The responsibility of the United Nations during stabilization operations

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The Responsibility of the United Nations During Stabilization Operations

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Abstract

UN peace operations which pursue *stabilization* often call for peacekeepers to assist with the extension of state authority, assist with the redeployment of host state forces, and to conduct joint operations and share intelligence. Such UN cooperation with host state forces and other international actors poses challenges for the international legal responsibility of international organisations and more generally, for the accountability of international actors for violence perpetrated against other actors. This chapter examines the complexities of responsibility in light of stabilization and whether Article 7 and Article 14 of the Draft Articles on Responsibility of International Organizations could lead to UN responsibility for wrongful acts committed by the host state (and other actors) where the UN has provided continuing support. The paper specifically looks at the UN Multidimensional Stabilization Mission in Mali (MINUSMA) where the UN has worked alongside Malian forces (MDSF), French troops deployed as part of Operation Barkhane, and a regional counter-terrorism force, the G-5 Sahel Force. Complex relationships have ensued, particularly in relation to counter-terrorism operations, which could have ramifications for the legal responsibility of international organisations where actors cooperate closely, and wrongful acts are committed.

Keywords

Responsibility for internationally wrongful acts, peacekeeping, stabilization, United Nations, MINUSMA

I. Introduction

United Nations (UN) peace operations which pursue *stabilization* uniquely work alongside the host government, promote the rule of law, have engaged in counter-terrorism activities, and use robust force. The activities we see in a UN mission bearing a stabilization mandate differ

from other deployments in that the Security Council calls for stabilization missions to assist with the extension of state authority to exclude armed groups, assist with the redeployment of host state forces, and conduct joint operations with host state or other international forces. Such UN cooperation with host state forces and other international actors poses challenges to the legal responsibility of UN, troop contributing countries, and, more generally, to the accountability of international actors for violence perpetrated against other actors whether the violence is perpetrated by those actors or their partners in the field.

The level of support needed to implicate the UN or its troop contributing countries in internationally wrongful acts committed by non-UN entities receiving support is unclear and now further complicated by stabilization practices. In the past, the UN has ceased support where civil war has broken out or human rights abuses by the host state have multiplied. However, in recent years, UN support for host states during stabilization missions has continued despite violations of humanitarian law and human rights. How, then, does international law find responsibility for wrongful acts made possible by an international organisation's support, and how is such responsibility apportioned between the organisation and states? The chapter examines the responsibility of the UN, but the analysis is applicable to a wide range of activities carried out by other international organisations such as the European Union (EU) or African Union.

This chapter's unique contribution is to draw out the complexities of responsibility under international law in light of the UN's current stabilization activities. By using the example of stabilization the chapter proposes novel interpretations of the 2011 Draft Articles on the Responsibility of International Organizations (ARIO) that have wider applicability for other a range of organizations. Existing literature has either addressed broader questions of UN accountability for sexual exploitation and abuse or attribution of the acts of UN peacekeepers to the UN.[1] Authors have not specifically examined the legal implications of stabilization

[1] See e.g Rosa Freedman, 'UNaccountable: a new approach to peacekeepers and sexual abuse' (2018) 29 *European Journal of International Law* 961-985; Sarah Smith, 'Accountability and sexual exploitation and abuse in peace operations' (2017) 71 *Australian Journal of International Affairs* 405-422; Timothy Donais and Eric Tanguay, 'Protection of Civilians and Peacekeeping's Accountability Deficit' (2021) 28 *International Peacekeeping* 553-578; Cedric Ryngaert, 'Apportioning responsibility between the UN and member states in UN peace-support operations—an inquiry into the application of the 'effective control' standard after Behrami' (2012) 45 *Israel Law Review* 151-178; Paolo Palchetti, 'The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations' (2013) 95 *International Review of the Red Cross* 727-742; Russell Buchan, 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?' (2012) 32 *Legal Studies* 282-301; Magdalena Pacholska, *Complicity*

activities such as providing support for the host state or the sharing of intelligence with other international actors that now feature in the practices of some of the largest UN missions currently deployed.

As the first legal examination of such activities, the chapter specifically queries whether Article 14 (on aid or assistance in the commission of an internationally wrongful act) and Article 39 on contribution to the injury) of ARIO could lead to responsibility for wrongful acts committed by the host state or other international actors where the UN has facilitated such acts through its continuing support.[2] By analysing examples of stabilization activities in light of ARIO, the chapter expands on both the practical contexts in which ARIO must be applied and the theoretical evaluation of ARIO's limits. By couching the analysis in ARIO, the findings are applicable to a range of acts undertaken by international organisations, not only the UN, such as EU Common Security and Defence Policy deployments or military interventions by the Economic Community of West African States (ECOWAS).

II. The application of ARIO to UN peace operations

The UN has long held that Article 6 ARIO applies to UN peacekeepers because when forces are put at the disposal of the UN, they are transformed into a subsidiary organ of the UN.[3] However, the situation is more complicated than this because "[t]he fact that these forces are accorded the status of organs under the rules of the organisation does not prevent national contingents from acting at the same time as organs of their respective states and therefore does not exclude certain acts of a national contingent composing the multinational force from being attributed to its sending state."[4] Application of only Article 6 is controversial because it could

and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations (Edward Elgar 2020).

[2] Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10).

[3] A/CN.4/637/Add.1. Article 6 ARIO reads as follows, '1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization apply in the determination of the functions of its organs and agents.'

