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The responsibility of the United Nation in joint operations

- Human rights, international humanitarian law
and the ILC Draft 2011

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Summary

In the thesis, the author deals with the prerequisites required for the United Nations to be held responsible for the conduct of contributed national forces in an international military operation authorized by the Security Council. In 2011, the International Law Commission adopted 67 draft articles on the responsibility of international organizations, and one of the intentions of the author is to highlight the ongoing discussion concerning the interpretation of the draft articles, with focus upon the two terms *breach of an international obligation* and *attributable to that organization*. Further, the author seeks to compare the different arguments to general principles of international law, and conclude upon whether they correspond or not, and whether they can be considered correct.

The discussion increased significantly after the controversial judgement by the European Court of Human Rights in the Behrami-Saramati Case, where the Court argued that the United Nations are to be considered internationally responsible for the conduct of the contributed forces if the Security Council authorizes the military operation. The judgment is in contrast to the well-established principle of State responsibility applied by the International Court of Justice in the Nicaragua Case, where the Court required control over each individual act in order for a State to be considered internationally responsible for the conduct of a non-organ of the State.

In relation to the term *breach of an international obligation*, the author seeks to clarify the international obligations applicable upon the United Nations, and considers treaty law as well as customary international law, the Charter of the United Nations and the norms with the character of jus cogens. Due to the fact that the United Nations has not ratified any multilateral treaty concerning human rights or international humanitarian law, the author concludes that those treaties are not applicable upon the organization. The author further notes that there is an ongoing discussion whether customary international law, including the norms of jus cogens, and the UN Charter is applicable upon the United Nations or not, and if so, to what extent.

In relation to the term *attributable to that organization*, the author identifies the crucial question to be whether the UN or the contributing State possessed *effective control* over the contributed forces at the time of the conduct, and therefore should be considered responsible. The author presents three different interpretations of the term *effective control*, and highlights the advantages and disadvantages with each one of them before concluding that caution should be considered before the traditional interpretation applied in the Nicaragua Case is abandoned.

Sammanfattning

I uppsatsen behandlar författaren de rekvisit som skall vara uppfyllda för att FN skall kunna hållas internationellt ansvarig för nationella truppers agerande i internationella militära insatser auktoriserade av säkerhetsrådet. Under 2011 antog the International Law Commission 67 provisoriska artiklar gällande internationella organisationers internationella ansvar, och ett av syftena med uppsatsen är att belysa den pågående diskussionen gällande hur de antagna artiklarna skall tolkas, med fokus på begreppen *breach of an international obligation* och *attributable to that organization*. Vidare så är författarens intention att jämföra de olika argumenten med generella principer i internationell rätt, för att avgöra huruvida de korresponderar med varandra samt huruvida argumenten kan anses korrekta.

Diskussionen fick ny fart efter Europadomstolen för Mänskliga Rättigheters kontroversiella dom i Behrami-Saramatifallet, där domstolen hävdade att FN skall hållas ansvarig för nationella truppers agerande i internationella militära insatser om säkerhetsrådet har auktoriserat den militära insatsen. Domen gick tvärtemot den väletablerade statsansvarsprincip applicerad av the International Court of Justice i Nicaraguafallet, vilken innebär att det krävs kontroll över varje enskild handling för att en stat ska kunna hållas ansvarig för ett icke-statsorgans agerande.

Gällande begreppet *breach of an international obligation*, är författarens syfte att redogöra för de internationella skyldigheter som tillfaller FN grundat på traktaträtt, internationell sedvanerätt samt jus cogens. Då FN inte har ratificerat några existerande multilaterala traktater gällande mänskliga rättigheter eller internationell humanitär rätt, så är organisationen inte heller traktaträttsligt bunden av dessa traktater. Vidare noterar författaren att det är oklart och omdiskuterat huruvida internationell sedvanerätt, inklusive jus cogens, samt FN stadgan är internationellt bindande i förhållande till FN, och i så fall i vilken utsträckning.

Gällande termen *attributable to that organization*, så är den avgörande frågan vem eller vilka som besatt *effektiv kontroll* över de nationella styrkornas handlande vid den aktuella tidpunkten, och därmed skall anses ansvariga. Tre olika tolkningsmöjligheter av begreppet effektiv kontroll presenteras, och författaren belyser såväl fördelar som nackdelar med de olika alternativen innan slutsatsen dras att försiktighet bör iaktas innan den traditionella tolkningen som användes i Nicaraguafallet överges.

Preface

To write a preface for a master thesis may sound like a perfectly simple and relatively amusing task, however, it is not. Before you start to jump to conclusions, let me try to explain. In 2006, when I first started law school, my perception of the world was limited and endless, gold lined and shiny, and the reality did not extend beyond the walls of the university. In other words, I was a perfectly normal 22-year-old small town girl. However, the normality quickly changed, and if someone would have asked me in 2008 if I ever thought I would be sitting here, writing the preface for my master thesis, my answer would have been no.

Today, for the first time, it struck me that I was wrong back in 2008, and that I actually managed to do the impossible. To the questions how and why, the answer is quite simple: *my people*. Without you, I would literally not be sitting here.

My greatest gratitude to, Mum and Dad, for having the strength to carry me when my wings were not strong enough to fly. *Little brother*, for always making me smile. *Jonas*, for loving me for me. *Grandma and grandpa*, for being my extra set of parents. *All my friends*, for not giving up on me. *Miio*, for being my baby. Last, but far from least, thank you *Daniel* for standing by my side when I needed it the most.

Abbreviations

ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
CIL	Customary International Law
DARIO	Draft Articles on the Responsibility of International Organizations
ECHR	European Court of Human Rights
FRY	Former Republic of Yugoslavia
HR	Human Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
KFOR	Kosovo Force
MNF	Multi-National Force
UK	United Kingdom
UN	United Nations
UNGA	General Assembly
UNMIK	United Nations Interim Administration Mission on Kosovo
UNPROFOR	United Nations Protection Force
UNSC	Security Council

UNSG	Secretary-General
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
VCLTSIO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
VRS	Republika Srpska's army
WHO	World Health Organization

1 Introduction

1.1 The Topic

“Freedom makes a huge requirement of every human being. With freedom comes responsibility. For the person who is unwilling to grow up, the person who does not want to carry his own weight, this is a frightening prospect.”

- *Eleanor Roosevelt*

In an ultimate world, human rights (HR) would not need to be codified in international law. In an ultimate world, international law would not have to worry about authorized or non-authorized use of force. In an ultimate world, the laws of armed conflicts would not be necessary. Moreover, in an ultimate world, the question of responsibility would never be an issue. However, there is no such thing as an ultimate world. Our world is a world where international law indeed is necessary, where HR needs to be codified and where the laws of armed conflicts are essential.

Historically, sovereign States interacting with each other constituted the only subjects of international law, and the principle of sovereignty has influenced the entire structure of the development of international law.¹ The sovereign States are considered ultimately responsible for the organs of the State, a principle well established in treaty law as well as customary international law and codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).² The principle worked relatively smoothly when the international community consisted of States alone, but in recent years international law has gone through a dramatic transformation and today international organizations are accepted as international subjects.³

In 2000, the ILC for the first time handled the question concerning responsibility of international organizations, and a suggestion was made to include the subject in the long-term work of the Commission, which became a reality in 2002.⁴ From there, it took another seven years of thorough and in-depth investigations before the ILC, in 2009, adopted 66 draft articles on the responsibility of international organizations on first reading, the ARSIWA.⁵ The draft was distributed to States as well as organizations for commentaries and observations, a process that in 2011 led to the adoption of 67 draft articles on the responsibility of international organizations on

¹ Linderfalk, U, *Folkrätten i ett nötskal*, p.11-12

² ILC, Report on the work of its sixty-first session, 2009, p.19-38

³ Reparation for Injuries Suffered in the Service of the United Nations, p.179

⁴ For a full background, see: http://untreaty.un.org/ilc/summaries/9_11.htm, displayed 2012-05-19

⁵ ILC, Report on the work of its sixty-first session, 2009, p.19-38

second reading (DARIO).⁶ The DARIO does not constitute a binding document, but is an attempt to codify existing customary international law regarding the responsibility of international organizations.⁷ Despite the hard work of the ILC, ambiguity concerning the subject remains, not least in relation to the interpretation and application of the articles in the DARIO.

1.2 Purpose and Delimitations

1.2.1 The purpose

The purpose of the thesis is to examine the preconditions and the extent of the responsibility of international organizations in joint operations, based on the meaning and interpretation of the two terms *breach of an international obligation* and *attributable to that organization*, presented in the DARIO.⁸

The thesis seeks to highlight the difficulties existing in the area and to present a comprehensive overview of the most common arguments. In addition, the author seeks to compare the different arguments to general principles of international law, and conclude upon whether they correspond or not, and whether they can be considered correct.

The author has consciously chosen research questions possessing a broad as well as deep character, in order to achieve the comprehensive result sought. The purpose is not to in detail examine each possible issue, due to the lack of space.

1.2.2 Delimitations

Despite the broad purpose of the thesis, elaborate restrictions of the subject were of absolute necessity. First, the thesis will be based on the assumption that international organizations can be held internationally responsible.⁹ Second, the main focus of the thesis is the responsibility of the United Nations (UN) in relation to international military operations authorized by the Security Council (UNSC) under chapter VII of the UN Charter (the Charter).¹⁰ Third, the international military operations referred to are not the traditional UN Peacekeeping Operations, where consent of the receiving State is required and the forces automatically are considered subsidiary organs of the UN.¹¹ The operations referred to are the so-called *joint operations*,¹² where the contributed forces not per se are considered

⁶ ILC, Report on the work of its sixty-third session, 2011, p.54-68

⁷ DARIO, p. 2, commentary (3)

⁸ DARIO, art.4

⁹ DARIO, art.3

¹⁰ UN Charter, art.42

¹¹ DARIO, art.6 & Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division

¹² DARIO, art.7 & Report of the Secretary-General, 1996, p. 6

subsidiary organs of the UN, and still acts to a certain extent as organ of the lending State or as organ or agent of lending organizations.¹³

The author considers International Humanitarian Law (IHL) and HR Law to be the most relevant areas of law in relation to joint operations, why the thesis will not consider any other regulatory frameworks.

Last, the author will not address the issue of possible simultaneously responsibility between the UN and the contributing State. There is no room in the thesis for such thorough and in-depth investigation, why the author has chosen to exclude the issue.

1.2.3 Use of Material

The thesis is mainly based on the specific articles of the ILC's DARIO. In addition, commentaries from States as well as international organizations are considered. Due to the broad purpose of the thesis, no bilateral agreements between the UN and contributing States will be taken into account. For the same reason, no national legislation will be considered.

The examples of national and international practice are not intended to constitute an exhaustive list of existent practice.

1.2.4 Research questions

Based on the ILC's DARIO, the research questions of the thesis are:

- Are there any HR- or IHL regulations based on either international treaty law or customary international law, including the norms of jus cogens, which are internationally applicable upon the UN in joint operations?
- For the UN to be held internationally responsible for the contributed troops in a joint operation, the conduct of the troops must be attributable to the UN. A conduct is attributable to the UN if the organization possesses *effective control* over the troops at the time of the conduct.
 - How does the ILC interpret the term *effective control* in relation to the UN, and is the interpretation in line with general principles of international law?

1.3 Method

The issue of international responsibility for international organizations are a relatively new issue, and the DARIO was not adopted on second reading until 2011, which results in a limited amount of practice and doctrine. The

¹³ ILC, Report on the work of its fifty-sixth session, 2004, p. 110 (1)

standard structure of comprehensive and descriptive introductory chapters is therefore not suitable for the subject chosen, neither is the strict division between the descriptive part and the analyzing part of the thesis. The descriptive chapters of the thesis are therefore limited in comparison to the analyzing parts and the conclusion.

