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**Suit for damages before
national courts against the UN
for the violation of
international humanitarian law**

Master thesis
30 credits (30 ECTS)

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Human Rights Law

Spring Semester 2009

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Summary

Military operations conducted by the UN or under their auspices lead inevitably to damages among the civilian population. The proceedings in the case of Srebrenica before dutch courts reveal the dilemma of war victims in general: the state could not be held responsible, because the acts were attributed to the United Nations, and the United Nations in turn could - in the view of the court - not be sued because they enjoy immunity from jurisdiction. This problematic lack of any juridical redress-mechanism is reinforced with the extension of those military missions in numbers and scope. Based on a formal approach to law, this paper takes the perspective of a victim and assesses his chances to win his case in front of a national court. It is limited to a discussion of the responsibility of the UN for violations of international humanitarian law. The responsibility of troop contributing states is not covered.

As regards procedural obstacles, the focus is on the immunity from adjudication enjoyed by the United Nations in front of national courts. It is argued here, that - notwithstanding seemingly different standards in the UN-Charter and the Convention on the privileges and immunities of the United Nations - the UN enjoy absolute immunity in principle. But even if immunity were functionally limited, military acts would presumably be covered. However, whereas the notion of jus cogens and other concepts do not lead to an exception to immunity, that immunity must be restricted in view of the human right of access to the court.

Turning to the merits, a basis for the claim might be found in public international law or in national tort law. A claim for compensation under international law requires, that a specific act, which must be attributable to the organization has violated an applicable rule of humanitarian law, which is binding on the United Nations, and which confers a right to compensation on the victim. The paper proceeds to analyze those requirements in more

detail. It is reasoned in the paper, that even if the UN Security Council acts under Chapter VII of the UN-Charter it is extensively bound by customary humanitarian law, at the very least however by jus cogens. Concerning the scope of application of humanitarian law the paper starts by analyzing the threshold of application of humanitarian law and asserts that the Convention on the safety of United Nations and associated personnel has no impact on it. Turning to the applicable rules problematic areas such as the treatment of prisoners of war, the law of occupation and the duty to protect are addressed. Discussing the responsibility of the UN, the different concepts for the attribution and allocation of the unlawful conduct are proposed with a focus on the standard of effective control and the Behrami and Saramati jurisprudence of the ECHR.

However, even if those preconditions of a wrongful international act are fulfilled, the individual must furthermore be entitled to a right on his own, which he can also enforce. It is suggested that even though the victim is not only the bearer of primary rights but also entitled to compensation, international humanitarian law does not confer the procedural capacity to enforce that claim.

Finally, national tort law as basis for the claim is examined. After describing the role of the rules on jurisdiction and international private law the relationship between national tort law and international public law is elaborated upon using the example of German tort law. It is concluded in this regard that the interaction between the two bodies of law is still ambiguous and requires further research.

Abbreviations

API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CFI	European Court of First Instance
CPI	Convention on the privileges and immunities of the United Nations
CSUN	Convention on the safety of United Nations and associated personnel
DARIO	Draft Articles on Responsibility of International Organizations
DASR	Draft Articles on State Responsibility
ECHR	European Convention of Human Rights European Court of Human Rights
ECJ	European Court of Justice
ECSI	European Convention on State Immunity
EECC	Eritrea-Ethiopia <i>Claims Commission</i>
FSIA	United States Foreign Sovereign Immunities Act of 1976
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949
GC II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
GC III	Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
GC IV	Convention (IV) relative to the Protection of Civilian Persons in in Time of War. Geneva, 12 August 1949.

GC	Common Articles of the Geneva Conventions (GK I - IV)
HC	Convention (IV) respecting the Laws and Customs of War on Land
HC-Annex	Annex to HC: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
ICC- (Statute)	(Statute of the) International <i>Criminal</i> Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
ONUC	The United Nations Organization in the Congo
PSA	Participating State Agreements
SOFA	Status of Forces Agreement
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCC	United Nations Claims Commission
UN-Charter	Charter of the United Nations
UNCSI	United Nations Convention on Jurisdictional Immunities of States and Their Property
UNEF	United Nations Emergency Force
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPROFOR	United Nations Protection Force

(UN-)SC (United Nations) Security Council
UNSCR United Nations Security Council Resolution
VCLT Vienna Convention on the Law of Treaties

1 Introduction

1.1 Scope of this thesis

What is commonly described as the Srebrenica Massacre was the July 1995 killing of an estimated 8,000 Bosniak men and boys in the area of Srebrenica in Bosnia and Herzegovina by units of the army of the Republika Srpska. The ICJ¹ and the ICTY² considered this to form Genocide. The UN had before declared that the enclave constituted a so-called safe area and thus was to be free from armed attack or any other hostile act. When the Genocide took place, the United Nations Protection Force (UNPROFOR) was present in Srebrenica. However, the UNPROFOR did not defend the safe area, and neither were NATO air strikes launched to this effect.³ For those reasons, relatives filed claims for damages in the Netherlands, against the state of the Netherlands and the United Nations, arguing, that both failed to prevent the genocide, and thereby committed a wrongful act. The fact, that the judgments dismissed the claims illustrates very well the dilemma of war victims in general: the state could not be held responsible, because the acts were attributed to the United Nations,⁴ and the United Nations in turn could in the view of the court not be sued, because it enjoys immunity.⁵

In a more general sense, apart from the incident in Srebrenica (which is legally even more sophisticated, because it concerns the contested issue of a duty to protect⁶), it is very well conceivable, that UN-missions violate public international law in the course of their deployment, in particular international humanitarian law. Indeed, violations have occurred, and the problem is reinforced with the extension of those missions in numbers and scope. This thesis will only discuss the responsibility of the UN, but not the

¹ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26.2.2007, p.108, para.297.

² ICTY, Prosecutor v Krstic, Trial Chamber Judgement, Case No. IT-98-33-T, para.504.

³ Cf. for an analysis on the fall of Srebrenica and the role played by the UN, Report of the Secretary-General pursuant to General Assembly Resolution 53/35, UN. Doc. A/54/549.

⁴ District Court in The Hague Judgments, Cases number 265615 and 265618, 10.9.2008.

⁵ District Court in The Hague Judgment, Case number 295247, 10.7.2008.

⁶ Cf. below Chapter C, II, 2.

responsibility of the troop contributing states. Based on a formal approach to law, this paper will take the perspective of a victim and assess his chances to win his case in front of a national court.

The main procedural obstacle is the immunity enjoyed by the United Nations in front of national courts. In case the court can establish immunity, the judges will not proceed to the merits, but dismiss the case as inadmissible. Therefore, this thesis will start by discussing this issue.⁷ It will be considered first, what standard of immunity the UN enjoys according to the UN-Charter, and in turn, whether this immunity must be restricted in view of other rules of international law, in particular the human right of access to the court.

Turning to the merits, the victim needs to show a basis for his claim.⁸ Such a basis could either be found in public international law,⁹ or in national tort law¹⁰. A claim for compensation under international law requires, that a specific act, which must be attributable to the organization,¹¹ has violated an applicable rule¹² of humanitarian law, which is binding on the United Nations,¹³ and which confers a right to compensation on the victim.¹⁴

In the following, the legal obstacles that victims have to face in front of courts, when asserting a claim for damages against the UN, will be discussed in more detail.

1.2 Development of different types of UN-missions

As is well-known, the regime of collective security envisaged by the UN-Charter never became fully implemented, because in view of the cold war,

⁷ Cf. below Chapter B.

⁸ For reasons of readability, this paper abstains from a separate denomination of the different genders. Thus, for instance, the terms 'his claim' comprises 'her claim' as well.

⁹ Cf. below Chapter C.

¹⁰ Cf. below Chapter D.

¹¹ Cf. below Chapter C, III.

¹² Cf. below Chapter C, II.

¹³ Cf. below Chapter C, I.

¹⁴ Cf. below Chapter C, IV.

states were not prepared to enter into agreements with the UN to make their armed forces available to the SC, as envisaged by Art.43 UN-Charter. In this situation the United Nations developed the practice of peace-support operations.

Traditionally, those missions were mere “interposition” forces between the warring parties of a conflict, whose purpose was to impede subsequent fighting, and to facilitate the establishment of lasting peace by creating a peaceful environment. Those forces are often labeled traditional peace-keeping forces. The three defining characteristics of those operations are described as (1) the consent of the warring parties (notwithstanding that only the consent of the host state is legally necessary) to the mission, (2) the impartiality of the UN-forces, and (3) the limitation of the use of force to self-defense, since the missions were not established under Chapter VII of the UN-Charter. Those characteristics guaranteed the neutrality of the UN-forces and were considered as indispensable for the success of the mission. The missions were set up as subsidiary organs of a principal UN-organ.

Although it seems of little avail in terms of legal consequences, to divide the various types of missions all too roughly into different stages of development, two distinguishing features of this process can be discerned, which often went hand in hand with each other.

Firstly, the traditional characteristics have become blurred. In particular the notion of self defense has become understood to encompass also a defense of the mandate. At the same time those missions departed from the principle of consent, thereby losing their impartiality in the eyes of the warring parties. This culminated in the establishment of UN-missions under Chapter VII of the Charter, notoriously in Somalia and Yugoslavia.

Secondly, the tasks, which were assigned to the missions have been considerably broadened. Such new tasks included for example the monitoring of elections, local disarmament, humanitarian relief action and inquiry into grave human rights violations. This culminated in the whole

transitional administration of territories, as in East-Timor and Kosovo, with the UN acting as a government.

Besides the establishment of those missions, the UN has in particular since the early 1990's authorized regional organizations and individual states or groups of states to use force under Chapter VII of the Charter. Those are often called enforcement missions.

But the terminology is inconsistent. Different terms, such as peace enforcement, robust peacekeeping, coercive or enforcement action and peace support operations are often used interchangeably and without an agreed meaning. For example, the term peace enforcement is sometimes understood as comprising only missions under exclusive control of the member states with delegated authority from the UN-SC. Sometimes however it is simply used as denoting the authorization by the UN-SC under Chapter VII, including missions, which were established as a subsidiary organ of the UN. Even the UN has over time adhered to different terminologies. However, in the opinion of the present author, the label of the mission is of no legal relevance. As will be seen in the following, generalizations as to certain types of missions are of no avail. Instead every single mission should be examined on its own. Was the mission established under Chapter VI or VII of the Charter? Is humanitarian law in concreto applicable, because an armed conflict exists? And is it the troop contributing states or the UN, which exercise effective control over the forces?

2 Immunity

In this thesis the term immunity will be understood in a narrow sense as immunity from every form of legal process, cf. Art.2 Sect. 2 Convention on the privileges and immunities of the United Nations (hereinafter CPI).¹⁵ In this respect immunity will be distinguished from the related concept of privileges. Whereas privileges exempt the International Organization from the binding force of certain regulations, immunity only prevents their enforcement without lifting the duty to observe those rules.¹⁶ Furthermore, this master-thesis deals only with immunity from process as opposed to immunity from execution.

Immunity is the major procedural obstacle in bringing an action for compensation based on the violation of international humanitarian law against the United Nations.¹⁷ When immunity is established, the court will not proceed to the merits but dismiss the case as inadmissible. The immunity of the United Nations arises at the level of international law from Art.105 UN-Charter, which is further elaborated on in the CPI, primarily Art.2 Sect. 2 CPI. It goes without saying that as the case may be courts apply their national law, which transposes those rules.

To start with, the scope of the immunity granted by these provisions needs to be identified.¹⁸ Even if immunity covers violations of humanitarian law in principle, a conflict with other rules of international law could be resolved to the disadvantage of the immunity regime. Given the potential gravity of the unlawful conduct this could follow from the disputed notion of jus

¹⁵ Cf. Chapter B, I, 1, d), (aa) for a more detailed analysis of the use of the term 'immunity'.

¹⁶ Schermers, Blokker, *International institutional law*, p.1008; Reinisch, *International Organizations*, p.265.

¹⁷ Concerning other avoidance techniques used by national courts cf. Reinisch, *International Organizations*, p.35 et seqq..

¹⁸ Chapter B, I.

cogens,¹⁹ or result from a conflict with the human rights guarantee of free access to a court as guaranteed inter alia by Art.6 ECHR.²⁰

2.1 Scope of the immunity of the United Nations

2.1.1 Absolute or functional standard of immunity

2.1.1.1 The standards of immunity

In principle it is possible for states to grant immunity either in absolute or restrictive terms. This becomes evident in the well-known tale of foreign sovereign immunity, which developed from absolute to restricted immunity, owing to a vast expansion in the economic activities of foreign states and a simultaneous spread of democratic ideals. In a nutshell, restricted sovereign immunity now basically preserves immunity only for sovereign, but not for non-governmental activities.²¹

According to Charles Brower, Immunity of International Organizations was already a matter of regulation in the 19th century when states not only began to establish administrative unions but also a small number of international organizations to manage international political problems. These organizations were protected by diplomatic privileges and immunities to ensure that no single state could bring their agents and thereby the organization itself under its control.²² Therefore, immunity was necessary to guarantee the feasibility of international organizations. The Covenant of the League of Nations continued this practice, but when the United Nations were established it was replaced because of doctrinal problems²³ by a so-called functional standard in Art.105 (1) UN-Charter: 'The Organization

¹⁹ Chapter B, II, 1.

²⁰ Chapter B, II, 2.

²¹ Cf. in more detail Chapter B, II, 2, a), cc).

²² Brower, International Immunities, 41 VAJIL (2000), p.9 et seqq.; Sato, Immunität, p.52 et seqq..

²³ Brower, International Immunities, 41 VAJIL (2000), p.16 et seqq..

shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes'. At first glance, this seems to point towards a more restricted standard of immunity.

As provided for in Art. 105 (3) UN-Charter, the General Assembly approved the Convention on the privileges and immunities of the United Nations on the 13th of February 1946, which spells out the basic principle in more detail. So far the convention is binding on 157 states.²⁴ Art.2 Sect. 2 CPI provides that 'the United Nations [...] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity'. This seems to stipulate an absolute standard of immunity.

Those different formulations raise the question as to the applicable standard of immunity which the national court must respect. Whether the immunity of the United Nations comprises violations of international humanitarian law depends therefore on whether the standard is absolute or functional,²⁵ and if the latter is the case, how extensive the functional standard limits the immunity.²⁶ In order to answer the former, it is essential to first ascertain the hierarchy between the UN-Charter and the CPI. As will be shown, the UN-Charter enjoys (at least) interpretatory supremacy.²⁷ Thus, how the CPI has to be construed in the light of the UN-Charter is subject to the respective standards of immunity indicated above which must be assessed in more detail.²⁸

2.1.1.2 The hierarchy between the standards

It seems reasonable to suppose a formal supremacy of the UN-Charter over the CPI. This position is sometimes opposed on the basis that the two

²⁴ Status as at 21-03-2009.

²⁵ Chapter B, I, 1.

²⁶ Chapter B, I, 2.

²⁷ Forthwith Chapter B, I, 1, b).

²⁸ This is further analyzed in Chapter B, I, 1, c), and in Chapter B, I, 1, d) respectively.

conventions allegedly have the same rank.²⁹ This argument is not further substantiated, though.³⁰

In particular, the reasoning could contradict Art.103 UN-Charter, which provides for the supremacy of the UN-Charter in case of a conflict between the obligations under the Charter and other international obligations of the member states. Indeed, the CPI was concluded in fulfillment of the Charter provisions, cf. Art.105 (3) UN-Charter, and could thus be of equal rank.³¹ Still, the CPI only partakes in the supremacy of the UN-Charter, if and to the extent that the Convention actually fills the Charter. Hence, obligations under the CPI are inapplicable, as far as they go beyond the limits of the UN-Charter.

However, it is doubtful whether an absolute standard of immunity in the CPI conflicts at all with Art.105 UN-Charter. Art.103 UN-Charter requires a conflict between two obligations. This is only the case, if Art.105 (1) UN-Charter not only obliges the member states to provide for a minimum standard of immunity, but at the same time obliges not to grant more than what is functional necessary. Only in that case a conflict between the obligation to provide 'immunity from every form of legal process' and Art.105 (1) UN-Charter might exist in the first place.³²

If the purpose of the functional limitation is only to spare the sovereignty of the member states, and does not in addition aim at the protection of interests of third persons, this militates against such a duty.

There is no clear-cut answer to this; but at any rate it is not necessary to

²⁹ Manderlier v. Organisation des Nations Unies and État Belge, Civil Tribunal of Brussels, 45 ILR (1972), p.453; Blatt, Rechtsschutz, 45 AdV (2007), p.92 in footnote 48.

³⁰ All too revealing the Court of Appeal's judgment does not take up that point, but negates its competence to interpret the CPI, Manderlier v. Organisation des Nations Unies and État Belge, Court of Appeals, 69 ILR (1985), p.143.

³¹ Bernhardt, p.1296, in: Simma, The Charter of the UN, Vol. II argues in regard to the Headquarters Agreement, that agreements concluded in the fulfillment of the Charter provisions must be qualified as obligations under the Charter.

³² Whether absolute immunity from legal process in fact is, what is functional necessary will be discussed below in Chapter B, II, 1, d), since it does not concern the issue of hierarchy in general, but whether the CPI keeps within the bounds of Art.105 UN-Charter.

explore this further since the UN-Charter already takes interpretatory precedence. This follows from a combined reading of Art.105 (3) UN-Charter on the one hand, which stipulates that the CPI shall determine the *details* of the application of §1, and the preamble of the CPI on the other hand, which points to Art.105 UN-Charter as the basis of the convention. Therefore, these norms create a hierarchy in the sense that the CPI shall fulfill Art.105 UN-Charter, but not go beyond the limits of the latter. Respecting this hierarchy, the convention must be read in the light of the UN-Charter, and arguably even leads to a restrictive reading of the wording where necessary.

2.1.1.3 The standard defined by Art.2 Sect. 2 CPI

Does Art.2 Sect. 2 CPI actually provide for absolute immunity, as indicated above? If the United Nations Secretary-General (UN-SG) were obliged to waive immunity, provided the retention of this prerogative is not necessary, immunity would be unrestricted in principle, and yet only be granted if functionally necessary.

Such a reasoning, leading to a indirect functional immunity, could arguably be based on a combined reading of Art. 2 Sect. 2 CPI on the one hand, and Art. 20 Sect. 5 CPI, Art.23 Sect. VI CPI on the other hand.³³ But such a reading is difficult to align with the fact that Sect. 2 itself is the only provision in the Convention which does not provide for such a duty. However, Brower accepts this duty for two other reasons.

First, he assumes a synchronization between the immunity of the organization itself and its personnel.³⁴ Indeed, it is indisputable that the immunity of an international organization is only effective, if its agents also enjoy immunity, because the organization can only act through them. This is also stressed by the first sentence of Art. 20 Sect. V CPI, Art. 23 Sect. VI CPI. Brower however effectively reverses this argument. According to him, the scope of the immunity of an organization cannot be more extensive than

³³ Brower, *International Immunities*, 41 VAJIL (2000), p.34.

³⁴ Brower, *International Immunities*, 41 VAJIL (2000), p.25 et seq., p.31et seq..

the immunity of its agents. This reasoning overlooks that in specific cases a waiver of the servant's immunity does not endanger the legal interests of the organization; while it is at the same time necessary to uphold the immunity of the organization itself.³⁵

Second, Brower argues that a duty to waive immunity derives from an obligation of the organization, corresponding to its rights, to act in observance of the principle of good faith.³⁶ But a specific conduct, cannot constitute a violation of the principle of good faith, if the convention explicitly allows for it. As demonstrated above, a systematic interpretation of the convention shows, that its purpose was to enable the United Nations to plead immunity without obligatory consideration of further legal preconditions. Thus, the mere assertion of immunity cannot violate the principle of good faith, as long as any further indication for an infringement on this principle is lacking.

Moreover, even if a duty to waive immunity existed, such a duty only makes a difference, if Article 2 Sect. 2 CPI authorizes (national) courts to exercise judicial control over the administrative decision not to waive immunity and substitute this decision if required.³⁷

As a result, the immunity enshrined in Art.2 Sect. 2 CPI is in principle unlimited.

2.1.1.4 The standard defined by Art.105 UN-Charter

What guidelines does Art.105 UN-Charter provide for the interpretation of the CPI?

A general problem of interpretation of public international law is the importance that should be attached to the wording, in comparison with the

³⁵ Cf. also Muller, *International Organizations*, p.150 in footnote 3, who observes, that in principle the scope of the immunity of international organizations is broader compared to the immunity of it's agents.

³⁶ Brower, *International Immunities*, 41 *VAJIL* (2000), p.33.

³⁷ Brower, *International Immunities*, 41 *VAJIL* (2000), p.30, p.47 et seqq. points to the ICJ as an enforcement-mechanism, but rejects control by domestic courts.

(allegedly genuine) intentions of the drafters. In the interpretation of Art.105 UN-Charter this article follows the view adopted by the ICJ and the Vienna Convention on the Law of Treaties (VCLT), whereby the intention is only relevant if derived from the wording.

2.1.1.4.1 Ordinary meaning of the terms

The wording of Art.105 (1) UN-Charter could be understood as determining a restrictive level of immunity, incompatible with absolute immunity.³⁸ However, it would come as a surprise, if state parties had chosen two incompatible standards within one year.

Of utmost significance to the understanding of the Article is its last clause: '[...] as may be *necessary* for the fulfillment of its purposes'.³⁹ According to general principles of interpretation, a rule should not be construed in a way as to render a part of it meaningless. The term 'necessary' delimits the first part of Art.105 UN-Charter 'The organization shall enjoy [...] such privileges and immunities [...]'.⁴⁰ Thus, it is decisive, whether the term would retain a narrowing impact, even if Art.105 (1) UN-Charter is construed in such a way as to allow for absolute immunity.

If Art.105 (1) UN-Charter allows for absolute immunity, one might possibly claim that it could just as well read: "The organization shall enjoy [...] absolute immunity and such privileges as are necessary [...]." In this case, the term 'necessary' would only restrain the privileges, but not the immunity that must be granted to the UN. Notwithstanding the fact that the term would not be without any relevance, one could argue that the precise wording requires a limiting impact on both immunity and privileges.

But this reasoning ignores that immunity is a legal term without a relevant natural meaning of itself and therefore understood in a variety of different

³⁸ Reinisch, *International Organizations*, p.335.

³⁹ Emphasis added.

⁴⁰ Reinisch, *International Organizations*, p.253.

ways.⁴¹ Some regard it as congruent to immunity from legal process including a clear distinction from privileges (this is also the way it was defined above for the purpose of this master-thesis), but this is arguably not what it was meant to imply in the UN-Charter. Most notably the use of the plural, 'immunities', reveals that the term was not understood to be a synonym for procedural immunity, but to encompass other manifestations of immunity as well. The CPI also follows a broad conception, as highlighted e.g. by Art. 3 Sect. 2 CPI, which uses the term immunity in the different context of 'search, requisition, confiscation'. To that extent the term 'necessary' retains its relevance in relation to immunities.

To sum up, absolute procedural immunity would only contradict the wording of Art.105 (1) UN-Charter, if one demanded that the term 'necessary' delimits any conceivable manifestation of immunity, including the immunity from process. Thus the ambiguous wording does not prohibit absolute procedural immunity.

2.1.1.4.2 The context

The CPI could be part of the context which must be taken into account in the process of interpretation, cf. Art.31 (1), (3) lit.a) VCLT. The CPI is a subsequent agreement regarding the interpretation of the UN-Charter. The crux of the matter is, whether the CPI is also an agreement concluded 'between the parties' in the sense of Art.31 (3) lit.a) VCLT, because not all member states of the UN are at the same time parties to the CPI. Art.31 (2) lit.a) VCLT requires an agreement made between all the parties. Conversely, given that Art.31 (3) lit.a) drops that specific reference to 'all' parties, a subsequent agreement between some of the parties only could also suffice to be taken into account in the interpretation. However, it is understood, that by 'the parties' all parties are meant. In the legal regime established by articles 31-33 of the VCLT, a recurring theme is that normally a phenomenon cannot be included in the context for the

⁴¹ Schermers, Blokker, p.234.

interpretation of a treaty, if all parties have not accepted it.⁴² Accordingly, each and every one of those states bound by the UN-Charter at the time of interpretation would have to be bound by the agreement. Thus, in order to take the CPI as context into account in the interpretation of the UN-Charter, one would either have to show, that as far as the CPI is concerned identical membership is not a prerequisite, or that the respective membership is in fact identical.

As regards the first approach one might argue, that the purpose of Art.105 (3) UN-Charter to facilitate an authoritative interpretation would be impeded, if it were understood to require an identical membership. On the other hand there is little in the wording supporting such a deviation from the principle of consent, which underlies Art.33 (3) lit.a) VCLT.

