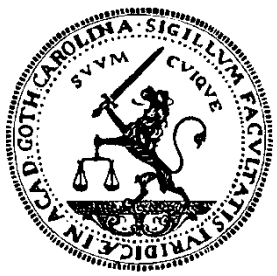

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Addressing impunity through State accountability?

A study on responsibility for human rights violations committed by UN peacekeepers

JURM02 Graduate Thesis

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Contents

Summary

In 2015, media reported on new allegations of sexual exploitation and abuse committed by UN peacekeepers against civilians. This was not the first time such allegations were made. Although a number of measures have been taken at the UN level to combat these crimes, the problem persists.

The majority of the personnel in UN peacekeeping operations are members of national military contingents, and most of the allegations of sexual exploitation and abuse are directed against this group. Regarding these persons, criminal jurisdiction and authority to decide on disciplinary matters stay with the sending State. The sending State is therefore responsible for investigating and prosecuting crimes committed by members of their national contingents but for different reasons, domestic authorities do not always investigate into such allegations. This essay focuses on the responsibility of the sending State. The scope of human rights treaties – the ICCPR to some extent but mainly the ECHR – is examined in this regard. The rationale behind this focus is that the ECHR is arguably the human rights instrument with the largest potential of providing a successful legal venue for the individual in this respect. Additionally, the judgments of the ECtHR, unlike the decisions of the HRC, are legally binding. As most UN peacekeeping operations take place in other continents than Europe, the concept of extraterritorial jurisdiction is central and a prerequisite for holding the sending State accountable for human rights violations committed by its soldiers in this context.

There is no doubt that the notion of extraterritorial jurisdiction has been acknowledged both in terms of the ICCPR and the ECHR. Regarding the latter, the ECtHR has in recent years shown a more permissive approach to the notion of extraterritorial jurisdiction and its case law has evolved significantly in this regard. However, in a case concerning a UN operation in Kosovo, where the conduct in question was considered attributable to the UN rather than to the sending State, the case was declared inadmissible. It was held that acts of Contracting Parties covered by a UNSC resolution could not be subjected to the scrutiny of the ECtHR. In this essay it is assumed that acts of sexual exploitation and abuse cannot be covered by the mandate or be attributable to the UN. The ECtHR is thus able to review such cases. It is argued that extraterritorial jurisdiction can arise in two ways; through a continuously permissive interpretation and application of the concept of extraterritorial jurisdiction by the ECtHR, or through the application of a model of extraterritorial jurisdiction argued for in the legal doctrine, which separates between positive and negative human rights obligations of States.

However, State responsibility under the ECHR is not enough from the perspective of the victims. UN peacekeepers come from all over the world, and the largest troop-contributing nations are not parties to the ECHR. Thus, there is a need for a global solution in order for the victims of these violations to be able to seek justice and redress and in order to address impunity. A convention-based regime or a special court or tribunal for this purpose is therefore suggested as a possible solution.

Sammanfattning

Under 2015 riktades nya anklagelser mot personal i FN:s fredsbevarande insatser om sexuella övergrepp mot civila. Detta var långt ifrån första gången sådana anklagelser riktades mot FN-personal. Trots att mängder av åtgärder har vidtagits inom FN-systemet för att motarbeta detta, kvarstår problemet.

Majoriteten av personalen i FN-insatser tillhör nationella kontingenter, och det är också mot dessa som de flesta av anklagelserna om övergrepp har riktats. I förhållande till denna personalkategori behåller sändarstaten straffrättslig jurisdiktion och rätten att vidta disciplinära åtgärder. Ansvaret för att utreda och åtala brott som begås av denna grupp vilar alltså på sändarstaten. Av olika anledningar tar truppbidragande stater inte alltid detta ansvar. I denna uppsats ligger fokus därför på staters ansvar under olika MR-traktat – till viss del ICCPR men med huvudsakligt fokus på EKMR – där dessa brott begås av deras utsända personal. Anledningen till detta fokus är att EKMR kan antas vara det MR-instrument som ger individen störst möjlighet att söka upprättelse och rättvisa. Därtill är Europadomstolens domar till skillnad från exempelvis FN:s kommitté för mänskliga rättigheters (MR-kommitténs) beslut rättsligt bindande. Då i princip alla FN:s fredsbevarande insatser äger rum på andra kontinenter än Europa, är frågan om extraterritoriell jurisdiktion av central betydelse, eftersom statens utövande av jurisdiktion är en förutsättning för att kunna hålla sändarstaten ansvarig för MR-kränkningar som begås av dess soldater i det här sammanhanget.

Det råder inget tvivel om att extraterritoriell jurisdiktion är ett erkänt koncept i förhållande till såväl ICCPR som EKMR. Vad gäller den senare har Europadomstolen på senare år tillämpat en allt mer generös tolkning av begreppet extraterritoriell jurisdiktion och har utvecklat praxis avsevärt i detta avseende. I ett fall som rörde FN-närvaro i Kosovo och där gärningarna (eller underlåtelserna) i fråga ansågs vara hänförliga till FN som organisation snarare än till sändarstaten förklarade dock Europadomstolen klagomålen icke-admissibla. Man uttalade att gärningar utförda av sändarstaten täckta av en säkerhetsrådsresolution inte kunde granskas av Europadomstolen. I denna uppsats förutsätts att sexuella övergrepp aldrig kan täckas av mandatet och aldrig vara hänförliga till FN, utan att Europadomstolen kan granska sådana fall och att stater därmed kan hållas ansvariga. Två möjliga sätt för extraterritoriell jurisdiktion att uppstå på i dessa fall presenteras; genom en fortsatt generös tolkning och tillämpning av begreppet extraterritoriell jurisdiktion av Europadomstolen, eller genom tillämpning av en modell för extraterritoriell jurisdiktion som har förts fram i litteraturen som skiljer mellan staters positiva och negativa MR-skyldigheter.

Ur offrens perspektiv är dock staters möjliga ansvar under EKMR otillräckligt. FN-soldater kommer från alla världens hörn, och de största truppbidragande länderna är inte statsparter till EKMR. Därför behövs en global lösning för att komma tillrätta med den straffrihet som ofta råder för dessa brott och för att offren ska kunna få upprättelse. Ett konventionsbaserat system eller en särskild domstol eller tribunal för dessa frågor föreslås därför som en tänkbar lösning.

Preface

Finalising this thesis marks the end of almost six years at Lund University. Six years filled with (mostly) good times, which I have been lucky enough to share with beloved friends – old ones as well as new ones. In the process of writing this thesis, a few people have been particularly supportive and should be mentioned here.

My supervisor Karol Nowak – thank you for valuable guidance and advice.

Hedvig – thank you for, besides bringing joy and laughter to every single day during the years at RWI, being a proofreading hero.

Mum, dad, Hampus, Sophie – thank you for endless love and support.

Fanny Zakrisson, Stockholm, 21 December 2015

Abbreviations

CAR	Central African Republic
CFI	Court of First Instance
CoE	Council of Europe
CRC	Convention on the Rights of the Child
DARIO	Draft Articles on the Responsibility of International Organizations
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EKMR	Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna
EU	European Union
HRC	Human Rights Committee (not to be confused with the Human Rights Council)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
KFOR	NATO Kosovo Force
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MOU	Memorandum of Understanding
MR	mänskliga rättigheter
NATO	North Atlantic Treaty Organization
SFIR	Stabilization Forces in Iraq
SOFA	status-of-forces agreement
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
US	The United States of America

1 Introduction

1.1 Background and purpose

According to Article 1.1 of the UN Charter, one of the purposes of the organisation is to maintain international peace and security. In pursuit of this aim, the Security Council has established many peacekeeping operations.

Article 1.3 of the UN Charter provides that another purpose of the organisation is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all. UN peacekeepers are deployed with, *inter alia*, the purpose to protect the civilian population. However, allegations of sexual exploitation and abuse and other human rights violations committed by military as well as civil personnel against the civilian population in the course of UN peacekeeping operations have been reported every now and then. For example, allegations of sexual exploitation and abuse have been reported in relation to UN operations in Mali[1], Haiti[2] and the Central African Republic (CAR)[3]. Such acts may violate human rights of individuals, such as the rights not to be subjected to cruel, inhuman or degrading treatment as laid down in, *inter alia*, the ICCPR and, where European States are concerned, the ECHR.

What is even more discouraging is that it is not a new phenomenon. The problem has been documented by media and human rights organisations since the early 1990s[4], and as a reaction, numerous measures have been taken within the UN system. In 2005, the so-called Zeid Report[5] produced by Prince Zeid Ra'ad Zeid Al-Hussein of Jordan (current UN High Commissioner for Human Rights) was released. The Zeid Report was a comprehensive analysis and report on sexual exploitation and abuse by UN peacekeeping personnel and contained a number of concrete recommendations on this matter. However, ten years later, several reports reveal that the problem persists, most recently allegedly in the Central African Republic.[6] The occurrence of sexual exploitation and abuse committed by UN peacekeepers is, arguably, all the more disturbing in light of the discourse relating to the UN Security Council resolution 1325[7] and subsequent resolutions forming the framework for the *women, peace and security agenda*. These resolutions, *inter alia*, acknowledge the different experiences of armed conflict experienced by women and men, and

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[1] http://www.un.org/apps/news/story.asp?NewsID=45942#.VZpufBPtmko (acquired 10
[2] *UN peacekeepers sexually abuse hundreds of women and minors in Haiti in exchange for food and medicine, new report will reveal*, The Independent (2015).
[3] http://www.aljazeera.com/news/2015/06/peacekeepers-face-sex-abuse-claims-car-150624123505253.html (acquired 10 October 2015).
[4] Murphy (2008), p. 75. See also Global Policy Forum (2005).
[5] Report of the Secretary-General, "*A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*", UN Doc. A/59/10, 24 March 2005; commonly referred to as the Zeid Report.
[6] See e.g. *UN aid worker suspended for leaking report on child abuse by French troops*, The Guardian (2015).
[7] S/RES/1325 (2000), 31 October 2000.

reaffirm the important role of women in prevention and resolution of conflicts, and calls on parties to conflicts to protect women and girls from gender-based violence such as rape and other forms of sexual abuse. As women and girls are subjected to sexual exploitation and abuse more frequently than men, combatting the occurrence of such acts in the course of UN peacekeeping ought to be a priority in light of the *women, peace and security agenda*. In October 2015, Security Council resolution 2242[8] was adopted, *inter alia*, urging police- and troop-contributing nations to provide robust pre-deployment training on sexual exploitation and abuse, to conduct swift and thorough investigations of their uniformed personnel, and, if appropriate, to prosecute such crimes.

UN peacekeepers come from all over the world and different legal regimes apply to different categories of personnel in a peacekeeping operation. Where members of military contingents in UN peacekeeping operations are concerned, the troop-contributing nation retains jurisdiction in criminal and disciplinary matters.[9] The host State is often a wrecked State in lack of a functioning legal system, and prosecution in that State is not possible, while at the same time the troop-contributing nations are sometimes unwilling or unable to prosecute. It is not clear to what extent a troop-contributing nation can be held responsible under different human rights treaties for acts committed by their representatives in the context of UN peacekeeping operations. In recent years, a general trend can be distinguished among international human rights law bodies, especially the European Court of Human Rights (ECtHR), towards a more permissive approach to extraterritorial application of human rights treaties. In the *Behrami and Saramati*[10] admissibility decision of 2008, however, the ECtHR basically declared itself incompetent to review acts covered by UN Security Council resolutions carried out by national contingents during peacekeeping operations because doing so would interfere with the fulfilment of the UN's key mission in this field, including with the effective conduct of its operations.[11]

Impunity and the lack of accountability for human rights violations in the course of UN peacekeeping operations is a huge problem as it not only severely hampers the possibility of the victims to seek redress, but it is also damaging the credibility of the UN as such. The purpose of this essay is to explore and analyse how different international law bodies have dealt with accountability for such acts and to suggest different ways of addressing impunity in order to combat the persistence of the problem.

1.2 Research questions and delimitations

This essay focuses on the situation where military members of national contingents commit rape or other acts of sexual exploitation or abuse against the civilian population, and the allocation of responsibility in such situations.

[8] S/RES/2242 (2015), 13 October 2015.
[9] See Model status-of-forces agreement for peace-keeping operations, para. 47 (b).
[10] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, appl. nos. 71412/01 and 78166/01, Admissibility Decision of 2 May 2007.
[11] Ibid., para. 149.

The criminal responsibility of the individual perpetrators is not the main focus of this study; rather, the possibility of holding the sending State accountable for acts committed by their representatives under human rights law is explored. Since these acts practically exclusively take place outside of the territory of the troop-contributing nations, it is examined how and to what extent different international human rights bodies, particularly the European Court of Human Rights and to some extent the Human Rights Committee (HRC), have dealt with the issue of extraterritorial application of their respective human rights treaties in the context of UN peacekeeping operations. In doing so, it is further examined whether a satisfactory human rights protection is afforded to civilians in these areas and a *de lege ferenda* reasoning is carried out in order to suggest a way forward to addressing impunity. Several questions are addressed. A key question is:

- When can a sending State be held accountable for human rights violations committed by its soldiers during UN peacekeeping operations under relevant human rights treaties?

In answering this question, I have chosen to focus on the ECHR (and thus the responsibility of European troop-contributing nations) and, to some extent, the ICCPR. The main reasons for this selection is, firstly, that based on my previous knowledge, I estimate that the ECHR is the human rights instrument with the largest potential of providing a successful legal venue in this respect, and secondly, time and space limitations. An obvious strength of the ECtHR in this respect and another reason why it is focused upon is that its judgments are legally binding for Contracting States. In order to answer the above-mentioned question, the following question must also be addressed:

- When can sending States exercise jurisdiction in the meaning of article 1 ECHR and/or article 2.1 ICCPR in the context of a UN peacekeeping operation?

In this connection, the questions of attribution of conduct and extraterritorial jurisdiction are crucial. After establishing the above-mentioned, the specific situation of sexual exploitation and abuse committed by, *inter alia*, French UN peacekeepers in the Central African Republic is addressed in order to concretise the problems that arise. It is not claimed that the problem is more prevalent in some contexts than in others or that some countries are worse than others, but the example has been chosen to show that the problem is real, that such abuse has occurred and that it might occur again in the future if the issue is not properly addressed. Misconduct has been reported in relation to peacekeepers from many countries, not only France, which has been in the centre of attention of media recently. However, using an example involving a European State raises the question of the applicability of the ECHR. A *de lege ferenda* reasoning is carried out in chapter 4, addressing the following question:

- Can victims of sexual exploitation and abuse in the Central African Republic bring a legal claim against the (European) sending State before the European Court of Human Rights?

Further, in order for this study not to become unreasonably large in its scope, a number of delimitations have been made. Focus is placed upon the procedural aspects of relevant human rights treaties and the possibilities of bringing a legal claim against the sending State, rather than the scope and content of the substantial rights. The human rights obligations of the host State are not dealt with, nor individual responsibility under international criminal law. As explained above, the main focus is placed upon the ECHR and, to some extent, the ICCPR. The role of other conventions and bodies, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Committee is not being examined. Another question that lies near the focus of this essay but in which it is not engaged is the relationship between human rights law and international humanitarian law. As mentioned above, the focus of this essay is the responsibility for acts committed by military members of national contingents. The rationale behind this choice is that military personnel constitute the majority of the total personnel in peacekeeping operations and the majority of the reported allegations of sexual exploitation and abuse are directed against military personnel.[12] Acts by UN officials and so-called experts on mission are not dealt with as they are ruled by different legal regimes. Lastly, it is presumed throughout this essay that sexual exploitation and abuse can never be covered by a UN peacekeeping operation mandate.

1.3 Theory, methodology and material

A starting point of this essay is the presumption that human rights are universal and should be enjoyed equally by all individuals. The universality of human rights is stated in, *inter alia*, Article 55 and Article 56 of the UN Charter, in the Preamble of the Universal Declaration of Human Rights, and in the Vienna Declaration and Programme of Action. Through the ratification of international human rights treaties, States commit to secure to its citizens the rights and freedoms in the treaty concerned. Sometimes that obligation may be extended to other individuals than its citizens through for example extraterritorial application of the human rights treaty. Where the human rights of an individual have been violated, that individual should have access to justice and measures should be taken to address impunity and to ensure that perpetrators are held to account. As outlined above, in the context of UN peacekeeping operations, the host State is often unable to investigate and prosecute due to the lack of a functioning legal system, which is part of the reason why the peacekeeping operation is there in the first place. Irrespective of this and regardless of the form of organisation of the entity to which the perpetrators belong, the issue of accountability needs to be addressed. In light of this, it is my opinion that in situations where States act extraterritorially, including where peacekeeping troops are deployed by the UN in order to protect civilians, the existing human rights treaties do not offer a satisfactory human rights protection for individuals. On the basis of this point of departure, the question of how troop-contributing nations could be held

[12] See e.g. Zeid Report, para. 9, p. 9; in 2004, the Department of Peacekeeping Operations received 16 allegations against civilians, 9 against civilian police and 80 against military personnel. See also Wills (2013), p. 48.

accountable for human rights violations committed by its soldiers is examined, using the legal dogmatic methodology. When applied correctly, this methodology can be used to put forward critique against the law and propose reforms.[13] This essay aims to do so, and for such proposals to contain ways to address the issue of impunity and provide possibilities for individuals to seek redress.

