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„Human Rights Treaty Bodies’ Monitoring of the
Accountability in Peacekeeping Operations: a Crossover
between Obligations of the UN and the Member States“

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Table of Abbreviations

BOI	Board of Inquiry
CESCR	Committee on Economic, Social and Cultural Rights
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
MOU	Memorandum of Understanding
OI	Ombudsperson Institution
OIK	Ombudsperson Institution of Kosovo
OSCE	Organization for Security and Co-operation in Europe
PISG	Provisional institutions of self-government
SEA	Sexual exploitation and abuse
SOFA	Status of Force Agreement
SRSG	Special Representative of Secretary General
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo

Introduction

1 Research objectives and research questions

This paper aims to reveal the potential roles of United Nations (UN) human rights treaty bodies in monitoring the accountability of the UN. The accountability of international organizations has increasingly received attention on growing number of occasions in which international organizations have a direct influence on the lives of individuals. The UN peacekeeping operation is one of the cases in which activities of the UN could cause damages to civilian population. While there are growing claims against international organizations with respect to human rights violations in some international courts and domestic courts, UN human rights treaty bodies seem to play a minor role in the issue of the accountability of international organizations. In contrast to this general understanding, this paper will review the roles of UN human rights treaty bodies as accountability mechanisms for UN peacekeeping operations in terms of the fact that, at times, the Human Rights Committee (HRC), under the International Covenant on Civil and Political Rights (ICCPR), has monitored the human rights situations in UN peacekeeping operations under the reporting system.

The main research question of this paper is this: What is the legal basis of UN human rights treaty bodies for monitoring the UN's accountability with regard to peacekeeping operations? More specifically, does the HRC have the competence to review the human rights obligations of each state party concerned in terms of UN peacekeeping operations? And what kind of legal basis does the HRC possibly rely on in order to review the human rights obligations of the UN, if any, in relation to peacekeeping operations? As associated questions, this paper will also address current UN efforts to strengthen the criminal accountability of UN peacekeepers. In this respect, this paper will answer a question on how human rights treaty bodies could contribute to the reform of accountability mechanisms in UN peacekeeping operations.

2 Methodology and materials

The research approach of this study comprises (1) a case study of the reporting system under the ICCPR, (2) the consideration of UN reforms for promoting the accountability in UN peacekeeping operations, and (3) the examination of the legal relationship between the states concerned and international organizations in terms of the accountability in UN peacekeeping operations. In the case study, cases touching upon the human rights situations in UN peacekeeping operations are dealt with. This study devotes special attention to a case that the HRC has monitored the human rights situations in the interim administration in Kosovo with the help of the UN Interim Administration Mission in Kosovo (UNMIK) by virtue of its specific situation in Kosovo. Based on analyses on accountability mechanisms for UN peacekeeping operations, this paper will make an observation on the legal relationship between the UN and its member states. As a consequence, this study will reach a conclusion on the potential roles of UN human rights treaty bodies to monitor the accountability of the UN.

3 Object of study

The main subjects of this study are HRC, UN, cases in the reporting system under ICCPR and accountability mechanisms in UN peacekeeping operations. Thus, for example, the Kosovo Force led by NATO (KFOR) falls outside the scope of this study.

In this paper, the term ‘peacekeeping operation’ refers to all operations created by a UN principle organ and conducted under the command and control of the UN, but excludes enforcement actions and the exercise of the collective right to self-defense authorized by the UN Security Council. The operations include traditional peacekeeping, peace enforcement and peace support.

This paper mainly addresses peace operations involving military force by virtue of the present research questions, which focus on the relationship between the UN, troop-contributing states and the host state in a peacekeeping operation. A distinction must be drawn between members of peacekeeping troops (members of contingent or armed forces), members of police and civilian missions and officials of UN. Officials of UN comprise UN staff and UN volunteers

and experts performing missions, including UN police, military observers, military advisers, military liaison officers and consultants¹. In light of the scope of this paper, the term ‘peacekeepers’ is used for soldiers or members of military contingents sent to a peace operation. Unless otherwise noted, the discussions below concern ‘peacekeepers’.

Characteristics of the perspective of this paper include a focus on the possible role of the HRC as one of accountability mechanisms in peacekeeping operations, and to see that the HRC’s monitoring of member states’ compliance with ICCPR in peacekeeping operations constitutes one kind of accountability mechanisms in a sense.

A comparative analysis of limitation and advantage in other remedial procedures is essential in this paper, while the main object of this research is the reporting system under ICCPR, which does not provide an immediate means to access remedies. This is because there can be found complementary or closely connected relationship between the former and the latter. The relationship can be rephrased as a relationship between judicial and administrative control.

4 Outline of the study

This study comprises two parts. Part I deals with the examination of the existing accountability mechanisms in the context of peacekeeping operations, with focusing on the scope of their institutional characteristics, the core objectives underlying each mechanism and their limitation in terms of rights to remedy. This Part highlights the current situation and challenges in accountability mechanisms for UN peacekeeping operations. In Part II, based on considerations in Part I, discussions segue into assessment of the potential role of HRC and the reporting system under ICCPR from the perspective of seeing the reporting system as another accountability mechanism. In this regard, several legal issues to be answered arise. The description of each chapter is as follows.

Chapter 1 first set the direction in the usage of the concept of accountability by international organizations, because issues related to accountability can spread so far ranging

¹ See the definition in a report by the Group of Legal Experts, ‘Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations’, UN doc. A/60/980 (16 August 2006), para. 7.

from the field of international relations to that of political philosophy. This chapter defined the understanding of accountability mechanism in this paper. The concept defined is the basis of the entire paper. According to the concept of accountability to be set in this study, several types of issues of accountability are examined. This entails the examination of several types of mechanisms under the concept of accountability.

Chapter 2 is devoted to an extensive analysis on the accountability that the UN assumes in relation to peacekeeping operations. Distinction must be made between circumstances in which the UN assumes legal responsibility to misconducts committed by peacekeepers and the other circumstances. In the latter circumstances, recent discussions are centered on problems associated with effective investigation and prosecution of alleged peacekeepers as well as internal control over a peacekeeping operation. At present, there lie problems in light of local people's rights to remedy in both cases. The present study compares the former and the latter cases, and leads to further considerations on how an accountability mechanism should function.

The case of UNMIK in which the reporting system under ICCPR is applied is a key fact about the possibility of further application of the reporting system in UN peacekeeping operations. The specific style of accountability mechanisms in the interim administration in Kosovo is highlighted in chapter 2, followed by the case study of reporting by UNMIK under ICCPR in chapter 3.

Chapter 3 is concerned with the potential role of the reporting system for monitoring a UN mission in peacekeeping operations. The adequacy of the reporting system is tested according to the institutional characteristics and by comparison with other forms of accountability mechanism examined in chapter 2.

Chapter 4 gives consideration to cases in which HRC raised a question of the extraterritorial applicability of ICCPR, including its application to activities of member states in peacekeeping operations, in the course of the reporting system. These cases imply the beginning of practices to monitor treaty obligations of member states in the context of peacekeeping operations. In these cases, the application of the reporting system requires special legal bases, which is discussed in detail in this chapter. Through the consideration in chapter 4, an answer is given to the main question of this study.

Part I

Designs of accountability mechanisms for UN peacekeeping operations

Chapter 1

Many faces of accountability mechanisms

1.1 Growing calls for the accountability of international organizations

The accountability of international organizations has increasingly received attention since the 1990s, in connection with an increasing number of occasions wherein international organizations have exercised direct influence on the lives of individuals². The occasions include situations within the European Union (EU), development projects funded by international financial institutions, peacekeeping operations, international administration and targeted sanctions adopted by the UN Security Council.

Accountability is linked to the exercise of power and its abuse³. Those who exercise power are required to be accountable when they abuse the power. Consequently, those who can be held accountable are required to keep justifying their performance to other. Thus, international organizations are facing the issue of accountability when they exercise a direct influence on the lives of individuals due to the possibility that activities of international organizations impair individuals' interests and rights. For instance, the accountability of the UN come into question when the UN deploys peacekeeping forces in territories where national authorities do not exercise governmental functions sufficiently and effectively. The question

² See G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (New York: Cambridge University Press, 2011), p 53; M Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005), p 61.

³ It is said that 'Power entails accountability, the duty to account for its exercise', International Law Association (ILA), *The final report on accountability of international organisations*, (Berlin: 2004), p 5.

comes from the fact that the UN exercises certain governmental functions—by peacekeepers relating to the population in the field—in the course of peacekeeping operations and that peacekeepers perform their responsibilities to the population in the same manner as officials of a national government would be accountable.

1.2 Designs of accountability mechanisms

As can be seen, the underlying idea connecting power and accountability is a so general perspective that the issue is common to a state administration and a company's management, where an independent legal person exercises power on behalf of particular people⁴. When discussing the accountability of international organizations, questions relate to the accountability vis-à-vis individuals as well as member states, in terms of relevant actors, and also involve legal, political and financial accountability, in terms of the type of accountability⁵.

In connection with the main object of this study, HRC aims at contributing to the promotion of human rights through widely publicizing the Concluding Observations under the reporting system. The Committee, as a matter of routine, has requested a state party to make its Concluding Observations public and broadly disseminated throughout the country. Moreover, the Committee expects relevant authorities of member states to involve civil society and NGOs in the preparation of periodic reports under the reporting system⁶. In this way, member states of ICCPR can give account to every kind of actor.

(a) Accountability in international law theory

⁴ Some observers see that there has been a considerable lack of transparency in decision-making among states on international scene, while more and more international agreements predetermine national policies. See A-M Slaughter, 'The accountability of government networks', *Indiana Journal of Global Legal Studies* 8.2 (2001), pp 347-367, pp 347-355.

⁵ The broad scope of accountability questions was recognized in most of literatures. See for example ILA, *supra* note 3.

⁶ For instance, in the Concluding Observations concerning Kosovo, 'The Committee requests that the text of the present report and these concluding observations be made public and broadly disseminated throughout Kosovo, and that the next periodic report be made available by relevant authorities to civil society and to non-governmental organizations operating in Kosovo' (CCPR/C/UNK/CO/1 (14 August 2006), Part I, para 23).

From a legal perspective, the concept of accountability is especially important for the point that the concept adds a fresh dimension to primary norms of international organizations.⁷ It was, in fact, demonstrated by the International Law Association (ILA), who streamlined the principles for the policies and activities of international organizations. Professor Hafner discerns the importance of the concept of accountability as follows:

‘It is a legal response to the growing actual or potential impact of IOs on international relations. It is aimed at striking a balance between the power of states and of international organizations.’⁸

(b) A categorization of accountability mechanisms

Accountability mechanisms that supposedly exist can have different forms as occasion may demand. Accountability mechanisms are generally divided into two categories: Giving account and being legally accountable⁹. The former can take the form of internal and external scrutiny and monitoring. The latter can assume the form of liability and responsibility systems in international law. The differentiation between the two categories can also be restated as mechanisms preventing one from holding to account and mechanisms holding one to account¹⁰. The two ways of accountability mechanisms form a mutually complementary relationship. While this paper principally discusses the former mechanisms—specifically the reporting system under the ICCPR—an examination of the latter mechanisms is also required to shed light on the position of the reporting system. As shown here, the broad analytical range of issues of accountability allows for an analysis of the reporting system and UN peacekeeping operations from many directions, whilst the truth is that the UN lags behind in substantive and procedural law for UN accountability mechanisms¹¹.

⁷ G Hafner, ‘Can International Organizations be Controlled? Accountability and Responsibility’, *American Society of International Law Proceedings* 97 (2003), pp 236-240, pp 239-240.

⁸ Ibid, p 240.

⁹ Some authors adopted even broader concept of accountability. See D Curtin and A Nollkaemper, ‘Conceptualizing accountability in international and European Law’, *Netherlands yearbook of international law* 36.01 (2005), pp 3-20, pp 7-8.

¹⁰ The ILA organized its study into three-fold, internal and external scrutiny, liability and responsibility. See ILA, *supra* note 3, p 5.

¹¹ For example, the lagging development of accountability mechanisms within the UN has led to a growing demand for external judicial control over the UN. See A Reinisch, ‘To What Extent Can and Should National Courts “Fill the Accountability Gap”?’’, *International Organizations Law Review* 10.2 (2014), pp 572-587.

The question of accountability of international organizations can be addressed both through judicial process and administrative process. The jurisprudence of national courts and European regional international courts has increasingly shown a development in this regard in the last few decades. A series of jurisprudence has been at the central attention in terms of judicial control over the accountability of international organizations. Nonetheless, administrative control over the accountability of international organizations is still an integral part of accountability mechanisms.

(c) Human rights accountability

As to issues of accountability in UN peacekeeping operations, one of the substantive issues is the violations of human rights by the UN and the lack of legal remedy to the victims¹². This paper also focuses on the question of human rights violations by peacekeepers who are personally accountable, which does not, in essence, bring up the question of liability and responsibility of the UN (see section 2.2 of chapter 2). That is to say, even though the latter question arises where the UN is not legally responsible for the human rights violations committed by peacekeepers, the question still concerns the accountability of the UN. As mentioned above, the question of accountability can arise insofar as the UN exercises power over the people in the field. Furthermore, the issue of effective legal remedy to victims rests on a variety of factors, including immunity of international organizations, no functional legal systems in conflict-affected areas, and fragile administrative underpinnings in a host state.

¹² See A Reinisch, 'Securing the accountability of international organizations', *Global Governance* 7 (2001), pp 131-149, p 131.

Chapter 2

Deficits in accountability vis-à-vis individuals in peacekeeping operations

This chapter analyzes accountability that the UN assumes in relation to peacekeeping operations. The analysis is made according to two different situations: in which the UN is accountable (2.1) and in which the UN gives account (2.2).

2.1 Remedy for peacekeepers' misconducts attributable to the UN

The human rights accountability of the UN is the one of most compelling reasons for discussing accountability in the context of UN peacekeeping operations. The core of the problem is that local people suffering from the conduct of operations carried out by the UN are not always guaranteed to obtain redress for a variety of reasons. This section will demonstrate under what circumstances locals can get a remedy, what kind of accountability mechanisms has been developed so far and the remaining problems. The main focus will be on the general accountability mechanisms in UN peacekeeping operations and those in the UN interim administration in Kosovo as a more problematic case, thereby maintaining the division between peacekeepers' conducts attributable to the UN and those not attributable to the UN.

2.1.1 Scope of liability

The UN is immune to the jurisdiction of local courts in accordance with the Convention on Privileges and Immunities of the United Nations (General Convention)¹³ and the Model Status of Forces Agreements (SOFA)¹⁴. Nevertheless, there is a possibility that the local population suffering damages from the conduct of UN operation may be compensated financially. With respect to members of military contingent, UN liability is provided that 'The United

¹³ Convention on the Privileges and Immunities of the United Nations (General Convention), New York, 13 February 1946, United Nations, Treaty Series, vol. 1, p. 15, Article II, section 2.

¹⁴ Model status-of-force agreement for peacekeeping operations, A/45/594 (9 October 1990), para 51.

Nations will be responsible for dealing with any claims by third parties' when the damage was caused by members of military contingent 'in the performance of services or any other activities or operation under this MOU [memorandum of understanding]',¹⁵. This, however, requires fulfillment of the following requirements. These rules are developed through UN practices and are partly stated as internal rules of the UN.

The UN understands that its international responsibility for peacekeeping operation follows the principle of state responsibility and that 'damage caused in breach of an international obligation and which is attributable to the State (or the Organization), entails the international responsibility of the State (or of the Organization) and its liability in compensation'¹⁶. This is reaffirmed in Article 4 of the Articles on Responsibility of International Organizations¹⁷.

Based on that, the third-party liability of the UN arises out of the acts of the peacekeepers under the performance of official duties¹⁸. The UN has expressed its position that the Organization has no legal liability for damage resulting from off-duty acts committed by members of peacekeeping forces¹⁹. In case the UN assumes third-party liabilities in the context of peacekeeping operation, the UN pays compensations for the damage caused to a third party due to the performance of official duties for peacekeeping operations. The UN has interpreted that a peacekeeper is considered off-duty when he/she acts in a non-official capacity while inside or outside the area of operations as well as when on leave²⁰. However, the factual circumstances of each case will be also taken into account²¹. Even if acts of peacekeepers fall within its official acts, the liability of the UN, especially arising from combat-related activities, is determined with regard to the degree of effective control exercised by a certain party²².

¹⁵ The Model Memorandum of understanding (amended in 2007), A/61/19 (Part III), Article 9. The revised Model MOU was approved by a General Assembly resolution 61/276. See A/RES/ 61/267 (15 June 2007).

¹⁶ 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations', Report of the Secretary-General, A/51/389 (20 September 1996), para. 6.

