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TITLE: UN ACCOUNTABILITY FOR GROSS HUMAN RIGHTS VIOLATIONS PERPETRATED BY ITS PEACE KEEPING TROOPS

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF LL.M. DEGREE ON HUMAN RIGHTS AND CRIMINAL LAW

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Declaration

I AZEB BELACHEW TEKLU, do hereby declare that the thesis, 'UN ACCOUNTABILITY FOR GROSS HUMAN RIGHTS VIOLATIONS PERPETRATED BY ITS PEACE KEEPING TROOP, is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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ACNOMYAND ABBREVIATIONS

ARSIWA: The Draft articles on the responsibility of states

CPIUN: Convention on the Privileges and Immunities of the UN

CPIUNSA: Convention on the Privileges and Immunities of the Specialized Agencies

DARIO: The Draft articles on the responsibility of international organizations

DFS: Department of Field Support

DPKO: United Nations Department of Peacekeeping Operations

EC: European Community

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

ICCPR: The International Covenant on Civil and Political Rights

ICJ: International Court of Justice

ICTY: The International Criminal Tribunal for the former Yugoslavia

IACtHR: Inter-American Court of Human Right

IHL: International Humanitarian Law

IHRL: International Human Rights Law

IJDH: Institute for Justice & Democracy in Haiti

IJDH: Institute for Justice and Democracy in Haiti

ILC: International Law Commission

MONUC: United Nations Organization Mission in the Democratic Republic of the Congo

MONUSCO: United Nations Organization Stabilization Mission in the Democratic Republic of Congo

MOU: Memorandum of Understanding

NATO: North Atlantic Treaty Organization

NCC: National Contingent Commander

ONUC: United Nations Operation in the Congo (July 1960 – June 1964)

PSO: Peace Support Operation

SOFA: Status of Forces Agreement

TCC: Troop Contributing Country

TCS: Troop Contributing State

UN: United Nations

UNDPKO: United Nation Department of Peace keeping operation

UNFC: UN Force Commander

UNFICYP: United Nations Peacekeeping Force in Cyprus

UNGA: The General Assembly of the UN

UNMIK: United Nations Interim Administration Mission in Kosovo

UNMIK: United Nations Interim Administration Mission in Kosovo

UNPKO: United Nation Peace keeping operation

UNSC: United Nations Security Council

UNSG: The United Nations Secretary General

UNTAET: United Nations Transitional Administration in East Timor

UNTSO: United Nations Truce Supervision Organization

WCHR: world Court of Human Right

Abstract

The thesis provides accountability of the UN for gross human right violation perpetrated by its peace keeping troops.International organizations involved in multidimensional activities, including international peace and security matters. UN involved in peace keeping operation mission starting from 1948, while conducting the mission peace keeping personnel are involved in gross human right violation like sexual exploitation, using excessive force resulting in the death of civilians, and destruction of civilian property. The media report about those incidents most of the time and those violations, has lead a question who is responsible for such wrongdoing, and to which entity the conduct is attributable to.

The main issue which is addressed by this paper is: What challenges are there in holding the UN accountable for violations of international law in peace operations and what will be the way out? In this regard the thesis added the main difficulties which hinder UN accountability like issue of broad immunity and how the threshold for attribution of conduct and the command and control system affect the possibility of holding the UN accountable. How and to which entity the conduct should be attributed to, how this is shown in practice and the threshold for the attribution of conduct will be evaluated. There remains uncertainty as regards to the content and application of the effective control test, and whether dual or multiple attribution of conduct is possible, and the thesis will explore options to address these difficulties.

On issue of immunity the proper limit to the broad immunity protection, like right to access to court, access to remedy. In addition the possibility of waiving UN immunity if possible is discussed. Regarding the forum for prosecution both internal and external mechanisms accessed, like the possibility of establishing independent human right tribunal or world human right court.

Key Words: *Peace Support Operation, International Responsibility, Attribution of Conduct, Effective Control and Command, Human Rights Violation, Human Rights Obligation.*

CHAPTER ONE

1.1 Back ground of the Study

After WWII the UN was formed as a new worldwide effort to maintaininternationalpeace and stability.[1]Currently the UN plays an essential role in reducing international tensions, preventing conflicts and putting an end to conflict already under way. The UN stipulates its primary aim under Article 1 of the Charter, namely the maintenance of international peace and securityof the world[2] whereas article 1(3) obliges the organisation to protect human rights.[3]With the intention of serving the above purpose the UN, inter alia, founded peace keeping in 1948 with the establishment of the UN Truce supervision organisation (UNTSO) in Middle East as one means of maintaining security of the world.[4]However the UN Charter does not contain the phrase "peacekeeping mission" anywhere in the document.[5] Even if peacekeeping mission is not specifically authorized by the Charter[6], since the main purpose of the UN which is to "maintain international peace and security"is given to the UNSC, then the council has the power and responsibility to take collective action to maintain international peace and security of the world.[7] Based on this UNSC can establish a UN peacekeeping operation if that is suitable solution to be taken up on determination of the council in gratifying its responsibility under the charter.[8] Based on the above ground the peace keeping operation acknowledged as *blue helmets*mandated by

[1]The preamble of the 1945 charter of United Nations states that, to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.

[2] TheUnitedNationsCharter(24October1945),Art1(1)and1(3),availableat:*http://www.refworld.org/docid/3ae6b3930.tml*[accessed 26 January 2018]The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collectivemeasures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace and To achieve international cooperation in encouraging respect for human rights and for fundamental freedoms for all without distinction.

[3]The United Nations Charter (1945), Supra, n,2,Art. 1(3), 55 and 56, also require theUNto respect human rights.

[4]United Nation Truce Supervision Organization, UN Document 50(1948), Resolution of 29 may 1948{S/801} UNTSO,was deployed when the Security Council authorized the deploymentof military observers to Israel, Egypt, Lebanon and Syria in the Middle East.

[5]Burke, R ' Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets' *16 No.1Journal of International Peacekeeping*(2012),pp. 4-5.

[6] Findlay, T *Challenges for the New Peacekeepers, Stockholm International Peace Research Institute* SIPRI Research Report No. 12(1996) ,p.13.Internet URL: *http://www.sipri.se*

[7]The United Nations Charter (1945),Supra,n,2, Art. 24(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

[8] The United Nations Charter (1945), Supra,n,2, Art 42 and 24.

UNSC,through Chapter VII authorization. Classically Peace keeping missionwas limited to certain acts like maintaining ceasefireds and stabilizing situation on the ground, providing crucial support for political efforts and to resolve conflict by peaceful means in the earlier time.But now a days the area of its involvement expanded and has been involving in multidimensional activity like protecting civilians, assists in disarmaments, support the organisation of elections, protect and promote human right and assist in restoring the rule of law.[9] Peacekeeping operations are still in place today in Jerusalem (UNTSO), Kashmir (UNMOGIP), Cyprus (UNFICYP), the Golan Heights (UNDOF),South Lebanon (UNIFIL), Western Sahara (MINURSO) and South Lebanon (UNIFIL), Abyei (UNISFA),South Sudan (UNMISS),Mali (MINUSMA),Central African republic(MINUSCA) and Darfur (UNAMID).[10]

When UN engages inmilitary activity in states with view tobringing international peace and security, the personnel of UN has been violating human rights such as sexual violence,[11] using excessive force resulting in the death of civilians& distraction of civilian property, abuse, torture, arbitrary detention of individual persons[12] in host state like Bosnia[13], Cambodia, East Timor, Somalia,[14]Yugoslavia, Rwanda, Haiti[15] and Namibia.[16]Since the media always report about sexual abuse committed by peace keepers, this abuse became eye catching, however Peace keepers have also involved in range of other gross human rights violations. UN peace keepers are accused of detaining individuals without charge, denying them access to a lawyer and right of

[9]United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008)),p.6.(Capstone Doctrine here in after).

[10]Novosseloff,A 'Can we make UN peacekeeping great again?' *Global Review Peace Operations* (may 2017),p.6.

[11]UN, Special Measures for Protection from Sexual Exploitation and Sexual Abuse (Report of the Secretary-General, UN Doc.A/64/669, 18 February 2010) para. 10; Prince Zeid Ra'ad Zeid Al-Hussein, 'For Love of Country and International Criminal Law'24 *American University International Law Review*(2008-2009), pp. 647.

[12]Lynch, C 'U.N. Faces More Accusations of Sexual Misconduct; Officials Acknowledge "Swamp" of Problems and Pledge Fixes Amid New Allegations in Africa, Haiti'Wash. Post (2005), p.22 (describing a United Nations official's response to sexual abuse allegations in Cambodia in 1990 as "boys will be boys"). Other abuses reported include murder, torture, and pillage, all of which constitute violations of international humanitarian law.