This essay is structured as follows. Chapter 2 consists of a description of the legal framework that regulates UN peacekeeping and measures that have been taken to combat the occurrence of sexual exploitation and abuse in the course of UN peacekeeping. Chapter 3 contains a presentation of jurisdiction and the notion of extraterritorial jurisdiction, as well as attribution of conduct, which are all of significance for the purpose of this essay. The main analysis is carried out in chapter 4 while chapter 5 contains some concluding remarks. Each of the main chapters starts with a describing part but also contains a concluding section with my reflections and analysis. In these sections, an attempt is made to sum up what has been outlined in the chapter in order to provide a good basis for analysis and some of these sections contain analyses and reasoning in relation to the research questions posed in this chapter. The research questions and the material used are discussed and the relevant sources of law are applied to the problem in order to find a feasible answer. The current state of affairs in general, and the case law of the ECtHR in particular (and, to some extent, that of the Human Rights Committee), are discussed and criticised to some extent.

In doing this, a traditional legal methodology, a legal dogmatic methodology, is used. The purpose of such method is often described as reconstructing the solution of a legal problem, often posed as a concrete research question, by applying a rule to it. The basis of doing so is the principles of the commonly accepted sources of law according to the hierarchy of norms. In international law, according to Article 38.1 of the Statute of the International Court of Justice, the recognised sources of law are treaties and conventions, international custom, general principles of law, and subsidiary sources such as judicial decisions and legal teachings.[14] A legal dogmatic analysis intends to analyse the relevant sources of law so that the result can be assumed to reflect the established law, or how the relevant rule should be perceived in a given context.[15] The describing sections of this essay mainly consist of a description *de lege lata*, focusing on how the law has been applied this far by international human rights law bodies. The "reflection sections" and the main analysis carried out in chapter 4 consist mainly of argumentation *de lege ferenda* and it is argued for a different approach to the legal questions at issue, and proposed approaches to matters yet unresolved are put forward.

The international law treaties that have been studied for the purpose of this essay are mainly the UN Charter, the ECHR and the ICCPR. In addition to this, case law from different international law bodies have also been examined; mainly from the ICJ, the ECtHR and the HRC. Focus is placed upon judgments relating to extraterritorial application of the treaties and, in the

[13] See Kleineman (2013), p. 24.
[14] See also Evans (2014), p. 91.
[15] See Kleineman (2013), p. 26.

context of the ECHR, particularly concerning acts committed by the armed forces of a State abroad. In terms of literature, mostly renowned publishers and journals have been used but attempt has been made to acquire information from a wide variety of sources. In addition to this, relevant UN documents have been studied, ranging from Security Council resolutions to handbooks for peacekeeping.

2 United Nations peacekeeping operations and human rights violations by peacekeepers

2.1 Legal framework of UN peacekeeping operations

UN peacekeeping operations are deployed to create conditions for lasting peace in countries torn by conflict and the operations consist of military, police and civilian personnel from all over the world.[16] Different rules apply to different categories of personnel. The multidimensional and multinational nature of the operations implies that the allocation of responsibility in the case of human rights violations by peacekeeping personnel is complex. This chapter aims to clarify the legal framework regulating UN peacekeeping operations in order to enable a subsequent analysis.

2.1.1 General rules regulating UN peacekeeping operations

Most peacekeeping missions constitute subsidiary organs to the UN Security Council.[17] As subsidiary organs, the privileges and immunities established in Article 105 of the UN Charter apply to the operations.[18] In addition to the resolution establishing the operation in question, the legal framework of the peacekeeping operation basically consists of a status-of-forces agreement (SOFA) between the UN and the host State, a memorandum of understanding (MOU) between the UN and troop-contributing nations, and Force Regulations issued by the Secretary-General.[19] Further, there are Rules of Engagement of each mission, tailored to the specific mandate of the mission as well as the situation on the ground, defining the use of force allowed by members of peacekeeping contingents.[20] The detailed provisions of these documents are not in focus in this essay.

Regarding military personnel contributed by States to the operation, the model memorandum of understanding between the UN and the troop-contributing State (which applies where no specific MOU has been concluded or until it is concluded) prescribes that the sending State consents to place its national contingent, while remaining in their national service, under UN command.[21] This structure is to give the Secretary-General full authority over deployment,

[16] http://www.un.org/en/peacekeeping/operations/ (acquired 10 December 2015.
[17] See http://www.un.org/en/sc/subsidiary/ (acquired 11 October 2015).
[18] Murphy (2008), p. 77.
[19] Ibid., p. 77.
[20] Handbook on UN Multidimensional Peacekeeping Operations, p. 140.
[21] Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, Article V(7).

organisation, conduct and direction of the peacekeeping operation.[22] This enables the UN to incorporate the contingents into its organisational structure.[23] However, as outlined in chapter 1.1, certain crucial competences such as criminal jurisdiction and disciplinary matters stay with the sending States, and some legal and institutional relationships between the national contingents and their sending State is thus retained.[24] National contingents keep their character as organs of their respective sending State, also where the international operation in question constitutes a subsidiary organ of an international organisation, for example UN peacekeeping operations.[25] This circumstance is of importance to the rest of this essay as the issue of accountability of military members of national contingents and the exercise of jurisdiction by the sending States are addressed.

2.1.2 The relationship between UN Security Council resolutions and other international agreements

As outlined above, the legal bases of most UN peacekeeping operations are UN Security Council resolutions containing the mandate for the operation in question. In the following (chapter 4), the possibility of applying human rights treaties, particularly the ECHR, extraterritorially in the context of UN peacekeeping operations is examined. Such application could to some extent address the issue of accountability by holding sending States responsible for human rights violations committed by its soldiers. However, if the UN Security Council resolution in question provides anything counter to the human rights treaty in question, there might be a norm conflict. Therefore, establishing the relationship between international agreements, i.e. human rights treaties, and norms contained in the UN Charter or provisions in UN Security Council resolutions is of relevance.

Article 103 of the UN Charter states that:

”In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

This has been interpreted as covering not only obligations arising directly from the UN Charter itself, but also those included in binding decisions by UN Charter bodies, such as Security Council resolutions.[26] Article 103 of the UN Charter implies that Charter obligations prevail over other international treaty obligations, regardless of whether the other international treaty was concluded

[22] Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations, Article V(7).
[23] Sari (2008), p. 159–160.
[24] Ibid., p. 159–160.
[25] Ibid., p. 159.
[26] *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, pp. 168–169, para. 331.

before or after the UN Charter, or if it was a regional treaty.[27] Article 25 of the UN Charter also holds that UN Member States "[…] agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". This suggests that obligations arising from for example Security Council resolutions prevail over obligations arising from any other international agreements. Further, according to the ICJ, Article 25 of the UN Charter means that also obligations stemming from Security Council resolutions prevail over obligations arising from any other international agreement.[28] Hence, in case of norm conflict with for example the ECHR, obligations arising from a Security Council resolution should prevail.

This entails that certain conduct otherwise prohibited under human rights law might be lawful in the context of a Security Council-mandated operation. When acting under Chapter VII of the UN Charter, the Security Council often refers to the use of "all necessary means" when authorising use of force. An important issue is what acts are allowed according to the mandate, or in other words, what means are necessary under what circumstances. It can be argued that resort to violence to some extent, for example in the exercise of self-defence, must be allowed in pursuit of carrying out the mandate. However, that will not be elaborated further as this essay primarily deals with the possibilities of bringing a claim towards the troop-contributing nation for acts of sexual violence committed by its soldiers. As outlined in chapter 1.2, it is presumed that sexual exploitation and abuse cannot be covered by a UN mandate.

In the context of EU law, the relationship between Security Council resolutions and the then European Community Treaty was subject to the scrutiny of the European Court of Justice (ECJ) in the joint *Kadi and Al Barakaat*[29] cases. The case concerned several UN Security Council resolutions, which imposed on UN Member States to take measures to freeze financial assets of persons and organisations associated with Osama bin Laden, al-Qaeda or the Taleban, and the European Community regulations enforcing them. The applicants were on the list of persons set up by the Sanctions Committee of the Security Council whose assets were to be frozen. According to the applicants, these measures violated their rights protected by the European Community Treaty, namely the right to a fair trial and to respect for their property. Thus, the case concerned whether Security Council resolutions should prevail over EU law and norms protecting human rights contained therein. Before the Court of First Instance, the applicants' claims were rejected because Article 103 of the UN Charter was considered to give primacy to

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[27] See *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 27; reference is also made there to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, p. 392, para. 107.

[28] See *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 27; reference is also made there to, *inter alia*, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America),* Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 114, para. 42.

[29] Judgment *Kadi and Al Barakaat*, Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

Security Council resolutions before other international obligations, including the EC Treaty. The Court of First Instance therefore did not have the authority to review Security Council resolutions or call in question their lawfulness in the light of Community law.[30] As is shown below (chapter 3.4), the ECtHR came to a similar conclusion in the *Behrami and Saramati* case regarding the relationship between the ECHR and decisions by the UN Security Council acting under Chapter VII of the UN Charter.

The ECJ was, however, of another view on this matter. According to the ECJ, EC (EU) law formed an internal and autonomous legal order and the lawfulness of a Community regulation within that legal order could be reviewed in the light of fundamental rights by the ECJ, even though the regulation had been adopted as a consequence of UN Security Council measures.[31] The ECJ held that it is not for the European Community judicature to review the lawfulness as such of a resolution adopted by an international body, but rather to review the lawfulness of the implementing measure.[32] Further, it stated that "[…]the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty".[33] Thereafter, the ECJ found that the restrictive measures contained in the regulation in question constituted an unjustified restriction of the right to property as there was no guarantee enabling the person or entity to put his or her case before the competent authorities in a situation, "[…]in which the restriction of his property rights must be regarded as significant".[34] The implementing measures were annulled.

The *Kadi and Al Barakaat* judgment was followed by extensive debate and has been subject to rather heavy criticism. By describing EU law as a distinct legal order, separate from that of international law, the ECJ took a dualist approach, which has been described as "[…] unfaithful to its traditional fidelity to public international law".[35] The approach of the ECJ allegedly risked sending the wrong message to for example domestic courts and organisations contemplating the enforcement of Security Council resolutions.[36] Further, it was argued by some observers that the said approach also risked undermining the "[…] image the EU has sought to create for itself as a virtuous international actor maintaining a distinctive commitment to international law

[30] Judgment of the Court of First Instance of 21 September 2005, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, T-315/01, ECLI:EU:T:2005:332, para. 225; and Judgment of the Court of First Instance of 21 September 2005, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, T-306/01, ECLI:EU:T:2005:331, para. 276.
[31] *Kadi and Al Barakaat*, ECLI:EU:C:2008:461, paras. 317 and 326.
[32] Ibid., para. 286.
[33] Ibid., para. 285.
[34] Ibid., para. 369.
[35] Kokott & Sobotta (2012), p. 1015. See also e.g. De Búrca (2010).
[36] De Búrca (2010), p. 1.

and institutions".[37] Others, such as human rights advocators, celebrated the judgment. By some, it was said to be "[s]trengthening the rule of law, but fragmenting international law".[38]

The case does not directly concern extraterritorial application of human rights treaties, which is the main focus of this essay. However, *Kadi and Al Barakaat* is of interest in this context because the application of a human rights treaty in the context of a UN peacekeeping operation, in addition to the question of extraterritoriality, concerns the relationship between the human rights treaty in question and UN Security Council resolutions. Compared to the judgment of the ECtHR in *Behrami and Saramati*, it displays a fundamentally different perception of international law and the approach to the relationship between different components of the international legal order such as regional courts in relation to the global UN system. The possibility of regional courts to review acts and omissions in the course of implementing UN Security Council resolutions, i.e. actions and omissions by soldiers in peacekeeping operations, is further discussed in chapter 4.

2.1.3 Privileges, immunities and accountability in UN peacekeeping operations – different rules apply to different categories of personnel

In UN peacekeeping operations, there are different categories of personnel. The operations can consist of a civilian component, a military component and a civilian police component. Because of their different legal status, different rules and disciplinary procedures apply.[39] The categories are:

- UN staff, formally appointed by the Secretary-General and subject to his authority. These persons have the status of officials under the 1946 Convention on the Privileges and Immunities of the United Nations (1946 Convention) and are thus immune from legal process in the host State regarding acts performed in their official capacity, according to Article V, Section 18 (a) of the 1946 Convention.[40]
- UN civilian police and military observers, who are considered as experts on mission in the meaning of the 1946 Convention on the Privileges and Immunities of the United Nations.[41] They are also immune from legal process in the host State according to Article VI, Section 22 of the 1946 Convention.
- Members of national military contingents, who enjoy the privileges and immunities in the status-of-forces agreement.[42] Where no such agreement has been concluded or until it is concluded, the model status-of-forces agreement contains provisions on privileges and immunities. This agreement states that all members of UN

[37] De Búrca (2010), p. 1.
[38] See Ziegler (2009).
[39] Zeid Report, para. 14, p. 10.
[40] Ibid., Annex, para. A.1, p. 32.
[41] Ibid., Annex, para. A.14, p. 36.
[42] Ibid., Annex, para. A.27, p. 38.

> peacekeeping operations are immune from legal process in the host State in respect of acts performed in their official capacity.[43] The model status-of-forces agreement also provides that criminal jurisdiction and disciplinary matters over military members of military contingents stay with the sending State.[44]

Accordingly, just like State officials, representatives of international organisations such as the UN may under certain circumstances enjoy immunity. The idea behind the concept of immunity is based on considerations of functional necessity and aims to facilitate for State officials and officials of international organisations to effectively carry out their functions.[45] For example, UN staff (first category above) in a peacekeeping mission cannot be prosecuted by host State authorities. According to Article 105 of the UN Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Further, "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization" (second paragraph). Regarding international organisations there are treaties regulating the privileges and immunities enjoyed by officials of those organisations. The 1946 Convention mentioned above, and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, contain more detailed rules on this topic than the UN Charter. According to Article V, Section 20 of the 1946 Convention, the Secretary-General has the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the UN.

However, the rules on immunity referred to above apply to UN staff and experts on mission (such as civilian police and military observers[46]), i.e. the first and second categories, but not to military personnel, i.e. the third category. Since the majority of allegations of misconduct reported is directed against military members of national contingents and since they constitute the majority of the total personnel in peacekeeping operations[47], as well as due to space limitations, the focus of this essay is on the third category of personnel. As outlined above, regarding these persons, criminal jurisdiction and disciplinary matters stay with the sending State and investigation and prosecution of crimes committed by members of national contingents should therefore be carried out by domestic authorities of the sending State. Members of military contingents enjoy the privileges and immunities laid down in the status-of-forces agreement.[48] Where no such agreement has been concluded, the model status-of-forces agreement provides that criminal jurisdiction and disciplinary matters

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[43] Model status-of-forces agreement for peace-keeping operations, para. 46.
[44] Ibid., para. 47 (b).
[45] Evans (2014), p. 399.
[46] Zeid Report, para. 18, p. 11.
[47] Ibid., para. 9, p. 9; in 2004, the Department of Peacekeeping Operations received 16 allegations of sexual exploitation and/or sexual abuse against civilians, 9 against civilian police and 80 against military personnel. See also Wills (2013), p. 48.
[48] Zeid Report, Annex, para. A.27, p. 38.

stay with the sending State.[49] In order for the sending State to be able to prosecute these crimes, there must be domestic provisions in place enabling for the prosecution of acts committed extraterritorially, which is not the case in all States.[50]

It follows that sometimes, where the sending State is unable or unwilling to prosecute acts of sexual exploitation or abuse, there is an accountability gap where human rights violations are committed by military members of national contingents. These persons remain within the exclusive jurisdiction of the sending State, but the State in question sometimes fails to prosecute, for different reasons. As is outlined in chapter 2.2.1, measures have been taken at the UN level to combat the occurrence of sexual exploitation and abuse, but the recent allegations in, *inter alia*, the Central African Republic, show that the problem persists and impunity remains a problem.

