



HARVARD ILJ ONLINE  
VOLUME 51 – JUNE 14, 2010

## United Nations Peacekeepers and Human Rights Violations: the Role of Military Discipline

Responding to Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113 (2010).

Peter Rowe\*

That breaches of military discipline occur during some peacekeeping operations can hardly be doubted. Some of these breaches likely infringe the human rights of the people those operations are intended to aid.<sup>1</sup> In a recent article advocating for a more

---

\* Peter Rowe is a Professor of Law at the Lancaster University Law School.

<sup>1</sup> There may be some doubt as to whether individuals actually possess human rights as legal rights which may be enforced, especially when they reside in states which are not party to any human rights treaties. States that contribute peacekeepers may also not be treaty parties. Even where all relevant states are also parties, it is not clear that the sending state has human rights obligations with respect to people outside its territory or its jurisdiction. In light of the frequency with which the Security Council directs states and other groups to comply with international human rights law, one might assume that the United Nations has a clear idea of what “human rights law” means in this context. See, for example, S.C. Res. 1868 (2009), ¶ 15, 28, U.N. Doc. S/RES/1868 (Mar. 23, 2009) (calling for respect for human rights and international humanitarian law in Afghanistan). In paragraph 4(g), however, the Council drew attention to those “[human rights] treaties to which Afghanistan is a State party.” UN peacekeeping capstone doctrine indicates that the term “human rights” refers to those rights contained in the Universal Declaration of Human Rights. U.N. Dep’t of Peacekeeping Operations and Dep’t of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, 14-15 (2008). It should be noted, however, that the preamble to the Declaration appears to apply it to “the peoples of Member States themselves and among the peoples of

effective system of accountability, Tom Dannenbaum proposes attributing responsibility between the United Nations and the state contributing troops to the mission.<sup>2</sup> Although this approach has an impressive judicial pedigree<sup>3</sup>, I believe discussion of the attribution of responsibility usually distracts from the more pressing

---

territories under their jurisdiction.” Universal Declaration of Human Rights, G.A. Res. 217A, pmbL, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Thus, although the United Nations should comply with the Declaration (and customary international human rights norms), it is not clear that Article 8 of the Declaration obliges a peacekeeping state to provide any remedy to victims of human rights violations.

<sup>2</sup> Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT’L L. J. 113 (2010).

<sup>3</sup> The issue of whether responsibility for the acts of armed forces acting under some form of UN authorization in individual cases should be attributed to the State involved or to the United Nations has been considered in a number of cases, not least by the European Court of Human Rights and by courts in England and Wales. See *Behrami v. France, Saramati v. France, Germany & Norway*, App. Nos. 71412/01 & 78166/01, 45 Eur. H.R. Rep. 85 (2007) (an admissibility decision of the Grand Chamber holding that it lacked jurisdiction to review the actions of the respondent states because the conduct was attributable to the United Nations). For criticism of that judgment see Heiki Kreiger, *A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights*, 13 J. INT’L PEACEKEEPING 159 (2009). Compare *Bici v. Ministry of Defence* [2004] EWHC 786, ¶ 2 (QB), in which Elias, J. concluded, in a judgment delivered prior to the *Behrami* case, that “the Crown retained command of the British forces [in Kosovo] notwithstanding that they were acting under the auspices of the U.N.”; *R. (Al-Jedda) v. Sec’y of State for the Home Dep’t*, [2007] UKHL 58, [2008] 1 A.C. 332 involving the detention by British forces of an individual in Iraq on the basis of UN Security Council Resolution 1546 (2004), and distinguishing *Behrami*. The decision in *Attorney-General v. Nissan*, [1970] A.C. 179, 222 (opinion of Morris, L.) in holding that “British forces [serving with the U.N. forces] continued... to be soldiers of Her Majesty,” appears now to be, at least in its outcome, consistent with the *Al-Jedda* case. However, the reasoning is different. Lord Morris seemed to conclude that the attribution of responsibility to the troop contributing State (the United Kingdom) was due to three factors: that the United Nations was not a sovereign state, that the United Kingdom remained exclusively responsible for discipline, and that an agreement between the Secretary-General and the government of Cyprus did not provide otherwise. The same court in *Al-Jedda* conducted a more detailed inquiry into the relationship between the United Nations and troop contributing states. The respective Security Council Resolutions 186, U.N. Doc. S/RES/186 (Mar. 4, 1964) (*Nissan*), and 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (*Al-Jedda*) can be distinguished from 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (*Behrami and Saramati*) at least in the detail set down in those resolutions by the Security Council. The nature of each resolution will determine with which decisions of the Security Council states are obliged to comply under U.N. Charter art. 25. For a more detailed discussion of the question of attribution of human rights violations committed by peacekeepers, see generally Keir Starmer, *Responsibility for Troops Abroad: UN Mandated Forces and Issues of Human Rights Accountability*, 13 EUR. HUM. RTS. L. REV. 318, 333 (2008); Christopher Leck, *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct*, 10 MELB. J. INT’L L. 346 (2009); Otto Spijkers, *The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court*, 13 J. INT’L PEACEKEEPING 197 (2009).