Since 157 of 192 member states of the UN are also parties to the CPI, the rules contained in it might be binding for the other states as customary law. In that case, there would be an agreement between all of the parties. This reasoning is in line with the statement that - given the nearly universal acceptance of the Convention - even members who have not acceded to the CPI are bound to provide for identical privileges and immunities.⁴³

However, even if the CPI cannot be taken into account according to Art.33 (3) lit.a) VCLT, it becomes relevant as subsequent practice. Art.31 (3) lit.b) VCLT stipulates, that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account as part of the context. Not all member states must have contributed to the practice, but all must have acquiesced in the interpretation established by the practice.⁴⁴ Yet, there is no contrary practice evident, which would cast doubt upon the acquiescence by those other states.

⁴² Linderfalk, *On the Interpretation of Treaties*, p. 162.

⁴³ Gerster/Rotenberg, p.1316, in: Simma, *The Charter of the UN*, Vol. II.

⁴⁴ Linderfalk, *On the Interpretation of Treaties*, p. 167.

Moving from the executive to the judicature, the practice is mainly established by national courts. However, the case law so far maintained the absolute immunity of the United Nations.⁴⁵

Summing up, the CPI must be taken into account at least as subsequent practice when construing Art.105 UN-Charter. At first glance, recognizing the supremacy of the UN-Charter, this might seem paradox. In fact however it is a logical consequence of the fact that both, the CPI as well as the UN-Charter, embody the intentions of the parties equally. The CPI can only influence the interpretation of the UN-Charter to a degree within the boundaries set by the ordinary meaning and the object and purpose. In other words, the meaning of the superior Art.105 UN-Charter is not defined by the inferior CPI, but informed by it. In the final analysis, this leads to reciprocity between the two rules.

As mentioned above, an absolute procedural immunity keeps in the bounds of the wording of Art.105 UN-Charter. The CPI therefore constitutes a strong indication, that an absolute procedural immunity is acceptable, since this standard may validly be regarded as 'necessary' under Art.105 UN-Charter.

2.1.1.4.3 Preparatory work

Art.32 VCLT limits recourse to preparatory work mainly to verify results which were already reached by other means of interpretation. With that in mind, the work of the United Nations Conference on International Organizations, which drew up the United-Nations Charter, deserves closer attention.

It is striking, that the wording of draft-article 105 by Committee IV/2 was accepted almost without discussion, both in the competent Commission IV

⁴⁵ Manderlier v. Organisation des Nations Unies and État Belge, Civil Tribunal of Brussels, 45 ILR (1972), 453; District Court in The Hague Judgment, Case number 295247, 10.7.2008; for further references, cf. Reinisch, International Organizations, pp.162, 254, 263.

and at the conference. Still, two conclusions can be drawn from the report of the Rapporteur of Committee IV/2. The report states that „the terms privileges and immunities indicate in a general way all that could be considered necessary to the realization of the purposes of the organization [..]. It would moreover have been impossible to establish a list valid for all the member states and taking account of the special situation in which some of them might find themselves by reasons of the activities of the organization or of its organs on their territory. But if there is one certain principle it is that no member state may hinder in any way the working of the organization or take any measures the effect of which might be to increase burdens, financial or other“.⁴⁶

First, the report suggests that one has to distinguish between two different levels of requirement of necessity.⁴⁷ The first level concerns what different kinds of privileges and immunities should be granted. But the extent of the respective immunity will be determined only at the second level. This analysis supports the argument made above, according to which immunities in general can be accorded in limited and procedural immunity at the same time in absolute terms.

Second, any kind of restricted standard of immunity would at least lead to increased financial burdens, which are not acceptable according to the report.

Hence, the preparatory work supports the interpretation reached above that Art.105 UN-Charter allows for absolute procedural immunity.

2.1.1.5 Conclusion

It has been shown, that Art.2 Sect. 2 CPI provides for absolute procedural immunity. Moreover, this construction is reconcilable with an interpretation

⁴⁶ The United Nations Conference on International Organization, Report of the Rapporteur of Committee IV/2, as approved by the Committee, Doc.933 IV/2/42, p.704 et seq..

⁴⁷ This approach was also adopted by Bekker, The legal position of intergovernmental organizations, p.39 et seqq..

of Art.105 UN-Charter; mainly because of the interpretatory reciprocity between the two rules.

Notwithstanding this conclusion, it makes sense to submit the standard of functional immunity to a careful examination for several reasons. There might exist better arguments than those considered above, which militate against the interpretation of Art.105 UN-Charter adopted in this thesis. What is more, concerning other international organizations some national courts adopted a functional approach in clear contradiction of the constituent treaty, which provided for absolute immunity.⁴⁸ While it is unlikely, that courts would apply this approach to the United Nations, it is by far not impossible, given the considerable complexity of interpretation delineated above.⁴⁹ Finally, a discussion would seem useful for the sake of completeness.

2.1.2 The functional immunity standard

In principle, approaches designed to determine, which acts are covered by functional immunity, fall into two broad categories. As a prerequisite of immunity, one could either demand a certain quality of the act itself, or one could look at the consequences of a denial of immunity for the work of the organization.

2.1.2.1 Determination on the basis of the quality of the act

2.1.2.1.1 Equating the standards of functional and absolute immunity

Sometimes it is argued that functional immunity necessarily equals absolute immunity (hereinafter equating-theory). This reasoning can also be found in

⁴⁸ In particular Italian courts, cf. Schmalenbach, *Die Haftung Internationaler Organisationen*, p.94 et seq.; Reinisch, Weber, *In the Shadow, 1 IOLR* (2004) p.62 et seq.; Reinisch, *International Organizations*, p.131 et seqq..

⁴⁹ The district court in *The Hague* oscillates in its judgment between a reasoning based on absolute and functional immunity, cf. *District Court in The Hague Judgment*, Case number 295247, 10.7.2008.

several national judgments.⁵⁰ It is based on the functional personality concept of international organizations, whereby their legal personality is functionally limited to the extent required to perform their actions.⁵¹ Thus, if all acts by the organization must be functionally justified, and if functional immunity at the same time covers all acts in the performance of the functions, there is no room left for non-functional acts for which immunity would be denied.⁵² All those acts would be ultra-vires.

2.1.2.1.2 A closer purpose-link is required for immunity than for personality

The weak point of the theory described above is that functional immunity does not necessarily cover all functional acts. In fact immunity could just as well be necessary only for a smaller category of activities. In other words, a closer link between the activity and the purpose could be required in matters of immunity than in matters of personality. In that case, the key question is about the nature of the link. Of course, the obvious starting point is the constituent treaty of the organization. However, the UN-Charter does not contain a specific reference in this regard.

A possible criterion to specify that link could be the principle of immediacy. Accordingly, an activity should be accorded immunity, if it serves the purpose immediately, . Vice versa no immunity should be granted, if the activity serves the purpose only indirectly. One might object this criterion, because often lawyers will not be able to draw a line between those different activities.

Bekker seems to suggest that the correct criterion is 'strictly necessary'. He begins his line of reasoning by arguing that the standard of functional immunity could become more clearly defined by the criterion of official

⁵⁰ Cf. footnote 35.

⁵¹ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion of 11.4.1949, p.179 et seq..

⁵² Seidl-Hohenveldern, Loibl, *Das Recht der Internationalen Organisationen*, p.282; Morgenstern, *Legal problems of international organizations*, p.6.

activity. But it is not entirely clear, what constitutes an 'official activity' according to him. Bekker states that “immunities enjoyed by an international organization are thus confined to their 'official activities' which are strictly necessary to the exercise of functions in fulfillment of the organization's purposes”.⁵³

One can either understand the reference to 'strictly necessary' as a qualification of the term 'official'. That way there would be a new and narrower category of official acts which enjoy immunity, distinct from functional acts which are not immune. Or official acts are identical with functional acts, but immunity is only granted to strictly necessary official acts. Ultimately, the two interpretations do not come to different results. Both ways, not all functional acts will be covered by immunity, but only those which are strictly necessary.⁵⁴ This – and not the term 'official activity' – is the major difference to the equation-theory.

Still, the precise meaning of 'strictly' is vague as well. According to Bekker, an act is only strictly necessary, if the activity is “a natural consequence of the organization's functions and purposes to such an extent that they could be said to logically arise from its purposes and functions”. This seems to be more a paraphrase than a clarification. A better criterion might be, whether the purpose can also be achieved without the activity concerned. If this is the case, the activity is not strictly necessary.

Therefore, are combat operations strictly necessary? According to Art.1 No.1 UN-Charter, a fundamental purpose of the United Nations is to maintain international peace and security. In this regard the UN-SC enjoys a wide scope of discretion, whether and what action is necessary pursuant to Chapter VII, cf. Art.42 UN-Charter. If the UN-SC considers combat operations as necessary, those operations serve to maintain or restore international peace and security, cf. Art.42 UN-Charter. Thus, combat

⁵³ Bekker, *The legal position of intergovernmental organizations*, p.42 et seqq., p.165.

⁵⁴ Reinisch seems to misinterpret Bekker's position on that point, cf. Reinisch, *International Organizations*, p.344, in footnote 90.

operations are strictly necessary to fulfill a fundamental purpose of the UN-Charter. The required link would be satisfied, and immunity granted.

2.1.2.1.3 Restrictive state immunity applied to International Organizations

The development from absolute to restricted state immunity is the result of a continuous expansion of the exceptions of immunity on the one hand; and a retention of immunity as the rule on the other hand. The constant transformation is driven mainly by national statutes and jurisprudence, and only to a lesser extent by international conventions. The European Convention on State Immunity (hereinafter ECSI) as well as the United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter UNCSI) are only binding on few states, with the result that the UNCSI is not even yet in force.⁵⁵ Therefore those conventions do not shape, but at the most clarify existing customary law.

As explained above, the historical starting point of the development was the expansion in the economic activities of foreign states and a simultaneous spread of democratic ideals. In order to avoid privileging foreign states compared to other economic operators, a restriction of immunity became inevitable. At least for commercial activities, restricted sovereign immunity now basically preserves immunity only for sovereign (*acte jure imperii*), but not for non-governmental (*acte jure gestionis*) activities. The criteria to distinguish between the two categories are controversial. The predominant ones are the nature of the act, the purpose of the act, or a combination of both.

Regarding the unsteady state practice in this matter, the controversy about the scope of restrictive state immunity in regard to torts comes as no surprise. This is particularly the case in regard to sovereign tortious acts committed by the forces.

⁵⁵ 8 and 6 respectively. Status as at 21-03-2009.

2.1.2.1.3.1 *The tort exception in common law and international conventions*

Mainly common law jurisdictions have regulated the issue of state immunity by statute. Those statutes can be found in the USA, Canada, the United Kingdom, Argentina, Pakistan, Singapore, Australia and South-Africa. All of them are similarly structured and – apart from Pakistan – all contain a tort-exception which provides for an exception of immunity in case of tortious conduct.⁵⁶

It is crucial to notice, that the exception is formulated broadly, thereby abandoning the traditional distinction on the basis of the sovereign character of the act. In other words, states do not enjoy immunity for sovereign tortious acts anymore.⁵⁷ The 'Letelier' judgment illustrates the potentially far-reaching impact of such a comprehensive exception. In that case the court did expressly not restrict the tort-exception to *acta iure gestionis*, but extended it to a political assassination of a former Chilean politician by Chilean secret service in the USA.⁵⁸ However, two caveats are in order.

First, all national statutes require some kind of territorial nexus. Notwithstanding some differences in the wording, it is for certain that the tortious act must have taken place in the country of jurisdiction. This was confirmed by the relevant national judgments.⁵⁹ Art. 11 ECSI and Art.12 UNCSI stipulate the same requirement. If this requirement is adopted to International Organizations, it would often constitute an insurmountable obstacle to any claim; because a lawsuit would only be admissible in the state, where the UN-mission took place.

Second, combat operations might fall under a counter-exception. The general tort-exception was originally created to preclude the possibility of

⁵⁶ Cf. for a detailed analysis of the statutes Bröhmer, *State immunity and the violation of human rights*, p.51 et seqq..

⁵⁷ A critical assessment of the conformity of this approach with international law undertakes Damian, *State immunity and judicial coercion*, p.114.

⁵⁸ *Letelier v. Republic of Chile*, 63 ILR (1982), p.378 et seqq.; cf. also *Liu v. Republic of China*, 101 ILR (1995), p.519 et seqq..

⁵⁹ Cf. for a detailed analysis of the statutes Bröhmer, *State immunity and the violation of human rights*, p.51 et seqq..

insurance companies hiding behind the cloak of State immunity in case of traffic accidents.⁶⁰ The expansion of the original concept in the case law of the common law jurisdictions described above does not in itself rule out counter-exceptions for certain sectors.

On the one hand, only two statutes provide for an explicit military exception.⁶¹ On the other hand, the statutes are open to interpretation. As far as can be seen there were no judgments rendered yet, which apply the tort-exception to sovereign acts of the military.

The multilateral conventions are similarly ambiguous. Art.31 ECSI excludes the armed forces on the territory of another Contracting State from the scope of the tort-exception enshrined in Art.11 ECSI. The dissenting judges in the case 'McElhinney' described Art.31 ECSI as an exception specific to the ECSI, which lacks general validity.⁶² However, the judges did not give any reasons for their assessment of Art.31 ECSI. Nevertheless, their result could be supported by the UNCSI. First, this Convention does not provide for a similar counter-exception to Art.12 UNCSI which would exclude the armed forces on the territory of another State . Second, it excludes military activities from the scope of the convention in general, as an *argumentum e contrario* from Art.3 UNCSI proves.⁶³ Having said that, the ILC commentary states that armed conflicts (a concept distinct from military activities)⁶⁴ are not covered by Art.12 UNCSI.⁶⁵ Given the mere subsidiary relevance of the preparatory work in the interpretation-process, one might be inclined not to attach major importance to the ILC commentary, compared to the rather open wording of Art.12 UNCSI. But then again, the

⁶⁰ ILC Commentary on draft articles on jurisdictional immunities of states, Yearbook of the International Law Commission, 1991, vol. II, Part Two, p.45.

⁶¹ Cf. Art.16 (2) UK State Immunity Act 1978, which states, that 'This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the M3 Visiting Forces Act 1952'. A similar exception can be found in the 1.

⁶² ECHR, *McElhinney v. Ireland*, (Joint dissenting opinion Caflish, Cabral, Baretto, Vajic), appl. no. 31253/96, p.18.

⁶³ The chairman's statement to the contrary should be noted, but it only enjoys subsidiary status and is inconsistent with a systematic interpretation of the convention and its travaux préparatoires, cf. Dickinson, *Status of forces*, 55 ICLQ (2006), p.428 et seqq..

⁶⁴ Dickinson, *Status of forces*, 55 ICLQ (2006), p.431 et seqq..

⁶⁵ ILC Commentary on draft articles on jurisdictional immunities of states, YILC, 1991, vol. II, part two, p.46.

ILC's statement finds support in the declaration of Norway, which forms part of the context, cf. Art.31 (2) lit.b).⁶⁶

2.1.2.1.3.2 The tort exception in civil law

In civil law jurisdictions the development of restricted state immunity was driven by the courts. But those courts uphold the distinction between *acta jure imperii* and *acta jure gestionis* not only in regard to commercial, but also for tortious acts. Acts of a military character - as for example opposed to traffic accidents involving the military - are typical sovereign acts, for which immunity would therefore be retained.

Yet the Greek *Aeropag* ruled in its 'Distomo' judgment contrary to this widely uniform pattern of judgments in civil law courts. It considered the tort-exception to constitute customary law and abandoned the *acte iure-imperii* dichotomy for torts.⁶⁷ At the same time it reasoned, that by way of exception immunity is retained in case of armed conflicts. It was only due to the atypical facts of the case, that the court did not classify the specific acts as constituting a part of the armed conflict, and denied immunity.

⁶⁶ The declaration states: "Recalling inter alia resolution 59/38 adopted by the General Assembly of the United Nations on 2 December 2004, in which the General Assembly took into account, when adopting the Convention, the statement of 25 October 2004 of the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property introducing the Committee's report, Norway hereby states its understanding that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties. Such activities remain subject to other rules of international law." Admittedly, this declaration denies the applicability of the whole convention to military acts. In contrast to a counter-exception this view would lead to an application of the general rules of international law, which could in principle also deny immunity for military acts. But since the intention of the declaration clearly was to uphold immunity for acts of the military, it militates in favor of a counter-exception.

⁶⁷ German translation in extracts in KJ 2000, p.472 et seqq.; extracts of the judgments in English with comments also in Prefecture of Voiotia, 95 AJIL 2001, pps.198.

2.1.2.1.3.3 Application of these approaches to International Organizations

It has been demonstrated that, contrary to the claim by the dissenting judges in the McElhinney case,⁶⁸ it is highly doubtful whether the tort exception actually reflects customary law – since a uniform state practice is missing. Therefore, both approaches shall be tested for their suitability to apply them *mutatis mutandis* to the immunity of international organizations.

2.1.2.1.3.3.1 Criterion of sovereignty (as decisive in civil law jurisdictions)

The majority of commentators reject the application of the concept of restrictive state immunity to international organizations.⁶⁹ Usually this discussion takes place against the background of commercial activities, since historically that was the most likely and frequent way international organizations could interfere with individual rights and freedoms. Therefore, the discussion revolves around the suitability of the *iure imperii* / *iure gestionis* distinction to international organizations.

Most notably, critics maintain that immunity of international organizations and states respectively rests on different legal justifications. On that account, applying the distinction that is used in the law of state immunity would be unsound in theory and would lead to inadequate results in practice.

The scope of state immunity is often assumed to result from the balancing of two conflicting sovereignties: one state's claim to enforce its jurisdictional power and another state's claim to preserve its autonomy from the authority of the organs of the former are in opposition to one another.⁷⁰ In contrast, international organizations lack sovereignty in a traditional sense. This is due to the fact that they are not legally independent from the will of their members.⁷¹ Instead, immunity is granted on account of functional

⁶⁸ ECHR, *McElhinney v. Ireland*, (Joint dissenting opinion Caflish, Cabral, Baretto, Vajic), appl. no. 31253/96, p.20.

⁶⁹ Cf. Reinisch, *International Organizations*, p.348 et seqq..

⁷⁰ Damian, *State immunity and judicial coercion*, p.15; Albert, *Völkerrechtliche Immunität ausländischer Staaten gegen Gerichtszwang*, p.32 et seqq.; Malina, *Die Völkerrechtliche Immunität ausländischer Staaten im zivilrechtlichen Erkenntnisverfahren*, p.45 et seqq.; Lüke, *Die Immunität staatlicher Funktionsträger*, p.212 et seqq..

⁷¹ Reinisch, *International Organizations*, p.350 et seqq..

considerations in order to secure the ability of the international organizations to discharge their purposes.

This reasoning ignores the impact of the restrictive immunity doctrine. As Reinisch puts it, the concept of restrictive immunity “presupposes, that not all state actions are sovereign actions”.⁷² Thus, the emphasis is shifted from the legal characterization of the person acting to the governmental quality of the act concerned. When states delegate sovereign powers to international organizations, the latter exercise those governmental powers.⁷³ Hence, international organizations can also act quasi-sovereign on the one hand and private on the other hand.

Nonetheless, a distinction based on the nature of the act would indeed - at least concerning economic activities of the organizations - lead to inadequate results. This is true for two reasons: First, in certain circumstances economic activities are of a far greater importance to international organizations than to states, because they can be essential for the fulfillment of its purposes. Second and more important, specific economic activities in themselves constitute for some organizations some of their functions.⁷⁴ A blanket qualification of certain acts by their nature is therefore inadequate, since it is not compatible with the character of functional immunity, whose point of reference is the achievement of certain purposes.

The same arguments also hold true in principle for tortious conduct of international organizations. Activities necessary for the fulfillment of the purposes of the organization, which are likely to inflict damage, might be qualified as private according to the criterion of the nature of the activity.⁷⁵

In contrast, a distinction based on the object of the act would make sense for international organizations; because in that case the point of reference would

⁷² Reinisch, *International Organizations*, p.350.

⁷³ Reinisch, *International Organizations*, p.353.

⁷⁴ Reinisch, *International Organizations*, p.359 et seq..

⁷⁵ A (hypothetical) example could be a nuclear-fusion-power plant.

be the purpose of the organization. More recent judgments of those courts, that apply the restrictive immunity doctrine to international organizations, also follow this approach.⁷⁶

But such an understanding of restrictive immunity raises the same problems as to the necessary purpose-link. Just as in old cases of state immunity, one could always find some link between the activity and a purpose of the organization – irrespective of how distant that link would be. In other words, to apply such a standard adds nothing to the concept of functional immunity.

2.1.2.1.3.3.2 Broad tort exception (as applied in common law jurisdictions)

So far literature has not dealt with the question, whether the common law tort exception could be applied to international organizations. The tort exception can be justified by arguing, that within the balancing process described above the state has a peculiar interest to assert its jurisdiction in case of tortious conduct.⁷⁷

But such an all-embracing exception is not reconcilable with the principle of functional immunity for the afore-mentioned reasons in regard to the nature of the act as the decisive criterion. In other words, activities of the organization in the fulfillment of its purposes, which are likely to cause damage, could be unduly influenced.

2.1.2.1.3.4 Conclusion

Therefore the bottom line, that to apply the concept of restrictive state immunity to international organizations is either futile or inapt – depending on the respective understanding of state immunity.

⁷⁶ Schmalenbach, Die Haftung Internationaler Organisationen, p.95.

⁷⁷ Hess, Staatenimmunität bei Distanzdelikten, p.312; Lüke, Die Immunität staatlicher Funktionsträger, p.214 in Footnote.668.

2.1.2.1.4 Is it possible to qualify a violation of humanitarian law as an official act?

One might argue, that it is per se not possible to qualify a violation of humanitarian law as an official act, for which the UN would enjoy immunity. This was the approach adopted in principle in the first ‘Pinochet’ decision.⁷⁸ This argument is even stronger in regard to international organizations as in regard to states. It has been explained, that an official act is only an act which is linked to the purposes of the organization. It has also been shown, that a purpose of the UN is to safeguard human rights and humanitarian law, cf. Art.1 III, 55 UN-Charter. Therefore, it can be argued, that an act, which violates humanitarian law is not in accordance with the purposes of the organization, therefore not official in nature, and thus not immune.

On the other hand, it could be argued, that this approach risks to undermine the protection afforded by immunity, if every alleged human rights violations would lead to an exception from immunity. Furthermore, the activity is undertaken by an agent of the organization in official capacity. However, if one accepts a functional standard of immunity for the UN, the argument – that the preconditions of immunity are not met – so far seems to be the strongest one.

2.1.2.2 Determination on the basis of the implications for the work of the organization

Art.105 UN-Charter stipulates that “the Organization shall enjoy [...] such privileges and immunities as are necessary for the fulfillment of its purposes”. It does not say that the Organization shall enjoy immunity for all acts, which are necessary for the fulfillment of its purposes, or use another similar wording. Instead, the specific wording of Art.105 UN-Charter points

⁷⁸ Lord Steyn, House of Lords, Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte, 25.11.1998, WLR 1998, Bd. 3, 1456 (1505 ff.); Lord Nicholls of Birkenhead, House of Lords, Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte, 25.11.1998, WLR 1998, Bd.3, 1456 (1499 ff.).

towards a test which would assess the negative consequences of a denial of immunity for the proper functioning of the United Nations. In other words, the decisive criterion seems to be the impact of the lack of immunity (and as the case may be, of a defeat in court) for the fulfillment of the purposes of the organization. In view of this wording, it comes as a little surprise, that such an impact-assessment is not more frequently advocated.⁷⁹

But the implementation of an impact-assessment faces some major difficulties.

First on a factual level, there is a multitude of criteria which need to be taken into account. Thus it is a highly speculative task to determine the precise impact of a denial of immunity;. Second and on a legal level, an impact-assessment necessarily works on a case-by-case basis without a clear-cut legal borderline. That could open the floodgates for national courts to deny immunity on dubious justifications.

Another objection could be, that an impact-assessment leads to inappropriate results in regard to the legal protection of third parties. On the one hand, in a case of a severe and widespread violation of humanitarian law, a claim for compensation could financially overburden the organization, and immunity would be upheld. On the other hand, a claim based on singular, possibly less serious violation, would proceed to the merits. The reason for this paradox is that immunity strives for protection of the organization from state interference which would endanger its functioning, but is in principle not concerned with the protection of third parties.