2.2 Sexual exploitation and abuse in the course of UN peacekeeping operations – old news

In 2015, human rights organisations and media have repeatedly reported on UN peacekeepers in the Central African Republic committing crimes such as rape and other sexual exploitation and abuse against the civilian population. Regrettably, sexual exploitation and abuse by military, civilian police and civilian UN peacekeeping personnel is not a new phenomenon. As mentioned above (chapter 1.1), it has been known since the early 1990s. In 2003, the Secretary-General published a bulletin containing detailed rules prohibiting such acts, mandatory for all UN staff.[51] Nowadays, the UN has a zero tolerance policy with respect to sexual exploitation and abuse by its own personnel.[52] Considering recent allegations, it is evident that the zero tolerance policy has not been successful, and that the problem of sexual exploitation and abuse by UN peacekeepers persists.

In the Secretary-General's bulletin from 2003, "sexual exploitation" is defined as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another." "Sexual abuse" is defined as "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions".[53]

[49] Model status-of-forces agreement for peace-keeping operations, para. 47 (b).
[50] Wills (2013), p. 51.
[51] Secretary-General's Bulletin, *Special measures for protection from sexual exploitation and sexual abuse.*
[52] http://www.un.org/en/peacekeeping/issues/cdu.shtml (acquired 11 October 2015).
[53] Secretary-General's Bulletin, *Special measures for protection from sexual exploitation and sexual abuse*, Section 1.

2.2.1 Measures taken to combat sexual exploitation and abuse in UN peacekeeping operations – the Zeid Report

Roughly ten years ago, after a series of allegations of sexual exploitation and abuse against UN peacekeepers, the then Permanent Representative of Jordan (a major troop-contributing country) to the UN, Prince Zeid Ra'ad Zeid Al-Hussein (current UN High Commissioner for Human Rights), was asked by the Secretary-General to create a strategy for addressing the issue. Consequently, in 2005, the UN Secretary-General Report *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* (commonly referred to as the Zeid Report) was released. The Zeid Report recommended engaging troop contributing countries, other UN Member States and the entire UN system in a new conduct and disciplining architecture for peacekeeping and contained a number of concrete recommendations, ranging from the proliferation of UN standards of conduct, to, *inter alia*, reforming investigation processes and establishing individual disciplinary, financial and criminal accountability.[54]

Since the release of the Zeid Report in 2005, a number of measures have been taken within the UN system to combat the problem of sexual exploitation and abuse committed by peacekeeping personnel. For example, the Zeid Report recommended that the model memorandum of understanding between the UN and the troop-contributing nations should be amended to provide that, if an investigation shows that a member of a national contingent committed an act of sexual exploitation or abuse, the sending State in question must agree to forward the case to its competent national or military authorities to be considered for prosecution, in accordance with its laws, and to report the results to the Secretary-General.[55] In 2007, the Special Committee on Peacekeeping Operations (also known as C-34) approved a revised draft model memorandum of understanding between the UN and troop-contributing nations, which was amended in accordance with the recommendations contained in the Zeid Report.[56] According to the revised memorandum of understanding, the sending State has ten days from the time at which it is notified of the allegations of misconduct of its contingent to initiate an investigation.[57] The adoption of the revised model memorandum of understanding together with other measures have led to some improvement in making troop-contributing nations hold the perpetrators accountable, but impunity remains a significant problem.[58]

Furthermore, a "three-pronged strategy" has been adopted in order to hold personnel accountable to the highest standards of behaviour, focusing on

[54] See http://www.un.org/en/peacekeeping/operations/reform.shtml (acquired 11 October 2015).
[55] Zeid Report, p. 5.
[56] See Report of the Special Committee on Peacekeeping Operations and its Working Group, *Revised draft model memorandum of understanding.*
[57] Wills (2013), p. 52.
[58] Ibid., p. 53.

prevention, enforcement and remediation.[59] In 2007 a Conduct and Discipline Unit was established and it can also be mentioned that the Sixth Committee of the General Assembly (Legal Affairs) has been discussing a Convention on the Criminal Accountability of United Nations Officials and Experts on Mission, but little progress has been made. Further, the proposed convention would not apply to personnel assigned to the military component of a UN peacekeeping operation, but only UN staff and experts on mission.[60]

Despite the measures taken after the release of the Zeid Report, the issue of accountability of perpetrators remains a challenge. According to the conclusions of the Zeid Report, a problem was that while investigating allegations against military members of national contingents was the responsibility of the sending State, many States remained reluctant to admitting misconduct by their troops.[61] According to some, that is especially the case where the misconduct can be traced back to inadequate training of the troops.[62] Today, every memorandum of understanding requires reporting, and the Conduct and Discipline Unit monitors and exercises pressure on troop-contributing nations in order to make them take the action required.[63] In conclusion, measures have been taken, but ten years after the release of the Zeid Report the problem persists, as allegations of sexual exploitation and abuse by peacekeeping personnel continue being reported.

2.3 A comment on certain aspects of troop contributing

In the context of contributions to UN peacekeeping operations, there are some political aspects that are of significance. Troop-contributing nations are reimbursed for their contributions by the UN and the level of the compensation is traditionally a contested issue among UN Member States. It is a politically sensitive issue between richer Member States, which in practice pay most of the costs for peacekeeping operations without participating to a larger extent, and less rich Member States which do not contribute financially as much but which send most of the troops.

Currently, the ten largest troop contributors are[64]:

1. Ethiopia (8161 troops)
2. Bangladesh (8135 troops)
3. Pakistan (7109 troops)
4. India (6716 troops)
5. Rwanda (5135 troops)
6. Nepal (4299 troops)

[59] http://www.un.org/en/peacekeeping/documents/backgroundnote.pdf (acquired 11 October 2015).
[60] Wills (2013), p. 53.
[61] Zeid Report, para. 67 (a), p. 24.
[62] Stern (2015), p. 10.
[63] Ibid., p. 14.
[64] http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml (numbers acquired on 11 October 2015).

7. China (2882 troops)
8. Ghana (2820 troops)
9. Burkina Faso (2525 troops)
10. Indonesia (2524 troops)

The top ten providers of assessed contributions to UN peacekeeping operation budget in 2013–2015 are[65]:

1. United States (28.38 %)
2. Japan (10.83 %)
3. France (7.22 %)
4. Germany (7.14 %)
5. United Kingdom (6.68 %)
6. China (6.64 %)
7. Italy (4.45 %)
8. Russian Federation (3.15 %)
9. Canada (2.98 %)
10. Spain (2.97 %)

The reimbursement is paid to the troop-contributing nation for the services of their contingents and is meant to cover the costs of providing troops. This fixed rate is paid by the UN directly to the governments of troop contributing nations and once it is received, governments are free to use the money as they wish.[66] There are significant differences among States as to the extent to which the reimbursement is actually received by the personnel. In some cases, reimbursements have been kept by the governments and even partly taken by senior politicians.[67] Furthermore, there are of course financial incentives for the individual to becoming a UN peacekeeper. These circumstances also have the potential of thriving corruption in troop selection processes.[68]

As shown by the numbers above, the largest financial contributors are completely different from the largest contributors in terms of military personnel. The financial incentives for States of contributing troops as well as that of the individual to becoming a UN peacekeeper cannot be neglected in this context. If a main reason for contributing with troops to peacekeeping mission is the income, the government of the troop contributing nation might be reluctant to "naming and shaming", admitting publicly to misconduct or investigating and prosecuting where allegations of sexual exploitation and abuse occur. Many major troop-contributing countries are not as rich or developed as the major financial contributors. In many cases, the legal systems of the troop-contributing nation is not very developed, which of course is also likely to affect the possibilities of investigating and prosecuting allegations of misconduct.

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[65] http://www.un.org/en/peacekeeping/operations/financing.shtml (numbers acquired on 11 October 2015).
[66] Transparency International UK (2013), p. 36.
[67] Ibid., p. 36; which uses an example from the Philippine national army, where peacekeepers have been continuously denied funds.
[68] Ibid., p. 35.

2.4 An example: United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)

In 2015, media reported on new allegations of sexual exploitation and abuse committed by UN peacekeepers against civilians, this time regarding, *inter alia*, French peacekeepers part of the MINUSCA operation in the Central African Republic. As initially outlined, it is not claimed that the problem is more prevalent in some contexts than in others or that military personnel from some countries are worse than others. The specific situation regarding acts of sexual exploitation and abuse committed by French UN peacekeepers in the Central African Republic is used as an example in order to concretise the problems that arise, and using an example involving a European State also raises the question of the applicability of the ECHR. This chapter aims to problematise the current legal framework regulating UN peacekeeping and its apparent inability to manage situations such as that arising in relation to the MINUSCA example.

2.4.1 The mandate of MINUSCA

The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (hereafter MINUSCA) was established through Security Council resolution 2149 (2014).[69] MINUSCA is concerned with the security, humanitarian, human rights and political crisis in the Central African Republic and its regional implications, and the protection of civilians is its utmost priority.[70] Its mandate includes the promotion and protection of human rights.[71] MINUSCA's mandate was renewed in April 2015 through Security Council Resolution 2217 (2015).[72] MINUSCA was authorised by the Security Council, acting under Chapter VII of the Charter, to take "[…] all necessary means to carry out its mandate, within its capabilities and its areas of deployment".[73]

2.4.2 Allegations of human rights violations by UN peacekeepers in the Central African Republic

In 2015, media reported on repeated allegations of sexual exploitation and sexual abuse against civilians by UN peacekeepers in the Central African Republic. The UN official Anders Kompass had leaked a report containing allegations against French troops, and the issue gained significant media attention, and the UN was heavily criticised for its initial handling of the

[69] S/RES/2149 (2014), 10 April 2014.
[70] http://www.un.org/en/peacekeeping/missions/minusca/ (acquired 11 October 2015); see also S/RES/2149 (2014) 28 April 2015, para. 30 (a).
[71] S/RES/2149 (2014), para. 30 (e).
[72] http://www.un.org/press/en/2015/sc11875.doc.htm (acquired 11 October 2015); see also S/RES/2217 (2015), 28 April 2015, para. 22.
[73] S/RES/2149 (2014), para. 29.

situation, including the suspension of Kompass that followed.[74] He was subsequently exonerated in a report of an independent review.[75] Allegedly, six boys between 9 and 13 years old had either been abused themselves or had witnessed sexual abuse of other children in exchange for food.[76] Subsequently, several allegations of misconduct, including regarding sexual exploitation and abuse in some cases, have been made against military personnel from, *inter alia*, Democratic Republic of the Congo, Equatorial Guinea, Chad, Burundi and Morocco.[77] As described in chapter 1.1, this is far from the first time UN peacekeepers are accused of human rights violations.

MINUSCA has pronounced that it is determined to investigate fully into the allegations and hold the perpetrators to account. The spokesperson Vannina Maestracci has stated that the investigation is complicated by the numerous nationalities of police and military personnel involved.[78] It is problematic that criminal jurisdiction stays with the sending State since the matter is dealt with differently in different States, as this impedes coherency and foreseeability. These are reasons why the need for a "global solution" is stressed in this essay (see chapter 5). In the following (chapter 4.3), the situation in the Central African Republic is used as an example and the potential application of human rights treaties in this context is discussed. As has been outlined in the introductory chapter, the example has been chosen in order to illustrate that the problem is real and that the UN system has not been successful in addressing impunity. Peacekeepers from a large number of States and part of different operations have been accused of misconduct, not only the State and the operation used as an example in this essay. However, using a case where the alleged perpetrators come from a European State as example allows us to examine the possibility for victims of using the ECHR as a legal venue. For the record, it should be mentioned that in the case that serves as an example for the purpose of this essay, French authorities have started investigations into the allegations.[79]

2.5 Reflections – lack of legal venues for victims of human rights violations committed by military members of national contingents

As mentioned above, where military members of national contingents are concerned, criminal jurisdiction and disciplinary matters stay within the

[74] See e.g. *3 Peacekeepers Accused of Rape in Central African Republic*, The New York Times (2015).
[75] *UN accused of 'gross failure' over alleged sexual abuse by French troops*, The Guardian (2015). See also *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* (2015).
[76] Human Rights Watch (2015).
[77] See e.g. *3 Peacekeepers Accused of Rape in Central African Republic*, The New York Times (2015).
[78] http://www.un.org/apps/news/story.asp?NewsID=51654#.VdLn0FPtmko (acquired 11 October 2015).
[79] See e.g. *UN aid worker suspended for leaking report on child abuse by French troops*, The Guardian (2015).

competence of the sending State. Thus, the responsibility to prosecute human rights violations committed by them lies primarily with the sending State. However, in practice this does not always work satisfactorily since the sending State, for different reasons, do not take the action that is required in order to hold perpetrators accountable. Of course it cannot be demanded that every allegation leads to prosecution, for evidentiary issues or as some allegations may be unfounded. What can be required is, however, that where there is a well-founded allegation of sexual exploitation, abuse or other misconduct, a serious investigation is undertaken by the sending State. Prosecution of these crimes is of course of utmost importance in addressing impunity, since many host States lack a functioning judicial system. Victims who are citizens of the host State are therefore often without legal protection from this kind of exploitation and abuse. As is outlined below (see chapter 4.3.1), under the ECHR, Contracting States are under a positive obligation to undertake an effective investigation were there is a well-founded allegation of rape or other conduct contrary to for example Article 3. Such an obligation would perhaps be feasible also in the context of UN peacekeeping.

In many cases, a fundamental problem is that the troop-contributing nation is unwilling to prosecute human rights violations committed by its troops.[80] It may be so for different reasons; one that has often been put forward by troop-contributing nations is that the evidence gathered by the UN investigation or investigation carried out by local authorities would not suffice in a criminal proceeding in the sending State.[81] It is also possible that sometimes the sending State is unable to prosecute or lacks the proper resources or legal system to be able to carry out such an investigation. For example, some States lack legal provisions that enable the prosecution of domestic crimes performed extraterritorially.[82] As has been outlined above (see chapter 2.3), troop-contributing nations often have a financial interest in contributing with troops to UN peacekeeping operations and it is a significant source of income for some states. The unwillingness of some sending States to investigate, taken together with the absence of judicial systems in many host States, entails a significant risk for impunity for these crimes. Some troop-contributing nations might also lack a functioning judicial system themselves.

The issue of impunity must, of course, be addressed. The UN has through several measures been trying to do so (see chapter 2.2.1). However, recent repeated allegations of misconduct by peacekeepers in the Central African Republic show that the measures have not been completely successful. While some cases of misconduct will probably always occur every now and then, it can be argued that other, more demanding, measures must be taken to further address the problem. The Zeid Report suggested many preventive measures that would to some extent address the root causes, which are of course welcome. However, I am of the opinion that the issue of impunity was not addressed enough. Impunity might be one of the most significant questions to address. Not doing so sends the message to the international community as a whole, and not least to the local population affected by these acts by UN

[80] Zeid Report, p. 24, para. 67 (a).
[81] Ibid., p. 14, para. 28.
[82] Wills (2013), p. 51.

personnel, that the problem is not taken seriously and that it is even tolerated. Further, the allegations of sexual exploitation and abuse severely damage the image of the UN. It is possible that wearing the blue helmet to some no longer means what it was supposed to mean.

In this context, another problem is that pushing troop-contributing nations to taking measures, such as prosecuting or legislating, might discourage them from contributing to UN peacekeeping. Taking such measures might be perceived as a question of sovereignty and integrity. In relation to this, however, I am inclined to agree with Professor Siobhán Wills who argues that in order for the UN to meet its own rule of law standards, it must prioritise accountability, establish effective mechanisms of ensuring that perpetrators of crimes are punished and also be prepared to decline to accept troop contributions from States with a poor accountability record – even if it implies difficulties in ensuring enough contributions.[83] Professor Nigel D. White argues that the sending States should not have the sole jurisdiction over alleged human rights violations by its contingents. Where the sending State is unwilling to assign jurisdiction to the UN, they should be required to prosecute alleged human rights violations.[84] Since States are, apparently, sometimes unwilling to do so, I believe that there is a need for an international oversight mechanism of some kind for this purpose.

Stricter requirements on the troop-contributing nations are key to reaching a better accountability record. However, in my opinion, other measures are required as well. Some have suggested the drafting of a specific UN convention based regime, specifically tailored to ensuring that peacekeepers are held accountable to internationally agreed standards, for this matter.[85] Another alternative could be the establishment of a special commission, tribunal or court. In a regional context, I am of the opinion that the European Court of Human Rights (ECtHR) has the potential to take a leading role and set an example in how claims could be brought against and how accountability could be handled in relation to Council of Europe Member States. This chapter has aimed to shed light on the challenges to holding UN peacekeepers and the sending States accountable for human rights violations. In chapters 4 and 5, possible solutions are proposed and discussed.

[83] Wills (2013), pp. 53–54.
[84] White (2005), p. 491.
[85] See e.g. Wills (2013), p. 47. See also pp. 68–69 regarding the recommendations of the Group of Legal Experts.