practical issues of “preventing the wrong in question.”<sup>4</sup> Individual property claims against sending states are outside the scope of this paper and are not considered further.<sup>5</sup>

Determining attribution as between the United Nations and individual states poses an almost insurmountable obstacle to those who claim that their human rights have been infringed by members of a peacekeeping force. Whether the claim is brought before a national court or to a human rights body, the litigation is likely to be protracted, complex and extremely costly. Current decisions show this to be the case.<sup>6</sup> Whether alleged breaches of human rights are attributed solely to the United Nations or the duty to obey U.N. Security Council resolutions replaces state obligations to comply with their human rights obligations, the result is the same.<sup>7</sup> The state whose armed forces acted (or failed to act) in such a way as to cause the alleged breach of human rights can disclaim any responsibility. The claimant is then left to the uncertain course of pursuing a remedy against the United Nations itself.<sup>8</sup> Even if successful, the

---

<sup>4</sup> Danennbaum, *supra* note 2, at 114.

<sup>5</sup> Although see below for a discussion of the practice of the United Nations in making ex gratia payments in appropriate cases. As to civil claims, see generally Jody M Prescott, *Claims*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 159 (Dieter Fleck, Ed., 2001); The Secretary General, *Model Status-of-Forces Agreement for Peace-Keeping Operations, Report of the Secretary-General*, ¶ 51, delivered to the General Assembly, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter *Model SOFA*]. Prescott discusses paragraph 51 and draws attention to the fact that “the Model SOFA claims mechanism has never been used.” Prescott at 170–71. For a tort claim brought against the U.K. Ministry of Defence respecting British soldiers who had shot and killed two civilians in Kosovo, see *Bici v. Ministry of Defence* [2004] EWHC 786 (QB). Individual peacekeeping forces may set up an *ad hoc* claims procedure in the territory concerned to provide compensation for a range of incidents caused by their armed forces.

<sup>6</sup> The various courts which have dealt with this issue were not, strictly speaking, determining attribution between states and the United Nations. They were determining whether the state concerned was responsible for alleged breaches of human rights under their particular human rights regimes. Decisions at first instance will rarely be sufficient to determine the issue. By way of example, the decision in the *Al-Jedda* case, [2007] UKHL 58, came before a court of first instance in England in August 2005 and judgment was given in the final court of appeal in December 2007. It is scheduled for a public hearing before the European Court of Human Rights to begin in June 2010. European Court of Human Rights, Cases Pending Before the Grand Chamber, available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Grand+Chamber/> (last visited Mar. 27, 2010).

<sup>7</sup> See *Al-Jedda*, [2007] UKHL 58. For comment see Aurel Sari, *The Al-Jedda Case Before the House of Lords*, 13 J. INT’L PEACEKEEPING 181 (2009).

<sup>8</sup> The proposals made by Dannenbaum might, if accepted, facilitate pursuing a remedy against the United Nations. However, as it stands, United Nations assistance for victims is limited to heads of missions “[considering] taking appropriate measures to assist victims of acts of serious misconduct, including directing them to relevant organizations/support groups that could provide assistance.” Department of Peacekeeping Operations, *Directives for Disciplinary Matters Military Members of National Contingents*, para. 27, U.N. Doc. DPKO/MD/03/00993; Department of Peacekeeping Operations, *Directive on Sexual Harassment in United Nations Peacekeeping and Other Field Missions*, para. 45, U.N. Doc. DPKO/MD/03/00995.

claimant can only expect the United Nations to make an *ex gratia* payment. If, on the other hand, the claimant takes a distinctly legal approach to the claim, he will be faced with a number of difficult issues, even assuming the issue of the immunity of the United Nations is not pursued.<sup>9</sup>

Any lawyer acting on behalf of the United Nations could raise significant questions, including: “Which precise human right are we alleged to have breached when we (the United Nations) are not a Party to any human rights treaty?”; “is the claimed human right established by customary international law?”<sup>10</sup>; “how could we, the United Nations, have acted to prevent it when actual control over members of national contingents remains with the armed forces of the national contingent?”<sup>11</sup>; “how could we, the United Nations, investigate the actions of those troops and ensure we bring to justice those who have committed breaches of the sending state’s law?”<sup>12</sup>; “how are we to determine these and other related matters within the existing claims machinery available to the United Nations?”