Further, the two terms *breach of an international obligation* and *attributable to that organization* are divided into two separate analyzing chapters. The disposition was far from obvious, and the author does consider the two terms to complement each other in several cases, why it could have been useful to analyze them together. However, with reference to the complexity of the terms, the author decided to go for the strictly divided disposition in order to be able to present a well-arranged analysis.

The thesis is mainly based on a comparative method, where the presented arguments and draft articles are compared to practice as well as doctrine. The method is further extended by the fact that the author has chosen to include the regulations in the ARSIWA, and the available practice of State responsibility, into the interpretation of the international responsibility of the UN. The regulations in the DARIO are in most cases close to identical to the corresponding articles in the ARSIWA, and the ILC has several times argued that the obligations of international organizations should not differ substantially from the responsibility of States.¹⁴ Therefore, the author is of the opinion that parallels can, and should, be drawn between the practice and doctrine of the two subjects. However, it is important to remember that the ARSIWA, and the practice of State responsibility, primarily is applicable upon States, and not automatically should be considered applicable upon international organizations.

1.4 Disposition

The thesis begins with three, limited, descriptive chapters. Chapter two provides a brief description of the term joint operations and the use of force.

Chapter three presents the basic article in the DARIO regarding the responsibility of international organizations along with a non-exhaustive list of relevant practice.

Chapter four presents commentaries concerning the DARIO from different international organization and the Special Rapporteur of the ILC.

Chapter five describes the basic conditions of treaty law, customary international law, including jus cogens, and analyzes the term *breach of an international obligation* in relation to doctrine as well as practice.

¹⁴ See for example DARIO, general commentary (4) & DARIO, art.41, commentary (1)

Chapter six is structured in the same way as chapter four, and describes the basic conditions of the term *attributable to that organization*, and analyzes the term in relation to doctrine as well as practice.

Despite the fact that the term *attributable* is mentioned before *breach of an international obligation* in the DARIO, the author has decided to present them in the reverse order. The reversal is only a matter of taste, since the author is of the opinion that it is more logical to first determine whether a breach was committed, before attempt to determine who or whom the breach can be traced back to.

Chapter seven presents the conclusions of the author, and provides the answers to the research questions.

2 Joint Operations

2.1 The UN and the use of force

The purpose of the UN is to promote international peace and security, and the Charter explicitly prohibits the use of force:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁵

However, there is an ambiguity regarding how the prohibition should be interpreted and there are arguments in favour of a more restrictive interpretation as well as arguments in favour of a more extensive interpretation. The proponents of a more restrictive interpretation of the prohibition argues that the prohibition does not include for example the use of force based on humanitarian purposes, due to the fact that the force does not aim to threaten the territorial integrity or the political independence of the State.¹⁶ Contrary, proponents of a more extensive interpretation of the prohibition argues that there are no other exceptions to the prohibition of the use of force than the ones described in article 51 and chapter VII of the Charter.¹⁷

2.1.1 The exclusive competence of the UNSC

The first exception to the prohibition is when the use of force is authorized by the UNSC because of a threat to the international peace and security. Through the Charter, the UNSC has been given the main responsibility to maintain international peace and security, and to fulfil that commitment the UNSC possesses the power to authorize the use of force.¹⁸

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹⁹

However, it is important to remember that the use of force only should be authorized if the measures provided for in article 41 of the Charter are considered inadequate.²⁰

¹⁵ UN Charter, art.2.4

¹⁶ Bring, O, *FN-stadgan och världspolitik, om folkrättens roll i en föränderlig värld*, 2002, p.69

¹⁷ See for example Brownlie, I, *International Law and the Use of Force by States*, 1963, p.265ff

¹⁸ UN Charter, art.24.1-2

¹⁹ UN Charter, art.39

²⁰ UN Charter, art.42

2.1.2 Article 51 of the Charter

The other exception to the prohibition is when the force is used in self-defence in response to an armed attack:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²¹

The requirement to be able to use force in self-defence is that an armed attack occurs against the Member State. It should be mentioned that there is an ongoing discussion whether the armed attack must have taken place or if self-defence can be used to prevent an armed attack.²²

2.2 Peacekeeping operations v. Joint operations

The regular peacekeeping forces are best described by three basic principles: consent of the parties, impartiality and non-use of force except in self-defence and defence of the mandate.²³ The purposes of the peacekeeping forces are several, and includes for example the protection of civilians, maintain peace and security, support and restore the rule of law and protect and promote HR.²⁴ The operations are created and regulated by the UNSC, and the UN consider the contributed forces in a peacekeeping operation as subsidiary organs of the organization.²⁵

Joint operations on the other hand, should not be equated with regular peacekeeping forces. First, the forces in a joint operation are authorized by the UNSC to use force, which are not the case regarding peacekeeping forces. It is also important to mention that a joint operation does not require consent from the targeted State, but is an enforcement action under article 42 of the Charter. Further, as mentioned above, the UN does not consider the contributed forces in a joint operation as subsidiary organs of the organization.²⁶

²¹ UN Charter, art.51

²² See for example Bring, O, *FN-stadgan och världspolitik, om folkrättens roll i en föränderlig värld*, 2002, p.157

²³ <http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml>, displayed: 2012-06-

14

²⁴ Ibid.

²⁵ Responsibility of international organizations, comments and observations received from international organizations, 2011, p.14, art.6

²⁶ Ibid.

3 Regulations and Practice

3.1 Basic conditions

The purpose of the DARIO was to codify the customary international law of the responsibility of international organizations, based on the assumption that an internationally wrongful act of the organization results in international responsibility of that organization.²⁷ In other words, the ILC presumes that responsibility for international organizations do occur if the organization acts in a way considered as an *internationally wrongful act*. The International Court of Justice (ICJ), supported the assumption in an advisory opinion, and held that the UN can be held internationally responsible for acts performed by the UN or an agent acting in the official capacity of the UN.²⁸ In addition, the assumption is supported in a statement by the Secretary-General of the UN (UNSG), saying that international organizations, as well as States, can be held responsible for the actions of the subject.²⁹

For an international wrongful act to occur according to the DARIO, the following conditions need to be met:

“There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) is attributable to that organization under international law; and
- (b) constitutes a breach of an international obligation of that organization.”³⁰

In other words, for an internationally wrongful act to occur, the act of the international organization must be *attributable* to the organization and be considered a *breach of an international obligation of that organization*. The latter prerequisite is further defined in an advisory opinion by the ICJ, where the Court held that as subjects of international law international organizations are bound by general rules of international law, the constitution of the organization and international agreements to which the organization is a party.³¹

²⁷ DARIO, art.3

²⁸ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, art.66

²⁹ Report of the Secretary-General, 1996, art.6

³⁰ DARIO, art.4

³¹ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, art.37

3.2 Practice

3.2.1 International Court of Justice (ICJ)

The two judgments presented below have been chosen by the author due to the fact that they represent the standard for State responsibility. The judgment in the Nicaragua Case is known as the beginning of the standard of State responsibility, and the judgment in the Bosnia and Herzegovina v. Serbia and Montenegro clearly shows that the standard of State responsibility has not changed since the Nicaragua judgment, according to the ICJ.

The author is aware of the fact that both cases concern the international responsibility of States, and not the international responsibility of international organizations. However, as mentioned in the method, several of the articles in the DARIO are close to identical to the corresponding articles in the ARSIWA, and the ILC seems to favour substantially equal obligations for States as well as international organizations.³² Therefore, the author is of the opinion that guidance can be sought in the regulatory frameworks and practice applicable upon States.

3.2.1.1 The Republic of Nicaragua v. The United States of America

The Republic of Nicaragua v. The United States of America (1986)³³ was the beginning of the discussion of *effective control*. The case considered, inter alia, whether the U.S., by the support to the Nicaraguan rebel group Contras, had violated international law. Further, the case considered whether the relationship between the U.S. and the Contras was sufficiently characterized by control on one hand, and dependence on the other, to equate the Contras with a State organ of the U.S.³⁴

Despite the fact that the Contras, at some occasions, had been complete dependent upon the U.S. support of money, weapons and training, the ICJ concluded that the U.S. could not be considered having exercised effective control over the Contras. The ICJ further held that for effective control to occur it is not enough with general control as possessed by the U.S. in this case, but there is a requirement of control over each individual operation.³⁵ The effective control principle applied in the Nicaragua Case is widely accepted in international law, and is considered the frame of reference when deciding whether States might be responsible for action conducted by non-organs of the State.³⁶

³² See subsection 1.3

³³ Nicaragua v. United States of America, Merits, 1986

³⁴ Ibid., art.109

³⁵ Ibid., art.115

³⁶ Brownlie, I, *Principles of Public International Law*, 2008, p.449

3.2.1.2 Bosnia and Herzegovina v. Serbia and Montenegro

Bosnia and Herzegovina v. Serbia and Montenegro (2007)³⁷ considered, inter alia, whether the conduct of Republika Srpska's army (VRS), resulting in the Srebrenica genocide, was attributable to The Federal Republic of Yugoslavia (FRY). The ICJ concluded that the VRS could not be considered an organ of the FRY,³⁸ and referred to the *effective control* principle applied in the Nicaragua Case when deciding whether VRS could be considered a de facto organ of the FRY or not. The crucial question was whether the VRS had sufficient ties with the FRY at the time when they committed the acts of genocide in Srebrenica. The ties would be considered sufficient if the VRS could be considered completely dependent upon the FRY at the time of the conduct.³⁹

Despite of the fact that the VRS, at some occasions, had been complete dependent upon the strong political, military and logistical relations between the FRY and the VRS, the ICJ concluded that the FRY could not be considered having exercised effective control over the VRS. Further, the ICJ held that because the VRS at some occasions had possessed a certain degree of independence, the conditions for effective control could not be considered fulfilled.⁴⁰ Thereby, the ICJ maintained its interpretation from the Nicaragua Case, and once again held that for effective control to occur it is necessary with control over every conduct, resulting in a complete dependence.

3.2.2 International Criminal Tribunal for the former Yugoslavia (ICTY)

The author has chosen the judgment presented below due to the fact that the ICTY dismissed the standard interpretation applied by the ICJ in the Nicaragua Case as well as in Bosnia and Herzegovina v. Serbia and Montenegro. According to the author, the dismissal provides interesting arguments in relation to the issue of international responsibility, and questions the interpretation of the term *effective control*.

3.2.2.1 Prosecutor v. Dusko Tadic´

Prosecutor v. Dusko Tadic´ (1999)⁴¹ considered, inter alia, whether the conduct of Dusko Tadic´, a member of the VRS, was attributable to the FRY or not. Tadic´ was a resident of Republika Srpska, and the ICTY

³⁷ Bosnia and Herzegovina v. Serbia and Montenegro, 2007

³⁸ Ibid., art.386

³⁹ Ibid., art.393

⁴⁰ Ibid., art.394

⁴¹ Prosecutor v. Dusko Tadic´, 1999

sought to clarify under what conditions armed forces fighting against the forces of the same State in which they live, can be considered an act of another State.⁴²

The ICTY concluded the principle of *effective control* applied in the Nicaragua Case as non-persuasive,⁴³ and held that the degree of control required to determine whether an act could be considered performed by a de facto organ of a State, varies from case to case. In its judgement, the ICTY separated private individuals and groups not military organized from armed forces, militias and paramilitary units, and required varying degrees of control from the different subjects. The ICTY maintained the *effective control* principle applied in the Nicaragua case in relation to private individuals and groups not military organized.⁴⁴ In relation to military forces, the ICTY held that the required control was of an *overall* character, not requiring specific orders or control over each individual operation. However, the ICTY stressed that the control must comprise more than financial assistance, military equipment or military training.⁴⁵

The ICJ later declared the judgement of the ICTY incorrect. The ICJ argued that the *overall control* test proposed by the ICTY broadened the scope of State responsibility well beyond the fundamental principles of international law.⁴⁶

3.2.3 The European Court of human rights (ECHR)

The author has chosen the judgments presented below due to the fact that they are considered controversial as well as the starting point of the discussion concerning the international responsibility of the UN in relation to joint operations. The judgment in the Al-Jedda Case clearly shows that the judgment in the Behrami-Saramati Case not was an isolated case, and that the ECHR is prepared to maintain its criticised interpretation.