3 Extraterritorial jurisdiction and attribution of conduct

3.1 Jurisdiction – different implications in different fields of international law

Jurisdiction is a notion of essential importance to understanding international law in general, and in particular to understanding how human rights treaties operate in relation to the questions posed in this essay. It is a multifaceted notion and can have different meanings in different contexts. It concerns the limits of the legal competence of States to make, apply and enforce laws upon persons.[86] The term is also used when describing the right of international courts and tribunals, such as the ICJ or the ECtHR, to rule in certain cases.[87] Both the jurisdiction of States and that of international courts and tribunals relate to the concept of the scope of the powers of a legal institution, but the types of jurisdiction are often distinguished between and treated separately for practical reasons.[88]

3.1.1 Jurisdiction in public international law

When it comes to State jurisdiction, it is often talked about different bases of jurisdiction (the territorial, personal, protective, universality principles) and different types of jurisdiction (prescribe, adjudicate, enforce).[89] In addition to this, one can talk about the notion of extraterritorial jurisdiction. In public international law, jurisdiction is often referred to as an aspect of sovereignty.[90]

The territorial principle has received universal recognition, and hinges on the idea that the courts of the State where a crime is committed may exercise jurisdiction.[91] *The (active) nationality principle*, on the other hand, presupposes that a State has jurisdiction over acts committed by its nationals, and is generally recognised as a basis for extraterritorial acts.[92] In terms of international criminal law, this principle would be relevant to the situation where military members of national contingents commit crimes in the course of a UN peacekeeping operation. However, the main focus of this essay in terms of jurisdiction is that of human rights treaties and (extraterritorial) jurisdiction. According to *the passive nationality principle*, the nationality of the victim is decisive. It stipulates that a State can exercise jurisdiction where an alien commit acts harmful to nationals of the forum State, but has not gained particularly wide support.[93] There is also *the protective or security principle* according

[86] Evans (2014), p. 309.
[87] Ibid., p. 310.
[88] Ibid., p. 310.
[89] Ibid., p. 311.
[90] Brownlie (2003), p. 297.
[91] Ibid., p. 299.
[92] Ibid., p. 301.
[93] Ibid., p. 302.

to which States may exercise jurisdiction over acts committed abroad which affect the security of the State. However, the interpretation of the scope of this principle varies widely from State to State.[94] Finally, *the universality principle* opens up for the possibility of a State to exercise jurisdiction over acts committed by aliens where the circumstances or the nature of the crime justify its repression "as a matter of international public policy".[95] Such crimes could be genocide or murder, where the State that would exercise jurisdiction according to the territorial principle is unable to do so.

3.1.2 Human rights treaties and jurisdiction

As mentioned above, the concept of State jurisdiction is often distinguished from that of international courts and tribunals. In the context of a human rights treaties, jurisdiction is often perceived differently compared to in the context of public international law. As is elaborated upon in the following (chapter 3.3.3), the ECHR prescribes that States shall secure to "everyone within their jurisdiction" the rights and freedoms set forth in the Convention. The ICCPR imposes on States parties to respect and ensure to "all individuals within its territory and subject to its jurisdiction" the rights in the Covenant.

In human rights treaties, the term "jurisdiction" serves as a threshold criterion that must be fulfilled in order for the treaty in question to apply at all.[96] In other words, it is a necessary prerequisite for indivuals' enjoyment of human rights. How this threshold criterion operates is subject to discussion in the following. Judging from the case law of the human rights bodies within the scope of this study, it seems like the spatial model (see chapter 3.2.1) has been the general rule, from which exceptions are made under certain circumstances. A central judgment in this aspect is that of the ECtHR in the *Bankovic* case, where it was ruled that "[…] from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial"[97]. As is shown in the following, however, the ECtHR has allowed numerous exceptions from what seemed to be the general rule of jurisdiction as something *primarily territorial*, and the decision in *Bankovic* seems to have been superseded. Understanding the notion of jurisdiction in the context of human rights law is crucial for the purpose of this essay. In the following, the notion of extraterritorial jurisdiction is described and analysed.

3.2 Extraterritorial jurisdiction and human rights treaties

Public international law is mainly concerned with the relations between States, with significant focus on notions such as sovereignty, jurisdiction and territoriality. Human rights law, on the other hand, focuses on the relationship

[94] Brownlie (2003), p. 302.
[95] Ibid., p. 303.
[96] Milanovic (2008), p. 415–416. See also, regarding the ECHR, Rainey, Wicks & Ovey (2014), p. 89–90.
[97] *Bankovic and Others v. Belgium and 16 other Contracting States*, appl. no. 52207/99, admissibility decision 12 December 2001, para. 59.

between the individual and the State. As explained above, jurisdiction in terms of human rights law often serves as a threshold criterion, which must be fulfilled in order for the treaty in question and the rights and freedoms contained therein to apply. Jurisdiction has often been conceived as a territorial notion. However, an increasingly complex world and an increased globalisation pose challenges to this conception; actions by State agents outside of the territory of their home State may affect the human rights of individuals there, or acts committed in one State may affect human rights of individuals in another. A satisfactory human rights protection should be guaranteed also in these situations. In the reality of a globalised world, it can be argued that human rights law is lagging behind.[98] Therefore, when applied correctly, the notion of extraterritorial jurisdiction may offer a better human rights protection where States violate human rights of individuals outside of their territory, as it enables the application of a human rights treaty outside of the physical territory of the State. Instead of focusing on the horizontal relationship between States and the vertical relationship between the State and its citizens only, the notion of extraterritoriality enables us to deal with the "diagonal" relationship between outside actors and citizens in other countries.[99]

In the following (chapters 3.3.2 and 3.3.3), it is shown that both the HRC and the ECtHR have acknowledged that States Parties to the respective treaty may exercise extraterritorial jurisdiction under certain circumstances. According to for example Marko Milanovic at the University of Nottingham, there are in principle two different forms or models of extraterritorial jurisdiction in this context; jurisdiction as control over territory, and jurisdiction as control over individuals.[100] In addition to this, Milanovic advocates for a third model, which distinguishes between positive and negative obligations, as a possible solution to some of the problems that arise in relation to the first two models.[101] In the following, the different models of extraterritorial jurisdiction are explored in order to lay the foundation for understanding the case law of the human rights bodies in the scope of this study, thereby enabling for analysis and criticism, and in order to put forward proposals for alternative solutions.

3.2.1 The spatial model – jurisdiction as control over territory

The spatial model of jurisdiction is the model with the most textual support in human rights treaties.[102] It defines extraterritorial jurisdiction as depending on a State's "effective overall control" over territory or an area. Under the ECHR, State jurisdiction may arise outside of the State's national territory regardless of whether such control has been legally or illegally obtained as a consequence of military action.[103] According to the spatial model, the question of what degree of control is required and what is meant by an "area" is obviously of significant importance. However, this will not be dealt with in detail here. It suffices in

[98] See e.g. Gibney & Skogly (2010), p. 1.
[99] Ibid., pp. 1–2.
[100] Milanovic (2013), pp. 119, 127ff and 173ff. See also Wallace (2014).
[101] Milanovic (2013), p. 119.
[102] Ibid., p. 127.
[103] *Louizidou v. Turkey*, appl. no. 15318/89, judgment 18 December 1996, para. 52.

this context to establish that a certain degree of control over the territory is required.

Not only the ECtHR, but also other international law bodies such as the Human Rights Committee and the International Court of Justice, have acknowledged the existence of this model.[104] Applying the spatial model only would in practice mean that States could disregard their obligations according to the human rights instrument in question whenever they do not reach the requirement of exercising "effective control" over the area. Therefore, it can be argued that this model alone would not be enough from a human rights based perspective, since there are many situations where States act extraterritorially and violate human rights of individuals without exercising de facto control over the territory.[105] There are many examples of such situations, one of which can be mentioned is where the US tortured persons detained in CIA "black sites" placed in territories outside of its own control and jurisdiction. However, in this situation the US clearly remained control over the actual acts of its agents and control over the individuals concerned.[106] Not regarding this as a violation of the prohibition of torture simply because the acts were committed outside of US territory might seem counterintuitive from a human rights perspective. An additional model might therefore be required in order to create a satisfactory human rights protection where the responsible State does not exercise such effective control over the area where the human rights violations in question are committed.

3.2.2 The personal model – jurisdiction as control over individuals

As outlined above, in order to ensure individuals an accurate level of protection in situations where their human rights are violated but effective control over the area is not exercised by the State in question, another jurisdiction model is needed. The personal model of jurisdiction hinges on the idea that extraterritorial jurisdiction arises where the State exercises authority and control over the individual, rather than over an area, for example where an individual is taken into custody or detention.[107] The personal, rather than the territorial, model of jurisdiction would solve some of the problems with the spatial model described above, since it would significantly expand the scope of human rights treaties and hence the protection of human rights to situations where the spatial model alone would not be enough. However, this model too has its problematic aspects, and how far the personal model can be drawn remains uncertain.[108]

A general drawback with the personal model of jurisdiction is that it runs contrary to the language of some human rights treaties that construct

[104] Milanovic (2013), p. 128. See also chapter 3.3.
[105] Ibid., pp. 118–119.
[106] Ibid., pp. 170–171.
[107] Ibid., p. 173.
[108] Ibid., p. 119.

jurisdiction in terms of territory only.[109] Another drawback that can be argued for is that applying the personal model too generously would imply that jurisdiction would lose its character as a threshold criterion and it would therefore be impossible to principally limit.[110] In the words of Milanovic, the personal model would "collapse"; States would have obligations under the human rights treaty in question towards all persons whose human rights it could possibly violate. The effect would then be that jurisdiction would serve no purpose as a threshold criterion.[111] A limit of some sort would therefore have to be put in place in order for the personal model to be useful.

3.2.3 A third model – distinguishing between positive and negative obligations

As has been outlined above, both the spatial and the personal model of jurisdiction have their flaws. None of them seem to give a completely satisfactory human rights protection. For this reason, Milanovic has suggested a third model. This model distinguishes between negative and positive obligations.[112] In short, a negative obligation is an obligation not to infringe a right. A positive obligation requires the State in question to take the necessary measures to safeguard a right.

In short, this model of jurisdiction suggests that a State is bound to comply with its negative obligations extraterritorially, in all times and places, irrespective of whether jurisdiction is exercised or not. The rationale behind this is that States are always able to control the acts of their organs or agents, no matter where in the world they are committed.[113] With regard to their positive obligations, States would only have to comply with these obligations within territories under their control, and the threshold criterion would hence still be relevant with regard to the positive obligations.[114] The reason for this is the argument that it is only where a State possesses a certain degree of control over an area that the positive obligations can be realistically complied with.[115] In other words, where a State controls an area, that State is also capable of ensuring individuals the enjoyment of all rights and freedoms contained in the human rights treaty in question, including positive obligations. According to this model, jurisdiction is perceived as only territorial and the personal model (chapter 3.2.2) would therefore be superfluous. In the case of the ECHR, the spatial model allows the ECtHR to retain some rigour to the Article 1 jurisdiction threshold, while the same is not true for the personal model.[116] Consequently, would the third jurisdiction model be implemented, an individual who for example were subjected to torture by State agents extraterritorially would always be able to bring a legal claim against that State

[109] See e.g. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), New York, 10 December 1984, Article 2(1); "[…m]easures to prevent acts of torture in any territory under its jurisdiction.".
[110] Milanovic (2013), p. 207.
[111] Ibid., p. 207.
[112] Ibid., pp. 209ff.
[113] Ibid., p. 119.
[114] Ibid., p. 210.
[115] Ibid., p. 119.
[116] Ibid., p. 171.

before the ECtHR, regardless of whether the State exercised control over the area or the individual, because States have a negative obligation not to subject individuals to torture or other treatment contrary to Article 3 of the ECHR. Chapter 4.3.1.3 will reconnect to the third model of jurisdiction.

3.3 Extraterritorial jurisdiction in the jurisprudence of some international law bodies

The notion of extraterritorial jurisdiction has been acknowledged by a number of international law bodies. The ICJ has played a role in the protection of human rights and the development of extraterritorial application of treaties, while the ECtHR is the international human rights law body that has applied the notion of extraterritorial jurisdiction most frequently. In the following, this development is explored and particular emphasis is placed upon the development of the jurisprudence of the ECtHR in terms of extraterritorial jurisdiction, in order to lay the foundation for a discussion as to the possibility of applying the ECHR extraterritorially to the events in the Central African Republic.

3.3.1 International Court of Justice and extraterritorial application of human rights treaties

While not a specialist human rights court as such, the ICJ has played a significant role in the protection of human rights and has in several cases been involved with human rights issues[117], including regarding the extraterritorial application of human rights treaties. This involvement has, according to some observers, to do with the general trend towards mainstreaming human rights issues within the entire UN system.[118]

The *Namibia* Advisory Opinion[119] was issued in 1971, which was before the question of extraterritorial applicability of human rights treaties had been subject to the scrutiny of any of the international human rights law bodies. The specific circumstances of the case will not be dealt with in detail here. In short, South Africa was unlawfully occupying Namibia, and the ICJ ruled that South Africa was accountable for violations of the rights of the people of Namibia. Further, it was stated that the fact that "[…] South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability

117 Wilde (2013), p. 645.
118 Ibid., p. 646.
119 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16.

for acts affecting other States".[120] Though this case did not concern human rights treaties specifically, it can be argued that it was important in paving the way for the subsequent development of extraterritorial application of human rights treaties and pronouncing that actual physical control of a territory is decisive, corresponding to the spatial model referred to above (chapter 3.2.1).[121]

In the *Wall* Advisory Opinion[122], one of the issues concerned whether the international human rights conventions to which Israel is a State party (in this case ICCPR, ICESCR and CRC) were applicable within the Occupied Palestinian Territory.[123] In this respect, the ICJ pointed out that while primarily territorial, the jurisdiction of a State may sometimes be exercised outside national territory.[124] The ICJ found that the ICCPR was applicable regarding acts carried out by a State in the exercise of its jurisdiction *outside its own territory*, with reference to the Concluding Observations made by the HRC regarding Israel.[125] The extraterritorial application of the ICCPR was affirmed in the *DRC v. Uganda* case.[126]

The ICJ has not elaborated upon the detailed principles on extraterritorial jurisdiction. To a large extent, this is explained by the role and function of the ICJ as opposed that of, for example, the ECtHR. The jurisprudence of the ICJ concerns inter-State disputes, and according to Article 34 of the Statute of the ICJ individuals do not have standing before it. Its main function is not that of enforcement of the law or providing remedies, but interpreting the meaning of the law on a more abstract level.[127] In light of this, the fact that the ICJ has acknowledged the notion of extraterritorial application of human rights treaties as such is important. Besides from the *Namibia* case paving the way for the development of the extraterritorial application of international law, the case law of the ICJ further strengthens the notion of extraterritorial application of human rights treaties as such. The jurisprudence of the ICJ in this respect can be seen as an important step towards mainstreaming the human rights obligations of States. Given the capacity of the ICJ as the principal judiciary organ of the UN and given the weight of its judicial decisions as an important source of international law, the pronouncement that extraterritorial application of human rights treaties is possible is therefore of significance for the way human rights develop before other bodies, such as human rights courts and tribunals. According to some, by concluding that the ICCPR, the ICESCR and the CRC may apply extraterritorially, the ICJ has "[…] universalised the territorial applicability of human rights law and circumvented the traditional sovereign power of States in depriving individuals, irrespective of their

120 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, para. 118.
121 See e.g. Wilde (2013), p. 663.
122 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136.
123 Ibid., para. 102.
124 Ibid., para. 109.
125 Ibid., para. 110–111.
126 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, I.C.J. Reports 2005, p. 168, paras. 216–217.
127 See e.g. Wilde (2013), p. 650–651.

nationality, of their human rights and respect for human dignity".[128] This could be a step forward for the cause of human dignity, and a step backward for the traditional narrow meaning of State sovereignty. By reaching that conclusion, the ICJ significantly broadened the scope of the human rights instruments in question.[129]

3.3.2 ICCPR and extraterritorial jurisdiction

As outlined above, the ICCPR can apply extraterritorially. Article 2.1 of the ICCPR states that:

"[e]ach State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant[…]" (emphasis added).