---

<sup>9</sup> See generally, Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT’L L. 103, 107-08 (2002) (discussing the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15); U.N. Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, *Working Paper on the Accountability of International Personnel Taking Part in Peace Support Operations*, ¶¶ 26–49, U.N. Doc. E/CN.4/Sub.2/2005/42 (July 7, 2005) (prepared by Françoise Hampson) (discussing immunity).

<sup>10</sup> Dannenbaum refers to “genocide, slavery, disappearance, torture, arbitrary detention, and apartheid to name a few” human rights norms recognized by some authorities as *jus cogens*. Dannenbaum, *supra* note 2, at 136 n.164

<sup>11</sup> Control over the actual conduct of military operations must reside with the national contingent since the United Nations could hardly determine when, for example, unexploded ordnance was to be cleared. The UN Force commander is unlikely to have a detailed knowledge of the skills of individual members of that contingent or the equipment available to them. See also *infra* note 21. The issue of whether a UN commander’s orders must be obeyed by members of a national contingent is discussed below.

<sup>12</sup> For investigations by the United Nations into allegations of misconduct by peacekeepers, see *infra* note 34. For investigations in relation to non-military members of national contingents, see Rawski, *supra* note 9, at 114. A related issue is whether statements or other evidence obtained from a UN investigation would be admissible in the military or civil courts of the national contingent. See United Nations General Assembly Sixth Committee, *Sixty-Second Session: Criminal Accountability of United Nations Officials and Experts on Mission*, <http://www.un.org/ga/sixth/62/CrimAcc.shtml> (last visited March 28, 2010). Further, the more rigid requirements of an investigation into alleged breaches of articles 2 and 3 of the European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213, U.N.T.S. 222, could probably not be fulfilled by the United Nations. In *Rantsev v. Cyprus and Russia*, App. No. 25965/04, ¶ 232 (2010), the European Court of Human Rights stressed that “the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-

Attributing the actions of national contingents to a UN peacekeeping operation raises also the matter of command of those forces and their obligation to obey orders emanating from outside their military structures. A UN Force commander will be appointed by, and answerable to, the Secretary-General, but his orders to a national contingent cannot be “orders” in the same way as orders given within the intrastate chain of command structure. The rules of engagement for individual national contingents are likely to differ as will the national law of contingents. Some states may have placed caveats on their participation. An “order” given by the Force commander to one contingent may amount to an illegal act according to its national law. Dannenbaum correctly draws attention to the fact that some “orders” may be direct in the sense that they require certain action to be taken or not taken while others may set out a particular course and leave it to the discretion of the national contingent as to how to achieve the objective sought.

A lawful “order” to do something by a U.N. Force commander is quite different from one which “orders” the national contingent to continue its operation without, for instance, requested air support for its ground operations. An “order” to do something that amounts to a war crime or a breach of human rights (as posited by Dannenbaum) cannot create a military law obligation on the part of its recipients in a national contingent to obey it. The actual decision as to whether to carry out an order from the Force commander can rest only with the national commander, who, in turn, can compel obedience from his subordinates.<sup>13</sup> The order of the U.N. Force commander could make him a secondary party to any war crime committed by soldiers of a national contingent following his “order.”<sup>14</sup> It is not easy to see why, as Dannenbaum suggests, such an “order” would create joint and several liability between the UN and the state supplying the national contingent, whereas an “order”

---

of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.”

<sup>13</sup> The national commander may order his subordinates to obey the UN Force commander, but a military obligation to obey only lawful orders (in whatever form this is expressed) is determined by the law of the national state, since members of national contingents are not employed by the United Nations. *See generally*, EUROPEAN MILITARY LAW SYSTEMS 120–129 (Georg Nolte, ed., 2003). For the position in the United States see Art 92, Uniform Code of Military Justice, 10 U.S.C., para 801; United States ex rel. New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006); United States v. Rockwood, 48 MJ 501 (A. Ct. Crim. App. 1998) (both cases involving disobedience to lawful orders in peacekeeping operations).