[4] Palchetti (n 1) p.730

be argued that where a subsidiary organ of the UN commits acts, the conduct must be attributed exclusively to the UN, not apportioned with the TCC or any other actor.[5]

Despite being able to attribute responsibility under Article 6, accountability is avoided because the UN asserts its peacekeeping forces, as subsidiary organs, enjoy the privileges and immunities of the UN under the 1946 Convention on the Privileges and Immunities of the United Nations.[6] This means that even if the UN has not set up an internal dispute settlement mechanism for claims arising from a situation attributed to the UN, the organisation can still invoke its immunities before domestic courts.[7]

What is envisaged is that third-party claims against the UN for wrongful acts are settled by a standing claims commission established as part of the UN peace operation. The UN's Model Status of Forces Agreement (SOFA) includes a provision in Article 51 that explains disputes of a private law nature may be submitted to a standing claims commission established by the UN and the host state.[8] However, in the twenty years after the conception of the Model SOFA, no standing claims commissions had ever been established.[9]

Consequently, the ILC believes that Article 7 ARIO must apply to UN peacekeeping forces. Article 7 of ARIO allows for responsibility to be allocated to whoever has effective control over the organ, which may be the UN or the TCC, depending on who, at the time of the wrongful act, has command and control of the forces.[10] The ILC explains in their draft commentary that Article 7 can apply to UN peace operations because "the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent" contributed to the UN.[11] Similarly, under Article 6, national contingents are regarded as an organ of the troop-contributing state and not an organ of the UN.[12] Nevertheless, the UN's suggestion that it assumes responsibility under Article 6 for acts of UN forces as organs of the

[5] Ibid. p.730
[6] A/45/594, para 15.
[7] Yohei Okada and Nigel D White, 'Overcoming the Hurdles to Accountability in UN Peacekeeping' (2020) 23 *Journal of International Peacekeeping* 117-120, p.118
[8] UN General Assembly (n 6).
[9] Katarina Grenfell, 'Accountability in International Policing' (2011) 15 *Journal of International Peacekeeping* 92-118, p.116
[10] Draft Articles on Responsibility of International Organizations, with commentaries (2011), Article 7.
[11] Ibid. p.20
[12] Buchan (n 1) p.283

organisation regardless of whether there is effective control has been said to make Article 7 "almost entirely redundant".[13]

The UN understands that military personnel are placed under the 'operational control' of the UN Force Commander but not under UN command.[14] The Secretary-General can then issue operational directives under the Security Council mandate for the UN peace operation. The UN recognises that operational planning must include national contingents' commanders. Therefore, the UN Force Commander should consult with other officers regarding the decision-making on their national contingent.[15] The UN Force Commander's obligation is merely to consult and "is under no obligation to adhere to any prescriptions by troop-contributing countries and troop-contributing countries cannot veto any decisions made by the UN Force Commander."[16]

What becomes problematic for the question of responsibility is to what extent the national contingent commander continues to exercise control of forces placed at the disposal of the UN.[17] For Article 7 ARIO, the ILC clarifies that the international organisation must have effective control over the conduct for attribution to the organisation. Conversely, if effective control does not exist over a national contingent, responsibility is attributable to the TCC under ARSIWA. Scholars have suggested that the presumption should be that conduct of UN peacekeepers is attributable to the UN as a subsidiary organ under Article 6 unless that presumption is "rebutted by evidence that the [troop contributing nation] remains in effective control of the wrongful conduct in question."[18]

The Mothers of Srebrenica litigation in the Netherlands exemplifies the conflict between the provisions. In *Mothers of Srebrenica*, the Dutch courts needed to consider the attribution of the Dutch Battalion's (Dutchbat) conduct during the Srebrenica Genocide as part of the UN peace operation present at the time, UNPROFOR. The case proceeded against the Netherlands after UN immunity had been upheld. The Netherlands argued that, following the UN position on UN forces forming a subsidiary organ of the UN, Article 6 ARIO applied to Dutchbat, and

[13] UN General Assembly (n 3) pp 13-14; Ryngaert (n 1) p.159.
[14] UN, United Nations Peacekeeping Operations: Principles and Guidelines (UNDPKO 2008) <http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf> p 68.
[15] A/51/389, para 19.
[16] Buchan (n 1) p.285.
[17] Ryngaert (n 1) p. 153
[18] Nigel D. White, 'In Search of Due Diligence Obligations in UN Peacekeeping Operations Identifying Standards for Accountability' (2020) 23 *Journal of International Peacekeeping* 203-225, p.208

conduct ought to be attributed to the UN.[19] However, the initial approach of the District Court and Court of Appeal was to use Article 7 ARIO and Article 8 ARSIWA in that Dutchbat was attributable to whoever exercises effective control over the conduct.[20] Nevertheless, the Supreme Court based its judgment on ARSIWA because the UN was not a party to the case. The Supreme Court explained it felt the provisions of ARIO were "not directly relevant in these proceedings".[21]

III. Evolving practices: the unique nature of UN stabilization missions

The missions, such as UNPROFOR, to which the provisions of ARIO have been applied, are very different from missions currently deployed. This section outlines the unique nature of missions mandated to pursue stabilization and gives examples of activities undertaken under stabilization mandates. The fact stabilization mandates have resulted in close cooperation between the UN and the host state presents new questions to be explored regarding ARIO. The vital issue to explore is whether responsibility can be appropriately attributed where wrongful conduct has been committed by the host state while receiving direct support from the UN under a stabilization mandate. Stabilization mandates typically authorise the UN to 'extend state authority', which may facilitate the capacity of the host state to commit wrongful conduct.

What do stabilization missions entail?