3.2.3.1 Behrami v. France and Saramati v. France, Germany and Norway

Behrami v. France and Saramati v. France, Germany and Norway (2007)⁴⁷ considered, inter alia, whether the conduct of the Kosovo Force (KFOR) and the United Nations Interim Administration Mission on Kosovo (UNMIK) was attributable either to the UN or to France, Germany and Norway. The forces were established by a UNSC resolution adopted in 1999,⁴⁸ and consisted of the NATO deployed KFOR and the subsidiary organ of the UN,

⁴² Ibid., art.91

⁴³ Ibid., art.100

⁴⁴ Ibid., art.137

⁴⁵ Ibid.

⁴⁶ Bosnia and Herzegovina v. Serbia and Montenegro, 2007, art.406

⁴⁷ Behrami & Saramati v. France, Germany & Norway, 2007

⁴⁸ Resolution 1244

UNMIK.⁴⁹ The ECHR held that the key question to whether the conduct of KFOR was attributable either to the UN or to the contributing States was whether the UNSC retained *ultimate authority and control* over the forces, so that operational command only was delegated.⁵⁰

The ECHR emphasized the UNSC possibility to delegate powers, and argued that the delegation in this case was distinctly expressed in the resolution together with sufficient limits considering objectives, responsibilities and means to be employed. Further, the ECHR noted that the resolution required the leadership of the military presence to report to the UNSC on a periodic basis.⁵¹ Therefore, the Court concluded that by delegating its security powers through resolution 1244, the UNSC retained *ultimate authority and control* of the conduct of the KFOR.⁵² The ECHR further concluded that because of the status as a subsidiary organ to the UN, the conduct of UNMIK was automatically attributable to the UN.⁵³

In other words, the Court concluded that *effective control* was to be interpreted as *ultimate authority and control*, and thereby dismissed the effective control principle applied by the ICJ in the Nicaragua Case.⁵⁴

3.2.3.2 Al-Jedda v. The United Kingdom

Al-Jedda v. The United Kingdom (2011)⁵⁵ considered, inter alia, whether the conduct of British troops in Iraq was attributable to either the UN or the UK. The UNSC authorized the establishment of an international security presence in Iraq, however, British and US troops (MNF) were already present in Iraq when the resolution was adopted.⁵⁶ The UK claimed that the resolution made the conduct of British troops attributable to the UN, and not the UK.

The case was first decided by the House of Lords in 2011. The Court did not reject the *ultimate authority and control* interpretation as a whole, but required a more extensive form of control in comparison to the ECHR. The House of Lords held that the mere fact that the UNSC acts under Chapter VII of the Charter should not necessarily mean that the UN has gained ultimate authority and control over the force.⁵⁷

The judgment was appealed to the ECHR, where the interpretation from the Behrami-Saramati Case, considering *ultimate authority and control*, was maintained. However, the ECHR did not agree with the UK position that resolution 1511 made the conduct of the British troops attributable to the

⁴⁹ Behrami & Saramati v. France, Germany & Norway, 2007, art.3-4

⁵⁰ Ibid., art.133

⁵¹ Ibid., art.134

⁵² Ibid., art.134

⁵³ Ibid., art.143

⁵⁴ See subsection 3.2.1

⁵⁵ Al-Jedda v. The United Kingdom, 2011

⁵⁶ Resolution 1511

⁵⁷ Al-Jedda v. Secretary of State for Defence, 2007, art.148

UN. The ECHR emphasized that unlike the international security presence in Kosovo, established by resolution 1244, the MNF were already present in Iraq when resolution 1511 was adopted why the command of the force did not change.⁵⁸ In other words, the ECHR maintained that an UNSC resolution can be sufficient for effective control to occur, but seems to imply that the presence of the forces must be established by the resolution.

3.2.4 National Courts

The author has chosen the judgement presented below due to the fact that the Dutch Court of Appeal provides another interesting interpretation of the term *effective control* that can be compared and interpreted in relation to the judgments of the international courts mentioned above.

3.2.4.1 Nuhanovic´ v. Netherlands & Mustafic´ v. Netherlands

Nuhanovic´ v. Netherlands & Mustafic´ v. Netherlands (2011)⁵⁹, considered, inter alia, whether the conduct of the Dutch troops (Dutchbat) present in the FRY as a part of the United Nations Protection Force (UNPROFOR), was attributable either to the Netherlands or the UN.

The Dutch Court of Appeal held that it was a question concerning who exercised *effective control* over the conduct of the Dutchbat.⁶⁰ The Court concluded that *effective control* occurs when a State is able to order its troops in a joint operation to act in a specific way, and the State is so involved in the operation that it could have prevented the alleged conduct.⁶¹ In other words, the Dutch Court of Appeal held that *effective control* requires theoretical as well as practical capability to intervene, and further concluded that the Netherlands possessed such control over the Dutchbat.⁶² Therefore, the conduct of Dutchbat was attributable to the Netherlands, and not to the UN.

3.3 Brief summary of the practice

To sum up, there seems to be three different interpretations of the term *effective control*. In both the Nicaragua Case and the Bosnia & Herzegovina Case, the ICJ sticks to the same interpretation and argues that the term *effective control* requires actual control over each individual operation.⁶³ In relation to joint operations, the interpretation by the ICJ would mean that the UN could only be held internationally responsible for the conduct of the

⁵⁸ Al-Jedda v. The United Kingdom, 2011, art.80

⁵⁹ Nuhanovic´ v. Netherlands & Mustafic´ v. Netherlands, 2011

⁶⁰ Ibid., art.5.8

⁶¹ Ibid., art.5.18

⁶² Ibid., art.5.20

⁶³ See subsection 3.2.1

contributed forces if the UN possesses actual control over the specific conduct.

Contrary, both the ICTY and the ECHR interprets the term *effective control* in a different way compared to the ICJ. In the Behrami-Saramati Case, the ECHR holds that the mere existence of an authorizing UNSC resolution is sufficient for *effective control* to occur.⁶⁴ Indirectly, the interpretation means that the UN, without exceptions, should be considered responsible for the forces in a joint operation since joint operations as such are dependent on an authorizing UNSC resolution.⁶⁵ The ICTY is slightly more restrictive in its interpretation of the term *effective control*, and seems to argue in favour of an interpretation somewhere in between the opinions of the ICJ and the ECHR.⁶⁶ The ICTY rejects the argument that the mere existence of an authorizing UNSC resolution would be sufficient for *effective control* to occur, but also held that there is no need for control over each individual operation for the requirements of *effective control* to be fulfilled.

The national courts in the United Kingdom and the Netherlands also seem to argue in favour of an interpretation somewhere between the two extremes, but especially the House of Lords do not conclude upon a definitive interpretation.⁶⁷

⁶⁴ See subsection 3.2.3

⁶⁵ UN Charter, art.42

⁶⁶ See subsection 3.2.2

⁶⁷ See subsection 3.2.3.2 & 3.2.4

4 Commentaries from States and Organizations

4.1 The UN and other organizations

The UN has commented on the DARIO adopted on first reading in 2009, and the organization strictly distinguishes military operations under UN command and control (regular peacekeeping forces) from operations not under UN command and control (joint operations) but authorized by the UNSC. The UN recognizes the regular peacekeeping operations as subsidiary organs to the organization, and accepts full responsibility. In relation to joint operations, the UN does not accept them as subsidiary organs of the organization, but rather independent from the UN and therefore subject of national or regional command and control.⁶⁸

Further, the UN rejects the ECHR judgement in the *Behrami-Saramati case*, and considers it to be contrary to the widespread practice of both the UN and the Member States of the organization. In addition, a statement of the UNSG holds that the international responsibility of the UN is limited to the extent of the *effective operational control* possessed by the UN.⁶⁹

The UN accepts the test of *effective control* as a general guideline in the determination of responsibilities between the UN and its Member States.⁷⁰ However, the UN stresses the fact that the proposed test never has been used in the practice of the organization, due to the fact that the UN accepts full responsibility for the subsidiary organs of the organization and refuses to accept responsibility in relation to joint operations.⁷¹

Considering the term *breach of an international obligation*, the UN emphasizes that several rules of the organization has the character of internal law only, incapable of resulting in international responsibility.⁷² On the other hand, the UN admits that several rules of the Charter has an international character, but once again stresses that some of the rules, for example article 101, has an internal character only.⁷³ Further, the UN holds

⁶⁸ Responsibility of international organizations, comments and observations received from international organizations, 2011, p.10, art.2

⁶⁹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, art.16

⁷⁰ Responsibility of international organizations, comments and observations received from international organizations, 2011, p.14, art.6

⁷¹ Ibid., p.13-14, art.3

⁷² Ibid., p.17, art.1

⁷³ Responsibility of international organizations, comments and observations received from international organizations, 2011, p.6, art.4

that the nature of a rule should be determined on a case-by-case basis, and not in the abstract.⁷⁴

4.2 Special Rapporteur

In March 2011, the Special Rapporteur of the ILC presented his eight report concerning responsibility of international organizations, where commentaries from States and organizations were summarized to guide the ILC in its work.⁷⁵ Most States agreed with the ILC's indication that *effective control* should be interpreted as *operational control*, and not *ultimate control* as interpreted by the ECHR. Countries expressly in favour of the *operational control* interpretation were Belgium, the United Kingdom, the Nordic Countries and Germany. Only one country, Greece, was expressly in favour of the *ultimate control* interpretation.⁷⁶

The second report of the Special Rapporteur stressed the fact that peacekeeping forces are considered subsidiary organs of the UN, an approach confirmed several times by the UN.⁷⁷ The Rapporteur further held that the responsibility of the UN in joint operations could not be premised on the attribution of conduct, since the contributed forces not are placed at the disposal of the UN.⁷⁸

The Rapporteur further emphasizes that the contributing State retains disciplinary power and criminal jurisdiction over the troops placed at disposal of an organization.⁷⁹ However, the Rapporteur continues by holding that the existence of disciplinary power and criminal jurisdiction on the part of the contributing State does not necessarily mean that the contributed forces cannot be considered placed at the disposal of the UN.⁸⁰

The Special Rapporteur sums up by holding that the UN never can possess exclusive control over the contributed forces, and that the degree of *effective control* is essential.⁸¹

⁷⁴ Responsibility of international organizations, comments and observations received from international organizations, 2011, art.4

⁷⁵ Eight report on responsibility of international organizations, Special Rapporteur, 2011

⁷⁶ Ibid., art.33

⁷⁷ Second report on responsibility of international organizations, Special Rapporteur, 2004, art.35-36

⁷⁸ Ibid., art.38

⁷⁹ Ibid. Report of the Secretary-General, 1994, art.6

⁸⁰ Second report on responsibility of international organizations, Special Rapporteur, 2004, art.40

⁸¹ Second report on responsibility of international organizations, Special Rapporteur, 2004, art.48

5 Breach of an international obligation

5.1 International obligations of the UN

In order to analyze the responsibility of the UN in joint operations it is necessary to clarify the international obligations of the organization. The intention of the author is not to in detail examine the general obligations of an international organization, however, it may be useful to describe briefly the basic frameworks. International organizations can possess legal personality if certain conditions are fulfilled,⁸² though States are the only sovereign subjects and therefore the only subjects automatically in possession of both rights and obligations.⁸³ In other words, there are no obligations, or rights, automatically possessed by the UN as an international legal subject. Every right or obligation possessed by an international non-state subject derives from some sort of conscious devolution or authorization from States.⁸⁴

The main purpose of the UN is to maintain international peace and security, especially the UNSC possesses far-reaching powers to fulfil the purpose of the organization.⁸⁵ The UNSC is primarily responsible for the maintenance of peace and security in accordance with the purpose of the organization,⁸⁶ and the Member States are obliged to accept and carry out its decisions.⁸⁷ In case of a conflict between an obligation of the Charter and another international agreement, the Member States must neglect the other agreement and let the Charter prevail.⁸⁸ However, it should be noted that the majority of regulations in the Charter are directed towards the Member States, and not the organization itself.