<sup>14</sup> As to the separate ways of committing a crime contrary to the Rome Statute of the International Criminal Court, July 17 1999, 2187 U.N.T.S. 90, see article 25 of that Statute. Any claim that the Force commander is immune from prosecution on the grounds that he is acting on behalf of the United Nations would be met with the rejoinder that, “[j]urisdictional immunity...cannot exonerate the person to whom it applies from all criminal responsibility,” Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 14).

which caused a breach of an individual's human rights would make the United Nations solely responsible.<sup>15</sup>

The Force commander is not a "commander" in the normal sense of the term. He cannot enforce his "orders" down the chain of command within a national contingent. That contingent, as a military unit, cannot therefore be linked to the UN merely through the umbilical cord of the Force commander. Apart from the unusual situation where the UN retains ultimate authority and control<sup>16</sup> over peacekeeping operations, each national contingent must be fully responsible for its own actions or inaction.

Should a court attribute responsibility to the state contributing troops to a UN peacekeeping mission at all, the claimant against the state can hardly rejoice. That state may not be a party to any human rights treaty.<sup>17</sup> Even if it is, it may take the view that its obligations do not run outside its own territory (or if they do so, only to a very limited extent).<sup>18</sup> Were it to concede this point, it might yet argue that there is no proof that a member of *its* armed forces committed the acts in question, or that injuries to a detainee were caused prior to capture, or that the claimant has not exhausted domestic remedies available to him.<sup>19</sup>

---

<sup>15</sup> In using the term a "war crime," it is not clear whether Dannenbaum intends to convey the idea of an egregious breach of human rights or whether he intends to refer to human rights breaches, which also amount to war crimes, committed by a UN force during an armed conflict. The former meaning is vague, while the latter is dependent on a finding that an armed conflict was taking place at the time (unless the acts committed by the UN force amounted to genocide or a crime against humanity). It is, perhaps, preferable that the criminal liability of an individual (the UN Force commander) should be separated from the issue of attribution of responsibility as between the United Nations and a particular State.

<sup>16</sup> *Behrami v. France, Saramati v. France, Germany & Norway*, App. Nos. 71412/01 & 78166/01, 45 Eur. H.R. Rep. 85, ¶¶ 134-136 (2007). Compare *R. (Al-Jedda) v. Sec'y of State for Defence* [2007] UKHL 58, [2008] 1 A.C. 332, ¶ 148, (Opinion of Brown, L.) "the precise meaning of the term 'ultimate authority and control' I have found somewhat elusive."

<sup>17</sup> Pakistan, the largest contributor of uniformed personnel to U.N. peacekeeping operations, *see* United Nations Peacekeeping, Monthly Summary of Contributors of Military and Police Personnel, available at <http://www.un.org/en/peacekeeping/contributors/> (last visited Apr. 9, 2010), has signed but has not ratified the International Covenant on Civil and Political Rights. United Nations Treaty Collections, International Covenant on Civil and Political Rights 2, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (last visited Apr. 9, 2010).

<sup>18</sup> *See R. (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26 and compare *R. (Smith) v Oxfordshire Assistant Deputy Coroner* [2009] EWCA Civ 441 (British soldier was within the jurisdiction of the United Kingdom whilst serving in Iraq).

<sup>19</sup> An application made to the European Court of Human Rights will be inadmissible if an applicant has not exhausted all domestic remedies and has not brought the application within 6 months of the final decision, Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Nov. 4 1950, Europ. T.S. 005. For examples see *Isayeva, Yusupova & Bazayeva v. Russia* (2005) 41 EHRR 39, ¶¶ 147-151; *Khashiyev v. Russia* (2006) 42 EHRR 20, ¶ 117.

Given the intractable legal questions that would undermine any attempt to seek relief by suing either the sending state or the United Nations, I support an alternative approach to the problem of human rights violations by UN peacekeepers. I believe that we should concentrate primarily on the prevention of abuses by peacekeepers rather than on providing a legal human rights remedy to those affected by the acts of peacekeepers. As the adage says, an ounce of prevention is better than a pound of cure. Of course, this is not to suggest that were a legal remedy to be more feasibly available, it should be closed off to a claimant under these circumstances.

As expressed in a number of U.N. Security Council resolutions, the current mantra (“zero tolerance to sexual exploitation and abuse in UN peacekeeping missions”) clearly supports the prevention approach.<sup>20</sup> This phrase is concerned less with providing a remedy (against a state or an international organization with legal personality) to the victims of such conduct than with abjuring this form of misconduct altogether.