¹⁷ UN Doc A/RES/66/100 (27 February 2012).

¹⁸ Memorandum to the Director, Office for Field Operational and External Support Activities, 1986 *United Nations Juridical Yearbook*, pp. 300-301; A/51/389, supra note 16, paras. 6-8.

¹⁹ Memorandum to the Director, Office for Field Operational and External Support Activities, Id, pp. 300-301.

²⁰ 'Liability of the United Nations for claims involving off-duty acts of members of peace-keeping forces--determination of "off-duty"', UN Juridical Yearbook 1986 (Part II), p 300.

²¹ Ibid.

²² A/51/389, supra note 16.

Claims arising out of misconducts committed by peacekeepers during ordinary operations are often rejected by the UN on the ground of ‘operational necessity’²³. The UN force commander has the discretion to decide what constitutes such operational necessity²⁴. While the UN has given some criteria for deciding operational necessity²⁵, the determination would depend on a variety of factual conditions in each case.

2.1.2 The Congo settlement

In 1965, the UN paid compensation in settlement of claims by Belgian citizens for losses caused as a result of the Congo operation, which was not of military-necessity nature²⁶. The UN paid the Government of Belgium \$1.5 million under the agreement concluded between Belgium and the UN Secretary-General²⁷. The reason for the compensation was stated that ‘it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.’²⁸

The compensation was paid based on the policy of the UN on third-party liability. The UN assumes responsibility for ‘unjustifiable damages’ arising outside the scope of military-necessary operations. In the case in question, the existence of ‘unjustifiable damage’, which is a serious violation of human rights, lessened the burden of proving the existence of damage²⁹. According to the letters from the Secretary-General, only damage arising outside of ‘military

²³ M Zwanenburg, ‘UN peace operations between independence and accountability’, *International Organization Law Review* 5 (2008), pp 23-47, p 32.

²⁴ A/51/389, supra note 16, para 14.

²⁵ Ibid.

²⁶ Exchange of letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, New York, 20 February 1965, 1965 UN Juridical Yearbook, p. 39.

²⁷ Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the USSR, S/6597, 1965 *United Nations Juridical Yearbook*, p. 41.

²⁸ Exchange of letters constituting an agreement, supra note 26, p. 39

²⁹ C Wickremasinghe and G Verdirame, ‘Responsibility and liability for violations of human rights in the course of UN field operations’, C. M. Scott ed., *Torture as tort: comparative perspectives on the development of transnational human rights litigation* (Hart Publishing, 2001), pp.465- 489, p. 475.

necessity' was compensable³⁰. It was stated that the legal basis underlying this policy comprised generally recognized legal principles, the General Convention, international humanitarian conventions, equity and humanity³¹. In the Congo settlement case, the Secretary-General accepted the UN's third-party liability as routine when the UN's legal liability is established.

Furthermore, the Congo settlement was a result of diplomatic protection by espousing the claims of Belgian nationals³². Claims in the form of diplomatic protection could be limited or affected by the discretion of the claimant state regarding whether or not to espouse a diplomatic claim and whether or not to pass on to the victim any reparation paid³³. Therefore, the way of the Congo settlement is not a complaints mechanism that is directly available to individuals. It also means that this form of compensation follows a case-by-case basis, which hinges on 'international pressure or litigation by the victim's state'³⁴. In fact, the lump-sum settlement is a much less common form of settlement.

2.1.3 Claim review board

In contrast with the Congo settlement, in which claims for compensation were settled through agreements between Belgium and the UN, liability issues in Somalia (UNOSOM II) and former Yugoslavia (UNPROFOR) were settled by claims review boards. Claims review boards (or local claims review boards) are UN administrative organs that operate a mission-by-mission basis in connection with claims brought against the UN or against a troop-contributing country³⁵. In practice, they are set up only when necessary. Claims review boards are delegated authority by the Controller to settle third-party claims in connection with acts of civilian or military

³⁰ C Wickremasinghe and G Verdirame, *ibid*.

³¹ Letter dated 6 August 1965 from the Secretary-General, *supra* note 27, p. 41.

³² Zwanenburg 2005, *supra* note 2, p. 88; A/51/389, para. 37.

³³ Wickremasinghe and Verdirame, *supra* note 29, p. 475.

³⁴ C Sweetser, 'Providing effective remedies to victims of abuse by peacekeeping personnel', *New York University Law Review* 83, (2008), pp. 1643-1678, p. 1663.

³⁵ Zwanenburg 2005, *supra* note 2, p. 90; K Schmalenbach, 'Third party liability of international organizations: a study on claim settlement in the course of military operations and international administrations', *International Peacekeeping* 10, (2005), pp. 33-51, p.41.

members of the mission, which were committed as part of official duties³⁶. They are also authorized to commit the UN to pay a settlement amount within its delegated financial authority³⁷. There is a temporal limitation for the submission of claims against the UN, a six-month statute limitation³⁸. Moreover, the compensation payable to third-party claimants is, in principle, limited to a maximum amount of US \$50,000, in relation to pecuniary loss³⁹. As is obvious above, claims review boards do not accept claims that are attributable to off-duty acts of members of peacekeeping operations⁴⁰.

Claims review boards have served as a substitute of ‘a standing claims commission’ originally envisaged in article 51 of the model SOFA, and of the dispute settlement mechanism envisaged in article 29 of the General Convention as well. The UN has found the existing mechanism of a claims review board was adequate for dealing with third-party claims⁴¹. The Secretary-General foresaw that claims review boards should remain as heretofore, and that no new procedures were necessary for dealing with third-party claims for some time in the future⁴². At the same time, the dispute settlement mechanism in the model SOFA was recognized as an option for potential claimants who prefer a dispute settlement with a neutral third party⁴³.

In respect to the position of the injured party, the dispute settlement by claims review board has not incorporated the injured party in the course of proceedings, and the injured party has not influenced on the solution⁴⁴. A commentator reported that the strength of an injured party’s negotiation hinges on the diplomatic protection given by the state of their nationality⁴⁵.

³⁶ Zwanenburg 2005, *supra* note 2, p 90.

³⁷ Zwanenburg 2005, *ibid.*; Schmalenbach, *supra* note 35, p 41.

³⁸ Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations, Report of the Secretary-General, A/51/903 (21 May 1997), paras 15-20.

³⁹ A/51/903, *id.*, paras 27-29.

⁴⁰ Zwanenburg 2005, *supra* note 2, p 90.

⁴¹ A/51/903, *id.*, paras 9-11.

⁴² A/51/903, *id.*, paras 9-10.

⁴³ A/51/903, *id.*, para 10.

⁴⁴ Schmalenbach, *supra* note 35, p 42.

⁴⁵ *Id.*, p 43.

2.1.4 Limited access to remedy

As observed above, the UN does not assume responsibility for off-duty acts of members of a peacekeeping operation. In addition, UN practice has excluded many claims based on the basis of ‘operational necessity’. On the other hand, UN practice saw several compensation cases that were revealed to the public. These cases were settled in a relatively flexible way, which customized proceedings according to the UN’s and state parties’ convenience, instead of strictly following the written procedures, such as ‘a standing claims commission’ in Article 51 of the model SOFA. In these third-party liability cases, especially in a case like the Congo settlement, the diplomatic muscle of the claimant states was crucial to the negotiation over settlement with the UN. Additionally, taking into account the temporal and financial limitations of UN third-party liability proceedings, these proceedings are of limited effectiveness as a means to seek full compensation from the victims’ viewpoint. These third-party liability proceedings seem like a mechanism to seek the UN’s responsibility toward member states, instead of toward individuals.

It brings us back to the beginning of a problem or turns to a new challenge. In light of the rights to a remedy or a right of access to court, the limited access to remedy resulting from the current system leads to the argument that the domestic courts should engage in dispute settlement on the ground of balancing the independence of the UN and individual rights⁴⁶. Stretching back to the initial arrangement between states and the UN concerning the grant of immunity and the provision of a dispute settlement procedure under section 29 of the General Convention, the consequential difficulties in accessing remedy is posing a question to the UN.

⁴⁶ A Reinisch, *International Organizations before national courts* (Cambridge University Press, 2000), p 369.

2.2 Remedy for peacekeepers' misconducts not attributable to the UN

2.2.1 Criminal and civil accountability of peacekeepers

As to a case where a misconduct of a peacekeeper is not attributable to the UN, the sending state has exclusive jurisdiction over the case⁴⁷. For instance, 'if the loss, damage, death or injury arose from gross negligence or willful misconduct of personnel provided by the Government, the Government will be liable'⁴⁸. Generally speaking, when a victim of local people seeks compensation from a peacekeeper alleged to cause damages to the victim or from the sending state, for that purpose the case first needs to be investigated by prosecutors as a criminal case and then get the confirmation of sentence from a court.

Sending states are understood not to be interested in or willing to investigate and prosecute members of their contingents for the reason that, after a perpetrator returns the state, the victim is far away, having a trouble with accessing evidence, witness and the victim⁴⁹. Consequently, one commentator even calls the current situation 'near-total impunity' of peacekeepers⁵⁰. Furthermore, the UN had not followed up the allegations dealt by sending states for long time. Sending states on the other hand had not had such obligation to inform the situation of handling allegations⁵¹. For these reasons, the problem of local people's right to remedy arises.

Although the issue of civil and criminal responsibility of individual peacekeepers is legally none of the UN's business, criminal misconducts committed by peacekeepers and the proceedings thereof are currently drawing attention within and outside the UN. The dissemination of scandals about sexual exploitation and abuse (SEA) committed by UN peacekeepers has sparked a discussion about criminal responsibility of peacekeepers.

⁴⁷ The model SOFA, paragraph 27.

⁴⁸ The Model MOU, Article 9. See also the revised Model MOU .

⁴⁹ Working paper on the accountability of international personnel taking part in peace support operations, prepared by F Hampson, E/CN.4/Sub.2/2005/42 (7 July 2005), paras 63-65.

⁵⁰ C Ferstman, 'Criminalizing sexual exploitation and abuse by peacekeepers', Report of United Institute of Peace, (available at <http://www.usip.org/sites/default/files/SR335-Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf>), 2013, p 2.

⁵¹ Working paper on the accountability, supra note 49, para 66.

To illustrate the key concept of accountability and its impact on legal issues, this section broadens the discussion to include criminal responsibility of peacekeepers, taking SEA as a typical example of misconducts not attributable to the UN. In fact, while there are specific legal and procedural problems accompanied by prosecution of SEA crimes, the issue of SEA by peacekeepers has brought about significant reforms in UN internal regulation. Needless to say, there have been SEA cases committed by UN staff other than members of military contingent. However, this paper only focuses on the issue of misconducts committed by soldiers and the response of the UN to it.

A. The issue surfacing in the international community

The UN has been under attack on the issue of SEA by peacekeepers since the first allegations arose in 1992 concerning the UN Operation in Mozambique (ONUMOZ). Following the sharp rise in prostitution and trafficking for the purpose of forced prostitution that accompanied UN mission in Cambodia, Somalia and Bosnia and Herzegovina, other reports publicized peacekeepers' alleged involvement in SEA in West Africa (Liberia, Sierra Leone and Guinea-Bissau), the Democratic Republic of Congo (DRC), Eritrea and East Timor⁵².

The heart of issue in terms of SEA by UN peacekeepers comprises the practical difficulties in accessing judicial redress for victims and in providing relief to the victims due to the lack of a functional legal system in the host state or due to the unwillingness of states having jurisdiction. The response of the UN to this issue includes institutional reforms, conduct of research and reforms of internal rules concerning peacekeeping operations.

B. Response of the UN

From 2002, UN policies began to address the issue of SEA by peacekeepers in a comprehensive way⁵³. In the Secretary General's Bulletin on 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse' was adopted in 2003⁵⁴. The 2003 Bulletin provides

⁵² O Simić and M O'Brin, "'Peacekeeper babies': an unintended legacy of United Nations peace support operations", *International Peacekeeping* 21. 3 (2014), pp 345-363, p 346.

⁵³ Simić and O'Brin, *ibid*.

⁵⁴ Verdirame, *supra* note 2, p. 216.

definition of SEA, prohibition of SEA and obligations of peacekeepers and head of mission⁵⁵. The Secretary General requested Prince Zeid Hussein, Jordan's Ambassador to the UN, to provide a comprehensive strategy to eliminate future SEA in UN peacekeeping operation, and subsequently adopted the so-called Zeid report in 2005⁵⁶. In 2007, the Model Memorandum of Understanding (MOU) that sets rules on relation between contributing states and the UN and the Code of Conducts were amended so as to reflect UN response to SEA by peacekeepers⁵⁷. Other responses to the issue of SEA have been the gender mainstreaming in decision making and the establishment of gender unit within peacekeeping missions⁵⁸. Furthermore, the Secretary-General recommended that the Department of Peacekeeping Operations assigns full-time gender advisers and gender units to peacekeeping operations⁵⁹.

C. Victim assistance

Although widespread SEAs already reported in the early 1990s, the UN did not adopt any strategy specifically for assistance of SEA victims abused by UN peacekeepers until 2008.⁶⁰ In March 2008, the UN General Assembly adopted Resolution 62/214, the 'Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel', which has called for the establishment of the Sexual Exploitation and Abuse Victim Assistance Mechanism (SEA/VAM)⁶¹.

Currently, relevant UN organizations are seeking to establish a SEA/VAM in every country in which the UN operates⁶². The SEA/VAM is to provide medical, legal, psychological and immediate material support as well as the facilitation of the pursuit of paternity and child support claims. The current style of the SEA/VAM has relied on inter-agency cooperation within

⁵⁵ The website of UN Conduct and Discipline Unit, <https://cdu.unlb.org/UNStandardsofConduct/CodeofConduct.aspx> [last access 13 August 2015]

⁵⁶ Verdirame, supra note 2, p 216.

⁵⁷ Report of the Special Committee on Peacekeeping Operations and its Working Group, A/61/19/Rev.1, (9 June 2008) pp 39-46.

⁵⁸ Sweetser, supra note 34, pp 1648-1649.

⁵⁹ Id., p 1649.

⁶⁰ Simić and O'Brin, supra note 52, p 345.

⁶¹ Ibid.

⁶² Website of UN Conduct and Discipline Unit, the <https://cdu.unlb.org/UNStrategy/RemedialAction.aspx> [last access 5 June 2015].

the UN system, in-country UN field missions and NGO partners⁶³. However, it is reported that the SEA/VAM has not been operating at a robust level in part due to the lack of funding mechanism to assist victims⁶⁴. For this reason, the 2015 report of the Secretary-General proposed to establish a trust fund for victims to provide support complainants, victims and children born as a result of SEA⁶⁵.

Most notably, in the Secretary-General report of 2015, a trust fund was proposed in a style that monies taken from peacekeepers convicted of SEA will be deposited into the trust fund⁶⁶. The money can be taken from peacekeepers by means of fines imposed as a disciplinary measure or withholding accrued annual leave by the UN⁶⁷. As another source of deposit, the Secretary-General has sought agreements of member states to transfer any payments to troop-contributing states to the trust fund, when the payments may have been suspended due to an individual suspected of SEA⁶⁸.

2.2.2 The UN's obligation to ensure obligations of sending states

In respect to members of contingent, the sending state retains exclusive disciplinary and criminal jurisdiction. When allegations of serious misconduct involving military personnel occur, the only option available for the UN is to repatriate the individuals concerned and ban them from future peacekeeping operations⁶⁹. Disciplinary sanctions and any other judicial actions rest with the sending state and national court of the state. On the other hand, in the case of off-duty misconducts committed by a member of contingent, including the case of SEA, the only obligation of the UN is to investigate the alleged offence and to call for the sending state to

⁶³ 'Special measures for protection from sexual exploitation and sexual abuse', Report of the Secretary-General, A/69/779 (13 February 2015), para. 68.

⁶⁴ A/69/779, id, para 68.

⁶⁵ A/69/779, id, paras 65-67.

⁶⁶ A/69/779, id, para 67.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ The website of the UN Conduct and Discipline Unit, <https://cdu.unlb.org/UNStrategy/Enforcement.aspx> [last access 29 June 2015].

fulfill its obligation to punish⁷⁰. Such obligation has been codified after the institutional reforms mentioned above.

Under the amended Model MOU, the exclusive jurisdiction of the sending state to investigate and prosecute its military contingents is maintained (Article 7 quinquies, para 1). New articles of the amended Model MOU provide sending states' obligations for dealing with allegations of peacekeepers as follows. The amended Model MOU provides three obligations of sending states. First, sending states have an obligation to 'notify the Secretary-General of progress in a regular basis, including the outcome of the case', when suspicions of misconduct by any member of the states are well founded (Article 7 sexies, para 1). This development was assessed as 'a significant advance', since before then the UN did not follow up misconduct cases investigated and prosecuted by civilian police officers⁷¹. Second, troop-contributing states are supposed to assure the UN that it shall exercise its exclusive jurisdiction with respect to any crimes or offences committed by a member of contingent (Article 7 quinquies, para 1). Third, sending states allow the UN to initiate a preliminary fact-finding inquiry of peacekeepers' misconduct in case of serious misconduct, if necessary to preserve evidence and where the government does not conduct fact-finding proceedings (Article 7 quater, para 2).