Hence, unlike the ECHR (see chapter 3.3.3), the ICCPR speaks of jurisdiction explicitly in terms of territory. The wording of the article could be perceived as suggesting that in order for an individual to be able to claim the rights of the Covenant, that person must be *both* within the territory *and* subject to the jurisdiction of the State in question. Some States, for example the US and Israel, have argued for such an interpretation.[130] However, the HRC has explained that the Article means that State Parties "[…] must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[131] The HRC has further held that "[…] those within the power or effective control of the forces of a State Party acting outside its territory […] such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcing operation" must also be able to enjoy the rights set forth in the Covenant.[132] Hence, the ICCPR may apply extraterritorially under certain circumstances. As outlined in chapter 3.3.1, this interpretation is supported by the ICJ.[133] The wording of the HRC General Comment no. 31 ("[…]within the *power or effective control* of that State Party[…]" (emphasis added)) suggests that the notion of jurisdiction is given a similar meaning here as in the ECHR (see chapter 3.3.3).[134]

The case law of the HRC regarding extraterritorial jurisdiction is not as extensive as that of the ECtHR, and it has therefore not elaborated the principles on jurisdiction to the same extent. However, in the *López Burgos*

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128 Bedi (2007), p. 344.
129 Ibid., p. 344.
130 Larsen (2012), p. 179.
131 HRC General Comment no. 31 [80], p. 10. See also e.g. Concluding Observations of the HRC: United States of America (1995), para. 284, where the HRC explained that "[the view that the Covenant lacks extraterritorial reach under all circumstances] is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State's territory".
132 HRC General Comment no. 31 [80], p. 10.
133 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 109–111.
134 Larsen (2012), p. 177–180.

decision[135], which concerned the kidnapping of a Uruguayan national by Uruguayan security and intelligence forces in Argentina, the HRC held that "[…] it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory".[136] Consequently, extraterritorial jurisdiction in terms of the ICCPR is possible, but detailed principles have not been elaborated by the HRC to date.

However, it can be argued that the considerations by the HRC are essential for the purpose of understanding the evolution of the case law of the ECtHR. In *Issa and others v. Turkey*[137], the ECtHR disregarded the submission by the Turkish Government that were based on the previous *Bankovic* judgment (in which the ECtHR had stated that jurisdiction is "primarily territorial"; see chapter 3.3.3), and cited views from, *inter alia*, the HRC in the *López Burgos* and *Celiberti di Casariego* cases when concluding that a State indeed can be held accountable for violations of the ECHR committed on the territory of another State.[138]

3.3.3 ECHR and extraterritorial jurisdiction – starting points

As mentioned previously, this essay focuses largely on the possibilities of bringing a legal claim against the sending State under the ECHR. In this context, the notion of extraterritorial jurisdiction in terms of the ECHR is of particular interest. Article 1 of the ECHR states:

"The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention." (emphasis added).

What is meant by jurisdiction, and especially extraterritorial jurisdiction, has been subject to lengthy debate, and the ECtHR has been somewhat inconsistent in its case law as to the meaning of the term. It has been established that jurisdiction is a threshold criterion, meaning that the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for its acts or omissions.[139] Traditionally, jurisdiction has been perceived as mainly a territorial concept. Extraterritorial jurisdiction is a notion that, as is shown in the following, has been applied more generously in recent years by the ECtHR.

One of the first cases in which the ECtHR dealt with the question of extraterritorial jurisdiction was *Bankovic*, which has often been invoked by

[135] HRC Communication No. 52/1979, 29 July 1981 *López Burgos v. Uruguay* (1981).
[136] Ibid., para. 12.3. See also HRC Communication No. 56/1979, 29 July 1981, *Celiberti di Casariego v. Uruguay* (1981) para. 10.3.
[137] *Issa and others v. Turkey*, appl. no. 31821/96, judgment 16 November 2004.
[138] See Rainey, Wicks & Ovey (2014), p. 92–93; *Issa and others v. Turkey*, para. 71.
[139] See e.g. *Al-Skeini and others v. The United Kingdom*, appl. no. 55721/07, judgment 7 July 2011, para. 130.

States in support of the view that extraterritorial jurisdiction should not be considered to have arisen. The case concerned the bombardment by NATO aircrafts of a building in in the Federal Republic of Yugoslavia (i.e. outside of Council of Europe territory). Sixteen people were killed and relatives of the victims claimed that 17 NATO and Council of Europe Member States had violated their relatives' rights under Article 2 and Article 10 of the ECHR. However, the ECtHR ruled that jurisdiction is "primarily territorial" and that the rights and freedoms in the Convention cannot be "[…] divided and tailored in accordance with the particular circumstances of the extra-territorial act in question"[140], and the application was therefore declared inadmissible. Nevertheless, in recent years the judgment in *Bankovic* has been, at least partly, superseded and the ECtHR has accepted more and more exceptions to the general rule of jurisdiction as "primarily territorial". As is shown in the following, there is no doubt that the ECtHR is now accepting extraterritorial application of the ECHR, but it remains partly doubtful as to under what specific circumstances such application is or should be allowed.

The cases described in the following concern alleged human rights violations taking place in Iraq during the occupation by the coalition forces (led by the US with a large force from the UK and smaller contingents from Australia, Denmark and Poland[141]) in 2003 and 2004. As opposed to the situation in Kosovo in the *Behrami and Saramati* cases (see chapter 3.4), there was no Security Council resolution authorising the use of force in place prior to the invasion of Iraq in March 2003. Subsequent to the invasion, the occupying States created the Coalition Provisional Authority to exercise powers of Government temporarily, until an Iraqi Government could be formed.[142] On 22 May 2003, Security Council resolution 1483[143] was adopted, *inter alia*, acknowledging the status of the United States and the United Kingdom as occupying powers.[144] Roughly five months later, on 16 October 2003, the Security Council, acting under chapter VII of the UN Charter, adopted resolution 1511[145], through which a Multinational Force was authorised to take all necessary measures to contribute to the maintenance of security and stability in Iraq and urged member States to contribute assistance, including military force, to the Multinational Force.[146]

3.3.3.1 Pivotal judgments of the ECtHR on extraterritorial jurisdiction

In the *Al-Skeini* case, which concerned six people who had been killed by British soldiers during security operations in Basra, the ECtHR established a

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140 *Bankovic and Others v. Belgium and 16 other Contracting States*, paras. 59 and 75.
141 See *Al-Skeini and others v. The United Kingdom*, para. 10.
142 Ibid., para. 12, where it is referred to Coalition Provisional Authority Regulation No. 1, dated 16 May 2003, section 1 (1).
143 S/RES/1483 (2003), 22 May 2003.
144 Ibid.; "[…] *Noting* the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognising the specific authorities, responsibilities, and obligations under applicable international law of these States as Occupying Powers under unified command […]".
145 S/RES/1511 (2003), 16 October 2003.
146 Ibid., paras. 13–14.

number of principles on extraterritorial jurisdiction that have been cited frequently in subsequent cases. The applicants argued that the victims had been within the jurisdiction of the United Kingdom under Article 1 of the ECHR at the moment of death and that the United Kingdom had not complied with its positive obligation to investigate into the deaths in accordance with Article 2 of the ECHR.[147] In its judgment, the ECtHR distinguished between two main principles of extraterritorial jurisdiction – the *State agent authority and control* principle, and the *effective control over an area* principle. The principles on jurisdiction, elaborated upon in paras. 131–140 of the judgment, can be summarised as follows:

a. *the territorial principle* – a State's jurisdictional competence under Article 1 is primarily territorial. Extraterritorial jurisdiction arises only in exceptional cases.
b. *State agent authority and control* – an exception to the territorial principle. Acts of State authorities which produce effects outside the territory of the State may give rise to extraterritorial jurisdiction in the following situations:

    i. when diplomatic and consular agents exert authority and control over others when present on foreign territory,
    ii. when, through the consent, invitation or acquiescence of the Government of that territory, the State exercises all or some of the public powers normally to be exercised by the Government of the territory, or that
    iii. the use of force by a State's agents when operating outside of the territory of the State may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. What is decisive in these cases is the exercise of physical power and control over the person in question. This type of extraterritorial jurisdiction had before *Al-Skeini* arisen for example where an individual was taken into the custody of a State abroad.[148] In relation to this, the ECtHR explicitly stepped away from its statements in *Bankovic*. Where this type of jurisdiction arises, the State is under an obligation to secure to that individual the rights and freedoms of the Convention relevant to his or her situation. In this sense, the rights and freedoms of the Convention can indeed be "divided and tailored", as opposed to the ECtHR's decision in *Bankovic*.[149] This exception is in many ways similar to the personal model described in chapter 3.2.2.

c. *effective control over an area* – another exception to the territorial principle. Where such control is exercised by a State as a consequence of lawful or unlawful military action, the State has the responsibility to secure the entire range of substantive rights set out in the Convention and those

[147] *Al-Skeini and others v. The United Kingdom*, para. 95.
[148] See e.g. *Öcalan v. Turkey*, appl. no. 46221/99, judgment 12 May 2005 and *Issa and Others v. Turkey*.
[149] *Al-Skeini and others v. The United Kingdom*, para. 137.

Additional Protocols that it has ratified in that area. When assessing whether effective control is exercised, the strength of the military presence of the State is the most important factor. This exception resembles the spatial model described in chapter 3.2.1.

The ECtHR ruled that the United Kingdom did exercise jurisdiction over the situation at the relevant time. In the capacity of Occupying Power, the United Kingdom had command of the military division in which the province where the events occurred was included. The ECtHR held that the United Kingdom also exercised authority and control over the individuals killed by its soldiers engaged in security operations. In other words, both the "State agent authority and control" (b. – iii.) and "effective control over an area" (c.) principles were applied by the ECtHR. This was considered enough so as to establish a "jurisdictional link" between the individuals killed and the United Kingdom, for the purposes of Article 1.[150]

In *Jaloud*[151], the jurisdiction question concerned whether the Netherlands had exercised extraterritorial jurisdiction in Iraq, even though their contributions to the military operations were limited and not comparable to those of the United Kingdom, which had been considered to exercise jurisdiction in preceding cases, such as *Al-Skeini*. Neither was the Netherlands an occupying power in the meaning of international law. The Netherlands troops participated in the Stabilization Force in Iraq (SFIR, a coalition of participating countries led by the United States and the United Kingdom[152]) in battalion strength and were during certain period of time part of a division under the command of an officer of the armed forces of the United Kingdom, in accordance with Security Council resolution 1483 with the purpose to assist the United Kingdom in creating stability and security in Iraq.[153] Dutch soldiers shot Mr Jaloud to death in a car at a vehicle checkpoint. The merits of the complaints concerned an alleged violation of the procedural aspect of Article 2; the applicant argued that the investigation into the death of Mr Jaloud had not been sufficiently independent.[154]

The ECtHR reiterated the principles delineated in *Al-Skeini*, and emphasised that while primarily territorial, State jurisdiction may be exercised outside national territory under certain circumstances.[155] It was further held that the status of occupying power is not in itself decisive for the question of exercise of jurisdiction.[156] Neither is a State relieved from its Convention obligations just because the troops are under the operational command of another State.[157] On the contrary, the ECtHR stated that the Netherlands had assumed responsibility for the security in the area despite the fact that they were under the command of an officer from the United Kingdom, and they had retained

[150] *Al-Skeini and others v. The United Kingdom*, para. 149.
[151] *Jaloud v. The Netherlands*, appl. no. 47708/08, judgment 20 November 2014.
[152] Ibid., para. 57.
[153] Ibid., para. 53.
[154] Ibid., paras. 105–106.
[155] Ibid., para. 139.
[156] Ibid., para. 142.
[157] Ibid., para. 143.

full command over their troops.[158] According to the ECtHR, the checkpoint where Mr Jaloud was shot to death was manned by personnel under the command and direct supervision of a Netherlands Royal Army Officer and set up in the execution of the SFIR's mission under UN Security Council resolution 1483 and within the limits of this resolution, the Netherlands had exercised jurisdiction "[…] for the purpose of asserting authority and control over persons passing through the checkpoint".[159]

3.3.3.2 Reflections on extraterritorial jurisdiction in terms of the ECHR – an increasingly permissive approach by the ECtHR

In my opinion, the recent case law of the ECtHR, particularly the *Jaloud* judgment, represents an increasingly permissive approach towards extraterritorial jurisdiction of the ECtHR. The threshold has been lowered and jurisdiction can now arise where a State exercises authority and control over persons passing through a checkpoint, rather than only within the territory of the State or where the State exercises overall effective control over an area. This approach is obviously a way more permissive version of the *State agent authority and control* exception (or version of the personal model) than the version based on detention and arrest. Further, it is also clear that the conception of ECHR rights as not being able to be "divided and tailored" has been, at least partly, abandoned. As the ECtHR held in *Al-Skeini*, ECHR rights can indeed be divided and tailored in the sense that where a State exercises extraterritorial jurisdiction over an individual, it is under the obligation to secure to that individual the rights and freedoms that are relevant to his or her situation.[160] In *Jaloud*, the ECtHR seems to have acknowledged extraterritorial jurisdiction on the basis of the personal model, or "for the purpose of asserting authority and control over persons passing through the checkpoint", in the words of the ECtHR.[161] While control over an individual can be relatively easily established in cases concerning for example detention, the situation in *Jaloud* is not at all as clear-cut. Some observers perceive the way the ECtHR established jurisdiction in *Jaloud* as a new, expanded, version of personal jurisdiction, in addition to that which can arise where State agents hold an individual in arrest or detention.[162]

The judgment in *Jaloud* has been criticised in the legal doctrine. Generally speaking, the ECtHR has moved from the approach that jurisdiction is essentially territorial with few exceptions (as in *Bankovic*) towards allowing more exceptions, often based on the personal model. This development has been criticised as inconsistent and confusing. In his concurring opinion in *Al-Skeini*, ECtHR judge Bonello argued that the case law of the ECtHR regarding extraterritorial jurisdiction was "based on a need-to-decide basis, patchwork case law at best" and suggested that the ECtHR should "return to the drawing

[158] Ibid., para. 149.
[159] *Jaloud v. The Netherlands*, para. 152.
[160] *Al-Skeini and others v. The United Kingdom*, para. 137.
[161] *Jaloud v. The Netherlands*, para. 152.
[162] See e.g. De Koker (2014).

board" in these matters.[163] The criticism has continued after the subsequent cases on extraterritorial jurisdiction.[164]

Regardless of one's opinion on the appropriateness of the recent development in the ECtHR's case law on extraterritoriality, it is clear that its increasingly permissive approach opens up for the possibility of extraterritorial application of the ECHR in more situations. The relevance of this development for the future and for the situation where human rights violations are committed in the course of UN mandated peacekeeping operations is discussed in chapter 4. Given this development in jurisprudence of the ECtHR on extraterritorial jurisdiction, it is not impossible to imagine that it could arise also in the case of, for example, European soldiers part of UN peacekeeping operations committing human rights violations in other parts of the world. However, the judgment in *Behrami and Saramati* seems to have, at least for now, excluded the possibility of the ECtHR to review such a case. The judgment in *Behrami and Saramati* is described in chapter 3.4 and thereafter it is subject to some discussion and criticism, and a different approach to the application of human rights treaties in the course of UN peacekeeping operations is suggested.

3.4 Attribution of conduct – starting points and pivotal judgments of the ECtHR

As outlined above (chapter 1.2), the question of attribution of conduct is crucial to the question of allocation of responsibility. The Draft Articles on the Responsibility of International Organizations (DARIO)[165] contain rules on the attribution of conduct and responsibility where organs or agents of a State are placed at the disposal of an international organisation, which is the case with military personnel sent to a UN peacekeeping operation by a State. The Draft Articles constitute an attempt to codify the principles of allocating responsibility where international organisations act, including through State organs or agents placed at their disposal. While not directly legally binding and perhaps not possessing the same authority as the corresponding draft articles on State responsibility[166], the work of the ILC in this respect serves as valuable guidance to the present position of customary international law in this area.[167]

According to Article 3 of DARIO, the international responsibility of an organisation is entailed where there is an *internationally wrongful act* of the organisation. Article 4 states that there is an internationally wrongful act of an international organisation when an act or omission

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163 Concurring opinion of Judge Bonello in *Al-Skeini and others v. The United Kingdom*, paras. 5–8.
164 See e.g. Sari (2014) in relation to *Jaloud*; "[t]he Court's jurisprudence on the subject is a source of endless fascination. Like any good thriller, its twists and turns leave the observer suspended in fearful anticipation on a never-ending quest for legal certainty".
165 Draft articles on the responsibility of international organizations, with commentaries, 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.
166 Ibid., General Commentary (5).
167 Sari (2008), p. 163.

a. is *attributable* to that organisation under international law; and
b. constitutes a *breach of an international obligation* of that organisation.

Thus, where there is a breach of an international obligation and the acts or omission is attributable to the UN, the UN may be held responsible for the violation. The Draft Articles on the Responsibility of International Organizations (DARIO) are structured the same way as the Draft Articles on Responsibility of States of Internationally Wrongful Acts regarding responsibility. Hence, there is a basic distinction between primary rules of international law (which create obligations for international organisations) and secondary rules (which consider whether there has been a violation of the international obligation and its consequences).[168] DARIO constitute secondary rules. It must therefore first be established which primary rule of international law is relevant in the specific case in order to decide whether the responsibility of the organisation is entailed.