While the issue of the degree of, or lack of, control over the armed forces of a national contingent by the United Nations figures heavily in the attribution issue proposed by Dannenbaum, it does not do so when considering the prevention approach. Within armed forces, which maintain a high level of discipline amongst their members, the control over troops by their commanders is likely to be greater than in any other organization. These commanders have considerable power at their disposal to prevent breaches of discipline. Frequently, the most effective way of “preventing the wrong in question” would lead us to the military commander within the contingent concerned. The UN Force commander or the UN Secretary-General, important though they are, will not be able in the same way as the military commander to prevent breaches of discipline, initiate investigations or bring proceedings against individual soldiers and thus provide a deterrent to others.<sup>21</sup>

---

<sup>20</sup> See, e.g., S. C. Res. 1894, ¶ 23, U.N. Doc. S/RES/1894 (Nov. 11, 2009). Compare breaches of discipline other than sexual exploitation committed by members of national contingents against local inhabitants. See also Secretary-General’s Bulletin, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ¶ 2.1, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter *Special Measures*]. This applies, however, only to “all staff of the United Nations,” *Special Measures*, ¶ 2.1. Military members of national contingents are not members of staff of the United Nations. Paragraph 2.2 of *Special Measures* refers to Secretary-General’s Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13, ¶1.1 (Aug. 6, 1999), but this only applies to “United Nations forces when in situations of armed conflict they are actively engaged therein as combatants.” It will, in practice, be very rare for a UN peacekeeping force to be engaged in an armed conflict as combatants.

<sup>21</sup> This assumes that disciplinary procedures are actually carried out. Even in *Bebrami*, 45 Eur. H.R. Rep. 85, the European Court of Human Rights recognized that “the effective command of the operational matters was retained by NATO,” para 140. Sari draws attention to the fact that in *Al-Jedda*, “whether inadvertently or by design, Lord Bingham and the majority in the House of Lords . . . did not follow the ‘ultimate authority’ test adopted by the European Court [in *Bebrami and Saramati*].” Sari, *supra* note 7, at 196. A claim made by a civilian, whose human rights were infringed by a British peacekeeper, would likely succeed in the courts of England

However, it may be that not all national contingents possess, or are able to maintain, a high degree of discipline during peacekeeping operations. In these cases the Force commander and other contingent commanders serving alongside an ill-disciplined unit may need to apply pressure on the relevant commander to enforce discipline. Diplomatic leverage could also be exerted on the home State of the ill-disciplined unit.

Most acts which could cause a breach of human rights to their victims will also amount to offences against the disciplinary code of the peacekeeping force. Rape, sexual assault, or other assaults against detainees are breaches of discipline punishable as if they were committed in the contingent's own state.<sup>22</sup> The jurisdiction that adjudicates alleged violations will depend on the law of the sending state and any status of forces agreement<sup>23</sup> concerned. The choice for the venue of any disciplinary proceedings prescribed by the law of the sending state will range from proceedings in its territory or by its armed forces on the territory of the receiving state to civilian trials in the courts of the latter state.

Even where a particular activity by troops of a national contingent does not amount to a disciplinary offence, the contingent commander will often have the power to proscribe such practices. Thus, the use by troops of food or money in exchange for sexual favors from adult women<sup>24</sup> may not amount to a disciplinary offence by the soldiers concerned, but in doing so those soldiers will have abused the trust vested in them while operating in an area where food or other essentials of life are in very short supply. It is difficult to argue that such activity, by itself, would be a breach of the human rights of the women concerned, but it comes clearly within the type of sexual exploitation referred to in UN Security Council resolutions.<sup>25</sup> It is likely

---

providing that individual was, at the time, within the jurisdiction of the United Kingdom (*Al-Skeini*) and the peacekeeping operation itself was similar to that in *Al-Jedda* and not to *Behrami and Saramati*. This conclusion would be similar to that proposed by Dannenbaum in relation to *ultra vires* acts of peacekeepers. See Dannenbaum, *supra* note 2, at 158–164.