These obligations of sending states are not legally binding except for the obligation to 'notify the Secretary-General of progress' mentioned above. In respect to the sending state's obligation to notify, the UN is now in the proper position to follow up the progress of criminal or disciplinary proceedings committed by a member of contingent. Therefore, it can be regarded that the UN now assumes an obligation to monitor the relevant sending states regarding the progress of allegations arisen in operations.

⁷⁰ D W Bowett and et.al., *United Nations Forces: A Legal Study* (the Lawbook Exchange, 2008), p. 246.

⁷¹ Ferstman, *supra* note 50, p 5.

2.2.3 Legal consequences and remained challenges

A. Legal consequences resulted from the accountability of the UN

Despite the fact that the UN does not assume any responsibility to off-duty conduct of peacekeepers in the sense of law of international responsibility, the concept of accountability and the awareness of the rights to remedy are increasingly having legal consequence. Here again, it must be noted that the legal consequences within the UN system have arisen from the perspective of rights to remedy. In other words, the right to remedy is a legal basis to create new rules and mechanisms within the UN. On the other hand, it is another question whether the institutional reforms result in solving the problem. However, it is beyond the scope of this paper to assess this point. At any rate, reforms are still under way and are anticipated to develop further.

Bringing back once again to the beginning of problem or turning to a new challenge, there is theoretically a room to discuss UN liability for off-duty acts of peacekeepers. As described above, under present circumstances, the UN has no liability for that. In contrast, one comment draws attention, which said that:

‘... where the off-duty conduct of the peacekeepers is not isolated but widespread or even systematic, the UN may still bear responsibility for omissions if they caused a breach of its positive obligations under human rights law, international humanitarian law or both.’⁷²

An international organization’s breach of an obligation to prevent is recognized in the ILC Commentary on Draft Articles on Responsibility of International Organizations⁷³. With this respect, it is also mentioned that ‘the test for the attribution of the act was whether it related to the functions of the Organization, irrespective of whether the Force member was on or off duty at the time.’⁷⁴

According to these comment, it would be possible that victims may seek compensation from the UN in the case widespread and systematic misconducts by peacekeepers. For instance,

⁷² Verdirame, *supra* note 2, p 126.

⁷³ International Law Committee (ILC), Commentaries on Draft Articles on the Responsibility of International Organizations, available at http://legal.un.org/ilc/texts/9_11.shtml [13 August 2015], 2011, p 29, para 10.

⁷⁴ ILC, Comments and observations received from international organizations, A/CN.4/637/Add.1 (17 February 2011), p 15, para 4.

in the case of reported SEA crimes, SEA crimes by peacekeepers have been well documented. Thus, it would be fair to say that they are prevalent in peacekeeping operations. In addition, although a careful case-by-case examination is required, some cases were reported that peacekeepers allegedly committed SEA crime when being on duty or being in their case camp, forming a group of several peacekeepers⁷⁵. It is high time that lawyers clarify the UN's obligation to prevent with respect to SEA committed by peacekeepers.

Hypothetically, if the UN accepts the liability for peacekeepers' off-conduct in the case of widespread and systematic misconducts, the recognition of such liability would have deterrent effects on the UN⁷⁶, which encourages the UN to take its utmost efforts to stop peacekeepers' serious misconducts. Although UN liability system has financial and temporal limitation as described in section 2.1.1, the precedents of UN third-liability leave open the possibility that a member state seeks compensation for off-duty misconducts of peacekeepers from the UN as a last resort in case of widespread and systematic misconducts committed by peacekeepers.

B. Bridging to the next discussion

One of remained challenges is the transparency of allegations handled by sending states. Although the UN has started to follow up the progress in allegations of peacekeepers based on the sending states' obligation to notify the Secretary-General of progress, which was codified in the amended Model MOU, the information in the publicized statistic is limited to the number of allegations in each mission⁷⁷. For that reason, one commentator criticized that the UN 'refrains from naming and shaming particular countries'⁷⁸. She singles out further that:

'... peacekeeping is a source of pride for troop-contributing countries. None wish to draw attention to any stain of abuse. This is natural and underscores the importance of the UN's publicizing more concrete information about abuse allegations. The UN, however,

⁷⁵ 'Report: Peacekeepers Sexually Exploited And Abused Women And Girls In Somalia', ThinkProgress, 8 September 2014, <http://thinkprogress.org/world/2014/09/08/3564325/women-and-girls-sexually-exploited-abused-by-peacekeepers/> [last access 21 April 2015]

⁷⁶ M Bothe, 'Compliance', *Max planck Encyclopaedia of public international law*, Oxford University Press, (<http://opil.ouplaw.com>), last updated 2010, paras 104-110.

⁷⁷ The website of the UN Conduct and Discipline Unit, <https://cdu.unlb.org/Documents/KeyDocuments.aspx> [last access 29 June 2015].

⁷⁸ Ferstman, *supra* note 50, p 12.

does not wish the allegations to be made public either: Abuse allegations that affect troop-contributing countries also affect the UN. Transparent reporting thus carries a double disincentive.⁷⁹

In this regard, when taking a look at UN human right treaty bodies, these existing supervisory systems of the treaty bodies give good examples for supervising member state's duty to investigate and prosecute accused peacekeepers. Furthermore, the case of UNMIK suggests the possibility that UN human rights treaty bodies play a role as an independent supervisory body to monitor UN operational activities.

To date, the role of UN human rights treaty bodies has a minor function in the question of accountability of international organizations. Therefore, there is a little discussion on the role of UN human rights treaty bodies in this regard while these bodies are potentially capable to monitor the human rights situation in UN operational activities the name of monitoring state parties of these treaties. This is discussed further in Chapter 3.

2.3 Accountability mechanisms in the interim administration in Kosovo

After the 1999 war in Kosovo, the Security Council adopted the mandate of UNMIK by resolution 1244 in June 1999. UNMIK was initially established as exclusive administration authority over the territory of Kosovo⁸⁰, while KFOR (NATO) has assumed the responsibility of safety guarantee, including post-conflict stabilization and public safety⁸¹. Other organizations, such as Organization for Security and Co-operation in Europe (OSCE) and EU, and other UN organs have also conducted operations in Kosovo. As to the role of UNMIK, civil administration authority has been gradually transferred to the interim government, especially increasing the tendency after the adoption of the Declaration of Independence and the Kosovo constitution⁸².

⁷⁹ Ibid.

⁸⁰ Report of the Secretary-General on UNMIK, S/1999/779, (12 July 1999), para 35.

⁸¹ Id, para 4.

⁸² Id, para 17.

Facing a particular situation of international administration, UNMIK has been required more the human rights accountability in association with the exercise of authority. Among its mandates of civil administration in Kosovo, UNMIK has also been given a mandate to promote human rights⁸³. Consequently, particular complaint procedures have been adopted for local people who claim to be victims of UNMIK staff's misconducts.

2.3.1. Human rights accountability mechanisms in Kosovo

A. Domestic institutions

Local courts of Kosovo decide cases of the violation of human rights. According to an UNMIK legislation, the courts can apply international human rights norms which were incorporated in the applicable law of Kosovo⁸⁴. In addition, there are internal monitoring bodies, called Human Rights Unites, in each of the ministries in the executive branch of provisional institutions of self-government (PISG), which review legislation and examine international standards in light of human rights⁸⁵. On the other hand, due to jurisdiction immunity of UNMIK and its staffs, courts do not have jurisdiction over cases involving international missions and personnel of the missions present in Kosovo. While allegations against the Government or municipality are brought before domestic system, each international mission—including UNMIK, EU Rule of law Mission in Kosovo (EULEX Kosovo) and OSCE—has each human rights watchdog body or complaint procedure for allegations against each international mission⁸⁶.

B. Specific accountability mechanisms of UNMIK

Accountability mechanisms in the interim administration in Kosovo can be categorized into two: the individual complaint mechanism and the internal monitoring of administration. In the case of UNMIK, special bodies handling claims against UNMIK were established, such as

⁸³ UNSC res 1244 (1999), para 11(j).

⁸⁴ UNMIK Regulation No 1999/24, Section 1.3.

⁸⁵ Core document submitted by UNMIK to HRC, HRI/CORE/UNK/2007 (15 January 2008), paras 195-197.

⁸⁶ EU Rule of law Mission (EULEX) has established a Human Rights Review Panel which receives complaints from individuals whose rights are violated by EULEX Kosovo in 2010. OSCE has human rights advisers.

the Ombudsperson Institution (OI), later on as the Human Rights Advisory Panel. The role of internal monitoring had first been entrusted to OI and has subsequently been entrusted to the Ombudsperson Institution of Kosovo (OIK).

UNMIK first set up OI as an independent human rights complaint-resolution body, as a human rights watchdog body, and as a monitoring mechanism for policies and laws adopted by UNMIK as well as domestic authorities. OI had accepted complaints from anyone who claimed to be a victim of a human rights violation, conducted investigations in the absence of an individual complaint, and monitored policies and laws adopted by authorities in terms of human rights and good governance⁸⁷. In the process of procedures, OI was first supposed to try to settle the dispute or problem, and, if the settlement ended unsatisfactorily, OI issued a report which contained its decision on whether or not there had been a human rights violation and, if necessary, recommendations to the Special Representative of Secretary General (SRSG)⁸⁸. Its findings and recommendations are not binding on the UNMIK and its staffs. Some criticized that this non-binding nature of OI's decisions comprised the limitation of effective protection of human rights⁸⁹. The non-binding nature of decisions has been maintained in the Human Rights Advisory Panel. Furthermore,

Afterward, OI was restructured as OIK. However, OIK does not have the competence to investigate claims involving UNMIK. Claims involving UNMIK are now addressed by the Human Rights Advisory Panel which was established by UNMIK Regulation 2006/12⁹⁰. As with OI, the Panel is an independent body and decides on claims from any person claiming to be the victim of a human rights violation against UNMIK, while applying international human rights standards, in particular the European Convention on Human Rights and ICCPR⁹¹.

C. Accountability to other international organizations.

As another form of accountability mechanism, UNMIK has a reporting obligation under the Agreement between the UNMIK and the Council of Europe (CoE) on Technical

⁸⁷ See UNMIK Regulation No 2000/38 (30 June 2000), Section 4.

⁸⁸ HRI/CORE/UNK/2007, *supra* note 83, paras 164-166.

⁸⁹ See Verdirame, *supra* note 2, p 265.

⁹⁰ UNMIK Regulation No 2006/12, UNMIK/REG/2006/12 (23 March 2006), Section 5.1.

⁹¹ UNMIL Regulation No 2006/22, UNMIK/REG/2006/22 (24 April 2006), Section 1.2.

Arrangements Related to the Framework Convention for the Protection of National Minorities Framework Convention for Protection of National Minorities (UNMIK/CoE Agreement)⁹² which was agreed between UNMIK and CoE. Under the agreement, UNMIK has periodically reported information on the legislative and other measures taken to implement the principles set out in the Framework Convention for the Protection of National Minorities Framework Convention for Protection of National Minorities (Framework Convention)⁹³. The report submitted by UNMIK is examined by the Advisory Committee on the Framework Convention for the Protection of National Minorities which adopts opinion concerning the report. After that, the Committee of Ministers of CoE decides on the adequacy of the measures taken by UNMIK⁹⁴.

This example is comparable to the reporting system under ICCPR, and allows us discern the bigger picture of the relationship between human rights bodies and UNMIK. This point is discussed further in Chapter 5.

2.3.2 Common accountability mechanisms

It is noteworthy that any of these institutions above have not been able to decide on liability for damages caused by UNMIK. They have not been able to judge on any other kind of provision of remedies as well. According to a UNMIK regulation,

‘Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to ... UNMIK or [its] respective personnel and which do not arise from “operational necessity” ..., shall be settled by Claims Commissions established by ... UNMIK.’⁹⁵

⁹² Signed on 23 August 2004, The website of the Council of Europe, http://www.coe.int/en/web/minorities/country-specific-monitoring#UNMIK_Kosovo [last access 13 August 2015]

⁹³ Adopted on 10 November 1994, enter into force on 1 February 1998, Council of Europe, H (95) 10, Council of Europe Treaty Series No 157.

⁹⁴ UNMIK/CoE Agreement, Article 2.4.

⁹⁵ UNMIK regulation 2000/47, UNMIK/REG/2000/47 (18 August 2000), Section 7.

While KFOR has been reported to set up the Claims Commission⁹⁶, there has been no information about the establishment of the Commission within UNMIK. On the other hand, it is reported that a local claims review board has been established for liability claims against UNMIK⁹⁷. As mentioned in Chapter 2, setting up a claims review board is an established practice of the UN to handle third-party claims in the course of peacekeeping operations.

Comparing to independent institutions, such as OIK and the Human Rights Panel, the UNMIK Local Claim Board lacks transparency. A claim reviews board is set up when the need arises in a mission⁹⁸. As a UN administrative organ, the claims review board established reports to the UN Secretary-General⁹⁹. The UNMIK Local Claim Board is also the case¹⁰⁰.

⁹⁶ B Knoll, *The legal status of territories subject to administration by international organisations* (Cambridge: Cambridge University Press, 2008), p 382.

⁹⁷ The Human Rights Panel has referred the UNMIK Local Claims Review Board in its several decisions, in connection with the judgment of admissibility of a claim, that is the exhaustion of local remedies. See Ntp Bujari case, Case No 311/09 (6 December 2012), para 25.

⁹⁸ A/51/389, *supra* note 16, para 25.

⁹⁹ Schmalenbach, *supra* note 35, p 41.

¹⁰⁰ Some authors singles out this fact. See for example, Knoll, *supra* note 96, p 383, fn 1221.

Part II

Crossover between the UN Charter and human rights treaties

Chapter 3

UN human rights treaty as an accountability mechanism

This chapter is concerned with the potential role of the reporting system for monitoring a UN mission in peacekeeping operations. The adequacy of the reporting system is tested according to the institutional characteristics and by comparison with other forms of accountability mechanism examined in the previous chapter.

3.1 The applicability of reporting system to the UN

3.1.1 The relationship between the UN and ICCPR

The UN has continued to consider human rights issues from the very beginning of its foundation¹⁰¹. The UN Charter embraced the protection of human rights as a matter of principle (Article 1, 13, 55, 62 and 68). As to the law-making through the UN, the adoption of the Universal Declaration of Human Rights has been followed by the adoption of human rights treaties one after another. The aim of codifying human rights norms was to oblige states to ensure the life and liberty of their citizens based on experiences that some states had been helpless before atrocities committed against certain groups of people or even become the main offender¹⁰².

¹⁰¹ M N Shaw, *International Law* (7th edn, Cambridge University Press, 2014), p 202-205.

¹⁰² C Tomuschat, 'International Covenant on Civil and Political Rights', UN Audiovisual Library of International Law, available at <http://www.un.org/law/avl/> [last access 13 August 2015].

Nearly all UN human rights treaties have a reporting system built into the provisions of each treaty¹⁰³. Reporting systems under these treaties aim to monitor the implementation of treaties in each state party on a periodic basis. State parties are necessarily obliged to submit a state report, contrary to other monitoring mechanisms under these treaties such as individual complain procedures, inquiry procedures, inter-state complaint procedures or country visits procedures, which are optional mechanisms in most cases.

Reporting systems under each UN human rights treaty have a common style and procedure which have been established through practice and codified in rules of procedure and working methods¹⁰⁴. A state party is required to make a report (state report) on the human rights situation within its territory and in any other cases which are subject to its jurisdiction, demonstrating how provisions of the treaty are implemented at the domestic level. The monitoring body of each treaty, such as HRC, examines the state report, and then holds a meeting with the representative of the state party for asking further explanations of the treaty implementation. Before holding the meeting, a Committee sends to the state party a list of questions based on the consideration of the state report. The state part may answer the list of questions in writing in advance of the meeting with the Committee. Subsequently, a Committee makes recommendations as to shortcomings in treaty implementation. Recommendations are listed in a Committee's report, called 'Concluding Observations'. The improvement on the recommendations will be reviewed through the follow-up procedure which includes requests for a progress report on that point and, if necessary, requests for a meeting between the representative of the state party and members of a Committee¹⁰⁵.

¹⁰³ Article 9 of CERD, article 40 of ICCPR, article 16 and 17 of CESC, article 18 of CEDAW, article 19 of CAT, article 44 of CRC, article 73 of CMW, article 35 of CRPD, article 29 of CED.