In other words, the UN has been given the right to safeguard international peace and security through various, more or less stringent, regulations. The remaining question rather concerns the outer limits, when the given rights transform into international obligations. If there are no obligations to break, there can be no responsibility of the organization.

⁸² Brownlie, I, *Principles of Public International Law*, 2008, p.677

⁸³ Linderfalk, U, *Folkrätten i ett nötskal*, 2006, p.11-12

⁸⁴ Ibid.

⁸⁵ UN Charter, art.1.1

⁸⁶ UN Charter, art.24

⁸⁷ UN Charter, art.25 & 48

⁸⁸ UN Charter, art.103

5.2 Article 10 DARIO

The term *breach of an international obligation of that organization* states that in order for the UN to be considered internationally responsible for a conduct or an omission, the conduct or omission must be considered a breach of an international obligation of the UN. Article 10 DARIO defines the existence of a breach of an international obligation as follows,

“1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of an international obligation that may arise for an international organization towards its Members under the rules of the organization.”⁸⁹

In other words, as mentioned in the article, the DARIO does not distinguishes treaty law, customary international law and international general principles, but holds that all of them may establish an international obligation applicable upon an international organization.⁹⁰

The ILC’s commentaries in relation to the term *breach of an international obligation* are significantly less extensive in comparison to the commentaries in relation to the term *attributable to that organization*.⁹¹ Whether the lack of commentaries can be explained by a hesitation to deal with the issue, or the belief that no further interpretation is needed, is unclear.

5.3 Treaty Law

For a treaty to be applicable and binding upon an international subject, the Vienna Convention on the Law of Treaties (VCLT) requires expressed consent from the subject.⁹² Despite the fact that the VCLT applies to States only, and not applicable upon the UN,⁹³ the principle of consent to be bound is considered well-established in customary international law and is accepted by the international community as a whole.⁹⁴

In 1986, there was an attempt to codify the law of treaties considering international organizations, resulting in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTSIO). The UN as ratified the VCLTSIO, but the treaty has not yet entered into force.⁹⁵

⁸⁹ DARIO, art.10

⁹⁰ DARIO, art.10, commentary (2) & art.2, commentary (8)

⁹¹ See Chapter 6

⁹² VCLT, art.11

⁹³ VCLT, art.1

⁹⁴ Cameroon v. Nigeria: Equatorial Guinea intervening, 2002, art.264

⁹⁵ Aust, A, *Modern Treaty Law and Practice*, 2007, p.401

5.3.1 Multilateral HR and IHL treaties applicable upon the UN

The UN has not ratified any existent multilateral treaties considering HR or IHL, why none of them are applicable upon the UN in a purely treaty based manner. The reason why the UN has not ratified a single multilateral treaty relating to HR or IHL can be discussed, though, it should be noted that most multilateral treaties does not address international organizations, and are therefore not open for ratification by the UN or any other international organization.

In other words, the author consider it uncontroversial to conclude that the UN is not internationally bound by any obligations considering HR and IHL based on the multilateral treaties not ratified by the organization. Further, the author consider it uncontroversial to argue that the ILC does not question or challenge the application of the Law of Treaties, why no ambiguity regarding the premises for the UN to be bound by a treaty occurs.

5.3.2 The UN Charter as a multilateral treaty

The one treaty left of value in relation to the UN, is the Charter of the organization. The Charter constitutes a multilateral treaty, open for ratification by States only,⁹⁶ why the UN is not a party and has not expressed consent to be internationally bound by the Charter as a multinational treaty.

The phrasing of article 17(b) DARIO, that an international wrongful act occurs when an act, or omission, by the international organization should be considered a breach of an international obligation of that organization, has given rise to an ongoing discussion whether all the obligations arising from the Charter should be considered international obligations of the UN.⁹⁷ In other words, the core issue seems to be whether the Charter, as the constituent instrument of the UN, automatically should be regarded internationally binding upon the UN as a multilateral treaty, without ratification or consent.

The ILC does not provide a clear view of the issue, but recognizes that international organizations are not members of the UN, and therefore have not expressed consent to be bound by the Charter.⁹⁸ The ILC further concludes that that if an obligation arising from the Charter has to be regarded as an international obligation, it is possible for the UN to become

⁹⁶ UN Charter, art.4.1

⁹⁷ DARIO, art.10, commentary (5)

⁹⁸ DARIO, art.67, commentary (2)

internationally responsible.⁹⁹ In other words, the ILC does not assume that all the obligations arising from the Charter are of an international character, but if some of them are, they fall under the present article.

In her article considering the rules and responsibility of international organizations, *Christiane Ahlborn* argues that if the UN indeed is considered internationally bound by the Charter as a multilateral treaty, it suggests that third parties are indeed bound by the Charter without consent.¹⁰⁰

“From this perspective, the UN Charter is not merely internal law of the United Nations but international law that obliges other subjects of international law to follow the acts of UN organs such as the Security Council in the sense of a ‘world constitution’”.¹⁰¹

According to the author, the idea of the Charter as a world constitution applicable to every international subject, regardless of consent, seems too extensive. The basic principle of State sovereignty does not comply with the theory of a world constitution, because of the contradiction in relation to the fundamental purpose that no international subject should intervene with the domestic affairs of another international subject.¹⁰² Neither the general principle requiring consent for an international subject to be bound by a treaty complies with the idea of a world constitution.¹⁰³

Contrary, *Constance Jean Schwindt* holds that several aspects of the Charter separate it from regular multilateral treaties, why the Charter possesses the potential to become a world constitution.¹⁰⁴ The argumentation of *Schwindt* characterizes the Charter as a unique instrument in comparison to the constituent instruments of international organizations in general, as well as regular multilateral treaties. According to the author, the Charter indeed possess a unique position in international law, partly due to the fact that almost all the world’s States are members of the UN, but also because of the fact that the Charter actually indicates a responsibility in relation to non-members of the UN.¹⁰⁵ However, it is important to remember that the Charter is based upon the principle of sovereignty,¹⁰⁶ and the existence of an obligation of the UN to ensure that non-members act in a certain way does not automatically mean that the Charter is applicable upon the non-members.

⁹⁹ DARIO, art.10, commentary (7)

¹⁰⁰ Ahlborn, C, *The rules of international organizations and the law of international responsibility*, p.33

¹⁰¹ Ibid.

¹⁰² Friendly Relations Declaration, annex

¹⁰³ See subsection 5.3

¹⁰⁴ Schwindt, C.J, *Interpreting the United Nations Charter: From Treaty to World Constitution*, 2000, p.206

¹⁰⁵ UN Charter, art.2.6

¹⁰⁶ UN Charter, art.2.1 & 2.7

5.3.3 The UN Charter as the constituent instrument of the UN

Even if it is concluded that the Charter is not applicable upon the UN as a multilateral treaty, because of the lack of consent, the Charter still constitutes the constituent instrument of the UN. In other words, the Charter is at least internally binding upon the organization, however, internal law cannot result in international responsibility.¹⁰⁷ The question is whether some of the regulations in a constituent instrument of an international organization can be regarded internationally binding upon that international organization in, because of the character as the constituent instrument.

The UN stresses the opinion that some provisions of the Charter possesses an internal character only,¹⁰⁸ and thereby seem to support the view that organizations not *per se* can be considered internationally bound by the constituent instrument of the organization.

5.3.3.1 Human Rights

Depending on the conclusion drawn from the previous discussion whether the Charter is internationally applicable upon the UN or not, or whether some of the regulations in the Charter should be considered international obligations, while others should not, there are two possible ways to address the issue of the HR responsibilities of the UN. The IHL responsibilities will not be considered in this subsection, since they are not regulated in the Charter.¹⁰⁹

By concluding that the Charter is not internationally applicable upon the UN, there is no need for a further discussion concerning the HR responsibilities of the UN, due to the fact that the organization has not ratified any multilateral HR treaties. On the other hand, by concluding that the Charter in fact is internationally applicable upon the UN, the next question to be asked is whether the Charter, as the constituent instrument of the UN, obliges the UN to act in accordance with HR.

The Charter holds that the UN should promote and encourage the respect for HR,¹¹⁰ as well as promote the universal respect for HR without distinctions to race, sex, language, or religion.¹¹¹ In an article published in the *Human Rights Quarterly*, it is argued that due to the fact that the basic purpose of the Charter is to promote HR in relation to others, there is also an obligation for the UN to comply with HR:

¹⁰⁷ Brownlie, I, *Principles of Public International Law*, 2008, p.694

¹⁰⁸ Responsibility of international organizations, comments and observations received from international organizations, 2011, art.6.3

¹⁰⁹ For a definition of IHL, see <http://www.icrc.org/eng/resources/documents/legal-factsheet/humanitarian-law-factsheet.htm> *what is international humanitarian law?* (PDF)

Displayed: 2012-05-25

¹¹⁰ UN Charter, art.1(3)

¹¹¹ UN Charter, art.55(c)

“This argument is that the United Nations is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order (---)”¹¹²

The argument is supported in an article in the *Harvard International Law Journal*, where it is argued that the purpose of the UN, to promote and encourage the respect for HR, clearly conditions the organization itself.¹¹³ According to the author, the above mentioned arguments are most likely based on the fact that the rights and obligations possessed by the UN is delegated by the Member States, through the UN Charter. In other words, the UN would not possess any rights or obligations at all if there were no delegation of power from the members of the organization. Therefore, it could be argued that it would be contradictory if the UN were not considered internationally bound by the Charter, due to the fact that the Charter creates the mandate of the organization. In other words, it could be argued that the UN would violate the Charter by acting in contrary with HR.¹¹⁴

If the Charter is internationally applicable upon the UN, so is the purpose of the organization. First, it must be noted that the Charter only obliges the UN to *promote* the respect for human rights in relation to other parties, there are no articles in the Charter actually requiring the organization itself to act in accordance with HR. Therefore, the international obligation for the UN in relation to the purpose of the Charter is to promote HR in relation to others. By accepting the above reasoning, the UN would be free to act in disregard of HR, whether or not the organization is considered to be bound by its constituent instrument.

The proponents seem to argue that the obligation to *promote* can transform into an obligation to *obey*, due to the fact that the purpose possesses a major role in the organization. The author is hesitant to accept such a conclusion without further investigation, and only agrees upon the fact that if the Charter is internationally applicable upon the UN, the obligation of the organization is to *promote* HR rights. To try to transform the Charter based on the view that the purpose constitutes a cornerstone of the organization, is according to the author not in accordance with general treaty law. The interpretation of a treaty should primarily be based on the ordinary meaning of the wording of the treaty, why it is hard to argue that the term *promote* should be interpreted as an obligation to *obey*.¹¹⁵

The author is aware of the fact that it may seem as a ridiculous discussion whether the Charter, as the constituent instrument of the UN, internationally

¹¹² Mégret, F & Hoffman, F, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, p.317

¹¹³ Paust, J, *The U.N. is bound by Human Rights: Understanding the full reach of Human Rights, Remedies, and Nonimmunity*, 2010, p.2

¹¹⁴ *Ibid.*, p.3

¹¹⁵ VCLT, art.31.1

binds the organization. Especially when a high amount of the articles of the Charter probably constitutes international customary law and it is highly unlikely that the UN would argue that the provisions of the Charter relating to HR possess the character of internal law only. The purpose of the UN's argument that some of the provisions should be considered internal law only is probably to ensure that the Charter as a whole cannot apply as international law in relation to the organization.

The legal definition of the constituent instrument of an organization is an on-going discussion, and the author considers the discussion to be of importance despite the difficulties to agree on a definitive solution.