In the 2000s, most peacekeepers were utilised in post-conflict situations where a peace accord was in place. Conversely, by 2015, two-thirds of peacekeepers were deployed in ongoing

[19] Cedric Ryngaert and Otto Spjikers, 'The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgment in Mothers of Srebrenica' (2019) 66 *Netherlands International Law Review* 537-553, p.540.
[20] Ibid. p.541.
[21] The State of the Netherlands v. Respondents & Stichting Mothers of Srebrenica No. 17/04567. At https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:1284 (Supreme Court of the Netherlands, 17 July 2019) para 3.3.5; However, note that Boon suggests the fact ARSIWA was prioritised reflects its greater standing as a source of international law when compared to ARIO. Kirsten Boon, 'The State of the Netherlands v. Respondents & Stichting Mothers of Srebrenica' (2020) 114 *American Journal of International Law* 479-486, p.484.

conflicts.[22] It is undeniable that operations in recent years have been given more robust mandates where force is used to pursue the goal of *stabilization*.[23] Stabilization missions typically have less regard for the UN's traditional principles of peacekeeping, including impartiality, as they expressly support the host state in capacity building.[24] Similarly, stabilization missions are more willing to take the initiative in the use of force where UN troops often fight a war alongside the host government forces, which the UN has designated the legitimate authority.[25]

In 2015 the UN's High-Level Panel on Peace Operations reported, "[t]he term "stabilization" has a wide range of interpretations, and the Panel believes the usage of that term by the United Nations requires clarification."[26] The panel does not comment further on the stabilization issue but discusses counter-terrorism and enforcement actions undertaken by UN operations by framing them as 'conflict management' situations. The Panel expressed their concern that UN operations are ill-suited for counter-terrorism activities and that extreme caution is needed where offensive force is authorised.[27] The Panel did not outright denounce the shift towards offensive force and instead called for the respect of humanitarian law and clear and achievable political end goals where that degree of force is used.[28]

What does 'stabilization' mean in the context of UN peace operations? The UN has not formally adopted a definition of the term or clear policy guidelines on what activities a mission that utilises stabilization will entail despite different activities being included in the four UN stabilization missions. The adoption of stabilization has been said to be a 'hodge-podge' of words, and "[t]he danger is that the terminological imprecision surrounding 'stabilization' creates a meta-category; full of buzzwords but empty of meaning."[29]

[22] Cedric de Coning, 'Offensive and stabilization mandates' In: Mateja Peter (ed), *United Nations Peace Operations: Aligning Principles and Practice* (NUPI Report No.2 2015) p.18; See also, Mateja Peter, 'Between Doctrine and Practice: The UN Peacekeeping Dilemma' (2015) 21 *Global Governance* 351-370.
[23] John Karlsrud, *The UN at War: Peace Operations in a New Era* (Palgrave Macmillan 2017) p.3.
[24] Alexander Gilder, *Stabilization and Human Security in UN Peace Operations* (Routledge 2022).
[25] See e.g. Aditi Gorur, 'Defining the Boundaries of UN Stabilization Missions' (Stimson, December 2016); Cedric de Coning, Chiyuki Aoi and John Karlsrud (eds), *UN Peacekeeping Doctrine in a New Era* (Routledge 2017); Karlsrud (n 23).
[26] A/70/95–S/2015/446, para 114.
[27] Ibid. paras 119, 122.
[28] Ibid. para 122.
[29] Roger Mac Ginty, 'Against Stabilization' (2012) 1 *Stability: International Journal of Security & Development* 20-30, p.24.

Currently deployed missions that expressly include stabilization in their title and mandates include the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), and UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). These missions share similarities that they are deployed during ongoing conflicts rather than following a peace agreement, they are mandated to extend state authority, they operate alongside state forces and actively build the capacity of those forces, and use varying degrees of proactive, 'robust' force to prevent attacks on themselves and those they are mandated to protect.[30]

There is a distinct trend of stabilization missions being asked to contain aggressors, enforce law and order, and protect civilians.[31] A prevailing view of what stabilization means is that the inclusion of the term in the missions "indicate[s] a belief that force is a key element in solving conflict" whether or not the Security Council prescribes to the civilian-led or 'hot' versions of the concept.[32]

The framing of the mandates reveals that the UN stabilization strategy focused on two areas, (1) the deterrence of armed groups and (2) peacebuilding activities aimed at creating state legitimacy within local communities.[33] Both of these actions are intended to extend state authority, first by displacing armed groups through the use of force for state-centric counter-insurgency or a more robust posture to be taken by UN forces, followed by civilian-led activities to entrench state authority in the vacuum left behind.[34]

The UN seeks to support the host state as the designated legitimate authority through its stabilisation strategy. Stabilization missions progressively build peace in territory cleared of armed groups and spoilers; whether the UN takes offensive action in cooperation with the state forces or by state forces acting unilaterally is dependent on the mission.

[30] Cedric de Coning, 'Is stabilization the new normal? Implications of stabilization mandates for the use of force in UN peacekeeping operations' In: Peter Nadin (ed), *The Use of Force in UN Peacekeeping* (Routledge 2018) p.90.
[31] Ibid. p.92.
[32] Karlsrud 2017 (n 23) p.87.
[33] Denis M Tull, 'The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo' (2018) 25 *International Peacekeeping* 167-190, p.186.
[34] Gilder (n 24); Alexander Gilder, 'The effect of 'stabilization' in the mandates and practice of UN peace operations' (2019) 66 *Netherlands International Law Review* 47-73.

The UN's relationship with the host state during stabilization missions

Cooperation with host state forces in stabilization missions presents a serious risk of partiality in the conflict and the entanglement of the UN in violations committed by the host state. UN forces must be impartial in dealing with parties to the conflict but not neutral in executing the mandate and can take coercive action against spoilers, those who attempt to undermine the peace process.[35] The UN relies on its impartiality to provide humanitarian assistance, support the work of organisations such as the ICRC, and implement its peacebuilding activities.