¹⁰⁴ Rules of procedure and working methods are available at the website of UN human rights treaty bodies (<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> [last access 16 July 2015]). See also Report on the working methods of the human rights treaty bodies relating to the State party reporting process, HRI/ICM/2011/4 (23 May 2011).

¹⁰⁵ See S Egan, *The UN Human Rights Treaty System: Law and Procedure* (Dublin: Bloomsbury, 2011); M Schmidt, 'Follow-up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council—Recent Developments', G Alfredsson, et al eds, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller*, (2nd edn, Martinus Nijhoff Publishers, 2009), pp 25-34, p 28.

It is said that a hierarchical relationship between organs of an international organization give authority to a superior to make recommendations of binding nature to a subordinate body¹⁰⁶. Thus, even if the HRC is considered as a subsidiary organ of the General Assembly, recommendations made by the HRC cannot have a binding effect on neither the General Assembly nor the Security Council.

Although ICCPR is only binding on state parties of the Covenant, the UN has kept a close organizational relationship with the HRC, such as provision of the necessary staff and facilities (ICCPR, Article 36). With respect to the reporting system, the Secretary-General has a competence to transmit to the specialized agencies concerned such parts of state reports as may fall within their field of competence (ICCPR, Article 40(3)). On the other hand, HRC also has a competence to transmit to the Economic and Social Council state reports and the Committee's comments on the reports (ICCPR, Article 40(4)). In addition, by virtue of the close relationship with the UN, the membership of ICCPR comprises the vast majority of states today.

For these reasons, this paper argues that HRC is in a right position for monitoring the human rights situations in UN peacekeeping operations, which is not very transparent in the current situation. As described in the previous chapter, peacekeepers' misconducts caused damages to locals may bring responsibility of the UN, in the case of peacekeepers' official acts, and that of individual peacekeepers, in the case of peacekeepers' unofficial acts. In both cases, there are not always adequate and accessible mechanisms for reviewing a peacekeeping operation in the light of human rights protection and good governance as well as mechanisms for seeking remedies for victims suffering from the misconducts of peacekeepers. As the UN has not yet created systematic accountability mechanisms neither giving account nor holding legally accountable in the context of peacekeeping operations, human rights accountability of the UN in peacekeeping operations has not been well reported about. At most, the case of the interim administration in Kosovo saw the development of an ombudsperson mechanism as a systematic accountability mechanism.

There is often no reference to the role of Committees under UN human rights treaties in literatures related to accountability mechanisms of the UN. Although the role of HRC (or any

¹⁰⁶ C F Amerasinghe, *Principles of the institutional law of international organizations*, (Cambridge University Press, 2005), pp 180-181.

other Committees under UN human rights treaties) is not necessarily identified as an accountability mechanism of the UN, there are some noteworthy practices of HRC. As the application of UN human rights treaties was accepted by law in the UN Interim Administration in Kosovo, a question on the reporting obligation arose. Regardless of whether the human rights treaty in question is binding on UNMIK, UNMIK accepted requests of reports from HRC based on the fact that these treaties are incorporated into applicable laws in Kosovo (see the next section 3.1.2). In the following sections, with citing an example of UNMIK, the potential of the reporting system as an accountability mechanism will be examined a little further.

3.1.2 ICCPR reporting system applied to UNMIK

HRC decided to request the UNMIK to submit reports under Article 40 of the ICCPR (a periodic reporting system) during its 81st Session in July 2004¹⁰⁷. Since then, through the application of the reporting system, HRC has made recommendations to authorities in Kosovo at that time, including UNMIK and KFOR as well as PISG, concerning the human rights situation in Kosovo. HRC found the reason for inviting UNMIK to submit a report on the human rights situation in Kosovo due to a new reality that Serbia and Montenegro, a state party of ICCPR, was not able to report the human rights situation in Kosovo where civil authority is exercised by UNMIK¹⁰⁸.

Furthermore, HRC found two legal bases to request a report from UNMIK. First, Security Council resolution 1244 (1999) stipulated that the protection and promotion of human rights were one of the main responsibilities of UNMIK¹⁰⁹. Furthermore, PISG in Kosovo are bound by ICCPR, according to Article 3.2 (c) of UNMIK Regulation No. 2001/9 (the similar

¹⁰⁷ Report submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999, CCPR/C/UNMIK/1 (13 March 2006), p 1.

¹⁰⁸ Report of Human Rights Committee, 79th-81st Sessions, A/59/40 (vol I) (1 October 2004), p 65, para 75 (3).

¹⁰⁹ Ibid.

provisions were first defined in UNMIK Regulation 1999/1, and amended in UNMIK Regulation 1999/24)¹¹⁰.

Second, according to the understanding of HRC, ‘once the people [who live in the territory of the state party] are accorded the protection of rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party’¹¹¹. Based on that, HRC considered that the Covenant continued to apply to Kosovo as a part of Serbia and Montenegro at that time¹¹². Moreover, for the same reason, HRC concluded that UNMIK is ‘bound to respect and to ensure all individuals within the territory of Kosovo and subject to their jurisdiction the rights recognized in the Covenant.’¹¹³ On the other hand, Committee on Economic, Social and Cultural Rights (CESCR), which also decided to call upon UNMIK to provide a report under its reporting system, gave only the first reason mentioned above as a legal basis to request UNMIK to provide a report¹¹⁴.

Responding to the request from HRC and CESCR, UNMIK produced reports on the implementation of the two Covenants in Kosovo. In a report which UNMIK submitted to HRC, while UNMIK accepted the Covenant as an applicable law of Kosovo according to Section 1 of UNMIK Regulation No 1999/24, UNMIK denied the above-mentioned second reason made by HRC for justifying application of ICCPR in Kosovo. That is to say, UNMIK had no intention of sending reports to Committees on the ground that the former Socialist Federal Republic of Yugoslavia was a party to the Covenants¹¹⁵. In addition, UNMIK emphasized that the human rights treaties are not in any way binding on UNMIK by the mere fact that these treaties apply to Kosovo¹¹⁶. Moreover, UNMIK also explained that the fact that Serbia and Montenegro, now the Republic of Serbia, is a party to these treaties does not automatically imply these treaties are

¹¹⁰ Ibid; CCPR/C/UNK/CO/1, supra note 6, Part I, para 5.

¹¹¹ General Comment adopted by the Human Rights Committee No 26: Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1 (8 December 1997), para 4.

¹¹² CCPR/C/UNK/CO/1, supra note 6, Part I, para 4.

¹¹³ Ibid.

¹¹⁴ Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Serbia and Montenegro), E/C.12/1/Add.108 (23 June 2005), para 9.

¹¹⁵ CCPR/C/UNK/1, supra note 6, Part I, para 123.

¹¹⁶ Ibid.

binding on UNMIK, because the situation of Kosovo under the interim administration by UNMIK is *sui generis*¹¹⁷.

After the declaration of independence was adopted by the Kosovo assembly in February 2008, although UNMIK transferred its competences to the Kosovo government and lost the capacity to implement the recommendations by HRC under the reporting system, UNMIK has continued to inform HRC of the human rights situations in Kosovo. UNMIK has recognized that it is in a position to 'liaise with and share information with other actors involved in the promotion of human rights in Kosovo.'¹¹⁸ For this reason, UNMIK remains committed 'to continue to cooperate with the Human Rights Committee.'¹¹⁹

It is made clear that UNMIK accepted to make reports on the human rights situation in Kosovo in response to HRC's request in accordance with its mandate, instead of the application of ICCPR to UNMIK. On the other hand, there appear to be cases that a UN mission is entrusted with reporting duties under UN human rights treaties. According to the case of UNMIK, in order to apply the reporting system to a UN mission, the mission first needs to have a sweeping competence for the protection of human rights, which is authorized by main organs of the UN. It is also essential as a prerequisite to be a situation that a state party of ICCPR has lost control over part of its territory or that a state party of the Covenant has lost its power to report the human rights situation in part of its territory.

In the present study, these facts provide suggestive evidence for possibilities of the monitoring by UN human rights treaty bodies of UN peacekeeping operation. Especially from the fact that UNMIK has continued to report to HRC after the transfer of some parts of civil authorities to Kosovo government, a UN mission may, if necessary and possible, provide reports under UN human rights treaties in cooperation with the local government in the future.

¹¹⁷ Id, Part I, para 124.

¹¹⁸ A letter from UNMIK dated 9 September 2011, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en [last access 13 August 2015].

¹¹⁹ A letter from UNMIK dated 12 February 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=438&Lang=en [last access 13 August 2015].

Based on these analyses, in the next section, the effectiveness and usability of monitoring by UN human rights treaty bodies of UN peacekeeping operation will be examined with reference to the example of UNMIK.

3.2 The efficacy of the framework for the reporting system

3.2.1 Analysis based on the case of UNMIK

A. The process of reporting by UNMIK

The practice and process of reporting by UNMIK has been summarized below. In July 2004, HRC asked UNMIK for a report on the human rights situation in Kosovo since 1999 on behalf of Serbia and Montenegro, which was a member state of the Convention and was not being able to discharge its reporting obligation with respect to the human rights situation in Kosovo due to the international administration by UNMIK. Responding to the request, UNMIK prepared a report following the reporting guidelines adopted by UN human rights treaty bodies¹²⁰. The initial report was submitted to HRC in February 2006. After reviewing the submitted report, HRC prepared a list of issues which would be taken up in the next session for further examination of the submitted report and forwarded it to UNMIK. At the 87th session of HRC, which took place from 10 July 2006 to 28 July 2006, HRC and representatives of UNMIK arranged a meeting on the human rights situations in Kosovo in the presence of representatives of Serbia and responses were given to the list of issues mentioned above¹²¹. After considering the initial report submitted by UNMIK, the dialogue with representatives of UNMIK and other

¹²⁰ See Report on the working methods of the human rights treaty bodies relating to the state party reporting process, HRI/MC/2005/4 (25 May 2005). See also the most recent version of reporting guidelines, Compilation of guidelines on the form and content of reports to be submitted by states parties to the human rights treaties, HRI/GEN/2/Rev.6 (3 June 2009).

¹²¹ Summary records of the second part (public) of the 2383rd meeting (19 July 2006), CCPR/C/SR.2383/Add.1 (28 August 2006); the 2384th meeting (20 July 2006), CCPR/C/SR.2384 (28 July 2006); the 2385th meeting (20 July 2006), CCPR/C/SR.2385 (8 November 2006).

sources of information, including members of the delegation of Serbia and NGOs¹²², HRC adopted Concluding Observations which included recommendations for UNMIK in August 2006¹²³.

The periodicity of reports under the reporting system of ICCPR is varied, depending on the progress of its follow-up to the Concluding Observations¹²⁴. In the present case, HRC and UNMIK had continued to have a contact under the follow-up procedure until 2013. Although no date has been set for the submission of the next periodic report as of August 2015, HRC would ask the second report anytime soon. Upon reaffirming that Serbia does not exercise effective control over Kosovo and that the civil authority continues to be exercised by UNMIK in Kosovo, HRC plans to request the second report from UNMIK as the Committee thinks it to be the best option¹²⁵.

As to follow-ups to the Concluding Observation of 2006, UNMIK was requested to keep HRC informed of three issues: the issue of serious crimes such as war crimes, crimes against humanity and ethnically motivated crimes; the issue of disappearances and abductions as well as measures taken for them; and the issue of return of displaced persons and remedies for them¹²⁶. For that, HRC requested UNMIK further information on measures taken for solving these issues.

As to HRC's recommendations for the first issue, HRC stated that:

‘UNMIK ... should investigate cases of war crimes, crimes against humanity and ethnically motivated crimes committed before and after 1999, ... ensure that the perpetrators of such crimes are brought to justice and that victims are adequately compensated.’¹²⁷

HRC expressed concerns over the implementation of Article 2(3), 6 and 7 of ICCPR. In response, UNMIK explained a department responsible for prosecution of these crimes and gave examples

¹²² HRC received reports from the Amnesty International, the European Roma Rights Centre (ERRC), Human Rights Watch and Internal Displacement Monitoring Centre (IDMC) and PRAXIS on the sidelines of examination of the initial report from UNMIK.

¹²³ CCPR/C/UNK/CO/1, supra note 6.

¹²⁴ HRI/ICM/2011/4, supra note 104, p 10.

¹²⁵ Report on follow-up to the concluding observations of HRC, CCPR/C/109/2 (19 November 2013), p 5. See also Concluding observations of HRC concerning Serbia, CCPR/C/SRB/CO/2 (20 May 2011), para 3.

¹²⁶ CCPR/C/UNK/CO/1, supra note 6, para 24.

¹²⁷ Id, para 12.

of such cases¹²⁸. However, UNMIK accepted the fact that a general comensatory scheme has not been established due to revenue shortage¹²⁹.

In relation to the second and third issues, HRC considered that UNMIK's reply had not responded enough to the Committee's recommendations. Therefore, through continuous communication between HRC and UNMIK, UNMIC demonstrated the current situation of measures taken in different ways. As to the second issue, which also concern Article 2(3), 6 and 7 of ICCPR, HRC recommended that:

'UNMIK ... should effectively investigate all outstanding cases of disappearances and abductions and bring perpetrators to justice. It should ensure that the relatives of disappeared and abducted persons have access to information about the fate of the victims, as well as to adequate compensation.'¹³⁰

UNMIK showed new legislations and how the law guarantees the relevant rights in question¹³¹. HRC at last found that the legal measures are satisfactory. On the other hand, the Committee spelled out that the report submitted by UNMIK did not clarify the coverage of compensation and the availability of other forms of reparation such as rehabilitation, restitution and satisfaction with respect to access to effective remedies for the relatives of those disappeared or abducted¹³².

In relation to Article 12 of ICCPR, the third issue led to the HRC's recommendations that:

'UNMIK ... should intensify efforts to ensure safe conditions for sustainable returns of displaced persons In particular, it should ensure that they may recover their property, receive compensation for damage done and benefit from rental schemes for property temporarily by the Kosovo Property Agency.'¹³³

HRC decided that the present measures do not ensure safe conditions for returns based on the fact that UNMIK did not refer to any measures taken at local level but merely referred measures

¹²⁸ Comment by UNMIK on the Concluding Observations of the HRC, CCPR/C/UNK/CO/1/Add.1 (1 April 2008), paras 1-10.

¹²⁹ Id, para 11.

¹³⁰ CCPR/C/UNK/CO/1, supra note 6, para 13.

¹³¹ CCPR/C/109/2, supra note 125, p 3.

¹³² Id, pp 3-4.

¹³³ CCPR/C/UNK/CO/1, supra note 6, para 13.

taken by international organizations such as capacity-building of communities¹³⁴. HRC also considered that UNMIK should give a further explanation on a compensation scheme simply due to the lack of information¹³⁵.

With respect to the process of the follow-ups, subsequent to the request written in the report of the Concluding Observation of 2006¹³⁶, UNMIK was requested to submit further information to HRC more than four times due to the lack of information in each previous report between 2008 and 2013¹³⁷. Meanwhile, the Special Rapporteur, who was a member of HRC, appointed by the Committee held a meeting with the Senior Human Rights Advisor to UNMIK in July 2008 and with the Director of the UNMIK Office of Legal Affairs in July 2011 with regard to follow-ups to the Concluding Observation of 2006¹³⁸.

3.2.2 Institutional analyses of the reporting system

A. The framework and essence of the reporting system

Throughout the proceedings of the reporting system under ICCPR, two characteristics can be observed. First, the reporting system is based on the involvement of the state party and is conducted in an amicable manner. From the preparation of a state report to the review of the state report, the state party is required to get involved in the proceedings¹³⁹. The mutual and amicable manner of the reporting system is typified by ‘constructive dialogue’, a word used by Committees of UN human rights treaties, which represents the purpose and function of the

¹³⁴ CCPR/C/109/2, supra note 125, pp 4-5.

¹³⁵ Ibid.

¹³⁶ CCPR/C/UNK/CO/1, supra note 6, paras 23-24.

¹³⁷ UNMIK provided further information, CCPR/C/UNK/CO/1/Add.1 (1 April 2008); CCPR/C/UNK/CO/1/Add.2 (10 February 2009); CCPR/C/UNK/CO/1/Add.3 (8 December 2009); a letter from UNMIK dated 13 February 2012 (available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=438&Lang=en [last access 12 August 2015]); a letter from UNMIK dated 12 February 2013 (available at the same website above).

¹³⁸ CCPR/C/109/2, supra note 125, pp 2-3.