Further, an impact-assessment and advocating a closer-purpose-link face a similar problem: how should the standard of necessity be substantiated? Is immunity only granted, if its denial would make it impossible for the United

⁷⁹As far as can be seen only Spijkers expressly and Wenckstern implicitly proposes an impact assessment for international organizations, cf. Spijkers, *The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court*, 13 JIP (2009), p.203; Wenckstern, *Die Immunität internationaler Organisationen*. p.17 et seqq. As far as state immunity is concerned, an impact assessment is undertaken by Norman Paech, *Wehrmachtsverbrechen in Griechenland*, KJ 1999, 394 ff. and Bröhmer, *State immunity*, p.196 et seqq.. Cf. also Reinisch, *International Organizations*, p.365.

Nations to fulfill its purposes? Or is it sufficient, if the fulfillment is made more difficult, or even only slightly impaired?

The last two objections might be solved by the adoption of a proportionality-approach. In essence, immunity would be denied, if the severity of the infringement by the organization would outweigh the adverse effect to the functioning of the organization. In any case immunity would have to be upheld, if a denial would render it impossible for the organization to fulfill its purposes.

If one adopted this approach, national courts would presumably not grant immunity in some cases of violations of humanitarian law. However, this must be assessed on a case-by-case basis.

2.2 Restriction of immunity by conflicting rules of international law

It has been shown, that from the perspective of Art.105 UN-Charter the United Nations enjoy immunity in front of national courts, even if a violation of international humanitarian law forms the basis of the lawsuit. But this principle might conflict with the violated rule of humanitarian law as well as with the human rights guarantee of free access to a court.⁸⁰

2.2.1 Jus cogens

A hierarchy of norms is a common element in national legal systems, *lex superior derogat inferiori*. In contrast to the formal hierarchy of the national system, there is no hierarchy between the different sources of international

⁸⁰ In regard to the immunity of states, two other approaches are often discussed. Firstly, it is often argued, that by violating rules of human rights law, states tacitly waived immunity. This already seems doubtful. But whatever the merits of this argument may be in relation to states, Art.2 Sect. 2 UNCSI requires an express waiver. Secondly, it is argued, that the state may lift the immunity by way of reprisal. But Art.8 Sect. 29 UNCSI stipulates, that “all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice [...]”. Therefore it seems that states may not resort to reprisals anymore.

law, such as for instance supremacy of customary law over treaties.⁸¹ Instead a rule can take precedence for material reasons, i. In other words, the supremacy can flow from the content of the so-called jus cogens norm. This prompts the question whether it follows from that supremacy, that the violation of a jus cogens rule also removes immunity for a corresponding claim for damages.

2.2.1.1 Nature and content of jus cogens

Art.53 VCLT codifies, that “a treaty is void if it conflicts with a peremptory norm of general international law”. A peremptory norm in turn is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Furthermore, Art.64 VCLT stipulates the same legal consequence in case a new peremptory rule develops. The importance of those rules lies in the restriction of the capacity of states to conclude treaties, which was unlimited before. Whereas the existence of jus cogens is disputed, yet widely accepted, it is dubious, which rules can be ascribed a jus cogens character. Furthermore, it is not clear what legal consequences follow from qualifying a rule as jus cogens - besides those laid down in Artt. 53, 64 VCLT.

It seems preferable to take the formal approach enshrined in the VCLT as a starting point to identify rules of a jus cogens character; instead of positivistic, natural rights based oder inductive methods. Even though the definition given in Art.53 VCLT might sound circular at first, such a reading would ignore its relevance. The definition rather reveals that decisive is not primarily the moral relevance but the legal consequences of

⁸¹ ILC Report, Conclusions of the work of the study group on the fragmentation of international law: Difficulties arising from the diversification and expansion of international law, Yearbook of the International Law Commission, 2006, vol. II, Part Two, No.31.

the rule. Any derogation from the rule must be interdicted. In other words, states must have ceded the possibility to dispose over certain rights.⁸²

Many writers assume that at least⁸³ the minimum standards of humanitarian law are rules of jus cogens.⁸⁴ This view is supported by the ICJ, which ruled in the Palestinian Wall advisory opinion that at least certain humanitarian rules are of a peremptory character.⁸⁵ However, it would go beyond the scope of this master-thesis to identify all of these rules. Instead, the analysis will – as pars pro toto - focus on rules protecting civilians, since a big share of possible claims derives from the violation of those duties.

Civilians, who are not in the power of the adversary,⁸⁶ are fundamentally protected by the prohibition to attack civilians, anchored in Art.51 AP I. Paragraph two of this article prohibits direct attacks, and paragraph four indiscriminate attacks against the civilian population. The latter also comprises "attacks, which may be expected to cause [...] injury to civilians [...] which would be excessive in relation to the concrete and direct military advantage anticipated", cf. Art.51 (5) lit.b) AP I. This prohibition of disproportionate attacks is a manifestation of the principle of

⁸² Kadelbach, Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms, in: Tomuschat, Thouvenin (Edts.), *The Fundamental Rules of the International Legal Order*, p.29 et seqq., p.35.

⁸³ Sassòli, Bouvier, *How does law protect in war*, Vol. I, p.135 even claim, that most obligations of international humanitarian law are rules of jus cogens.

⁸⁴ Hannikainen, *Peremptory norms (jus cogens) in international law*, p.621 with further references; Fleck, *The Handbook of International Humanitarian Law*, para.135; Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in: Tomuschat, Thouvenin (Edts.), *The Fundamental Rules of the International Legal Order*, p.30 et seq. with further references; Talmon, *An obligation without real substance*, in *ibid.*, p.103; Schmahl, *An example of jus cogens: the status of POW*, in *ibid.*, p.57; Alexander Orakhelashvili, *The Impact of Peremptory Norms*, EJIL 2005, p.66; ILC Report, *Conclusions of the work of the study group on the fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, Yearbook of the International Law Commission, 2006, vol. II, Part Two, No.33.

⁸⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9.6.2004, para.159.

⁸⁶ The protection of civilians can be systematically split up (cf. Fleck *The Handbook of International Humanitarian Law*, p.237) in (a) protection of civilians in the hand of the adversary, cf. in particular GC IV and AP I, as well as (b) protection from direct effects of hostilities. Only the latter rules shall be analyzed in this thesis because they are more important for UN-missions. Hannikainen states, that the latter rules also have to some extent a peremptory character, cf. Hannikainen, *Peremptory norms (jus cogens) in international law*, p.720.

proportionality, which has general application in international humanitarian law. According to the International Committee of the Red Cross (hereinafter ICRC), those are principles of customary law.⁸⁷ To establish, that they are moreover peremptory rules, one needs to find evidence that states decided to cede the possibility to dispose over the corresponding rights.

One aspect in disfavor could be that states are allowed to denounce the convention, cf. Art.99 AP I. But a termination of the treaty does not suffice to remove the binding force of customary law - a status acquired by those principles.

One might further argue, that a *si-omnes* clause – that is to say a provision which confines the obligation to comply with rules of humanitarian law to situations, in which all warring parties are also a party to the convention – would show that states are not bound in all events. This requirement of reciprocity was still featured in the Hague Law. But the Geneva Conventions (hereinafter GC) replaced it in favor of a duty to respect the law in all circumstances, cf. Art.1 GC. The same applies to the AP I, as it builds upon the GC.⁸⁸ This is confirmed in Art.1 (1) AP I. According to the ICRC, this move away from the law of the Hague became customarily binding.⁸⁹ Besides, as all warring parties are bound by the above principles customarily,⁹⁰ a *si-omnes* clause would not apply anyway.

However, one could argue, that reciprocity is still relevant as far as parties of the conflict are allowed to resort to reprisals against the civilian population. This practice is prohibited by Art.51 VI AP I. Yet it is contested, whether this is a customary rule. In the light of contrary state practice, in particular a strong opposition in the drafting process, a customary nature is rejected by the ICRC; even though it recognizes a strong trend towards a

⁸⁷ Summed up in rules 7, 11-13, und 14, Henckaerts, Doswald-Beck (edt.), Customary International Humanitarian Law, Vol. I, p.25, p.37 et seqq..

⁸⁸ Abi-Saab, Georges, The specificities of humanitarian law, in: Swinarski (edt.), Studies and essays on IHL and Red Cross Principles in honor of Jean Picet, p.267

⁸⁹ Henckaerts, Doswald-Beck (edt.), Customary International Humanitarian Law, Vol. I, Rule 140.

⁹⁰ This is not unproblematic. Concerning the UN cf. below Chapter C, I, 1, a).

customary prohibition.⁹¹ Other commentators arrive at a more differentiated and persuasive result. They take the state practice as an opposition mainly against a prohibition of indiscriminate attacks against civilians in reprisal, but not against a prohibition of direct attacks in reprisal.⁹² It is argued, that in regard to disproportionate attacks this is also a position which is at least justifiable.⁹³

In favor of a classification as peremptory norms one should mention the concept of grave breaches. In case of the violation of certain humanitarian rules – inter alia the principles described above, cf. Art.85 (3) AP I - states are obliged to criminally prosecute the persons responsible. But it would make no sense to criminalize an act, and at the same time allow the parties to a conflict to deviate from the same rule.⁹⁴

Further, deviating inter-se agreements between some state parties of the conventions are forbidden,⁹⁵ and military necessity is no excuse for a departure from duties under international humanitarian law.

Thus, the crucial factor for the classification of a rule of humanitarian law as peremptory seems to be, to what extent the respective norm also prohibits reprisals. One has to keep in mind that it is often difficult to distinguish between military and civilian objects, because the former may also be objects of a mere indirect military importance. Regarding this, even direct attacks on civilians in the course of a UN-operation are not inconceivable. All the more this is the case with regard to the principle of proportionality. Moreover, other rules of humanitarian law of particular relevance to UN-operations could be of a jus cogens nature as well; e.g. the parts of GC III

⁹¹ Henckaerts, Doswald-Beck (edt.), Customary International Humanitarian Law, Vol. I, p.520 et seqq..

⁹² Hannikainen, Peremptory norms (jus cogens) in international law, pp.685, 679.

⁹³ Fleck, The Handbook of International Humanitarian Law, para.447; Hannikainen, Peremptory norms (jus cogens) in international law, p.685 et seq..

⁹⁴ Kadelbach, Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms, in: Tomuschat, Thouvenin (Edts.), The Fundamental Rules of the International Legal Order, p.30.

⁹⁵ Hannikainen, Peremptory norms (jus cogens) in international law, p.605 et seq.; Kadelbach, Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms, in: Tomuschat, Thouvenin (Edts.), The Fundamental Rules of the International Legal Order, p.31.

and IV concerning the protection of prisoners of war⁹⁶ and civilians in the power of the adversary⁹⁷ respectively.

To sum up, the United Nations might violate jus cogens in the course of its operations. Still, this leaves the question open, whether this also leads to an exception of immunity in a possible trial.

2.2.1.2 Impact of violations of jus cogens on state immunity

2.2.1.2.1 Dogmatic foundation

Concerning state immunity, this issue has played an important role in a couple of recent judgments. The ‘Al-Adsani’ judgment by the ECHR demonstrates the legal difficulty.⁹⁸ In this case, the court had to decide whether the dismissal of an action for damages on account of alleged torture against the state of Kuwait by the English House of Lords due to immunity constituted a violation of the claimant's right to a fair trial as enshrined in Art.6 ECHR. This was answered in the negative by a minimal majority of nine to eight judges. The reasoning in this judgment deserves to be explained in more detail, since it is also of particular relevance for the right of access to the court, discussed further below.

All judges agreed on the methodical starting point. Affirming their constant case-law, the court held that “the procedural guarantees laid down in Article 6 would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to a court”. However, since the right to access to the court needs to be regulated by the state because of its very nature, it follows that it is not an absolute right. Rather, this right may be limited by the state who must in using its margin of appreciation observe the limits of proportionality and the very essence of

⁹⁶ Schmahl, an example of jus cogens: the status of POW, in: Tomuschat, Thouvenin (Eds.), *The Fundamental Rules of the International Legal Order*, p.57 et seqq.

⁹⁷ Hannikainen, *Peremptory norms (jus cogens) in international law*, p.720.

⁹⁸ This jurisprudence was affirmed by the ECHR in *Kalegoropoulou v Greece and Germany* (Application No. 50021/00, unreported). The claimants in the *Distomo*-case had sued, because they were lacking the necessary authorization by the executive to enforce their judgment, which provided for claim for damages, by way of execution.

the right. According to the court, the legitimate aim pursued by granting state immunity is “to comply with international law to promote comity and good relations between States”. In assessing whether the restriction is proportionate, the judges resorted to Art.31 (3) lit.c) VCLT. To their mind this rule necessitates an interpretation of the ECHR in conformity with other rules of international law. Therefore, limitations which comply with customary rules of state immunity “cannot in principle be regarded as imposing a disproportionate restriction on [...] Article 6 (1) ECHR“. On account of this, the court only had to decide about the scope of state immunity. That is to say, whether there exists in the given case a customary duty for states to grant immunity. The judges were also in agreement on the peremptory nature of the prohibition of torture. Hence, the problem of the legal consequences of a violation of jus cogens was crucial for the outcome of the case. On this point the judges were divided.

The majority maintained that “the present case concerns not the criminal liability of an individual for alleged acts of torture but the immunity of a state in a civil suit for damages”. “Notwithstanding the special character of the prohibition of torture” the judges found no sufficient state practice “for concluding that a state no longer enjoys immunity from civil suits in the courts of another state where acts of torture are alleged”. The majority subsequently analyzed the ILC commentary but found that neither the cited judgments, in particular the ‘Pinochet’ judgment, nor the amendment of the United States Foreign States Immunity Act (hereinafter FSIA) produce a different result.

In contrast, the minority began its assessment by stating that only the prohibition of torture constitutes jus cogens, but not the rules of state immunity. They went on that this “entails that a State allegedly violating the rule of jus cogens [sic!] cannot invoke hierarchically lower rules [...] on state immunity to avoid the consequences of the illegality of its actions”. This leads to the conclusion, that “the bar of state immunity is automatically lifted because those rules, as they conflict with hierarchically higher rule, do

not produce any legal effect”. Similarly the “distinction made by the majority between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the jus cogens rules”.

The judgment, but even more the dissenting opinion, is brief and succinct. Whereas the peremptory nature of the prohibition of jus cogens is still substantiated in some detail, the reasoning concerning the legal consequences of a violation is not.

It has been argued that the majority only looks for a customary exception to state immunity, but does not deal with the fundamental argument of the minority that the supreme prohibition of torture overrides the subordinate conflicting rules of state immunity.⁹⁹ A closer examination however shows that in fact both positions had to struggle with the legal consequences of jus cogens.

The reasoning of the minority rests on two assumptions. First, the judges assume that the rule anchored in Artt. 53, 64 VCLT is also applicable to conflicts between jus cogens and customary law. Even though this assumption is not unproblematic, it seems to be widely accepted. Second and even more important, they presume implicitly that there is a conflict between the two rules in the first place. But a conflict only exists, if the requirement of one rule and the prohibition of another rule are in opposition to each other.¹⁰⁰ Thus, either the prohibition of torture would have to entail a requirement for states to grant legal protection to all victims of torture by way of a civil remedy in front of their courts; in addition that requirement would have to partake in the jus cogens nature of the general rule. Or a general rule would need to be proven, which demands that the legal consequences of a violation of any jus cogens rule is the right to a legal avenue in third countries if required.

⁹⁹ Cremer, Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit, AvR 41 (2003) p.159 et seqq..

¹⁰⁰ Jenks, Conflict of law-making treaties, BYIL 30, p.426; Karl, Conflict between treaties, in: Wolfrum (ed.), Encyclopedia of Public International Law, p.468; Czaplinski, Danilenko, *Conflict of norms in international law*, NYBIL 1990, p.12.

It seems, that after an analysis of the state practice the majority rejected precisely that this requirement was fulfilled. In other words, they denied the existence of a conflict. This helps to explain their reference to the distinction between criminal and civil proceedings: whereas the majority seems to consider this requirement to be fulfilled in regard to the former, it rejects it for the latter.

The presumption of the existence of a conflict by the dissenting opinion on the other hand tacitly assumes that those procedural (existence of an effective remedy) and material (right of damages) consequences are inherent in the concept of jus cogens. The minority does not try to refute the majority's analysis of state practice, because from its theoretical point of view there is no need to.

Eventually, this assumption also explains the conclusion that a distinction based on the nature of the proceedings is not reasonable. Indeed, it would make little sense to argue that inherent legal consequences of the concept of jus cogens are limited to criminal proceedings.

In point in favor of the minority's view is, that the notion of jus cogens is of little avail without effective legal consequences. The nullity of a treaty as provided for in the VCLT however has only a very limited impact. In that sense a pure formal reasoning ignores that the very idea of jus cogens intends not only the prohibition of contradictory agreements but above all to eradicate a certain practice.¹⁰¹ In contrast, a formal reasoning could in fact lead to impunity of those responsible¹⁰², and deprive the victims of all civil rights.

On the 'con' side of the argument, it is dubious whether lawsuits in third countries are the proper way to prevent such violations, if one takes the stability of the whole international system into account. It is neither possible

¹⁰¹Voyiakis, Access to Court v State Immunity, 52 ICLQ 2003, p.319.

¹⁰²McGregor, Torture and State Immunity, 18 EJIL p.903 et seqq..

nor necessary to answer this question at this point, because as public international law stands right now, it is up to the states to decide. Put in a different way, to attach a legal consequence to a norm without sufficient supporting state practice is contrary to the principle of international law that the formation of new law requires consent.

This reasoning of the majority was also at the bottom of the judgment of the ICJ in the Arrest-Warrant case. In that case, the court ruled that criminal proceedings against a foreign minister are barred by immunity *rationae personae*, if he is still in office; even though the minister had allegedly violated *jus cogens*. This shows at least that the ICJ, too, assumed that the prohibition to violate *jus cogens* does not in itself imply secondary rules that lift immunity.¹⁰³

Therefore, the further analysis will be based on the dogmatic foundation of the majority's reasoning.

2.2.1.2.2 Analysis of the state practice

This leaves the question open, whether the analysis of the state practice by the majority is (still) correct. As has been explained above, one would have to show that either the prohibition of the violation of a specific *jus cogens* rule entails an additional *jus cogens* requirement for states to grant legal protection by way of a civil remedy in front of their courts; or that a general rule demands that the legal consequences of a violation of any *jus cogens* rule is the right to a legal avenue in third countries.

The majority characterized the amendment of the FSIA¹⁰⁴ as irrelevant, arguing that “the very fact that the amendment was needed would seem to

¹⁰³It is not possible to conclude vice versa from the assumption of a court, that no immunity exists in criminal proceedings, that this court applies the theory of inherent legal consequences of *jus cogens*, cf. further below.

¹⁰⁴§ 1605 FSIA was changed to include a so-called terrorism-exception:

'A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case - [...]

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in Sect. 2339A of title 18) for such an act if such act

confirm that the general rule of international law remained, that immunity attached even in respect of claims of acts of official torture”.

This reasoning does not take into account that the courts in the United States have construed the FSIA as an exhaustive instrument. In other words, they only accept an express exception provided for in the FSIA as a reason not to grant immunity, but not an exception in public international law. Thus, if no duty to grant immunity existed on the international plane, the United States still would have had to amend the act.

One could argue, that the non-existence of a general statutory exception militates against an exception in customary law.¹⁰⁵ But since states may in principle grant unilaterally a more extensive immunity as required by international law, the lack of a statutory exception could also only mean that the United States denies the existence of any international duty to lift immunity; and not that it assumes the existence of a duty to grant immunity. Moreover, given that an exception only to the detriment of some states would possibly violate international law, one could argue that the United States assumes that no international law duty existed in such cases to grant immunity. However, as a singular fact, the amendment of the act cannot in itself establish customary law.

Turning to jurisprudence, the courts in the United States consistently oppose a blanket *jus-cogens* exception from state immunity.¹⁰⁶ But again, this

or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism [...]; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim [...]; or

(ii) neither the claimant nor the victim was a national of the United States

[...] when the act upon which the claim is based occurred.'

¹⁰⁵ *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26, per Lord Hoffmann §59.

¹⁰⁶ *Siderman de Blake and Others v. The Republic of Argentina and Others*, United States Court of Appeals, Ninth Circuit, 103 ILR (1996), p.454 et seqq.; cf. also the other judgments referred to by the ECHR: *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 81 ILR (1990), p.658 et seqq. which does not concern the violation of peremptory law, but derives its relevance from the fact, that the court introduced in this judgment the supremacy of the FSIA over

allows only limited conclusions to be drawn about customary law,¹⁰⁷ because the judgments proceed on the basis that an express exception needs to be shown in the FSIA.¹⁰⁸ Therefore, the existence of an exception in international law was not decisive for these judgments.

In the case law of the United Kingdom, the ‘Al-Adsani’ judgment itself is obviously opposed to such a state practice.¹⁰⁹ But its relevance could be limited by the judgment of the House of Lords in the ‘Pinochet’ case, if and insofar the exception made there from immunity *rationae materiae* of former head of states in criminal proceedings for torture could be generalized. In this way the judgment was acknowledged by the ILC as a potentially groundbreaking step towards limited immunity in civil proceedings as well.¹¹⁰ The ECHR rightly countered this argument by referring to the reasoning of some Law Lords who explicitly stated that the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims is not affected.¹¹¹ Furthermore - and notwithstanding their differing argumentation on several points - none of the Law Lords based the exception from immunity in the ‘Pinochet’ judgment on the supremacy of

ATCA, and moreover introduced the requirement of a specific exception in the statute; *Princz v. Federal Republic of Germany*, United States District Court, District of Columbia, and Court of Appeals, District of Columbia Circuit, 103 ILR (1996), p. 594 et seq., in which the court argued in view of the requirement of an explicit statutory exception, that the violation of *jus cogens* leads to an tacit waiver of immunity; *Saudi Arabia and Others v. Nelson*, United States Supreme Court, 100 ILR (1995), p.544 et seq., which concerns the issue of the scope of the exception from immunity in regard to economic activities. Even though in those cases, the supremacy of *jus cogens* was not at issue, the judgments are still relevant in this regard, because states upheld immunity, even though a violation of peremptory law was at issue.

¹⁰⁷ Bröhmer, *State immunity and the violation of human rights*, pp.76, 84.

¹⁰⁸ Cf. *Siderman de Blake and Others v. The Republic of Argentina and Others*, United States Court of Appeals, Ninth Circuit, 103 ILR (1996), p. 474 et seq. with reference to the judgment in *Amerade Hess* (cf. footnote 101), which leaves open, whether a *jus cogens* exception is accepted under public international law; Defeis, Elizabeth, *The Foreign Sovereign Immunities Act and The Human Rights Violations*, 8 ILSA Journal of Int. & Comp. Law pp.368.

¹⁰⁹ *Al-Adsani v. Government of Kuwait and Others*, Court of Appeal, 107 ILR (1997), p.537 et seq..

¹¹⁰ Report of the Working Group on jurisdictional immunities of States and their property, UN Doc. A/CN.4/L.576, YILC 1999, Vol. II (2), p.172.

¹¹¹ *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No.3), 24.3.1999, per Lord Phillips, per Lord Hutton, and per Lord Millett.

jus cogens.¹¹² Instead they used the criterion of official activity, argued with a tacit removal of immunity by the UNCAT, or the consistency of public international law.¹¹³ This narrow reading of the judgment¹¹⁴ was affirmed by the House of Lords in the ‘Jones Case’, in which the Law Lords dismissed a claim for compensation on grounds of immunity, basing themselves on the authority of the Al-Adsani judgment.¹¹⁵ Moreover, in that case the judges emphatically refuted the argument of an exception of state immunity based on the supremacy of jus cogens.¹¹⁶

To sum up, the case law of the House of Lords does not acknowledge an exception to immunity *rationae materiae* based on jus cogens.

In addition to the practice described above, which the ECHR took into account as far as possible,¹¹⁷ subsequent judgments deserve consideration.

The ‘Distomo’ judgment by the Greek Aeropag denies immunity not only on the grounds of the tort-exception, but argues also that immunity was implicitly waived by violating jus cogens. Even though this argument is distinct to the one under consideration, it supports the conclusion that no immunity should be granted in the event of a violation of a peremptory norm.¹¹⁸

¹¹²This idea is only raised by Lord Slynn of Hadley in his dissenting opinion in the first judgment, but he rejects it.

¹¹³Cf. Bank, Der Fall Pinochet, 59 HIJL (1999), p.688 et seqq..

¹¹⁴Accordingly, the State not only enjoys immunity in case of a violation of jus cogens, but this reasoning is extended to all civil proceedings, and thus also in regard to claims against state organs.

