Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility (Brussels II-*bis* Regulation), *OJ* 2003, L 338/1.

20 Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), *OJ* 2010, L 343/10.

21 Incidentally, the Lisbon Treaty also imposed an obligation on the EU to accede to the ECHR. The draft agreement on EU accession to the ECHR was finalised in April 2013. See e.g. Roeland Böcker, 'Gaten dichten. Toetreding van de Europese Unie tot het EVRM', *NJB* 2013/24, p. 1560.

22 The EU Charter was first introduced with the Treaty of Nice, but it was a non-binding instrument at that time.

23 See Kiestra 2014, *supra* n. 2, supra, chap. 4, particularly section 4.3 et seq. This may also be a good place to point out that the word jurisdiction is not used in the same manner as it is normally used in private international law. See on the notion of jurisdiction in Art. 1 ECHR further Kiestra 2014, chap. 4.2.

24 See e.g. *Al-Skeini and Others v. the United Kingdom* [GC] 7 July 2011, Case No. 55721/07, ECHR 2011; *Banković and Others* v. *Belgium and 16 Other Contracting States* (dec.) [GC],

Most private international law-cases do not actually concern the extraterritorial application of the ECHR. If a court of one of the Contracting Parties applies foreign law originating from a third country (or other Contracting Parties) violating one of the rights guaranteed in the ECHR, then it is this act of applying the repugnant law by that national court that may lead to a violation of the ECHR.[25] This act of applying a foreign law by a court of a Contracting Party unquestionably falls within the jurisdiction (in the sense of Art. 1 ECHR) of the Contracting Party. A similar reasoning applies to the recognition and enforcement of a foreign judgment, regardless of the origin of this judgment. This means, of course, that foreign laws and judgments originating from third countries are held up to the standards of the ECHR, even though the country of origin of the foreign law or judgment has never signed the ECHR.

One could thus state that if a court of a Contracting Party has jurisdiction in the private international law sense to hear a case, this automatically implies that the subjects in that case come within the jurisdiction of the Contracting Party in the sense of Article 1 ECHR and that the ECHR applies.[26]

The ECHR even applies to the question whether the court of a Contracting Party can assert jurisdiction. As will be discussed further in the next subsection, Article 6(1) ECHR entails the notion of the right of access to a court.[27] If a court of one of the Contracting Parties finds that it has no jurisdiction to hear a case on the basis of its jurisdictional rules, is it then also possible for a plaintiff habitually residing in a third country (or, for that matter, in that of another Contracting Party) to invoke Article 6(1) ECHR? It could be argued that this instrument should only apply if a Contracting Party has jurisdiction in the private international law sense to hear the case. If a court has no jurisdiction to hear the case, how could it be expected to guarantee the rights contained in the ECHR? The answer to this question is again found in Article 1 ECHR: the moment a litigant from a third country (or another Contracting Party) brings proceedings in a court of one of the Contracting Parties, he or she is – in principle – within the jurisdiction of that Contracting Party in the sense of Article 1 ECHR.[28] The jurisdictional rules of the forum can-

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Case No. 52207/99, ECHR 2001-XII.

25 This also follows from *Ammdjadi v. Germany*, ECtHR 9 March 2010, Case No. 51625/08, which concerned an Iranian couple, who wanted to obtain a divorce in Germany. Iranian law was applied to the case. The applicable law thus originated from a third country, and as such does not necessarily be in line with the standards guaranteed in the ECHR, as the country responsible for the law is not a party to the ECHR. Nevertheless, the Court had no issue reviewing the application of Iranian law by the German courts. The fact that the court applying the foreign law is responsible for possible violations of the ECHR following from the applicable law also means that even if the law of another Contracting Party is applied, only the Contracting Party of the court applying the law can be held responsible. In *X. v. Belgium and the Netherlands*, decision of 10 July 1975, *DR* 6, p. 77 the Commission found that only the Belgian court applying Dutch law that violated the ECHR could be held responsible for violation of the ECHR.

26 Kiestra 2014, *supra* n. 2, section 4.3.

27 See *infra* section 3.

28 Kiestra 2014, *supra* n. 2, section 5.3.

not limit the applicability of the ECHR in this regard.[29] This was confirmed by the ECtHR in *Markovic and Others v. Italy*.[30]

In most cases brought before the courts of a Contracting Party concerning issues of private international law one is thus not concerned with the actual extraterritorial application of the ECHR. This does not apply, though, to the last scenario introduced above on the applicability of the ECHR to conduct of officials who act on behalf of the State in the exercise of State authority in a third country. In such a case the question may indeed arise whether such conduct falls within the scope of the ECHR.[31]

2.3 The applicability of the EU Charter in private international law

Since the entry into force of the Lisbon Treaty in 2009, by virtue of Article 51 of the EU Charter, Dutch courts, as well as the courts of other EU Member States, are obliged 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).[32] Also, the Court of Justice of the European Union (hereinafter CJEU) can be called upon to interpret, in the light of the Charter, the law of the European Union. This also applies to EU private international law, as laid down in, for example, the Brussels I Regulation and the Rome II Regulation.[33] The Charter creates no new competences though for the EU, including in the area of fundamental rights. It applies only where the EU has competence to act, in accordance with Article 6(1) Treaty on the Functioning of the European Union (hereinafter TFEU) and Article 51 (2) of the Charter.[34]

While the EU Charter contains a number of rights that could be invoked in issues of private international law, the restriction discussed above limits the applicability of this instrument. According to the CJEU's settled case-law the fundamental rights guaranteed in the legal order of the EU apply in all situations governed by EU law, but not outside such situations. In principle, the Charter does not apply to national or international law.[35] Furthermore, it should be kept in mind that there is a considerable overlap between the rights guaranteed in the ECHR and

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29 F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la convention européenne des droits de l'homme*, Brussels, Bruylant 2007, p. 45 et seq.

30 *Markovic and Others v. Italy* [GC], 14 December 2006, Case No. 1398/03, ECHR 2006-XIV.

31 See further *infra* section 4.3.3.

32 Charter of Fundamental Rights of the European Union, *OJ* 2012 C 326/391.

33 Compare, Recital 33 Brussels II-*bis*, Recital 38 Brussels II-*bis*, recast, Recital 16 Rome III, and Recitals 5 and 11 Council Directive 2003/8/EC. Although Rome II does not provide for a similar recital (and for that matter, neither does Rome I), it must be held that these regulations too are to respect the human rights and principles under the EU Charter.

34 See also H.J. van Harten and H.A.M. Grootelaar, 'Doorwerking van het Handvest van de Grondrechten van de Europese Unie in de Nederlandse rechtspraak: een kwantitatieve stand van zaken' [The Impact of the EU Charter in Dutch Case Law: A Quantitative Analysis], 2014/39 *Nederlands Tijdschrift voor de Mensenrechten*, p. 181-199.

35 See e.g. CJEU 8 May 2014, C-483/12 (*Pelckmans Turnhout v. Van Gastel*), ECR 2014, n.y.p.; and CJEU 6 March 2014, C-206/13 (*Cruciano Siragusa v. Regione Sicilia*), ECR 2014, n.y.p.

in the EU Charter. Article 52(3) of the EU Charter states that in so far as the Charter contains rights corresponding to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR.[36]

Until now the EU Charter has rarely been examined by the CJEU in cases concerning private international law, although there is some case-law in which the CJEU interpreted rules of private international law in the light of the ECHR without reference to the Charter.[37] One of the rare cases, in which it did, concerned an issue of international family law, particularly the interpretation of Article 20 Brussels II-*bis* Regulation, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.[38]

In an interesting case for our purposes, and related to the restrictions under the EU Charter, the CJEU has held that it has no jurisdiction under Article 267 TFEU to give a ruling on the interpretation of provisions of international law which bind Member States outside the framework of EU law.[39] *Gennaro Currà and Others v. Bundesrepublik Deutschland* concerned the application of Italian nationals for compensation on the basis of a tort in respect of the harm which they had suffered by reason of their deportation, or the deportation of the persons to whom they were the legal successors, during World War II. The referring Italian court asked whether the objection of civil immunity derived from international law, which Germany had invoked before the Italian courts, and which the Italian courts had applied to the facts in the main proceedings, was contrary to a number of rights guaranteed in the EU Charter. The CJEU stated that it could not give a ruling in this case, as it had been asked to interpret general principles of international law relating to State immunity, an issue that is beyond the competence conferred on the EU by the Member States.

3. JURISDICTION

3.1 **Introduction**

The issue of jurisdiction in private international law concerns the question of which court has adjudicatory or judicial competence in international civil litigation. In a cross-border affair a case often has links to more than one country. There may

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36 While depending on the EU Member State concerned, other rights guaranteed in the EU Charter may also be duplicates. This raises fascinating issues regarding the concurrence of the protection of fundamental rights. See with regard to the concurrence of the protection of fundamental rights in the Netherlands J.H. Gerards and M. Claes, 'Bescherming van fundamentele rechten post-Lissabon' ['Protection of Fundamental Rights Post-Lisbon'], *SEW* 2012, p. 270-279.

37 See e.g. Joined Cases C-509/09 and C-161/10 (*eDate Advertising v. Martinez*), and Case C-292/10 (*G v. de Visser*), *supra* n. 3, and section 3.2.4 *infra*.

38 CJEU 23 December 2009, Case C-403/09 PPU (*Jasna Detiček, Maurizio Sgueglia*), ECR I-2193, no. 34.

39 CJEU 12 July 2012, Case C-466/11 (*Gennaro Currà and Others v. Bundesrepublik Deutschland*), ECR 2012 n.y.p.

therefore be ample reason for more than one country to assert jurisdiction in such an international case. However, a reverse situation is also possible: if the facts of a case have little or no connection to the forum, there is a good chance that a court will refuse to assert jurisdiction. In other words, in international litigation it is also possible that no court is available to a plaintiff.

In this section we will examine the role of human rights law with regard to the issue of jurisdiction in private international law. In the first part we will take a look at the impact of human rights law, particularly the ECHR, on rules of jurisdiction in private international law (section 3.2). In the second part of this section we will discuss in what manner and to what extent this right of access to a court is guaranteed by EU law and domestic civil procedure in the Netherlands and whether (alleged) violations of human rights norms may create a possibility to assert jurisdiction. Particularly, we will discuss the notion of civil universal jurisdiction and whether this ground of jurisdiction is available in the Netherlands (sections 3.3 and 3.4).