But the position of the UN as an impartial actor becomes tenuous when the stabilization mandates of MINUSCA and MINUSMA expressly call for the missions to assist with the extension of state authority, assist with the redeployment of host state forces, and conduct joint operations and share information.[36] MINUSMA has *de facto* partiality, which has led to its forces being targeted for retaliation by armed and terrorist groups.[37] By working alongside the host state, the UN arguably takes sides in a civil war and fails to act with any sense of impartiality.

One example of the UN's close partnership with building the host state's capacity can be seen in MINUSCA. The EU deployed a training mission (EUTM RCA) in 2016 to assist with defence sector reform.[38] By 2018 the EU trained almost 3000 soldiers from the Central African Armed Forces (FACA), who were then redeployed to work alongside international forces, including UN peacekeepers.[39] The UN stresses the members of FACA need "clean criminal and human rights records."[40] However, given the history of abuses by FACA, communities must trust that the forces will not commit further human rights violations.[41] MINUSCA has

[35] Capstone Doctrine (n 14) p.33; Nigel White, 'Peacekeeping and International Law' In: Joachim Koops, Norrie MacQueen, Thierry Tardy, Paul D Williams (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford University Press 2015) p.50.
[36] See e.g. S/RES/2387, para 42(a)(iv); S/RES/2364, para 20(a)(i); S/RES/2409, para 34; S/RES/2423, para 38(b).
[37] Stian Kjeksrud and Lotte Vermeij, 'Protecting governments from insurgencies: The Democratic Republic of the Congo and Mali' In: Cedric de Coning, Chiyuki Aoi and John Karlsrud (eds), UN Peacekeeping in a New Era (Routledge 2017) p.234.
[38] Council Decision (CFSP) 2016/1791 on the signing and conclusion, on behalf of the Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Central African Republic on the status of the European Union CSDP Military Training Mission in the Central African Republic (EUTM RCA) [2016] OJ L274/31.
[39] EUTM, 'European Union Training Mission in Central African Republic (EUTM- RCA)' (13 August 2018) <https://eeas.europa.eu/sites/eeas/files/180823_mission_factsheet_eutm_rca_jul18_v1.pdf>.
[40] S/2018/463, para 22.
[41] This issue is recognised by the UN here, S/2018/463, paras 4, 25.

carried out joint patrols with FACA and supported their redeployment.[42] There is one instance where the UN has reported how local communities requested additional FACA deployments following a positive perception, but there is no mention of how UN forces are perceived.[43]

A similar EU training mission exists in Mali (EUTM Mali) but has been said to have had a "limited impact on the performance of the [Malian Armed Forces] and on the security situation more generally."[44] The UN has designated the Malian government the legitimate authority and supported international actors in rebuilding the security sector. However, worryingly the Malian forces are still regarded as bureaucrats in uniform and only suitable for military parades.[45] Most damning is the report that one Malian colonel believes international actors should provide Malian forces with weapons, not just small arms, and "the problem will be solved quickly because everyone knows where the terrorists are to be found."[46] The UN has unquestionably taken sides in Mali's conflict, but the differences in strategic goals between the two actors are stark. The UN traditionally seeks political solutions, whereas the Malian government are seeking overall military victory against all spoilers it deems terrorists. Close cooperation between two parties with vastly different approaches and strategies is worrying.

Impartiality has been said to mean "putting all parties on a common ground and thus giving a sort of international recognition to rebels."[47] However, the situation in Mali, and other stabilization missions in general, no longer see the government and rebels as equal adversaries. Instead, the host state seeks to eradicate all insurgents with UN support for capacity building for the state to exert such authority. Such an approach makes the primacy of a political solution questionable. To achieve a political solution, the UN must form partnerships at all levels to resolve the root causes of conflict at local, regional, and national levels.[48] Stabilization can undermine these goalposts and requires us to query the scope of finding UN responsibility for wrongful acts committed by the actors receiving capacity-building assistance and intelligence from the organisation.

[42] S/PV.7787 p.2 as per Mr. Ladsous; S/2018/463, para 5.
[43] S/2018/922 para 21.
[44] Denis M Tull, 'Rebuilding Mali's army: the dissonant relationship between Mali and its international partners' (2019) 95 *International Affairs* 405-422, p.406.
[45] Ibid. p.411.
[46] Ibid. p.417.
[47] Giulia Piccolino and John Karlsrud, 'Withering consent, but mutual dependency: UN peace operations and African assertiveness' (2011) 11 *Conflict, Security & Development* 447-471, p.450.
[48] Louise Riis Andersen, 'The HIPPO in the room: the pragmatic push-back from the UN peace bureaucracy against the militarization of UN peacekeeping' (2018) 94 *International Affairs* 343-361, p.358.

MINUSMA and counter-terrorism

MINUSMA is unique in that the mission has operated alongside French troops deployed as part of Operation Barkhane (previously Operation Serval) and a regional counter-terrorism force, the G-5 Sahel Force (FC-G5S), that includes forces from the host state, Mali.[49] The French and FC-G5S support MINUSMA, and the UN Security Council welcomed "the continued action by the French forces … to deter the terrorist threat in the North of Mali".[50] Furthermore, the UN Security Council stated the FC-G5S would "facilitate the fulfilment by MINUSMA of its mandate to stabilize Mali".[51] In February 2018, a technical agreement was signed for MINUSMA to provide operational and logistical support to FC-G5S.[52] In 2018 uniformed MINUSMA personnel assisted FC-G5S with preparing their operational bases, and the Secretary-General called for coordination between the forces to be boosted further.[53] Support has continued with an "enhanced support mandate" from 2020.[54]