<sup>22</sup> By way of example, see the Uniform Code of Military Justice, 10 U.S.C. § 920 (1956) (rape, sexual assault and other sexual misconduct); *id.* § 928 (assault); the National Defence Act, R.S.C., ch. N 5, s. 130 (offences punishable by the ordinary law); *id.* at s. 129 (conduct to the prejudice of good order or discipline); *id.* at s. 93 (disgraceful conduct); Armed Forces Act, 2006, c. 52, § 42 (Eng.) (criminal conduct); *id.* § 19 (conduct prejudicial to good order and discipline). For an account of the military law of a large number of states relating to rape and other forms of sexual violence see 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) p.2193, para. 1584 *et seq.*

<sup>23</sup> See *Model SOFA*, *supra* note 5.

<sup>24</sup> See *Special Measures*, *supra* note 20, at 3. For the purposes of United Nations Staff Regulations and Rules, an adult woman is over the age of 18, regardless of the age of consent in the receiving state or the peacekeepers' own state. *Id.*

<sup>25</sup> See, e.g., S.C. Res. 1704, art. 13, U.N. Doc S/RES/1704 (Aug. 25, 2006). Compare trafficking in women and the exploitation of prostitution of women, the Convention on the Elimination of all Forms of Discrimination Against Women art. 6, July 17, 1980, 1249 U.N.T.S. 13. It is not uncommon for the military codes of particular States to prohibit acts "to the prejudice of good order and discipline...of a nature to bring discredit upon the armed forces," see the

that in the military law of most states an order by an appropriate commander to his subordinates to refrain from such activity would be a lawful order, and that disobeying it would amount to a disciplinary offence.<sup>26</sup>

The linkage between disciplinary offences and breaches of human rights is not water-tight. The detention of an individual by a national contingent on the orders of the Force commander poses problems. Where the order is a lawful one, in the sense that there is lawful authority to order his detention, those acting on the basis of that order can no more be criticized for placing him in detention than could a police officer who places a suspect in the cells with lawful authority to do so. If we assume that the detainee is well looked after in detention, it is difficult to lay a charge of a breach of discipline at the door of anyone from that national contingent who has been involved in any way in the detention.<sup>27</sup> The national contingent will, however, be *a cause* of the detainee's deprivation of liberty (or at least of his continued detention), and thus a cause of the breach of his human rights should the basis of the deprivation and continuing loss of liberty be inconsistent with any human rights obligation owed by the detaining state. It does not matter whether the order to detain an individual comes from the Force commander or from a superior officer of the national contingent.

In much the same way, the acts or omissions of a superior armed forces officer may cause his state to be in breach of its human rights obligations to others, even though the soldiers who carried out those orders may not have committed a breach of discipline. The United Kingdom was in breach of its obligation to protect the lives of three IRA suspects in Gibraltar when British soldiers opened fire and killed all three. Although their actions were held to be justifiable,<sup>28</sup> the actions of their commanders

---

Uniform Code of Military Justice, 10 U.S.C. § 934 (1956), or to act in a “disgraceful manner”, the National Defence Act, R.S.C., ch. N 5, s. 93 (1985).

<sup>26</sup> Such a device is necessary since the United Nations has adopted the line that behaviour which it deems to be unacceptable, if committed during peacekeeping missions, must lead to disciplinary measures. *See* Rep. of the Spec. Comm. on Peacekeeping Operations and its Working Group on the 2005 resumed session, Aug. 4–8 2005, ¶ 16, U.N. Doc. A/59/19/Add.1 (Apr. 11, 2005); the Ten Rules: Code of Personal Conduct for Blue Helmets in Compilation of Guidance and Directives on Disciplinary Issues for All Categories of Personnel serving in United Nations Peacekeeping and other Field Missions, [http://www.un.org/en/peacekeeping/info/documents/disciplinary\\_issues.pdf](http://www.un.org/en/peacekeeping/info/documents/disciplinary_issues.pdf) (last visited 25 January 2010).

<sup>27</sup> An example is provided by the facts of the *Al-Jedda* case, *supra* note 3, where an individual was detained by British armed forces on the basis of United Nations Security Council Resolution 1546 (2004). In that case it was argued that the complainant's detention was in conflict with his rights in relation to detention set out in article 5 of the European Convention on Human Rights, applying extra-territorially because he was detained by British armed forces.

<sup>28</sup> *McCann v. United Kingdom*, 21 Eur. Ct. H.R. 97 (1996), in which the European Court of Human Rights held that the soldiers who fired had used no more force than was absolutely necessary within the meaning of Art. 2 of the European Convention on Human Rights (1950). *Compare* *Nachova v. Bulgaria*, 42 Eur. Ct. H.R. 43 (2006), where the force used to prevent conscript soldiers from evading arrest had been excessive.

in not providing alternative means of preventing a possible bomb explosion in Gibraltar amounted to a breach of the right to life of the three suspects. None of the military participants in this operation had committed a criminal or a disciplinary offence.