3.2 The impact of Article 6(1) ECHR on the issue of jurisdiction in private international law

The impact of the ECHR on the issue of jurisdiction in private international law is essentially limited to the right to a fair trial, which has been laid down in Article 6(1) ECHR.[40] Article 6(1) ECHR may be relevant for both plaintiffs and defendants with regard to the issue of jurisdiction in private international law. A plaintiff in international litigation may be faced with a situation in which there is no court willing to assert jurisdiction (a negative conflict of jurisdiction). In that case a plaintiff may attempt to rely on Article 6(1) ECHR, as the right to a fair trial also includes the right of access to a court (section 3.2.1). However, it may also be possible for a defendant in international proceedings to invoke Article 6(1) ECHR in order to prevent a court from asserting jurisdiction in a particular case (section 3.2.2).

3.2.1 *The impact of the right to access to court on the issue of jurisdiction in private international law*

Article 6(1) ECHR guarantees that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. It is clear from this wording that the right to a fair trial does not explicitly contain the right of access to a court. However, in an early case, *Golder v. the United Kingdom*,[41] the ECtHR made clear that the right of access to a court should also be understood to be part of the right to a fair trial. It stated that '[t]he principle whereby a civil claim must be capable of being submitted to a judge

40 Kiestra 2014, *supra* n 2. Section 3.2 is based on chap. 5 of Kiestra 2014.

41 *Golder v. the United Kingdom*, 21 February 1975, Case No. 4451/70, Series A No. 18.

ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 […] [ECHR] must be read in light of these principles'.[42] It noted furthermore that there would be little use in laying down extensive procedural guarantees in Article6 (1) ECHR, if this right did not also include the right of having a trial in the first place. In other words, in this case the Court derived the right to access to a court from the right to a fair trial.

Golder v. the United Kingdom did not concern an issue of private international law, but there is no reason to assume that the right of access to a court would not also apply to international civil litigation, as Article 6(1) ECHR applies to the determination of 'civil rights and obligations,' which, in principle, covers all issues with which private international law is concerned.[43] It should be noted, though, that the right of access to a court only applies to disputes over civil rights and obligations, which at least on arguable grounds could be recognised in domestic private law, because Article 6(1) ECHR in itself does not create 'any particular content for (civil) "rights and obligations"', according to the ECtHR's case-law.[44]

In its case-law the ECtHR has found that the right of access to a court should not merely be theoretical, but that it should be effective.[45] In certain circumstances, this effective right of access to a court may go as far as requiring a State to provide legal aid when legal assistance proves indispensable by reason of the complexity of the procedure or of the case.[46]

In *Golder* the ECtHR not only identified the right of access to a court as being part of the right to a fair trial, but it also noted that this right is not absolute.[47] The right to a court by its very nature calls for regulation by the State. Consequently, it may be subject to limitations. This would also apply to the right of access to a court in private international law. With regard to the regulation of the right of access to a court the Contracting Parties enjoy a certain margin of appreciation. However, these limitations should not rob the right of its meaning and the very essence of the right should not be impaired.[48]

The ECtHR has held that a limitation to the right of access is only compatible with Article 6(1) ECHR if the restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[49] These conditions are very similar to the system of

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42 Ibid. at para. 35

43 Kiestra 2014, *supra* n. 2.

44 See *Fayed v. the United Kingdom*, 21 September 1994, Case No. 17101/90, Series A No. 294-B.

45 See e.g. *Airey v. Ireland*. 9 October 1979, Case No. 6289/73, Series A No. 32; *Kutić v. Croatia*, 1 March 2002, Case No. 48778/99, ECHR 2002-II; and *Multiplex v. Croatia*, 10 July 2003, Case No. 58112/00.

46 *Airey v. Ireland*, *supra* n. 45 .

47 *Golder v. the United Kingdom*, *supra* n. 41 at para. 38.

48 See e.g. *Ashingdane v. the United Kingdom,* 28 May 1985, Case No. 8225/78, Series A No. 93, at para. 57.

49 See e.g. *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, Case No. 62/1997/846/1052-1053, *Reports of Judgments and Decisions* 1998-IV,

restrictions in Articles 8 to 11 ECHR,[50] except for the fact that the requirement of 'prescribed by law' is not invoked by the ECtHR. Legitimate aims accepted by the ECtHR consist of, for example, the good administration of justice,[51] restrictions aimed at preventing the judiciary from overflowing,[52] and international relations, which may require the granting of State immunity and the immunity of international organisations. Immunities are an important restriction to the right of access to a court, but will not be discussed in this paper.[53]

In its case-law the ECtHR has further expanded on what kind of, and under what circumstances, restrictions to the right of access are permissible. While most of the cases do not specifically concern the right of access to a court in private international law, the framework established by the ECtHR is also relevant for cases concerning jurisdiction in private international law and the plaintiff's right of access to a court, even though the exact scope of this right in cross-border cases has to be further examined.[54]

There are very few cases in which the ECtHR has specifically discussed a plaintiff's right of access to a court in relation to jurisdiction in private international law. In fact, only the Commission appears to have dealt directly with this topic, and not exactly exhaustively.[55] In *Gauthier v. Belgium*,[56] a Belgian pilot worked for Air Zaire until he received a letter notifying him that he would be dismissed for economic reasons. The pilot subsequently initiated proceedings before the court in Brussels, Belgium. Air Zaire, however, argued that the Belgian court had no jurisdiction, as the employment contract of the pilot contained a jurisdiction clause, in which Léopoldville (now Kinshasa), the capital of Zaire (not

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at para. 72. For an overview of the Court's case-law in this regard see also *Fayed v. the United Kingdom*, *supra* n. 44.

50 See the Concurring Opinion of Judge Martens in *De Geouffre de la Pradelle v. France*, 16 December 1992, Case No. 12964/87, Series A No. 253-B, in which he argued that the test should be similar. In *Fayed v. the United Kingdom*, *supra* n. 44, the Court indeed appears to tie these conditions concerning Art. 6(1) ECHR to the restrictions it had formulated in *Handyside v. the United Kingdom*, 7 December 1976, Case No. 5493/72, Series A No. 24, at para. 41, regarding Art. 8(2) ECHR.

51 *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Case No. 18139/91, Series A no. 316-B, at para. 61.

52 *Brualla Gómez de la Torre v. Spain*, 19 December 1997, Case No. 155/1996/774/975, *Reports of Judgments and Decisions* 1997-VIII, at para. 36.

53 See e.g. *Al-Adsani v. the United Kingdom* [GC], Case No. 35763/97, ECHR 2001-XI, at para. 54; the decision of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012; and e.g. A.A.H. van Hoek et al., *Making Choices in Public and Private International Immunity Law – Mededelingen van de Nederlandse Vereniging voor Internationaal Recht No. 138*, The Hague, T.M.C. Asser Press 2011.

54 Kiestra 2014, *supra* n. 2, and section 3.3 *infra*.

55 The Commission, or rather the European Commission of Human Rights, was a predecessor of the current European Court of Human Rights. With the entry into force of Protocol 11 in 1998 the European Commission of Human Rights (Commission) and the (old) European Court of Human Rights were replaced by the new (permanent) European Court of Human Rights.

56 *Gauthier v. Belgium* (dec.), 6 March 1989, Case No. 12603/86.

a Contracting Party to the ECHR) had been named. The court in Brussels in first instance set aside the jurisdiction clause. Air Zaire appealed. On appeal the Belgian pilot argued that the Belgian court should ignore the jurisdiction clause, because it named a court in a country whose judicial structure did not necessarily guarantee the impartiality of the judiciary and the right to a fair trial. This argument was rejected on appeal in Belgium.

The Commission similarly found that the lack of jurisdiction of the Belgian courts was attributable to the jurisdiction clause in the contract, which the pilot had freely entered into and was not the result of a unilateral decision by Belgium. In doing so the Commission did not answer the interesting question whether it is possible for a plaintiff in international civil proceedings to invoke the right to access to a court *ex* Article 6(1) ECHR in a situation where an alternative forum is available in a third country, particularly where proceedings are allegedly not up to the standards of Article 6(1) ECHR. It merely held that the jurisdiction clause had been voluntarily entered into and that the applicant subsequently could not complain about this.

While the Commission did not give any further insight into a plaintiff's right of access to a court in private international law, this case further raises the question under what circumstances a plaintiff could successfully rely on this right, within the meaning of Article 6(1) ECHR, in international litigation? It is contended here that one could essentially distinguish two situations, in which this issue could come up.[57] First of all, the right of access to a court could be invoked in the situation where no court is available to a plaintiff in cross-border civil litigation – a case of negative conflict of jurisdiction. It should be clear that the right of access to a court is engaged in this scenario.[58] If a court of a Contracting Party refused to assert jurisdiction in such a situation, this would immediately result in a denial of justice, which the Court in *Golder* explicitly held as being contrary to Article 6(1) ECHR. One may logically extend this argument to the scenario where no court would be available to a plaintiff in a cross-border affair due to extraordinary circumstances beyond his control.[59] A plaintiff's right of access to a court in a case of negative jurisdiction is not controversial. In fact, jurisdiction based on necessity, the *forum necessitatis*, is incorporated in many legal systems – including that of the Netherlands,[60] which thereby open up their courts to plaintiffs who otherwise would

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57 It is possible to further distinguish between the two scenarios discussed here. For reasons of brevity, this will not be done here. See further Kiestra 2014, *supra* n. 2, section 5.4.

58 See e.g. P. Kinsch, 'Droits de l'homme, droits fondamentaux et droit international privé', 318 *Recueil des Cours* (2005), Leiden, Martinus Nijhoff Publishers 2007, at p. 44-45; F. Matscher. 'Le Droit International Privé face à la Convention Européenne des Droits de l'Homme', *Travaux du Comité français de droit international privé* (1995-1998), p. 211-234, at p. 218.