The FC-G5S is a regional operation "entirely dedicated to combatting terrorist groups and organized crimes".[55] The FC-G5S constitutes a new counter-terrorism method as no similar African regional body has previously undertaken counter-terrorism operations.[56] France, the G-5 Sahel, and the UN have coordinated a division of labour where the French and FC-G5S fight a war to allow space for MINUSMA to build peace and carry out conflict resolution.[57] As a result, it is only a short leap to make the argument that if the international community believes it is necessary to use military means to fight terrorism, then "the UN must do everything

[49] The UN Security Council welcomed FC-G5S in Resolution 2359 and provided for its formal cooperation with MINUSMA in Resolution 2391; For more information on the French intervention in Mali see Karine Bannelier, Theodore Christakis, 'The intervention of France and African countries in Mali—2013' In: Tom Ruys, Olivier Corten, Alexandra Hofer (eds), *The use of force in international law: a case-based approach* (Oxford University Press 2018) 812-827; S/RES/2359; S/RES/2391.
[50] S/RES/2227, p.3.
[51] S/RES/2391, para 12.
[52] S/2018/1006 para 44.
[53] S/2018/432 paras 3, 68.
[54] S/2020/952 para 45; S/RES/2531.
[55] Moda Dieng, 'The Multi-National Joint Task Force and the G5 Sahel Joint Force: The limits of military capacity-building efforts' (2019) 40 *Contemporary Security Policy* 481-501, p.482.
[56] Ibid. p.4.
[57] Bruno Charbonneau, 'Intervention as counter-insurgency politics' (2019) 19 *Conflict, Security & Development* 309-314, p.311.

possible to facilitate this 'war' or, to use current terminology, to counter and prevent violent extremism."[58]

MINUSMA has also supported the host state in its fight against terrorism. MINUSMA has given technical assistance to Mali's Specialized Judicial Unit to Combat Terrorism and Transnational Organized Crime as well as to personnel in the criminal justice system on housing inmates "suspected or convicted of terrorism-related offences."[59] Importantly for our discussion on responsibility, the UN recognises that the host state's counter-terrorism activities have led to "repeated allegations of violations of international human rights law and international humanitarian law".[60] The allegations include executions, torture, enforced disappearances and varying levels of ill-treatment and arbitrary arrests.[61]

MINUSMA supports counter-terrorism by identifying groups and individuals considered a threat to the mission and includes them in 'targeting packs'.[62] MINUSMA has a sophisticated intelligence system using a German UAV unit and a Swedish reconnaissance company of armoured vehicles, amongst others.[63] The targeting packs are compiled by MINUSMA's dedicated intelligence unit, the All Sources Information Fusion Unit (ASIFU), which collects actionable intelligence.[64] ASIFU's targeting packs have been informally shared with Operation Barkhane and were reported to the UN as possibly having "serious operational, political and legal implications".[65]

Recently, the UN has discussed the importance of sharing information between MINUSMA and its international partners fighting terrorism in the region. A Coordinating Body for Mali was created in January 2019 to improve information sharing.[66] Intelligence sharing raises the question of whether the UN can be responsible for wrongful acts committed by states that rely

[58] Ibid. p.312.
[59] S/2020/476, para 9; S/2020/223, para 23.
[60] S/RES/2531, para 34.
[61] A/HRC/43/76 para 32
[62] John Karlsrud, 'From liberal peacebuilding to stabilization and counterterrorism' (2019) 26 *International Peacekeeping* 1-21, p.13.
[63] Erwan de Cherisey, 'Desert watchers: MINUSMA's intelligence capabilities' (2017) 54(23) *Jane's Defence Weekly* pp 2-3.
[64] Kjeksrud and Vermeij (n 37) p.232.
[65] Karlsrud 2019 (n 62) p.13; The author cites UN, 'Lessons Learned Report' (Sources Information Fusion Unit and the MINUSMA Intelligence Architecture, Semi-final draft for USG Ladsous' review, 1 March 2016) p.3. On file with John Karlsrud.
[66] S/2019/371 para 21; S/PV.8492 p.5 as per Mr. Ipo.

on that intelligence? In essence, the wrongful act may not have been possible without the intelligence provided by the UN mission.

The UN Security Council is far from in agreement on the ideal relationship between a UN peace operation and a regional counter-terrorism force that includes the host state as a principal actor. On the one hand, the Secretary-General believes that "stronger support to the Joint Force, including with predictable and sustainable financial resources, is critical to ensuring the success of that initiative."[67] On the other hand, Resolution 2359 does not authorise FC-G5S under Chapter VII; the mandate does not mention enforcement action. Instead, the regional force operates with the states' consent due to US reluctance.[68] Neither has the UN Security Council previously used Chapter VII to authorise force against terrorists. Instead, states typically use force in self-defence.[69] However, MINSUMA is mandated to use robust force under Chapter VII *and* to provide logistical and operational support to FC-G5S and share intelligence.[70] Examples such as this are vital for appreciating the deficiencies in ARIO.

The following section will outline how ARIO can provide an avenue for responsibility where the UN has supported state forces who have committed wrongful acts. However, the avenue is plagued by uncertainty, with the ILC not providing clear guidance on applying its provisions to such situations.

IV. UN responsibility for wrongful acts during UN stabilization missions

A) Deciphering ARIO

Would it then be possible to hold the UN responsible for actions committed by host state forces where the UN and host state have cooperated closely, such as in Mali? First, looking at Article 7 ARIO, the host state troops would need to be regarded as organs or agents of the UN. The

[67] S/2018/541 para 88.
[68] Jennifer G Cooke, 'Understanding the G5 Sahel Joint Force: Fighting Terror, Building Regional Security?' (Center for Strategic and International Studies, 15 November 2017) <https://www.csis.org/analysis/understanding-g5-sahel-joint-force-fighting-terror-building-regional-security>.
[69] Nigel White, 'The United Nations and counter-terrorism' In: Ana Maria Salinas de Frías, Katja Samuel, Nigel White (eds) *Counter-terrorism: international law and practice* (Oxford University Press 2012) 54–82, p.73-4; Christian Henderson, 'The centrality of the United Nations Security Council in the legal regime governing the use of force' In: Nigel White, Christian Henderson (eds), *Research handbook on international conflict and security law* (Edward Elgar 2013) 120-169, p.157.
[70] S/RES/2423 paras 48, 50.