The obligation of states to protect the right to life, and not just to refrain from taking life directly, poses particular problems for peacekeeping forces where those forces know of risks to the life of particular individuals.<sup>29</sup> They may, for example, be aware of unexploded ordnance in a particular area for which they are not directly responsible, but be limited in the resources available to them to remove the danger. They may know that particular groups of individuals are at greater risk than others, such as girls attending schools. In these circumstances, a failure to remove the danger would not incur any disciplinary liability on the part of individuals. Nor would it amount to a breach of the right to life of anyone killed as a result of the explosion of any of this ordinance, or a schoolgirl killed by insurgents, since the state to which the contingent belongs could not accept that it had any effective control to be able to remove the danger and thus to prevent the death of civilians. As a result, none of the victims would come within the jurisdiction of that state.<sup>30</sup>

As in the circumstances discussed above, where a possible breach of the human rights obligations owed by a state supplying the peacekeeping contingent has been identified, not all apparent rights violations can be remedied legally. This may be because in the detention example a court might decide that either the peacekeeping force was under the ultimate authority and control of the United Nations or that the effect of Article 103 of the UN Charter has the effect of trumping the human rights treaty.<sup>31</sup>

Despite these difficulties, what remains is that the most effective way of preventing human rights violations and other serious abuses is through the military disciplinary code of the individual participating nations. Indeed, even if the state supplying the peacekeeping contingent cannot be held responsible for alleged breaches of human rights to victims in the foreign territory, the military discipline code can and should still be invoked against individual soldiers by their own states. Reliance upon the military discipline code as a means of preventing what may also be described as human rights breaches can only be realistic where that code is enforced.

---

<sup>29</sup> The European Court of Human Rights has established the principle that in very limited circumstances, a state may be responsible for the acts of private individuals. *See Osman v. United Kingdom*, 29 Eur. Ct. H.R. 245 (2000) where the issue involved whether the State was responsible for the criminal acts of a private individual.

<sup>30</sup> Compare the liability of Turkey for injury to a child who had strayed into a mine field in Turkey, *Erol v. Turkey*, 49 Eur. Ct. H.R. 27 (2009). A significant consequence of a finding that a person is within the jurisdiction of a state party to the European Convention on Human Rights is that an independent investigation must be conducted within the meaning of art. 2 or 3 of the Convention. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. 005.

<sup>31</sup> Compare if the peacekeeping mission has been established by the European Union. *See Kriege, supra* note 3 at 179.

It is much more likely to be enforced where the contingent is part of highly disciplined armed forces and retains that discipline throughout its time serving in a UN peacekeeping mission. It is also much more likely to be enforced if the state concerned is permitted, by way of a status of forces agreement, to conduct disciplinary procedures, including courts-martial, on the territory of the receiving state.<sup>32</sup> The alternative might involve, depending on the national law of a particular contingent, repatriation of the alleged offender (along with potential witnesses) to his home state for trial. National contingents are normally relatively small and the loss of one or more key individuals, even for a short time, may be a course the commander is reluctant to take while the contingent continues to serve in a peacekeeping role.

Although the Secretary-General of the United Nations does not have the luxury of being able to choose from among states which should (and which should not) supply peacekeeping forces, he can concentrate on trying to ensure that disciplinary proceedings are held within the territory concerned. Not only will this provide an opportunity for the victims of any disciplinary breach to be involved, but it will also enable the Secretary-General to see how such violations against individuals belonging to the local population have been determined. With this information, his report to the UN Security Council can provide some unwelcome publicity at an international level for the state concerned.

The law of some peacekeeping states will not permit this relatively simple process.<sup>33</sup> Major criminal offences, such as rape or serious assault, may be reserved for trial by the civilian courts of the participating state. The practical difficulties of mounting a trial that is perhaps thousands of miles from the scene of the alleged crime are significant. The risk is that the soldier's home state will not take any prosecution forward. Once this approach becomes known, a feeling of impunity can seep into the consciousness of the peacekeeping soldiers concerned to the serious detriment of the local population.