¹³⁹ That is to say, the whole proceedings comprise an exchange of a list of questions and a reply to them, holding a question-and-answer session between representatives of a state party and a Committee and the publication of concluding observations and a subsequent comment on the observations (eg ICCPR, article 40 (5)), HRI/ICM/2011/4, supra note 104, pp 15-20, paras 51-73.

reporting system, implying that the examination of state reports does not aim to blame or bring shame on state parties; rather, it helps their implementation of treaties¹⁴⁰.

As a result, the monitoring through reporting is of a non-judgmental nature. It means that the reporting system is more acceptable for state parties as the means of international monitoring¹⁴¹. Furthermore, recommendations made by a Committee as a result of the report examination have no binding effect¹⁴². In other words, the implementation of recommendations basically hinges on state parties. There are neither compulsory measures nor any sanctions to enforce recommendations made by Committees with respect to the reporting system. For that reason, this first characteristic of the reporting system would be one of determining factors that UNMIK accepted treaty bodies' offers of reporting. UNMIK's involvement in the reporting system cannot, in any way, result in judicial control over UNMIK, while it can be, at most, collateral administrative control over UNMIK.

As to the second characteristic, the reporting system allows an overall examination of the human rights situation in each state party¹⁴³. In contrast with other monitoring mechanisms, such as individual complain procedures or inquiry procedures, under UN human rights treaties, the reporting system does not limited to respectively address a specific case of an individual or a certain human rights issue; rather, it deals with human rights protection in general within the domestic legal order of each state party.

An important point here is that UN human right treaties recognize positive obligations of state parties as well as negative obligations. Each state party is supposed to implement a very broad kind of obligation and to take or not take certain measures in terms of the protection of human rights under the treaty. UN human rights treaties also acknowledge three kinds of obligations: obligations to respect, obligations to protect and obligations to fulfill. These concepts of obligations are adopted by the treaty bodies based on the interpretation of treaty

¹⁴⁰ HRI/ICM/2011/4, supra note 104, p 7. See also M Kjaerum, 'State Report', Alfredsson, et al eds, *Mechanisms*, supra note 105, pp 17-24, pp 20-21; J Brunnée, 'Compliance control', G Ulfstein ed, *Making Treaties Work*, (Cambridge University Press, 2007), pp 373-318, p 382.

¹⁴¹ See A Cheyes and A H Cheyes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995), p 154.

¹⁴² However, there is a strong argument for the recognition of authority in Concluding Observations adopted by UN human rights treaty bodies. See for example, W Kälin, 'Examination of state reports', H Keller, et al eds, *UN human rights treaty bodies: law and legitimacy* (Cambridge University Press, 2012), pp 16-72, pp 30-31.

¹⁴³ See Brunnée, supra note 140, p 374.

obligations to ‘respect’ and ‘ensure’ rights of all individuals, which are stipulated in articles of the treaties¹⁴⁴. Professor Mégret explains as follows. The obligation to respect is ‘a negative obligation not to take any measure that result in a violation of a given right’.¹⁴⁵ This obligation does not basically require state parties to take specific measures. A certain kind of human rights can entail both a negative obligation (obligation to respect) and a positive obligation (obligation to fulfill). For example, the right to be free from torture entails both an obligation not to be tortured and an obligation to take necessary preventive measures¹⁴⁶. The obligation to protect ‘means that the state needs to proactively ensure that persons within its jurisdiction do not suffer from human rights violations at the hands of third parties’.¹⁴⁷ Thus, state parties are required to create an environment that will enable people to enjoy their rights. Professor Mégret gives examples such as an obligation to protect an individual from murder when the police knew the victim’s life had been threatened or an obligation to create an environment that enable women to be protected from domestic violence and persons with disability to enjoy their rights¹⁴⁸. An obligation to fulfill, such as the right to vote, is understood as an obligation that ‘states should take positive steps that have as a consequence the greater enjoyment of rights’.¹⁴⁹

State parties produce their reports in accordance with reporting guidelines, which each Committee had adopted, in order to specify information to be reported for evaluating the degree of the state party’s treaty implementation¹⁵⁰. Consequently, a state report under the reporting system is also required to contain information on every relevant aspect related to the implementation of the treaties including administrative, judicial, legislative, educational and social issues. Committees deem that:

‘Reports should elaborate both *de jure* and the *de facto* situation with regard to the implementation of the provisions of the treaties to which States are a party. Reports ...

¹⁴⁴ See eg ICCPR, article 2; ICESCR, article 3. See also General Comment adopted by the Human Rights Committee No 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.31.

¹⁴⁵ F Mégret, ‘Nature of Obligation’ in D Moeckli, S Shah and S Sivakumaran eds, *International Human Rights Law*, (1st edn, OUP 2010), pp 124-149, p 130.

¹⁴⁶ Ibid.

¹⁴⁷ Id, pp 130-131.

¹⁴⁸ Id, p 131.

¹⁴⁹ Id, p 130.

¹⁵⁰ HRI/ICM/2011/4, supra note 104, para.18

should indicate how those legal instruments are reflected in the actual political, economic, social and cultural realities and general conditions existing in the country’¹⁵¹

The case of the interim administration in Kosovo shows that the overall examination of the human rights situations through the reporting system enables UNMIK to enhance the accountability to the public separately from other accountability mechanisms situated in Kosovo, including the Human Rights Panel and the OIK. In fact, the reporting system is not merely a formality, but concerns a state party’s accountability to actual human rights situations, along with the mere existence of a legal system or laws.

Furthermore, given that even international organizations and their organs are susceptible to public criticism or public pressure in the same way as states¹⁵², publicizing results of the reporting system was a means of ensuring the accountability of a UN mission as well as that of providing the public with the overview of the human rights situation in Kosovo in accordance with international standards of human rights treaties.

B. Theoretical account of the reporting system

This section will give further consideration to the reporting system under multilateral treaties in general and its potential as an accountability mechanism for the UN in peacekeeping operations. According to views of some authors regarding the general features of the reporting system, this paper summarizes relevant points into three: transparency, accessibility for the public and cooperation-based function. The three points represent fundamental features of accountability mechanism. Only the third point can be a limitation of the reporting system.

First, the reporting system enhances the transparency of treaty implementation by state parties¹⁵³. Transparency of the treaty implementation relates to trust in a state party’s compliance with the treaty. While each state party (or the government) is in the best position to compile a

¹⁵¹ Compilation of guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties, HRI/GEN/2/Rev.6 (3 June 2009), para 25

¹⁵² See Cheyes and Cheyes, *supra* note 141, p 274; N Valticos, ‘Contrôle’, R-J Dupuy ed, *A handbook on international organizations* (2nd edn, Martinus Nijhoff, 1998), pp 461-484, pp 463- 464; A Kiss, ‘Reporting Obligation and Assessment of Reports’, Beyerlin et al eds, *Ensuing Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff Publishers, 2006), pp 229-245, p 244.

¹⁵³ See Brunnée, *supra* note 140, p 374.

report on treaty implementation¹⁵⁴, absence of report submission gives the impression of being violating substantive obligations stipulated in the treaty¹⁵⁵. Although the reporting system under human rights treaties is not generally understood as a system of peer review or mutual surveillance between member states, publicity of state reports relates to trust between state parties as well as trust in the public¹⁵⁶. With respect to UN peacekeeping operations, it is often the case that a UN mission is in the best position to report the human rights situation in a peacekeeping operation. In that case, if a UN mission assumes the reporting duty, the reporting system can be regarded as an accountability mechanism vis-à-vis all other actors including member states of the UN, locals and the public. This is a necessary feature of an accountability mechanism which gives account to others.

Secondly, in the reporting process, the involvement of non-state actors facilitates state parties' awareness of the human rights situation, creating better environment for human rights protection. This is especially so in the case of UN human rights treaties. Since the reporting process allows the involvement of NGOs and national human rights institutions as well as different ministries and departments of the government, the government possibly have occasions to periodically review its measures in connection with human rights protection and, at the same time, can be exposed to third-party oversight in the course of the reporting process¹⁵⁷. As it is commonly believed that a UN mission lacks adequate accountability mechanisms, the systematic application of third-party review, such as that of the reporting system under UN human rights treaty, is desirable.

Thirdly, the effectiveness of the reporting system is dependent on the cooperation of reporting states. Without sincere cooperation of member states and their involvement in reporting process, a monitoring body cannot access vital source of information for its monitoring activities in the first place. The effectiveness of reporting system can be questioned due to the non-binding nature of recommendations made by HRC, a lack of enforcement mechanism of

¹⁵⁴ See Cheyes and Cheyes, *supra* note 141, p 154; UNEP, *Compliance Mechanisms under Selected Multilateral Environmental Agreements*, UNEP web site, (<http://www.unep.org/delc/MorePublication/tabid/54417/Default.aspx>), (2007), p 106.

¹⁵⁵ See Cheyes and Cheyes, *id*, p 155.

¹⁵⁶ See Brunnée, *supra* note 140, p 374; CESCR, General comment No 1: Reporting by States parties, E/1989/22 (1 January 1989), Annex III, para 9.

¹⁵⁷ See Valticos, *supra* note 152, p 468; CESCR, General comment No 1, *id*, paras 4 and 5.

the recommendations or any other malfunction of the reporting system in connection with uncooperative member states. In fact, there are a number of overdue reports¹⁵⁸. Although this study does not address head-on the issue of effectiveness or a statistical analysis on achievements resulted from the reporting system, it is noted that such cooperation-based nature is a prerequisite for universality of the Covenant—a prerequisite for having more member states. As far as the present study is concerned, it seems that the cooperation-based nature has made the reporting system acceptable even to UNMIK. The cooperation-based nature is thus a sharp contrast with the UN's hesitance to be subject to judicial control.

In a bit different context, some state parties are not able to submit reports due to a lack of administrative ability or resources¹⁵⁹. Moreover, the implementation of recommendations adopted by a monitoring body also hinges on ability and resources of the state party. Considering the situation of peacekeeping operations and the application of the reporting system to that, when a host state, which has accepted peacekeeping operation, cannot carry out its reporting obligations due to the chaos of post-conflict situation, it is not hard to anticipate that a UN mission, which exercise certain power there, pursues a reporting duty in this regard based on the UN's accountability and cooperation with UN human rights treaty bodies.

C. Bridging to the next discussion

The case of UNMIK suggests a possible beneficial effect of the role of a UN mission to provide reports to UN human rights treaties bodies for its monitoring activities. However, a question arises as to the relationship between a reporting duty of a troop-contributing state and that of a UN mission. As mentioned in chapter 2, either the UN or a sending state assumes responsibility for misconducts of peacekeepers. In this respect, the present study distinguishes between two forms of accountability mechanisms: A mechanism the UN giving account and a mechanism the UN being legally accountable. While the application of the reporting system under ICCPR can be a mechanism the UN giving account, the reporting obligations of a sending state, if the state is a member state to ICCPR, is originally not relevant to the accountability of the UN. Nevertheless, when the UN's accountability for its internal discipline and its systematic

¹⁵⁸ Kälin, *supra* note 142, pp 19-20 and 32.

¹⁵⁹ Kjaerum, *supra* note 140, p 19.

failure in a peacekeeping operation is questionable, reporting obligations of sending states, when they are also member states to ICCPR, may be understood differently from a perspective of the accountability of the UN. Given this, the next chapter is devoted to discussing the competence of HRC to monitor the human rights situation in peacekeeping operations as well as the reporting obligations of sending states (at the same time, member states to ICCPR) under ICCPR.

Chapter 4

The harmonization of accountability and human rights obligations

This chapter gives consideration to cases of reporting on the human rights situation in a peacekeeping operation submitted by some of member states to ICCPR. In these cases as well as the case of UNMIK, the application of the reporting system requires special legal bases. The application of the reporting system under UN human rights treaties is related more closely to off-duty misconducts of peacekeepers, which are not attributable to the UN, in the sense that the application of the reporting system to a UN mission (or to the UN) is still a rare case. When deeming the reporting system as a mechanism the UN giving account of peacekeepers' misconducts to the public as well as to other member states, the legal basis of reporting by a member state (to ICCPR as well as to the UN) seems to have twofold backdrop—duties under ICCPR and the UN Charter. In this chapter, the legal issue and practices of the application of ICCPR to peacekeeping operations will be first discussed (4.1), followed by the analysis of the legal relationship between the UN, HRC and member states to the both (4.2). Through the consideration in this chapter, an answer is given to the main question of this study.

4.1 Applicability of UN human rights treaties in peacekeeping operations

4.1.1 Extraterritorial applicability of ICCPR

A. General understanding

Article 2(1) of ICCPR prescribes that a state party is obliged 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. In contrast with the strict literal interpretation of Article 2(1) of ICCPR, HRC interprets that the Covenant applies to all individuals within a state party's territory 'and/or' subject to its jurisdiction¹⁶⁰. The Committee understands that a state party is obliged to respect

¹⁶⁰ See Kälin, *supra* note 142, pp 53-54.

and ensure the rights under the Covenant to all individuals within the power or effective control of that state party, ‘even if not situated within the territory of the State Party’¹⁶¹. The Committee stated that:

‘This principle also applies to those within the power or effective control of the force of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation’¹⁶².

A strict literal interpretation has also support from several countries.¹⁶³ In fact, the US, Israel and the Netherlands have expressed their opposition to the extraterritorial application of ICCPR¹⁶⁴. The extraterritorial application of ICCPR seems to be accepted to some extent, gaining favor with some of the state parties—but not all state parties—, the ICJ in the Wall case¹⁶⁵ and many scholars¹⁶⁶.

According to this understanding, a state party of a troop-contributing country is obliged to secure rights and freedom under ICCPR to individuals who are subject to the jurisdiction of state party in the context of peacekeeping operations. In that case, it is reasonable to assume that treaty bodies are in the position to monitor relevant activities and measures of the state party in relation to peacekeeping operations.

In practices, under the individual complaint procedure of UN human rights treaties, there has not been any case brought against troop-contributing states concerning UN peacekeeping operations¹⁶⁷. If that type of case would be brought before the individual complaint procedure under the Optional Protocol to ICCPR, HRC will make a decision on the case only when the Committee recognizes that the state party exercises authority and control over the complainant

¹⁶¹ HRC, General Committee No 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.31, para 10.

¹⁶² Ibid.

¹⁶³ USA’s third periodic report, CCPR/C/USA/3 (28 November 2005), Annex I, p 110.

¹⁶⁴ See K M Larsen, *The human rights treaty obligations of peacekeepers* (Cambridge University Press, 2012), pp 178-180.

¹⁶⁵ The case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Report 2004, p 136, paras 108-110.

¹⁶⁶ See for example, Larsen, supra note 164, p177; Kälin, supra note 142, pp 53-54.

¹⁶⁷ Larsen, id, p 181.

during the peace operations. For instance, in the case of *H. v. s. P. v the Netherlands* under the individual complaint procedure, the complainant claimed to be a victim of the alleged mistreatment in the recruitment and selection process of the European Patent Office (EPO) which is an international organization and the Netherlands is a member state of it¹⁶⁸. HRC dismissed the complaint on the ground that the matter at issue was beyond the jurisdiction of the Netherlands. HRC stated that:

‘The Human Rights Committee observes ... that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant. The author's grievances, however, concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party Accordingly, the author has no claim under the Optional Protocol.’¹⁶⁹

On the other hand, HRC has referred to the application of ICCPR in the context of peacekeeping operations in its Concluding Observations to member states’ periodic reports. In the Concluding Observations to the Netherlands’ report, HRC expressed its concern over the Srebrenica massacre case and the delay in the investigations as to the alleged involvement of members of the Dutch peacekeeping forces in the event according to Article 2 and 6 of ICCPR¹⁷⁰. In the Concluding Observations, HRC made a recommendation to the Netherlands that the investigations should be completed as soon as possible, and the results should be publicized widely¹⁷¹. However, the Netherlands denied the understanding of HRC concerning the extraterritorial application of ICCPR based on the text of Article 2(1) of the Covenant¹⁷². The Netherlands stated that the Srebrenica case was concerned with citizens of Srebrenica, and thus any obligation under the Covenant obliges the Netherlands to investigate the case¹⁷³. So far, there has been no response from HRC to the objection from the Netherlands.

¹⁶⁸ *H. v. s. P. v the Netherlands*, CCPR/C/29/D/217/1986 (8 April 1987).

¹⁶⁹ *Id.*, para 3.2.

¹⁷⁰ Concluding Observations to the Netherlands’ third periodic report, CCPR/CO/72/NET (27 August 2001), paras 7-8.

¹⁷¹ *Id.*, para 8.

¹⁷² Replied of the Netherlands to the Concluding Observations, CCPR/CO/72/NET/Add.1 (29 April 2003), paras 18-19.