UN has a tight definition of who is to be considered an agent of the organisation and has criticised the International Law Commission's broad use of the term 'agent' in ARIO.[71]

Even when host state forces are mandated to cooperate and carry out functions alongside UN forces, the UN would still not automatically regard them as agents for attribution. There would need to be a degree of control of the host state forces by the UN mission's chain of command to be regarded as more than merely partners achieving a common goal. As a result, the actions of host state forces will only be attributable to the organisation under Article 7 if there is a "sufficiently close relationship" or the UN has effective control over the forces.[72] This is unlikely.

Another route to find responsibility is ancillary responsibility under Article 14 of ARIO. An international organisation can be held responsible where it 'aids or assists' a state in the commission of an internationally wrongful act if: (a) the organisation does so with knowledge of the circumstances of the internationally wrongful act, and (b) the act would be internationally wrongful if committed by that organisation.[73]

The ILC modelled Article 14 ARIO on Article 16 ARSIWA. The latter was held by the International Court of Justice to constitute customary international law despite being initially seen by Crawford as a progressive development.[74] The type of aid or assistance encapsulated by Article 14 is not defined by the ILC but can include providing material resources, such as weapons, as well as financial, logistical, and technical support.[75] However, not all assistance will result in responsibility as UN forces must make a 'significant' contribution to the wrongful act.[76] This results in a *de minimis* threshold where remote or minimal aiding will not be sufficient for responsibility whilst the upper end of the scale may see a particularly serious piece of assistance resulting in joint responsibility for the wrongful act.[77]

[71] Ryngaert (n 1) p.162.
[72] Ibid. pp 162-3.
[73] ARIO (n 10) Article 14.
[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43, para 417; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) p.408.
[75] See e.g. Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in: André Nollkaemper, and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) pp. 134-168.
[76] ARIO (n 10) p.66.
[77] Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (Chatham House, November 2016) p.8.

The biggest question surrounding the application of Article 14 is that of the knowledge and intent required.[78] The ILC explains, based on its previous commentary on Article 16 of ARSIWA, that if the "assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility." The same understanding is in place for Article 14 ARIO. The ILC further notes the organisation must have "*intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State".[79] However, no guidance is given on how knowledge and intent are to be adduced or the significance of the assistance is to be judged.

The ILC's commentaries on ARIO and ARSIWA are inconsistent as the Articles themselves do not include a requirement of intent resulting in 'uneven use of the terms "knowledge" and "intent" within the commentary.'[80] The standard of fault was the source of much disagreement when drafting ARSIWA and has generated substantial discussion in academia.[81] If intent were not to be required, states and organisations would feel as if aiding and assisting is too risky and therefore international law serves to discourage international cooperation.[82] If intent is required, states and organisations could rely on a strict interpretation of direct intent to deny responsibility for blatant wrongdoing that would not otherwise be possible without the assistance. Nevertheless, when looking at an example, such as providing intelligence, this 'is always intentional under some description'.[83] The crux of the issue then is what degree of intent and knowledge is required under Article 14?

Where a state or organisation provides assistance with actual knowledge that the aid will be used to commit a wrongful act, we can infer that the state intends to facilitate the act as the assistance has nevertheless been provided.[84] Similarly, if the assistor is practically or virtually certain that the state is committing the act this will also result in the required level of knowledge to infer intent as it is acting with indirect or oblique intent.[85] The assistor needs to not only know the state is committing wrongful acts but must know the assistance is being used to

[78] See Pacholska (n 1).
[79] ARIO (n 10) p.66 (emphasis added).
[80] Marko Milanovic, 'Intelligence Sharing in Multinational Military Operations and Complicity under International Law' (2021) 97 *International Law Studies* 1269-1403, pp 1307, 1304.
[81] Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) pp 159-161.
[82] Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law' 58 *International and Comparative Law Quarterly* 1-30, pp. 14-15.
[83] Milanovic (n 80) p.1310.
[84] Jackson (n 81) p.160, Milanovic (n 80) p.1310.
[85] Milanovic (n 80) pp 1310, 1320.

facilitate the acts.[86] The assistor therefore either has actual knowledge or is virtually certain wrongful acts are being facilitated but provides the assistance nonetheless, consciously accepting its own contribution to the wrongful act committed by the state.[87] The UN will then meet the requirements of Article 14 if it is actually or virtually certain that the non-UN entity receiving assistance is committing or intends to commit the wrongful act and that the entity is using the UN's assistance to facilitate the wrongful act. The UN does not need to share the full intent of the entity committing the wrongful act but must have sufficient foresight and certainty. The mere possibility that the wrongful acts are taking place and that assistance is facilitating the acts would be insufficient.

An example of the risk posed by Article 14 arose in MONUC, where the mission needed to decide whether to adhere to its mandate requiring it to provide support to host state forces who were likely to commit serious violations or refuse to do so.[88] The UN Office of Legal Affairs decided that where there is reason to believe a host state is engaged in serious violations, the UN forces cannot lawfully continue to provide support.[89] Similarly, in 2014 the UN Security Council terminated assistance to the South Sudanese government provided by the UN Mission in South Sudan (UNMISS) after civil war broke out and government forces committed widespread violations of human rights and humanitarian law.[90]

The ILC relies on the example of MONUC to illustrate Article 14 but does not expressly state whether continued assistance by MONUC would have led to ancillary responsibility under Article 14. Importantly, no mention of intent is made by the UN Legal Counsel. Instead, it appears the UN would agree that where there is 'reason to believe' wrongful acts are being committed this a) equates to actual knowledge or virtual certainty and b) that the UN does not need to share intent of the non-UN entity by wishing to facilitate wrongful acts for the organisation to regard the assistance as unlawful.