59 See e.g. A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, London, Informa 2009, at p. 19-20.

60 See Art. 9 Dutch Code of Civil Procedure.

have nowhere to turn.[61] Incidentally, an interesting exception is England, which does not have such a rule.[62]

The more interesting question, though, is whether a plaintiff's right of access to a court in international civil litigation may also be engaged in a case of positive jurisdiction – where more than one court could claim jurisdiction. In this scenario one would firstly have to tackle the question whether the right to access is relevant at all. After all, one could argue that, regardless of the quality of the other available court, there would be access to a (foreign) court – thus fulfilling the requirement of Article 6(1) ECHR. However, even if there was access to a foreign court, there would still be a restriction of the right to access in such a situation. As we have seen above, such a restriction may be allowed, but may not go as far as to endanger the very essence of the right, must pursue a legitimate aim, and be proportionate to the legitimate aim pursued. In reviewing the proportionality of the restriction of the plaintiff's right to access, in our opinion, the Court could take account of the quality of the proceedings in the available foreign court.[63] The proposition that Article 6(1) ECHR merely requires a trial to be held somewhere, without any possibility to review the quality of the proceedings abroad, would appear to be rather odd.[64]

There is one final question regarding a plaintiff's right of access to a court that should be briefly discussed here. Could this right also play a role with regard to a denial of substantive justice? In other words, if it were certain that the ordinarily competent foreign court would deny the plaintiff's claim, can one argue that in order for the right to access to be effective a Contracting Party should open up its courts? Surely, this would stretch the procedural right to access to a court. And indeed, it has been said that the right to access to a court merely entails the right to a fair hearing, and not the right to be victorious.[65] This is quite right. Nevertheless, what if it were certain that proceedings in the only available foreign court would result in violation of one of the substantive rights guaranteed in the ECHR?

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61 For an overview of the use of this ground of jurisdiction in the EU Member States see A. Nuyts, *Study on Residual Jurisdiction (Review of the Member States' Rules Concerning the 'Residual Jurisdiction' of Their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations)*, General Report, final version dated 3 September 2007, at p. 64-66. Available at: <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>, (last accessed August 2014).

62 With regard to the rules on jurisdiction in England see e.g. A.V. Dicey et al., *The Conflict of Laws*, London, Sweet & Maxwell 2012, at p. 371 et seq. For a further discussion of this topic see Kiestra 2014, *supra* n. 2, section 5.4.3.1.1.

63 It should be noted that this scenario could only come up where the available foreign court would be the court of a third country. See further Kiestra 2014, *supra* n. 2, section 5.4.3.2 et seq.

64 Incidentally, this does not necessarily mean that the proceedings before the foreign court of a third country should be in conformity with the full standards of Art. 6(1) ECHR. This would be an unrealistic standard. Nevertheless, certain minimal requirements should be met. See further Kiestra 2014, *supra* n. 2, section 5.4.3.3.

65 Briggs and Rees 2009, *supra* n. 59, at p. 21.

Courts may be tempted to act in such situations.[66] We would argue that the right of access to a court, which is primarily procedural in nature, cannot entail substantive guarantees. However, we will not delve deeper into this debate at this point. It will be recalled that the general question of whether violation of substantive human rights norms may be used to establish a ground for jurisdiction will be examined further below.

3.2.2 *The impact of the right to a fair trial on the issue of jurisdiction in private international law – the invocation of Article 6(1) ECHR against the assertion of jurisdiction*

Whereas in the previous section we have examined the role of Article 6(1) ECHR, and particularly the right of access to a court, in helping to establish a forum for a plaintiff in international civil litigation, it will be discussed here that there is an argument to be made that the right to a fair trial *ex* Article 6(1) ECHR could also be invoked by a defendant *against* the assertion of jurisdiction, if jurisdiction is based on a questionable ground. However, it should be noted from the outset that this is more of a theoretical possibility for now, as this topic has not often been discussed by the Strasbourg Institutions, the ECtHR and its predecessors, and consequently there is little case-law of the Strasbourg Institutions – or national case-law – to support this point of view.[67] Even so, it could at least be argued that the right to a fair trial *ex* Article 6(1) ECHR may function as a brake on the unreasonable assertion of jurisdiction in issues of private international law.

The notion that the right to a fair trial could be invoked against the assertion of jurisdiction, where jurisdiction is based on questionable grounds, is partly based on the idea that Article 6(1) ECHR could play a role with regard to jurisdiction in private international law similar to the role which the Due Process Clause of the Constitution of the United States of America (hereinafter US) has in inter-state cases in the United States.[68] In these cases the Due Process Clause requires a con-

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66 See e.g. Court of Appeal of The Hague (Hof 's-Gravenhage), 21 December 2005, *EB* 2006, 32; *NJF* 2006, 154. This case has been much discussed. See e.g. K. Boele-Woelki, 'Internationaal Privaatrecht' ['Private International Law'], 55 *Ars Aequi* (2006), at p. 5503-5504; F. Ibili, *Gewogen rechtsmacht in het IPR. Over forum (non) conveniens en forum necessitatis* [Weighed Jurisdiction in Private International Law. On Forum (Non) Conveniens and Forum Necessitatis], Deventer, Kluwer 2007, at p. 118 and 147; G.E. Schmidt, '*Forum necessitatis* bij echtscheidingen' ['*Forum necessitatis* in Case of Divorce'], *NIPR* 2007, p. 116-121; see also Kiestra 2014, *supra* n. 2, section 5.4.3.4.

67 The case-law on this topic is essentially limited to two old cases of the Commission. See Decisions of the European Commission of Human Rights, No. 6200/73, 13 May 1976, in 2 *Digest of Strasbourg Case Law* relating to the European Convention on Human Rights (Article 6), Cologne, Heymann 1984, at p. 269 and *H v. the United Kingdom*, Case No. 10000/82, decision of 4 July 1983, D.R. 33, p. 247. See also Kiestra 2014, *supra* n. 2, section 5.5.

68 This idea has been developed by several writers. See e.g. E. Guinchard, 'Procès Équitable (Article 6 CESDH) et Droit International Privé', in: A. Nuyts and N. Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Brussels, Bruylant 2005, p. 199-245; Kinsch 2007, *supra* n. 58, at p. 65-67; P. Lagarde, 'Le principe de proximité dans

stitutional check on the assertion of jurisdiction by courts in the United States.[69] It is argued that the right to a fair trial *ex* Article 6(1) ECHR could function as a similar check on the assertion of jurisdiction by a court in private international law.[70] In short, it has been argued – inspired by similarities between the reasoning of the old Commission in Strasbourg and the US Supreme Court – that in order for the assertion of jurisdiction in private international law to be reasonable (and thus not contrary to Article 6(1) ECHR), there should be a sufficient link between the facts of the case and the forum in question.[71] Moreover, an important element of the right to a fair trial is the notion of equality of arms, which naturally requires a balance between the plaintiff and defendant.[72] From this vantage point, it is certainly not impossible to derive from Article 6(1) ECHR a defendant's right not to be hailed before a court based on unreasonable grounds – a court that would lack a sufficient link to the facts of the case.[73]

Consequently, where the right of access to a court entails the right of the plaintiff to access to a court on reasonable grounds and the right of the defendant under Article 6(1) ECHR entails the right not to be hailed before a court on unreasonable grounds, we may accept the idea that the right to access to a court in Article 6(1) ECHR entails the right to access to an *appropriate* forum.

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le droit international privé contemporain. Cours général de droit international privé', 196 *Recueil des Cours* (1986-I), at p. 155-157; F. Matscher, 'Die Einwirkungen der EMRK auf das Internationale Privat- und zivilprozessuale Verfahrensrecht' in: F. Matscher (ed.), *Europa im Aufbruch: Festschrift für Fritz Schwind zum 80. Geburtstag*,Vienna, Manzsche Verlags- und Universitätsbuchhandlung 1993), at p. 80-81; A. Nuyts, 'Due Process and Fair Trial: Jurisdiction in the United States and in Europe Compared', 2 *CILE Studies*, in R.A. Brand and M. Walter (eds.), *Private Law, Private International Law & Judicial Cooperation in the EU-US Relationship*, Eagan, Minnesota, Thomson/West 2005, p. 30 et seq.; P. Schlosser, 'Jurisdiction in International Litigation: The Issue of Human Rights in Relation to National Law and to the Brussels Convention', 74 *Rivista di diritto internazionale* (1991), at p. 16.

69 See e.g. R. Whitten, 'The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses', 14 *Creighton Law Review* (1981), p. 735.

70 Incidentally, it has been noted that the parallel between the role of Art. 6(1) ECHR and the Due Process Clause is not perfect, as the jurisdictional thinking in Europe differs from the thinking on the topic in the United States, which would explain the different roles of Art. 6(1) ECHR and the Due Process Clause. See e.g. J. Hill, 'The Exercise of Jurisdiction in Private International Law', in P. Capps et al. (eds.), *Asserting Jurisdiction. International and European Legal Perspectives*, Portland, Oregon, Hart Publishing 2003, at p. 41; and R. Michaels, 'Two Paradigms of Jurisdiction', 27 *Michigan Journal of International Law* (2005-2006), p. 1003-1069, at p. 1053. However, while this is certainly true, this does not preclude courts from drawing inspiration from the US case-law.

71 For a more detailed explanation of the case-law see Kiestra 2014, *supra* n. 2, section 5.5.2 and the literature cited there.

72 See e.g. *Dombo Beheer B.V. v. the Netherlands,* 27 October 1993, Case No. 14448/88, Series A no. 274, at para. 33, and *Steel and Morris v. the United Kingdom*, 15 May 2005, Case No. 68416/01, ECHR 2005-II.

73 Compare Nuyts 2005, *supra* n. 68, at p. 56 et seq.; and Kinsch 2007, *supra* n. 58, at p. 65 et seq.

3.3 The role of Article 6(1) ECHR in international civil litigation in matters related to tort – the right to access to an 'appropriate' forum

If one considers the jurisdictional rules that are available in matters related to international torts under Brussels I, in light of a possible right of access to an appropriate forum, one may notice that *prima facie* these rules do not violate principles of international law and are not unreasonable.[74] They establish a closed system of *appropriate* jurisdiction, and divide international jurisdiction among the courts of the EU Member States.[75] The rules are based on criteria constituting a proper connection with the forum (based on principles of territoriality or personality, including domicile and habitual residence)[76] and on principles of sound administration of justice in international proceedings. They attribute international jurisdiction in matters related to tort to the court(s) of the domicile of the defendant (*forum rei*), in Article 2 of the Regulation, to the court of the place where the harmful event took place (*forum delicti*), in Article 5 (3)[77]; to the court of the criminal proceedings, in Article 5 (4)[78]; to the courts of the domicile of one defendant, where there are more than one defendant, provided the claims are closely connected and the jurisdiction of the court is foreseeable, in Article 6(1)[79]; to the courts of the original proceedings with regard to third party proceedings, with an explicit restriction for proceedings that are instituted solely with the object of removing the third party from the jurisdiction of the court that would be competent otherwise, in Article 6(2); as regards counter claims to the court of the original proceedings, in Article 6(3); and to the courts of the choice of the parties, in Articles 23 and 24.