5.4 Customary International Law

The ICJ Statute defines customary international law as *general practice accepted as law*.¹¹⁶ However, the DARIO does not give any further guidance in how to interpret the term *general practice accepted as law* in relation to the UN. In relation to the main multilateral treaties regulating HR and IHL, there is an ongoing discussion whether the regulations in these treaties are to be considered as customary international law, to what extent they might be considered as customary international law, and whether the regulations in that case are applicable upon the UN.

The UNSG has made a statement in relation to the IHL, and held that the fundamental principles and rules of IHL are applicable upon UN forces engaged in armed conflicts, as well as in peacekeeping operations where the use of force is permitted in self-defence.¹¹⁷ Because of this statement, the author does not consider it necessary to further discuss whether the IHL is applicable upon the UN as customary international law.

Before moving forward to the discussion whether customary international law applies to joint operations, the relation between international organizations and customary international law must be considered. There is an ambiguity relating to the interpretation and application of customary international law in relation to international organizations. In the advisory opinion *On the Legality of the Threat or Use of Nuclear Weapons*, the ICJ observed that UNGA resolutions can possess normative value and provide evidence valuable for establish the existence of an *opinio juris*.¹¹⁸

5.4.1 The UN and applicable *Opinio Juris*

The next question to be asked is whether customary international law applicable upon international organizations should be based upon the *opinio juris* of States, the *opinio juris* of international organizations or the *opinio juris* of both States and international organizations.

¹¹⁶ ICJ Statute, art.38.1(b)

¹¹⁷ *Observance by United Nations forces of international humanitarian law*, 1999

¹¹⁸ *Legality of the Threat or Use of Nuclear Weapons*, 1996, art.70

The creation of customary international law requires connection to general practice, as well as the practice being accepted as law (*opinio juris*). Comparisons can be drawn to the required consent to be bound by a treaty. There is also a theory of the persistent objector, holding that an actively and repeatedly objecting subject cannot be bound by the *opinio juris* objected to.¹¹⁹

The ILA indicates that there might be a possibility that customary international law could be considered based on different *opinio juris* in relation to different subjects:

“Whether the conduct of organs can create a sort of internal customary law of the organization concerned, or of international organizations generally, is beyond the scope of this Statement”¹²⁰

In addition, the Chatham House, in a discussion on *Legal Responsibility of International Organizations in International Law*, pinpointed the ambiguity in relation to customary international law and international organizations and held that it is in most cases far from established which rules of customary international law that are applicable upon international organizations, and to what extent.¹²¹ According to the author, the Chatham House’s statement as well as the position of the ILA, implies that the customary international law applicable to international organizations not necessarily are the same as the customary international law applicable to States.

On the other hand, in an article in the *Harvard International Law Journal*, it was argued that:

“It surely is a consequence of the United Nations' legal personality at international law that it is bound by customary international law, *mutatis mutandis*, and there is a strong argument that a number of human rights are protected under customary international law (---)”.¹²²

According to the author, the article seems to refer to customary international law as one solid entity, applicable to the international community as a whole. A reason for the argument that the customary international law applicable upon international organizations should be based on the *opinio juris* of States, could be due to the possible risk that States otherwise would take advantage of the different regulatory frameworks and create international organizations only to avoid the customary international law applicable upon States. In other words, if the possible customary

¹¹⁹ Dumberry, P, *Incoherent and Ineffective: The Concept of persistent objector revisited*, p.779

¹²⁰ ILA report (2000), p.19, note 44

¹²¹ Chatham House, 2011, p.6

¹²² Dannenbaum, T, *Translating the Standard of Effective Control into a System Of Effective Accountability: How Liability Should Be Apportioned For Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, p.135

international law based on the *opinio juris* of international organizations requires less than the customary international law based on the *opinio juris* of States, it is a possible scenario that States would start acting through the international organization and not in the capacity of a sovereign State. However, the author stresses that it should not be assumed that the customary international law of international organizations actually would differ from the customary international law applicable upon States, especially not in relation to the main principles of HR and IHL.

To clarify the issue, guidance can be sought in the ILC's ARSIWA, from where several of the articles in the DARIO are taken. The article in the DARIO regulating the existence of *a breach of an international obligation*¹²³ is almost identical with the corresponding article in the ARSIWA.¹²⁴ According to the author, there is no indication in the DARIO that the basic rules of international law should apply differently in relation to States versus international organizations. The ARSIWA and the DARIO apply the basic rules of international treaty law equally, despite the fact that international organizations cannot ratify the VCLT. In other words, a treaty without consent cannot internationally bind either a State or an international organization. In addition, no legal obligations occur in relation to an international organization due to the fact that the members of the organization might have ratified a specific treaty.

In relation to customary international law, the ARSIWA and the DARIO both refer to the definition in the ICJ Statute, despite the fact that international organizations cannot ratify the Statute. According to the proponents of one solid entity of customary international law, the similarities to treaty law there ends. The proponents argue that the customary international law applicable upon the UN is the one based on the *opinio juris* of States. If that is indeed the case, there is a requirement of consent in order for States to be bound by customary international law, but no similar requirement in relation to international organizations to be bound by customary international law.

The sovereignty of states is a fundamental principle in international law, and it could be argued that States, as the founders and active players of international organizations, indeed possesses the power to create customary international law applicable upon international organizations. All the rights and obligations possessed by the UN is somehow delegated from the Member States, why it could be argued that the States would not be able to create an international organization that possesses more far-reaching rights or less far-reaching obligations than the States themselves. On the other hand, it could also be argued that States as well as international organizations are considered subjects of international law, why the customary international law applicable upon the subjects should be the same, and based on the joint *opinio juris* of both subjects.

¹²³ DARIO, art.10

¹²⁴ ARSIWA, art.12

5.4.2 Opinio Juris and Human Rights

As mentioned before, it is a fact that the UN has not ratified any of the multilateral HR treaties, and it is an on-going discussion whether the Charter obliges the UN to act in accordance with HR or not.¹²⁵ In addition, it is unclear whether the customary international HR law should be based on the opinio juris of States, the opinio juris of international organizations or the opinio juris of both States and international organizations.

It is a fact that the UN has ordered its peacekeeping forces to act in accordance with HR,¹²⁶ and additional UN practice indicates that the organization consider itself and its subsidiary organs to be bound by customary international HR law.¹²⁷ There is however no UN practice or indications in relation to joint operations, which is easily explained by the fact that the UN does not consider the forces of a joint operation as subsidiary organs. According to the UN, the forces remain organs of the contributing States, why it is not the responsibility of the UN to regulate or develop practice in relation to these forces.¹²⁸

The UN argument that the contributed forces in a joint operations remains organs of the contributing State, makes it possible to argue that there is no need for the UN to regulate or develop practice in relation to the contributed forces. It is a fact that States per se are considered responsible of the conduct of the organs of the State acting in that capacity,¹²⁹ and that the State is obliged to act in accordance with customary international HR law as well as HR treaties. Parallels can be drawn to the argument that States are unable to delegate more far-reaching powers to an international organization than the States themselves possess. Should it then be possible for States to delegate the responsibility of the conduct of a State organ? As mentioned before, there is a risk that States might create international organizations with the sole purpose to avoid State responsibility.

5.4.3 The lack of practice

Depending on the conclusion drawn from the previous discussions whether the customary international law applicable upon international organizations should be based on the opinio juris of international organizations, the opinio juris of States or the opinio juris of both international organizations and States, there are different ways to address the issue. By concluding that customary international law applicable upon international organizations

¹²⁵ See subsection 5.3.3.1

¹²⁶ See Ten Rules: Code of Personal Conduct For Blue Helmets, <http://cdu.unlb.org/UNStandardsOfConduct/TenRulesCodeofPersonalhttp://cdu.unlb.org/UNStandardsOfConduct/TenRulesCodeofPersonal>, displayed 2012-05-19

¹²⁷ See e.g. resolution 1244 in relation to UNMIK.

¹²⁸ Responsibility of international organizations, comments and observations received from international organizations, p.16, art.3.3

¹²⁹ ARSIWA, art.4

should be based on the *opinio juris* of States, there is no need for a further discussion since the customary practice of States are relatively well documented. On the other hand, by concluding that the customary international law applicable upon international organizations should be based on the *opinio juris* of international organizations or at least upon the *opinio juris* of both international organizations and States, the legal situation is less clear.

The major problem of an *opinio juris* of international organizations is the lack of practice. Besides the fact that the available practice of international organizations are relatively limited in comparison to the practice of States, there is also a problem to gather the practice of different international organizations since the organizations cannot be equated in the same way as States:

“There are very significant differences among international organizations with regard to their powers and functions, size of Membership, relations between the organization and its Members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.”¹³⁰

Because of these differences, it becomes difficult to ascertain a general and common practice. The Chatham House concluded that there indeed is a lack of consistent practice in relation to international organizations, and further stressed the fact that even if limited amounts of practice is available in relation to some organizations, there are other organizations where virtually no practice can be found. The Chatham House further held that much of the practice available concerns liability under national law, not responsibility under international law.¹³¹

5.5 Jus Cogens

The VCLT defines the term *jus cogens* as,

“a peremptory norm of general international law is 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”.¹³²

The ILC refers to these peremptory norms in article 41 DARIO, indicating that the prevailing view is that the peremptory norms are applicable upon international organizations.

Article 41,

¹³⁰ DARIO, general comment (7)

¹³¹ Chatham House, p.5

¹³² VCLT, art.53

- “1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.”

In the commentaries to the DARIO, the ILC holds that it cannot be ruled out that an international organization can commit a breach of a peremptory norm, and if so is the case the consequences should be the same for international organization as for States.¹³³ The subject is controversial, and there is disagreement regarding almost everything between the mere existences to the actual application of the rules. The purpose of the thesis is not to discuss those questions, but to investigate whether the jus cogens regime is applicable to the UN as an international organization.

5.5.1 Jus cogens and Treaty law

The definition of jus cogens opens up for a similar discussion as in the subsection above, does States possess the power to, without consent, legally bind another international subject? The VCLT refers to norms accepted *by the international community of States*, and there are no references to other subjects of international law. The focus upon States in the VCLT can easily be explained by the fact that the treaty only applies to States, and cannot be ratified by international organizations.¹³⁴ However, it should be noted that the definition in the VCLTSIO is identical with the definition in the VCLT, and refers to the recognition by the international community of States.¹³⁵ As mentioned earlier, the UN has ratified the VCLTSIO, even though the treaty is not yet in force.¹³⁶

The fact that the UN has not ratified the VCLT is one of the most common used arguments by the opponents of jus cogens being applicable to the UN. The opponents argue that the UN cannot be legally bound by a regulation in a treaty not ratified by the organization, why jus cogens could not be applicable to the UN,

“However, it is doubtful whether jus cogens can constitute a binding limitation on the Council’s discretion under Chapter VII. The notion of jus cogens has its foundation in Article 53 of the Vienna Convention on the Law of Treaties. Therefore, it is essentially a concept from the law of international treaties that cannot easily be transplanted into the law of the United Nations.”¹³⁷

On the other hand, the proponents of jus cogens being applicable upon the UN, holds that jus cogens does not require consent to legally bind

¹³³ DARIO, art.41, commentary (1)

¹³⁴ VCLT, art.1

¹³⁵ VCLTSIO, art.53

¹³⁶ See subsection 5.3

¹³⁷ Martenczuk, B, *The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?*, p.545-546

international subjects, why it is insignificant whether the UN has ratified the VCLT or not.¹³⁸ According to the author, it is indeed true that the UN has not ratified the VCLT, and is therefore not bound by the treaty as such. However, if the VCLTSIO would have entered into force, the UN would be internationally bound by the treaty as well as the statement that the norms of jus cogens should be characterized based on the recognition of the international community of States.

Even though the VCLTSIO has not yet entered into force, and even though the UN has not ratified the VCLT, it should be noted that the previous discussions regarding the application of treaty- and customary international law, are based on rules and definitions in treaties not ratified by the UN. For example, the discussion concerning the general principle of consent to be bound by a treaty is accepted as applicable upon the UN, despite the fact that the UN is not a party to the VCLT.¹³⁹ Therefore, the author does not consider it too controversial to refer the ongoing discussion, and the definition of the term jus cogens, to a treaty not ratified by the UN. Both States and international organizations generally accept several of the regulations in the main multilateral treaties as principles of international law, i.e. customary international law.