¹¹⁵The irony lies in the composition of the bench: whereas Lord Bingham rendered the High Court of Justice's judgment in the Pinochet Case which was overruled by Lord Phillips and the other Lords in the House of Lords, it was the other way around in the Jones-case.

¹¹⁶Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others, [2006] UKHL 26: per Lord Bingham para.24; and per Lord Hoffman para.44.

¹¹⁷The judgment in the Jones-case was rendered subsequently to the Al-Adsani judgment.

¹¹⁸Cf. footnote 63.

However, in the ‘Ferrini’ judgment¹¹⁹ the Italian court of cassation opposed the application of the tort exception as well as the idea of a tacit waiver of immunity.¹²⁰ Instead the court argued that it is impossible for the notion of jus cogens “not to be reflected in the scope of the other principles [...] of the international legal order, especially the principle of 'sovereign equality' of states, which incorporates the recognition of one State's immunity from the civil jurisdiction of other states.”¹²¹ The court amplified this train of thought when it stated that “the proposition [...] that only an express normative provision would be able to justify derogation from the principle of state immunity [...] is one with which the court cannot agree”.¹²² Those statements show that the court resumed the reasoning of the minority in *Al-Adsani*.

Noting the deviating precedents described before, the court tried to distinguish them from the case at hand by the fact that the proceedings in the Ferrini case were brought in the country where the tortious conduct took place.¹²³ This line of argument is not convincing. The focus on the place of the tort would make good sense, if the court had applied the tort-exception. But as said before, this was rejected by the court for acts of the military. Apart from that, there seems to be no reason why the violation of jus cogens should lead only to an exception of state immunity if the tort scene and the forum-state coincide; but not if they do not. In particular it is not possible to refer to a corresponding state practice which distinguishes between those cases, since the court followed the conception of inherent legal consequences which does not rely on state practice at all. Neither would it make sense to argue that the legal consequences allegedly inherent in the concept of jus cogens would differentiate between those two situations, because that concept can only be defended on the basis of all-encompassing legal consequences. Finally, the court's own reference to the principle of

¹¹⁹This case also concerned human rights violations by the Third Reich during World War II. The victims of deportation to forced labor asserted a claim for compensation against Germany in front of Italian courts.

¹²⁰ Ferrini v. Federal Republic of Germany, Italy, Court of Cassation, 128 ILR, p.668.

¹²¹ Ibid, p.669 et seqq..

¹²² Ibid, p.671.

¹²³ Ibid, p.670.

universal jurisdiction in order to justify the denial of immunity for out-of-forum crimes seems to turn the whole distinction irrelevant.¹²⁴

As a result, one may conclude that the court does not succeed in distinguishing the case from precedents. Hence, it does not prove that a *jus cogens* exception is compatible with existing state practice. Still the judgment could have been the beginning of the necessary state practice.¹²⁵

However, this does not seem to be the case. Not only the House of Lords expressly dismissed the *jus cogens* exception in the ‘Jones’-case as mentioned above, but also Canadian courts in the ‘Bouzari’-case.¹²⁶ Furthermore, in its ‘Distomo’ judgment the German Federal Court of Justice did also rule that, according to customary international law state immunity, is not restricted because *jus cogens* has been violated.¹²⁷

One should also note that the UNCSI consciously lacks an exception from immunity for the violation of *jus cogens*, since the drafters feared that such a provision would effectively prevent the convention from coming into force.¹²⁸ Similarly, the proceedings instituted by Germany against Italy in front of the ICJ because of the judgment in ‘Ferrini’ and other pending cases reveal that a common *opinio juris* in favor of an exception is absent as well.

¹²⁴ Cf. Focarelli, Denying Foreign State Immunity, ICLQ 54 (2005) p.956 et seqq..

¹²⁵ Concurring in the result Focarelli, Foreign State Immunity, ICLQ 54 (2005) p.956 in footnote 25; De Sena, De Vittor, State Immunity and Human Rights, 16 EJIL (2005) p.97.

¹²⁶ Bouzari v. Islamic Republic of Iran, Ontario Court of Appeal, 124 ILR (2002) p.427 et seqq.; the Supreme Court dismissed the request for leave to appeal.

¹²⁷ German Federal Court of Justice, Case number III ZR 245/98, 26.6.2003.; affirmed by German Federal Constitutional Court, Case number 2 BvR 1476/03, 15.2.2006.

¹²⁸ For this reason some commentators have disadvised to accede to the convention, because they feel the danger, that the convention could freeze public international law as it stands at the moment, cf. Keith Hall, UN Convention on State Immunity, 55 ICLQ 2006, pps.411; McGregor, State Immunity and *Jus Cogens*, 55 ICLQ (2006), p.437 et seqq..

2.2.1.3 Applicability of these results to immunity of international organizations

In contrast to other approaches to limit the principle of state immunity, the results of the analysis of jus cogens can easily be applied to immunity of international organizations.

If one follows the position presented by the minority in 'Al-Adsani', the immunity of international organizations, too, would be lifted in case of the violation of peremptory norms. There is no reason to assume that immunity of international organization should be exempted from the inherent legal consequences of jus cogens.

If one agrees with the point of view of the majority, one would have to prove a rule of international law that enshrines the necessary legal consequence of such a violation. As has been shown, there is no such a rule; neither in general nor in regard to state immunity. In theory, such a rule could also arise merely for the immunity of international organizations. Nevertheless, so far there is no evidence.

Thus, the violation of jus cogens cannot cause an exception of the immunity of international organizations.

2.2.1.4 Conclusion

To sum up, the United Nations are in a position to violate jus cogens rules. But such a violation would only lift immunity, if a conflict between the rules of jus cogens and the rules of immunity existed. This in turn would require that a violation of jus cogens has certain legal consequences described above. But state practice supporting those legal consequences is missing. The violation of humanitarian jus cogens therefore does not lift the bar of immunity of international organizations.

2.2.2 Art. 6 ECHR

Even if immunity of international organizations does not conflict with jus cogens, it might be opposed to the human rights guarantee of access to the court which is i.a. enshrined in Art.6 ECHR. As has been stated in the

context of *jus cogens*, a conflict only exists, if the requirement of one rule and the prohibition of another rule are in opposition with each other. Thus, there is no conflict in the technical sense, if both rules can be accommodated by interpreting them in a way which avoids contradictions. In the following such a situation will be labeled a *prima-facie* conflict. But if interpretation reaches its limits and a true conflict exists, international law has only limited means to solve this conflict; so-called conflict rules. One of them – '*lex superior derogat legi inferiori*' – has already been introduced by way of *jus cogens*. Other rules of customary nature, which are partly reproduced in Art.30 VCLT, include '*lex specialis derogat legi generali*' and '*lex posterior derogat legi priori*'.

It should be noted, that in fact both approaches will to some extent give priority to one of the competing interests. The following analyses aims to systematize the leeway and decision options of the ECHR, which hold for national courts as well, when they apply the Convention.

2.2.2.1 Accommodating the *prima-facie* conflict by interpretation

2.2.2.1.1 Limited scope of the right of access to the court

The *prima-facie* conflict between the two rules would be resolved, if the right of access to the court is not guaranteed by Art. 6 ECHR in cases, in which a duty exists to grant immunity according to public international law. In those cases there would be no interference with the guarantee in the first place. In the final analysis this means that the *prima-facie* conflict would be resolved in favor of the principle of immunity.

In 'Holland v. Lampen-Wolfe' the House of Lords accepted that granting state immunity did not interfere with the guarantee of access to the court. In their view Art.6 ECHR presupposes that the contracting states do have in fact the necessary power to adjudicate. However, this power to adjudicate could be limited by rules of public international law which oblige the state to grant immunity. Art.6 ECHR would not extend the scope of those powers

because the contracting state could not, by its own act of acceding to the Convention and without the consent of a third party, obtain a power of that party which international law denies it.¹²⁹

If one applies this reasoning to international organizations, the result is the same. In fact, in the 'Manderlier' judgment the Civil Tribunal of Brussels argued similarly that Art.6 ECHR is not applicable: the convention was concluded between European states only, and therefore cannot be applied and imposed upon the United Nations.¹³⁰

This reasoning does not tackle the problem that states can be trapped between two conflicting rules. To be sure, Art.6 ECHR does not impose a duty on a third party, it only binds the contracting states. Even if the adjudicating state is bound by treaty or customary law to grant immunity, it is at liberty to commit itself to afford absolute access to its courts; even if those two duties might conflict. This does not infringe upon the principle '*pacta tertiis nec nocent nec prosunt*', because the duty against the third party persists, and its rights are not diminished, cf. Art.34 VCLT. In case of a conflict which cannot be solved by conflict rules, the state has to take a political decision which obligation it will adhere to, and which it will accordingly violate. Thus, the fact that the membership of the UN-Charter and the ECHR is not congruent is no legal bar to apply Art.6 ECHR.

Nevertheless, an interpretation of Art.6 ECHR might show that its scope of protection was not meant to comprise cases in which states are obliged by international law to grant immunity. The line of argument goes that, since states did not want to affect the field of immunity by creating the ECHR, Art.6 ECHR is implicitly limited.¹³¹ Just as well, one could consider to use not Art.6 ECHR but Art.1 ECHR as a leverage – thereby limiting the scope

¹²⁹ House of Lords, *Holland v. Lampen-Wolfe*, 20.6.2000, per Lord Millett; Jones, Article 6 ECHR and immunities arising in public international law, 52 ICLQ (2003), p.463.

¹³⁰ *Manderlier v. Organisation des Nations Unies and État Belge*, Civil Tribunal of Brussels, 45 ILR (1972), p.452.

¹³¹ Seidl-Hohenveldern, Loibl, *Das Recht der Internationalen Organisationen*, para.1906a; Damian, *State immunity and judicial coercion*, p.16 et seq..

of the convention as a whole.¹³² This reasoning could further be sustained by applying the principle of harmonizing interpretation as laid down in Art.31 (3) lit.c) VCLT.

But a substantial argument against this interpretation of Art.1, 6 ECHR appears to be the nature of human rights treaties. The ECHR aims to achieve a principally all-embracing control of governmental conduct. This does not allow for an interpretation which restricts the scope of human rights guarantees one-sided in such a way, as to avoid judging other rules of public international law by standards of human rights law. This argument might be able to draw upon a statement of the ECHR in the ‘Al-Adsani’ case that it would be inconsistent with the rule of law, if “a state could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons”.¹³³ The issue might be compared with the problem, whether the legal responsibility of states continues, if they transfer sovereignty to international organizations. This was answered by the ECHR in the affirmative. Both issues are based on the idea that states cannot escape their human rights duties by entering into other obligations in international law. Hence, noting that this approach received no mention by the ECHR at all, the immunity of international organizations cannot limit the scope of the ECHR .¹³⁴

2.2.2.1.2 Art. 31 (3) lit.c) VCLT

The ECHR chose another approach to reconcile Art.6 ECHR and the rules of state immunity by interpretation. As demonstrated above, in the ‘Al-Adsani’ judgment the court considered granting immunity as an interference in the right of access to the court. Assessing, whether the limitation is

¹³² Voyiakis, *Access to Court v State Immunity*, 52 ICLQ 2003, p.313; Tomonori, *Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means*, 71 MLR (2008) p.736.

¹³³ *Al-Adsani v. The United Kingdom*, appl. no. 35763/97, para. 47. It should be noted, that the reasoning mainly aimed at the argument, that on grounds of immunity there exists no base of the claim under substantive law, as required by Art.6 ECHR.

¹³⁴ *Concurring Bröhmer, State Immunity and the violation of human rights*, p.164 et seqq., p.186.

proportionate in relation to the legitimate aim pursued by the state, the judges resorted to Art.31 (3) lit.c) VCLT. They argued that this rule of interpretation necessitates an interpretation of the ECHR in conformity with other rules of international law. Therefore, limitations which comply with customary rules of state immunity “cannot **in principle** be regarded as imposing a disproportionate restriction on [...] Article 6 (1) ECHR”.¹³⁵ Subsequently, the judges examined the relationship between immunity and jus cogens. The majority concluded that states are entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state.

This approach by the ECHR indeed shifts the problem of the compatibility between immunity and Art.6 ECHR from the level of the scope of protection to the level of proportionality. Nevertheless, it seems that the court will almost invariably arrive at the same conclusion as the House of Lords in ‘Holland v. Lampen-Wolfe’. In other words, it will arrive at an unlimited preference of immunity over the rights safeguarded by Art.6 ECHR. Even though the court indicated that a customary rule, which grants immunity, could in specific cases impose a disproportionate restriction on the right of access to the court ('in principle'), the judges totally evaded the discussion of this possibility in regard to the case at hand. This is all the more eye-catching, if one takes the peculiarities of the case into account: the claimant alleged a violation of a peremptory norm of international law; and there was no alternative legal remedy available to him, for instance in his home country.

Thus, the back door, which the court seems to leave open, in all likelihood will always be closed. It seems difficult to imagine in what circumstances the court would accept the claim of a disproportionate restriction, if it does not even take this possibility into consideration in this case.

¹³⁵ Emphasis added.

2.2.2.1.3 A full-fledged application of the principle of proportionality

2.2.2.1.3.1 *Waite & Kennedy*

As has been seen, the ECHR does not apply a full-fledged principle of proportionality in regard to state immunity. This contrasts sharply with its approach to the problem of immunity of international organizations. The landmark judgment in this regard is ‘*Waite & Kennedy v. Germany*’. The grant of immunity to international organizations is, just as state immunity, considered by the ECHR to be an infringement of Art.6 ECHR, which needs to be justified. Concerning the legitimate aim, the court shortly notes that immunity “is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments”, accorded to them in a long-standing practice. The court further held that by establishing international organizations, contracting states are not absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution; in particular concerning the right to a fair trial. In assessing the proportionality, the judges proceeded differently in the two cases. In ‘*Waite & Kennedy*’ the court did not resort to Art.31 (3) lit.c) VCLT, which would lead to a presumption of the permissibility of the rules on immunity. Instead, in assessing whether the restriction of Art.6 ECHR is proportionate, the focus is exclusively on the existence of alternative means of legal process available to the applicants, for example an international court or tribunal. In the case at hand, this was answered in the affirmative by the ECHR.

This means that in practice totally different standards are applied to immunity of states and international organizations respectively. Irrespective of this, it should be noticed that the discussion by the court still only approximates a full-fledged application of the principle of proportionality, as the result fully depends on the availability of alternative remedies. A different approach, which the court might avoid for good reasons such as judicial restraint, would cast doubt on the proposition that immunity is indeed required to promote the legitimate aim.

2.2.2.1.3.2 *Legitimate aim revisited*

Even though the court gives short script to the issue of the legitimate aim, its analysis seems to be correct.

On the one hand, there is a danger as the court argues that both a hostile domestic environment and prejudices against the organization in the judiciary, might in some cases endanger the functioning and independence of international organizations. Further, one can validly argue that the influence of member states should be channeled through the organization's internal law - in order to avoid an unilateral interference by one state.¹³⁶

On the other hand, some other arguments proposed from time to time are not valid. For example, the prestige of the organization is not a legitimate aim. Moreover, it is not possible to argue that immunity must be granted because it is derived from the immunity of states.¹³⁷ Neither are judges unfamiliar with issues related to international organizations; at least to the extent that the case at hand concerns ordinary private law such as tort law. Some argue that immunity is necessary to secure uniformity in dispute settlement. In this regard one must differentiate between immunity and the choice of law. In other words, the same law can be applied by different courts in a sufficiently uniform manner, as the very idea of international private law proves.¹³⁸

2.2.2.1.3.3 *Proportionality revisited*

The restriction of Art.6 ECHR is only proportionate, if the legitimate aim of protecting the functioning and independence of the organization cannot be achieved by other less drastic means. In this regard one could contemplate to turn the whole system of the protection of international organizations upside down. Instead of granting immunity to the organization and at the same time guarantee protection of third parties only in a rough-and-ready

¹³⁶ Reinisch, *International Organizations*, p.233 et seqq..

¹³⁷ Reinisch, *International Organizations*, p.245 et seqq., p.251.

¹³⁸ Reinisch, *International Organizations*, p.243 et seqq..

manner by diplomatic protection,¹³⁹ lawsuits against international organizations could be regarded as admissible, whereas international organizations would be referred to their possibilities for action on the international plane. Even though it is argued that international organizations are in a weaker position than states, compared to the bulk of individuals they are still strong. Recognizing that in all likelihood biased judgments by national courts are the exception but not the rule, such a position would arguably strike the balance more appropriate. However, it is not certain that international organizations would indeed be sufficiently protected. In such a situation, states have a margin of appreciation at their hands.

One could further ponder, if only the availability of alternative remedies should determine, whether the restriction is proportionate. It could also be argued that other criteria, such as the severity of the violation of human rights, could play a role in this regard.

2.2.2.1.4 Conclusion

Those interpretatory approaches are able to avoid a real conflict to different degrees. The approach adopted by the House of Lords would make a conflict impossible, and the judgment in ‘Al-Adsani’ would in all likelihood lead to the same result in the bulk of cases.

The reasoning in ‘Waite & Kennedy’ on the other hand leaves the possibility open that granting immunity might be disproportional. Such an interpretation of Art.6 ECHR only avoids the possibility of a real conflict with the UN-Charter, if the rules of immunity do not demand the grant of immunity in those cases.

¹³⁹ The state can assert the claims of the individual via diplomatic protection. However, this is only of limited use for the victims, because the state is in principle not obliged to assert diplomatic protection, cf. Vermeer-Künzli, Restricting Discretion: Judicial Review of Diplomatic Protection, *NordicJIL* 75 (2006) p.279 et seqq.. Further avenues could be to exert political pressure in the organization or to sue in front of the ICJ, if this possibility is provided for, cf. Art.VIII, Sect.s 29 and 30 UNCSI.

Art. VIII Sect. 29 lit.a) UNCSI demands that the UN provide for appropriate modes of settlement of disputes of a private law character, to which the UN is a party. Just as the ECHR, the UNCSI must also be interpreted in accordance to Art.31 (3) lit.c) VCLT. It is argued here that in view of human rights law, which demands an alternative remedy in case of immunity of international organizations, the UNCSI only grants immunity under the condition, that the UN have in fact created alternative modes of settlement which satisfy this requirement.

A real conflict between Art.105 UN-Charter and Art.6 ECHR exists to the extent that such an interpretation of Art.105 UN-Charter is not accepted at all, or is of no avail; because immunity is considered in a specific case as disproportionate as regards Art.6 ECHR, even though alternative remedies are available. If conflict rules do not provide for a solution either, contracting states would have to violate necessarily one of their conflicting obligations, by taking a political decision. This consequence seems to have been accepted by the ECHR in its 'Waite & Kennedy' judgment.

2.2.2.2 Conflict rules: Art.103 UN-Charter

In regard to the United Nations, conflict rules might indeed solve the conflict – but to the detriment of the ECHR. From Art 103 UN-Charter follows, that the obligation to grant immunity to the UN prevails over obligations under any other international agreement, such as the ECHR. To be sure, as stated above, this is only the case if the proposed interpretation of Art.105 UN-Charter is not accepted, or of no avail.

It should be noted that Art.103 UN-Charter is also the reason why it is as a matter of principle (that is to say, without considering, whether their application would be appropriate, what seems in fact unlikely) not conceivable, that conflict rules, in particular 'lex specialis derogat legi generali' and 'lex posterior derogat legi priori' solve the conflict to the benefit of the ECHR, cf. Art. 30 (1) VCLT.

2.2.2.3 An assessment of the diverging case law

In the end, the common problem of all those judgments is the extent to which it is possible to judge other rules of public international law by standards of human rights law. None of the different approaches seems to be legally right or wrong. Rather it appears that a choice between them can only be made, if one takes into account the different visions of the appropriate relationship between international law in general and human rights guarantees.

On the level of conflict rules, the problem is, whether obligations under the UN-Charter always prevail over conflicting human rights obligations laid down in the ECHR. If that should not be the case, one must further ask on the level of interpretation, whether UN-Charter rules must conform to the proportionality-standard established by ‘Waite & Kennedy’; or whether this standard was overruled by the judgment in ‘Al-Adsani’.

2.2.2.3.1 Level of conflict rules: Al-Jedda v. Kadi

Provided that Artt.103, 105 UN-Charter indeed require that the entitlement to immunity supersedes the right of access to the court, it is still an open question, whether the ECHR has no other choice but to accept this result.

The relationship between Art.103 UN-Charter and the ECHR was discussed by the House of Lords in its ‘Al-Jedda judgment’.¹⁴⁰ Al-Jedda, a dual British-Iraqi national, argued that his indefinite detention without charge by British forces at detention facilities in Iraq violated Art.5 ECHR. The Lords first distinguished this case from the ECHR decision in ‘Behrami & Saramati’ and attributed the detention to the UK and not the UN. Subsequently, they verified that the UK exercised jurisdiction in terms of Art.1 ECHR as required by the ECHR in its Bankovic decision.¹⁴¹ However, what matters is, how the court denied a violation of Art.5 ECHR in the absence of a valid derogation under Art.15 ECHR. The judges argued that

¹⁴⁰ R (on the application of Al-Jedda) v Secretary of State for Defence, [2007] UKHL 58.

¹⁴¹ ECHR, Bankovic and others v. Belgium and 16 other contracting states, Appl. no. 52207/99.

Art.5 ECHR is qualified or displaced by UNSCR 1511 and 1546. The Law Lords considered this to be quite problematic, because the authorization to use all necessary means by the UNSCRs is not easily construed as an obligation in terms of Art.103 UN-Charter. This issue, however, is of no relevance for the duty to grant immunity. In that case, the only way out is to argue that Art.103 UN-Charter is insignificant when it comes to the ECHR. But this argument by the applicants was easily dismissed by the court.¹⁴²

The 'Kadi' judgment by the ECJ reveals that a different conception of the relationship between a legal order and the UN-Charter is possible. This case concerned the UN-SC listing of individuals which are suspected to be affiliated with terrorism. Member states of the UN must execute 'smart sanctions' against individuals or organizations whose names are blacklisted, freezing their funds and other financial resources. Therefore, to execute specific restrictive measures, the European Community Council enacted regulation 881/2002 EC. The claimants brought action against this regulation before the CFI and subsequently appealed to the ECJ.

The CFI adopted an internationalist approach.¹⁴³ It argued that the member states of the EC are obliged by Art.103 UN-Charter and Artt.307, 297 EC to leave unapplied any provisions of Community law, that raise any impediment to the proper performance of their obligations under the UN-Charter. It further held that the same is valid for the Community itself. Therefore the CFI concluded that, since any review of the internal lawfulness of the regulation would indirectly question the lawfulness of the UNSCR, review is confined to formal requirements of the Community law; and to the compatibility with international jus cogens, because those norms are as well binding on the UNSC. However, the judges could not find a violation of jus cogens and dismissed the case.

By contrast, the ECJ adopted a different approach.¹⁴⁴ The Advocate General argued that "the community courts determine the effect of international

¹⁴² R (on the application of Al-Jedda) v Secretary of State for Defence, [2007] UKHL 58, para.35 per Lord Bingham.

¹⁴³ Kadi v. Council, European Court of First Instance, case no. T-315/01.

¹⁴⁴ Kadi v. Council, European Court of Justice (Grand Chamber), case no. C-402-05 P.

obligations within the community legal order by reference to conditions set by community law".¹⁴⁵ The Grand Chamber, in a more moderate way, assumes that there is a way to discharge the obligations under the UN-Charter without violating community law. Nevertheless, in the final analysis the judges seem to accept that, if such a reconciliation should not be possible, fundamental rights in community law will prevail. As Halberstam and Stein convincingly put it, the judges thereby complete the constitutionalization of the European legal order as an autonomous legal order not only internally in the relationship to their member states, but also externally with regard to public international law.¹⁴⁶ To sum up, the court does not allow obligations under the UN-Charter to rule out protection of fundamental rights in the European Convention.

To date the ECHR has not determined the relationship between Art.103 UN-Charter and the ECHR. In fact it has been argued, that the court in its *Behrami & Saramati* case mainly attributed the acts to the UN and not to the member states, to avoid precisely this question. The argument goes, that the judges wanted neither to acknowledge a preemptive effect of Art.103 UN-Charter, nor interfere with the Chapter VII system.¹⁴⁷

On the one hand, given the fact that the ECJ had before established an extensive autonomy of the European Convention, its reasoning might be difficult to transpose to the ECHR. On the other hand, the ECHR in fact often acts as a substitute or complementation of national human rights protection. Therefore, it would not seem logical, if the relationship between Art.103 UN-Charter and the ECHR would be construed in a way as to prevent that international acts and norms can be measured against the yardstick of the ECHR.

¹⁴⁵ *Ibid*, at para.23.