The system is completed by rules on *lis pendens* and related actions, in Articles 27 to 29, in order to avoid irreconcilable decisions.[80] Moreover, these jurisdictional rules operate in such a way that, within the EU, there is always one 'appropriate' court available (often there is more than one). Generally speaking, inappropriate or exorbitant jurisdiction (e.g. based on *forum actoris*) is avoided by virtue of Article 3. Furthermore, the system is based on an international legal in-

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74 Up to now these standards have not generated very precise guidelines.

75 The territorial scope of the Regulation is restricted, though, in Art. 4. This restriction was debated at length at the time of the conclusion of Brussels I (recast); but will not be discussed here.

76 Compare Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *amici curiae* in support of neither party, in the *Kiobel* case, *supra* n. 5, at p. 11 et seq.

77 E.g. CJEU 30 November 1976, 21/76 (*Mines de Potasse*), ECR 1976 1735; CJEU 3 July 1995, C-68/93 (*Shevill and Others*), ECR 1995 I-415; CJEU 10 June 2004, C-168/12 (*Kronhofer v. Maier*), ECR 2004 I-6009.

78 CJEU 21 April 1993, C-172/91 (*Sonntag v. Waidmann*), ECR 1993 I-1963.

79 CJEU 11 April 2013, C-645/11 (*Land Berlin*), ECR 2013, n.y.p.; CJEU 1 December 2011, C-145/10 (*Painer v. Standard Verlags*), ECR 2011I-12533; CJEU 12 July 2012, C-616/10 (*Solvay v. Honeywell*), ECR 2012, n.y.p.

80 Irreconcilable decisions form a ground for refusal as to the recognition and enforcement of foreign judgments (based on the Rule of Law).

strument (Article 67(4) and 81(2) TFEU) and embedded in State practice. Its purposes can be viewed as legitimate: it aims to contribute to an area of freedom, security and justice (by facilitating access to justice) and it aims to guarantee legal certainty, predictability and foreseeability, a balance between the interests of the defendant and plaintiff, the protection of the procedurally and socio-economically weaker party, the sound administration of justice and efficacious conduct of proceedings, and party autonomy where appropriate.[81] Its overall aim is to further the free movement of judgments within the EU, which ultimately also helps to sustain the right to a fair trial.[82]

Nonetheless, *forum non conveniens* doctrines or anti-suit injunctions are not admitted[83] under the Regulation, even where a correction of the jurisdictional rules of the Regulation may be required in an individual case, by virtue of Article 6(1) ECHR (assuming that it entails the right to an appropriate court in international civil litigation). And the Regulation does not provide for a *forum necessitatis* either.

If a correction were required in an individual case, a preliminary ruling of the CJEU on the interpretation of a jurisdictional rule in light of the respect of the fundamental rights, might be requested, by virtue of Article 47 EU Charter, in conjunction with Article 51(1).[84] In this regard, we may point to the judgment of the CJEU of 15 March 2012, C-292/10 (*G v. de Visser*). The case was based on an action for tortious liability for publishing (partly naked) photographs of the plaintiff on an internet site without her consent (a violation of personality rights). The CJEU, while interpreting, *inter alia*, provisions of Brussels I, particularly, Articles 4 and 5(3), weighed the right of the defendant to a fair hearing (the right to be duly served) against the right of the plaintiff to access to a court in international proceedings (in order to avoid denial of justice), with reference to Article 6(1) ECHR and Article 47(2) EU Charter. The Court decided in favour of the latter right (by ruling that the right to be duly served in principle does not preclude 'summons by public notice'). Another interpretation would have resulted in no court at all being available to the plaintiff under the Brussels I Regulation.

A more or less similar line of reasoning can be identified with regard to the jurisdictional rules of the Dutch Code of Civil Procedure (Articles 1 to 14). In particular, we point to Article 2, *forum rei*, Article 6(e), *forum delicti*, and Article7

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81 These principles are reflected in the Recitals to the Regulation, Nos. 1, 3, 4, 13, 15, 16, 18 and 19, and in the case-law of the CJEU; compare, J.A. Pontier and E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters According to the Case Law of the European Court of Justice*, The Hague, T.M.C. Asser Press 2004.

82 Recitals 1 and 3 Brussels II-*bis* (recast), and Recital 38. In this regard one may also mention that Art. 6(1) ECHR contains, in principle, an obligation to recognise and enforce foreign judgments, albeit, of course not a blanket right to enforcement. See further Kiestra 2014, *supra* n. 2, sections 7 and 8.2.4.

83 CJEU 20 January 2005, C-281/02 (*Owusu*), ECR 2005 I-1383; CJEU 27 April 2004, C-159/02 (*Turner v. Grovit*), ECR 2004 I-3565; CJEU 2 October 2008, C-185/07 (*Allianz Spa v. West Tankers*), ECR 2009 I-663.

84 CJEU 15 March 2012, C-292/10 (*G v. de Visser*), ECR 2012, n.y.p., paras. 48 to 59.

(1), on joinder of parties and claims (subject to the requirement of there being a sufficient connection). While referring requests for a preliminary ruling of the CJEU would be out of the question here, a possible remedy before the ECtHR would be available. The Dutch Code provides for a *forum necessitatis*, in Article 9(b) and (c), but in principle allows neither *forum non conveniens* doctrines nor *anti-suit* injunctions.

3.4 Justifying inappropriate courts in international civil proceedings in international human rights litigation

Where Article 6 ECHR might entail the right to an appropriate court in international civil litigation, and may forbid the assertion of jurisdiction on a questionable ground, the question may arise whether human rights law might, on the contrary, justify the assertion of exorbitant or even universal jurisdiction.

An example of attribution of a sort of exorbitant jurisdiction to the national courts, arguably a violation of international law, that was justified in light of the involvement of a human right and in light of the circumstances of the case, can be found in the case-law of the CJEU, in the Joined Cases C-509/09 and C-161/10 (*eDate Advertising v. Martinez*).[85] These cases concerned an alleged *infringement of personality rights* that occurred via an internet site. This ultimately gave rise to a specific interpretation by the Court of the *forum delicti*, in Article 5(3) Brussels I. The Court deviated from its settled case-law on this rule of special jurisdiction. According to this case-law the jurisdiction laid down in Article 5(3) is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred (covering both the place where the damage occurred and the place of the event giving rise to it), which justifies the attribution of jurisdiction to these courts for reasons relating to the sound administration of justice and efficacious conduct of proceedings.[86]

Taking into account the serious nature of the harm which may be suffered by the holder of a personality right of material placed online (due to its global impact), and of the special status of personality rights, the Court introduces in its judgment in *eDate Advertising v. Martinez*, a sort of *forum actoris*. The Court held that the words

> 'place where the harmful event occurred or may occur', in Article 5(3), must be interpreted as meaning that 'in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for

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85 *Supra* n. 3; and Opinion A-G Cruz Villalón, delivered on 29 March 2011, pt. 51 et seq.; compare, J.J. Kuipers, 'Het internet en de Brussel I Verordening: een kwestie van Luxemburgse wispelturigheid?' ['The Internet and the Brussels I Regulation: A Question of Luxemburg Fickleness'], *NIPR* (2012), p. 390-395.

86 Ibid., *supra* n. 3, at para. 40.

> liability, in respect of all the damage caused […] [inter alia] before the courts of the Member State in which the centre of his interests is based […]'.[87]

Universal jurisdiction in private international law as a rule of judicial jurisdiction is, in principle, also considered as an exorbitant ground for jurisdiction, which some even regard as being against the law of nations, since there need *not* be *any* connection with the forum that could justify the competence of the court.[88] Nonetheless, in the United States, for decades, in certain cases in which an infringement of international law or human rights law was at stake, extraterritorial, rather universal jurisdiction was accepted and considered justified under the Alien Tort Statute (ATS).[89] In the *Kiobel*-case the US Supreme Court concluded differently though.[90] The Court held that the presumption against extraterritoriality under American law, providing that 'when a statute gives no clear indication of an extraterritorial application, it has none', also applies to claims under the ATS. The Court stated thereto that nothing in the statute would rebut that presumption, neither its text, its history, or its purposes, nor earlier decisions, and that there was no indication that the ATS was passed by Congress to make the United States a uniquely hospitable forum for the enforcement of international norms.[91]

In his concurring opinion, Justice Breyer, while agreeing with the Court's conclusion that that there was no jurisdiction, disagreed with the Court's reasoning based on the presumption against extraterritoriality. According to Justice Breyer universal or extraterritorial jurisdiction should be upheld in cases where the wrongful conduct is to be characterized as an infringement of a rule of *jus cogens*, particularly as a conduct against mankind or torture. Guided in part by principles and practices of foreign relations law, Breyer would find jurisdiction under the ATS where

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, [… including] a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Moreover, Breyer pointed to certain countries, which do not only find 'universal' *criminal* jurisdiction to try perpetrators of particularly heinous crimes such as

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87 Ibid., *supra* n. 3, No. 45 et seq. and particularly No. 52.

88 See e.g. Brief of the Governments, *supra* n. 76, at p. 11 (and the references cited there in n. 14) and on.

89 The Alien Tort Claims Act, 28 U.S.C. §1350, provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.

90 *Kiobel v. Royal Dutch Petroleum Co.*, *supra* n. 5.

91 Ibid. As Justice Story put it: 'No nation had ever yet pretended to be the *custos morum* of the whole world', *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 847 (No. 15.551) (CC Mass. 1822).

piracy and genocide, but also permit private persons injured by that conduct to pursue '*actions civiles*', seeking civil damages in the criminal proceedings.