The proponents of jus cogens being applicable upon the UN further argues that international organizations are bound by jus cogens as an inherent obligation, deriving from the obligation of States to act in accordance with jus cogens.¹⁴⁰ The Member States of the UN are the founders of the organization, and the rights and obligations of the UN are delegated by the Member States through the Charter. Due to that fact, it could be argued that it would be illogical, and in contrary with the obligation of States to comply with the norms of jus cogens, if the Member States are able to delegate powers to the UN that the States themselves does not possess. In other words, due to the fact that the Member States of the UN is prohibited to act in contrary with the norms of jus cogens, so is the UN.

The author considers the above-mentioned argument to be possible, but it should be noted that the phenomena of inherited obligations do exist in relation to neither treaty law nor customary law. For example, a treaty ratified by the Members of the organization does not automatically bind the UN as an inherited obligation, and there is an ongoing discussion whether international organizations can be considered internationally bound by customary international law based on the opinio juris of states.¹⁴¹

¹³⁸ Brownlie, I, *Principles of Public International Law*, 2008, p.512

¹³⁹ See subsection 5.3

¹⁴⁰ Orakhelashvili, A, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, p.60

¹⁴¹ See subsection 5.4.1

5.5.2 Jus cogens and art 103 of the Charter

The VCLT defines jus cogens as norms from which no derogation is permitted.¹⁴² At the same time, article 103 of the Charter holds that in case of a conflict between an obligation under the Charter and an obligation under any other international agreement, the Charter should prevail.¹⁴³ The question is whether it thereby is possible for the UNSC to adopt a resolution, binding upon the Member States, in contrary of jus cogens.

The article explicitly holds that the Charter will prevail over any other conflicting *international agreement*. The scholars are far from unanimous whether the *international agreements* referred to are limited to treaties and similar agreements, or if the interpretation of the article must be extended to also include customary international law and jus cogens. The proponents of the more restraint interpretation argues that the clear text of article 103 does not support the inclusion of general international law, such as customary international law and jus cogens, why the Charter cannot prevail in relation to those sources.¹⁴⁴ At the same time, others argue that the Charter indeed, in a technical sense, is limited to treaties and other agreements, but leaves a theoretical possibility to also include customary international law.¹⁴⁵

According to the author, it should be noted that treaties and customary international law are both considered sources of international law, with the possibility to create international obligations. Further, neither the DARIO nor the ARSIWA distinguishes one of the sources as more important than the other one, but rather holds that an international obligation can stem from every source of international law.¹⁴⁶ Therefore, the author considers it questionable to argue that the term *international agreements* does not include customary international law, but only written agreements in form of treaties.

The author agrees with the proponents arguing that because of the definition of jus cogens as norms impossible to derogate from, it would be contradictory if the resolutions adopted by the UNSC would be an exception.¹⁴⁷ On the other hand, it must also be considered that there is a possibility that the UN, because of article 103 of the Charter, never has been internationally bound by the norms of jus cogens, resulting in the question whether it is possible to derogate from a norm never applicable upon the international subject as such. According to the author, parallels can be drawn to the fact that a subject cannot commit a breach of an obligation, if there is no obligation to act in contrary with.

¹⁴² VCLT, art.53

¹⁴³ UN Charter, art.103

¹⁴⁴ Orakhelashvili, A, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, p.69

¹⁴⁵ Perez, A.F, *The perils of Pinochet: Problems For transnational justice and a Supernational governance solution*, footnote 139

¹⁴⁶ DARIO, art.10, commentary (2) & ARSIWA, art.12, commentary (3)

¹⁴⁷ Liivoja, R, *The scope of the supremacy clause of the United Nations Charter*, p.609-610

5.5.3 Jus cogens and the Charter as a constituent element

The proponents of jus cogens being applicable upon the UN argues that several norms considered to have the character of jus cogens are embodied in the Charter, and are therefore internationally applicable upon the UN in accordance with the principles of international treaty law.¹⁴⁸ For such arguments to be relevant, the discussion whether the UN Charter is internationally applicable upon the organization must be considered.¹⁴⁹

The author consider it possible that the special character of the Charter could indicate a need for special treatment, however, the author is reluctant to jump into conclusions solely based on the Charters character as the constituent instrument of the UN. It is far from established whether the Charter is internationally applicable upon the UN, and carefulness should be considered before arguing that the UN is bound by jus cogens solely because norms, generally seen as jus cogens, are embodied inside the Charter.¹⁵⁰

¹⁴⁸ Orakhelashvili, A, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, p.67

¹⁴⁹ See subsection 5.3.2 & 5.3.3

¹⁵⁰ Ibid.

6 Attributable to that organization

6.1 Article 7 DARIO

The term *attributable to that organization* holds that it is not enough for a conduct to be considered a breach of an international obligation for responsibility to occur, but the conduct must also be attributable to the UN. The conduct of an organ or agent of an international organization is regulated in article 6 DARIO, however, since the purpose of the thesis is to interpret the responsibility of the UN in relation to joint operations where the forces of the contributing States are not accepted as UN organs, the article is not applicable. The cases of responsibility of non-organs of the organization are regulated in article 7 DARIO, defining the existence of a breach of an international obligation as follows:

“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”¹⁵¹

The DARIO distinguishes joint operations from regular peacekeeping operations by referring to a statement made by the UNSG. The statement held that the international responsibility for the conduct of the troops in joint operations lies where operational command and control is vested. If there are no formal agreements, the question of responsibility should be determined in every case based on the degree of effective control exercised by either party.¹⁵² The DARIO further notes that the UN consider peacekeeping forces as subsidiary organs, why the conduct of such forces per se is attributable to the UN.¹⁵³ In addition, the DARIO stresses that the conduct of a contributed force in a joint operation should not be considered attributable to the UN when the UNSC authorizes States or international organizations to act outside the command and control of the UN.¹⁵⁴

6.1.1 The term effective control

The interpretation of the term *effective control* is far from obvious, according to the author. The article in the DARIO does not further clarify the conditions of the term, and the commentaries by the ILC refer to several different interpretations by different Courts, without presenting a final opinion or conclusion. The ambiguity in the commentaries can most likely

¹⁵¹ DARIO, art.7

¹⁵² Report of the Secretary-General, 1996, p.6

¹⁵³ DARIO, art.7, commentary (6)

¹⁵⁴ DARIO, art.7, commentary (5)

be explained by the fact that Courts indeed have interpreted the term *effective control* in very different ways, and the ILC probably does not want to agree upon a conclusion that later is considered to be inaccurate.

Three different main interpretations can be identified among scholars and Courts, and the advantages and disadvantages of the different views will be presented in the following subsections.

6.2 Extensive interpretation

The ECHR is undeniable in favour of a broad and extensive interpretation of *effective control*, and in the Behrami-Saramati Case concluded that *effective control* should be interpreted as *ultimate authority and control*.¹⁵⁵ The ultimate authority and control required was further defined as no requirement of the UN to possess control over each specific conduct of the contributed forces, as long as *the overall control* remains with the organization.¹⁵⁶ The ECHR further considered the requirements of *ultimate authority and control* to be fulfilled if the joint operation in question was based on an authorizing UNSC resolution.¹⁵⁷

The ECHR maintained the extensive interpretation of effective control in the Al-Jedda Case,¹⁵⁸ but concluded that the conduct of the British forces could not be considered attributable to the UN due to the fact that that British and U.S. troops were already present in Iraq when the resolution was adopted. Therefore, the resolution did not establish the presence of the international forces as the resolution did in the Behrami-Saramati Case.¹⁵⁹ If the Iraq resolution would have had established the presence of the international forces, the author considers it very likely to conclude that the Court would have had considered the conduct of the British troops attributable to the UN.

The ILC disagrees with the interpretation made by the ECHR, and holds that the term effective control should be interpreted as *operational control*, and not *ultimate control* as argued by the ECHR. The ILC further holds that the term *operational control* implies a role in the act in question.¹⁶⁰ Any other guidelines considering the definition of the term operational control are not given, but at least the ILC holds that for UN to be held internationally responsible for the conduct of national forces in joint operations, the UN must possess a role in the act in question.

¹⁵⁵ See subsection 3.2.3

¹⁵⁶ Behrami v. France & Saramati v. France, Germany and Norway, art.143

¹⁵⁷ Ibid., art.133-134

¹⁵⁸ See subsection 3.2.3

¹⁵⁹ Compare resolution 1244 (Kosovo) & resolution 1511 (Iraq)

¹⁶⁰ DARIO, art.7, commentary (10)

6.2.1 In conflict with general principles of international law

The author argues that the ILC is correct in the dismissal of the interpretation made by the ECHR, partly due to the opinion that the judgement in the Behrami-Saramati Case is in conflict with several general principles of international law.

One of the basic principles in international law is the sovereignty of States, prohibiting a State from intervening in the domestic affairs of another State.¹⁶¹ Another basic principle is the responsibility of States, obliging the sovereign States to take full responsibility for the conduct of the State organs. The ARSIWA clearly holds that a State should be considered responsible for any conduct of a State organ, regardless of the character of the organ or of the conduct.¹⁶²

According to the author, the interpretation of the ECHR is in conflict with these two basic principles of international law. The military forces of a State are considered organs of the State, why the conduct of such forces generally should be considered attributable to the State.¹⁶³ The interpretation by the ECHR, on the other hand, argues that when the UNSC authorizes a joint operation, the military forces of a State are no longer considered State organs of the contributing State, and the responsibility for the conduct of the contributed forces transfer to the UN.¹⁶⁴ There is an exception to the assumption of State responsibility in relation to the organs of the State, which makes it possible for the State responsibility to transfer to another subject of international law. That is when an organ of State A is placed at the disposal of State B, and the placed organ acts under the authority and for the purposes of State B, as well under State B's exclusive direction and control.¹⁶⁵ In other words, for a transfer of responsibility to occur, it is crucial with the establishment of a functional link between the placed organ and the receiving State.¹⁶⁶ The ICJ, in the Nicaragua Case, further clarified the prerequisites for a transfer of responsibility to occur, and held that a State is responsible for a non-organ of the State, if the organ can be equated with an actual organ of the State.¹⁶⁷

According to the author, the ECHR obviously is of the opinion that an authorization by the UNSC is enough to establish the required crucial link between the contributed forces and the UN. The author does not agree, and stresses the fact that the contributed forces in a joint operation primarily are

¹⁶¹ UN Charter, art.2.7

¹⁶² ARSIWA, art.4

¹⁶³ Convention (IV) respecting the Laws and Customs of War on Land, art 3 & Protocol Additional to the Geneva Conventions, protocol I, art.91

¹⁶⁴ See subsection 3.2.3

¹⁶⁵ ARSIWA, art.6 and art.6, commentary (2)

¹⁶⁶ ARSIWA, art.6, commentary (4)

¹⁶⁷ See subsection 3.2.1

organs of the contributing State, in accordance with the ARSIWA.¹⁶⁸ The principle that a State is responsible of the organs of the State is well established and highly recognized in international law,¹⁶⁹ and the author is reluctant to accept that the mere existence of an authorization from the UNSC would change that well-known principle. Further, it is a fact that the contributing States retain the disciplinary powers and criminal jurisdiction over the contributed forces,¹⁷⁰ making it even harder for the author to accept that the UNSC through an authorization gains effective control.

In addition, the condition for an interpretation as the one made by the ECHR, presumes that the UNSC possesses the power to convert an organ of a Member State into an organ of the UN. With reference to the principle of State sovereignty, the author strongly argues that the UNSC does not possess that power. The UN, as an international organization, strongly emphasizes the principle of State sovereignty, and holds that no regulation in the Charter should authorize the UN to intervene in the domestic jurisdiction of any State, nor should the UN require its members to do so.¹⁷¹

Therefore, the author argues that the contributed forces in a joint operation should not be considered de facto organs of the UN, why the prerequisites for a transfer of the responsibility are not fulfilled.