¹⁴⁶ Halberstam, Stein, *The UN, the EU, and the King of Sweden*, p.34 et seqq..

¹⁴⁷ Milanović, Papić, *As bad as it gets*, p.29.

2.2.2.3.2 Level of interpretation: ‘Al-Adsani’ v. ‘Waite & Kennedy’

At the level of interpretation, the issue of the appropriate relationship between the UN-Charter and the ECHR arises again. As has been explained, in the ‘Al-Adsani’ judgment the court stated that the convention should as far as possible be interpreted in harmony with other rules of international law. This leads to a presumption of conformity of generally recognized rules on state immunity with the ECHR. Otherwise, the court could have used the idea of the special character of the ECHR-law to justify its use as a benchmark for international law. The court had used this special character before to account for different means for interpretation, and refers to it in ‘Al-Adsani’ as well. In that way, the ECHR-law would attain a quasi-constitutional character. However, the court decided not to take this road.

Turning from the possible avenues of the court to its actual jurisprudence, the relationship between the judgments in ‘Al-Adsani’ and ‘Waite & Kennedy’ must be assessed. As has been shown above, only the latter seems to require that an alternative remedy is available.

First of all, one could try to deny this assessment and argue that the court did in fact approach both cases in the same way.

The argument would be, that the ECHR simply did not spell out the application of the harmonious interpretation in ‘Waite & Kennedy’ - even though it was in fact applied. In that line of thought, to grant immunity to international organizations is in principle a proportionate limitation of Art.6 ECHR, if that is demanded by other rules of international law. However, exceptionally immunity is not proportionate, if no alternative remedy is available.

Likewise, this reasoning would read the ‘Al-Adsani’ judgment as requiring an alternative remedy as well. However, there was no need for the court to spell this out, since in cases against states there will in principle always be an alternative remedy available in the defending state. This reading of the judgment could be supported by the reference of the ECHR to an alternative

forum in ‘McElhinny’. This case, as explained above, also concerned immunity of states.

But it must be acknowledged that in ‘Al-Adsani’ and in similar cases of systematic violations of human rights, there exists no effective alternative remedy in front of the court of the violating state. As the ECHR clarified, an alternative forum must also safeguard comparable legal protection. Hence, in ‘Al-Adsani’ the court would have had to discuss the proportionality - because in fact an alternative forum was missing. It follows, that the court did not approach the two cases in the same way.

Thus, it is dubious, whether the ‘Al-Adsani’ decision in fact overruled the judgment in ‘Waite & Kennedy’. If so, the approach of harmonious interpretation would be transposed to international organizations, and the requirement of an alternative remedy would have no relevance anymore. But there might be reasons to treat the cases of the immunity of states and international organizations respectively in a different manner, so that the judgment in Waite & Kennedy would still be relevant.

Possibly, the diverging judgments could be explained by pointing to the different sources of law – customary law on the one hand, and treaty law on the other – which form the basis of the immunity of states and international organizations respectively.¹⁴⁸ Since customary law is per definitionem often supported by almost the entire community of states, greater importance could be attached to it, militating against the application of a human rights standard to assess those rules. Having said that, one also has to point out that international law lacks a formal hierarchy between sources of law. Furthermore, the UN-Charter for instance is more universal in its membership than the state-practice of most rules of customary law.

The difference between the two cases could also be found in a varying legal responsibility of the member states of the ECHR.

¹⁴⁸ Gärditz, Klaus Ferdinand, Urteilsbesprechung des Falles Al-Adsani, in: Menzel, Pierlings, Hofmann (edt.) Völkerrechtsprechung, p.436.

As said above, the ECHR holds its contracting states responsible for acts of international organizations in which they are members; because they are not allowed to evade their obligations in that way. In 'Waite & Kennedy' the court holds that "this is particularly true for the right of access to the courts". In that judgment the court links this concept with proportionality. In other words, a material factor, why the limitation of Art.6 ECHR by granting immunity is not proportional, is that by granting immunity to the international organizations, the state assumes the responsibility to ensure that the organization complies with Art.6 ECHR by setting up an effective alternative remedy.

However, it is difficult to argue that this is also the case, if states grant immunity to other states. Indeed, it has been proposed that by granting foreign states immunity, the forum state transfers the concurrent jurisdiction, which it is entitled to exercise, to the foreign state. Therefore, the alternative means test would also become applicable in regard to state immunity.¹⁴⁹ But unlike international organizations, other states are not created by the will of the contracting states, and the 'transfer' of concurrent jurisdiction to the defending state differs from the granting of immunity to international organizations, because the primary responsibility to grant access to court always rested with the defending state.

Thus, the stronger responsibility of states to ensure access to courts regarding claims against international organizations, compared with claims against third states, is a difference which might justify a different treatment.

Finally, the decisive difference can be found in the effect of harmonious interpretation. Art. VII Sect. 29 lit.a) UNCSI obliges the UN to make provisions for appropriate alternative settlements of private law disputes. However, there is no firm basis in state practice that the existence of an effective alternative remedy is a condition for the grant of state immunity. If the ECHR applies a harmonious interpretation in terms of Art.31 (3) lit.c) VCLT to Art.6 ECHR, this would reinforce an argument that only in the

¹⁴⁹ Mizushima, Denying foreign state immunity on the grounds of the unavailability of alternative means, 71 *The Modern Law Review* (2008), pp.744.

case of immunity of international organizations Art.6 ECHR should be interpreted as requiring effective alternative means in terms of proportionality.

Thus, the case law does not give the impression that the reasoning in ‘Al-Adsani’ overruled the requirement of an effective alternative remedy for immunity of international organizations. The decisive question therefore is: is an effective alternative remedy available, if the UN violates its humanitarian law obligations?

The United Nations have established an United Nations administrative tribunal, which deals with employment-disputes.¹⁵⁰ Similar proceedings to deal with disputes of a private law character, as envisaged in Art. VIII Sect. 29 UNCSI, have not been set up.¹⁵¹ Contracts between the organization and private parties concluded as part of their business dealings often envisage the establishment of arbitration tribunals on an ad-hoc basis. This does not live up to the standard provided for in Art. VIII Sect. 29 UNCSI.

But when it comes to liability in tort, the position of the claimants is even worse, because they depend on the consent of the UN to institute an ad-hoc settlement. Usually the UN set up local claims review boards, instead of the standing claims commission, which was envisaged in the Model participating state agreement. But those local claim review boards fall short of the necessary equivalent standard of juridical protection. In particular, judicial neutrality is only ensured in regard to the chief judge. Those commissions are not a neutral court, but rather a forum for a diplomatic settlement of claims.¹⁵²

To conclude, in case of an alleged violation of humanitarian law, there is no effective alternative remedy available to victims as envisaged by Art. VIII Sect. 29 UNCSI and required by Art.6 ECHR; even though the UN has acknowledged that the former provision also comprises claims arising in the peace-keeping context.¹⁵³

¹⁵⁰ UN Doc. A/RES/351.

¹⁵¹ Blatt, *Rechtsschutz gegen die Vereinten Nationen*, 45 AdV (2007), p.104.

¹⁵² Schmalenbach, p.

¹⁵³ Cf. UN Doc. A/C.5/49/65 para.9; UN Doc. A/RES/52/247 para.8.

3 Humanitarian law as basis of the claim

3.1 Obligations of the UN under humanitarian law

3.1.1 Binding force of humanitarian law in principle

3.1.1.1 Obligations derived from customary law¹⁵⁴

A claim for damages against the United Nations first of all requires that the organization is bound by the rules of humanitarian law. Most notably, an obligation of the United Nations could be derived from customary law. This is especially important since large parts of humanitarian law are customary in character.¹⁵⁵

The bulk of the legal literature assumes that international organizations are bound by customary law. It is therefore concluded that the United Nations are bound by humanitarian law. But this does not follow conclusively.¹⁵⁶

Customary law could be binding on International organizations just by virtue of their capacity as subjects of international law. On the other hand, the development of a rule of customary law could require the participation not only of the community of states, but also of its addressees, the international organizations.¹⁵⁷ Whereas the practice of the United Nations

¹⁵⁴ One could further argue, that the organization is bound because of general principles of international law. This reasoning has been used by the ECJ to establish human rights obligations of the Community, derived as general principles of the Community law from national legal systems of the member states. Cf. also Schermers, Blokker, International institutional law, p. 984 et seq.; Halberstam, Stein, The UN, the EU, and the King of Sweden, p.14 et seqq..

¹⁵⁵ Cf. in more detail, Henckaerts, Doswald-Beck (edt.), Customary International Humanitarian Law.

¹⁵⁶ Doubting also Rauschnig, statement in BDGV 42, p.120. He argues, that Individuals, too, are only bound by a small portion of the law that applies to states, even though individuals are partial subjects of international law. But this can be explained by the fact, that - as will be seen - the transposition of the law from states to other subjects of international law requires, that an analogy can be drawn.

¹⁵⁷ Bleckmann, Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen, 37 HJIL (1977), p.110 et seqq..

supports the claim that customary humanitarian law is also binding upon international organizations,¹⁵⁸ a corresponding practice with regard to other organizations, in particular the NATO, is not evident.¹⁵⁹ The practice of international organizations would therefore not be sufficient to establish a customary rule.¹⁶⁰ However, as primary subjects of international law, states may by their practice create customary law, which is binding not only on them, but also on other international law subjects.¹⁶¹ Therefore, customary law is also valid for international organizations, provided that an analogy can be drawn between the two situations.¹⁶² That requires firstly, that the nature of the organization allows for the application of the rule. Secondly, a contradictory state practice rules this adaptation to international organizations out.¹⁶³ As a result, due to limited differences between a military operation conducted by an international organization and a state respectively¹⁶⁴, the transfer of obligations arising from customary humanitarian law is possible to a large extent. This reasoning is consistent with the jurisprudence of the ICJ, which applies customary law to international organizations as well.¹⁶⁵

However, even though large parts of humanitarian law belong to the body of customary law, the issue remains, whether the UN is also bound by other important rules not of a customary character.

¹⁵⁸ Cf. above Chapter C, I, 1, e). As regards state practice, one should also note the ICC-Statute, the UNCSI, and the Statute for the Special Court of Sierra Leone. All those conventions imply, that humanitarian law is in principle applicable to the UN, cf. in more detail Zwanenburg pps. 166, pps. 175.

¹⁵⁹ Zwanenburg, *Accountability*, p.179 et seq., p.207.

¹⁶⁰ Cf. statement by Bausback in 42 *BDGV* (2007), p.122.

¹⁶¹ Ewa Butkiewicz, *The Premises of International Responsibility of Inter-Governmental Organizations*, XI *Polish Yearbook of International Law 1981-1982*, p.118. This is also revealed by the obvious existence of customary international criminal law, which were developed by state practice, but oblige individuals, without their participation in the formation of the rule.

¹⁶² Cf. Shrage, 5(2) *International Peacekeeping*, 1998, p. 65.

¹⁶³ Similar Bleckmann, *Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen*, 37 *HJIL* (1977), p.120.

¹⁶⁴ Zwanenburg, *Accountability*, p.152.

¹⁶⁵ ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion of 20.12.1980*, p.90.

3.1.1.2 Absence of own contractual obligations

The UN is not a contracting party of the conventions of humanitarian law. What is more, those conventions even seem to exclude the possibility of accession for international organizations.¹⁶⁶

However, the UN committed itself in Participating State Agreements to comply with humanitarian law. Participating State Agreements (hereinafter PSA) codify the conditions under which national contingents for missions are allocated, and are concluded between the particular troop-providing state and the UN. A corresponding clause is also included in Art.28 Model Participating State Agreement, which is based on prior PSA.. But in these agreements, the UN only undertakes to comply with basic principles and the convention's spirit, which does not clearly define the range of the obligations.¹⁶⁷ Moreover, they arguably only create obligations towards the contracting state.

It was not until the UNAMIR-operation in Ruanda, that this clause was included in the Status of Forces Agreements (SOFA)¹⁶⁸. SOFAs regulate the relationship between the host state and the armed forces of the UN. But again, the agreements merely refer to the basic principles, and create an obligation arguably only towards the host state. Furthermore, such agreements were not concluded for all UN-operations.¹⁶⁹ This holds in particular true for missions established under Chapter VII, in which the violation of humanitarian law is most likely.

Thus, an obligation of the United Nations must mainly be derived from other sources.

¹⁶⁶ Zwanenburg, *Accountability*, p.136 et seqq.. The United Nations in particular take the position, that it would not be possible for the organization to become a contracting party, since many regulations could not be applied. Furthermore, the UN would not be a „power“ in terms of the convention, cf. Umesh Palwankar, *Applicability of international humanitarian law*, 294 IRRC, p.227 et seqq..

¹⁶⁷ Benvenuti, pps. 833 in Part VII, argues that this is a higher standard than customary law. But even the UN-SG's Bulletin (cf. below) which elaborates upon this formula, lags often behind customary law. Doubting also Sassoli, Marco, in ICRC San Remo report, p.102; Glick, *Lip Service to the Laws of War*, 17 *Michigan Journal of International Law* (1995), p.78 et seqq.

¹⁶⁸ Zwanenburg, *Accountability*, p.165 et seq., Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p. 44.

¹⁶⁹ Wein, Aolain, *Beyond the laws of war*, 27 *Columbian Human Rights Law Review* p.308.

3.1.1.3 Obligations derived from the commitments by member states

According to one approach, the United Nations' commitment to international humanitarian law arises from the corresponding obligations of the member states,¹⁷⁰ because member states must not evade their obligations by establishing international organizations. However, it seems difficult to found this conclusion on existing international law. It is not possible to conclude that an organization is bound, just because its member states continue to be bound.

Sometimes it is argued, that the contractual obligations of the member states are passed on to the organization by way of functional succession – virtually comparable to the case of state succession.¹⁷¹ It must be pointed out, though, that this approach, too, is merely law in the making, which finds no basis in any general rule of international law. Moreover, the differing scope of the member states' commitments to humanitarian law necessarily leads to a divergence between national obligations and those of the organization. In addition, the organization must not get trapped between incompatible obligations derived from different groups of member states. Therefore, it seems difficult to extend this concept beyond customary or treaty law, which is in force for all member states.

Sometimes it is argued, that the contractual obligations of the member states under international humanitarian law limit the competences, which they are able to assign to the international organization and thus limit in turn the organization's powers.¹⁷² But, as international law is contractual in character, states are in fact able to breach their commitments by setting up another organization, which is not similarly bound.

¹⁷⁰ Benevenuti, in: *Law in Humanitarian Crises*, p. 83 et seqq. in Sect. III; similarly Bausback, statement in 42 BDGV, p.122.

¹⁷¹ Schermers, Blokker, *International Institutional Law*, p. 983; Halberstam, Stein, *The United Nations, the European Union, and the King of Sweden*, p.10; cf. also Bleckmann, *Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen*, 37 HJIL (1977), p.119; Reinisch, *Securing the accountability of International Organizations*, 2001.

¹⁷² Schermers, Blokker, *International institutional law*, p.988.

3.1.1.4 Obligations derived from the constituent treaty

Besides, obligations of the UN could arise from the UN-Charter itself, even though there is no explicit commitment to that effect included in the Charter. An implicit commitment could be derived from Artt.1 No.3, 55 lit.c) UN-Charter, which obliges the UN to respect human rights, including humanitarian law.¹⁷³ The wording initially suggests, that it addresses the member states, and that the UN are solely obliged to promote human rights. But this should not be read as if human rights violations committed by the United Nations were considered legitimate, but rather that this possibility was simply not anticipated. Thus, the UN actually neglects their responsibility to promote human rights - including humanitarian law - if they violate those rights themselves.¹⁷⁴

In addition, humanitarian law obliges the member states to ensure, that the organization is bound by those obligations as well.¹⁷⁵ Since it can be assumed that the member states are willing to carry out their duties arising from international law, this supports an interpretation of the UN-Charter, according to which the UN is in fact bound by humanitarian law.¹⁷⁶ But duty to comply with humanitarian law in principle does not specify the extent of this obligation.¹⁷⁷

3.1.1.5 Obligation derived from unilateral declarations

The binding effect of unilateral declarations is certain,¹⁷⁸ regardless of whether one sees its dogmatic basis in customary law or rather in the

¹⁷³ Gasser, Die Anwendbarkeit des humanitären Völkerrechts auf militärische Operationen der Vereinten Nationen, Schweizer Zeitschrift für Internationales und europäisches Recht 1994, p.462; Benevenuti, in: Law in Humanitarian Crises, p.83 et seqq. in Sect. III; Zwanenburg, Accountability, p.148 et seqq..

¹⁷⁴ Reinisch, Developing Human Rights and Humanitarian Law Accountability, 95 AJIL (2001) p.857; Cannizzaro, A machiavellian moment, 3 IOLR (2006), p.208 et seqq..

¹⁷⁵ Cf. statement Giegerich in BDGV 42, p.116; statement Bausback in BDGV 42, p.122.

¹⁷⁶ Bleckmann, Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen, 37 HJIL (1977), p.119; statement Khan, BDGV 42, p.145.

¹⁷⁷ In contrast to the other approaches it is necessary, though, to take into account the fact, that the UN-Charter does not benefit any third parties. While this is of limited relevance for the UN because of its comprehensive membership, it is important for other organizations, such as NATO.

¹⁷⁸ Ipsen, Völkerrecht, p.236.

principle of good faith.¹⁷⁹ To qualify as an unilateral declaration, a statement must have external effect as opposed to internal effect within the organization only, and must be made in public by an organ authorized to represent the organization, which acts with the intent to bind the organization legally.¹⁸⁰

Under the constant pressure since the beginning of the UNEF-operation from the ICRC to guarantee the compliance with humanitarian law, , the UN Secretary-General assured in a letter, that the United Nations were not able to comply with detailed clauses of the Geneva Conventions, that they, however, were bound by its principles and spirit. At least until the issuance of the UN-SC bulletin (see below), the effective scope of this commitment was not clear, especially to what extent it might lag behind possible obligations arising from customary law.¹⁸¹ It seems doubtful that it was the intention of the UN-SG to be legally bound by this letter.¹⁸² Moreover one might doubt, that it is within his competences as (chief) executive officer to issue such a unilateral binding declaration with external effects.¹⁸³

The same clause can also be found in intern regulations of some UN-missions (UNEF I, ONUC, UNFICYP).¹⁸⁴ Furthermore, the United Nations eventually responded to demands to specify the precise meaning of 'the principles and spirit of humanitarian law', to which the organization claims to be bound. In cooperation with the ICRC, the Secretary-General developed

¹⁷⁹ In a similar way, but without qualifying those statements as unilateral declarations, it is argued, that an obligation can be derived from the concept of legitimate expectations as a progressive interpretation of the estoppel principle: cf. de Wet, Human Rights limitations to economic enforcement measures, 14 LJIL (2001) p.284 et seqq., and statement in BDGV 42, p.144; Schwendimann, Rechtsfragen des humanitären Völkerrechts, p.51 et seqq..

¹⁸⁰ Peters, Völkerrecht Allgemeiner Teil, p.122 et seqq..

¹⁸¹ Glick, Lip service to the laws of war, 17 MJIL (1995) p.78.

¹⁸² Assuming a binding force: Bowett, United Nations Forces, p.511 et seqq.; Yves Sandoz, The Application of Humanitarian Law by the Armed Forces of the United Nations Organization, International Review of the Red Cross, 1978, p.274 et seqq., cited in Reinisch, Securing the accountability of International Organizations, Global Governance 2001. Dissenting Schreuer, p.243.

¹⁸³ Rejecting his competence Hofman, Die Rechtskontrolle von Organen der Staatengemeinschaft, in BDGV 42, p.15.

¹⁸⁴ UN Doc. ST/SGB/UNEF/1 Reg.44 (1957) for UNEF I; UN Doc. ST/SGB/ONUC/1 Reg.43 (1963) für ONUC; UN Doc. ST/SGB/UNFICYP/1 Reg.40 (1964) for UNFICYP; reprinted in Siekmann, Basic Documents on United Nations and related Peace-keeping Forces, pp.42, 102, 185.

and issued a bulletin laying down the duty of the UN-forces¹⁸⁵ to act in accordance with humanitarian law. What is more, the bulletin lists specific regulations – instead of just referring to the conventions’ principles and spirit – with which the troops must comply.¹⁸⁶ The internal administrative orders have no external effects, and do not therefore constitute an unilateral declaration. The same holds true for the bulletin.¹⁸⁷ Furthermore, it should be noted, that the rules in the bulletin partially fall short of those of customary law and are therefore, provided that the UN is bound by customary law, to a large extent at best of a clarifying importance.

In connection with the ONUC operation in the Congo, the UN paid a compensation for the violation of humanitarian law within the limits of a global compensation agreement to several states that exercised diplomatic protection for their citizens, for example, Belgium. This could be understood as the recognition of a existing claim for compensation against the United Nations, resulting from a violation of humanitarian law. Whether this conduct, which can certainly be part of a code of practice justifying customary law, can also be qualified as a unilateral declaration is doubtful in view of the required intention to become legally bound.

To sum up, it seems difficult to classify the different actions of the United Nations as unilateral declarations. Moreover, the obligations accepted by the UN in that way would barely add anything to existing obligations under customary law.

¹⁸⁵ UN Doc. ST/SGB/1999/13. Bulletin on the observance by United Nations forces of international humanitarian law.

¹⁸⁶ The SOFAs were subsequently changed as well, and refer now to the principles and rules instead of the principles and spirit of the conventions., cf. Aeschlimann, Alain, Overview of protection issues in contexts of multinational peace operations, in: Expert meeting on multinational peace operations, 2003, p.25.

¹⁸⁷ Zwanenburg, Accountability, p.174; Schreuer, Christoph, Die Bindung Internationaler Organisationen an völkerrechtliche Verträge ihrer Mitgliedstaaten, in Ginther, Festschrift für Karl Zemanek, p. 243; statements in: Report on the expert meeting on multinational peace operations, 2003, p. 10.

3.1.2 Possible reasons for a only limited obligation to comply with humanitarian law

3.1.2.1 Does the UN enjoy a special position from the perspective of humanitarian law?

First of all, one could argue, that the UN - at least in traditional peace-keeping operations – is due to its neutrality, not a conflict party in terms of humanitarian law. In contrast, its position could to a certain extent be compared to that of „world-police“. ¹⁸⁸ Since UN-missions thus would lack hostile elements, the UN could per definitionem not be a party to the conflict. ¹⁸⁹

A similar argument refers to the violation of the prohibition of the use of force in Art.2 IV UN-Charter by the aggressor. According to this reasoning, the aggressor thereby forfeits its right to be treated in accordance with the rules of humanitarian law. ¹⁹⁰

Primarily the frequently affirmed principle of reciprocity in humanitarian law argues against both approaches. ¹⁹¹ The incitement is limited for the opposing party to stand by the rules of humanitarian law, if the other party does not. Humanitarian law can only accomplish its spirit and purpose – to limit human suffering during armed conflicts – if it applies to both parties. ¹⁹² Hence, a higher legitimacy of the UN does not alter its obligations under humanitarian law, the *ius ad bellum* needs to be strictly distinguished from the *ius in bello*. ¹⁹³

3.1.2.2 The special position of the UN-SC from the

¹⁸⁸ Cf. e.g. Sharp, Protecting the avatars of international peace and security, 7 *DukeJCIL* (1996), p. 96. But the analogy between the UN and a police force seems not convincing, cf. Greenwood, Protection of peacekeepers, 7 *DukeJCIL* (1996) p. 204.

¹⁸⁹ Schwendimann, Rechtsfragen des humanitären Völkerrechts, p.65.

¹⁹⁰ Zwanenburg, Accountability, p.159 et seq..

¹⁹¹ Greenwood, Protection of peacekeepers, 7 *DukeJCIL* p. 204.

¹⁹² Lauterpacht, The limits of operation of the laws of war, 30 *BYIL* (1953), p. 212.

¹⁹³ Okimoto, Violations of international humanitarian law by United Nations forces and their legal consequences, *YIHL* 2003, pp.207; Final Report of the prosecutor by the Committee established to review the NATO bombing campaign against the federal republic of Yugoslavia, 39 *ILM* 1257 (2000) paragraph 32.

perspective of the UN-Charter

Whereas the UN are therefore in principle bound (at least) by customary rules of humanitarian law, the question remains, whether this applies to activities of the UN-SC, too.

As an organ of the UN, the Security Council is basically subject to the same legal obligations as the organization itself. However, as the supreme political organ, the Security Council could have been liberated deliberately from such an obligation, in order to enable it to effectively discharge its main function of protecting peace and security. If so, the control of the UN-SC would be of a procedural-political rather than legal nature.¹⁹⁴ But even if the UN-Charter does liberate the UN-SC from its obligations, it is still doubtful, whether this is permitted under general international law.