To what extent would the Netherlands open its courts to such torts committed abroad? And would universal (civil) jurisdiction as regards violations of human rights, more particularly, regarding conduct abroad against mankind, be admitted in the Netherlands? Reading the joint Brief of the Governments of the Netherlands and the United Kingdom of Great Britain and Northern Ireland in the *Kiobel* case, we may doubt that. Both Governments advanced arguments against the idea of preventing a State from becoming a safe harbour of liability for a torturer or other common enemy of mankind, by accepting universal jurisdiction, except for criminal jurisdiction. The Governments argued that they 'strongly believe that […] allegations of human rights violations should be dealt with in an appropriate forum, *respecting international law principles of jurisdiction*'. In the case of civil law claims, jurisdiction is principally based on the territoriality, nationality (or personality) principle.[92]

From the overview of the jurisdictional rules (European and national) given in § 3.3, it is clear that universal jurisdiction was neither adopted by the Member States in the Brussels I Regulation, nor provided for in the Dutch Code of Civil Procedure, while such a ground of jurisdiction also cannot be based on the ECHR.[93] Nonetheless, by virtue of Article 5(4) Brussels I, and Article 10 Dutch Code of Civil Procedure, seeking civil damages in criminal proceedings (including claims based on wrongful conduct against mankind), a Dutch court that is seized with regard to these criminal proceedings (even on the basis of universal criminal jurisdiction), in principle has international jurisdiction under these rules of private international law to hear such a claim. The claim must be admissible though under Dutch national procedural law.[94] However, a broad interpretation of the 'simplicity' requirement for the admissibility of such claims in criminal proceedings – the right is only guaranteed, in simple cases, and reference to a civil court is at the discretion of the criminal court –, may render this ground for international jurisdiction ineffective. As was recently seen, in a case concerning issues of private international law, the Dutch Supreme Court upheld the appellate court's decision that the plaintiffs could not be admitted on the ground that their claims were not simple in nature.[95] One of the factors that contributed to the 'complex' nature of the claims

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92 Supplemental Brief of the Governments in support of neither party, at p. 6 and 11 (and the references cited in n. 13, referring to, *Nottebohm*, *Anglo Norwegian Fisheries*, and to Malcolm N. Shaw, etc.).

93 For further details on extraterritorial jurisdiction in international human rights litigation before Dutch Courts, see, Michael J.G. Uiterwaal, 'Extraterritorial Civil Jurisdiction with Respect to violations of Fundamental Human Rights', 8 *Griffin's View* 2007, p. 79-91.

94 In accordance with Art. 45(2) Dutch Judiciary Organisation Act, in conjunction with Arts. 51a and 322 et seq. Dutch Code of Criminal Procedure; and see Brief filed by the European Commission in the *Kiobel* case, *supra* n. 5, at p. 25, examples of such proceedings before Belgian and Dutch courts.

95 Compare, Supreme Court of the Netherlands (HR) 30 June 2009, *NJ* 2009 481, note N. Keijzer, at para. 13, and Conclusion of Attorney-General, No. 18.4, ECLI:NL:PHR:2009:BG4822. The

was the possible applicability of foreign law. Although the issue of the admissibility in cases governed by Article 5(4) Brussels I, is indeed left to the national law of the forum state, we recall here the case-law of the CJEU, establishing that a restrictive interpretation of the jurisdictional rules of the Regulation to the extent that it loses its effectiveness, must be avoided.[96]

4. CHOICE OF LAW

4.1 **Introduction**

In this section we will examine some aspects of the interaction between the choice of law or applicable law in private international law on the one hand and human rights on the other. In the first part of this section we will look at how human rights law, and the ECHR in particular, may impact the result of the application of the forum's choice of law rules. In this first part we will mostly focus on the impact of the rights guaranteed in the ECHR where a foreign law is the applicable law (section 4.2). This is, incidentally, an issue that should be distinguished from the impact of human rights law on the choice of law rules themselves, which are applied by a court to determine the applicable law. This is an issue that will not be discussed here, except to say that in the past human rights law, and particularly rules regarding discrimination, indeed have had an impact in this regard.[97]

In the second part of this section a different aspect of the role of human rights law with regard to the issue of applicable law will be discussed. Here, we will focus on the effect of human rights law, in particular the ECHR, on the applicable

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case concerned the delivery of ingredients for mustard gas to Iraq. In this case, a restrictive interpretation was given of Art. 322 et seq. Dutch Code of Criminal Procedure; subsequent civil proceedings were brought though before the District Court of The Hague (Rechtbank 's-Gravenhage), judgment of 24 April 2013, *NIPR* 2013, 240 (English text: ECLI:NL:RBDHA:2013:8087).

96 Compare, for instance, CJEU (*Mines de Potasse*), *supra* n. 77, at paras. 17, 20 and 21; and C-292/10 (*G/De Visser*), *supra* n. 84, at paras. 44, 45.

97 In Germany, for example, the *Bundesverfassungsgericht* held in 1971 that the German rules of private international law had to comply with the fundamental rights found in the German *Grundgesetz*, which eventually led to a discussion of the discriminatory nature of the connecting factors used in German choice of law rules referring to the national law of the husband, and subsequent reform of these rules. See *Bundesverfassungsgericht* 31 May 1971, 31 BVerfGE 58; *NJW* 1971, p. 1508. Similar developments took place in other Western European countries. See e.g. J.H.A. van Loon, 'De wisselwerking tussen internationaal privaatrecht en rechten van de mens', in D. van Dijk et al. (eds.), *Grensoverschrijdend privaatrecht: een bundel opstellen over privaatrecht in internationaal verband* [*Cross-Border Private Law: A Collection of Essays about Private Law in an International Context*], Deventer, Kluwer 1993, at p. 141-142 with regard to the developments in the Netherlands. See on this topic also P. Kinsch, 'Choice-of-Law Rules and the Prohibition of Discrimination under the ECHR', *NIPR* (2011), p. 19-24. And compare, section 2.3 *supra* on the applicability of the EU Charter to EU rules on private international law.

private law, and its impact on the merits in international civil proceedings in matters related to tort (4.3).

4.2 The impact of human rights law on the applicable law in private international law

In this section we distinguish two aspects of the impact of human rights on the applicable law in private international law. The classical example of human rights norms impacting the issue of applicable law is when these norms are used as a defensive mechanism.[98] If the application of the forum's choice of law rules points to a foreign law whose application would subsequently violate a human rights norm in the forum, it may be possible to set aside the ordinarily applicable foreign law.[99] Yet even this relatively straightforward example raises a number of questions with regard to the impact of human rights, relating, *inter alia*, to the level of scrutiny that should be used with regard to the human right in question, and the technique used to set aside the repugnant foreign law. These issues will be discussed in more detail below with regard to the impact of the ECHR (section 4.2.1). While human rights are most frequently used as a defensive mechanism in relation to the ordinarily applicable foreign law in a dispute of private international law, it has also been argued in relation to the rights guaranteed in the ECHR that some of these rights could be invoked to promote the application of foreign law. This possibility will be discussed briefly in section 4.2.2.

4.2.1 *The impact of the ECHR as a defensive mechanism with regard to the applicable foreign law in private international law disputes*

The impact of the rights guaranteed in the ECHR on the issue of applicable law in private international law is a topic that has received a fair amount of attention over the years.[100] Remarkably, though, there is not much case-law of the ECtHR on this topic. The ECtHR has dealt with only a handful of cases – all admissibility deci-

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98 In this regard see also section 2 *supra*, where it was discussed that there is no doubt that the ECHR can be invoked against the ordinarily applicable (foreign) law and that it is the Contracting Party whose court applies the foreign law that is ultimately responsible in such cases.

99 Of course, it is also possible that the forum's choice of law rules would point to the *lex fori*, and that applying that would also infringe upon one of the rights guaranteed in the ECHR. However, such a case, in principle, does not differ from a purely domestic case, and therefore will not be discussed in this paper.

100 See e.g. C. Engel, 'Ausstrahlungen der Europäischen Menschenrechtskonvention auf das Kollisionsrecht' ['Emanations of the European Convention on Human Rights on of Laws'], 53 *RabelsZ* 1989, p. 36 et seq.; Kinsch 2007, *supra* n. 58, p. 165 et seq.; P. Kinsch, 'The Impact of Human Rights on the Application of Foreign Law and on the Recognition of Foreign Judgments – A Survey of the Cases Decided by the European Human Rights Institutions', in T. Einhorn and K. Siehr (eds.), *Intercontinental Cooperation through Private International Law – Essays in Memory of Peter E. Nygh*, The Hague, T.M.C. Asser Press 2004, p. 212 et seq.; Y. Lequette, 'Le droit international privé et les droits fondamentaux', in R. Cabrillac et al. (eds.), *Libertés et droit fondamentaux*, Paris, Dalloz 2004, p. 109 et seq.; F. Marchadier, *Les objectifs*

sions – and many possible questions with regard to this issue thus remain unanswered by the ECtHR. One may in particular note that the ECtHR has not decided a single case in which the application of a foreign law actually resulted in violation of one of the rights guaranteed in the ECHR.[101] Nevertheless, one could say that the principle that human rights in general, and by extension the rights guaranteed in the ECHR, may be invoked against the ordinarily applicable foreign law to set aside repugnant foreign law is well established in many legal systems.[102] This means that the discussion on the ECHR as a defensive mechanism with regard to the applicable law in private international law disputes thus does not so much concern the question of whether human rights can be invoked against the foreign law that ordinarily would apply, but rather to what extent and in what manner.

These two questions are, incidentally, at least somewhat intertwined. The question on the extent to which the rights guaranteed in the ECHR may be applied to the applicable foreign law concerns the issue of what the standard of control should be with regard to the ECHR's scrutiny of the applicable foreign law.[103] The question here is whether it is possible, and if so, desirable to attenuate the standards of the ECHR in such cases.[104] The ECtHR's case-law concerning the extra-territorial effect of the ECHR in *Soering v. the United Kingdom*[105] and *Drozd and Janousek v. France and Spain*[106] has served as inspiration to many specialists in the area of private international law, who noted that the reduced effect of certain rights guaranteed in the ECHR introduced in the aforementioned cases could similarly be applied to private international law cases, and the application of the law of a third country.[107]

The reasons for the proposed attenuation of the ECHR's standards with regard to the applicable foreign law originating from a third country are manifold, but in short come down to the question whether one may expect that laws from all over the world should live up to the standards of the ECHR. Moreover, if one insisted on the full scrutiny of the ECHR with regard to foreign laws of third countries,

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généraux du droit international privé à l'épreuve de la convention européenne des droits de l'homme, Brussels, Bruylant 2007, p. 549 et seq. See also Kiestra 2014, *supra* n. 2, chap. 6.

101 Kiestra 2014, *supra* n. 2, section 6.3.1 et seq. The most recent cases on this topic *Ammdjadi v. Germany* (dec.), 9 March 2010, Case No. 51625/08 and *Zvoristeanu v. France* (dec.), 7 November 2000, Case No. 47128/99, both resulted in the Court not finding a violation with regard to the foreign law applicable, and declaring the application manifestly inadmissible.