6.2.2 The relationship between States and international organizations

According to the author, the interpretation by the ECHR does not only threaten the sovereignty of States, but also creates a difference between the obligations applicable upon States and the obligations applicable upon international organizations.

In order for a State to become responsible for the conduct of a non-organ of the State, the ICJ, in the Nicaragua Case, required effective control over every conduct of the non-organ.¹⁷² In order for the UN to become responsible for the conduct of a non-organ of the organization, the ECHR, in the Behrami-Saramati Case, did not require effective control over each conduct as long as the joint operation was based on an authorizing UNSC resolution.¹⁷³

The author consider that the extensive differences in the requirements threatens to undermine the entire concept of the ARSIWA, by holding that a contributing State is not responsible for the conduct of its organs as long as

¹⁶⁸ ARSIWA, art.4

¹⁶⁹ ARSIWA, art.4 commentary (3)

¹⁷⁰ DARIO art.7, commentary (1) & footnote 93 & Responsibility of international organizations Comments and observations received from international organizations, 2011, art.3.4

¹⁷¹ UN Charter, art.2.7

¹⁷² See subsection 3.2.1

¹⁷³ See subsection 3.2.3

the joint operation is based on an authorizing UNSC resolution adopted within Chapter VII of the Charter. The author considers there to be an imminent risk that States would take advantage of the differences in the regulations, and create international organizations with the sole purpose to act through the organization to avoid responsibility as a State. The criticism by the author is supported in an article written by *Milanovic & Papic*, where it is argued that the ECHR interpretation of *effective control* indeed sends a clear message to States that they can act regardless of the obligations attributed to them as long as they shield themselves behind an international organization.¹⁷⁴

In addition, the author stresses the importance of keeping in mind that States are the founders of the UN and other international organizations, not the other way around, and the UN act and function through the Member States of the organization.¹⁷⁵ The author further stresses that there are no obligations, or rights, automatically possessed by the UN because of the characterization as an international subject. Every right or obligation possessed by an international non-state subject derives from some sort of conscious devolution or authorization from states.¹⁷⁶

Therefore, the author argues that it is unreasonable to adapt an interpretation that creates a possibility for States to take advantage of the effective control doctrine to escape State responsibility.

6.2.3 The difference between binding and enforceable

The main rule is that the Members of the UN are obliged to act in accordance with the Charter and comply with the decisions of the UNSC.¹⁷⁷ The regulations in the Charter are, however, of different characters, and thereby affect the character of the decisions of the UNSC.¹⁷⁸ A resolution with the purpose to authorize a joint operation is always adopted under chapter VII of the Charter, a chapter that can contain binding as well as enforceable decisions. The difference between the two terms is best shown by the comparison of article 41 and article 42 of the Charter, where the Members of the UN are obliged to carry out the binding and enforceable non-military decisions adopted under article 41,¹⁷⁹ but cannot be forced to carry out the military actions adopted under article 42.¹⁸⁰ Due to the fact that an authorizing resolution never can be forced upon the Member States, there

¹⁷⁴ Milanovic, M, & Papic, T, *As bad as it gets: The European Court of Human Rights's Behrami and Saramati Decision and General International law*, p.268

¹⁷⁵ *Ibid.*, p.285

¹⁷⁶ Linderfalk, U, *Folkrätten i ett nötskal*, 2006, p.11-12

¹⁷⁷ UN Charter, art.2.2 & 25

¹⁷⁸ For example: UN Charter art.36.1, recommendations

¹⁷⁹ UN Charter, art.41

¹⁸⁰ UN Charter, art.42

is an ongoing discussion whether it is reasonable to attribute the conduct of the contributed forces to the UN.

The resolution in the *Behrami-Saramati Case*, authorizing the international security presence in Kosovo,¹⁸¹ was adopted under article 42 of the Charter. The resolution is therefore binding, but not enforceable, upon the members of the UN.¹⁸² The author considers it difficult to accept that the UN actually possessed the *ultimate authority and control* alleged by the ECHR, when the UN did not possess control over the outcome of the resolution, due to the non-enforceability. *Milanovic & Papic* argues in line with the author, and holds that the ultimate authority and control possessed by the UN can at most be abstract, due to the fact that the UNSC could pass whatever resolution it likes, but that does not mean that States will actually obey it.¹⁸³

6.3 Slightly limited interpretation

The ICTY and the House of Lords does not agree upon the extensive interpretation made by the ECHR, and argues in favour of a slightly more limited interpretation of the term *effective control*.

The House of Lords held that the mere existence of an authorizing UNSC resolution should not result in an assumption that the conduct of the contributed forces could be attributed to the UN.¹⁸⁴ The House of Lords, as well as the ECHR, adopted the term *ultimate authority and control*, but held that even though the meaning of the term was elusive, there was no assumption of UN ultimate authority and control solely based on the existence of an UNSC resolution adopted under chapter VII of the Charter.¹⁸⁵ The House of Lords definitely interprets the term *effective control* in a more restraint way than the ECHR, however, a more precise definition of the term is hard to conclude upon, since the Members of the Court virtually only seems to have agreed upon the outcome of the judgement.¹⁸⁶

6.3.1 Under UN auspices

Several of the judges in the House of Lords noticed that while the KFOR troops in Kosovo were *deployed under UN auspices*,¹⁸⁷ the British and US troops in Iraq were only authorized to *protect peace and security*.¹⁸⁸ The relevant question to ask is whether the term *under UN auspices* constitutes

¹⁸¹ Resolution 1244, art.7

¹⁸² However, it should be noted that a resolution adopted under article 42 of the Charter is binding as well as enforceable upon the State considered the subject of the sanctions

¹⁸³ Milanovic, M & Papic, T, *As bad as it gets: The European Court of Human Rights's Behrami and Saramati Decision and General International law* 2009, p.286

¹⁸⁴ *Al-Jedda v. Secretary of State for Defence*, art.148

¹⁸⁵ *Al-Jedda v. Secretary of State for Defence*, art.148

¹⁸⁶ See subsection 3.2.4

¹⁸⁷ Resolution 1244, art.5

¹⁸⁸ *Al-Jedda v. Secretary of State for Defence*, art.147 & 23

the dividing line between whether a conduct of a military force may be attributable to the UN or not? The author considers it doubtful whether the term should be attributed such an important role in the context.

It is correct that resolution 1244, in relation to the establishment of an international presence in Kosovo, used the term *under UN auspices*, while resolution 1511, regarding Iraq, did not. The author considers it important to emphasize the difference between the operation in Kosovo and the operation in Iraq. In Kosovo, there were no existing international forces when the resolution was adopted, why the UN had to both establish and authorize, *under UN auspice*, the international security presence. In Iraq, on the other hand, international forces were already present, why the UN only had to authorize the existing forces to operate under unified control, therefore, the use of the term *under UN auspices* was not necessary.¹⁸⁹

Further, the author is of the opinion that there is a significant difference between the term *under UN auspice* and a subsidiary organ of the UN. The UN generally never accepts joint operations as subsidiary organs, in contrast to peacekeeping operations where the UN accept full responsibility.¹⁹⁰ The author is not sure whether the House of Lords indicates that the term *under UN auspices* actually should be sufficient for ultimate authority and control to occur. The purpose of the Court could also have been to emphasize the opinion that the existence of an authorizing UNSCH resolution should not automatically result in UN responsibility.

6.3.2 Possible acceptance by the ILC

The ICTY, as well as the House of Lords, does not consider the mere existence of an authorizing UNSC resolution under Chapter VII to be sufficient for *effective control*, interpreted by the ICTY as *overall control*, to occur.¹⁹¹ The Court held that the term *overall control* should be interpreted as more than just support in terms of financial assistance, military equipment or training, but does not require control over each individual act.¹⁹²

There is no reference to the Tadic´ Case in the commentaries by the ILC, which could be explained in two different ways. Either, the ILC took note of the fact that the ICJ, in the Bosnian Genocide Case, dismissed the wider interpretation of *effective control*,¹⁹³ or the ILC consider the interpretation by the ICTY inaccurate. On the other hand, the ILC refers to the judgement of the House of Lords in the Al-Jedda Case, and holds that the interpretation

¹⁸⁹ United Nations Juridical Yearbook 2007, art.87-88

¹⁹⁰ Model Status of Forces Agreement for Peace-Keeping Operations & Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division & DARIO, art.6, commentary (7)

¹⁹¹ See subsection 3.2.2

¹⁹² Prosecutor v. Dusko Tadic´, art.137

¹⁹³ See subsection 3.2.1

of the term effective control made by the House of Lords appears to be in line with the way in which the term was intended to be interpreted.¹⁹⁴

The reference to the judgement by the House of Lords indicates that the ILC considers the interpretation by the ICTY to be too extensive, and that the term *overall control* is not in conformity with *operational control*. The rejection of the *overall control* interpretation could imply that the ILC does not consider the existence of financial assistance, military assistance or training necessary for *operational control* to occur, but rather interprets the term as slightly more than the mere existence of an authorizing UNSC resolution.

The author agrees upon that the implied interpretation by the ILC of the term *operational control* is an improvement in comparison to the interpretation by the ECHR. However, the author is afraid that the differences between the two interpretations only are fictional, and would not result in any difference in practice.

6.4 Limited interpretation

The Nicaragua Case was the beginning of the effective control doctrine, where the ICJ invented the term and interpreted it as meaning control over each individual operation.¹⁹⁵ Further, the ICJ held that both training, weapons and money was too general and not sufficient for *effective control* to occur, irrespective of whether the force occasionally had been complete dependent upon the support.¹⁹⁶ The ICJ maintained its position in the Bosnian Genocide Case, and condemned the ICTY's *overall control* interpretation as far too extensive.¹⁹⁷ The ILC does not refer to any of these cases in its commentaries.

In addition, the Dutch Court of Appeal seem to have adopted the limited interpretation of *effective control* in the UNPROFOR Case, where the Court held that for *effective control* to occur there must be a theoretical, as well as practical, possibility for the State or international organization to intervene in the conduct of the force.¹⁹⁸ The Court exemplifies by holding that effective control exists when a State can order the contributed troops in an international peacekeeping force to act in a specific way.¹⁹⁹ The definition is a bit vaguer in comparison to the definition by the ICJ, and the question is whether the interpretation of the Dutch Court of Appeal can be equated with the interpretation made by the ICJ. According to the author, the answer is likely to be the positive since it must be considered impossible to effectively intervene in the conduct of a national military troop without possessing

¹⁹⁴ DARIO, art.7, commentary (12)

¹⁹⁵ See subsection 3.2.1

¹⁹⁶ Nicaragua v. United States of America, art.115

¹⁹⁷ See subsection 3.2.1

¹⁹⁸ See 3.2.4

¹⁹⁹ Nuhanovic v. Netherlands & Mustafic v. Netherlands, art 5.18

control over each individual operation. Thereby, the criterion is identical with the one required by the ICJ.

6.4.1 A rigorous burden upon international organizations

The ICJ is extremely clear in its judgements, and stresses that effective control requires control over each individual operation. In other words, general control is not sufficient for the conduct of a non-organ to be attributable to the State. The ILC, on the other hand, imposes a more rigorous burden upon international organizations by interpreting the term *operational control* as slightly more than the mere existence of an authorizing UNSC resolution, but not to the extent of existence of financial assistance, military assistance or training.²⁰⁰

The ARSIWA is considered to constitute a correct codification of international customary law, and is well established and accepted in the international community as a whole. The ILC's reference to the term *operational control* challenges the function of the ARSIWA, and indicates that international organizations can become internationally responsible much easier than States. The author is of the belief that the interpretation by the ILC expands the possibility for States to escape responsibility by hiding behind an international organization.²⁰¹

The author is in other words in favour of a more limited interpretation of the term effective control, applied by the ICJ in the Nicaragua Case, and argues that different international subjects should not be distinguished when it comes to basic international principles. However, it should be questioned whether the degree of control required by the ICJ ever can be achieved by an international organization as the UN. As mentioned earlier, the military forces of a joint operation remain organs of the contributing State, and the State retains the disciplinary powers and criminal jurisdiction over the contributed forces.²⁰² It is true that the UN possesses the authority, as well as the power, to draw up guidelines and demand certain rules to be followed in relation to the joint operations, and it is a matter of interpretation whether that control should be considered sufficient. The author is hesitant to the argument that it is possible to gain effective control over each individual operation, when both criminal jurisdiction and disciplinary powers remains with the contributing States and emphasises that the ICJ, in the Nicaragua case, dismissed both training and financial assistance, as well as military assistance, to be sufficient for *effective control* to occur.