Article 7 of DARIO concerns the conduct of organs of a State or organs or agents of an international organisation placed at the disposal of another international organisation. This is the case where national contingents are placed at the disposal of a UN peacekeeping operation.[169] In these cases, the sending State retains disciplinary powers and criminal jurisdiction over the individual members of the contingent.[170] A problematic issue in this context is often that of deciding which conduct is attributable (in accordance with Article 3 (a)) to whom; in other words, when the conduct of a seconding organ or agent is attributable to the receiving organisation (in this context, the UN) and when it is attributable to the sending State.[171] According Article 7, "[…t]he 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" (emphasis added). Hence, the exercise of effective control is decisive when establishing whether it is the sending State or the organisation as such to which the act or omission in question should be attributed.

According to the commentary to DARIO, UN practice relating to peacekeeping operations is to regard acts of peacekeeping forces as in principle imputable to the UN. If such acts violate an international obligation, they entail the responsibility of the organisation as such.[172] However, the fact that the sending State retains jurisdiction in some aspects, such as in criminal and disciplinary matters, is of importance for the question of attribution since the State may retain control over its military contingent in those aspects.[173] Generally, the UN claims exclusive command and control over the peacekeeping forces for the sake of military efficiency. However, attribution of

[168] Draft articles on the responsibility of international organizations with commentaries, Chapter II, Attribution of conduct to an international organization, General Commentary (3).
[169] Ibid., Commentary (1) to Article 7.
[170] Ibid.
[171] Ibid.
[172] Ibid., Commentary (6) to Article 7.
[173] Ibid., Commentary (7) to Article 7.

conduct should, according to the commentary, be based on a "factual criterion".[174]

DARIO have been referred to, *inter alia*, by the ECtHR in *Al-Jedda v. the United Kingdom*.[175] The Draft Articles were also of importance for the ECtHR's reasoning regarding attribution and the outcome in *Behrami and Saramati*, which is dealt with in more detail below, where the ECtHR explicitly referred to them and particularly to the *effective control* criterion.[176] In the latter case, the ECtHR based parts of its reasoning regarding attribution on DARIO.[177]

Human rights treaties, including the ECHR, require that an act or omission is attributable to the State in order for responsibility to arise.[178] The concept of attribution is separate from that of jurisdiction. The two notions and the interrelationship between them has not been handled consistently by the ECtHR; in some cases (such as *Al-Jedda*, referred to in the following), attribution of conduct to the State has been established first and thereafter the issue of whether extraterritorial jurisdiction was exercised has been examined. In other cases, the exercise of jurisdiction by the State over a territory has been considered to imply in itself that the acts of the authorities in that area were attributable to the State.[179] The question of attribution is of importance for the purpose of this essay. As is shown below, the fact that the acts and omissions of KFOR and UNMIK were attributable to the UN prevented them from being subjected to the scrutiny of the ECtHR in the case of *Behrami and Saramati*, which is described in detail below. In the *Al-Jedda* case[180], on the other hand, where the conduct of British troops was attributable to the United Kingdom rather than to the UN, the ECtHR was able to proceed to examine the merits of the case. Thus, in order to be able to bring a claim against the sending State, the conduct must be attributable to that State.

The *Behrami and Saramati* case concerned the situation in Kosovo. In 1999 the UN Security Council adopted resolution 1244[181], acting under Chapter VII of the UN Charter. The resolution established a dual international presence in Kosovo; a civil interim administration run by the United Nations Mission in Kosovo (known as UNMIK), and the NATO-led military forces (known as KFOR).[182] UNMIK consisted of national contingents placed at the disposal of the UN, and constituted a subsidiary organ to the UN.[183] KFOR, the NATO-led peacekeeping force, was sub-divided into a number of multinational brigades[184] but deployed under "unified command and control".[185] KFOR did

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174 See Draft articles on the responsibility of international organizations with commentaries, Chapter II, Attribution of conduct to an international organization, Commentary (9) to Article 7.
175 Ibid., Commentary (13)–(14) to Article 7.
176 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, paras. 29ff.
177 Ibid., paras. 121 and 138.
178 Larsen (2008), p. 518.
179 See e.g. *Loizidou v. Turkey*, para. 56; the case concerned human rights violations in northern Cyprus, under effective overall control by Turkey.
180 *Al-Jedda v. The United Kingdom* appl. no. 27021/08, judgment 7 July 2011.
181 S/RES/1244 (1999), 10 June 1999.
182 Milanovic & Papic (2009), p. 269.
183 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 143.
184 See Milanovic & Papic (2009), p. 269.

not constitute a subsidiary organ to the UN.[186] The ECtHR's admissibility decision in the joint cases revolved around alleged human rights violations in Kosovo by UNMIK and KFOR forces.

In the *Behrami* case, the applicants were Mr Agim Behrami and his son Bekir Behrami. The other son had been killed and Bekir had been severely injured while playing with undetonated cluster bomb units dropped by NATO during the bombardment in 1999.[187] The area where the incident took place was under the responsibility of the KFOR multinational brigade led by France. The applicants submitted a case against France alleging that the incident leading to the death and injuries took place because of the failure of French KFOR troops to mark or defuse the undetonated cluster bomb units, in accordance with the Security Council resolution. Therefore, allegedly, the rights of the applicants under Article 2 of the ECHR had been violated.[188] Supervising de-mining lied within KFOR's mandate until the international civil presence (i.e. UNMIK) could, as appropriate, take over responsibility for that task.[189]

Mr Saramati had been arrested and detained by UNMIK police, suspected of murder and illegal possession of a weapon, and later re-arrested in the sector assigned to the multinational brigade led by Germany and on the order of a Norwegian Commander of KFOR, subsequently replaced by a French officer.[190] It was argued that KFOR's mandate under the Security Council resolution included the authority to detain, as that was considered necessary in order "to maintain a safe and secure environment".[191] The detention of Mr Saramati was extended three times and he argued that his rights under Articles 5, 13 and 6 § 1 of the ECHR had been violated.[192]

The applicants argued that there was a sufficient jurisdictional link between them and the respondent States, within the meaning of Article 1, while the respondent States maintained that the applicants did not fall within their jurisdiction.[193] At the outset, the ECtHR established that Kosovo was at the time under the effective control of the international presences, which exercised the public powers normally exercised by the FRY Government.[194] The ECtHR avoided the question of whether the responding States exercised extraterritorial jurisdiction in accordance with Article 1 of the ECHR in Kosovo. Instead, it was found more relevant to examine whether the ECtHR was competent to "[…] examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo" and the compatibility *ratione personae* of the complaints with the Convention.[195]

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185 S/RES/1244 (1999), Annex 2, para. 4.
186 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 142.
187 Ibid., para. 5.
188 Ibid., para. 61.
189 S/RES/1244 (1999), para. 9(e).
190 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, paras. 8, 9 and 15.
191 Ibid., para. 11.
192 Ibid., para. 62.
193 Ibid., paras. 66–67.
194 Ibid., para. 70.
195 Ibid., paras. 71–72.

Subsequently, the ECtHR reviewed whether the impugned action or inaction could be attributed to the UN. In this connection it was noted that the Security Council resolution had delegated powers to both KFOR and UNMIK, and a key question was therefore whether the Security Council retained "ultimate authority and control" over the security mission.[196] Several factors indicated that the powers had been lawfully delegated to KFOR and UNMIK and that therefore the Security Council had retained such control as was necessary for the action and inaction to be attributable to the UN in both cases.[197] After this, it was examined whether the ECtHR was competent *ratione personae* to review action or inaction attributable to the UN. In relation to this, the ECtHR simply found that the ECHR cannot be interpreted "[…] in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court"[198], and declared both applications inadmissible as they were incompatible *ratione personae* with the provisions of the Convention.[199]

It can be noted that the decision has been referred to by the ECtHR when declaring subsequent applications inadmissible. For example, since KFOR actions were "[…] in principle attributable to the UN, which had a legal personality separate from that of its member States and which was not a Contracting Party to the Convention", and because the ECtHR "[…] was not competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN", the applications in *Kasumaj v. Greece* and *Gajic v. Germany* were declared inadmissible.[200]

In *Al-Jedda*, the applicant was detained in a British-run military facility in Basra, Iraq, and the case concerned an alleged violation of Article 5 § 1 of the ECHR. The detention, which lasted for over three years, took place during the occupation of Iraq by the Coalition States. The merits of the case concerned the relationship and potential norm conflict between Security Council resolution 1546 and Article 5 § 1 of the ECHR, i.e. similar to the issue described in chapter 2.1.2.

The admissibility issue, which is in focus here, concerned whether the internment of Mr Al-Jedda was attributable to the United Kingdom or to the UN, and whether he fell within the jurisdiction of the UK. In this respect, the ECtHR found that firstly, the UN's role regarding security in Iraq in 2004 was different from that in Kosovo in 1999, where the detention of Mr Saramati had been considered attributable to the UN rather than to any of the troop-contributing nations.[201] In Kosovo, the international security forces' presence had been established by a Security Council resolution in the first place. Iraq, on the other hand, had been invaded by the United States-led coalition, before any Security Council resolutions were adopted on the matter. Further, the

[196] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, paras. 128–133.
[197] Ibid., paras. 141 and 143.
[198] Ibid., para. 149.
[199] Ibid., para. 152.
[200] *Kasumaj v. Greece*, appl. no. 6974/05, admissibility decision 5 July 2007 and *Gajic v. Germany*, appl. no. 31446/02, admissibility decision 28 August 2007.
[201] *Al-Jedda v. The United Kingdom*, para. 83.

detention of Mr Al-Jedda took place within a facility exclusively controlled by United Kingdom forces. Another circumstance of importance in this case was that the UN (through the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), both organs of the UN) had repeatedly protested against the extent to which security internment was being used by the multinational force. This made it difficult to regard the detention as attributable to the UN.[202]

Overall, the ECtHR concluded that the UN Security Council had "neither effective control nor ultimate authority and control" over the acts and omissions of troops constituting the Multinational Force. The ECtHR did not consider that the acts of Multinational Force soldiers became attributable to the UN or ceased to be attributable to the troop-contributing nations.[203] The detention of Mr Al-Jedda was therefore not attributable to the UN, but to the United Kingdom.[204] During his internment, the applicant fell within the jurisdiction of the United Kingdom since the internment took place within a detention facility controlled exclusively by British forces and the applicant was within the control and authority of the UK throughout.[205] This is in accordance with the *State agent authority and control* model established by the ECtHR in *Al-Skeini*, and resembles the personal model of jurisdiction referred to in chapter 3.2.2. As the conduct was attributable to the UK and the applicant fell within the jurisdiction of the UK, the ECtHR could proceed to examine the merits of the case.

3.4.1 Reflections on attribution – a tricky question in the context of UN peacekeeping

In the context of international peacekeeping missions, the question of attribution is a crucial and tricky one. According to for example Aurel Sari at the University of Exeter, military members of national contingents participating in international peacekeeping operations occupy a "dual legal position" and act in a "dual role"; it acts in an international capacity as part of the structure of the international organisation carrying out the mission, while in a national capacity as it simultaneously constitutes a national organ of the sending State.[206] The fact that the international presences exercise effective control over an area does not exclude the possibility that the troops contributed by States can act in a national capacity and thereby bring individuals within the jurisdiction of the sending State. The decisive question for deciding in what capacity someone is acting, Sari argues, is in whose name and for whom, from a functional point of view, the person is acting.[207] It can further be argued that the same conduct may be attributable to an international organisation and the State simultaneously.[208]

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[202] *Al-Jedda v. The United Kingdom*, para. 82.
[203] Ibid., para. 80.
[204] Ibid., paras. 84–85.
[205] Ibid., paras. 85–86.
[206] Sari (2008), p. 160.
[207] Ibid., p. 161.
[208] Ibid., p. 159. See also Rainey, Wicks & Ovey (2014), p. 99.

As opposed to the decision in *Behrami and Saramati*, where the impugned actions and omissions were considered attributable to the UN, in *Al-Jedda*, the ECtHR found that the detention was attributable to the UK and subsequently went on to examine whether extraterritorial jurisdiction arose and later the merits of the alleged violations. Hence, attributing actions and omissions of the peacekeeping soldiers to the sending State is of crucial importance for victims of human rights violations to be able to bring a claim against a Contracting State because it seems like the ECtHR lacks jurisdiction over acts or omissions which are attributable to the UN.[209] As some observers put it, after the *Al-Jedda* judgment, the "door is open" for Contracting States to avoid jurisdictional liability for human rights violations either attributable to the UN or required by a UN resolution.[210] Where an act or omission is attributable to the UN and not to the sending State, DARIO provide some guidance as to the responsibility of the UN. However, the responsibility of the organisation is not further examined in this essay as its main focus is the responsibility of sending States. In chapter 4.3.1.1, it is argued that certain conduct by peacekeepers cannot be attributed to the UN and thus that the sending States which are parties to the ECHR could be held accountable under the ECHR. Thereafter, the question whether the ECHR could serve as a satisfactory legal framework in these situations is addressed.

[209] See De Búrca (2010), p. 16.
[210] See e.g. Rainey, Wicks & Ovey (2014), p. 100.

4 Analysis: Possible application of human rights treaties in UN peacekeeping operations

4.1 Application of the ICCPR in UN peacekeeping operations?

As outlined above (chapter 3.3.2), the ICCPR may apply extraterritorially where forces constituting a national contingent of a State Party in a peacekeeping operation exercise power or effective control over an individual.[211] However, the case law of the HRC is not as extensive as that of the ECtHR regarding extraterritorial jurisdiction. The HRC has stated that the applicability of international humanitarian law does not preclude accountability of States parties in accordance with Article 2.1 of the ICCPR for extraterritorial actions of its agents, and one State party has been encouraged to provide training on relevant rights contained in the ICCPR specifically designed for members of its security forces deployed internationally.[212] The scope of the notion of extraterritorial jurisdiction in terms of the ICCPR and in what situations jurisdiction is exercised in the context of peacekeeping operations remains unclear.[213] It remains unclear, for example, what degree of control is required over a territory as well as over an individual in order for a State to be exercising extraterritorial jurisdiction in the meaning of the ICCPR.

The complaints procedure under the ICCPR was established through its first Optional Protocol. Article 1 of the Optional Protocol states that States parties recognise the competence of the HRC to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the ICCPR. To date, the Optional Protocol has 115 States Parties.[214] Among the ten largest troop-contributing countries to UN peacekeeping operations (see chapter 2.3), only three have ratified the Optional Protocol and the individual complaints mechanism contained therein.[215]

Hence, there is a possibility that the ICCPR would apply to acts committed extraterritorially by UN peacekeepers and that such acts would thus entail the exercise of jurisdiction of the sending State. However, as explained initially, this essay focuses mainly on the ECHR for several reasons; it could be argued that the ECHR provides the best possibilities of addressing impunity because,

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211 HRC General Comment no. 31 [80], p. 10.
212 HRC Concluding Observations: Germany, para. 11.
213 See Larsen (2012), p. 185.
214 http://indicators.ohchr.org/ (acquired 3 October 2015).
215 Ibid.; as of this date, Nepal, Ghana and Burkina Faso have ratified the Optional Protocol. Ethiopia, Bangladesh, Pakistan, India, Rwanda, China and Indonesia have not done so.

inter alia, the judgments of the ECtHR are legally binding and its case law is more developed in terms of extraterritorial jurisdiction.

4.2 Application of the ECHR in UN peacekeeping operations?

In the case law of the ECtHR, which is more extensive than that of the HRC in this aspect, there are a number of cases regarding alleged human rights violations in situations involving UN Security Council resolutions. The situation in *Behrami and Saramati*, described in chapter 3.4, concerned a UN Security Council mandated operation in Kosovo. This chapter seeks to discuss and analyse how the ECtHR has handled the application of the ECHR in the context of UN peacekeeping operation and subsequently, the case law is analysed and to some extent criticised. A *de lege ferenda* reasoning is carried out, mainly in chapter 4.3, arguing for a different approach to the example relating to the Central African Republic.

4.2.1 Reflections – does the case law of the ECtHR exclude the possibility of legal review of acts in the course of UN peacekeeping?

At the outset, it should be noted that the cases concerning military operations abroad dealt with by the ECtHR are very fact-specific and the outcome may differ significantly depending on, *inter alia*, the situation on the ground, the terms of the Security Council resolution in question, the different status-of-forces agreements, and one should be cautious when drawing too general conclusions. However, a few remarks can be made in relation to this chapter.