102 See Kiestra 2014, *supra* n. 2, section 6.3.3. See also Kinsch 2007, *supra* n. 58, p. 173 et seq.

103 For a more detailed discussion of this topic see Kiestra 2014, *supra* n. 2, section 6.3.2.1.

104 Incidentally, it should be noted that this question is not confined to the issue of applicable law. It is also relevant with regard to the recognition and enforcement of foreign judgments. See Kiestra 2014, *supra* n. 2, section 8.2.1.

105 *Soering v. the United Kingdom*, 7 July 1989, Case No. 14038/88, Series A No. 161.

106 *Drozd and Janousek v. France and Spain*, 26 June 1992, Case No. 12747/87, Series A No. 240.

107 See e.g. Van Loon 1993, *supra* n. 97, at p. 145-147; P. Mayer, 'La Convention européenne des droits de l'homme et l'application des normes étrangères', 98 *Rev.crit.dr.int.priv.* (1991), p. 653 et seq.; A.P.M.J. Vonken, 'De reflexwerking van de mensenrechten op het ipr' ['The Reflex of Human Rights on Private International Law'], in P.B. Cliteur and A.P.M.J. Vonken (eds.), *Doorwerking van mensenrechten* [*The Impact of Human Rights*], Groningen, Wolters-Noordhoff 1993, at p. 172-174.

little room may be left for the application of these foreign laws. This would not only impede respect for the diversity of legal cultures in the world, which may be regarded as one of the principles of private international law, but could also have more practical consequences, such as the risk of limping legal relationships, which ultimately would hinder people's international mobility.[108]

There are also some arguments against the attenuation of these standards. The principal argument against is that it may not be allowed, or rather only insofar as it is permitted under the ECHR. This essentially follows from Article 1 ECHR.[109] Furthermore, by attenuating the standards of the ECHR in such cases, one would ultimately create inequality. Even though it could be argued that this difference in treatment may be justifiable to an extent, the fact would remain that the human rights of some people (those involved in cross-border cases) guaranteed in the ECHR would receive less protection than the rights of others (in domestic cases).[110] The ECtHR has yet to really weigh in on this issue, as not much can be derived from the scarce case-law available at this time.

The second question concerns the manner in which the rights guaranteed in the ECHR may be applied in these cases. Broadly speaking, there are two different paths that could be chosen in this regard. The first is the indirect route of using the public policy exception. The second path is that of directly applying the ECHR against the applicable foreign law. Incidentally, this is a topic, which in principle does not concern the Court in Strasbourg, as the Court is not concerned with how Contracting Parties fulfil their obligations. Historically, the public policy exception has been the preferred means of protecting fundamental rights in private international law.[111] It is also the preferred method of many authors, as it would leave more room for the application of foreign law.[112] However, it has also been argued that, due to the characteristics of this instrument, particularly its relative character, in certain circumstances the use of the public policy exception may lead to violation of the ECHR.[113] We would argue that, while the public policy exception may be used in such cases, it cannot lead to more room for the application of foreign law in cases where this would lead to violation of the ECHR. Nevertheless, national courts in virtually all cases make use of the public policy exception (*ordre*

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108 See for a more detailed discussion Kiestra 2014, *supra* n. 2, section 6.3.2.1 et seq. and the writers cited there.

109 See section 2 *supra*. See in more detail Kiestra 2014, *supra* n. 2, chap. 4.

110 See further Kiestra 2014, *supra* n. 2, section 6.3.2.1.

111 See Kinsch 2007, *supra* n. 58, p. 171-192 for an overview of the historical use of the public policy exception in this regard. See also P. Kinsch, 'Sklavenbesitz, religiöse Ehehindernisse und entschädigungslose Enteignungen: zur Vorgeschichte der Frage nach der Einwerkung der Grund- und Mensenrechte auf die Anwendung ausländischen Rechts', in H-P Mansel et al. (eds.), *Festschrif für Erik Jayme*, Sellier 2004, Band I, p. 419-435.

112 See e.g. J.H.G.E. van Hedel, 'Het recht op eerbiediging van het familieleven *ex* artikel 8 EVRM en het conflictenrecht' ['The Right to Respect for Family Life *ex* Article 8 ECHR and the Conflict of Laws'], *NIPR* (2008), p. 132; Mayer 1991, *supra* n. 107, at p. 651 et seq.

113 See Kiestra 2014, *supra* n. 2, sections 4.4, 6.3.3.3.

public) when assessing the applicable foreign law in relation to the rights guaranteed in the ECHR,[114] while the method of direct application is rarely used.[115]

4.2.2 *The impact of the ECHR as a promoter of the application of foreign law*

The application of foreign law is not the only possible outcome when a court applies its choice of law rules. This may, after all, also lead to application of the law of the forum, the *lex fori*. This raises the question whether the rights guaranteed in the ECHR can also be invoked against the application of the *lex fori* in private international law cases in order to promote the application of foreign law.

The ECHR promoting the application of a foreign law is an idea that has been developed in legal literature.[116] It has been argued that the ECHR, particularly Article 8 ECHR, may also guarantee the right – or at least strengthens a claim – to have a specific law applied to a judicial matter out of respect for the cultural identity of a person.[117] Others have added that such a right could be extended to legal cultures in general.[118] On that basis a person could argue that his or her law should be applied to a certain case out of respect for his or her legal culture.[119] Until now this has mostly remained a theoretical possibility, as there is little indication in the ECtHR's case-law – or in the case-law of national courts for that matter – that the ECHR can be invoked in order to promote the application of a foreign law in this manner.

There is one case, *Losonci Rose and Rose v. Switzerland*,[120] in which a Hungarian husband and his Swiss-French wife successfully invoked the ECHR against

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114 See Kiestra 2014, *supra* n. 2, section 6.3.3.3 et seq.

115 In the Netherlands, for example, for a long time, Supreme Court (HR) 15 April 1994, *NJ* 1994, 576 appeared to be the only case in which the method of direct application was used. Compare Van Hedel 2008, *supra* n. 112, at p. 131 et seq. However, fairly recently in a case before the District Court (Rechtbank) Haarlem Art. 8 ECHR was directly applied to the ordinarily applicable foreign law (Nigerian law). See District Court (Rechtbank) Haarlem 11 December 2012, *NIPR* (2013), p. 24; *JPF* 2013, 131 (note Curry-Sumner).

116 E. Jayme, 'Menschenrechte und Theorie des Internationalen Privatrechts' (speech delivered on 24 January 1992), in: E. Jayme, *Internationales Privatrecht und Völkerrecht*, Heidelberg, C.F. Müller Verlag 2003, p. 97. The author based his argument on an old case before the Commission, *G. and E. v. Norway*, 3 October 1983, Case Nos. 9278/81 & 9415/81 (joined), DR 35, p. 30.

117 Jayme 2003, *supra* n. 116, p. 97. Compare D. Looschelders, 'Die Ausstrahlung der Grund- und Menschenrechte auf das Internationale Privatrecht' ['The Impact of Fundamental and Human Rights on Private International Law'], 65 *RabelsZ* (2001), p. 468-469; Matscher 1998, *supra* n. 58, at p. 216; S.W.E. Rutten, 'Mensenrechten en het ipr: scheiden of trouwen?' ['Human Rights and Private International Law: To Divorce or to Marry?'], 23 *NJCM-Bulletin* (1998), p. 801.

118 Van Loon 1993, *supra* n. 97, p. 139.

119 It is interesting to note that this would essentially mean a return to an archaic principle that was used in Europe during a time, in which there were essentially no rules of private international law. See e.g. J.A. Pontier, *Europees conflictenrecht. Een complexe geschiedenis in vogelvlucht* [*European Conflict of Laws. A Bird-Eye's View of a Complicated History*], Amsterdam, Vossiuspers 2005, at p. 10-11.

120 *Losonci Rose and Rose v. Switzerland*, 9 November 2010, Case No. 664/06.

the application of Swiss law, being the *lex fori*. This case particularly concerned the discriminatory nature of the relevant Swiss private international law rules, because the *lex fori*, Swiss law, essentially took away the husband's preferred (Hungarian) name after his marriage, while he could have retained his name, had Hungarian law been applied. If the wife had been Hungarian, under Swiss law the couple could have retained their own names as they wished to do, as Swiss law would allow the woman's surname to be governed by her national law. Under these specific circumstances it was possible to successfully invoke the ECHR against the application of the *lex fori* in order to have a foreign law applied.[121]

4.3 The impact of human rights in matters related to tort, in domestic as well as in international cases

In the foregoing subsections we have discussed how the rights guaranteed in the ECHR may have an impact on the ordinarily applicable (foreign) law in private international law cases. Here we will look at a different aspect of the role of human rights law in international proceedings. There may be international tort cases, where human rights law may impact on the merits of the case in the sense that human rights norms are considered to be part of the applicable law. In our discussion of this topic we will first look at the effect of human rights in private law. After that we will in particular focus on international cases.

4.3.1 *The effect of human rights in private law in matters related to tort*

In international cases, as well as in domestic cases regarding private law issues, including tortious liability, a national court may also have to consider the impact of human rights law, including the ECHR, when ruling on the merits of the case.[122] In tort cases, the question whether the conduct of a natural or legal person, or the conduct of officials acting on behalf of a State, can be characterised as wrongful and may lead to liability and an award of damages, in principle may be judged in light of human rights law, in that the wrongful act (or omission) should be deemed a violation of a human right against another natural or legal person, and may therefore constitute a tort. In this regard, both a so-called horizontal and a so-called vertical effect of human rights law may play a role.

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121 See with regard to this case also P. Kinsch, 'Private International Law Topics before the European Court of Human Rights. Selected Judgments and Decisions (2010-2011)', 13 *Yearbook of Private International Law* (2011), p. 39-41; see also further Kiestra 2014, *supra* n. 2, section 6.4.1 et seq.

122 See C. Mak, 'Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, The Netherlands, Italy and England' (diss. UvA 2007), Alphen aan den Rijn, Kluwer Law International 2008; and, J.M. Emaus, 'Handhaving van EVRM-rechten via het aansprakelijkheidsrecht. Over de inpassing van de fundamentele rechtsschending in het Nederlandse burgerlijk recht' (diss. UU), The Hague, Boom Juridische Uitgevers 2013.