[13]The Srebrenica Massacre during the Bosnian War of 1992-95 happened on the watch of Dutch UN peacekeepers.

[14]For instance, troops deployed to Somalia in the early 1990s were accused of sexual assault, rape, torture, deaths in custody and the defacing of local cultural objects.

[15]MINUSTAH soldiers have conducted several smaller-scale raids as well as incidents of murder, unlawful detention, and rape. In addition to direct perpetration of human rights abuses against civilians, MINUSTAH forces have stood by as members of the HNP carried out mass killings of Haitian civilians.

[16]Dannenbaum, T 'Translating the standard of effective control in to a system of effective Accountability :How liability should be Apportioned for violations of Human Rights by Member state troop contingents serving as United Nations Peace keepers' *5 Harvard International Law Journal*(2010),p. 113.

appeal in some host states like Somalia. Akin to this some peacekeepers brutally tortured and murdered detainees,while others indiscriminately fired upon civilians in the street.[17]

In addition to this due to the negligence and recklessness of the troops innocent civilians were victimized, this is against the peace keeper's motive of protecting civilians which in fact they failed to do so, even when doing so was within their mandate and capacities. We can take civilian massacres in the DRC, unenforced weapons-free zones that created a false sense of security for civilians in the CAR, and women and girls being raped in South Sudan.[18]

Due to these gross human rights violations victims are resorting to domestic and international courts to obtain reparation for damages occurred.[19]Surprisingly, in the last decade there has been a significant increase in the number of cases and raising the question of the accountability of the UN as an institution for human right violation. However the problem is;there is no clear cut way out to decide who is responsible and from whom to collect compensation.This is due to the fact that UN enjoys immunity and in addition to this peace support operations often involve complex and quickly-arranged relationships between contributing states and UN.[20]Here some scholars argue that peacekeeping troops as the members of national contingents, while remaining in the service of their state, for the period of their assignment in the operation they become international personnel under the authority of the UN. Due to this peacekeepers are placedin an odd position and this unique legal situation of peacekeepers renders the question of liability unusually complicated.

International law experts agree that the UN's response to the citizens' petition and its refusal to accept claims violated the UN's responsibilities under international law.As is well-documented by both the UN and independent academics, the UN's practice with regard to civil peacekeeping claims does not comply with the framework envisioned in the UN's governing documents, nor does it meet minimum requirements of impartiality andtransparency that are fundamental to due process.The experience of Haitian cholera victims is representative of a broader problem with accountability for harms of peacekeeping missions.[21] Here this case is important because the verdict of the case not only affected the cholera victims left without any remedy, but also it

[17] Ibid,p.119.

[18]Novosseloff (2017),Supra, n, 10,p.6.

[19]Palchetti, P 'International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution' (2016),p.98.

[20] Bell, C 'Reassessing multiple attribution: the international law commission andthe *Behrami* and *Saramati* decision' *42International law and politics(*2010),p.520.

[21]*Georges v. United Nations*, District Court (Southern District of New York), 84 F. Supp. 3d 246 (S.D.N.Y. 2015).

opens away for discussion on the gaps between the UN's obligation to promote human rights and its refusal to beabide by the basic principles associated with human rights.

Even if international legal personality granted for IO's in order to exercisetheirpowereffectively,this status not only gives a power to act in the international arena, but also expose them tointernational responsibility, it enables themto sue and be sued. However,IO'sincorporate provisions of immunity to limit the legal processes of domestic courts under different treaties.These are the UN Charter, the Convention on the Privileges and Immunities of the United Nations (CPIUN) [22] , and the Source of Force Agreements (SOFAs)[23].Due tothis scope and limitations of immunity has been the subject of ongoing debate both in scholarship and in judicial practice.From the expression of the CPIUN it can be inferred that the only situation, where the UN will be uncovered of its absolute immunity and exposed to the legal process is when the immunity is expressly waived; otherwise the UN is the 'untouchable' mighty.Due to this through the passage of time the international community is witnessing the unintended consequences of immunity which is remedy gap for victims. Under international human right instrument like ICCPR[24] and the UDHR[25]due process rights have been codified as basic human rights; therefore, the UN has violated its own Charter by denying victims of criminal and civil misconducts the right to an effective remedy. Generally by focusing on the right to a fair trial especially the right of access to a court, almost absolute lack of judicial mechanisms to review acts of UN transitional administrations and lack of accountability mechanism by UN due to immunity violates the local population's human rights, for this matter absolute immunity of the UN needs to be limited.[26]

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[22]UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, available at: *http://www.refworld.org/docid/3ae6b3902.html*[accessed 21 June 2018] (Here in after General convention)

[23]At the outset it is valuable to point out that SOFA is an agreement concluded with the government of a State/territory to which the mission is to be send while MOU is an agreement with a State whose troops are contributed into a mission.

[24]UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December Art. II, sec. 3, ("Each States Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.") 1966 available at: *http://www.refworld.org/docid/3ae6b3aa0.html*[accessed 26 January 2018]

[25] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.") available at: *http://www.refworld.org/docid/3ae6b3712c.html*[accessed 26 January 2018]

[26]Werzer, J 'The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor'*77 Nordic Journal of International Law* (2008), P.106.

The aim of this paper is to investigate the current legal situation on accountability of UN for human rights violations by peacekeeping forces and victims access to remedies.

1.2 Statement of the Problem

Classically the UN was intended and perceived as protector and promoter of Human right, however due to its increasing involvement in various activities, it become more likely to violate and weaken human rights of individuals.In other expression as the number of peace keeping troops and their activity grown prevalent number of inappropriate behavior which amounts to human right violation have been reported around the world.[27] Due to this, especially in recent years individual victims are bringing a claim against the UN. Here we can see the most influential case which is brought before a United States court against the UN, for its alleged responsibility for an outbreak of cholera in Haiti in 2010.[28] However UN raised immunity as a defenseto protect itself from suit for institutional negligence, such as its failure to act while genocide was taking place in Rwanda.[29]And victims are still deprived of adequate and effective redress and UN member states are not satisfactorily acting against individuals who commit these forms of violence. The victims get no recognition, compensation and have to live with what happened to them without any form of help. This partly relatedto the abuse of immunities which is granted to protect the functional independency of the UN, but in fact this leads to*de facto* impunity. This *defacto* impunity encourages UN peacekeepers to engage in gross human right violation without fear of prosecution or with impunity and encourage the UN to abdicate its responsibility.

The perpetration of gross human right abuses by peace keepers necessarily led peoples to ask a question likewhich entity is responsible for such wrongdoing and to which entity the conduct is to be attributed? In turn this increase the need for accountability of the UN and examination on the limitation of immunities granted to the UN before judicial entities.[30]In the Haiti Choleraand

[27] Natalie, N 'When Those Meant to Keep the Peace Commit Sexualized Violence' Women under Siege, 25 May 2012: *http://www.womenundersiegeproject.org/blog/entry/when-those-meant-to-keep-the-peace-commit-sexualized-violence* accessed on 23 April, 2018.

[28]*Georges v. United Nations*, District Court (Southern District of New York), 84 F. Supp. 3d 246 (S.D.N.Y. 2015).

[29]In January 2000, two Australian lawyers announced that they would initiate a lawsuit against the UN for failing to act when it had knowledge months in advance that genocide was imminent in Rwanda. When the announcement was made, the UN in turn announced that the UN would invoke its immunity to protect it from lawsuit if necessary.

[30]The increased focus on violations of IHRL and IHL has led to increased focus on who is responsible for such wrongdoing, and to which entity the conduct is attributable to. This led the International Law Commission (ILC) to develop its Draft Articles on the Responsibility of International Organizations (DARIO) drawing on the

Mothers of Srebrenica cases, individuals have alleged that the UN committed a wrong in the course of peacekeeping operations, sought a forum to hear their claims, and asked for a remedy.Unfortunately, the UN insists that it bears no legal liability itself for human right violation committed by its peace keeping personnel. Current decisions show this to be the case.[31] The UN contrary to the human rights and good governance principles is not accountable to those individuals who are adversely affected by their decisions and activities.Instead the UNinvoke its immunity; however, this raises important questions about the extent to which traditional immunities can be challenged by fundamental values inherent in the victim's international human rights.One of the most obvious human rights problems that arise from broad immunityof international organizations is the denial of the fundamentalright of access to a court guaranteed to all persons.[32]Thisrestriction on the right to access to a court is against international law's prohibition on the denial of justice.[33]

According to UN Charter's guidance the extent of immunity the UN enjoys is limited, which is functional immunity.[34] However The CPIUN provides that the UN "shall enjoy immunity from every form of legal process except insofar as it has expressly waived its immunity."[35]This language expands the UN's immunity from functional immunity to approximately closer to absolute immunity. The up-to-date issue is precarious concerning the immunity and accountability of the UN, which creates obstructions to individuals' rights of access to court.