3.1.2.2.1 The position of the UN-SC according to the UN-Charter

As a basic principle, the UN-SC is limited in its competences by the UN-Charter and does not possess any competence-competence, that is a competence to broaden its own competences.¹⁹⁵ The decisive question therefore is, whether the UN-Charter obliges the UN-SC to comply with international law.

Art.25 UN-Charter obliges member states to carry out resolutions by the Security Council. The wording leaves it open, though, whether the addition „in accordance with the present Charter“ refers to the implementation by member states, or whether member states are only obliged to carry out decisions by the UN-SC, which have been reached in conformity with the Charter.

One could argue against the latter, that in view of the manifold possibilities to interpret the UN-Charter the binding effect of decisions of the UN-SC

¹⁹⁴ Kelsen, *The law of the United Nations*, p.735.

¹⁹⁵ Frowein / Kirsch in Simma (ed.), *The Charter of the UN*, Vol. I, p.710; cf. also Tadic, ICTY, Appeals Chamber, Judgment 2.10.1995, ILM 35 (1996), p.42, paras.33, 56.

would in fact be effectively undermined, if states could judge upon its conformity with the UN-Charter.

On the other hand, according to Delbrück, the history of the article militates in favor of the latter interpretation. In his opinion, to reconcile both arguments, states may only control, whether the decision was formally taken lawfully.¹⁹⁶

However, regardless of how one interprets Art. 25 UN-Charter, the article does certainly not establish the duty of the UN-SC to comply with international law, but confirms at most the obligation of the UN-SC to act in accordance with the Charter.

In fact, one is redirected to the remaining provisions of the UN-Charter, especially Artt.24, 1, 2 UN-Charter.¹⁹⁷ Art.24 II UN-Charter provides, that in discharging its responsibility for the maintenance of international peace and security the UN-SC shall act in accordance with the purposes and principles of the UN, which are spelled out in, Artt. 1 and 2 UN-Charter. In its first part, Art. 1 I UN-Charter sets out the purpose to maintain universal peace and security. The second part refers in its first half to collective measures as envisaged by Chapter VII, and in its second part to peaceful means as envisaged by Chapter VI of the UN-Charter.

At the same time, paragraph I refers explicitly to the duty to act in accordance with the principles of justice and international law. A precise analysis of the wording shows however, that this obligation refers only to the second half of the sentence, that is to action taken by the UN-SC according to Chapter VI, but not to measures under Chapter VII as provided for in the first half. This is systematically affirmed by Art. 2 VII UN-Charter, which provides only for an exception of the prohibition to interfere in internal affairs of a state, if the UN-SC acts under Chapter VII.¹⁹⁸ Furthermore, the drafting history militates in favor of this interpretation, because the proposal to extend the reference to justice and international law

¹⁹⁶ Delbrück in Simma (ed.), *The Charter of the UN*, Vol. I, p.459.

¹⁹⁷ Oosthuizen, *Playing the Devil's Advocate*, 12 LJIL, p. 556.

¹⁹⁸ Frowein / Kirsch in Simma (ed.), *The Charter of the UN*, Vol. I, p.710.

to the whole paragraph had been rejected, in order to preserve the UN-SC's freedom of action.¹⁹⁹

The UN-SC therefore does not have to obey to international law in general. However Artt. 1 III, 55 UN-Charter obliges not only the member states to respect human rights and humanitarian law, but also the United Nations.²⁰⁰ This is a purpose of the UN, so that according to Art.24 II UN-Charter even the UN-SC has to respect humanitarian law. It is sometimes argued, that this can not apply if the Security Council takes action according to Chapter VII, since human rights would concern a part of international law, whose prevalence had precisely been excluded in Art.1 I UN-Charter.²⁰¹

That argument is not convincing, because in contrast to paragraph I, paragraph III does not establish an absolute supremacy of human rights. Moreover, Art.55 UN-Charter shows, that the Charter assumes, that respect for human rights is essential to reach international peace and security.²⁰² Thus, the UN-SC must try to realize in its actions both principles as extensively as possible, while the central importance of peacekeeping needs to be accounted for, as the Charter indicates. This interpretation is also affirmed by Artt. 40,42 UN-Charter, which determine, that the UN-SC has to judge its actions by the standard of necessity.²⁰³

It follows from this analysis, that the UN-SC must at least not entirely ignore humanitarian law in its activities.²⁰⁴ Moreover, in regard to most rules of humanitarian law, it would seem difficult to explain, why their violation should be necessary in order to maintain international peace and security. This might be a defensible position in regard to parts of the law of occupation, but it is not for basic rules protecting civilians.

¹⁹⁹ ICJ judgement, Questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Dissenting Opinion Schwebel; cf. the drafting-history in more detail, Zwanenburg, Accountability, p.140.

²⁰⁰ See above Chapter 1), c).

²⁰¹ Zwanenburg, Accountability, p.149.

²⁰² Cf. e.g. Gasser, Collective Economic Sanctions and International Humanitarian Law, 57 HJIL S.881; dissenting Oosthuizen, Playing the Devil's Advocate, 12 LJIL p.562.

²⁰³ Frowein / Kirsch in Simma (ed.), The Charter of the UN, Vol. I, pp.711.

²⁰⁴ Frowein / Kirsch in Simma (ed.), The Charter of the UN, Vol. I, p.711.

This reasoning is backed up by the practice of the UN-SC. In resolution 1483 the UN-SC has indeed liberated the occupying states USA and Great-Britain from the prohibition to change the law and institutions of the occupied country, which is contained in the law of occupation. This makes sense, if one considers the existence of effective public structures a precondition for future peace. On the other hand the UN-SC has never decided with regards to instruments and methods of warfare. Concerning economic sanctions, the Security Council rather has acknowledged, that it is necessary to avoid their negative humanitarian effects on civil population.²⁰⁵ To sum up, the SC is, even if it acts under Chapter VII, in most cases bound to the full extent of humanitarian law.

3.1.2.2.2 Other sources of obligations

In addition the approaches developed above in part 1) may serve as arguments to establish an obligation of the UN-SC to comply with humanitarian law under all circumstances to the full extent.

The fact, that the UN as a subject of international law is bound by customary rules of humanitarian law²⁰⁶ is not sufficient to establish such a comprehensive obligation for the UN-SC. Member states can found an international organization, which (respectively its organs) is not obliged to respect customary law. It follows from the fact, that states can violate their commitments under international law, they must also be able to found an organization, which is not bound by those rules.²⁰⁷

Thus, in addition to unilateral declarations,²⁰⁸ only the functional approach could possibly explain a comprehensive obligation. Objections against this construction have already been mentioned above, especially that the result

²⁰⁵ Frowein / Kirsch in Simma, *The Charter of the UN*, Vol. I, p.711.

²⁰⁶ Cf. Chapter C, I, 1, d).

²⁰⁷ Oosthuizen, *Playing the Devil's Advocate*, 12 LJIL p.562; Orakhelashvili, *The Impact of Peremptory Norms*, 16 EJIL (2005) p.60; Doehring, *Unlawful resolutions of the Security Council and their legal consequences*, 1 MPYUNL (1997) p.104.

²⁰⁸ De Wet, *Human Rights limitations to economic enforcement measures*, 14 LJIL (2001) p.284 et seq.; Werzer, *The UN Human Rights Obligations and Immunity*, 77 *Nordic Journal of International Law* pp.110; dissenting Oosthuizen, *Playing the Devil's Advocate*, 12 LJIL p.559 et seq.; cf. also Chapter C, I, 1, c).

seems to be a simple postulate, which generates judge-made law. This does not have any basis in traditional sources of international law.²⁰⁹ Furthermore, in regard to the UN, Art.103 UN-Charter must also be taken into account, which stipulates, that obligations of member states under the UN-Charter prevail over other (not only contractual) commitments. Hence, these other commitments must be interpreted in a way that they do not interfere with the UN-Charter, because otherwise the precedence clause would apply. Therefore, one could argue, that any other commitment undertaken by the member states must not have the effect to delimit the competences of the UN-SC contrary to the UN-Charter. Put differently, humanitarian law treaties must not be interpreted as serving the basis for a functional succession, if that would establish duties contrary to the wording of the UN-Charter.

However, matters are different, if *jus cogens* comes into play, cf. Artt. 53, 64 VCLT.²¹⁰ States can not only violate *jus cogens* by concluding a conflicting agreement, but also by exercising their contractual rights and duties in a way that conflicts with *jus cogens*.²¹¹ In other words, in order to avoid a conflict between *jus cogens* and the UN-Charter, the latter must be construed as prohibiting any decisions, which violate *jus cogens*.

To sum up, it is not possible for the UN-SC to completely ignore humanitarian law, even if it acts under Chapter VII. Conversely, it must respect humanitarian law as far as possible, while balancing it with other purposes of the Charter, especially the maintenance of peace and security. This will most likely demand the application for the most part of customary humanitarian law. At the very least however, the UN-SC is obliged to respect humanitarian law as far as it has gained the status of *jus cogens*.

²⁰⁹ Cf. Chapter C, I, 1, b).

²¹⁰ Cannizzaro, A machiavellian moment, 3 IOLR (2006), p.211 et seqq..

²¹¹ Orakhelashvili, The Impact of Peremptory Norms, 16 EJIL (2005) p.67 et seqq..

3.2 Scope of application of humanitarian law

3.2.1 The threshold of application: existence of an armed conflict

Humanitarian law only becomes applicable, if an armed conflict exists. For the GC, this follows from Art.2 GC, and nothing else applies for the HC.²¹²

A formal declaration of war is not necessary.

There is no definition of an armed conflict, rather a factual evaluation is necessary. However, in borderline cases this can lead to controversies about the existence of an armed conflict. Since in particular traditional UN-Peacekeeping missions are often deployed in instable situations with sporadic incidents, it is necessary to define the term 'armed conflict' as precisely as possible. According to the ICRC commentary, „any difference arising between two States and leading to the intervention of members of the armed forces“ suffices. „It makes no difference how long the conflict lasts, or how much slaughter takes place“.²¹³ Sometimes this assessment is challenged with reference to actual state practice,²¹⁴ or by arguing, that specific norms of humanitarian law require a certain degree of intensity of the conflict.²¹⁵ But taking the purpose of humanitarian law into account, its protection must be already available to the first victims of a conflict.²¹⁶ Thus, occasional armed encounters between armed forces must rightly be considered to constitute an armed conflict, without a requirement of a certain intensity of fighting. Concerning UN-missions however, two caveats are in order.

²¹² Greenwood, in Fleck, *The handbook of humanitarian law in armed conflicts*, p.41 et seq.; *ibid* in *International Law*, Malcom D. Evans (ed.), *International law*, p.786.

²¹³ Pictet, *The Geneva Conventions*, p.20.

²¹⁴ Greenwood, in Fleck, *The handbook of humanitarian law in armed conflicts*, p.42.

²¹⁵ Bothe, in: *Völkerrecht*, Graf Vitzthum (ed.), p.687.

²¹⁶ Ipsen, Knut, *Zum Begriff des „internationalen bewaffneten Konflikts“*, in: Delbrück (ed.), *Festschrift für Eberhard Menzel*, p.419 et seq..

3.2.1.1 Distinction between international and non-international conflicts

Humanitarian law traditionally distinguishes between international and non-international armed conflicts. In the latter type at least one warring party is not a subject of public international law.²¹⁷

In non-international conflicts, the tension between humanity on the one hand and the sovereignty of the concerned state on the other hand, have led to a lower standard of protection and a variety of compromises in the law of non-international conflicts, which is laid down in Art.3 GC and AP II.

This is exemplified by the fact that insurgents do not enjoy a combatant privilege, and consequently will not be treated as prisoners of war. In contrast and in marked difference to international armed conflicts, they remain liable to prosecution for the mere act of participating in the hostilities.²¹⁸ Due to this tension between humanity and sovereignty, the threshold of armed conflict in non-international conflicts is also higher.²¹⁹

Firstly, one must distinguish between the armed conflict as defined in Art.3 GK and armed hostilities below this standard (low level violence), which do not reach the level of required intensity. According to Art.1 (1) AP II, the rules of this protocol only apply, if the organized and armed forces in fact control a part of the national territory. Furthermore, according to Art.1 (2) AP II, the rules of non-international armed conflict do not apply in cases of mere inner disturbances or tensions.²²⁰ This raises the question, what threshold applies to the UN, if it becomes involved in a non-international armed conflict. As a matter of fact, the majority of conflicts, in which the UN step in, are of non-international character.²²¹ Such so-called mixed conflicts, that is to say conflicts with the participation of at least two

²¹⁷ Only if the state recognizes the insurgents as a conflict party, is the law of international armed conflict applicable. However, this is of almost no relevance, cf. Bothe in: Graf Vitzthum, *Völkerrecht*, p.720 et seq..

²¹⁸ Oeter, *Civil war, humanitarian law, and the United Nations*, 1 MPYUNL (1997) p.207 et seq..

²¹⁹ Cf. also Greenwood in: *International Law*, Evans (ed.), p.807 et seq..

²²⁰ Partsch, in: Bothe/Partsch/Solf, *New Rules*, p.623 et seq.; according to the ICTY „protracted armed violence“ is necessary, *Prosecutor v. Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70.

²²¹ Saura, *Lawful Peacekeeping*, 58 *Hastings Law Journal* (2007), p.513.

subjects of international law (be it states or international organizations) and at least one other warring party, are not explicitly regulated in humanitarian law. The community of states neither wanted to give up the distinction between international and non-international conflicts, nor approved the suggestion by the ICRC during the drafting-process of the Additional Protocols to apply the rules of international armed conflicts to a non-international conflict, in which a third state intervenes. Thus, this issue remained intentionally unresolved.²²²

3.2.1.1.1 Differentiation approach

Commentators usually apply the so-called differentiation approach, if a third state intervenes.²²³ According to this approach, it is necessary to distinguish between all different relations among the warring parties and to determine the respective nature for each of them independently, on the basis of their status as legal subjects of international law.²²⁴

Transposed to interventions of UN-forces that means:

In case the UN itself get involved in fighting against the established government, the law of international armed conflict must be applied.²²⁵ This is also the case if conflicts arise with third states, which intervened in favor of a party to the conflict. However, if UN-forces fight insurgents, it is controversial as to which body of law must be applied. If one only considers, whether all involved parties are subjects of international law, one must qualify the conflict as non-international. On the other hand, in case of an intervening state it is also controversial, whether the international

²²² Gasser, Internationalized non-international armed conflicts, 33 American University Law Review p.146.

²²³ This approach was followed by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27.6.1986, para.219.

²²⁴ Gasser, Internationalized non-international armed conflicts, 33 American University Law Review p.147.; *ibid.*, *Humanitäres Völkerrecht*, 2007, p.64 et seq..

²²⁵ Even though the UN is not a state, the law of international armed conflict can be applied because it concerns a conflict between two subjects of international law, cf. Zwanenburg, *Accountability*, p.184 with further references.

character of the intervention prevails and one must consequently apply the rules of international armed conflicts.²²⁶

3.2.1.1.2 Internationalization

Moreover, a conflict might become internationalized, precisely because the United Nations are involved.²²⁷

State practice and the practice of the United Nations are inconclusive in this respect.²²⁸ Turning to legal instruments, the same is true in regard to Art.2 II Convention on the safety of United Nations and associated personnel (hereinafter CSUN). This provision could either be interpreted in a way that (a) at least in cases of enforcement action by the United Nations according to Chapter VII (quasi as legal consequence), the law of international armed conflicts is applied, or that (b) the CSUN does not apply, if quasi as an additional requirement the law of international armed conflicts is applicable.²²⁹

Only the UN-SG's bulletin militates in favor of the application of law of international armed conflicts, since it does not differentiate between the different types of conflict.²³⁰

²²⁶ Bothe, *Völkerrechtliche Aspekte des Angola-Konflikts*, 37 HJIL (1977) p.592 with further references; Zwanenburg, *Accountability*, p.185 with further references.

²²⁷ It should be noted, that this part discusses only, whether the relationship between the UN and the insurgents becomes internationalized. A distinct question not treated here, is whether the whole conflict becomes internationalized by the involvement of the UN.

²²⁸ Robert Kolb, *Applicability of international humanitarian law to forces under the command of an international organization*, in: *Expert meeting on multinational peace operations*, 2003, p.65 et seq.; Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p.105; Greenwood, *International Humanitarian Law and UN Military Operations*, 1 YIHL (1998), p.26; dissenting opinion Zwanenburg, *Accountability*, p.185 et seq..

²²⁹ Robert Kolb, *Applicability of international humanitarian law to forces under the command of an international organization*, in: *Expert meeting on multinational peace operations*, 2003, p.64 et seq.; Antoine Bouvier, *Convention on the Safety of United Nations and Associated Personnel: Presentation and analysis*, 309 IRRC (1995) p.638 et seq.; Zwanenburg, *Accountability*, p.170; Sassoli, *International humanitarian law and peace operations, scope of application ratione materiae*, in: *ICRC San Remo Report* p.102.

²³⁰ Robert Kolb, *Applicability of international humanitarian law to forces under the command of an international organization*, in: *Expert meeting on multinational peace operations*, 2003, p.64.

The possibility of the existence of double standards is an aspect in disfavour of the application of the law of international armed conflicts. Insurgent forces in particular would only be privileged as combatants when attacking the UN-forces.²³¹ But this argument can also be used the other way around. If one applies the law of non-international conflicts to insurgents, the UN would be bound by different rules, depending on whom they attack.

Furthermore, one could argue that a conflict by definitionem becomes international, as soon as the United Nations intervenes, because contrary to states, the UN lacks a national dimension, which needs protection.²³² As demonstrated above, on the contrary, the UN-Charter obliges the UN to promote humanitarian law.

As a result, it seems correct to apply the law of international armed conflicts. But in order to meet counter-arguments as well, the law of international armed conflicts can only be applied to an appropriate extent.²³³

In this context, it could for instance be taken into account, whether the application of specific rules of international armed conflict does not only affect the UN, but at the same time the sovereignty of the state, as is arguably the case in relation to the status of combatants. It has to be admitted, though, that such a sui-generis approach might lead to an ambiguous and insecure legal situation, which is, especially in humanitarian law, not desirable.

3.2.1.2 Convention on the safety of United Nations and associated personnel

In the following, the impact of the CSUN on the obligations of the UN under humanitarian law shall be determined. The scope of the CSUN is limited by Art.2 (2) CSUN. Its aim is to raise the level of protection of UN-

²³¹ Schwendimann, Rechtsfragen des humanitären Völkerrechts, p.82 et seq..

²³² Robert Kolb, Applicability of international humanitarian law to forces under the command of an international organization, in: Expert meeting on multinational peace operations, 2003, p..62 et seq.. With further references; Marco Sassoli, International humanitarian law and peace operations, scope of application *ratione materiae*, in: San Remo Report, p.104.

²³³ Cf. for problematic issues below 2).

personnel during UN-missions,²³⁴ by prohibiting attacks on personnel of the UN and imposing corresponding specific duties to implement this prohibition on contracting states, cf. Artt. 7 ff. CSUN. On the face of it, this prohibition is inconsistent with humanitarian law, which qualifies combatants as legitimate targets of attacks. Thus, the scope of the CSUN and of humanitarian law are mutually exclusive, if and to the extent that one retains the humanitarian law principle of equal application of humanitarian law. Art.2 (2) CSUN must be interpreted accordingly.

This becomes clear, if one considers the first problematic issue in determining the scope of the CSUN. According to the wording of Art.2 (2) CSUN, an UN-Mission is only excluded from the scope of the convention, if it was authorized by the SC as an enforcement action under Chapter VII of the UN-Charter. But also UN-missions, which are not enforcement actions but were established under Chapter VII or VI of the UN-Charter, can get involved in fighting.²³⁵ In that case, according to the wording, Art.2 (2) CSUN would not be applicable, and the forces of the UN would not be legitimate targets of attack. Thus, contrary to the principle of equal application only one of the parties would be punished for participating in the hostilities per se. Therefore, the principle of equal application and the CSUN can only be reconciled, if Art.2 (2) CSUN is understood to the effect, that the decisive criterion is the active engagement of UN-forces as combatants. In that case, the type of authorization of the UN-SC would be of no relevance.

²³⁴ The personal scope of the CSUN comprises only forces, under the authority and control of the UN, Art.2 iVm Art.1 c) i) CSUN; critically Daphna Shruga, *The United Nations as an actor bound by International Humanitarian Law*, 5 *International Peacekeeping* (1998) S.75 f.

²³⁵ Okimoto, *Violations of International Humanitarian Law by United Nations Forces and their legal consequences*, 6 *YIHL* (2003) p.214 et seq.; Zwanenburg, *Accountability*, p.169; Greenwood, *Protection of peacekeepers: the legal regime*, 7 *DukeJCIL* (1996) p.198; Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p.122. Vice versa it might be, that the SCUN is also applicable in missions authorized under Chapter VII, if there is no armed conflict, cf. Bouvier, *Convention on the Safety of United Nations and Associated Personnel*, 309 *IRRC* p.638 et seqq. after footnote 81.

A second issue in determining the scope of the CSUN is, at what point the threshold of armed conflict in terms of humanitarian law is overstepped.²³⁶ In this regard, too, the scope of the CSUN and of humanitarian law are mutually exclusive, if the principle of equal application shall be maintained. But according to the law of international armed conflict, it does not make a difference, whether troops act in self-defense or whether they attack themselves. In both cases they are in principle lawful targets under humanitarian law. If the same reasoning applied to UN-forces, no additional protection would be afforded to the troops contrary to the intent of the CSUN.²³⁷ It follows, that the threshold is in fact raised by the CSUN, even though this leads to an inequality between the parties to some degree.²³⁸ On the other hand, the threshold cannot be interpreted too high, because the ensuing inequality would lead to unrealistic results in the face of a conflict.²³⁹

In the end however, the precise scope of application of the CSUN can be left open for present purposes. A claim for compensation requires that the UN-forces violate rules of international humanitarian law, by which they are bound. But international humanitarian law and the CSUN are only mutually exclusive in regard to the duties of the adversary of the UN. The UN on the other hand may - even if the CSUN is applicable and its forces therefore must not be attacked – very well be bound by the rules of humanitarian law on its part.²⁴⁰ To that extent, the scope of the two bodies of law overlaps.

²³⁶ A further problem, which cannot be discussed here, is when the CSUN applies again, after the forces have already been excluded from the scope of the convention, cf. Ola Engdahl, in: ICRC San Remo Report, p.129 et seqq..

²³⁷ Evan Bloom, Protecting Peacekeepers: The Convention on the Safety of United Nations and associated personnel, 89 AJIL (1995) p.625. Without elaboration upon the SCUN, Sassoli argues in principle, that the UN might also by self-defence cross the line to an armed conflict, Sassoli, ICRC San Remo Report, p.103.

²³⁸ Greenwood, International Humanitarian Law and UN Military Operations, 1 YIHL (1998), p.25; *ibid*, Protection of peacekeepers: the legal regime, 7 DukeJICL (1996) p.202.

²³⁹ Sassoli gives the example of an UN-soldier in an aircraft attacking former Yugoslavia and claiming to be an expert on mission, who may not be attacked, cf. Sassoli, ICRC San Remo Report, p.105.

²⁴⁰ Saura, Lawful Peacekeeping, 58 HSTLJ (2007) p.518 et seq.; Benevenuti, How Can International Humanitarian Law Be Made Effective in Armed Conflicts, in: Law in humanitarian crises, p.83 et seqq., in Sect. VIII.

This is confirmed by the savings-clause in Art.20 lit.a) CSUN, which should be interpreted in such a way as demanding the UN to comply with humanitarian law, as soon as an armed conflict (in the traditional sense) is given.²⁴¹

3.2.1.3 Conclusion

To sum up, humanitarian law becomes applicable to UN-missions as soon as an armed conflict exists. This is debatable in regard to insurgents, but there are good reasons to apply the threshold of international armed conflict in those cases as well. The CSUN in turn has no bearing on the duties of the UN under international humanitarian law, and in particular it does not influence at what point those duties become applicable.

3.2.2 Applicable rules

As has been indicated above, another issue is which rules of humanitarian law are actually binding on the United Nations. Only insofar as rules are binding on the UN a claim for compensation may arise from their violation. A comprehensive review, in particular of the customary nature of particular rules, would however go beyond the scope of this article. Instead fundamental issues shall be discussed in the following.