The court of a State that is an EU Member State and a Contracting Party to the ECHR, such as a Dutch court, while applying its domestic rules of private law to the case at hand, may give effect to human rights law on private law issues, particularly where that law entails open textured-norms, such as Article 6:162 Dutch Civil Code.[123]

In many European jurisdictions human rights have effect in matters related to tort, but the manner in which human rights law is dealt with by the national courts varies from country to country, and may depend on whether the state concerned follows a (more or less) monistic or dualistic system.[124]

The impact of human rights law in private law is often considered as problematic though, due to the differences between private law and human rights law. In essence, it is held that human rights law has been designed to serve public interests, and addresses only States, and therefore cannot be equally applied in private law.[125] Consequently, it is argued that, in private law cases between private parties, where human rights would have a so-called horizontal effect, fundamental rights can only be taken into account in a more indirect manner, particularly as sources for filling in the open-textured norms of private law, such as 'negligence' and 'due care'.[126]

As to the extent to which human rights have (horizontal) *effect in private law*, a distinction is made between direct and indirect (horizontal) effect, and between different forms of (in-)direct effect. For example, within a strong version of '*direct effect*' of human rights in private law, the parties to a dispute are considered to be directly bound by these rights, meaning that one party can base a claim or defence against the other party on such a right without having to seek recourse to a rule of tort law. Within a 'strong' version of '*indirect (horizontal) effect'*, however, the parties are considered not to be bound directly by human rights. Courts only guarantee the values protected by these fundamental rights by interpreting the rules of non-contractual liability in light of these rights. And, finally, in a 'weak' version of indirect (horizontal) effect, human rights serve only as an inspiration for the solution of tort law disputes, while no explicit reference is made to human rights.[127]

In domestic cases, Dutch courts, when applying Dutch law, seem to give an '*indirect but strong* (horizontal) *effect*' to human rights in private law, although, occasionally, they also honour direct claims for breach of a fundamental right, particularly where the conduct of officials acting on behalf of the State is concerned (we assume that in such cases, in principle, vertical effect is given to human rights

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123 Art. 6:162(2) stipulates: As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law *or of what according to unwritten law has to be regarded as proper social conduct*, always as far as there was no justification for this behaviour.

124 Mak 2007, *supra* n. 122, chap. 2, at p. 58-132; Emaus 2013, *supra* n. 122, p. 171, and chaps. 5 and 6.

125 Mak 2007, *supra* n. 122, at p. 52.

126 Mak 2007, *supra* n. 122, at p. 49-58; compare Brief of Professor Alex-Geert Castermans et al., as *amici curiae*, in support of the petitioners, filed in the Kiobel case, *supra* n. 5, No. 10-1491.

127 Mak 2007, *supra* n. 122, at p. 57-58 and p. 133-134.

law).[128] When giving indirect (horizontal) effect to human rights, Dutch courts balance the different parties' interests, in that on the one hand, the limitations of fundamental rights are considered in light of the (restricted) liabilities under tort law, and, on the other hand, the (wrongfulness of the) conduct, in terms of the open-textured norms of tort law, is determined in light of these fundamental values.[129]

4.3.2 *Human rights law having effect in (domestic) private law (foreign law or* lex fori*) in matters related to tort, in international civil proceedings*

In international civil proceedings, national courts, having international jurisdiction, generally apply national, or European or international (uniform) rules of choice of law in order to determine which national law applies to the legal issues of the dispute, and then decide the merits of the case by applying the substantive rules of the designated law. Today, in matters related to tort, a Dutch court, like the courts of other EU Member States, as a general rule will apply Article 4 (1) Rome II, which provides that the law of the state in which the damage occurs applies.[130] In principle, these choice of law rules only refer to national (substantive) rules of private law, be it the *lex fori* or the foreign law.[131]

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128 Compare Mak 2007, *supra* n. 122, p. 79, 135.

129 Mak 2007, *supra* n. 122, at p. 57-58. Leading cases are: Court of Appeal (Hof) Amsterdam 30 October 1980 *NJ* 1981 422 (*Boycot Outspan Aksie*) (analysed in Mak 2007, *supra* n. 122, p. 79-81); Supreme Court (HR) 31 October 1969, *NJ* 1970 57 (*Mensendieck*) and 18 June 1971 407 (*Mensendieck II*); and (HR) 22 February 2002 *NJ* 2002 240 note J.B.M. Vranken (*Taxibus*) (discussed in Emaus 2013, *supra* n. 122, at p. 350-351). As to the horizontal effect of human rights law, see in particular, Supreme Court (HR) 18 June 1993 *NJ* 1994 347 note EAA and CJHB (*Gedwongen Aidstest*) (discussed in Emaus 2013, *supra* n. 122, at p. 1-2, 21 and 348-350); and as to the vertical effect of human rights law, Supreme Court HR 9 July 2004 *NJ* 2005 391 note JBMV (*Oosterpark*) (regarding omissions in the exercise of State authority, *in casu*, the police; Emaus 2013, *supra* n. 122, at p. 3 and 351-352).

130 Dutch national choice of law rules, the International Torts Act (*Wet conflictenrecht onrechtmatige daad*), withdrawn on 1 January 2012, are applied to events that took place before the entry into force and applicability of Rome II, as of 11 January 2009; see EUCJ 17 November 2011, C-412/10 (*Homawoo v. GMF Assurances*), ECR 2011 I-11603. This Act also applies to legal issues that are excluded from the substantive scope of Rome II, in Art. 1(2), as for example, 'defamation'; or to torts concerned with acts or omissions of public authorities, *acta iure imperii*, Art. 1(1), up to 1 January 2012. As of 1 January 2012, Arts. 10:157 to 159, and 10:164 Dutch Civil Code on private international law apply to issues excluded from the substantive scope of Rome II and to *acta iure imperii*. A Dutch court may also have to apply choice of law rules laid down in treaties, such as the Hague Convention on the Law Applicable to Traffic Accidents of 1971 and the Hague Convention on the Law Applicable to Products Liability of 1973, available at <www.hcch.net>.

131 Occasionally, national courts may also have to apply uniform rules of private law (such as, the Principles of European Tort Law, (available at: <www.egtl.org>), if certain requirements are met; compare Recital 14 of Rome I. Also rules of public international law (the law of nations or customary international law) may be applied in international civil proceedings, including international human rights law. In principle, these rules only apply to States, and their applicability is not to be determined by regular choice of law rules, as laid down in Rome II.

This means that, in an international dispute between private parties on tortious liability, where the alleged wrongful conduct is claimed to be a violation of a human right, a court may also have to consider whether and in what manner (in-) direct (horizontal) effect is to be given to human rights under the applicable law (foreign law or *lex fori*).

Due to the international character of private international law cases, different scenarios emerge in this context, in that: 1) the applicable law is the law of a Contracting Party to the ECHR that provides for rules on tortious liability entailing open-textured norms, and *a)* follows the same approach as the forum court as to the (horizontal) effect given to human rights in private law, or *b)* follows a different approach; 2) the designated law is the law of a Contracting Party, but does not entail open-textured norms and therefore only a form of 'direct effect of human rights law' (whether or not incorporated by a national statute) can be at stake; 3) the designated law is the law of a non-Contracting Party to the ECHR, entailing a system with open-textured norms, and *a)* follows another human rights law regime, or *b)* has not admitted any human rights law regime at all, et cetera.[132]

In private international law cases, it is only natural that national courts have to cope with these and other differences in the domestic laws of states. And even though it may not be directly clear in what manner the applicable foreign law admits (in-)direct (horizontal) effect to human rights in private law, or what is the scope of its (incorporated) national rules on human rights, a Dutch court has an obligation *ex officio* to apply the designated foreign law, and in the manner in which that law is applied and interpreted in the courts of that foreign state. Or at the least, a Dutch court has an obligation to make an effort thereto, 'using its best endeavours to ascertain the content of foreign law'.[133]

If, however, the application of a foreign law results in violation of human rights in the forum state, different legal instruments are available to a court of an EU Member State to enforce a correction. As was seen in the foregoing subsections, in these situations the ECHR can be used as a defensive mechanism against the foreign law. The court may have an obligation not to apply the foreign law. In matters related to tort, the public policy exception in Article 26 Rome II can be invoked as well, at least to the extent this is compatible with the ECHR, whereas one might also consider recourse to Article 16 or Article 17 Rome II.[134]

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132 Other scenarios may emerge if the conduct took place within the jurisdiction of a non-Contracting Party and the damage occurred within the jurisdiction of a Contracting Party; or in case of different levels of protection of human rights.

133 In accordance with Art. 10:2 Dutch Civil Code on private international law. Compare the Principles for a Future EU Regulation on the Application of Foreign Law (Principle IV of the Madrid Principles), published in: Carlos Esplugues et al. (eds.), *Application of Foreign Law*, Munich, Sellier 2011, at p. 377, and 147.

134 The scope of the latter provisions, Arts. 16 and 17 Rome II, whether including human rights law as overriding mandatory provisions or as rules of conduct, is not clear though. Case-law of the CJEU is not available.

4.3.3 *The effect of human rights law in international civil proceedings against a state or an international organisation, in matters related to tort*

Other issues relating to the applicable law in human rights litigation are at stake in international cases, where states or international organisations are involved. [135] If proceedings are brought before a Dutch court against a foreign State or an international organisation, even though, due to immunities, such cases hardly ever will be decided before a Dutch court,[136] ultimately questions may arise as to which national rules on tortious liability are to be applied and whether the applicability of human rights law would be involved.[137] In principle, in international cases claims for violation of a human rights norm can be brought against the State of the Netherlands before a Dutch court, by virtue of Article 2 Dutch Code of Civil Procedure, as was seen recently, in the 'Srebrenica' cases.[138]

Today, according to Article 10:159 Dutch Civil Code on private international law, where acts of public authorities of the Netherlands are involved, the applicable law is Dutch law. Assuming that this provision only applies to *acta jure imperii*, the applicability of Dutch law not only implies the applicability of the provisions laid down in Book 6, Title 3 of the Dutch Civil Code on tortious liability, whether or not including unwritten law as derived from principles of human rights law (the horizontal effect of human rights in private law), but it also implies the (direct) vertical effect of the ECHR, where Dutch public authorities are involved, in accordance with the spatial scope and the extraterritorial effect of the ECHR (see, § 2). Claims arising out of *acta jure imperii* are excluded from the scope of Rome II, in Article 1(1).[139] Therefore, tort cases concerning *acta jure imperii* of Dutch public authorities are to be regulated by national choice of law rules, under current Dutch choice of law rules, Article 10:159 BW.