The mixture of the existing difficulties regarding the accountability, immunity and available means of settlement procedures have resulted in human rights emptiness.In principle, there might be the possibility of resorting to internal mechanisms set up by the organization for the purposes of redressing individuals injured by conduct during a peace operation. However, with rare

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inspiration from the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). When a Statecontributes armed forces to an organization, DARIO provides guidance about attribution of conduct and responsibility.

[31]Mothers of Srebrenica Association*et al* v. Netherlands (Admissibility), App. No. 65542/12, 57 Eur. Ct. H.R. 114 (2013), *Georges v. United Nations*, District Court (Southern District of New York), 84 F. Supp. 3d 246 (S.D.N.Y. 2015).

[32] Gaillard, E and Lenuzza,I, I 'Intemational Organisations and Immunity from Jurisdiction: To Restrict or to Bypass'*51 International and Comparative Law Quarterly* (2002), pp. 1- 5.

[33] See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, 24, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

[34]The United Nations Charter (1945), Supra, n, 2.Art. 105. This article provides that "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

[35] The General Convention (1946) ,Supta,n,22, Art.II, Section 2.

exceptions, mechanisms of this kind are generally lacking.[36]In every SOFA concluded between UN and states hosting peacekeeping operations, it is provided that any dispute or claim of a private law character to which the UN peacekeeping operation is a party must be settled by a standing claims commission. In practice, no such commissions have ever been set up.[37]To date, the UN has failed to create any commissions in any country despite the fact that it has signed over thirty similar treaties that mandate this process.[38]A kin to, the UN is acting contrary to its purpose of promoting respect for human rights and against its affirmed mission by ignoring its treaty obligation to provide an adequate dispute resolution mechanism required by CIPUN provisions.

In general the above mentioned problems create an environment of impunity for the UN and its agents. The UN has used immunity privilege beyond its intended functionality to avoid taking responsibility for its actions and to avoid numerous complaints of breaching international treaties.[39]This thesis assesses to whom is the responsibility for the violation of human rights by UN peace keeping forces is attributed under international law, when and how they can be responsible for the misconducts of the UN personnel. Hence, the responsibility of the UN under international law and the issue of how to redress victims would be considered in this thesis.

1.3 Objective of the Study

1.3.1 General Objective of the Study

The general aim of this thesis is examining the existence of any legal framework that designated to govern the responsible legal person for wrongful conduct committed by peace keeping troops.In addition the focus of the thesis would be how to make UN accountable and how to compensate victims of human rights violation.

[36] Palchetti, P 'International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution' (2016), p.99.
[37] Dannenbaum (2010), supra, n, 16, p.141. ; See also Werzer, J 'The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor' *77 Nordic Journal of International Law*(2008),p.122.
[38] Chan, R 'Peacekeeping without Accountability: The United Nation's Responsibility for the Haitian Cholera Epidemic'80*https://www.law.yale.edu/system/files/documents/pdf/clinics/Haiti-TDC-Final-Report.pdf*
[39] Ibid.

1.3.2 Specific Objective of the Study

- Examining whether there is a legal framework designated to govern the responsible legal person for wrongful conduct committed by peace keeping troops.
- Analyzing for whom the conduct of UN peacekeeping troops could be attributed and the criteria for attribution.
- To investigate the current legal situation with regards to the immunity and accountability of UN, and how this affects the victim's right to remedy.
- To find out what are the main obstacles to the accountability of international organisations (UN) for human right violation.
- Accessing whether UN immunity can be a defense to escape accountability from Human Rights violation committed by peacekeeping troops.
- Discovering if there is any forum having jurisdiction over UN to entertain misconductattributable to the UN and how to enable victims have forum for claiming compensation.

1.4 Research Questions

The central research question in this study is analyzing the current legal situation on accountability of UN for human rights violations committed by its peacekeeping personnel and victims access to remedies.

The study will attempt to answer the following specific questions:

1. What is the legal basis for the UN's human rights obligations?
2. Is the UN or troop contributing state who shoulder the burden of misconduct undertaken by peacekeeping troops and redressing of Victims?
3. What are the various fora to bring an action against the UN for human rights violations by peace keeping forces?
4. What difficulties are there in holding the UN accountable for violations of human rights by peace keeping personnel?
5. Can the UN enjoy immunity from suit where it has refused to comply with its treaty obligations to provide victims with access to a dispute resolution mechanism, thereby denying their fundamental right to a remedy?

1.5 Research Methodology

The thesis followed doctrinal research method. Doctrinal analysis is a detailed and highly technical commentary up on, and systematic explanation of, the context of legal doctrine.Accordingly, to achieve its objective of examining accountability of UN for wrong perpetrated by its peace keepers the thesis employsdoctrinal research method. So this study isconfined to analyzing and reviewing the existing literature and library materials.Both primary and secondary source of data are used. As a primary source the review will focus on international laws and principles which help to analyze the issue of international responsibility in relation to the peacekeeping operations conducted by the UN. In doing so, the work of the ILC which is relevant both for international responsibility of the UN and States such as Articles on Responsibility of States for Internationally wrongful Acts of 2001 (ARSIWA) and Draft Articles on the Responsibility of International Organizations of 2011 (DARIO), ICJ advisory opinions, and the resolutions and reports of the UNGA or UNSC and bulletins of UN will be sources for the thesis. Then as a secondary source like Journal article, books will be extensively used in order to get the full picture of the thesis.

Moreover since doctrinalmethod involve case analysis, practical cases will be analyzed (like ICJ, ECtHR, HRC… and case's before national courts), in order to illustrate the width of immunity enjoyed by the UN in its peacekeeping operations and the lack of a forum to entertain cases and to evaluate how the issueof responsibility has worked in practice. Generally the study analyzes existing literatures, laws, cases and draw inference and conclusion in view of answering the research questions.

1.6 Significance of the Study

As it is stated in the statement of the problem, the legal framework and applicability of international legal liability of UN for the violation of international human rights during peacekeeping operation remained unanswered in international arena. Hence, after the study examines the existed literature and laws on the area of the problem, it will have the following implication. It helps the victims toclaim redress under the international arena and provides comprehensive analysis of reparation for the human right abuse committed by peacekeeping troops and attribution of the legal liability to the UN. Besides it gives awareness to UN itself, to

provide and promulgate mechanisms which protect individuals and help victims to claim redress for the violation.In addition it initiates other fascinated researchers to carry out more extensive studies in the area since the issue is still debatable and require further discussion.

1.7 Delimitation of the Study

The study primarily aims to analyzethe possibility of holding the UN accountable for acts perpetrated byits peace keeping personnel. Due to this the paper confined on analyzing the institutional accountability of the UN based on rule of attribution. The criminal responsibility ofthe individual perpetrators is not the focus of this study. This paper does not go further to analyze the international responsibility of troop contributing states in detail but only peripherally.

1.8 Organization of the Study

The thesis is systematically divided into five substantive chapters.Chapter one introduces the background of the problem, statement of the problem, objective and scope of the study, research methods, significanceof the study, limitation of the study and finally literature review.Chapter two begin with a presentation of the UN's mandate to authorize peacekeeping operations.In addition thelegal framework of UN peacekeeping operations,purposes and principle of peacekeeping operation also discussed. Chapter-three addressed human rights obligation of international organisation(UN) and its international responsibility and discuses the criteria for attribution of human rights violation by PKTs to UN and TCS.Chapter four analyzethe possibility of bringing claim against the UN and discussed the various forums under which victims can file claim and mechanisms to redress victims of human rights violation. In addition the policy justification for granting immunity to the UN will be analyzed. The source, scope and the proper limitations on UN immunitydiscussed in detail.This chapter mainly focuses on answering the question of forum for prosecution on UN as an institution. Here lawsuit against the UN in a national court and challenge of the UN's immunity discussed and legal justifications weighing against absolute immunity. Here the proper limits for the immunity of the UN and how to secure access to effective remedy or other mechanisms to provide reparations given the main emphasis. The final chapter of this thesis which is chapter five is dedicated to conclusion and some recommendation.