To begin with, reference must be made to the above discussion about the body of law which applies, if the UN intervenes in an non-international armed conflict. The distinction between the law of non-international and the law of international conflicts is important, because they guarantee a different level of protection. To name just one example, in a non-international conflict the UN would not have to grant Prisoner of War Status to detainees. As has been explained, a lot of arguments militate in favor of

²⁴¹ Zwanenburg, *Accountability*, p.171; Greenwood, *Protection of peacekeepers: the legal regime*, 7 *DukeJCIL* (1996), p.198; Saura, *Lawful Peacekeeping*, 58 *HSTLJ* (2007) p.519; Shraga, *The United Nations as an actor bound by International Humanitarian Law*, 5 *International Peacekeeping* (1998) p.75.

applying consistently the law of international armed conflict to UN-missions.²⁴²

Furthermore it is contentious, if and to what extent the Third Geneva Convention relative to the Treatment of Prisoners of War (hereinafter GC III) applies to UN-missions.²⁴³ In civil wars it is particularly problematic, that – as has been seen – the application of GC III goes hand in hand with the acceptance of the privilege of combatants, which excludes penal sanctions based on the mere participation in hostilities. But even if one accepts the applicability of GC III, it is still dubious, what precise rules have to be transposed *mutatis mutandis* to the UN, cf. also Art.8 UN-SG Bulletin.

Thirdly, there is a lot of discussion, as to whether the law of occupation, which is mainly laid down in Artt.42 – 56 HC-Annex and GC IV, is applicable to the United Nations. This part of humanitarian law becomes particularly relevant, if the UN replace national authority, as for example in Kosovo, Cambodia or East-Timor.²⁴⁴ However, if the concerned state consents, the presence of the UN cannot be qualified as a occupation in terms of Art.42 HC-Annex.²⁴⁵ The prohibition to change the law and institutions in the occupied territory as anchored in Art.43 HC-Annex and Art.64 GC IV makes the application of this body of law problematic,

²⁴² Cf. Chapter C, II, 1, a).

²⁴³ Saura, *Lawful Peacekeeping*, 58 HSTLJ (2007) p.504 et seq.; Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p.133 et seq.; Greenwood, *International Humanitarian Law and UN Military Operations*, 1 YIHL (1998), p.29.

²⁴⁴ Saura, *Lawful Peacekeeping*, 58 HSTLJ (2007) p.506; Shraga, *The United Nations as an actor bound by international humanitarian law*, 5 *International Peacekeeping* (1998) p.68. The law of occupation might become applicable during an armed conflict, cf. Greenwood 1 YIHL (1998), p.28, Shraga, 5 IP (1998) p.70. Greenwood vice versa does not apply the law of occupation, if the UN has not been before a party to the conflict, cf. Greenwood, *International Humanitarian Law and UN Military Operations*, 1 YIHL (1998), p.30. Furthermore, the law of occupation might be applicable in so-called failed states, cf. Faite, Alexandre, *Applicability of the law of occupation to United Nations-mandated forces*, in: *Expert meeting on multinational peace operations*, 2003, p.71.

²⁴⁵ Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p.141. Possibly even in the case of forced consent in the Kosovo the law of occupation was applicable, because it was authorized by the UN-SC, cf. Sassöli, Marco, *Outline of de jure and de facto applicability of the law of occupation to United Nations-mandated forces*, in: *Expert meeting on multinational peace operations*, p.33; critically Saura, *Lawful Peacekeeping*, 58 HSTLJ (2007) S.507; Zwanenburg, *Accountability*, p.196 f.; Faite, Alexandre, *Applicability of the law of occupation to United Nations-mandated forces*, in: *Expert meeting on multinational peace operations*, pp.72, 74.

because this prohibition might conflict with the goals of the UN-mission, especially to establish democratic state structures.²⁴⁶ But even assuming that this is a sufficient legal argument in view of the principle of factual determination in humanitarian law, it has been argued before, that UN-SC Resolutions may legally disregard this prohibition.²⁴⁷ Furthermore, taking into account human rights obligations, the application of some existing national law and the maintenance of some national institutions might be 'absolutely prevented' in terms of Art.43 HC-Annex.²⁴⁸ Thus, the limited prohibition of change is no decisive argument against an application of the law of occupation.

But some rules of this body of law just do not go with the nature of the UN.²⁴⁹ Therefore, the law of occupation, too, can only be transposed to the UN analogously (*mutatis mutandis*).

Finally, it needs to be resolved, whether the UN has a duty to step in, if the violation of humanitarian law by a third party is threatening. The practical relevance is exemplified by the case of Srebrenica, where the UN refrained from intervening, even though this lead to a Genocide.²⁵⁰ It is contentious, whether such a duty can be based on Art.1 GC, which stipulates a 'duty to ensure respect'.²⁵¹ In any case, such a duty is limited by the means available to the UN-mission.²⁵²

²⁴⁶ Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p.140; cf. also Gasser, *Humanitäres Völkerrecht*, p.130 et seq..

²⁴⁷ Greenwood, *International Humanitarian Law and UN Military Operations*, 1 *YIHL* (1998), p.28; Zwanenburg, *Accountability*, p.197 et seq..

²⁴⁸ Sassòli, Marco, *International humanitarian law and peace operations, scope of application ratione materiae*, in: *Expert meeting on multinational peace operations*, p.33 et seq.; Faite, Alexandre, *Applicability of the law of occupation to United Nations-mandated forces*, in: *Expert meeting on multinational peace operations*, p.75.

²⁴⁹ Saura, *Lawful peacekeeping*, 58 *HSTLJ* (2007) p.509, Schwendimann, *Rechtsfragen des humanitären Völkerrechts*, p.143

²⁵⁰ *The Fall of Srebrenica*, Report of the Secretary-General pursuant to General Assembly Resolution 53/35, UN. Doc. A/54/549.

²⁵¹ In favor Saura, *Lawful peacekeeping*, 58 *HSTLJ* (2007) p.511; rejecting Greenwood, *International Humanitarian Law and UN Military Operations*, 1 *YIHL* (1998), p.32 et seq..

²⁵² Saura, *Lawful peacekeeping*, 58 *HSTLJ* (2007) p.512.

3.3 Responsibility of the UN for the unlawful conduct

3.3.1 Attribution of conduct: the applicable yardstick

As has been explained above, an international wrongful act requires not only, that an international obligation of that international organization has been breached, but also, that the conduct is attributable to the international organization under international law, cf. Art.3 Draft Articles on Responsibility of International Organizations (hereinafter DARIO). This is doubtful in relation to UN-missions, because troops are contributed by national states, cf. Artt. 4, 5 DARIO.

3.3.1.1 Effective control

What stance did the UN take on the issue of attribution? Official UN statements indicate, that a distinction must be made according to the legal status of the operations. Whereas acts of peace operations under the operational control of the UN, which are regularly given the status of subsidiary organs of the organization, are considered to be imputable to the organization, acts during Chapter VII-authorized operations under national command and control give rise to the responsibility of the state.²⁵³

It is on the basis of this practice, that the ILC has developed its Draft Articles on Responsibility of International Organizations.²⁵⁴ In the following, the legal reasoning on the bottom of this proposition, as well as possible alternatives offered, will be elaborated upon.

Legal persons, such as a state or international organizations, can only act through other persons or entities. Therefore, Art.4 Draft Articles on State Responsibility (hereinafter DASR) as well as Art.4 DARIO recognize, that the conduct of an organ shall be considered the act of the state or the

²⁵³ ILC Commentary on the Responsibility of International Organizations, A/59/10, p.112, para.5; A/51/389, para.17; A/CN.4/545; A/CN.4/556, paras.3, 46.

²⁵⁴ Krieger, A Credibility Gap, 13 JIP (2009), p.167.

organization respectively under certain circumstances. But during peace operations, ordinarily military personnel do not act as normal agents of their home states, but are rather placed at the disposal of the UN.²⁵⁵ However, when states contribute troops to UN-missions, they always retain some control, - besides disciplinary powers and criminal jurisdiction often the right to withdraw. It follows, that Art.4 DARIO is not applicable, because the organ is not fully seconded. Thus, in question is, whether those troops are still an organ of the state or became an organ of the United Nations.

The troops therefore still act to a certain extent as an organ of the lending State, so-called 'lent organs'. This situation is addressed by Art.5 DARIO,²⁵⁶ which establishes the exercise of 'effective control' over the organ by the organization as the decisive criterion for the attribution. This criterion also finds strong support in the literature.²⁵⁷

To avoid confusion, this yardstick must be distinguished from related, yet different concepts. Firstly, the yardstick of effective control is also used in relation to the question whether conduct of persons is attributable to a State,²⁵⁸ famously applied for instance by the ICJ in the Nicaragua case.²⁵⁹ Its role regarding international organizations, however, is different, because it does not concern the issue of whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity - the contributing State respectively organization or the receiving organization - conduct is attributable.²⁶⁰ Secondly, a similar but lower benchmark of overall effective control was used by the ECHR in its judgment on the Loizidou case,²⁶¹ but in this case as well, the issue was only, whether the

²⁵⁵ Larsen, Attribution of conduct, 19 EJIL (2008) p.512.

²⁵⁶ ILC Commentary on the Responsibility of International Organizations, A/59/10 p.110 as para.1.

²⁵⁷ References in the ILC Commentary on the Responsibility of International Organizations A/59/10 p.113 as para.7 in footnote 297; Milanović, Papić, As bad as it gets, p.15 in footnotes 46, 47 and p.24; Larsen, Attribution of conduct, 19 EJIL (2008) p.513.

²⁵⁸ Cf. in general ILC Commentary on the Responsibility of States, A/56/10, p.47 et seqq..

²⁵⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 27.6.1986, paras.109, 115.

²⁶⁰ ILC Commentary on the Responsibility of International Organizations, A/59/10 p.111 as para.4.

²⁶¹ ECHR, Loizidou v. Turkey, App. No. 15318/89, para.56.

control was sufficient to establish the jurisdiction of the state in terms of the ECHR.²⁶²

The degree of control that constitutes effective control is difficult to assess. The UN does not have agreed terms to designate levels of command and control, as the NATO has.²⁶³ The NATO terminology could at least be a starting point, to define more precisely, what is necessary. In that sense it has been argued, that effective control requires - in the terminology of the NATO - the exercise of 'operational command' as opposed to 'full command' at the top and 'operational control'²⁶⁴ at the lower end of the spectrum.²⁶⁵ In the NATO terminology, operational command is defined as the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational control and / or tactical control.

What degree of control the UN is permitted to exercise, is usually governed by the PSA. In the NATO and UNO alike, full command always remains under national authority.²⁶⁶ It should be noted, that effective control is understood in a factual sense.²⁶⁷ While Germany assigned operational control to the UN in the UN-mission in former Yugoslavia, the Netherlands assigned only operational command. However, it seems that they did not in fact grant different powers on the ground.²⁶⁸ Similarly, if an act is committed outside the chain of command, in fact no effective control is

²⁶² Krieger, A Credibility Gap, 13 JIP (2009), p.163 et seq.; cf. also Larsen, Attribution of conduct, 19 EJIL (2008) p.518 et seq..

²⁶³ Zwanenburg, Accountability, p.39.

²⁶⁴ Operational control is defined in the NATO nomenclature as the authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location, to deploy units concerned and to retain or assign tactical control of those units

²⁶⁵ Nato Doc. MC 57 / 3, as reprinted in: Lüder, *Völkerrechtliche Verantwortlichkeit*, p.87 et seq.; Dieter Fleck, Stuart Addy, *The Handbook of the Law of Visiting Forces*, 2001, p.39 et seq.. Note, that below operational control exist the levels of tactical command, (authority delegated to a commander to assign tasks to forces under his command for the accomplishment of the mission assigned by higher authority) and tactical control (the detailed and, usually, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned).

²⁶⁶ Lüder, *Völkerrechtliche Verantwortlichkeit*, p.89.

²⁶⁷ ILC Commentary on the Responsibility of International Organizations, A/59/10 p.111 as para.3.

²⁶⁸ Zwanenburg, Accountability, p.39 et seq..

exercised in this respect, and the act is thus performed in national capacity.²⁶⁹

The advantage of the criterion of effective control is its straightforwardness. Some authors seem to suggest, that classical peace-keeping under Chapter VI should be attributed to the UN and peace-enforcement under Chapter VII should be attributed to the member states. To be sure, if the UN-SC only delegates its power to Member States, the UN does not exercise effective control. However, even full-fledged war as for example in the Korea or Gulf war, which was until now delegated to Member-States, could in theory also be conducted under effective control of the UN. Vice versa, some commentators seem to assume, that the conduct of a peacekeeping force, which is established as a subsidiary organ of the UN, is ipso facto attributed to the UN.²⁷⁰ But this ignores that effective control, as it is understood in Art.5 DARIO, is based on a factual assessment.²⁷¹ The bottom line therefore is that the only decisive factor is, whether the UN exercises in fact effective control, whereas the character of the mission is of no relevance.

Still, whether Art.5 DARIO in fact already constitutes customary law is highly uncertain.²⁷² Therefore, it seems appropriate to consider possible alternative conceptions.

3.3.1.2 Dual capacity and dual attribution

It has been argued, that national contingents retain their character as organs of their respective sending state under all circumstances. Therefore, if troops are put at the disposal of the UN and thereby incorporated into its

²⁶⁹ Sari, *The Berami and Saramti Cases*, 8 HRLR (2008), p.166; Krieger, *A Credibility Gap*, 13 JIP (2009), p.170 et seq.; Larsen, *Attribution of conduct*, 19 EJIL (2008) p.523. It should also be noted, that the ECHR has accepted that argument in principle, when it discussed whether NATO had indeed effective control, or whether troop contributing states could interfere, ECHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, appl. no. 71412/01 and 78166/01, para.137.

²⁷⁰ Sari, *The Berami and Saramti Cases*, 8 HRLR (2008), p.164; Larsen, *Attribution of conduct*, 19 EJIL (2008) p.520.

²⁷¹ Milanović, *Papic*, *As bad as it gets*, p.18.

²⁷² Larsen, *Attribution of conduct*, 19 EJIL (2008) p.517; Krieger, *A Credibility Gap*, 13 JIP (2009), p.169.

institutional structure, those troops are placed in a dual legal position.²⁷³ Each act must be examined separately, to determine whether it was performed in a national or international capacity. Accordingly, the act will either be attributed to the international organization or the troop contributing state. But given the international nature of the mission, the problem with this perception is the fact that it leaves open, on what basis the distinction should be struck.

Nonetheless, this reasoning reveals, that the quality as an organ of one subject of international law is not necessarily exclusive. A joint organ is in principle conceivable. Such a joint organ would lead to a dual attribution. This possibility was also acknowledged by the ILC.²⁷⁴ In the course of UN-missions the considerable elements of control, which remain with the troop contributing states, support this view.²⁷⁵ However, if effective control is understood on the basis of the criterion of operational command, it would in practice be doubtful whether both, states and the UN, could in fact exercise effective control. The argument might instead go, that neither of them does, and therefore the act has to be attributed to both.

3.3.1.3 Ultimate authority and control

The ECHR in its *Behrami and Saramati* case adopted a different approach. The joined cases arose out of events relating to the international territorial administration of Kosovo. In the *Behrami* case, France was accused of being responsible for the violation of Art.2 ECHR i.a. for the death of a son of the applicant by undetonated cluster bomb units. In the *Saramati* case, Mr. Saramati argued that his arrest on suspicion of i.a. attempted murder, which was repeatedly extended for more than half a year, although the Supreme Court in Kosovo had ordered his release before, constituted a violation of Artt. 5, 6, 13 ECHR.

²⁷³ Sari, *The Berami and Saramti Cases*, 8 HRLR (2008), p.159 et seq..

²⁷⁴ ILC Commentary on the Responsibility of International Organizations, A/59/10 p.101 as para.4.

²⁷⁵ Cf. for a more detailed analysis Krieger, *A Credibility Gap*, 13 JIP (2009), p.170 et seqq..

The court argued in its decision, that the supervision of de-mining fell within UNMIK's mandate.²⁷⁶ Since UNMIK was established as a subsidiary organ of the UN under Chapter VII of the Charter, its inaction was held to be attributable to the UN.²⁷⁷ As has been stated before, under an effective control test, this might be factually true, but it would demand some more explanation, as to in what way the UN in fact exercises effective control.

Even more instructive is how the ECHR justified the attribution of the arrest to the UN, instead of attributing it to the troop contributing states. This is all the more true given the acknowledgement by the court, that the troops operated on the basis of UN delegated and not direct command and control.²⁷⁸ The approach of the court is well summarized in the last sentence of the section, in which it concludes, “that KFOR was exercising lawfully delegated Chapter VII powers of the UN-SC so that the impugned action was, in principle, 'attributable' to the UN”.²⁷⁹

As is well-known, the regime of collective security envisaged by the UN-Charter never became a reality, because states were not prepared to enter into agreements with the UN to make their armed forces available to the SC, as envisaged by Art.43 UN-Charter. As a substitute for the original enforcement mechanism, the SC, acting under Chapter VII, passed resolutions, in which willing member states were authorized to engage in military action. Authors tried to reconcile this practice with the text of the Charter and to define its limits at the same time. They therefore proposed to consider the practice as a delegation of powers, pursuant to general principles of the law of international organizations.²⁸⁰

This is the delegation model to which the court refers in the sentence cited above. The court stated in this regard, that the delegation is compatible with the UN-Charter only if the UN-SC retains ultimate authority and control.

²⁷⁶ ECHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, appl. no. 71412/01 and 78166/01, paras.125, 126.

²⁷⁷ *ibid*, para.142.

²⁷⁸ *ibid*, paras.129, 133.

²⁷⁹ *ibid*, para.141.

²⁸⁰ Milanović, Papić, *As bad as it gets*, p.11 et seq..

This in turn is the case, if and because (1) Chapter VII allows delegation, (2) the relevant power is a delegable power, (3) the delegation is prior and explicit in the resolution itself, (4) the Resolution puts sufficiently defined limits on the delegation, and (5) the leadership of the military presence has a duty to report.²⁸¹ In passing it might be noticed, that the last requirement is in fact the only real element of supervision inherent in the test. Moreover, the judges made explicitly clear, that direct operational command from the UN-SC is not a requirement of Chapter VII collective security missions.²⁸² The whole delegation model is not uncontroversial in itself, but the decisive and most delicate move by the court was to infer from the lawfulness of the delegation to the attribution of the acts to the United Nations.

Firstly, it is a bit strange to apply the 'internal' institutional law of an organization to the issue of attribution, which should be regulated by external secondary rules of general international law.

Secondly, it is quite striking, that, even though there might be good reasons as to why a lawful delegation implies attribution, the judges did not give any, but simply presumed this to be the case. In particular, the reasoning finds no basis in its own jurisprudence nor in the practice of the ICJ or the ILC, but seems to draw heavily on doctrine, especially Sarooshi's work.²⁸³ This work was rebutted by Milanovic and Papic in a thoughtful analysis.²⁸⁴ They show, that Sarooshi's reasoning is based on Art.5 DADR, which provides, that 'the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an

²⁸¹ *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, appl. no. 71412/01 and 78166/01, para.134.

²⁸² However, this does not prove anything. The conduct of the forces could still be attributable to the UN, even if direct operational command is not required for the delegation to be lawful.

²⁸³ Sarooshi, *The United Nations and the Development of Collective Security*, p.163 et seqq.. Sarooshi submits that 'the question of who exercises operational command and control over the force is immaterial to the question of responsibility. The more important enquiry is who exercises overall authority and control over the forces.' Further he states that 'acts of forces authorized by the Council are attributable to the UN, since the forces are acting under UN authority', and that the only exceptions are cases where the Council is 'prevented from exercising overall authority and control over the force', or when the forces act *ultra vires*.

²⁸⁴ Cf. for the following explanations Milanović, Papic, *As bad as it gets*, p.20.

act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. When this rule is applied to international organizations analogously, it would render an organization responsible, when it delegated some of its power to states. Milanovic and Papic argue, that in view of the purpose of Art.5 DASR it is not possible to transpose the norm to international organizations. Art.5 DASR intends to prevent states from escaping their responsibility under international law by delegating their functions at the national level. For international organizations however the situation is the reverse of the domestic level, because states have a further possible doorway to escape their responsibility. This analysis by Milanovic and Papic is supported by the fact, that, as has been shown, the ILC chose not to adopt Sarooshi's approach but the effective control criterion.

Thirdly, the control exercised by the United Nations over the different missions varies considerably in fact. It seems a bit queer, that in all those cases alike, the conduct should only be attributable to the United Nations.²⁸⁵ Finally the argument should be noticed, that the House of Lords decision in the case *Al-Jedda*,²⁸⁶ which concerned a case in Iraq very similar to *Saramati*, rendered an opposed judgment, even though it tried to distinguish the cases with the argument of lacking delegation of UN-SC powers in Iraq.²⁸⁷

To conclude, the criterion of ultimate authority and control seems inappropriate to attribute conduct. But even if one does not adopt this theory, which would effectively lead to a responsibility of the UN *ipso facto* in all missions established under Chapter VII,²⁸⁸ the UN is still at least responsible for conduct in missions under its effective control.

3.3.2 Allocation of conduct: responsibility

²⁸⁵ Cf. also Krieger, A Credibility Gap, 13 JIP (2009), p.166.

²⁸⁶ *R (on the application of Al-Jedda) v Secretary of State for Defence*, [2007] UKHL 58.

²⁸⁷ Milanović, Papic, As bad as it gets, p.27 et seq.; Larsen, Attribution of conduct, 19 EJIL (2008) p.526.

²⁸⁸ Milanović, Papic, As bad as it gets, p.24 et seq..

derived from the conduct of member states

It is often debated, whether states might incur responsibility, even if the conduct itself must be attributed to an International Organization. For instance the voting behavior of the respective states in decision-making-bodies might lead to their responsibility under international law. Furthermore, it was prominently discussed in the *Behrami and Saramti* case, whether in application of the ECHR jurisprudence regarding the continuing responsibility of states, established in the cases *Matthews*, *Bosphorus* and *Waite & Kennedy*, the troop contributing states would also be responsible, if the level of human rights protection guaranteed by the United Nations is not equivalent to the ECHR.²⁸⁹

Vice versa, even if the conduct is attributed to the states, it might still be possible to allocate it to the UN..It is in this context that the ultimate authority and control test applied by the ECHR for the attribution of conduct might be put to better use. Ultimately, this approach would lead to a dual responsibility of both the state, which exercises effective control, and the UN.

3.4 Procedural capacity of individuals to invoke breaches of humanitarian law

Even if the preconditions of a wrongful international act are fulfilled, viz. a rule of international law is violated, and this violation is attributable to the United Nations, the victim must still be entitled to a right on his own, which he can also enforce.

Issues arise on three different levels.²⁹⁰ On a primary level individual need to have a right to protection. Furthermore on a secondary level, a right to a remedy must flow from the violation of the right on the primary level.

²⁸⁹ This argument was rejected by the court, cf. ECHR, *Behrami and Saramati*, paras.145-151. Cf. further Sari, *The Berami and Saramti Cases*, 8 HRLR (2008), p.169; Larsen, *Attribution of conduct*, 19 EJIL (2008) p.524.

²⁹⁰ Mazzeschi, *Reparation claims by individuals*, 1 *Journal of International Criminal Justice* (2003), p.342.

Finally on a tertiary level individuals must have the procedural capacity to enforce such a claim.²⁹¹

If there is no primary right, there can be no secondary right, and if no basis for a claim for compensation can be established at the secondary level, the matter of procedural enforcement of this claim does not arise.²⁹²

3.4.1 Primary norms

The traditional conception of public international law mediates the individual to a large extent. But as international law developed, the individual became a partial subject of rights and duties in international law. Already the Permanent Court of International Justice had clarified in an advisory proceeding, that a treaty can confer rights and duties upon individuals.²⁹³ Human rights law and international criminal law exemplify this point. Humanitarian law also confers rights on individuals. This is indicated by the purpose of humanitarian law, and by the fact, that some norms are inalienable.²⁹⁴

Still, it is necessary to scrutinize every single norm, whether it confers true rights or only turns out to be a reflex of an interstate obligation to the advantage of the individual.²⁹⁵

3.4.2 Secondary norms

A different question is, whether the violation of the primary norm leads to a claim for damages of the plaintiff, i.e. whether the victim is entitled by a secondary norm. Whereas such an entitlement cannot be found in the primary norm itself, Art.3 HK as well as Art.91 AP I envisage such a claim.

²⁹¹ In addition humanitarian law must if necessary be transposed into nation law; in particular the issue of the self-executing character of those norms is often viewed as problematic by courts, cf. Zegveld, Remedies for victims of violations of international humanitarian law, 85 IRRC (2003) p.507 et seqq..