The 'Srebrenica' cases that were brought before the Dutch court, originally concerned civil suits filed by individual plaintiffs and the 'Mother of Srebrenica

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135 Whether international law or human rights law directly applies to multinationals, in the same manner that it applies to States and international organisations (the so-called direct vertical effect), is a topic that is not discussed in this study. We refer here to studies on this topic, *inter alia* L.F.E. Enneking 2012, *supra* n. 4; and to *Kiobel v. Royal Dutch Petroleum*, US Court of Appeals for the Second Circuit, 17 September 2010, 621 F.3d 111 (2d Cir. 2010).

136 Immunities are, of course, a clear obstacle to the right of access to a court *ex* Art. 6(1) ECHR. This topic has been often discussed by the Court and in the literature; and text following *supra* n. 53; and e.g. M. Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights*, Leiden, Martinus Nijhoff Publishers 2010; E. Voyiakis, 'Access to Court v State Immunity', 52 *ICLQ* (2002), p. 297-332.

137 To torts committed by foreign states (as *acta jure imperii*) involving state authority, a Dutch court (in the rare case that it would have international judicial jurisdiction) may consider the analogous application of Art. 10:159 Dutch Civil Code, see below.

138 See *infra* n. 140 and 142.

139 Notice though, that *acta jure gestionis* are *not* excluded from the scope of Rome II; CJEU 19 July 2012, C-154/11 (*Ahmed Mahamdia*), ECR 2012, n.y.p.; and 21 April 1993, Case C-172/91 (*Sonntag v. Waidmann*), ECR 1993 I-1963.

Foundation' against the United Nations and the State of the Netherlands, which were both held liable for the consequences of the fall of Srebrenica and for their failure to prevent genocide. In its decision of 13 April 2012,[140] the Supreme Court of the Netherlands (*Hoge Raad*) held, in short, that the UN enjoy absolute immunity from jurisdiction and that, in view of the case-law of both the ECtHR and the International Court of Justice, possible violations of human rights and international humanitarian law (Genocide Convention and ECHR) do not warrant an exception.[141]

The decision of the Supreme Court of 6 September 2013, in two of these 'Srebrenica' cases, the *Mustafić et al.* and the *Nuhanović*-case, only concerned claims against the State of the Netherlands.[142] The lower court, the Court of Appeal of the Hague, gave a declaratory ruling that the Netherlands were indeed responsible for the damage suffered by the claimants and assessed Dutchbat's actions in light of the (domestic) private law of Bosnia and Herzegovina, being the *lex loci delicti*, in accordance with Article 3(1) of the Dutch International Torts Act, withdrawn on 1 January 2012, as well as Articles 2 and 3 of the ECHR, and Articles 6 and 7 of the ICCPR (concerning the right to life and the prohibition of inhuman treatment).[143] The findings of the Court of Appeal with regard to the applicable foreign law could not be addressed in the appeal before the Supreme Court.[144] By way of *obiter dictum*, the Supreme Court observed, that Mustafić and Nuhanović fell within the jurisdiction of the Netherlands, in accordance with Article 1 ECHR, thereby relying on *Al-Skeini* (para. 3.17.2). In this regard, the Supreme Court referred to the spatial scope of the ECHR (particularly, to the 'extraterritorial effect' of the ECHR), to Dutchbat's presence in the compound and to the fact that the Bosnian Serb Army respected Dutchbat's authority over the compound in Potočari near Srebrenica (para. 3.17.3), whereas the Supreme Court had already confirmed the Court of Appeal's finding that the State had effective control over Dutchbat's conduct in the compound under international law (paras. 3.11.2 and 3.11.3). The Court held that any individual at the compound, including Mustafić and Nuhanović, would

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140 Supreme Court of the Netherlands (HR) 13 April 2012, ECLI:NL:HR:BW1999, *Mothers of Srebrenica Foundation v. the State of the Netherlands and the United Nations,* see *supra* n. 8.

141 See Th.M. de Boer, 'Netherlands Judicial Decisions Involving Questions of Private International Law: Can the United Nations Be Sued for Its Role in the Srebrenica Massacre?', *NILR* (2013), p. 60., at p. 121-130; and *supra* n. 138, on this issue. An application brought against this decision before the ECtHR also proved to be unsuccessful. See *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), No. 65542/12, ECHR 2013 (abstracts).

142 Supreme Court of the Netherlands (HR) 6 September 2013, *State of the Netherlands v. Mustafić et al.*, ECLI:NL:HR:2013:BZ9228 (A-G's advisory opinion: ECL:NL:PH:2013:BZ9225); English text in *NILR* 2013 at p. 447-485); see, on this judgment, Cedric Ryngaert (2013), Supreme Court (*Hoge Raad*), *State of the Netherlands v Mustafić et al*., *State of the Netherlands v Nuhanović*, Judgments of 6 September 2013, *NILR* (2013), p. 441-485.

143 Decisions of the Court of Appeal of The Hague (Hof 's-Gravenhage) 5 July 2011, ECLI:NL:GHSGR:2011:BR0132; ECLI:NLGHSGR:2011:BR5386 (in English) (*Mustafić v. State of the Netherlands*) and ECLI:NL:GHSGR:2011:BR0133; and ECLI:NL:GHSGR:2011:BR5388 (in English) (*Nuhanović v. State of the Netherlands*).

144 In accordance with Art. 79(1)(b) Dutch Judicial Organisation Act.

thus fall within the jurisdiction of the Netherlands, and that any acts which Dutch authorities had taken *vis-à-vis* them, could be assessed in light of international human rights standards.[145]

We assume therefore that in this regard the Supreme Court took account of the ECHR, in light of its direct (and so-called vertical) effect. We also assume that the question of whether the ECHR or ICCPR were a part of the legal order of Bosnia and Herzegovina or whether under the private law rules of Bosnia and Herzegovina (in-)direct effect could have been given to human rights law, was of no relevance. One could even question whether the law of Bosnia and Herzegovina, as the *lex loci delicti*, should be applied in such cases, as Bosnia and Herzegovina had no or only limited jurisdiction in that part of its territory at the time of the event. Whether recourse to the law of a manifestly more closely connected country (the Netherlands) would have been more appropriate, is not discussed here.[146] In any event, if applying the law of Bosnia and Herzegovina had resulted in violation of the ECHR, the ECHR itself could have been used as a defence mechanism against the foreign law, or the public policy exception could have been invoked.

5. CONCLUSIONS

In this paper we have taken a closer look at some of the different aspects of the role of human rights law, and particularly the ECHR, in international civil proceedings, particularly in matters related to tort. We have mainly focused on the role of the ECHR with regard to the issues of jurisdiction and choice of law in private international law and on the applicability of the ECHR on the merits in international civil litigation.

In conclusion, looking at the two roles of human rights law in international civil litigation discussed in this paper, it is clear that human rights, and particularly the ECHR, have a significant impact on the issue of jurisdiction and choice of law in private international law. We could name the notable impact of Article 6(1) ECHR on the issue of jurisdiction, particularly where no other court would be available. Also, it is generally accepted that the application of a foreign law interfering with one of the rights guaranteed in the ECHR by a national court of one of the Contracting Parties may lead to violation of the ECHR by the respondent Contracting Party, even though questions remain regarding the level of scrutiny with regard to foreign laws, and the (preferred) manner of application of the ECHR by national courts. Incidentally, in this regard, considering the fact that many rules of private international law are EU rules, it is conceivable that the rights guaranteed in the EU Charter will become more important in private international law cases.

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145 Ryngaert 2013, *supra* n. 142, at p. 445-446.

146 Compare, District Court of The Hague (Rechtbank 's-Gravenhage) 14 September 2011 ECLI:NL:RBSGR:2011:BS8793, *NJ* 2012 578 (*Stichting Komite Utang Kehormatan Belanda/Staat der Nederlanden*), regarding the Rawagedeh (Indonesia)-executions in 1947.

It remains difficult, however, to use private international law, particularly international tort law, to seek remedies for human rights violations in international cases. If we take civil liability for human rights violations resulting from peace keeping operations as an example, we may observe that it would not be impossible to hold the State accountable in this regard, particularly before their own courts, but obstacles remain – even other obstacles than the obvious one of immunities afforded to foreign States (and international organisations). It is difficult to argue that an (alleged) human rights violation is a ground for jurisdiction in such cases. Even universal civil jurisdiction as regards conduct against mankind does not appear to be accepted. This means that, in principle, it will be difficult to establish a ground of jurisdiction in such cases.

Even after having established jurisdiction difficult questions remain. We have demonstrated that it is certainly possible to apply human rights law to the merits of an international tort case, but the manner in which this is possible will still depend on the applicable foreign law to the case. The direct application of human rights law to a case – independently of the applicable (foreign) law – would only seem possible in exceptional circumstances, such as, for example, those in *Mustafić* and *Nuhanović*, in which the Dutch State exercised full control over the compound in Bosnia. Under those (exceptional) circumstances an argument could be made for the direct application of human rights standards.

6. PROPOSITIONS AND POINTS FOR DISCUSSION

1. Where the law of a foreign state is the applicable law and application of that law would result into violation of one of the rights guaranteed in the ECHR, the act of applying the repugnant law by a court of a Contracting Party may lead to violation of the ECHR.

2. Using the public policy exception (as an instrument of private international law) in cases as referred to in the previous proposition to stave off the result of applying the repugnant foreign law is a legitimate solution, but because of the relative character of this instrument, in certain circumstances, this could result in violation of one of the rights guaranteed in the ECHR.

3. The decision of a court of a Contracting Party to the ECHR on the assertion (declination) of jurisdiction in an international case touches on the right of access to a court within the meaning of Article 6(1) ECHR.

4. The extent to which private international law can facilitate international civil proceedings against States for human rights violations during peace operations is rather limited.

5. Although issues such as 'liability for the acts of another person, et cetera' are in principle governed by the *lex causae* (compare, Article 15(a-h), Rome II), naturally, public international law (including human rights law and international humanitarian law) sets aside these national rules of private law where the attribution of conduct and responsibility to States is concerned.

6. The right to access to a court, within the meaning of Article 6 ECHR, should also entail the right to access to an appropriate forum in international civil proceedings. If Article 6(1) ECHR would entail such a right, the Brussels I Regulation guarantees this right, in matters related to tort, even where it does not provide for a *forum necessitatis*.