This section relates to the first research question of this essay, regarding the possibility of State accountability to arise for human rights violations committed by its soldiers during UN peacekeeping operations. The ECtHR stated in its admissibility decision in *Behrami and Saramati* that acts and omissions of Contracting Parties which are covered by UNSC resolutions and occur prior to or in the course of such missions cannot be reviewed by the ECtHR, because the operations are fundamental to the UN's mission to secure international peace and security and they rely on the support from the Member States.[216] This decision was problematic in the sense that the ECtHR unconditionally rejected the possibility of reviewing the legality of the acts and omissions carried out by KFOR and UNMIK and attributable to the UN, or of any action by a Contracting State where authority for the action lies with the UN.[217] For this reason, the decision probably has considerable consequences for human rights protection in peacekeeping operations, as it possibly removes a variety of State conduct from its sphere of review.[218] This effect of the decision in *Behrami and Saramati* is illustrated by subsequent admissibility decisions by the ECtHR such as *Kasumaj v. Greece* and *Gajic v. Germany*, where

[216] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 149.
[217] See e.g. Larsen (2012), p. 334 and Rainey, Wicks & Ovey (2014), p. 99.
[218] See e.g. Sari (2008), p. 152 and 167.

Behrami and Saramati was used by the ECtHR to declare inadmissible claims against Contracting States for alleged human rights violations in Kosovo.[219] The outcome can be compared to that of the *Al-Jedda* case (chapter 3.4), where acts by British troops in Iraq were found attributable to the United Kingdom and hence could be subject to the scrutiny of the ECtHR, applying the principles regarding extraterritorial jurisdiction. Attributing acts or omissions to the contracting State thus seems crucial for the individual to be able to bring a legal claim against that State.

In my opinion, the problem is that the statement of the ECtHR in *Behrami and Saramati* is too general as it seems to exclude *any* acts and omissions committed by State agents covered by UN Security Council resolution. It would have been more understandable if the ECtHR would have pronounced that it could not review the legality of UN Security Council resolutions as such, but that it would have been possible to review the actual conduct by Contracting States.[220] A regional court such as the ECtHR might not legitimately be able to review the legality of decisions made by United Nations organs. However, the pronouncement by the ECtHR in *Behrami and Saramati* excludes the possibility for victims of human rights violations to bring a claim before the ECtHR where the acts or omissions are covered by UN Security Council resolutions and occur in the course of a peacekeeping mission. This somewhat static approach by the ECtHR has been criticised as the ECtHR seemed to abandon its "dynamic and evolutionary" approach to human rights protection and because the decision upholds a vacuum in accountability for human rights violations that occur in carrying out UN Security Council mandates.[221] Upholding such vacuum in accountability for human rights violations is questionable from the point of view that human rights are universal, which is the theoretical starting point for the purpose of this essay. The approach of the ECtHR is rather surprising and perhaps disappointing to human rights idealists, coming from a court that has often been progressive and seeking to expand the human rights protection. The way the ECtHR expressed it, it seems like no acts covered by a UN Security Council resolution may be subject to its scrutiny. However, not all acts carried out by UN peacekeepers can be attributed to the UN but may very well be carried out in a national capacity or outside of the scope of the mandate. In these cases, the ECtHR should, in my opinion, be able to review the acts and establish whether extraterritorial jurisdiction was exercised, and if so, whether there was a material breach of the ECHR.

Some observers have suggested that the rationale behind the unwillingness of the ECtHR to adjudicate upon the situation in *Behrami and Saramati* was the "desire to avoid an open conflict with the Security Council"[222] and its "reluctance to decide on questions of State jurisdiction and norm conflict"[223]. In contrast to the judgment of the ECJ in *Kadi* (see chapter 2.1.2), where the ECJ took a pluralist approach and stated that EU law formed a "distinct,

[219] See Milanovic & Papic (2009), p. 295.
[220] See Sari (2008), where this argument is further elaborated at p. 167.
[221] De Búrca (2010), pp. 30–31.
[222] Ibid., pp. 16–17.
[223] Milanovic & Papic (2009), p. 267.

internal legal order", separating the EU system from the UN system, the ECtHR took a more constitutionalist approach to the international legal order.[224] In doing so, the ECtHR seemed to perceive itself as a specialised human rights institution, part of the international legal order where the UN is the forum for international cooperation in security matters and whose acts the ECtHR is not competent to review.[225] The judgment of the ECJ in *Kadi*, however, shows that the perception of the ECtHR in *Behrami and Saramati* is not uncontradicted. It displays that regional treaties can be perceived as distinct legal orders and not merely subordinate to the UN system, at least where fundamental rights are concerned.

After the ECtHR had delivered its decision in *Behrami and Saramati*, many observers were pessimistic as to the future protection of human rights in this context. It has been argued, *inter alia*, that the decision indicated that the significance of the extraterritorial effect of the ECHR was reduced for many Contracting States, and that a possible consequence was that participation in international peace operations was now removed from the list of practical scenarios for extraterritorial effect because the reasoning of the ECtHR regarding attribution made it difficult to see how conduct in the course of UN peacekeeping operations could be attributed to troop contributing nations.[226] In my opinion, however, this might be true for acts committed in pursuit of the mandate, or in the official capacity of peacekeepers. Acts outside of the scope of the mandate must be able to be subject to the scrutiny of the ECtHR.

This chapter has aimed to summarise and problematise some aspects of the case law of the ECtHR regarding UN peacekeeping operations. However, it is argued in the following that the development in the case law of the ECtHR in recent years might open up for the possibility of extraterritorial jurisdiction to arise also in the course of UN peacekeeping. After *Behrami and Saramati*, the ECtHR has dealt with several cases regarding the extraterritorial application of the ECHR, some of which have been described in chapter 3.3.3. As outlined in that chapter, those cases did not concern the situation of human rights violations in UN peacekeeping operations, but rather human rights violations by members of the Coalition Forces in Iraq. However, as outlined in the relevant chapters above, there were UN Security Council resolutions involved in the situation in Iraq, where the *Al-Jedda*, *Al-Skeini* and *Jaloud* cases took place, as well. In the following, it is argued that the model of jurisdiction as control over an individual, as used in *Jaloud*, may enable for an individual to bring a claim before the ECtHR against a troop-contributing nation.

[224] De Búrca (2010), p. 7.
[225] Ibid., p. 28.
[226] See Larsen (2008), pp. 530–531.

4.3 The example: extraterritorial application of the ECHR to the alleged human rights violations by MINUSCA personnel – a possible solution?

For the purpose of this essay, the main focus is on the possibility of the ECHR to serve as a workable legal venue for victims of sexual exploitation and abuse in the Central African Republic. The ICCPR and the complaints mechanism in its Optional Protocol have been examined to some extent above. However, it can be argued that the ECHR provides the best opportunities for this, mainly because of its relatively well-developed case law on extraterritorial jurisdiction and the fact that the judgments of the ECtHR are legally binding.

4.3.1 The relevant rights under the ECHR

In the Central African Republic, UN peacekeeping troops forming part of MINUSCA from, *inter alia*, France, have allegedly abused children sexually in exchange for food and money. For an individual to be able to successfully bring a claim against the troop-contributing nation under the ECHR, the act or omission must, firstly, fall within the jurisdiction of that State. Secondly, it can be examined whether there has been a violation of one or more of the rights or freedoms in the ECHR. It is argued here that the most relevant right in this case would be Article 3 of the ECHR. This essay focuses on the possibilities of bringing a claim against the troop-contributing nation offered by the ECHR, rather than the substantive rights contained therein. The ECHR offers the most extensive case law both in terms of extraterritorial jurisdiction and in terms of the scope of the Article on cruel, inhuman or degrading treatment.

According to the well-established case law of the ECtHR, allegations of rape and sexual abuse is dealt with under Article 3 and sometimes Article 8 of the Convention and rape amounts to treatment contrary to Article 3.[227] Under Article 3, Contracting States are under a positive obligation to punish rape and to effectively investigate rape cases.[228] Further, Contracting States have a primary duty to secure the right not to be exposed to treatment contrary to Articles 3 and 8, or to attacks on one's personal integrity, by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[229] Consequently, Contracting States are under a negative obligation not to, through its agents, subject individuals within its jurisdiction to treatment contrary to, in this case, Article 3, but also under a positive obligation to conduct an effective investigation of allegations of rape or other treatment contrary to Article 3.

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[227] See e.g. *M.C. v. Bulgaria*, appl. no. 39272/98, judgment 4 December 2003, para. 148, *D.J. v. Croatia*, appl. no. 42418/10, judgment 24 July 2012, para. 83.
[228] *M.C. v. Bulgaria*, paras. 149–153, *D.J. v. Croatia*, para. 84, *Tyagunova v. Russia*, appl. no. 19433/07, judgment 31 July 2012, para. 63.
[229] *D.J. v. Croatia*, para. 86.

Soldiers are likely to be considered as State agents or organs of the State and it should therefore not be difficult to view the rape as attributable (in the meaning of the ECHR) to the sending State. Should the soldiers for some reason not be considered as State agents, but acting in a personal capacity, the State is still under the positive obligation to conduct an effective investigation. The requirements on this investigation are similar where the treatment contrary to Article 3 has been inflicted by private individuals.[230] Although it is possible that violations of other Articles of the ECHR have taken place in the Central African Republic, or that not all acts of sexual exploitation and abuse amount to violations of Article 3, the right not to be subjected to torture or inhuman or degrading treatment or punishment as laid down in Article 3 is in focus for the purpose of this essay. However, the question whether a certain conduct amounts to a material violation of Article 3 or not is not dealt with. The focus of this chapter is the extraterritorial application of the ECHR, and in the case of the Central African Republic example, Article 3 is the relevant substantial Article.

4.3.1.1 The conduct is attributable to the sending State

Following what has been outlined above (chapter 3.4), it seems that where a conduct is attributable to the UN, the ECtHR cannot review such conduct. While the ECtHR's conclusion in its decision in *Behrami and Saramati* may be criticised for enabling Contracting States to avoid jurisdictional liability regarding conduct attributable to the UN or required by a resolution, it is argued here that the conduct in question in the Central African Republic situation cannot be attributable to the UN. The situation and the conduct in question in *Al-Jedda* (detention) as well as that in *Behrami and Saramati* (detention and failure to de-mine) are different from that in the Central African Republic.

While the conduct constituting the alleged human rights violations in *Al-Jedda* and *Behrami and Saramati* could be lawful in the context of a peacekeeping operation, the behaviour of the French soldiers in the Central African Republic cannot be said to be "covered" (see *Behrami and Saramati*, para. 149) or required by a UN resolution under any circumstances. It is not exactly clear what the ECtHR intended in *Behrami and Saramati* when pronouncing that it could not review acts "covered" by Security Council resolutions. It could be either that all acts committed by UN peacekeepers, regardless of their nature, are covered by the resolution, or merely acts that are evidently committed in pursuit of the mandate. For the purpose of this essay, it is argued that acts committed outside of the scope of the mandate of the operation is performed in a national capacity, i.e. it is presumed that not all acts committed by UN peacekeepers are "covered" by the resolution in question. The UN considers itself responsible for actions of peacekeepers when on duty, while it has stated that it does not consider itself responsible for acts committed by peacekeepers off duty. In this respect, "off duty" means not operating in an official capacity. According to such a definition, it could be argued that the UN would never be accountable

[230] *D.J. v. Croatia*, para. 85.

for acts of sexual exploitation and abuse as such acts cannot *per se* be included in the official duties of peacekeepers.[231]

In its third-party submission in *Behrami and Saramati*, the United Kingdom argued that Article 1 of the ECHR "[…] should be interpreted to mean that, where officials from States act together *within the scope of an international operation authorised by the UN*, they are not exercising sovereign jurisdiction but that of the international authority, so that their acts did not bring those affected within the jurisdiction of the States or engage the Convention responsibilities of those States" (emphasis added).[232] A contrario, such reasoning would imply that acts committed *outside* the scope of an international operation authorised by the UN, i.e. outside the mandate, or outside of the chain of command, would be committed in a national capacity.[233] As outlined above (chapter 3.4.1), the fact that the international presences exercise effective control over an area does not exclude the possibility that the troops contributed by States can act in a national capacity. The decisive question for deciding in what capacity someone is acting is in whose name and for whom, from a functional point of view, the person is acting.[234] Acts performed in a national capacity can create a jurisdictional link that can bring the individual concerned within the jurisdiction of the sending State for the purposes of Article 1.[235] In the context of sexual abuse in the Central African Republic, the conduct of the French troops cannot be attributable to the UN because sexual exploitation or abuse of civilians is never a necessary mean to carrying out a mandate. Instead, the conduct of the French soldiers is attributable the sending State and therefore it would be relevant to proceed to examine the issue of jurisdiction. Conduct attributable to a Contracting State can be subject to the scrutiny of the ECtHR. The issue of extraterritorial jurisdiction therefore remains central.

4.3.1.2 The "State agent authority and control" principle or the personal model of jurisdiction – a possible solution?

According to the way of reasoning used by the ECtHR in *Behrami and Saramati* and *Al-Jedda*, after concluding that the conduct is attributable to the troop-contributing nation rather than to the UN, the next step would be to examine the issue of extraterritorial jurisdiction. In that respect, recalling the case law of the ECtHR regarding the cases in Iraq (see chapter 3.3.3.1) is useful. The personal model of jurisdiction (chapter 3.3.2) or the *State agent authority and control* principle could in the case of sexual exploitation and abuse by peacekeepers in the Central African Republic enable a victim to bring a claim before the ECtHR. As has been shown above, the ECtHR has in its recent case law on the issue of extraterritorial jurisdiction accepted an increasing

231 Neudorfer (2015), s. 13.
232 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 116.
233 See e.g. Sari (2008), p. 166, where it is argued that "[…] the qualification 'within the scope of an international operation' is critical. An act committed outside of the scope of the international mandate of the operation or outside its chain of command is performed in a national capacity."
234 Sari (2008), p. 161.
235 Ibid., p. 166.

number of exceptions to what used to be the general rule; that jurisdiction is "primarily territorial".

In particular, the judgment in *Jaloud* may open up for a significantly more generous application of the ECHR extraterritorially, enabling for the personal model of jurisdiction to apply not only where a person is taken into detention, but also where control is exercised over person passing through a checkpoint. An important aspect in *Jaloud* was that even though the Dutch troops were under the operational command of a British commander, the Netherlands retained "full command" over its military personnel. The fact that they were executing an order given by an authority of a foreign State was not in itself sufficient to relieve the Netherlands of their obligations under the ECHR, nor did it divest the Netherlands of its jurisdiction in the meaning of Article 1.[236] Some observers perceive the way the ECtHR established jurisdiction in *Jaloud* as a new version of personal jurisdiction, in addition to that which arises, for example, where a State holds an individual in arrest or detention.[237] Consequently, a State may exercise extraterritorial jurisdiction over individuals passing through a vehicle checkpoint controlled by that State. However, in contrast to for example a detention facility, vehicle checkpoints are not fixed to a building or similar and can be moved with short notice. Therefore, it can be questioned what the exact difference is between a checkpoint and for example foot patrol. Is it possible that the ECHR will apply also to foot patrol in the future?[238] It seems like *Jaloud* is a step towards opening up for the application of the ECHR in armed conflicts abroad more frequently. As an idealist and not a military commander, I am of the opinion that steps towards granting universality of human rights are positive. Further, on a moral level, an increased applicability of human rights in armed conflict is positive. Such approach would be consistent with the idea of universality of human rights and is appealing to an idealistic human rights law student as myself. It makes sense that a State which, through the ratification of a human rights convention, undertakes to respect, protect and fulfil human rights[239] of individuals would be, or at least should be, willing to do so regardless of where in the world and under what circumstances it operates.

In my opinion, a similar reasoning to that applied by the ECtHR in *Jaloud* could, depending on the circumstances of the specific case, lead to the extraterritorial application of the ECHR in the context of UN peacekeeping operations in the future. Mr Jaloud met his death while passing through a checkpoint set up in the execution of SFIR's mission under UN Security Council resolution 1483. The ECtHR established that the Netherlands exercised jurisdiction within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.[240] If a State can exercise authority and control and thus

[236] *Jaloud v. The Netherlands*, para. 143.
[237] See e.g. De Koker (2014).
[238] For this discussion, see e.g. Sari (2014).
[239] See, regarding the obligation to respect, protect and fulfill http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx (acquired 15 October 2015).
[240] *Jaloud v. The Netherlands*, para. 152.

extraterritorial jurisdiction in accordance with Article 1 of the ECHR over persons passing through a vehicle checkpoint set up in accordance with a Security Council resolution, it is imaginable that the same may apply to several other situations. Likewise, where abuse takes place for example in facilities provided in order to fulfil the mandate of a peacekeeping operation, it could be argued that the victim is within the jurisdiction of the sending State.