¹⁷³ *Ibid.*

In the same way, under the reporting system, on several occasions, HRC has touched upon state parties' actions or omissions in relation to UN peacekeeping operations. The difference of the reporting system from the individual complaint procedure arises from the fact that, in the case of the reporting system, HRC can oversee every human rights issue related to treaty provisions without allegations from victims. In the reporting process, state parties are required to give account as to omissions of treaty obligations as well as necessary measures taken pursuant to treaty provisions. As mentioned in the previous chapter (see section 3.2.2), UN human rights treaties require a broad range of measures to be taken. Furthermore, treaty bodies have paid attention to the actual human rights situation in addition to mere existence of legal system and laws in connection with certain human rights issues. Consideration of the practices under the reporting system is given in the following section, 4.1.2.

B. Questions on the competence of HRC

Is there a legal backing of HRC's competence to monitor treaty implementation based on the extraterritorial application of ICCPR? There is a room to argue that HRC has the competence to monitor extraterritorial application of the Covenant in parallel with the discussion on extraterritorial applicability of ICCPR. In the first place, a question whether international institutional law applies to HRC, a treaty body, should be addressed. Subsequently, the discussion will move on to the legal basis of HRC's competence to monitor extraterritorial application of the Covenant.

(a) The legal status of HRC

The HRC is commonly understood as an expert body under ICCPR and is monitoring the implementation of the Covenant, which is also called as a judicial organ, a quasi-judicial organ or even a *sui generis* entity¹⁷⁴. Does international institutional law generally applied to

¹⁷⁴ It would be also possible to call the HRC as an autonomous institution according to Churchill and Ulfstein, although they use the term 'autonomous' for describing the institutional structure under multilateral environmental arrangements as one framework (and call this autonomous institutional arrangement) which does not constitute international organizations in a strict sense and yet includes organs having lawmaking powers and acting independently from state parties. See R R Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', *American Journal of International Law* 94 (2000), pp 623-659, pp 625-628.

international organizations also apply to HRC? A well-known definition defines an international organization as ‘forms of cooperation’;

- ‘(1) founded on an international agreement;
- (2) having at least one organ with a will of its own; and
- (3) established under international law.’¹⁷⁵

According to this definition, the Committee is not regarded as an international organization. According to the four main criteria of an international organization, the HRC lacks forms of cooperation consisting of states or other organizations and also has an uncertainty on whether ICCPR is a constituent instrument for HRC¹⁷⁶.

Professor Churchill and Professor Ulfstein provide one way of understanding in relation to a group of treaty bodies (named as an autonomous institutional arrangement) under a multilateral environmental agreement, which comprises a conference of the parties (COP), a secretariat and one or more specialist subsidiary bodies¹⁷⁷. Proving that four main criteria for an international organization, forms of cooperation, existence of a founding treaty, an organ or organs and a will of its own, are fulfilled, the authors conclude that international institutional law applies to such a group of treaty bodies. Professor Churchill and Professor Ulfstein further back their understanding up with the fact that decisions of the treaty bodies do not fall within the definition of a treaty and rather entail a distinct feature of international institutional law. The second fact is that the functions and competences of the treaty bodies at internal level resemble those of international organizations. The third fact is that state parties must foresee effective and dynamic institutional structure for treaty bodies, as with that of international organizations¹⁷⁸. However, Professor Churchill and Professor Ulfstein distinguish institutions under ICCPR from treaty bodies under a multilateral environmental agreement for the reason that ICCPR does not establish any autonomous bodies as a multilateral environmental agreement does.

¹⁷⁵ Schermers and H Schermers and N M Blokker, *International Institutional Law: unity within diversity* (3rd edn, Springer 2010)

¹⁷⁶ See V Engström, *Understanding powers of international organizations: a study of the doctrines of attributed powers, implied powers and constitutionalism—with a special focus on the Human Rights Committee* (Turku: Åbo Akademi University Press 2009), pp 7-8.

¹⁷⁷ Churchill and Ulfstein, *supra* note 174, pp 631-634.

¹⁷⁸ *Id.*, p 633.

Referring to the discussion of Churchill and Ulfstein, Engström considers that ‘the ICCPR regime does seem to fall within their definition of an “institutional arrangement”, exercising a supervisory function, convening periodically, having a secretariat, supervising compliance, and developing the normative content of the ICCPR.’¹⁷⁹ After all, due to the ambiguity of the legal status of HRC, focus of this question inevitably shifts to the actual functions of HRC as an international actor¹⁸⁰. Accordingly, it would be appropriate to understand that international institutional law applies to HRC. The following discussions are premised on this understanding.

(b) The expansion of competences

HRC has repeatedly enlarged the scope of its competence on the ground of the necessity or an implied power¹⁸¹, although it has not always mentioned the legal basis. In contrast with the Human Rights Council, which is a subsidiary organ of the UN General Assembly, HRC is an independent institution, and is not controlled by state parties to ICCPR. In the past, as to the question of the validity of reservations to the ICCPR, after lots of debate, it was found that the HRC only have the competence to assess the validity of reservations instead of the competence to make binding determination on that matter¹⁸².

There is an argument that legal basis for the development of HRC’s competences is given on the ground of functional necessity or an implied power¹⁸³. However, as far as HRC’s competence to monitor peacekeeping operations is concerned, since the argument of the implied power with respect to the competence has not reflected aggregate opinion among member states of ICCPR, the argument seems controversial¹⁸⁴. Rather such development should be more acceptable when the competence is established through practices. In fact, HRC’s practices

¹⁷⁹ Engström 2009, supra note 175, pp 11-12 and fn 37.

¹⁸⁰ See Id, pp 9-12.

¹⁸¹ See Id, pp 214-216.

¹⁸² A report of ILC meeting with human rights bodies (15 and 17 May 2007), prepared by A Pellet, ILC(LIX)/RT/CRP.1 (26 July 2007), para 34.

¹⁸³ See The report of HRC, A/48/40 (7 October 1993), Part I, annex X • B, paras. 5-6; K A Young, *The Law and Process of the U.N. Human Rights Committee: The Procedural Aspects of International Law Monograph Series*, (Transnational Publishers, 2002), p 7.

¹⁸⁴ V Engström, ‘Reasoning on powers of organizations’, in J Klabbers and W Asa eds, *Research handbook on the law of international organizations* (Edward Elgar Publishing, 2011) p 56, p 66.

concerning the monitoring of peacekeeping operations are gradually increasing as if to foresee the establishment of such practices. This is examined in the next section, 4.1.2.

4.1.2 Practices: Touchstones of the reporting system

In other instances under the reporting system, HRC affirmed that Italy and Poland accepted that the Covenant applies to acts of their troops in peacekeeping operations¹⁸⁵. In the list of issues in connection with fifth periodic report of Italy, HRC asked Italy, in light of Article 2 of ICCPR, whether the state party believes that the Covenant applies to persons under its jurisdiction in cases where Italian troops and police officers are stationed abroad¹⁸⁶. At the eighty-fifth session held in the presence of the members of the delegation of Italy, one of the Italian delegates said that:

‘the Penal Military Code of War had been amended to ensure that members of the armed forces and police officers who participated in international operations were aware of the local population’s rights under the Covenant.’¹⁸⁷

This was how Italy expressed its understanding on the extraterritorial applicability of ICCPR.

Moreover, the delegate also demonstrated Italy’s positive attitude towards the integration of international standards and the regulation for the activities of troops and police officers operated abroad. For instance, he explained that the Italian Parliament was currently considering further amendment of the Penal Military Code in order to harmonize it with international humanitarian and human rights law, and that the Parliament adopted a policy of

¹⁸⁵ ‘The Committee welcomes the State party’s position that the guarantees of the Covenant apply to the acts of Italian troops or police officers who are stationed abroad, whether in a context of peace or armed conflict’, Concluding Observations to Italy’s fifth state report, CCPR/C/ITA/CO/5 (24 April 2006), para 3; ‘The Committee welcomes the commitment of the State party to respect the rights recognized in the Covenant for all individuals subject to its jurisdiction in situations where its troops operate abroad, particularly in the context of peacekeeping and peace-restoration missions’, Concluding Observations to Poland’s fifth state report, CCPR/CO/82/POL (2 December 2004), para 3.

¹⁸⁶ List of issues for the consideration of the Italy’s fifth periodic report, CCPR/C/84/L/ITA (29 April 2005).

¹⁸⁷ Summary record of the 2317th meeting concerning Italy’s fifth periodic report, CCPR/C/SR.2317 (26 October 2005), para 39.

transparency regarding its international operations and was willing to reflect a new situation in the field of such operations¹⁸⁸.

In the case of Poland, at the occasion of dialogue with the members of the delegate of Poland under the reporting system, a member of HRC Professor Kälin asked Polish delegates the Government's opinion on the extraterritorial applicability of the Covenant, referring to the fact that Polish troops were currently serving in Iraq¹⁸⁹. A Polish delegate answered that Poland believes that the Covenant applies in situations such as those in Iraq, although he understood that the state's obligations under the Covenant does not apply in the current operations in Iraq because Polish troops does not exercise authority in Iraq¹⁹⁰. Another Polish delegate added that there has been no report of human rights violations committed by any Polish people in Iraq¹⁹¹.

In the Concluding Observations to Norway's report, HRC recognized that Norway took measures for the protection of human rights prescribed in ICCPR with respect to the deployment of its troops in peacekeeping operations¹⁹². At a session in the presence of the members of the delegation of Norway, one Norwegian delegate confirmed his government's position that the Covenant has the extraterritorial character in accordance with the HRC's General Comment No 31¹⁹³. Furthermore, in the sixth periodic report of Norway dated 25 November 2009, Norway stated its commitment to 'respect the rights recognized in the Covenant for all individuals within its power or effective control.'¹⁹⁴ Norway inserted one section describing measures to comply with the Covenant in the context of international operations pursuant to Article 2 of the Covenant. For instance, the member state reported that it has conducted education and training programs in

¹⁸⁸ Id, paras 39-41.

¹⁸⁹ Summary record of the 2240th meeting concerning Poland's fifth eperiodic report, CCPR/C/SR.2240 (4 November 2004), para 55.

¹⁹⁰ Compt rendu analytique de la 2241e séance concernant Cinquième rapport périodique de la Pologne, CCPR/C/SR.2241 (31 Janvier 2005), § 61.

¹⁹¹ Id, § 64.

¹⁹² 'The Committee takes note of measures taken by the State Party to give effect to the commitment under the Covenant to respect the rights recognized in the Covenant for all individuals within its power or effective control in situations where its troops operate abroad, particularly in the context of peacekeeping and peace-restoration missions', Concluding Observations to Norway's fifth state report, CCPR/C/NOR/CO/5 (25 April 2006), para 6.

¹⁹³ Summary record of the 2342th meeting concerning Norway's fifth periodic report, CCPR/C/SR.2342 (22 March 2006), para 20.

¹⁹⁴ The Norway's sixth periodic report, CCPR/C/COR/6 (11 November 2010), para 13.

international humanitarian law and human rights for soldiers before being sent to international missions¹⁹⁵.

Germany also expressed its agreement with the applicability of ICCPR to individuals subject to its jurisdiction in situations where its troops or police forces operate abroad, after HRC had encouraged Germany to accept its extraterritorial application through the reporting process. HRC first asked the same question in the list of issue for fifth periodic report of Germany¹⁹⁶. At a session in the presence of the members of the delegation of Germany, one German delegate explained that the question was currently under consideration due to the fact that the question had arisen only fairly recently in Germany¹⁹⁷.

Subsequently, HRC made a recommendation to Germany ‘to clarify its position and provide training on relevant rights contained in the Covenant specifically designed for members of its security forces deployed internationally.’¹⁹⁸ In the comment from Germany to the recommendation, the government finally has accepted that:

‘Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.’¹⁹⁹

In the next periodic report of Germany (sixth periodic report), the extraterritorial applicability of the Covenant was listed as one key issues. Germany demonstrated that how the government ensures the opportunities of education and training on human rights and international human rights treaties²⁰⁰.

Similarly, HRC encouraged the United Kingdom (UK) to accept the extraterritorial applicability of ICCPR to all individuals subject to its jurisdiction or control. However, the HRC’s argument has been partly contested by the UK. The UK’s position on the extraterritorial applicability is that:

¹⁹⁵ Id, para 15-16.

¹⁹⁶ The list of issues for consideration of Germany's fifth periodic report, CCPR/C/80/LDEU (26 November 2003), para 3.

¹⁹⁷ Summary record of the 2171st meeting concerning the consideration of Germany's fifth periodic report, CCPR/C/SR.2171 (21 April 2004), para 25.

¹⁹⁸ Concluding Observation to Germany's fifth periodic report, CCPR/CO/80/DEU (4 May 2004), para 11.

¹⁹⁹ Comment from Germany to the Concluding Observation, CCPR/CO/80/DEU/Add.1 (11 April 2005), p 3.

²⁰⁰ The Germany’s sixth periodic report, CCPR/C/DEU/6 (10 May 2011), paras 77-84.

‘its obligations under the Covenant can only apply to persons who are taken into custody by the armed forces and held in British-run military detention facilities outside the United Kingdom in exceptional circumstances.’²⁰¹

On the other hand, HRC made a recommendation that the UK should conduct prompt investigations and sanction of alleged deaths, torture and cruel or inhuman degrading treatment in detention facilities in Afghanistan and Iraq²⁰². Responding to the recommendation, the UK submitted three follow-up reports, in August 2009, January 2011 and October 2011. According to these reports, the UK informed HRC that all allegations of abuse are addressed and investigated by relevant organs. The UK accepted that, Iraqi nationals were allegedly killed or ill-treated by British forces in Iraq²⁰³. It was also reported that a number of the claims of abuse in British custody in Iraq have been faced difficulties in investigation because these claims have arisen years after the event²⁰⁴. On the other hand, the UK reported that no allegation has been made by Afghan nationals²⁰⁵.

These precedents show the HRC’s position that ICCPR applies to acts of peacekeeping forces sent by state parties to ICCPR and that state parties are obliged to secure rights of individuals subject to their jurisdiction or control even outside their territories. It is pointed out that HRC’s statements in these cases did not explain on which conditions or criteria the Committee decides on whether a state party exercises its jurisdiction or control over individuals in the context of peacekeeping operations²⁰⁶. Some dialogues between HRC and member states concerning the extraterritorial applicability of the Covenant have showed a sign of emerging practices of HRC’s monitoring in peacekeeping operations.

When some of member states accepted the extraterritorial application of the Covenant, HRC’s monitoring on the extraterritorial activities was based on the consent of each member state in question on an individual state basis. As demonstrated in previous section (4.1.1), there is another legal backing of the HRC’s competence based on the teleological interpretation of

²⁰¹ Concluding Observations to the UK’s sixth periodic report, CCPR/C/GBR/CO/6 (30 July 2008) para 14; The follow-up report from the UK, CCPR/C/GBR/CO/6/Add.1 (3 November 2009), paras 24-27.

²⁰² Concluding Observations to the UK’s sixth periodic report, CCPR/C/GBR/CO/6 (30 July 2008) para 14.

²⁰³ The second follow-up report from the UN, CCPR/C/GBR/CO/6/Add.2 (4 February 2011), paras 4-15.

²⁰⁴ Report of the Special Rapporteur for follow-up on concluding observations, CCPR/C/104/2 (27 April 2012), p 7.

²⁰⁵ CCPR/C/GBR/CO/6/Add.2, *supra* note 195, paras 4-15.

²⁰⁶ Larsen, *supra* note 165, p 185.

ICCPR—a functional necessity. In addition, as seen in this section, there are gradual accumulations of practices that could establish such competence of HRC in the future.

Getting back to the topic of accountability of the UN, accountability of the UN in peacekeeping operations is another source of legal and factual bases to support HRC's competence to monitor activities of member states in peacekeeping operations. This point is discussed in more detail as follows.

4.2 Complex web of legal relationships in peacekeeping operations

4.2.1 Layers of obligations for human rights accountability of the UN

A. The duties of member states vis-à-vis the UN and HRC

Member states of an international organization are understood to have some duties based on the membership. First, as the ICJ has touched upon, an organization and its member states assume certain mutual obligations of cooperation and good faith on the ground of the membership²⁰⁷. Some writers call this duty as part of general principle of law. That is to say, member states 'have to behave as a good members, a duty which can be seen as part of a modern general principle of law: duty to cooperate.'²⁰⁸ All in all, the point is that the duty to cooperate comes into being in the absence of express provisions. Nevertheless, some constituent treaties additionally have provisions concerning member states' cooperation, such as Article 2(2) and Article 56 of the UN Charter.

In this regard, Professor Amerasinghe further explains that since the very purpose of establishing an international organization is to build cooperation, a duty to cooperate comprises a basic obligation of membership²⁰⁹. He points to provisions prescribing a treaty object of

²⁰⁷ The case concerning Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, (The WHO Agreement Case), 1980 ICJ Report, pp 93-96.