²⁰⁰ See subsection 6.3.2

²⁰¹ Ibid.

²⁰² Ibid.

7 Conclusion

7.1 The obligations applicable upon the UN in joint operations

Research question number one concerns the obligations applicable upon the UN in relation to joint operations:

- Are there any HR- or IHL regulations based on either international treaty law or customary international law, including the norms of jus cogens, which are internationally applicable upon the UN in joint operations?

7.1.1 Treaty law and the UN Charter as a multilateral treaty

The main question under this subsection is whether the UN is internationally bound by any of the existing multilateral HR or IHL treaties, and the answer of the author is no. A treaty is not applicable upon an international subject unless consent to be bound has been expressed.²⁰³ The fact that UN is not a party to any of those treaties makes it easy to conclude that there are no multilateral treaties in that area applicable upon the UN.

In addition, the author argues that the UN Charter as a multilateral treaty does not internationally bind the UN, due to the fact that the UN is not a party to its own statute. The author further argues that if the Charter, as a multilateral treaty, should be considered internationally applicable upon the UN, it is suggested that multilateral treaties possess the power to legally bind international subjects without expressed consent.²⁰⁴ The author considers the principle of consent to be bound as one of the most fundamental in international law, and therefore does not accept the conclusion that the Charter can be internationally applicable upon the UN in the character of a multilateral treaty. For the same reasons, the author does not support the conclusion that the Charter should be considered as a world constitution, applicable upon the international community as a whole irrespective of existing consent.

²⁰³ VCLT, art.34

²⁰⁴ Ahlborn, C, *The rules of international organizations and the law of international responsibility*, 2011, p.33

7.1.2 The Charter as the constituent instrument of the UN

There is an ongoing discussion and ambiguity concerning the legal status of the UN Charter as the constituent instrument of the UN. The author agrees upon the fact that the Charter at least should be considered as internal law of the UN, but does not dismiss the possibility of some of the regulations in the Charter having the character of internationally binding regulations.²⁰⁵

The author is torn between the different arguments, but has chosen to argue in line with the statement presented by the UN.²⁰⁶ The author is not able to conclude that the Charter as a whole is internationally applicable upon the UN, partly due to the fact that the organization has not ratified the Charter and has therefore not expressed consent to be bound. On the other hand, the author is neither able to conclude that the Charter as a whole should be considered as internal law of the organization, partly due to the fact that the rights and obligations of the UN are delegated by States through the Charter. Several of the obligations in the Charter most likely should be characterised as international obligations, and when the UN refers to obligations with the character of internal law of the organization, the regulations referred to are most likely of a more administrative character.

In other words, the author concludes that the obligation to *promote* HR, is most likely internationally binding upon the UN. However, the author further concludes that even if the UN should be considered internationally bound by several regulations in the Charter, it is a fact that the strict wording of the Charter only obliges the UN to *promote* HR in relation to other subjects.²⁰⁷ Nowhere in the Charter is there a direct obligation for the UN to act in accordance with HR. Therefore, the author concludes that the character of the regulations does not really matter from a strict literal interpretation.

The author is reluctant to, without further knowledge, conclude that the obligation of the UN to promote HR is able to transform into an obligation to act in accordance with HR. Caution should be considered before concluding that the main purpose of an international organization automatically can transform into an obligation internationally binding upon the organization, regardless of the wording of the purpose.²⁰⁸

7.1.3 Customary law

The basis of the customary international law applicable upon the UN is the subject of an ongoing discussion. The author is reluctant to accept the

²⁰⁵ Responsibility of international organizations, comments and observations received from international organizations, 2011, art.1

²⁰⁶ Responsibility of international organizations, comments and observations received from international organizations, 2011, art.1

²⁰⁷ UN Charter, art.1.3 & 55(c)

²⁰⁸ See for example VCLT art.31.1, where the wording of the treaty is emphasized

argument that the customary international law applicable upon the UN should be the one solely based on the *opinio juris* of States. On the other hand, the author is also reluctant to, without further consideration, accept the argument that the customary international law applicable upon the UN should be the one solely based on the *opinio juris* of international organizations.

The author concludes that the customary international law applicable upon the UN is not the customary international law based on the *opinio juris* of States alone. It is true that States, because of the State sovereignty, possesses a unique and superior role in international law, however, international organizations are considered international subjects and the author dismiss the conclusion that State sovereignty automatically would imply the right to internationally bind a separate international subject without consent.

The arguments of the author partly refers to the fact that the DARIO is highly inspired by the ARSIWA,²⁰⁹ indicating that in most cases States and other international subjects should be regarded equal. In addition, there is no indication that the principles of international treaty law should be applied differently in relation to States or international organizations, but States as well as international organizations need to express consent to be bound. In other words, there is no indication that States by expressing consent to be bound by a multilateral treaty, in some way also would bind the international organizations they are Members of. The author argues that due to the fact that States and international organizations are considered equal in relation to international treaty law, it would not be reasonable if international organizations were completely dependent upon States in relation to customary international law.

The author is of the opinion that international organizations possess significant and growing importance in international law, and there is no doubt that several of the international organizations, especially the UN, has the ability to act in a manner that will be followed by others as law. Therefore, the author concludes that the customary international law applicable upon the UN should be the one based on the joint *opinio juris* of States and international organizations. By dividing the regulatory frameworks applicable upon States in comparison to the frameworks applicable upon international organizations, there is a possible risk that States, as the founders of the organizations, takes advantage of, inter alia, the UN, to avoid State responsibility.

The problem of a joint *opinio juris* is whether the existence of practice of international organizations is too limited to create an *opinio juris*.²¹⁰ There are significant differences between different international organizations, regarding both powers, size, structure and the treaties applicable upon

²⁰⁹ DARIO, General Comment (3)

²¹⁰ Chatham House, p.5

them.²¹¹ Further, it must be taken into account that because of the fact that the UN does not consider the forces of joint operations as subsidiary organs, there is no practice at all available.²¹² The author considers it doubtful whether the practice available is enough to create a joint opinio juris among States and international organizations, especially in relation to joint operations. Therefore, the author is hesitant to, without further consideration, conclude that customary international HR law is applicable upon the UN in relation to joint operations.

7.1.4 Jus cogens

The author consider the subject to be rather complex, and can fully understand why there is an on-going discussion in relation to almost everything. To begin with, the author does not consider the argument that the UN has not ratified the VCLT to be relevant, since it is more rare than common that international organizations actually has ratified the basic multilateral treaties. The discussions considering treaty law and customary international law are both based on principles and definitions that can be found in treaties not ratified by the UN, but nevertheless applies upon the UN because the character of several of the regulations in the basic multilateral treaties as customary international law accepted by the international community as a whole.

As founders and members of the UN, the States indeed possesses a unique and important role. The question is whether the UN is bound by jus cogens as an inherent obligation deriving from the obligation of States to act in accordance with jus cogens. On one hand, the author considers it correct that States should not be able to delegate powers that they themselves do not possess, due to the fact that such delegation most likely would create an opportunity for States to avoid State responsibility. On the other hand, the author is having difficulties accepting the phenomena of inherent rights. The term does not exist in relation to treaty law, meaning that the UN does not automatically become internationally bound by a treaty on the sole basis that one or several of the Member States ratifies the specific treaty. It should further be noted that there is an ongoing discussion whether the UN and other international organizations can be internationally bound by customary international law based on the opinio juris of States, or whether there is a need for the opinio juris to at least stem from a joint opinio juris of States and international organizations together.

If the norms of jus cogens are considered binding upon the UN as an inherent obligation deriving from the Member States, the next question to take into consideration is whether article 103 of the UN Charter only addresses treaty law, or extends to also include customary international law and jus cogens. The author is of the opinion that article 103 of the UN Charter should be interpreted in a more extensive way, and therefore argues

²¹¹ DARIO, General comment (7)

²¹² See subsection 4.1

that customary international law as well as the norms of jus cogens should be considered included. According to the author, the term *international agreements* should not be considered as addressing treaties and similar agreements alone, due to the fact that treaties and customary international law are both considered sources of international law, and neither the DARIO nor the ARSIWA distinguishes one of the sources as more important than the other. The author therefore concludes that an international agreement can be based on treaty law as well as customary international law.

Is it then possible for the UNSC to adopt a resolution in contrary with jus cogens, binding upon the Member States? Moreover, if it is possible, are the Member States obliged to carry out the resolution? The author cannot conclude on a definitive answer, but consider the questions interesting and important in the discussion concerning the relation between the norms of jus cogens and the UN. The author agrees upon the argument that it might seem contradictory if the UN is able to derogate from norms impossible to derogate from. On the other hand, to draw such conclusion it must be established that the UN indeed is strictly internationally bound by the norms of jus cogens, otherwise there is slight possibility that the UN never was a subject to the norms.

7.2 The ILC and the interpretation of the term attributable

Research question number two concerns the ILC's interpretation of the term attributable:

- For the UN to be held internationally responsible for the contributed troops in a joint operation, the conduct of the troops must be attributable to the UN. A conduct is attributable to the UN if the organization possesses *effective control* over the troops at the time for the conduct.
 - How does the ILC interpret the term *effective control* in relation to the UN, and is the interpretation in line with general principles of international law?

7.2.1 The interpretation by the ILC

According to the ILC, the UN is responsible for the contributed forces in joint operations if the organization possesses operational control, which implies a role in the act in question.²¹³ The ILC further holds that the interpretation of the term *effective control* by the House of Lords seems to be in accordance with the intended interpretation.²¹⁴ The House of Lords held that the mere existence of an authorizing UNSC resolution is not enough for *ultimate authority and control* to occur. The ICTY interpreted

²¹³ DARIO, art.7, commentary (10)

²¹⁴ DARIO, art.7, commentary (12)

the term effective control as *overall control*, and held that financial assistance, military assistance or training is not enough for *overall control* to occur. The ILC does not refer to the interpretation by the ICTY, indicating that the ILC consider the interpretation too extensive, and the term *overall control* not in conformity with *operational control*. That would mean that the ILC consider the definition of *operational control* somewhere between slightly more than the mere existence of an authorizing UNSC resolution, but not requiring the existence of financial assistance, military assistance or training.

In other words, the ILC interpretation of *operational control* seems to indicate that if the UN contributes with either financial- or military assistance as well as training, the possessed control is strong enough to create an attribution to the UN. However, what happens if the UN contributes with financial support only to a joint operation, does that result in effective control? What happens if the UN demands annual reports regarding the proceedings of the forces in the joint operation, does that result in effective control? Alternatively, what happens if the UN, in addition to a general resolution authorizing the presence of international forces, provides specific guidelines to each individual national force, does that result in effective control? In other words, the ILC is in favour of interpreting the term *effective control* as *operational control*, but does not present any further guidelines considering the interpretation why the subject remains vague and unclear.

7.2.2 General principles of international law

The author is of the opinion that the ILC interpretation of the term *effective control* as *operational control*, is not in accordance with general principles of international law. The author considers the correct interpretation to be the one established by the ICJ in the Nicaragua Case, also the one applicable upon States. The principle of State responsibility is widely accepted as customary international law, and the author cannot support a conclusion that puts a heavier burden upon international organizations than upon States.

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