1.9 Literature Review

Regarding issue of gross human right violation committed by peace keeping troops; several academics and scholarly writinghave discussed the problem of accountability for peacekeepers,troop contributing state and UN.But the issue is still subjected to heated debate and different scholars on the area argue differently ; specially regarding the absolute immunity granted for the UN. While some articles and journals merely discuss the problem and the issues at stake, others go a step further by suggesting solutions to this problem. Some of the article and journals mention about the UN not paying sufficient attention to the allegations of abuse and about cover-ups of abuse by peacekeepers in the past. Much of the literature has focused on the accountability of the individual or of the State. Due to this institutional wise accountability of UN has received less attention. However, this is an important area of accountability as UN peacekeeping operations are conducted under the auspices of the UN. Furthermore, when theorganizational accountability of the UN has been considered by some literatures, the solutions proposedhave often been administrative rather than legal in nature. In other word they focused on the administrative changes that the Organisation should undertake to address the issue of human right violation, rather than an analysis of the UN's legal responsibilities under international law and how its acts or omissions may have breached its obligations. In addition to this as some research in this area consider the UN's liability as an employer for its peacekeeping personnel, however many of the issues surrounding the legal accountability of the UN remain unresolved. So possibly we can conclude thatthe issue of the legal accountability of the UN has rarelybeen addressed. Then this area need yet to be examined in great detail and still requires furtherresearch and debate.The scope and limitations of immunity has been the subject of ongoing debate both in academics and cases before courts.International law experts agree that the UN' response to the citizens' petition and its refusal to accept more claims were inadequate and violated the UN' responsibilities under international law. Fran Quigley, a law professor at the Health and Human Rights Clinic of McKinney School of Law, stated in his amicus curiae, "In agreeing to the SOFA process, the UN evidenced a clear intent to avoid establishing or claiming full immunity for itself for claims based on personal injury, illness, or death arising out of negligence."

In addition to journal and articles there are also some thesis done on the issue. In athesis done on the UN's responsibility for the Wrongful act of its Peacekeepers, the author simply describe the legal rules for the UN to become responsible for its peacekeepers, and he look at the deficiencies with the normative framework and how the law possibly should be. In addition he discusses thedeficiency which creates a lack of accountability for the UN.However this author fails to say anythingabout the forum for prosecuting the UN and other means of redressing victims. The other thesis written by Sepided Mohammadi, which issimilar with previous one but he focus on sexual exploitation and abuses of children and women. And it only discuses peripherally about UN accountability as institution and the issue of immunity as a bar to question of prosecuting the UN as institution and lack to provide appropriate way out for that problem.It doesnot provide the alternative means of victim compensation and other mechanism of filling that remedy gap. Finally thepaper done byFanny Zakrisson, Addressing impunitythrough State accountability?A study onresponsibilityfor human rights violationscommittedbyUN peacekeepers, deal with contributing states accountability only and say nothing about the accountability of the UN.

However,the author is convinced that these works do not fully address the objectives this paper aims to achieve.The author in this thesis will consider the issue of imputability of responsibility between the UN and troop contributing state but with particular emphasis on UN as an institution.It must be however pointed out that there is a scarcity of literature addressing the possibility of prosecuting the UN. In fact what makes may thesis different from other articles written on the area is that, the thesis will deeply dwell on appropriate forum to brought a case againstUN ; the area which is not discussed well but only peripherally by other authors.

1.10 Limitation of the Study

The researcher, while conducting the study, faced the following limitations; lack of enough data, lack of internet access, lack of resource and lack of adequate time too.

CHAPTER TWO

THE EVOLUTION, LEGAL BASIS AND CORE PRINCIPLES OF THE UN PEACEKEEPING OPERATIONS

Introduction

After the IIWW, the UN brought the concept of human rights in to the field of international law in its own constituent document.[40]So the idea of human rights exists as one from the three pillars of UN, such as peace and development.[41] The Charter under its preamble asserted its goal as: to save succeeding generations from the scourge of war, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.[42] UN have function of maintaining peace and security and at the same time maintaining respect for human rights and these two functions are inextricably linked. The goal of peacekeeping missions 'should be to measurably increase respect for human rights.[43] In order to achieving the above purpose, the UN uses peace keeping mission as one of its main tool.[44]

According to the Panel on United Nations Peace Operations[45] assembled in 2000 by the Secretary-General to examine peace operations in the UN context, the term "peace-operations" as an umbrella term covers "conflict prevention[46], peacemaking,[47] peacekeeping[48] andPeace-building.''[49]The Stockholm International Peace Research Institute (SIPRI) defines multilateral peace operations as:

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[40]Joseph, S and Beth, A (eds.) *Research Handbook on International Human Rights Law* (2010), p.1.

[41] The United Nations Charter(1945), Supra, n,2, Art. 1; See also Gilmour, A 'The Future of Human Rights: A View from the United Nations' 28, no.2 Ethics & International Affairs (2014),P.239.

[42]The United Nations Charter Preamble.

[43]Howland, T 'Peacekeeping and Conformity with Human Rights Law', in Murphy, R and Mansson, K (eds.), Peace *Operations and Human Rights*, (New York, Routledge, 2008), p.6.

[44]Langholtz, H Principles and Guidelines for UN Peacekeeping Operations2010 Peace Operations Training Institute

[45]The Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations, 10, delivered to the Security Council and the General Assembly*, U.N. Doc.A/55/305, S/2000/809 (Aug. 21, 2000); See also Sandler, T 'International Peacekeeping Operations: Burden Sharing and Effectiveness'61*Journal of Conflict Resolution* (2017), PP.1878-79.

[46] Conflict prevention involves the application of structural or diplomatic measures to keep intra-state or inter-state tensions and disputes from escalating in to violent conflict.

[47] Peacemaking refers to the use of diplomatic means to persuade parties in conflict to cease hostilities and to negotiate the peaceful settlement of a dispute.

[48]The term "peacekeeping" can refer to (UN) peace operations in general, in that sense peacekeeping is used as an umbrella term for all (UN) peace operations. Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers.

[49]For the United Nations, peace building refers to efforts to assist countries and regions in their transitions from war to peace, including activities and programmes to support and strengthen these transitions. It involves a range

Operations conducted under the authority of the UN, carried out by regional organisations and alliances, Operations carried out by ad hoc coalitions of states that have been authorized for the purpose by a UN Security Council resolution.[50] With the affirmed intention of operations: (a) serving as an instrument to facilitate the implementation of peace agreements already in place; (b) supporting a peace process or (c) assisting conflict prevention or peace-building efforts.[51]

In the Present days, multidimensional peacekeeping operations are called upon not only to maintain peace and security, but also entrusted with more extended tasks.[52] Those operations include: to facilitate the political process, protect civilians, assist in the disarmament, demobilization, reintegration of former combatants, support the organization of elections and protect and promote human rights.[53]As an example, MONUSCO, which is operating in the DRC, has over 40 tasks mandated by the UNSC and exemplifies how wide-ranging the tasks of UN peacekeeping have become. Generally peace keeping mission range from strengthening government ministries in South Sudan to supporting elections in Haiti, from protecting civilians in Eastern Congo to maintaining ceasefire along the Golan Heights, to assist the governments and people of host countries to prevent a relapse of conflict.[54]

Generally this chapter discusses about three points; firstly the chapter deal with historical evolution of UN peace keeping operations, then the chapter tries to access the legal basis for the power of the UN to deploy peace keeping mission. Finally the three core principles of UN peace keeping operations are discussed.

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of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development.

[50]The SIPRI definition of peacekeeping missions does not include activities like good offices, fact-finding and supporting elections.

[51] Lijn, J and Smit, T 'Peace operations and conflict management', in SIPRI Yearbook 2017: Armaments, Disarmament and International Security (Oxford University Press: Oxford, 2017), p. 165; See also the SIPRI Multilateral Peace Operations Database, *www.sipri.org/databases/pko/* .

[52]United Nations Peacekeeping Operations <http://*www.un.org*/en/peacekeeping/missions/unmogip/> (last accessed February 28, 2018), p.19.

[53]See for instance United Nation Civilian Police Mission in Haiti (MIPONUH) 2000, *http://www.un.org/en/peacekeeping/missions/past/miponuh.html*. (last accessed February 24, 2018)

[54]United Nations Department of Peacekeeping Operations/Department of Field Support Civil Affairs Handbook (2012),p. 10.