²⁹² Examples of individual primary rights can be found in Zegveld, Remedies for victims of violations of international humanitarian law, 85 RICR (2003) p.503 et seqq..

²⁹³ PCIJ, Jurisdiction of the Courts of Danzig, PCIJ Series B No.15, p.17 et seq..

²⁹⁴ Fischer-Lescano, Subjektivierung völkerrechtlicher Sekundärregeln, 45 AdV (2007) p.301 et seq..

²⁹⁵ Dörr, Privatisierung des Völkerrechts, JZ 2005, p.906 et seqq..

Both norms are rules of customary law, and thus apply to the United Nations. It is disputed, though, whether those norms entitle the victim or only his or her national state.

The wording does not specify the beneficiary. It has been argued, that the term 'compensation' as opposed for instance to 'reparation' indicates an entitlement of the individual.²⁹⁶ Others again objected this reasoning on the basis, that it would have been contrary to the concept of international law at that time to establish an individual entitlement.²⁹⁷ Art.3 HK and Art.91 AP I both lack a procedure to enforce a possible claim. Seen from a systematic angle, this is not a convincing point against an individual entitlement, because the issue of the existence of a right is distinct from its procedural enforcement.²⁹⁸ Quite to the contrary, the explicit codification of a procedure is only an indication of the existence of such a right. This was implicitly confirmed by the ICJ in its La Grand judgment.²⁹⁹

According to Art.31 (3) lit.b) VCLT one has to draw on subsequent practice in the application of the treaty. Fischer-Lescano conducted an extensive study of the praxis by the USA, Japan, Israel, Germany, Great-Britain, Italy and Greece and concluded, that it is supportive of an individual entitlement.³⁰⁰ This proposition is cast into doubt due to several reasons. To begin with, suits were dismissed in many countries, such as Germany³⁰¹ and Japan³⁰², because courts actually insisted, that humanitarian law does not

²⁹⁶ Mazzeschi, Reparation claims by individuals, 1 Journal of International Criminal Justice (2003), p.341; cf. expert opinion by Kalshoven, Art.3 of the Convention (IV), respecting the laws and customs of war on land, in H. Fuijta, I. Suzuki, K. Nagano (Eds.), War and Rights of Individuals, p.39, cited in Zegveld, Remedies for victims of violations of international humanitarian law, 85 RICR p.507.

²⁹⁷ Von Heinegg, Heintschel, Entschädigung für Verletzungen des humanitären Völkerrechts, in 40 BDGV (2003) p.31.

²⁹⁸ Oliver Dörr, Urteilsanmerkung, JZ 2004, p.575.

²⁹⁹ Grzeszick, Rechte des Einzelnen im Völkerrecht, 43 AdV (2005), p.328

³⁰⁰ And furthermore in his opinion of the corresponding procedural capacity, cf. Fischer-Lescano, Subjektivierung völkerrechtlicher Sekundärregeln, 45 AdV (2007) p.337 et seqq..

³⁰¹ German Federal Court of Justice, case number III ZR 190/05, 2.11.2006. The claimants have brought a constitutional complaint, which has not been decided yet the German Federal Constitutional Court.

³⁰² For a detailed analysis of the Japanese jurisprudence, cf. Shin Hae Bong, Compensation for victims of war time atrocities, 3 JICJ (2005) p.187 et seqq..

confer individual rights at a secondary level. In other cases suits were indeed dismissed for different reasons and the judges left the question of an individual right open. While Fischer-Lescano is right, that those judgments therefore do not militate against the existence of an individual right,³⁰³ they cannot establish a state practice either. Finally judgments in favor of the claimants mostly rest upon a national basis for a claim (especially in the USA, e.g. on the Alien Tort Claim Act), and thus do not give evidence about the interpretation of humanitarian law.³⁰⁴ This analysis is supported by the ECHR, which denied the existence of an individual right in the Markovic case.³⁰⁵ To conclude, there is no uniform state practice supporting the entitlement of individuals at the secondary level.

Still, a dynamic interpretation of Art.3 HK and Art.91 I AP I, which takes the development of international law in general into account, might affirm such an interpretation.

Overall in public international law a development towards enforceable claims for damages can be observed. To begin with, the saving clause in Art.33 (2) DASR underlines, that individuals can have claims for damages on the international plane in principle, by excluding those claims from the scope of the DASR. Art.16 Draft Articles on Diplomatic Protection allows the same conclusion. Furthermore, individual claims can in some cases be asserted in front of international ad-hoc tribunals, such as the Iran-United-States Tribunal, the EECC or the UNCC.³⁰⁶ What is more, some treaties acknowledge individual claims for compensation. Eventually, individual claims may be asserted in an adhesive procedure before the ICC according to Art.75 ICC-Statute. To infer from this that a rule of customary law has developed, which provides for claims for compensation against the state violating international law for the benefits of victims, and which would lead

³⁰³ Fischer-Lescano, Subjektivierung völkerrechtlicher Sekundärregeln, 45 AdV (2007) p.372.

³⁰⁴ Von Heinegg, Heintschel, Entschädigung für Verletzungen des humanitären Völkerrechts, 40 BDGV (2003) p.32.

³⁰⁵ ECHR, Markovic and others v. Italy, appl. no. 1398/03, Judgment, 14.12.2006, para.109.

³⁰⁶ Cf. in more detail Fischer-Lescano, Subjektivierung völkerrechtlicher Sekundärregeln, 45 AdV (2007) p.319 et seqq., p.328 et seqq..

to a corresponding interpretation of humanitarian law,³⁰⁷ however overrates this praxis. As much as these procedures provide an enforceable individual right, they rather rest on considerations of political expedience than on *opinio juris*.

Given the arguable intersection of humanitarian law and human rights law, the avenues in human rights law to bring an action might influence the interpretation of Art.3 HK and Art.91 AP I.³⁰⁸ It is possible that the ICJ in its Palestinian Wall advisory opinion, in which the court assumed the existence of individual claims for compensation, without referring to a specific basis of the claim. On the other hand, the principles of compensation in human rights law cannot easily be transposed to humanitarian law. Firstly, from the point of view of states, there might be good reasons to differentiate (such as the number of cases) between the two areas of law, and secondly the relationship between the two is disputed.

According to Art. 32 VCLT in such an ambiguous case interpretation can resort to the preparatory works. Based on a detailed analysis, Kalshoven concludes, that the genesis of the provision reveals its purpose to create an individual right to compensation.³⁰⁹ According to him, the German delegate, who proposed the inclusion of the article, intended to add to the existing possibility of recourse against the individual soldier, a further claim against the state.³¹⁰

The wording of Art.91 AP I is almost identical to Art.3 HK. Kalshoven however suggests on the basis of its genesis, that the political purpose of

³⁰⁷ Fischer-Lescano, *Subjektivierung völkerrechtlicher Sekundärregeln*, 45 AdV (2007) p.331, p.372.

³⁰⁸ Hofman, *Victims of violations of International Humanitarian Law: Do they have an individual right to reparation against States under International Law*, in Dupuy (ed.), *Völkerrecht als Wertordnung*, Festschrift Tomuschat, 2006, p.350; Graefrath, *Schadensersatzansprüche wegen Verletzung humanitären Völkerrechts*, 14 JILPAC (2001) p.116.

³⁰⁹ Kalshoven, *State Responsibility for Warlike Acts*, 40 ICLQ p.830 et seq.; Frulli, *When are states liable for serious violations of Humanitarian Law*, 1 JICJ (2003), p.417; Mazzeschi, *Reparation claims by individuals*, 1 JICJ p.341; Graefrath, *Schadensersatzansprüche wegen Verletzung humanitären Völkerrechts*, 14 JILPAC (2001) p.116.

³¹⁰ Kalshoven, *State Responsibility for Warlike Acts*, 40 ICLQ p.831 et seq.; diverging opinion von Heinegg, 40 BDGV p.31 et seq..

this norm was to provide a right to compensation for the state and not the individual, possibly because states were not aware of the original meaning of Art.3 HK anymore.³¹¹ On the other hand, this purpose was not explicitly stated in the preparatory works, and neither was the issue of an individual right addressed, so in view of their almost identical wording, both norms should be given the same meaning.³¹²

Thus, both norms can be a basis of a claim for compensation of the individual.

3.4.3 Tertiary norms

However, a claimant needs not only be a bearer of a right, but in addition possess the procedural capacity to enforce his claim.³¹³ Otherwise the individual would only be the beneficiary of the claim, which the state would need to enforce on his behalf. Again, the wording gives no indication for either interpretation. The preparatory works on the other hand reveal that the contracting states considered the individual entitlement and the procedural capacity to be distinct issues. There is no clue however, that the states intended to assign the latter to individuals.³¹⁴ Thus, individuals are entitled to a claim for damages, but states are not obliged to complement this claim with a procedural right to sue in their national legal order. On the other hand, states are not precluded from creating such a procedural mechanism in their legal order, so that national judgments might develop state practice

³¹¹ Kalshoven, *State Responsibility for Warlike Acts*, 40 ICLQ p.845 et seqq..

³¹² Frulli, *When are states liable for serious violations of Humanitarian Law*, 1 JICJ (2003), p.416; militating against this argument is, that state parties could have expressly agreed on individual secondary rights, as they did in human rights treaties.

³¹³ Differentiating in the same way: Steinkamm, *War damages*, in: EPIL Vol. IV p.1356 et seq.; Frulli, *When are states liable for serious violations of Humanitarian Law*, 1 JICJ (2003) p.417 et seq.; Graefrath, *Schadensersatzansprüche wegen Verletzung humanitären Völkerrechts*, 14 JILPAC (2001) p.113; arguably also Hofmann, *Victims of violations of International Humanitarian Law: Do they have an individual right to reparation against States under International Law*, in Dupuy (ed.), *Völkerrecht als Wertordnung*, Festschrift Tomuschat, 2006, p. 341 et seqq..

³¹⁴ Frulli, *When are states liable for serious violations of Humanitarian Law*, 1 JICJ (2003) p.417 et seq.. However, it must be admitted, that a claim without a procedural capacity to enforce that claim might not be very useful.

further (cf. Art.31 (3) lit.b) VCLT) towards a full-fledged entitlement of the individual.

4 National tort law as the basis for the claim

4.1 International law of civil procedure and international private law

Even though individuals thus cannot enforce their claim under international humanitarian law, they might be able to take recourse to the national legal system.

The international law of civil procedure determines in front of which court the claimant must file his suit, by establishing rules on international jurisdiction. That court must subsequently apply the applicable substantive law on the basis of international private law. Given (a) the obstacles, such as the actual access to the court, which a claimant might face in practice, depending on the competent court, (b) the indirect impact on the applicable substantive law, and (c) the fact, that the avenue of enforcement is at the most secured in the country, in which the judgment was rendered, the international law of civil procedure is of eminent importance.³¹⁵

International private law in turn indirectly influences the outcome of the case to a certain degree by determining the applicable substantive law..

In this paper it is not possible to examine, which courts are competent according to their national procedural provisions to rule on a claim against the United Nations, because this depends on the specifics of the given case and the respective national law.

However, according to the roman law principle „actor sequitur forum rei“, which is accepted in most legal systems, the place of general jurisdiction, that is where the juridical person is incorporated, is competent.³¹⁶

Furthermore, national law systems can establish particular places of jurisdiction. Is the claim based on a tort, this might be the place of the tort, as for example Art.5 Nr.3 Brussels I Regulation stipulates. However, there

³¹⁵ Kropholler, Internationales Privatrecht, p.606 et seq..

³¹⁶ *ibid.*, p.615.

might be a multitude of acts, which could have arguably caused the damage, such as acts of an individual soldier on the ground or orders of a superior acting in the troop contributing state. Depending on which act is chosen, the place of acting and of injury may lie in different countries. In that case, the choice between the available courts is up to the claimant.³¹⁷

Possibly a court could also be competent for other reasons. For example the District court in The Hague seems to have accepted the reasoning by the claimants in the Srebrenica case, that its competence follows on the basis of Art.7 (1) Wetboek van Burgerlijke Rechtsvordering from the close connection between the claims against the UN and the state of the Netherlands respectively.³¹⁸

Moreover, it should be mentioned in passing, that the national law can recognize a subsidiary emergency competence.³¹⁹ Finally, the controversial issue of universal civil jurisdiction might justify national jurisdiction.³²⁰

Depending in front of which court the claimant institutes legal proceedings, the respective national provisions of international private law apply. Due to the differing national statutes it is not possible to pinpoint the applicable substantive law. Often however, the law of the place of tort will be applicable.³²¹ This in turn might open up again the differentiation between the place of acting and place of injury.³²²

Obviously, the substantive law which governs a possible claim for damages against the United Nations depends on the circumstances of the particular case. Still, a renowned researcher stated, that notwithstanding the historically grown peculiarities of the national legal conceptions of tort law,

³¹⁷ *ibid*, p.620.

³¹⁸ Cf. Srebrenica writ of summons, para. 291; District Court in The Hague Judgment, Case number 295247, 10.7.2008.

³¹⁹ In Germany for instance this is accepted to avoid a denial of justice, if an competent court is not identifiable or not accessible, for example in case of war, cf. Kropholler, p.611.

³²⁰ Heß, Burkhard, *Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in: 40 *BDGV* (2003) p.184 et seqq..

³²¹ Cf. for the situation in Germany, Art. 40 Abs.I *EGBGB*.

³²² The claimants in the Srebrenica-trial argued for instance, that dutch law is applicable, as decisions were taken in the Netherlands, cf. Srebrenica writ of summons, para.306.

if one attends “to the practicalities of the law of tort, we quickly see that underneath the doctrinal variations the groups and types of case which appear problematic owing to the exigencies of actual life are much the same in all the legal orders under consideration, even if they are dealt with in different portions of the legal system and even, occasionally, with divergent result.”³²³ The same should be true for issues arising in the context of UN-missions. Thus, in the following German tort law shall serve as an example to deal concisely and in a tentative way with these issues.

4.2 The example of German tort law

It seems appropriate to start with a short comparative law outline of German tort law. The German Civil Code (Bürgerliches Gesetzbuch, hereinafter BGB) neither stipulates a sweeping clause as does Art.1382 Code Civil in French law, nor is it based on distinct types of torts, which protect certain interests against specific ways of infringement, as it is the case in the common law.³²⁴ Instead it occupies more or less a middle ground between those two conceptions by providing for a three-tiered structure: (1) § 823 I Bürgerliches Gesetzbuch (German Civil Code, hereinafter BGB), (2) § 823 II BGB, and (3) § 826 BGB. In addition, judicial lawmaking aims at closing existing gaps of protection.

§ 823 I BGB lays down a claim for compensation for every unlawful and culpable infringement upon certain specified legally protected interests. § 823 II BGB on the other hand, which requires a unlawful and culpable breach of a statute that is intended to protect another person, almost approximates a sweeping clause.³²⁵

Notwithstanding the general importance of § 826 BGB, which is the only norm (narrowly confined, though) protecting assets per se, it seems not to be of any particular relevance in the context of UN-operations.

³²³ Zweigert, Kötz, An Introduction to comparative law, p.622.

³²⁴ Cf. in general Zweigert, Kötz, An Introduction to comparative law, p.595 et seqq..

³²⁵ Fuchs, Deliktsrecht, p.135.

Before dwelling on the preconditions of the different foundations of claims, it is necessary to clarify whether national tort law may be applied to war damages at all.

4.2.1 The relationship between national tort law and international public law

4.2.1.1 International law perspective

First of all, public international law might exclude individual claims based on national tort law.³²⁶ Such a rule could determine that war damages must be regulated on the interstate level, in order to avoid juridical and political chaos, ensuing from large quantities of individual claims. The German Federal Court, referring to the jurisprudence of the German Federal Constitutional Court, however rejected in its Varvarin case, that such a rule exists in international law.³²⁷ The Federal Constitutional Court had justified the co-existence of national and international claims particularly by the fact, that diplomatic protection requires the exhaustion of national remedies, because this requirement presupposes the existence of an individual national claim. That would most notably be the case, if an act violates at the same time national and international law.³²⁸

4.2.1.2 National perspective

From the perspective of national law, one could argue, that national tort law is not suitable to regulate activities during armed conflicts and therefore not applicable.

The German Federal Court noted in that context in its *Distomo* decision, that at least according to the prevailing opinion at the end of World War II, war was regarded as an international state of emergency, which suspends to a large extent the law, which is valid during peacetimes. But it is an unresolved issue, whether this still holds true in view of the adoption of the

³²⁶ Cf. also Heß, Burkhard, *Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in: 40 *BDGV* (2003) p.114 et seqq. with further references.

³²⁷ German Federal Court of Justice, case number III ZR 190/05, 2.11.2006, para.19.

³²⁸ German Federal Constitutional Court, *BVerfGE* 94, p.330 et seqq.

federal constitution after the conclusion of World War II.³²⁹ The Higher Regional Court Cologne answered this question in its Varvarin decision in the negative, but the German Federal Court could leave this question open, because it dismissed the claim for compensation due to a lack of culpability.³³⁰

4.2.2 The interaction between national tort law and international public law

4.2.2.1 § 823 I BGB³³¹ as the basis for the claim

A claim for compensation firstly requires the violation of one of the enumerated protected interests: life, body, health, freedom and property.³³²

A violation of a rule of international humanitarian law, which protects individuals, will regularly encroach upon one of those protected interests as well.

The violation of the legally protected interest must be attributable to an action or omission of the defendant. An international organization as a legal person is not able to act. Instead acts of natural persons need to be attributed to it within the limits of § 31 BGB³³³ analogous. This in turn requires in particular the quality of a constitutional assigned agent, that is to say a person, who was assigned meaningful functions of the juridical person, which he must fulfill autonomously.³³⁴ This means, that the group of people, whose acts may give rise to a violation of § 823 I BGB by the UN is extensively restricted. Most likely, in most cases only strategic planning at

³²⁹ German Federal Court of Justice, NJW 2003, p.3488 et seqq.

³³⁰ German Federal Court of Justice, case number III ZR 190/05, 2.11.2006, para.20.

³³¹ § 823 I BGB provides, “A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.”

³³² § 823 I BGB protects also 'another right'. But this right must be similar to property - a precondition which is only recognized in few cases, that are of no relevance in the context of UN-missions.

³³³ § 31 provides, 'The association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business with which it or he is entrusted, where the act gives rise to a liability in damages'. This provision is applied analogously to other legal persons than associations.

³³⁴ German Federal Court of Justice, BGHZ 49, p.21 et seqq.

the highest level of authority will be comprised; in any case the ultra-vires conduct of individual soldiers on the ground is not covered. Further, one would need to examine more deeply the relationship between international and national rules on attribution, especially how the former influence the latter.

The act must further be unlawful. This in particular seems to reveal the interplay between international law and national tort law, because damage to property, bodily injury and homicide are legal during war, as long as rules of humanitarian law are respected. Only if those rules are violated, an act can be considered as unlawful under national tort law.³³⁵

The act must in addition be committed culpably. The German Federal Court stucked to this requirement at least in the context of the law of government liability, and did not replace it by strict liability.³³⁶ There is no obvious reason, why this should be different in regard to a UN-mission.³³⁷

4.2.2.2 § 823 II BGB³³⁸ as the basis for the claim

§ 823 II BGB could also be the basis for a claim. The prerequisites of paragraphs I and II are similar, but instead of a violation of a protected interest, paragraph II demands a breach of a statute that is intended to protect another person. A statute in terms of paragraph II could also be a customary rule of international humanitarian law.³³⁹ § 823 II BGB requires,

³³⁵ Burkhard Heß, *Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in 40 *BDGV* p. 112; cf. also Graefrath, *Schadensersatzansprüche wegen Verletzung humanitären Völkerrechts*, *JILPAC* 2001, p.118.

³³⁶ German Federal Court of Justice, case number III ZR 190/05, 2.11.2006, para.20.

³³⁷ But cf. also Graefrath, *Schadensersatzansprüche wegen Verletzung humanitären Völkerrechts*, *JILPAC* 2001, p.119.

³³⁸ § 823 II provides that, 'The same duty [as in § 823 I BGB] is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.'

³³⁹ Customary law is transposed to national law by virtue of Art.25 II GG.

that the statute intends to grant individual protection as opposed to the mere protection of the general public.³⁴⁰

As has been shown, parts of humanitarian law create primary rights for individuals, notwithstanding the fact that every single norm must be interpreted as to its effect. Therefore it would stand to reason to qualify such self-executing norms as a statute in the terms of paragraph II.³⁴¹

4.2.2.3 § 831 I BGB³⁴² as the basis for the claim

As we have seen, the possibility to attribute acts to a legal person by § 31 BGB is very limited. § 831 I BGB in contrast establishes a liability for the culpable conduct of one person in selecting and supervising another person used to perform a task. Let us consider the prerequisites. (1) Troops will regularly be persons used to perform a task. (2) This person must have unlawfully (but not necessarily culpably) inflicted damage on a third party as stipulated by § 823 BGB. (3) This must have happened in carrying out his task. This requirement excludes violations of humanitarian law by the inferior person, which are not closely connected to the assigned task. However, this will seldom be the case, because it is difficult to imagine a violation of humanitarian law, which is not closely connected to the military tasks of the soldier. (4) It is further important, that the culpability of the principal is assumed, but may be rebutted. In that context, it should be mentioned, that according to German jurisprudence not every single person in the chain of command must be able to rebut this assumption. In case of delegated responsibilities, the courts are satisfied, if the person at the top of the chain satisfies those criteria of selection and supervising via the person he delegated powers to.³⁴³ For the hierarchical organized military that could

³⁴⁰ German Federal Court of Justice, NJW 1992, p.242.

³⁴¹ Cf. also Schmahl, *Amtshaftung für Kriegsschäden*, 66 HJIL (2006), p.713 et seqq..

³⁴² § 831 I BGB provides, that 'A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.'

³⁴³ So-called 'dezentralisierter Entlastungsbeweis'. To be sure, this is judge-made law, which is not uncontroversial.

be of the utmost importance. On the other hand, the idea of Artt. 4, 6 DARIO and the purpose of Art.3 HK, which aim at holding the state and international organizations respectively responsible for all acts of their troops in violation of humanitarian law, could call for a different interpretation of § 831 BGB.

But even if that latter interpretation would be accepted, a rebuttal would probably often be possible. It follows, that in view of the limited scope of § 31 BGB, violations of humanitarian law can only be sanctioned partly by national tort law. The victim thus has in these cases only a claim against the individual soldier. This is a marked difference compared to German law of government liability, which passes responsibility from the individual civil servant on to the state (§ 839 BGB in conjunction with Art.34 GG). Therefore, whereas according to Art.3 HK the international organization just as states is responsible for all acts of its troops, responsibility of international organizations and states respectively differs on the national plane. This inconsistency is only one of many issues, which are inherent in the relationship between international law and national tort law, but could only be indicated at this point.

5 Conclusion

The problem of immunity of the United Nations should be seen as a part of the bigger issue of guaranteeing the legal responsibility of international organizations. This is of particular importance, if international organizations assume a larger field of activities, because they may violate human rights in discharging their functions. As has been seen, this problem is well known from the context of European integration, and the multi-layered interrelationship between the ECJ, ECHR and national supreme courts.

In this paper it has been proposed, that national courts must take care, that extended international cooperation does not lead to gaps in the protection of human rights. As far as claims for compensation against the United Nations are concerned, in the view of the present author, national courts should not in the first place try to limit the scope of activities, for which the organizations enjoys immunity. Instead, in the view of the human rights guarantee of access to the court, they should grant subsidiary legal protection, if the UN does not provide for alternative adequate legal remedies.

To be sure, as in armed conflicts between states, one might argue, that not all victims in a full-fledged war can be compensated by way of court proceedings, but that a political settlement is necessary. However, if that should be the case, states and the UN may agree upon a lump-sum-agreement. But in UN-missions hopefully victims need to be compensated for violations of humanitarian law only in isolated cases. At least in those cases, the victims need to have access to a juridical settlement of their claims.

As far as humanitarian law as a basis for compensation is concerned, it has been seen, that the United Nations are in principle bound by humanitarian law as well, even though it is sometimes doubtful, to what extent the rules, which were created to bind states, can be transposed *mutatis mutandis* to the UN. It has further been argued, that one of the biggest problems is, on what

conditions the conduct of the forces can be attributed to the United Nations and the troop contributing states respectively. It has been argued, that the basic principle should be the effective control test. However, even if the UN incurs responsibility for the unlawful acts under international law, individuals can not enforce their claim, because, as the law stands currently, they are lacking the procedural capacity.

Therefore, the victims can only resort to national tort law. It seems that how these two bodies of law interact, is still unresolved to a large extent. Therefore, the relationship between international law and national law needs further research.

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