Firstly, if some of the cases of abuse took place within facilities established for the purpose of fulfilling the mandate, it is plausible that the individuals were within the jurisdiction of the sending State based on the "State agent authority and control" principle. As outlined above (see chapter 3.3.3.1), according to the ECtHR, what is decisive in such cases is the exercise of physical power and control over the person in question.[241] Given the judgment in *Jaloud*, I am of the opinion that such a conclusion does not seem like too much of a long shot as it would have done just a few years ago, before *Jaloud*. If a State can exercise jurisdiction over a person passing through a checkpoint, it seems reasonable to me that where a soldier of the sending State (i.e. a State agent) commits a crime against a civilian, the victim may be brought within the jurisdiction of the sending State under the same premises. Some have argued that the exercise of jurisdiction over individuals is not limited to situations where the individual is detained in a permanent detention facility. Rather, the individual may be under the authority and control of the State through the exercise of any form of physical control. That may be when he or she is held back by State agents in a room, a vehicle, or being physically controlled by State agents outdoors.[242] If jurisdiction arises in such a case, the State would be under the obligation to secure to that individual the rights and freedoms of the ECHR relevant to his or her situation.

The case law of the ECtHR regarding extraterritorial jurisdiction, with *Jaloud* as the most recent addition, has been subject to criticism for being inconsistent and hard to foresee (see chapter 3.3.3.2, comments by, *inter alia*, judge Bonello). In order to make the law more foreseeable, I believe that there is a need for more elaborated general principles on jurisdiction to be established, and most of all for those principles to be applied consistently by the ECtHR. The question is how such general principles could be framed. Starting with the spatial model (chapter 3.2.1), it seems obvious that applying only that model and doing so too strictly would not guarantee the rights and freedoms of the ECHR in a way that most people probably intuitively consider that it should. If the ECHR would apply only within the territory of the Contracting States, States would be free to disregard their human rights obligations elsewhere. In order to provide an effective human rights protection, the spatial model needs to, at least to some extent, be supplemented by the personal model of jurisdiction (chapter 3.2.2). It seems like the ECtHR is now struggling to establish how far the personal model can be elaborated. As has been argued above, the latest position of the ECtHR in *Jaloud* has opened up for a more permissive approach to extraterritorial application of the ECHR. However, in order for a more consistent case law to be established and in order for States to be able to foresee whether the ECHR applies to acts or omissions of their

[241] See *Al-Skeini and others v. The United Kingdom*, para. 136.
[242] See Larsen (2012), p. 210–211.

agents, I am inclined to agree with Milanovic in that a "third model" of jurisdiction (chapter 3.2.3) could be useful.

4.3.1.3 The third model of jurisdiction – a possible solution?

The third model of jurisdiction argued for by Milanovic is, in my opinion, a constructive suggestion on how to enable for the individual to bring a claim before the ECtHR. This model distinguishes between positive and negative obligations. As outlined above, according to that model, a State must always comply with its negative obligations, including when acting extraterritorially, because States can always control the actions of their organs or agents. According to this way of reasoning, victims of sexual exploitation and abuse committed by French troops in the Central African Republic would be able to bring a legal claim against France before the ECtHR, regardless of whether France controlled the area or the individual, because States have a negative obligation not to subject individuals to treatment that is contrary to Article 3 of the ECHR through its agents. On the other hand, according to this model, sending States would not be able to be held accountable for violations of their positive obligations, such as the obligation to effectively investigate allegations of rape, extraterritorially. However, this model seems to be able to reconcile the need for a better human rights protection when States act extraterritorially with the upsides of keeping the threshold character of Article 1 of the ECHR. It also offers a reasonable and acceptable solution to the situation in focus of this study, where the common sense says that the sending State must be held accountable for the actions of their soldiers, but where it might be difficult to prove the existence of the jurisdictional link that is required.

Against the background of the idea of universality of human rights, it can be questioned why States are not always obliged to comply with all of their human rights obligations, at all times and in all places. However, there is little support for this in the ECHR since such a view is not what States have agreed upon at ratification, as Article 1 speaks of "[…] everyone within their jurisdiction". Likewise, according to Article 2.1 of the ICCPR, "[e]ach State Party […] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]". It can also be argued that such an interpretation would place an unrealistic burden on States, implying that they would have to not only *respect* but also to *ensure* human rights to everyone, everywhere. Therefore, I am of the opinion that Milanovic' suggested "third model" and the separation between positive and negative obligations in terms of extraterritorial jurisdiction is feasible. The third model seems to be able to, at least in theory, reconcile the idea of universality of human rights and effectiveness by imposing on States an obligation to comply with their negative human rights obligations everywhere (i.e. universality of human rights), while having to fulfil their positive human rights obligations only where they possess control over territory (i.e. effectiveness and feasibility).[243] The main drawback of the third model, however, is that there does not seem to be much legal support for the division between positive and negative obligations in this regard. Milanovic is also

[243] See Milanovic (2013), p. 219.

aware of some problematic aspects of the model he is advocating for.[244] On the other hand, the ECtHR has previously not been afraid of developing its case law in new ways. It might be the case that the ECtHR through its judgment in *Jaloud* opened up for the possibility of taking up its "dynamic and evolutionary approach" (see chapter 4.2.1).

4.4 Reflections – ECHR: a possible regional solution, but globally insufficient

In *Jaloud*, the Netherlands troops participated in the Stabilization Force in Iraq and were under the command of a United Kingdom officer. The basis for sending Netherlands troops to Iraq was to be found in Security Council resolution 1483. The role of the Netherlands in this operation was not as prominent as that of the US or the UK, who were present in Iraq in the capacity of occupying powers. Nevertheless, the Netherlands did exercise extraterritorial jurisdiction over the applicant, according to the ECtHR. It could be argued that the role of the countries contributing to the SFIR was similar to that of troop contributing countries in UN peacekeeping missions. Therefore, I am of the opinion that if the ECtHR in the future would step away from its (in my opinion too general) statement in *Behrami and Saramati* that it cannot review acts covered by Security Council resolutions or at least opening up for the possibility that some acts committed in the course of a UN peacekeeping operation may be attributable not to the UN but to the troop-contributing State, chances are that it would come to a similar conclusion as in *Jaloud*. If so, extraterritorial jurisdiction could arise in the context of UN peacekeeping operations, and Contracting States could be held accountable for human rights violations committed by military members of its national contingents. Would that be the case, it could further be argued that, considering the case law of the ECtHR on the scope of Article 3 and Article 8, Contracting States are under an obligation to conduct an effective investigation into allegations (similarly to in *Jaloud*, where the merits concerned the obligation to conduct an effective investigation under Article 2). In this aspect, one could hope that the *Jaloud* case opens up for the possibility of the ECtHR to continue its "dynamic and evolutionary approach" (see reasoning by de Búrca referred to in chapter 4.2.1).

An important aspect that should be mentioned in this context is that of the potentially deterring effect of a permissive interpretation of the notion of extraterritorial jurisdiction. If the requirements of human rights compliance are too strict (or even if there is insecurity as to whether the ECHR applies or not), States may be deterred from contributing to peacekeeping operations. As argued by Norway in *Behrami and Saramati*, extending Article 1 of the ECHR to cover peacekeeping operations risked "[…] deterring States from participating in such missions and […] making already complex peacekeeping operations

[244] Ibid., p. 211, where it is stated that "[a]dopting the third model would require a radical rethink of Strasbourg's approach, and to a lesser extent also that of other human rights bodies. I am well aware that this makes the third model less attractive", and p. 119: "[i]t is, however, not free of all weaknesses, and is lacking in explicit textual support at least with regard to some treaties".

unworkable due to overlapping and perhaps conflicting national or regional standards".[245] It was also argued by Norway and France that recognising jurisdiction of troop-contributing nations would undermine the coherence and effectiveness of peacekeeping missions.[246]

In conclusion, I see two options of evolving ECtHR case law so as to afford a satisfactory human rights protection for individuals in these cases. The first option is that the ECtHR would resume its "dynamic and evolutionary" approach and adopt a similar approach as in *Jaloud* and establish that extraterritorial jurisdiction in terms of the ECHR can be exercised also in the context of UN peacekeeping under certain circumstances. The second option would be to adopt the "third model" of jurisdiction suggested by Milanovic. A profound human rights protection would then (at least in theory) be afforded to victims of sexual abuse also in the context of UN peacekeeping operations in countries outside of Europe. However, this would not be satisfactory from a human rights perspective, as the possibilities of bringing a legal claim and holding the perpetrator accountable would depend on where the perpetrator is from. In some cases, the troop-contributing nation in question does not recognise the occurrence of, for instance, sexual exploitation and abuse by their troops and many of the major troop-contributing nations are non-European (i.e. the ECHR would be irrelevant) and have not ratified the Optional Protocol to the ICCPR and thus not recognised the individual complaints mechanism contained therein.

This essay has certain delimitations and is for example is very Europe-centred. Other regional mechanisms and instruments fall outside its scope, mainly because of limitations in terms of space and time. It is possible that the extraterritorial application of the ECHR argued for here could serve as a model for other regional mechanisms, such as the Inter-American Commission on Human Rights or the African Commission on Human and Peoples' Rights, and their respective human rights instruments, and thus indeed form part of a "global solution". However, the existing regional human rights mechanisms do not cover the entire world (for example, there is no regional Asian convention for the protection of human rights) and therefore it is argued that a more comprehensive, "global" solution is required. This is elaborated upon in chapter 5.3.

[245] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 90.
[246] Ibid., para. 94.

5 Concluding remarks

5.1 Regionally: the ECHR could serve as a legal venue

As argued for above, there is a possibility that the ECHR could provide a sufficient legal basis for successfully bringing a legal claim against a European troop-contributing nation, whose soldiers commit human rights violations against civilians in the course of UN peacekeeping. It has been argued that sexual exploitation and abuse cannot be covered by the mandate of a peacekeeping operation and is therefore not attributable to the UN, but to the troop-contributing nation. In order for such a claim to be able to be declared admissible, the ECtHR must step away from its case law established in *Behrami and Saramati* and subsequently reaffirmed in *Kasumaj* and *Gajic*, or at least adopt a more nuanced approach, recognising that perhaps not all acts or omissions by UN peacekeepers are attributable to the UN.

Where certain acts or omissions are attributable to a Contracting State, the question of extraterritorial jurisdiction needs to be examined. This is where the recent development of the case law if the ECtHR becomes relevant; in for example *Al-Skeini*, *Al-Jedda* and *Jaloud*, all relating to conduct attributable to European States in Iraq, the ECtHR has shown an increasingly permissive approach to extraterritorial application of the ECHR. In *Jaloud*, the ECtHR stated that the Netherlands had exercised extraterritorial jurisdiction "[…] within the limits of its SFIR mission and for the purpose of asserting authority and control over individuals passing through the checkpoint"[247]. Likewise, it has been argued in this essay that where, for example, sexual abuse takes place in a tent or other facilities set up for the purpose of fulfilling the mandate, extraterritorial jurisdiction may be exercised according to a permissive interpretation of the *State agent authority and control* exception to the rule that jurisdiction is "primarily territorial". It has also been argued above that an individual may be brought within the jurisdiction of a State through the exercise of any form of physical control, not necessarily within a detention facility but also in a room, in a vehicle or outdoors. Where extraterritorial jurisdiction arises, the State must secure to that individual the rights and freedoms in the ECHR relevant to the situation of that individual. In terms of Article 3 of the ECHR, that includes, in addition to the obligation not to subject any individual to treatment contrary to the Article, the positive obligation to conduct an effective investigation of well-founded allegations.

Another possible solution that has been argued for in this essay is the model of jurisdiction advocated for by Milanovic, as outlined in chapter 3.2.3. Building on the separation between positive and negative obligations, it seems to be able to reconcile the idea of universality of human rights with the need for effectiveness. If this model were applied, Contracting States would, in the context of UN peacekeeping operations overseas, be able to be held

[247] *Jaloud v. The Netherlands*, para. 152.

accountable for violations committed by its agents of the negative obligation not to subject anyone to treatment contrary to, *inter alia*, Article 3, while not having to comply with positive obligations. Thus, in the Central African Republic example, victims would be able to bring a legal claim against the sending (European) State where the soldiers committed acts possibly amounting to treatment contrary to for example Article 3.

5.2 Globally: insufficient possibilities for victims to bring a legal claim against troop-contributing nations

As has been described in this essay, I am of the opinion that the current legal framework does not provide a satisfactory human rights protection where civilians are subjected to sexual exploitation and abuse by UN peacekeepers. The different possible legal venues are insufficient in different ways.

This essay attempts to display that the ECHR is a human rights treaty that could provide prospects of providing the individual victims with a legal venue. According to the reasoning presented above (chapter 5.1), the ECHR could be interpreted so as to provide a possibility for victims of sexual exploitation and abuse in the course of UN peacekeeping operations overseas to bring a legal claim against the sending State. However, from the perspective of the victim, this is insufficient as the possibility of administering justice thus would depend on where the perpetrator is from; in many cases, the perpetrator is not from a State Party to the ECHR.

The ICCPR, on the other hand, is almost universal in its scope, with 168 States Parties and 7 signatories.[248] However, as outlined above, many of the major troop-contributing nations have not ratified the Optional Protocol containing provisions on the individual complaints mechanism. I am of the opinion that the ICCPR and the HRC cannot serve as a sustainable and long-term solution as the complaints mechanism currently does not apply to all peacekeepers. Thus, the problem is the same as in relation to the ECHR – where there is an allegation against peacekeepers from a troop-contributing nation that has not ratified the Optional Protocol and where that country does not take action domestically to punish or prevent these acts from occurring, the victims are left without possibilities to use the ICCPR as a legal venue. In addition, the jurisprudence of the HRC is not very elaborated in terms of extraterritorial jurisdiction and more importantly, the decisions of the HRC are recommendations, which are not legally binding.

There are situations where sexual exploitation and abuse occur and the sending State to which the alleged perpetrator belongs is not party to the ECHR nor to the ICCPR, and perhaps does not even acknowledge the occurrence of sexual exploitation and abuse and thus not taking action to combat its occurrence or investigate into allegations. Taken together with the fact that the host State often lacks a functioning legal system, victims are often unable to seek justice.

[248] http://indicators.ohchr.org/, acquired 4 October 2015.

5.3 The need for a "global solution"

In order to ensure victims of sexual exploitation and abuse committed by UN peacekeepers a satisfactory human rights protection and access to justice and in order to properly address impunity, there is a need for something to be changed. Although the ECHR could, if applied in the manner argued for in this essay, provide a functioning legal venue in this respect, it would be insufficient. As outlined initially, the starting point of this essay is that human rights are universal and should be enjoyed equally by all individuals. Thus, it would be unacceptable if different human rights standards applied to different soldiers, depending on where in the world he or she is from. There is a need for a more comprehensive, global framework to address the occurrence of sexual exploitation and abuse in the course of UN peacekeeping operations, as the UN system apparently has been unable to sufficiently address it despite being aware of it and despite taking a number of measures.

Efforts have been made to investigate the possibilities of a legally binding convention for the purpose of addressing sexual exploitation and abuse in UN peacekeeping operations, but have not proven to be very successful, for different reasons. Further, the proposed convention would not apply to military members of national contingents, against which most of the allegations of sexual exploitation and abuse are directed.[249] As I see it, there are (at least) two possibilities of ensuring a satisfactory human rights protection of victims, that fills its purpose regardless of where the perpetrator is from; either a convention covering also military members of national contingents, which would deprive States of their exclusive jurisdiction in criminal matters in this context, or the establishment of a specialised international court or tribunal for this purpose. In order to mark the recent fifteenth anniversary of the adoption of Security Council resolution 1325, a comprehensive study was carried out with regard to the implementation of the resolution and the *women, peace and security agenda*.[250] This study emphasised that the feasibility of setting up an international tribunal for sexual exploitation and abuse by UN peacekeepers and UN staff in the field should be discussed with all stakeholders.[251]

As argued for by some already in 1964, the reservation of exclusive jurisdiction over military personnel to the sending State has no justification apart from the purely political justification that it is only upon this basis that States will provide contingents.[252] It is not likely that UN Member States would agree to either a convention or a court or tribunal to adjudicate in these matters. However, the issue of impunity must be addressed. A key question is who or what instance may legitimately review conduct directly or indirectly sanctioned by the Security Council. In this essay, it has been argued for a more prominent role of the ECtHR in this regard. However, in addition to the fact that the possibilities for victims of bringing a legal claim would then vary depending on where the perpetrator is from and thus in practice different human rights

[249] Wills (2013), p. 53.
[250] Global study on the implementation of United Nations Security Council resolution 1325.
[251] Ibid., p. 17.
[252] Bowett (1964), p. 440; see also Wills (2013), p. 53.

standards would apply to different contingents, it could be argued that there is a sort of democratic deficit; a regional court might not be the right instance for reviewing acts or omissions in the course of UN peacekeeping operations, given the universal character of the UN. What is needed is a uniform review system, applicable to all troop-contributing nations. This might be unrealistic or even a utopia. However, some sort of review mechanism must be established, in order to address impunity, in order for the UN not to lose all of its credibility, and in order for individuals that have been subjected to human rights violations by UN peacekeepers to be able to seek justice and redress.

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