2.1 History and the Evolution of United Nations Peacekeeping Operations

The first peace operation, which is the United Nations Truce Supervision Organization (UNTSO), was established in 1948[55] up on authorization of UNSC to deploy lightly armed military observers in the Middle East countries to monitor the Ceasefire Agreement between Israel and its Arab neighbors.[56] Since 1948, around 71 UN peacekeeping operations have been deployed worldwide fifty-three of which occurred after 1990.[57] The first peace operation (UNTSO) is typical of what is now known as "traditional" peacekeeping and falls under Chapter VI of the UN Charter.[58] But know a days the peace operations evolved from traditional peace keeping which involve the "pacific settlement of disputes" under Chapter VI to the more forceful action mandated under Chapter VII or towards robust peace keeping method. However, a UN peace mission usually contains a mix of elements of peacekeeping, peace-building and peace enforcement.[59]The initiation of the *Agenda for Peace*,[60] a landmark report by Boutros Boutros-Ghali on anticipatory diplomacy, peacemaking and peacekeeping, marked for the first time that Chapter VII was invoked for this purpose.[61] And peacekeeping operations started to be deployed under Chapter VII of the UN Charter (Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression). [62]

The UN starting from the beginning of peace keeping idea continuously engaged in reform process to meet the perpetually changing and increasingly complex needs of the global security

[55]UN Security Council, *Security Council resolution 50 (1948) [The Arab- Israel Question]*, 29 May 1948, S/RES/50 (1948), available at: *http://www.refworld.org/docid/3b00f23d10.html* [accessed 12 April 2018]

[56]Daniel, D and Hayes, B *Beyond Traditional Peacekeeping* (New York: Martin's Press, 1995).available at: *http://trove.nla.gov.au/work/31257916.* (last accessed February 2018)

[57] Sandler, T 'International Peacekeeping Operations: Burden Sharing and Effectiveness' 61 *Journal of Conflict Resolution* (2017), P.1876.

[58]UN Peacekeeping, From the Millennium Report.
Available at: *http://www.un.org/cyberUNSChoolbus/briefing/peacekeeping/peacekeeping.pdf*. Millennium Report stated: ''Chapter VI outlines specific means which countries may use to settle disputes: negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional institutions or arrangements or other peaceful means. Chapter VI operations are generally understood to be derived from Article 33 as a "peaceful means" of achieving a settlement of a dispute between the parties.

[59] Boss, B 'Law and Peace: a legal framework for United Nations peacekeeping' (2006) PhD Thesis on file at the University of Sydney, p.21. ; See also Reynaert, J 'MONUC/MONUSCO and Civilian Protection in the Kivus' Interns & Volunteers Series (IPIS)(2012),P.11.

[60]Boutros-Ghali, B. An Agenda for Peace, A/47/277 – s/24111.(17 June 1992) at para 20. Boutros Boutros-Ghali presented "An Agenda for Peace, Preventative Diplomacy, Peace Making and Peacekeeping" to the UN Security Council which adopted it on 31 January 1992.

[61]An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, A/74/277—S/24111 (June 1992).

[62] The United Nations Charter,art.39 provides the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

environment. As such, peacekeeping operations look very different today from 1948 or even 1999. This is because Peacekeeping reform is unending process, especially in the wake of the highly visible and heartbreaking failures of the UN missions in Somalia, Rwanda and the former Yugoslavia in the mid-1990s different attempts was made to reform UN peacekeeping operation. The first major initiatives for reform include the 2000 Brahimi Report which play a great role and represent as an important turning point in setting out a renewed vision for peacekeeping in the 21st century.[63] A kin to this UN has initiated a major reforms which enabled incredible transformation in terms of size and operation which is different from the past peace keeping operation undertaken by UN.

The second major attempt to re-model peacekeeping was the adoption of 'Capstone Doctrine' through the process of Peace Operations undertaken in 2010, which was started in 2006 by the Secretary General and culminated in 2010.[64]The focus of the Doctrine is 'an alteration of the basic principle that peacekeeping forces should not use force except in self-defense, instead it calls for "restraint in use of force."[65]Subsequent reform initiatives of the UN Secretariat and Member States have built on this foundation for improvement by seeking to adapt UN peacekeeping to changes in the strategic and operational environments.

2.2The Legal Basis for the Power of UN to Deploy Peacekeeping Mission

The UN has been deploying military personnel in peace operations since 1948 and striving to ensure peace and security of the world. However the UN Charter does not contain the phrase "peacekeeping mission" anywhere in the document or there is no express legal provision for UN Peacekeeping operation in the Charter; in other word, it neither mentioned by name nor given a specific legal basis in the UN Charter.[66]And this may be one of the reasons for the lack of an articulated legal framework, although it is now generally agreed that UN peacekeeping is

[63] General Assembly and Security Council, '*Report of the Panel on United Nations Peace Operations* ("Brahimi Report")', 21 August 2000, UN Doc. A/55/305, S/2000/809 at paras. 56ff.; SC Res. 1327 (2000).Brahimi Report, which was written in the aftermath of the failures of the collective security system in Somalia, Rwanda and in the former Yugoslavia in the 1990s. The Report contained a wide range of proposals for reform and insisted, among other things, on the need to adopt mandates that are 'clear, credible and achievable.

[64]Report of the Secretary General to the General Assembly on the Financing of UN Peacekeeping Operations, UN Doc. A/60/696; Department of Peacekeeping Operations and Department of Field Support, UN Peacekeeping Operations: Principles and Guidelines: 'Capstone Doctrine' (2008).

[65]Gray, C *International Law and the Use of Force (*3rd edn. Oxford University Press, 2008), p.324.

[66] Findlay, T '*Challenges for the New Peacekeepers'* Stockholm International Peace Research Institute SIPRI Research Report No. 12' (Oxford University Press 1996) Internet URL: *http://www.sipri.se*, p.13; see also Boss, B 'Law and Peace: a legal framework for United Nations peacekeeping' (2006)PhD Thesis on file at the University of Sydney.

authorized as an implied or inherent power of the UN. [67]Although peacekeeping missions are not specifically authorized by the Charter, the enumerated purpose of the UN which is to "maintain international peace and security," includes using "collective measures'' for the prevention and removal of threats to the peace can be its basis.[68] Regarding this ICJ in the *Reparations Case* [69]argued that the Peacekeeping has been an implied power of the UN deriving from Article 1of the charter, which states the primary purpose of the UN. In turn in achieving its purpose the UN Charter grants this primary responsibility[70] to the UNSC, this responsibility can include authorizing, withdrawing or renewing UN peace operations. [71]

A kin to article 1 of the Charter there are elements in both Chapters VI and VII which can be mentioned as a basis or as legitimacy for different types of peacekeeping operations.[72]

> *''Although the implied powers for the use of peacekeeping forces is derived from the primary purposes of the UN set out in Article 1 of the Charter, the purposes or grounds for which the implied powers may be used are found in Chapters VI and VII. It is upon these two Chapters that all peacekeeping operations have been founded.''* [73]

While peacekeeping operations under Chapter VII of the UN Charter can only be authorized by the SC, Chapter VI operations may be initiated on the basis of a recommendation from the General Assembly, but this power of the Assembly which is to recommend peacekeeping operations is useful where a member of the SC is using the veto to prevent the authorization of peacekeeping operation.

Under chapter VII the SC has the prerogative to determine when and where a UNPO's should be deployed or decides when to establish a PKO on an ad hoc basis.[74] The council in order to decide to establish or not, first it is required to determine whether there is a "threat to international peace

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[67] Contemporary issues in UN Peacekeeping and International Law (September 2010) UN Peacekeeping Law Reform Project Briefing paper, University of Essex, p.4.

[68] Nystrom, D 'The UN Mission in Congo and the Basic Principles of Peacekeeping- Revolution or Evolution?'(2015) LLM thesis on file at Stockholm University, p.10-11.

[69] *Reparations for Injuries Suffered in the Service of the United Nations, ICJ 174* (1949), p. 182. ICJ stated that 'the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties. See also *Certain Expenses of the United Nations (Advisory Opinion)ICJ* (1962) ICJ Rep 149(*Certain Expenses Case)*

[70] The United Nations Charter, Chapter III Art 7& art 24.The Security Council established under the United Nations Charter with the primary responsibility for the maintenance of international peace and security.

[71] Lijn, J *Progress on UN peacekeeping reform: HIPPO and beyond* (Clingendael Report October 2017), P.7.

[72] Kralik, J 'Sexual exploitation and abuse by UN peacekeepers' (2017) LL.M. thesis on file at the University of Charles, p.15.

[73] Boss (2006), Supra, n, 58, p.26.