While it is impossible to extrapolate all the scenarios in which Article 14 would apply, it can be speculated on the types of scenarios that would cross the threshold. If a UN mission is mandated to extend state authority it may provide logistical and technical assistance to the host

[86] Ibid. p.1311.
[87] Ibid. p.1320.
[88] Stephen Mathias, 'UN peacekeeping today: legal challenges and uncertainties' (2017) 18 *Melbourne Journal of International Law* 138-153, p.147.
[89] A/66/10 p.105.
[90] S/RES/2155.

state in establishing military bases, as the case with MINUSMA and FC-G5S .[91] The bases may be established in territory previously controlled by armed groups to allow the host state forces and their allies to project state authority. If those forces were to commit wrongful acts, such as human rights abuses against the local population, we would need to establish several facts before responsibility could be found under Article 14.

First, the UN would need to have actual knowledge or be virtually certain the wrongful acts were being committed (*the knowledge and intent*). Second, the wrongful acts must have been made possible by the assistance proffered by the UN (*the significance*). If these two requirements are met, the UN mission must cease its support. It would be insufficient for the UN to merely suspect wrongful acts are likely based on the record of the host state's forces, nor would we be able to use Article 14 where UN support had a minimal impact on the capacity of the host state forces to commit the wrongful acts. It must be the case the UN assistance made the establishment of the bases and consequent projection of state authority possible.

Above, the question was raised whether the UN can be responsible for wrongful acts committed by states that rely on intelligence provided by the UN mission? The simple answer is yes, if, as with the preceding example, the UN has actual knowledge or is virtually certain the state in question is committing wrongful acts that would otherwise have not been possible without the shared intelligence. For instance, if MINUSMA were to share intelligence with international forces countering terrorism and those forces were to commit acts of torture, the UN would need to a) have actual knowledge or be virtually certain those forces were or were intending to use torture and b) that those individuals would otherwise not have been apprehended without the sharing of intelligence.

B) The UN Human Rights Due Diligence Policy

Despite the exact requirements of Article 14 being woefully underexplored by the UN in the context of its peace operations, the UN is aware of the risk of responsibility. Actions that may invoke Article 14 ARIO are inexplicably linked to the operation of the UN's Human Rights Due Diligence Policy (HRDDP). The HRDDP requires that UN assistance can only be given to non-UN security forces upon their respect for human rights, humanitarian law, and refugee

[91] See for example, S/2018/432, paras 3, 68.

law.[92] Notably, the policy allows 'the UN to distance itself from a host state that is violating international laws and show communities that the UN is not synonymous with the host state'.[93]

Missions such as MINUSMA, MONUSCO, and MINUSCA have all indicated that the support offered to the host state complies with the UN's HRDDP.[94] Here the HRDDP operates as the unspoken shield against responsibility under Article 14 indicating that where support continues, the UN believes it does not possess sufficient knowledge or has not made a significant contribution to any wrongful acts.

With regards to MINUSMA, activities such as drawing up a plan for the redeployment of Malian forces to the north of Mali were said to be 'fully in line with the human rights due diligence policy of the Organization'.[95] But the UN recognises Mali's counter-terrorism activities have led to "repeated allegations of violations of international human rights law and international humanitarian law."[96] The allegations include executions, torture, enforced disappearances, and varying levels of ill-treatment and arbitrary arrests, all of which bring into question the extent to which UN assistance facilitated these wrongful acts.[97]

A review of MINUSMA in 2018 recommended that clear parameters are established on the provision of services by the UN to non-UN entities.[98] As military cooperation becomes more prevalent, particularly alongside counter-terror operations, the UN must take steps to make clear how Article 14 and the HRDDP interact. The UN Office for Legal Affairs will need to evaluate in what specific circumstances UN stabilization missions can continue to provide support to their host states where wrongful acts are committed and demonstrate how the UN either has insufficient knowledge or did not significantly contribute to the acts.

The HRDDP may also result in due diligence obligations on the part of the UN, providing another potential route for establishing UN responsibility for wrongful acts committed by the host state. Due diligence is pivotal to the realisation of positive human rights obligations. Where an international legal actor fails in a due diligence obligation, it can be held responsible for human rights violations caused by a third party due to its failure to exercise due diligence

[92] S/2012/894 para 22.
[93] Gilder (n 24) p.154.
[94] S/2021/867 para 57; S/2021/571 para 67; S/2021/146 para 61; S/2021/807, para 32; S/2021/587 para 43; S/2021/844 para 74; S/2021/519 para 42.
[95] S/PV.7784 p.3 as per Mr. Ladsous. See also S/RES/2364, para 26.
[96] S/RES/2531, para 34.
[97] A/HRC/43/76, para 32.
[98] S/2018/541, para 71.

in preventing or responding to the violation.[99] In the UN context, "[t]his would mean that if the UN does not act diligently to prevent human rights violations when it has the power to do so then it would be responsible and accountable to those suffering harms as a result of those violations."[100]