²⁰⁸ H Schermers and N M Blokker, *International Institutional Law: unity within diversity* (3rd edn, Springer1995), § 156.

²⁰⁹ See Amerasinghe, *supra* note 106, pp 178-179.

international cooperation as a legal basis for a duty to cooperate. As to an interpretation of this kind, the preamble of ICCPR, which provides a close relationship between peace and human rights as well as an agreement on human rights obligations under the Covenant, might be an additional legal basis for a duty to cooperate of member states vis-à-vis the UN.

Whilst the duty to cooperate is so general in nature that the duty can be invoked in a variety of situations where cooperation of member states is necessary, the duty to cooperate has been often discussed in relation to the status of recommendations made by international organizations. Concerning this issue, most authors agree that member states are obliged to cooperate in achieving objects and purposes of the organizations or at least not to hinder the implementation of recommendations²¹⁰. This duty is not understood as a duty to cooperate in carrying out the recommendations which are not binding for member states in the first place²¹¹.

As a corollary of the duty to cooperate or as part of the duty, a duty to consider recommendations in good faith and to report on action taken is also argued²¹². In the Voting Procedure Case, Judge Klaestad and Judge Lauterpacht endorsed the idea of the duty to consider recommendations²¹³. Judge Lauterpacht further argued that a member state has a duty to consult with the organization to achieve the objectives of the recommendations which the state, in good faith, decided not to comply with. In addition, he also argued that the persistent uncooperative attitude of a member state will call into question of abuse of right²¹⁴.

From this paper's position that international institutional law applies to HRC (see 4.1.1, subsection B), member states' duty to cooperate suggests legal consequences of recommendations made by HRC through the reporting system. In this case, although the recommendations are not binding for member states of ICCPR, a member state which is addressed the recommendations is required to cooperate in good faith based on its membership to ICCPR.

²¹⁰ See Ibid.

²¹¹ In specific cases where a member state agreed to abide by a recommendation of the organization or there are provisions provided for otherwise, the member state in question is obliged to comply with the recommendations. Examples are given in Amerasinghe, id, pp 181-183.

²¹² See the WHO Agreement Case, supra note 206, pp 95 and 97; Amerasinghe, id, pp 178-179.

²¹³ The case concerning Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa (the Voting Procedure Case), 1955 ICJ Report, p 88 and pp 118-119.

²¹⁴ The separate opinion of Judge Lauterpacht in the Voting Procedure Case, 1955 ICJ Report, p 120.

In addition, the law of treaty also requires for member states good faith in carrying out treaty obligation (Article 26 of the Vienna Convention on Law of Treaty²¹⁵). In this respect, Professor Kälin noted that:

‘the principle of good faith suggests that states, at a minimum, take note of recommendations on policies and strategies to enhance human rights implementation, examine whether they want to implement them and provide the treaty body with some kind of reasoning during the follow-up procedure or the next reporting cycle if they decide not to do so.’²¹⁶

Likewise, member states of both the UN Charter and ICCPR are legally required to perform treaty obligations in good faith regardless of the presence of sanctions or enforcement mechanisms against the violations of these obligations. Given that, do provisions of human rights obligations enshrined in the UN Charter (ie Article 1(3)) give legal basis to require the member states (to both the UN Charter and ICCPR) to accept the extraterritorial application of ICCPR in the context of UN peacekeeping operations? This is not the situation in which obligations of the UN Charter and other treaty obligations conflict each other (see Article 103 of the UN Charter). Rather it is the case that collateral obligations arising from the UN Charter and another treaty correspond with each other.

This study take the position that the member states (to both the UN Charter and ICCPR) are required to consider in good faith the extraterritorial application of ICCPR and the application of the reporting system thereof with respect to peacekeeping operations on the basis of human rights provisions in the UN Charter. The concept of human rights accountability also supports this position. In light of the current insufficiency of accountability mechanisms in the UN system, the UN has no reason to refuse to make use of an existing mechanism outside the UN Charter as an accountability mechanism. Given that principles of accountability arise from a factual issue that an international organization violates individual’s rights, it is no wonder that the principles of accountability require the application of the reporting system under ICCPR, which is essentially a factual matter for the UN.

²¹⁵ The Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol 1155, p. 331.

²¹⁶ Kälin, *supra* note 142, p 32.

While the legal consequence of the obligation to cooperate is small in comparison with that of binding obligations, the UN and member states should be aware of the existence of such legal obligations for healthy development of the Organization, avoiding to distorting legal orders of internal law and international law.

To sum up, this subsection has demonstrated that member states (to both the UN Charter and ICCPR) are required to cooperate with the application of the reporting system under ICCPR on the basis of the Covenant, obligations to cooperate with the UN and HRC and accountability of the UN. Other legal relationships with respect to UN peacekeeping operations and their legal consequences are examined a little further in section 4.2.2

B. The harmonization on their obligations between the UN and the member states

The following paragraphs demonstrate complex regulatory regimes for investigating, prosecuting or disciplining alleged peacekeepers. The complexities result from a triple relationship between the UN, a host state and a troop-contributing state. As described in 2.2, the criminal accountability of peacekeepers is one of the hot topics in the UN system. The existing regimes as well as UN efforts for its reforms give good examples that principles for accountability have had an influence on obligations of UN member states.

In the internal proceedings of criminal acts committed by peacekeepers, the allegations are first supposed to report to the relevant component of the mission, such as SRSG²¹⁷. SRSG will then conduct a preliminary investigation and may call a board of inquiry (BOI) to hold hearings with relevant parties, normally a representative from the contingent. SRSG then make recommendations on appropriate measures to be taken.

In the case of members of national armed forces, based on the BOI's recommendations, SRSG will make recommendations to the national contingent of the alleged perpetrator concerning criminal/disciplinary proceedings²¹⁸, which have no binding force for the national

²¹⁷ UN Department of Peacekeeping Operations (DPKO), Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers, (Directives for Disciplinary), DPKO/CPD/DDCPO/2003/001 or DPKO/MD/03/00993, para. 9.

²¹⁸ Directives for Disciplinary, id, para 8 and 28.

contingent²¹⁹. As already described in section 2.2.2 of chapter 2, the UN can only repatriate the alleged perpetrator and ban the individual in question from future peacekeeping operations²²⁰.

In the first place, there is no binding obligation for the sending state to exercise its criminal jurisdiction over peacekeepers from its contingent, who have allegedly committed criminal acts. Professor Hampson took this fact as one of the reasons why the sending state is unlikely to exercise criminal jurisdiction over the individuals²²¹. Responding to this deficiency, the amended model MOU firstly stipulates that the government assure the UN that it shall exercise criminal and disciplinary jurisdiction with respect to any crimes or offences that might be committed by military and civilian members of the national contingent (Article 7 quinquies, paras 1 and 2).

Secondly, as a new mechanism for following up subsequent proceedings after the repatriation of UN peacekeepers, sending states now have an obligation to ‘notify the Secretary-General of progress on a regular basis, including the outcome of the case’, when suspicions of misconduct by any member of a national contingent are well founded (article 7 sexies, para 1). The follow-up by the UN on the progress of allegations back in the home state or the sending state gives sending states an incentive to exercise their criminal or disciplinary jurisdiction over the allegations, while it is said that the sending state is unlikely to have much interest in prosecuting its national under suspicion of misconducts involving a victim living in a far-away and a conflict-affected area²²². In respect of the sending state’s obligation ‘to notify’, the UN is now in the proper position to follow up the progress of criminal or disciplinary proceedings on misconducts committed by a member of the contingent. Therefore, it can be regarded that the UN now assumes a duty to monitor the relevant troop-contributing states regarding the progress of cases.

When a suspect is subject to the sending state’s criminal jurisdiction, the trial concerned also faces practical difficulties in the collection of evidence and access to the victim or witness²²³.

²¹⁹ Directives for Disciplinary, id, para. 28.

²²⁰ The website of the UN Conduct and Discipline Unit, <https://cdu.unlb.org/UNStrategy/Enforcement.aspx> [last access 29 June 2015].; Ferstman, supra note 50, p 4.

²²¹ Working paper on the accountability, supra note 47, para 67.

²²² Working paper on the accountability, supra note 49, para 66.

²²³ Id, para 41.

In another case, some countries do not allow for the prosecution of all nationals, including police officers, for acts committed abroad²²⁴. Professor Hampson suspected that the exercise of the criminal jurisdiction by the sending state or home state is not always effective, and it causes breach of human rights norms in case allegations are not fully investigated, allegations are not brought before an appropriate authority; the charge, sentence or penalty is not to be decided without taking into account the seriousness of the alleged crime that has taken place in peacekeeping operations²²⁵. Although Professor Hampson did not clearly state the root causes of these problems on the procedural fairness, they would result from the unfamiliarity of the issue on criminal acts committed by peacekeepers as well as the practical difficulties in access to evidence, witnesses and victims.

Some improvements have been seen in relation to the preliminary investigation by the UN, which was also done by the amendment to the Model MOU. The UN has now a competence to initiate preliminary fact-finding proceedings of peacekeepers' misconducts in case of serious misconduct. 'If necessary to preserve evidence and where the Government does not conduct fact-finding', the UN 'may... initiate a preliminary fact-finding inquiry of the matter, until the government starts its own investigation' (Article 7 quater, paras 2 and para 3(a)). The government may send its representative to the investigation team, and receive a complete report of its preliminary fact-finding inquiry (Ibid). These provisions may, if applied appropriately, make up for the practical difficulties in access to evidence, victims and witnesses when a sending state conducts criminal or disciplinary proceedings over misconducts committed by a member of national contingent with respect to peacekeeping operations.

Taking all currently existing mechanisms together, it appears that dealing with off-duty misconducts committed by peacekeepers always involves a two-layer structure between member states and the UN—national jurisdictions and the internal law of the UN—as well as a triple relationship between the UN, a host state and a troop-contributing state. Even the UN puts efforts on developing new mechanism and internal rules to improve criminal accountability of peacekeepers, achieving the purpose always requires cooperation and agreements of member

²²⁴ Id, paras 39-45 and 64; Ferstman, *supra* note 50, p 4.

²²⁵ Working paper on the accountability, *supra* note 49, para 64.

states of the UN. In this regard, member states' obligations to cooperate with the UN would be an element to consider for the states (see the previous subsection A.).

In the case of off-duty misconducts committed by a member of contingent, the only duty of the UN is to investigate the alleged offence and to call for the participating State to fulfill its obligation to punish²²⁶. If the duty of the UN for dealing with such misconducts is to investigate the alleged offence and to call for a competent state to fulfill its obligation to prosecute and punish, the duty was in fact discussed and reviewed within the UN in last several years. In order to efficiently investigate the alleged offence and to call for a competent state to fulfill its obligation to punish, the UN has recognized another subsidiary duty to ensure a relevant state exercises its judicial and disciplinary jurisdiction over the case. In other words, the UN has prepared the way for the environment that the UN can implement its duty to ensure the implementation of member states' obligation to prosecute.

On the other hand, there is a perception that, if possible, prosecution of suspect peacekeepers in the host states is desirable in light of protection of victims and collecting evidence, although prosecution in local courts of a host state is often not realistic due to the inability or unwillingness of national court systems to prosecute peacekeepers²²⁷. One commentator notes that:

'Given that members of UN forces can be subject to the civil jurisdiction of the host country for non-official acts, this may prove an effective route for ensuring greater protection of victims, as well as for preventing abuses through deterrence, provided that claims are actually brought and judgments executed.'²²⁸

Therefore, it is another option to institutionalize special courts or mixed courts in each peacekeeping operation in the field, with asking the sending state to waive the absolute immunity of members of its contingent, although waiver of the absolute immunity of peacekeepers would be controversial²²⁹.

²²⁶ D W Bowett and et.al., supra note 70, p 246.

²²⁷ S A Notar, 'Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo', *Journal of Gender, Social Policy & the Law* 14. 2 (2006), pp 413-429, p 425; Verdirame, supra note 4, p. 217.

²²⁸ Verdirame, *ibid*.

²²⁹ See Working paper on the accountability, supra note 49, para 35 and fn 35.

By and large, a decision-making body of the UN is expected to decide upon an adequate institutional design for an accountability mechanism, harmonizing and balancing the interests of relevant parties inside and outside the UN as well as the objectives of peacekeeping operations.

4.2.2 Interdependence and competing interests in a peacekeeping operation

This section illustrates a complex legal relationship between the UN and member states with respect to activities of peacekeeping operations a little further. As a legal maxim goes, ‘where there is a society, there is law’. Hence, this section tries to find norms addressed to each concerned party by revealing legal relationships concerning peacekeeping operations.

A. Fundamental relationship between the UN and relevant states

A peacekeeping operation is based on several instruments applied to different parties. In the first place, the legal basis for establishing a peacekeeping operation is a UN Security Council or UN General Assembly resolution which specifies the mandate of the operation. The Secretary-General usually prepares a detailed plan of the mandate, finds troop-contributing states through informal counsel, after consulting with the Security Council, and at last concludes the agreement on the supply of troops with state parties²³⁰. In this way, the UN and a contributing state conclude an agreement on the responsibility and standards for the provision of personnel and equipment. The agreement is known as the Memorandum of Understanding (MOU) whose content is somewhat harmonized by adopting the model MOU reflecting established practices²³¹. On the other hand, the UN and the host state generally conclude the Status of Force Agreement (SOFA) which regulates the relations between the force and the host state and also between the UN and the host state.

²³⁰ Zwanenburg 2005, *supra* note 2, p 35.

²³¹ Model Agreement between the Member State Contributing Personnel and Equipment to United Nations Peacekeeping Operations, UN Doc A/46/185 (23 May 1991). See also the amended Model MOU.

Once a national force is incorporated into a peacekeeping operation, the force becomes a subsidiary organ of the main organ²³², either the UN Security Council or the UN General Assembly according to whether the peacekeeping operation is established by a UN Security Council or UN General Assembly resolution²³³. The Secretary-General has authorization to deploy, organize, conduct and direct the operation, which is exercised by a Special Representative of the Secretary-General (SRSG), or in his absence the Force Commander, in the field²³⁴. In other words, a SRSG has an authority over all components of a peacekeeping operation. However, to what extent the UN takes command and control of each mission or military contingent depends on the SOFA and the MOU.

The troop-contributing states have the exclusive criminal and disciplinary jurisdiction, because the contributing states require it for ease of supplying personnel²³⁵. That is, '[s]uch policy, obviously, makes easier the decision of States to contribute troops from their armed forces.'²³⁶ The criminal accountability of UN peacekeepers is, in the first place, assumed by the individual perpetrators. At least, the troop-contributing state is required to investigate the case to prosecute the perpetrators in accordance with the Model MOU although investigation and prosecution are not legally binding obligations for the troop-contributing state. In addition, the off-duty misconducts committed by peacekeepers can—on the rare occasion—raise a liability issue for the UN or the troop-contributing state, depending on circumstances (See section 2.2).

B. Financial relationship

The UN reimburses contributing states for the expense of providing equipment, personnel and support service to military contingents according to the agreed MOU, while soldiers are paid their salary by their own government²³⁷. The personnel expense of soldiers is set at a standard rate of US\$ 1,028 a little plus per soldier per month. These reimbursements are

²³² See The case concerning Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, 1962 ICJ Report, p 151, p 176.

²³³ Zwanenburg 2005, *supra* note 2, p 37.

²³⁴ UN Doc A/46/185 (23 May 1991), para 7. See also Zwanenburg 2005, *id*, pp 38-39.

²³⁵ See Zwanenburg 2005, *id*, p 38.

²³⁶ See Summary study of the experience derived from the establishment of the Forces, UN Doc. A/3943 (9 October 1958), para 136.

²³⁷ 'Financing peacekeeping', the website of the UN, <http://www.un.org/en/peacekeeping/operations/financing.shtml> [29 July 2015 last access].

paid from out of a total budget for UN peacekeeping operations²³⁸. In the case of police and other civilian personnel, the UN pays the personnel expenditure from the peacekeeping budgets.

With respect to the financing of peacekeeping operations, peacekeeping expenses are expenses of the UN provided for in Article 17 of the UN Charter²³⁹. While peacekeeping operations are one of the UN's official activities, member states' contributions to peacekeeping operations are differ greatly in member states. The General Assembly adopted the scale of assessments for member states for peacekeeping expense according to the relative economic wealth of member states instead of providing a comprehensive peacekeeping budget from the regular budget of the UN²⁴⁰. In addition, it is said that some member states provide contributions above and beyond their assessed share of peacekeeping costs²⁴¹. All in all, the delay in payment and voluntary contributions give a little different picture of each member state's contributions.