[74]Capstone Doctrine (2008), Supra, n, 9, p.47.

and security'' or there is no such threat.[75]The Council then evaluates the situation and determines for example, if it is a threat to international peace and security, the existence of a cease-fire, whether the parties commit to a peace process, the safety of UN personnel, and whether a precise mandate can be expressed.[76] Due to this the UNSC is authorized under Chapter VII of the charter to deploy force in order to maintain or restore international peace and security.[77]

In recent years, most of the peace keeping operations are authorized by invoking Chapter VII of the Charter when authorizing the deployment of UN peacekeeping operations. For examples in areas where there is volatile post-conflict situation where the State is unable to maintain security and public order, like MUNUSCO in the DRC and MINUSMA in Mali.It is under Article 42 that the post-cold war robust Chapter VII peacekeeping operations are now conducted.[78]

Another basis for the power of the council to authorize peace operation is its power under the charter to establish subsidiary organs as it deems necessary for the performance of its function.[79] Due to this peace keeping operation can be established as one subsidiary organ of the UN. This issue is also reflected in Rule 28 of the Council's Provisional Rules of Procedure:

> *'' The mandate of subsidiary organs, range from procedural matters (e.g. documentation and procedures, meetings away from headquarters) to substantive issues (e.g. sanctions regimes, counter-terrorism, peacekeeping operations).''*[80]

If we look at the peacekeeping operation which is established as a subsidiary organ and deployed as a mandate of subsidiary power of the security council, it is an operation consists of military, police and civilian personnel, who work to deliver security, political and early peace building support.[81]

Together, these provisions form the foundation of the UN power to deploy armed combatants known as ''*blue helmets*."In general the legitimacy of UNPKO is derived from its unique position in the UN Charter and UNSC authorization.[82] This legitimacy is rightly seen as one of the key assets, and comparative advantages, of UN peacekeeping operations.While Chapter VII

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[75]The United Nations Charter (1945), Supra, n,2, Art.39.
[76]Ibid. See also Veileder, G 'The legal basis for the use of force by UN peacekeeping operations' (2003) LLM thesis, p.4.
[77]The United Nations Charter (1945), Supra, n, 2, Art.42.
[78]Ibid, Art 24 and 42.
[79]Ibid, Chapter V Article 29.
[80]Provisional Rules of Procedure of the Security Council Rule 28.
http://www.refwrold.org/publisher,UNSC,Resolution,,,,0.html (last accessed February 24,2018)
[81]Capstone Doctrine (2008), Supra,n,9.
[82]Coning, C *UN Peacekeeping Operations Capstone Doctrine Report of the TfP Oslo Doctrine Seminar 14 & 15* (May 2008, Oslo, Norway), p.1.

of the Charter puts the SC in charge of determining a threat to peace and security of the world then mandating action accordingly, a significant proportion of the planning and execution of peacekeeping remains within the discretion of member states.[83] This is due to the fact that, since UN has no military force of its own, it is dependant up on states contribution; here the extent and circumstances of troop contributions left almost entirely to the will of the contributing state. Even after a decision is made to contribute troops to a particular mission, states will often intervene in the activity of their contingents in order to safeguard their interests and protect their peacekeepers.[84] Due to this determining the responsibility of the UN and the TCC's for human rights violation committed by peace keeping personnel is difficult. This point will be discussed in brief in the next chapter.

Prior to the deployment, the UN and the TCCs agree to a Memorandum of Understanding (MOU) or a formal Transfer of Authority (TOA) agreement. The TOA or MOU will define the level of authority transferred to the UN, typically operational command and/or control.[85] The UN enters a Status of Forces Agreement (SOFA) with the host state when the operation is based on principle of consent. This agreement regulates the legal relationship between the peacekeepers and the host state.

Furthermore, the SOFA clarifies that the TCCs will retain criminal jurisdiction over its contingents.[86] Once approved, the Secretary-General will appoint a Head of Mission who with assistance from the DPKO and DFS plans the day-to-day operations of the mission,[87] which includes political, military, operational, and administrative decisions. When deployment occurs and the operation commences, the Secretary-General provides regular reports to the Security Council containing information on the implementation of the mandate. The SC still reserves the right to extend, amend, or end a mission at any time.[88]

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[83] Ibid

[84] Leck, C 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct'10 *Melbourne Journal of International Law* (2009), p. 355.

[85]Gill, D 'Legal Aspects of the Transfer or Authority in UN Peace Operations' in Dekker, F and Hey, E., (eds.) *Netherlands Yearbook of International Law,* (2011), p.48.

[86] UN General Assembly, 'Model status-of-forces agreement for peace-keeping operations', A/45/594, 9 October (1990),P. 47.

[87]Department of Peacekeeping Operations, United Nations Peacekeeping, *http://www.un.org/en/peacekeeping/about/dpko* (last accessed 20 February 2018)

[88]Role of the Security Council, United Nations peacekeeping, <*http://www.un.org*/en/peacekeeping/operations/rolesc.shtml> (last accessed January 20,2018).

2.3 The Core Principles of United Nations Peacekeeping Operation

The UN through its Department of peace keeping operation and Department of Field support in 2008, affirmed the basic principles of peace-keeping in its document entitled UN Peacekeeping Operations: Principles and Guidelines (the Capstone Doctrine). Peacekeeping is defined as an instrument for peace and security by three mutually reinforcing core principles[89] those principles may provide guidance for ensuring a successful UNPKO[90] Even if UN peacekeeping has brought significant change over the past six decades, those three basic principles have traditionally served and continue to set UNPKO as apart as an important instrument for maintaining international peace and security. Those principles are: Consent of the parties, Impartiality and Non-use of force except in self-defiance and defense of the mandate. These principles are interconnected and mutually supporting.[91] Recently, international courts have also relied on the three principles when defining the 'peacekeeping nature' of such operations. [92]

2.3.1 Consent of the Parties

The consent is the main criteria which separate peacekeeping operations from enforcement operations. UNPKO are deployed with the consent of the main parties to the conflict.[93] Without such consent, the peace keeping mission considered as a party to the conflict and being drawn towards enforcement action, which is against the target of peace keeping operation.[94] If consent is given by host state unwillingly under international pressure; it can be withdrawn in different ways. For instance, a party that has given its consent to the deployment of the operation may subsequently seek to restrict the operation's freedom of action, resulting in a *de facto* withdrawal of consent. The complete withdrawal of consent by one of the main parties challenges the rationale for the UNPKO and will likely alter the core assumption.[95]

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[89] Capstone Doctrine (2008), Supra, n, 9.
[90] Contemporary issues in UN Peacekeeping and International Law: UN Peacekeeping Law Reform Project briefing paper (September 2010) University of Essex, p.3.
[91] Capstone Doctrine (2008), Supra, n,9, p.31.
[92] Nystrom (2015), Supra,n, 67, p.20.
[93] The Security Council may take enforcement action without the consent of the main parties to the conflict, if it believes that the conflict presents a threat to international peace and security. This, however, would be a peace enforcement operation. It may also take enforcement action for humanitarian or protection purposes; where there is no political process and where the consent of the major parties may not be achievable, but where civilians are suffering.
[94] Ladsous, H 'Department of Peacekeeping Operations Department of Field Support' 1United Nations Infantry Battalion Manual (2012), p.13.
[95]United Nations Peacekeeping Operations Principles and Guidelines, 2010

2.3.2 Impartiality

Principle of impartiality means that peacekeepers must implement their mandate without favor or prejudice to any party to the conflict[96], but it should not be to extent of neutrality in the execution of their mandate and it is crucial in maintaining the consent and cooperation of the main parties. However, it should not be confused with neutrality[97] or inactivitywhich was done by UNAMIR in Rwanda where peacekeepers were forced to stand by as the genocide took place in front of them.[98] To avoid such problem, UN peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate.[99] This helps them to be perceived as fair and transparent. Failure to do so may undermine the peacekeeping operation's credibility and legitimacy, and may lead to a withdrawal of consent for its presence by one or more of the parties.[100]

2.3.3 Non-Use of Force except in Self-Defense and Defense of the Mandate

The third principle is limited use of force, which means that peacekeepers should not use force except in self-defense or in the defense of the mandate. This principle dates back to the fist deployment of armed peacekeeping operation in 1956.[101] The notion of self-defense has subsequently come to include resistance to any forceful attempt to prevent the peacekeeping operation from discharging its duties under the mandate of the SC. This is due to the fact that there is a probability in host state, the peace process may be undermined due to the presence of criminal gangs and militias or the population may be at risk. In this case the SC give mandate to the PKO missions to 'use all necessary means' to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, but should only use force as a measure of last resort.[102] Generally peace keepers can use force with the authorization of the SC, this can be occurred as a measure of last resort with intention of defending UN's personnel and

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http://www.refworld.org/docid/484559592.html. (last accessed April 6,2018)

[96] Capstone Doctrine (2008), Supra, n, 9, p.33.