For such an argument to hold true, it must be accepted that customary international human rights law applies to the UN and its peace operations.[101] The Leuven Manual, compiled by a group of experts who sought to uncover and state the law applicable to peace operations, believes that customary international human rights law does apply to UN peace operations.[102] However, the UN must further develop its understanding of its due diligence obligations. For example, the HRDDP recognises the need to take precautions due to violations of human rights by non-UN forces.[103] But does the UN have due diligence obligations towards the host population? And must the UN "take positive measures through its peacekeepers" to prevent or respond to violations committed by the host state?[104]

Nevertheless, a commitment to the HRDDP is essential throughout a UN peace operation cooperating closely with the host state to serve as yardstick with which to assess whether support must be stopped to ensure the UN does not facilitate wrongful acts. The emphasis on the HRDDP shows there are "lingering concerns" about close cooperation with other actors.[105] The perception of the mission by the population, where the UN is operating alongside the host state, is key to ensuring the messaging from the UN communicates that the mission does not tolerate and is not facilitating further abuses by non-UN actors. Radio is regularly used to disseminate information and improve communication with the population. Still, this method was only included in MINUSMA's mandate in 2017, over four years since the mission's initial authorisation.[106] The UN Security Council must be more conscious of how best to disseminate mandates, the meaning of the HRDDP, and their purpose to local populations amidst uncertainty over responsibility for wrongful acts.

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[99] *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988), para 172.
[100] White (n 18) p.206
[101] Ibid p.205.
[102] Terry Gill, Dieter Fleck, William H Boothby and Alfons Vanheusden, *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press 2017) pp 76-8.
[103] UN, Human Rights Due Diligence Policy on UN Support to Non-United Nations Security Forces (2015) https://unsdg.un.org/sites/default/files/Inter-Agency-HRDDP-Guidance-Note-2015.pdf
[104] White (n 18) p.223.
[105] Karlsrud 2019 (n 62) p.9
[106] S/RES/2364, para 24.

C) Dual attribution and Article 39 ARIO

A vital thread that can be seen in the Dutch cases, *Mothers of Srebrenica* and *Nuhanović*, is the recognition by national courts that UN peacekeepers can be subject to dual attribution. Dual attribution, if generally accepted, would allow multiple actors to exercise effective control and therefore be responsible for the wrongful conduct. In *Nuhanović*, the Dutch Court of Appeal explained, "it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party."[107]

There is considerable debate surrounding the applicability of dual attribution, but it is worth noting the ILC recognises dual attribution as a possibility in ARIO.[108] The fact dual attribution has been utilised in cases of UN peace operations is an essential consideration for whether dual attribution could be a question surrounding the UN and the host state in stabilization missions.

Where, under Article 14, the UN has facilitated a wrongful act the application of Article 39 ARIO could apportion reparations between the UN and the state. Article 39 provides that "in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought." Article 39 "fits well, incidentally, with emerging concepts of dual attribution between the UN and the TCC which show, analogously, that responsibility can be split, especially when it comes to human rights obligations."[109]

Such dual attribution of conduct to multiple actors is presumed not to apply to Article 7, where the ILC's commentary explains,

> "[the] criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7

[107] André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 *Journal of International Criminal Justice* 1143–1157, p.1152

[108] Pierre d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) 1 *Questions of International Law, Zoom-in* 17; Tom Dannenbaum, 'Dual Attribution in the Context of Military Operations' (2015) 12 *International Organizations Law Review* 401; ARIO (n 10) Articles 19 and 63.

[109] Frédéric Mégret, 'Beyond UN Accountability for Human Rights Violations: Host State Inertia and the Neglected Potential of Sovereign Protection' (2019) 16 *International Organizations Law Review* 68-104, p.88

> on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal."[110]

The ILC's interpretation presumes dual attribution cannot apply under Article 7. Still, no such similar wording is found in Article 14. The ILC's commentary does not indicate that responsibility could not be apportioned between the actors under Article 14 ARIO and the sister provision in ARSIWA, Article 16. As a result, it may be possible for the UN to be held responsible for facilitating wrongful acts committed by the host state under Article 14 and for responsibility to be dually attributed and reparations apportioned between the UN and the host state under Article 39. Equally, Article 39 would allow for the UN's liability for reparations to be reduced where any non-UN entity has contributed to a wrongful act.

V. Conclusion

ARIO applies to a range of international organisations, not only the UN. As the way in which states and IOs cooperate in the field evolves, these actors must be aware of how ARIO applies in those contexts. This chapter has outlined where it would be possible for an IO to be found responsible for wrongdoing committed by a partner in the field by examining the practices of the UN in its stabilization missions. But with thousands of forces deployed around the world by a variety of IOs and cooperation high on the agenda, as was seen in Mali, IOs must be explicit with regards to their interpretation and application of ARIO and where their actions will cross into ancillary responsibility under Article 14.

In the UN context, stabilization missions present numerous risks for current UN peace operations working alongside host states on mandated tasks, and one such risk is ancillary responsibility of the UN for wrongful conduct committed by the host state or other partners in the field. Providing support is a pivotal part of peacekeeping mandates that require UN personnel to assist with building the state's capacity to assume responsibility for the protection of civilians, undertake security sector reform, and more. This means it is all the more concerning that the architecture in place through ARIO, ARSIWA, and the HRDPP provides insufficient clarity on UN responsibility. The UN must develop a definitive test for applying the HRDPP to situations of ongoing abuses committed by UN partners that mirrors its

[110] A/66/10, p.85.

obligations under Article 14. The UN must also elucidate the extent of its due diligence obligations towards the host state's population. Only then can the UN incorporate further safeguards into its activities to prevent unresolvable questions on UN responsibility where violations of human rights and humanitarian law by the host state persist. The current framework leaves the door open for activities, such as the capacity building of the host state by UN personnel or the sharing of intelligence, to come under scrutiny where UN assistance has provided the capacity for the host state to commit a wrongful act.