What can the Secretary-General do about this? Monitoring of disciplinary proceedings, or the lack of them, already takes place.<sup>34</sup> Where information is

---

<sup>32</sup> See, e.g., the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. 7, para. (1)(a), June 19, 1951, 14 U.S.T. 1789, T.I.A.S. No. 2846. The *Model SOFA*, *supra* note 5, contains no similar arrangement, although a memorandum of understanding between the peacekeeping force and the host state may cover this issue. See Fleck, *supra* note 5, at 612

<sup>33</sup> See generally, Nolte, EUROPEAN MILITARY LAW SYSTEMS, *supra* note 13, at 160–165

<sup>34</sup> See U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/1999/957 (Sept. 8, 1999); U.N. Secretary-General, *Children and Armed Conflict: Report of the Secretary-General*, U.N. Doc. A/55/163, S/2000/712 (Jul. 19, 2000). Under the Directives for Disciplinary Matters Involving Military Members of National Contingents, Heads of Mission can initiate a preliminary investigation and subsequently the United Nations can convene a board of inquiry to determine the relevant facts as a “management tool.” U.N. Department of Peacekeeping Operations, *Directives for Disciplinary Matters Involving Military Members of National Contingents*, para. 16, U.N. Doc. DPKO/MD/03/00993. The United Nations can order a state to repatriate a military member, *id.* at para. 24, and will follow up action taken by the contributing state against that individual, *id.* at para. 28. See also U.N.

incomplete or where it shows that no action was taken against peacekeepers alleged to have been involved in misconduct against the local population, it merely strengthens the perceived lack of accountability. This monitoring procedure can act as an incentive for some states, but not all, to bring criminal proceedings against the soldier concerned.

What else could the Secretary-General do to minimize the risk of misconduct by peacekeepers, particularly when faced with a national contingent whose record on dealing with disciplinary cases is poor? He could encourage as much press coverage as possible of day-to-day peacekeeping activities, but particularly so where there is any suggestion of misconduct.<sup>35</sup> Indeed, Dannenbaum's proposals could lead to greater awareness of breaches of human rights caused by a particular national contingent. Experience shows that the spotlight of publicity can often clear a path through obfuscation and attempts to cover up particular episodes.

The Secretary-General could encourage all participating states to change their domestic law, if necessary, so as to provide for investigation procedures and courts-martial to be held in the peacekeeping area.<sup>36</sup> It must be recognized that this may not always be possible, particularly where an offence charged is a serious one. In these cases, any proceedings brought within the home state can be notified to the Secretary-General through the normal monitoring process.

States that frequently offer peacekeeping forces to the Secretary-General should also be encouraged to discuss amongst themselves how to improve the disciplinary procedures within their national contingents. To do so must be in the interests of all states simply because a refusal by the Secretary-General to accept an offer made by a particular state to supply troops, as a result of a poor record by that state in dealing with alleged misconduct by its contingent members, will impact upon other states to make up any shortfall in troop numbers. The term, "ill-disciplined armed forces" should be an oxymoron. It must be in the interests of all states to ensure that this is so.

If the debate, so well contributed to by Dannenbaum, leads to a reduction in the number and seriousness of instances of misconduct caused by members of a UN

---

Department of Peacekeeping Operations, *Directive on Sexual Harassment in UN Peacekeeping and Other Field Missions*, U.N. Doc. DPKO/MD/03/00995, DPKO/CPD/DSHCPO/2003/02.

<sup>35</sup> See U.N. Department of Peacekeeping Operations, *Public Information Guidelines for Allegations of Misconduct Committed by Personnel of United Nations Peacekeeping and Other Field Missions*, U.N. Doc. DPKO/MD/03/00996, DPKO/CPD/DPIG/2003/001. Such a policy approach does, however, run the risk of highlighting failings in the peacekeeping process and might conceivably act as a deterrent to potential contributor States.

<sup>36</sup> See, for example, the attempt to urge all states to extend extra-territorial jurisdiction over United Nations officials and experts, G.A. Res. 62/80, U.N. Doc. A/RES/62/63 (Jan. 8, 2009) ("Criminal Accountability of United Nations Officials and Experts on Mission"), and G.A. Res. 64/110, U.N. Doc. A/RES/64/110 (Dec. 16, 2009). For supporting material see U.N. Secretariat, *Criminal Accountability of United Nations Officials and Experts on Mission*, paras. 54–65 U.N. Doc. A/62/329 (Sept. 11, 2007), which also draws attention to the fact that military members of national contingents do not come within the title of the proposed convention.

peacekeeping force, many in those areas where the conditions of life, for whatever reason, have become such that a UN presence is needed, will have cause to be grateful.