[97] Neutrality means to take no sides in hostiles or engage at any time in controversies of a political, racial, religious or ideological nature, while impartiality means being guided solely by needs, making no discrimination on the basis of nationality, race, gender, class or political beliefs.

[98] Rwanda: Why the international community looked away available at:http://www.dw.com/en/rwanda-why-the-international-community-looked-away/a-4157229

[99]Ibid, p.33.

[100] Ibid.

[101] Capstone Doctrine (2008), Supra, n, 9, p.24.

[102] Ibid, p.34.

its property of last resort and to defend the mandate.[103] The ultimate aim of the use of force is to influence and deter spoilers working against the peace process and not to seek their military defeat.

[103] The use of force by a United Nations peacekeeping operation should always be calibrated in a precise, proportional and appropriate manner, within the principle of the minimum force necessary to achieve the desired effect.

CHAPTER THREE

RESPONSIBILITY OF THE UN UNDER INTERNATIONAL LAW FOR HUMAN RIGHTS VIOLATIONS COMMITTEDBY ITS PEACEKEEPING TROOPS

Introduction

This chapter of the thesis deals with the human rights obligations of IO's in general and the UN in particular; an area which lacks the attention it deserves, because extensive scholarship on the legal personality of international organisations tends to concentrate on their rights and omits to scrutinize their duties.

In this chapter the first sectionwill examine the existence of human rights obligations of IO's and the UN. So many questions may arise regarding the accountability of the UN for violations of human rights. The first question is: does the UN violate human rights? If that is the case, how?Secondly: is the UN bound by IHRL? What legal consequences follow from the breach by the UN on the rule ofIHRL? Since the UN and international organizations in general are not party to any of the universal or regional human rights treaties,[104]the legal sources of their obligation to respect human rights are less clear and thus, need to be identified. Under the proposal of this thesis it was mentioned that UN peace keeping troops are committing human right violation on civilians for whom they are expected to be their guardians, but in fact they become perpetrators. The increased report of human right violation by peace keeping personnel from different area of missionshas led to ask which entity is responsible for such wrongdoing, and to which entity the conduct is attributable to. Before examining how responsibility for the human rights violations of peacekeepers should be apportioned between troop-contributors and the UN, it must first be shown that the organization is actually bound by human rights laws. So to answer those question this chapter deal with theresponsibility of UN and TCS's under international law for human rights violations committed by the UN peacekeeping troops.

Then after the criteria and the test for imputability of wrong done by peace keepers will be assessed under the second section of the chapter in detail based on the ARSIWA and DARIO articlesdrafted by ILC.

[104]Reinisch, C 'Securing the Accountability of International Organizations' 7 Global Governance (2001), pp. 131-134.

3.1How and Why International Human Rights Norms Binds International Organizations

Undeniably, the international human rights legal structure is generally premeditated for States; however, this doesnot mean that IO's are not obliged to respect international human rights norms. Before moving to answer the question of whether and to what extent IO's are bound by human rights laws, looking the legal status of IO's under international law is important. As a leading point, in the first place it is necessary to conduct a query into the international legal personality[105] of the IO's at hand[106] and the legal consequences flowing from its status as a subject of international law.[107]

The above-mentioned question also pleads another fundamental issue, namely to find out, to what extent is international human rights norms which in fact belongs to established rules of treaty law, form part of customary international law and/or general principles of international law.[108] Due to the fact that CIL applies to all subjects of international law; these customary human rights norms are also binding upon international organisations.[109] Some authors consider that the stipulationunderArticle 38(1)(c) of the Statute ofICJ[110] which is the 'general principles of law recognized by civilized nations' can be a medium through which some human rights developed to the general principles of international law.

Although it seems there is a convergence of views on human right obligation of international organisations, controversies persist, particularly as to the identification of sources of this obligation and its scope.Even if an international system that allowed international organisations (UN) not to be bound by human rights obligations would fail to advance human right values and not acceptable; however the main challenge for the jurist is to find systemically coherent and

[105]The notion of *international legal personality* describes rather the *ability to possess* such rights and duties, and the *ability to participate in international legal relations*, i.e. to exercise powers on the international plane.

[106] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Rep. (1949) pp. 173–219.; See also Klabbers, J *An Introduction to International Institutional Law* (Cambridge, Cambridge University Press 2009), pp. 46–52.; White, N *The law of international organisations*, 2nd edn. (Manchester, Manchester University Press 2005), pp. 30–70.

[107]A subject of international law is an entity possessing rights and duties stemming directly from international law.

[108] The most plausible interpretation is that these locutions are shorthand for customary international law of universal or quasi-universal applicability and for general principles of law.

[109]Wouters, J *et.al* (eds.) *Accountability for Human Rights violations by international organisations* (Hart Publishing Ltd.2010).

[110] Simma, B and Alston, P 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' 12 *Australian Yearbook of International Law* (1988–1989), p. 82. , See also Art. 38 of ICJ Statute, treaties are on the top of the list of possible sources of human rights obligations which one needs to look at when trying to identify whether and how international organisations are bound by them.

logicallyconvincingexplanations for the application of international human rights obligations to international organisations.

For several authors, this obligation rests on the customary status of internationalhuman rights. This is based on the massive adoption and continuous affirmation of the fundamental human rights listed in the UDHR[111]has so it is submitted, transformed these rules or at least some of them into customary international law.[112]Moreover, some provisions of human rights law such as the prohibition of torture are considered as norms of jus cogens.[113] It is generally admitted that peremptory rules bind international organisations.

The Charterrequires the UNto promote and encourage respect for human rights. Such promotion and encouragement will hardly be performed by the organisation itselfattempting to avoid responsibility in this area. [114] There are at least four key issues that must be addressed as part of a general theory on the creation of obligations binding international organisations (UN in our case): the obligatory effects of international legal personality; the obligations arising under constituent instruments; the obligations arising from CIL; and the effects of member states obligation on the organisation.

3.1.1 International Legal Personality

Legal personality is 'the capacity of being a subject of legal duties and rights, of performing legal transactions and capable of suing and being sued at law'.[115]The status of the UN as a subject of international law is found under Art 1 of the CIPUN.[116] A kin to the CIPUN, ICJ asserted that the UN is endowed with international legal personality, because 'the Organisation was envisionedto exercise and adore functions and rights which can only be progressed on the

[111]Hannum, H 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 *Georgia Journal of International and Comparative Law* (1995–1996), pp. 287–395.; See alsoUN General Assembly, Resolution A/217 (III), Universal Declaration of Human Rights, UN Doc. A/RES/3/217 A, 10 December 1948.

[112]Wouters, J and Ryngaert, C '*Impact on the Process of the Formation of Customary International Law*', in Kamminga, M and Scheinin, S(eds.)*The Impact of Human Rights Law on General International Law* (Oxford, Oxford University Press 2008), pp. 111–131.

[113]Kondoch, B '*Human Rights Law and UN Peace Operations in Post-Conflict Situations'*, in White, N and D. Klaasen, D(eds.) *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press 2005) ,p. 36.

[114]Maogoto,J 'Watching the Watchdogs: Holding the UN accountable for violations of International Humanitarian Law by the 'blue helmets'' 5 No.1 *Deakin Law Review* (2000),p.67.

[115]UN General Assembly, *Reparation for injuries incurred in the service of the United Nations*, 1 December 1949, A/RES/365, Advisory Opinion: ICJ Reports
available at: *http://www.refworld.org/docid/3b00f1ed28.html*[accessed 21 June 2018](Reparation for Injuries hereinafter).; See also Nijman, J *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: T. M. C. Asser Press, 2004)

[116] General convention (1946),Supra,n,22.

basis of thepossession of international personality and the capacity to operate upon an international arena.'[117] Due to these and other factors the UN endowed 'a subject of international law status and capable of possessing international rights and duties,[118] at the same time it has capacity to maintain its rights by bringing international claims'.[119]But then again since rights are not conferred without corresponding duties under the theory of reciprocity, along with the right to bring an international claim, the UN also has the responsibility to be held responsible under international law for the actions ofits agents.[120]

In addition to the above as ICJ explained in the interpretation of agreement case,which is the ICJ's 1980 WHO-Egyptadvisory opinion conclude that 'international organizations are subjects of international law and as such, are bound by any obligations incumbent upon them under general rules of international law.[121] In full, it reads:

> *''International organizations are subjects of international law and,as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.''*[122]

The saying of the case thus seems to indicate that obligations 'under general rules of international law' flow automatically from the personality of international organisations. Here we can argue that there are obligations which flow automatically from international legal personality. Like obligation to protect fundamental human right.

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[117]Reparation for Injuries case(1949),p. 179.