The degree of contribution to peacekeeping operations is not a decisive factor in deciding whether only personnel-contributing states assume inordinate burden based on their spirit of self-sacrifice. Rather it appears that troop-contributing states have accountability for peacekeepers' behaviors in the field vis-à-vis the UN and member states to the extent that some parts of expenses for each national contingent are covered by the UN and other voluntary contributions of benefactors. In other words, while peacekeeping expenses are regarded as expenses of the UN by acknowledging that peacekeeping is one of UN activities, the burden of peacekeeping operations has been shared by member states not equally but somewhat in a balanced manner.

As a result, it is made clear that all member states have interest in the outcome of peacekeeping operations, including peacekeepers' behaviors in the field. Therefore, troop-contributing states assume the accountability to the UN and all other member states. All member states more or less exercise authority over peacekeeping operations through financial or

²³⁸ 'Contingent owned equipment', the website of the UN, <http://www.un.org/en/peacekeeping/sites/coe/index.shtml> [29 July 2015 last access].

²³⁹ The Certain Expenses Case, *supra* note 228, p 151.

²⁴⁰ UN General Assembly res A/RES/55/235 (23 December 2000).

²⁴¹ 'Financing peacekeeping', the website of the UN: <http://www.un.org/en/peacekeeping/operations/financing.shtml> [last access 29 July 2015].

personnel contributions to the operations. Therefore, not only the troop-contribution states but also all other member states have the accountability for peacekeepers' misconducts in the field.

C. Practical adverse effects from misconducts of peacekeepers

Criminal and disciplinary offences need to be publicized and make the process transparent, because impunity for misconducts committed by peacekeepers may undermine the trust in the mission. Therefore, accountability mechanisms for transparency of criminal and disciplinary offences are significant. Where the exercise of criminal jurisdiction is uncertain, disciplinary proceedings should at least be secured. The virtual impunity resulting from unwillingness or inability of the state having jurisdiction affects the accountability of the UN, and is subject to adverse effects. Firstly, 'any apparent lack of accountability is not only bad in itself but it seriously weakens the authority and credibility of the mission as a whole and undermines the possibility of securing accountability in the future within the host State.'²⁴²

There is also a noteworthy comment that says:

'Whenever crimes are committed by persons participating in a United Nations operation, there will be an impact on the trust that the United Nations seeks from the local community. This breach of trust makes the work of the United Nations difficult to accomplish. Without the trust of the community, mandates will not receive full cooperation and may fail or take longer to achieve.'²⁴³

Therefore, dealing with criminal accountability of peacekeepers is crucial to carrying out coherent and efficient operations in the field.

D. Interdependence and competing interests between the UN and member states

This section has shown that there is a complex legal relationship between the UN and member states with respect to activities of peacekeeping operations. The relationships are concerned with bases of cooperation, attribution of responsibility and issues of accountability. Some relations are based on unilateral commitment, others are multilateral or reciprocal. What is

²⁴² Working paper on the accountability, *supra* note 49, para 66.

²⁴³ 'Criminal accountability of United Nations officials and experts on mission', note by the Secretariat, A/62/329 (11 September 2007), para 12.

more, the relationship comprises the involvement of peacekeepers and locals. The relationship between member states is also diverse depending on the position of each member state, such as a troop-contributing state, a host state, a financially contributing state.

The complexities of legal relationship between all concerned parties make indistinct where responsibility or accountability lies. From a broader perspective in line with the concept of accountability, it appears that there is an undeniable demand for accountability mechanisms or internal control mechanisms which are to give account to each other for the purpose of good governance. UN peacekeeping activities are based on many-layered cooperation between a host state, troop-contributing states and UN bodies. Therefore, while attribution of responsibility between the UN and a member state concerned can be established in accordance with law of responsibility—one single regime, securing accountability requires a variety of means. With respect to human rights accountability of the UN, concerned parties include not only states and UN bodies but also individuals.

The demand for accountability mechanisms based on these legal relationships supports a UN mission's and member states' reporting obligations under UN human rights treaties in connection with the human rights situation in peacekeeping operations. While the UN may establish new models of accountability mechanisms, the reporting system under UN human rights treaties can serve as an accountability mechanism. While the demand for accountability mechanisms is a consequence of UN activities in the new field, conventional institutions, such as the reporting system, can serve for the new demand as far as the legal basis relate to the original objectives of the institution.

Conclusion

The reporting system in the context of UN human treaties has been a conventional form of international system since the creation of the UN, which is to monitor state parties implementing treaty obligations. Following the introduction of the concept of accountability of international organizations, the institutional design of the reporting system has been seen as one of the mechanisms for the UN's accountability in connection with peacekeeping operations. Although the reporting system has potential utility in issues of the UN's accountability, practices are still scarce to generalize the reporting system as an accountability mechanism. The aim of the present study has not been to advocate such utility of the reporting system, but to prove that some of the existing procedures are able to deal with the new problem—issues on accountability of international organizations. This study has found legal bases of such utility of the reporting system in UN human rights treaties with special emphasis on the legal relationship between the UN and member states to it.

In line with the principles under the concept of accountability, human rights protection relates to good governance. In essence, the exercise of power can be in conflict with the interests of people subject to the power. Thus, control over power is necessary in light of accountability of authorities as well as human rights and good governance. The institutional design to effectively secure individual's rights requires transparency in the activities of authorities and the involvement of third parties, including individuals, monitoring bodies or NGOs, for the realization of the objectives of human rights treaties. The involvement of a variety of concerned parties seems to be based on the particularity of human rights obligations which have an *erga omnes* character.

As far as institutional design is concerned, this paper has showed that the international community has already seen several models of accountability mechanisms giving account in the field of human rights protection. On the other hand, new rules and regulations are required in line with new activities of international actors and changes in the international scenario. The fact

is that conventional international systems that were agreed between states more than a half century ago do not cover legal issues arising from new situations these days. On the other hand, legal stability is a competing factor against the adoption of new norms in the international legal order. Furthermore, the more drastic the proposed change in law, the more difficult it becomes to reach an agreement on the amendment in international law. Between new regimes and old regimes, international actors are in the process of reconciling their interests, justifying their interest based on laws.

Bibliography

SELECTED UN DOCUMENTS

- ‘A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations’ (Zeid report), A/59/710 (24 March 2005).
- ‘Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations’, Report of the Secretary-General, A/51/389 (20 September 1996).
- ‘Liability of the United Nations for claims involving off-duty acts of members of peace-keeping forces--determination of “off-duty”’, UN Juridical Yearbook 1986 (Part II), p 300
- ‘Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations’, UN doc. A/60/980 (16 August 2006)
- ‘Special measures for protection from sexual exploitation and sexual abuse’, Report of Secretary-General, A/68/756 (14 February 2014).
- ‘Special measures for protection from sexual exploitation and sexual abuse’, Secretary-General's Bulletin, ST/SGB/2003/13 (9 October 2003)
- United Nations comprehensive strategy on assistance and support to victims of sexual exploitation and abuse by United Nations staff and related personnel, UNGA res. A/RES/62/214 (7 March 2008)
- Working paper on the accountability of international personnel taking part in peace support operations, prepared by F Hampson, E/CN.4/Sub.2/2005/42 (7 July 2005)

BOOKS, ARTICLES AND OTHER LITERATURE

- Amerasinghe, C F, *Principles of the institutional law of international organizations* (Cambridge University Press, 2005).
- Bothe, M., 'Compliance', in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, (<http://opil.ouplaw.com>), last updated 2010.
- Bowett, D W, and et al, *United Nations Forces: A Legal Study* (the Lawbook Exchange, 2008)
- Brunné, J, 'Compliance control', in G Ulfstein ed., *Making Treaties Work*, (Cambridge University Press, 2007) [hereinafter, Ulfstein ed, *Work*] pp. 373-318.
- Cassese, A, *International Law* (2nd edn, Oxford University Press, 2005)
- Cheyese, A and A H Cheyese, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).
- Churchill, R and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', *American Journal of International Law* 94 (2000), pp 623-659.
- Collins, R, and N D White eds, *International organizations and the idea of autonomy: institutional independence in the international legal order* (Routledge, 2011).
- Collins, R, and N D White, 'Between independence and accountability: exploring the legal autonomy of international organizations', in B Reinalda ed, *Routledge Handbook of International Organization* (Routledge, 2013), pp 119-131.
- Curtin, D and A Nollkaemper, 'Conceptualizing accountability in international and European Law', *Netherlands yearbook of international law* 36.1 (2005), pp 3-20.
- Dekker, I F, 'Making sense of accountability in international institutional law', *Netherlands Yearbook of International Law* 36.1 (2005), pp 83-118.

- Engström, V, *Understanding powers of international organizations: a study of the doctrines of attributed powers, implied powers and constitutionalism—with a special focus on the Human Rights Committee* (Turku: Åbo Akademi University Press 2009).
- , 'Reasoning on powers of organizations', in J Klabbers and W Asa eds, *Research handbook on the law of international organizations* (Edward Elgar Publishing, 2011), pp 56-83.
- Ferstman, C, 'Criminalizing sexual exploitation and abuse by peacekeepers', Report of United Institute of Peace, (available at <http://www.usip.org/sites/default/files/SR335riminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf>), (2013), p. 5.
- Hafner, G, 'Can International Organizations be Controlled? Accountability and Responsibility', *American Society of International Law Proceedings*, 97 (2003), pp. 236-240.
- International Law Association, *The final report on accountability of international organisations*, (Berlin: 2004).
- Kälin, W, 'Examination of state reports', in H Keller, G Ulfstein and L Grover. *UN human rights treaty bodies: law and legitimacy*, (Cambridge University Press, 2012), pp 16-72
- Kiss, A, 'Reporting Obligation and Assessment of Reports', in Beyerlin et al eds, *Ensuing Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, (Martinus Nijhoff Publisher, 2006), pp. 229-245.
- Kjærum, M, 'State Reports', in Alfredsson, G et al eds, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller*, (2nd edn, Martinus Nijhoff Publishers, 2009) [hereinafter, Alfredsson, et al eds, *Mechanisms*], pp.17-24.
- Klabbers, J, *An Introduction to International Institutional Law*, (1st edn, Cambridge University Press, 2002).

- , *An Introduction to International Organizations Law*, (Cambridge University Press, 2015)
- Koh, H H ‘How Is International Human Rights Law Enforced?’, *Indiana Law Journal* 74, (1998), pp. 1397-1417.
- Knoll, B, *The legal status of territories subject to administration by international organisations* (Cambridge: Cambridge University Press, 2008).
- Larsen, K M, *The human rights treaty obligations of peacekeepers* (Cambridge University Press, 2012).
- Mégret, E, ‘Nature of Obligation’ in D Moeckli, S Shah and S Sivakumaran eds, *International Human Rights Law*, (1st edn, Oxford University Press, 2010), pp 124-149.
- Notar, S A, ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo’, *Journal of Gender, Social Policy & the Law* 14. 2 (2006), pp. 413-429.
- Raustiala, K, *Reporting and Review Institutions in 10 Multilateral Environmental Agreements*, (UNEP, 2001).
- Reinisch, A, *International Organizations before national courts* (Cambridge University Press, (2000).
- , ‘Securing the accountability of international organizations’, *Global Governance* 7 (2001), pp 131-149.
- , ‘Aid or assistance and direction and control between states and international organizations in the commission of internationally wrongful acts’ *International Organizations Law Review* 7.1 (2010), pp 63-77.
- , ‘To What Extent Can and Should National Courts “Fill the Accountability Gap”?’, *International Organizations Law Review* 10.2 (2014), pp 572-587.

- Scheinin, M, 'The International Covenant on Civil and Political Rights', in Ulfstein ed, *Work* (2007), pp 48-69.
- Schermers, H and Blokker, N M, *International Institutional Law: unity within diversity* (3rd edn, Martinus Nijhoff Publishers, 1995).
- , *International Institutional Law: unity within diversity* (4th edn, Martinus Nijhoff Publishers, 2011).
- Schmalenbach, K, 'Third party liability of international organizations: a study on claim settlement in the course of military operations and international administrations', *International Peacekeeping* 10, (2005), pp. 33-51.
- Schmidt, M, 'Follow-up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council—Recent Developments', in Alfredsson, et al. eds, *Mechanisms* (2009), pp.25-34.
- Simić, O and M O'Brin, "'Peacekeeper Babies": An Unintended Legacy of United Nations Peace Support Operations', *International Peacekeeping* 21.3, (2014), pp.345-363.
- Shaw, M N, *International Law* (7th edn: Cambridge University Press, 2014).
- Slaughter, A-M. 'The accountability of government networks', *Indiana Journal of Global Legal Studies* 8.2 (2001), pp 347-367.
- Sweetser, C., 'Providing effective remedies to victims of abuse by peacekeeping personnel', *New York University Law Review* 83 (2008), pp. 1643-1678.
- Tams, C J, 'Enforcement', in Ulfstein ed, *Work* (2007), pp. 319-406.
- Tomuschat, C, 'Human Rights Committee', in *Max Planck Encyclopedia of Public International law*, Oxford University Press (<http://opil.ouplaw.com>), last undated October 2010.
- , 'International Covenant on Civil and Political Rights', UN Audiovisual Library of International Law, available at <http://www.un.org/law/avl/> [last access 13 August 2015].

Ulfstein, G, ed, *Making Treaties Work*, (Cambridge University Press, 2007).

UNEP, *Compliance Mechanisms under Selected Multilateral Environmental Agreements*, UNEP Web site, (<http://www.unep.org/delc/MorePublication/tabid/54417/Default.aspx>), (2007).

Valticos, N, 'Contrôle', in Dupuy, R-J ed, *A handbook on international organizations* (2nd edn, Martinus Nijhoff, 1998), pp 461-484.

Wickremasinghe, C, and G Verdirame, 'Responsibility and liability for violations of human rights in the course of UN field operations', in C. M. Scott ed., *Torture as tort: comparative perspectives on the development of transnational human rights litigation*, Hart Publishing, 2001, pp.465- 489.

Young, K A, *The Law and Process of the U.N. Human Rights Committee: The Procedural Aspects of International Law Monograph Series* (Transnational Publishers, 2002).

Zwanenburg, M, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005)

-----, 'UN peace operations between independence and accountability', *International Organization Law Review* 5 (2008), pp 23-47, p 23.

Abstract

This paper aims to answer a question: What is the legal basis of UN human rights treaty bodies for monitoring the UN's accountability with regard to peacekeeping operations? For that purpose, demonstrations have been given regarding the institutional characteristics and practices of the reporting system under the International Covenant on Civil and Political Rights, whose treaty body is called the Human Rights Committee (HRC), in accordance with the current discussion about the accountability of international organizations. The accountability of international organizations has increasingly received attention from a variety of perspectives, including human rights protection, good governance, peacekeeping operations and immunity of international organizations. Pursuant to the broad scope of discussion on accountability, the present study deepens the analysis on legal issues regarding the UN's accountability with regard to peacekeeping operations, with special focus on UN practices and the new developments in this field. In contrast to a general understanding, this paper highlights the roles of UN human rights treaty bodies as a mechanism for accountability over UN peacekeeping operations. It is revealed that HRC is able to monitor the human rights situation in a peacekeeping operation based on the legal relationship between the UN and member states and their duties that arise therein.

Zusammenfassung

Ziel der Arbeit ist es, eine Frage zu beantworten: Was ist die legale Basis der UN-Menschenrechtsorganisationen zur Überwachung der Accountability der Vereinten Nationen bei Friedenssicherungseinsätzen? Zu diesem Zweck werden die institutionellen Merkmale und Praktiken des Berichtswesens im Rahmen des Internationalen Pakts über bürgerliche und politische Rechte, dessen Vertragsorgan der Menschenrechtsausschuss (HRC) ist, in Übereinstimmung mit der aktuellen Diskussion über die Accountability internationaler Organisationen dargelegt. Die Accountability internationaler Organisationen erhält zunehmend Aufmerksamkeit aus einer Vielzahl von Perspektiven, dazu gehört der Schutz der Menschenrechte, Good Governance, Friedenssicherungseinsätze und die Immunität von internationalen Organisationen. Gemäß dem breiten Umfang der Diskussion über Accountability, vertieft die vorliegende Studie die Analyse rechtlicher Fragen der UN-Rechenschaftspflicht in Bezug auf Friedenssicherungseinsätze, mit speziellem Fokus auf UN-Praktiken und neuen Entwicklungen in diesem Bereich. Im Gegensatz zum allgemeinen Verständnis untertreicht dieses Papier die Rolle der UN-Menschenrechtsvertragsorgane als einen Mechanismus für die Accountability über UN-Friedenssicherungseinsätze. Es wird gezeigt, dass der HRC in der Lage ist, die Menschenrechtslage während eines Friedenssicherungseinsatzes auf der Grundlage des Rechtsverhältnisses zwischen den Vereinten Nationen und den Mitgliedstaaten sowie den Aufgaben, die daraus erwachsen, zu überwachen.