[118] Reinisch,A 'Introductory Note, Convention on the Privileges and Immunities of the United Nations' 2 *Audiovisual Library International Law* (2009), http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html .

[119]Ibid.

[120]Peck, J 'The UN and The Laws of War: How Can the World's Peacekeepers be Held Accountable?' 21 Syracuse & Commerce (1994), P. 285. ; See alsoWorster, W 'Relative International Legal Personality of Non-State Actors' 42 *Brook Journal of International Law* (2016), pp.215-222.
Available at: http://brooklynworks.brooklaw.edu/bjil/vol42/iss1/4

[121]The ICJ has used such an expression as well as the analogous 'general international law' without explaining what is meant by them. The general international law can be interpreted as combining two source under article 38 which is shorthand for customary international law of universal or quasi-universal applicability and for general principles of law(like obligation to protect fundamental human rights)

[122]Interpretation of the Agreement of March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports (1980), p. 73.

3.1.2 Obligations Arising Under the Constituent Instrument

The most important treaty for international organisations is their constituent document, which contain obligations imposed on them by Member States.[123]As far as human rights obligations are concerned, the direct references to them in the Charter are sufficient to establish a legal basis for their general applicability to the activities of the UN. For example the Preamble of the UN Charter offers an indication of what those values might be security and peace, human rights, rule of law.[124] As it is clearly stipulated under article 1(3) the purpose of the UN isto promote and encourage respect for human rights and for fundamental freedoms, in addition Article 2 expressly obliges the UN to act in advancement of certain principles in pursuit of the purposes stated in Article 1. The major constitutive mandate appears in Article 55(c) of the Charter "the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms for all."Here its internal order obliges the UN to pursue its own purposes and principles, which include promoting and encouraging respect for human rights and for fundamental freedoms for all. [125]In this regard "the UN is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order.'' [126] Hypotheticallythe UN often groundsits specific peacekeeping missions in human rights values.[127] This is because if the need to preserve human rights provides a basis for action, it must also delimit the scope of action that can be taken on that basis, so the UN cannot violate human rights on the justification of promoting human rights protection.

3.1.3 Human Rights Obligations under Customary International Law

Since UN has been established through international law and is itself a subject of international law [128] it is possible to argue that a kin to the constitutive instrument ,Customary international

[123]Faix, M 'Are international organisations bound by international human rights?' 5 *CYIL*(2014), p.284.
[124] Guglielmo, V *The UN and human rights: who guards the guardians?* (Cambridge University Press 2011, New York), pp.56-57.
[125]Specific legal obligations connected to the general principles in Article 2 are fleshed out in other provisions of the Charter. For example, Article 55 asserts that the UN shall 'promote' inter alia 'universal respect for, and observance of, human rights and fundamental freedoms for all.
[126] Megret, F & Hoffmann, F 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities'*25 Human Rights Quarterly* (2003),p. 317.
[127]Dupont, P '*Detention of Individuals During Peacekeeping Operations: Lessons Learned from Kosovo 'In*Roberta Arnold & Geert-Jan Alexander Knoops(eds.) *Practice and policies of modern peace support operations under international law*(2006),p. 255–56
[128] Megret & Hoffmann (2003), Supra, n, 125, pp.314-317.

human right law can also bound IO's to the extent they have reached CIL status.[129]This issurely the consequence of the UN's legal personality that it is bound by CIL and there is a strong argument that a number of human rights are protected under CIL. Freedman also insists that 'under the current legal situation, there is a general consensus that international organisations are bound by CIL.'[130]

At the very least, certain human rights have been recognized on a case-by-case basis to be part of CILby the ICJ:the prohibition on genocide;and the prohibition on slavery and against inhuman and degrading treatment or torture; freedom from arbitrary detention and the right to physical integrity; and protection against denial of justice or ingeneral term they have *jus cogens* status.[131] And most of them are violated by UN peace keeping personnel.

3.1.4UN Bound by Human Rights Obligation of its Member States

Lastly, but not the least UN is bound by international human rights law to the extent that its member states are bound. According to this conception, the organisation cannot act contrary to the already existing obligation of member states, but this is not to mean that the organisation would be under the same obligations as the member states, but in any scenario the organisation would act ultra vires.[132] It is clear that such a consequence is necessary in the international legal order as states would other-wise be able to escape theirinternational obligations by establishing IOs and acting through them.[133]This has recently been reaffirmed by ECtHR in the Bosphorus case: 'with regard to member states' human rights obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and their transfer of sovereign powers to the European Union (EU)/European Community(EC).'[134] The court specifically say that 'Absolving Contracting States completely from their Convention

[129] Ibid.
[130] Freedman, R 'UN Immunity or Impunity? A Human Rights Based Challenge' 25(1) *The European Journal of International Law* (2014), P.239.
[131] Among the human rights norms assigned *jus cogens* by at least one of these authorities are prohibitions on genocide, slavery, disappearance, official torture, prolonged arbitrary detention, and apartheid.
[132] Wouters, J *et.al* (eds) *Accountability for Human Rights Violations by International Organizations*(2010),PP. 62-63, See also Schermers, H 'The European Communities bound by Fundamental Human Rights' (1990) 27 *Common Market Law Review*(1990),pp. 251-52. 'As no one can transfer more powers than he has, the Member States were not competent to transfer any powers conflicting with these treaties they were parties to. The Member States cannot grant the Community any possibility to infringe the rights guaranteed by the Convention. Any rules made by the Community contrary to the Convention are therefore void'.
[133]Werzer(2008), Supra, n, 25, p.109.
[134]*Bosphorus v. Ireland*, ECtHR Judgment of 30 June 2005, para. 133.

responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention.'[135]

3.2International Responsibility for Conduct of UN Peacekeeping Forces

Obviously peace keeping personnel conventionally perceived by people as promoter and protector human rights norms, but unexpectedly today they are involved in gross human right violation around the world, due to their involvement in multi-dimensional activities. Due to this after establishing human right obligation of UN, thepaper isgoingto analyse in the following parts international responsibility of UN and TCS (troop contributing state) for the human right violation committed by its peace keeping troops. The discussion is mainly by focusing on the Draft article on responsibility of state and international organisation for international wrongful act of troops. Due to media coverage on human right abuse done by peace keeping personnel in different host state, scholarsstarted to ask which entity is responsibleand which act is attributable to which entity and how?This leads the ILC[136] to develop itsdraft articles on the responsibility ofinternational organizations (DARIO)[137]based on the articles on responsibility of states for internationally wrongful Acts (ARSIWA)[138]as inspiration. In case a State contributes troops to UN, DARIOprovides guidance about attribution of conduct andresponsibility for the wrong committedduring themission.

3.2.1 Responsibility of Troop Contributing States for Peacekeepers Actions

In analyzing the general framework guiding the responsibility of a state for an internationally wrongful act Articles 1 and 2 of the ILC Draft article ARSIWA[139] is very important to answer the question when does a state held accountable for human rights violations committed by

[135] Ibid.
[136] The ILC was established by the UN to work on the progressive development and codification of international law. Article 1(1), Statute of the International Law Commission, GA Res 174 (II) (UN Doc A/519, 21 November 1947).
[137] Draft Articles on the Responsibility of International Organizations of 2011, Adopted by the ILC at its fifty-third session in 2001, A/56/10,
available at *http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf*(Here in after DARIO).
[138]Articles on the responsibility of states for internationally wrongful acts', annexed to UN General Assembly resolution 56/83, UN doc. A/RES/56/83, 12 December 2001 or International Law Commission, 'Responsibility of States for Internationally Wrongful Acts, with commentaries', in Yearbook of the International Law Commission (2001), Vol. II. Adopted by the Commission on its 53rd session in 2001, and endorsed by the UN GA: see res. 56/83 (28 Jan. 2002) and res. 59/35 (16 Dec. 2004).(Here in after ARSIWA)
[139]International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries), Yearbook of the International Law Commission, 2001, UN Doc A/56/10 (Here in after ARSIWA commentaries).

members of its armed forces duringpeace operations. By reading Article 2 and 3, together with Article 1, we can understand that a state maybe held responsiblefor internationally wrongfulactswhen an action or omission is attributable to the stateand constitutes abreach of an international obligation of the state.International responsibility of States as a principle found under Article1 andstates that '*every internationally wrongful act of a State entails the international responsibility of that State'*.[140] The international wrongful conduct can be an act or omission which is attributabletotheState and which constitutes a breach of an international obligation of theState.[141] Hence, a conduct in breach of an international obligation will not entail the international responsibility of a State unless it is also attributable to that State. In this regard there are two tests, the first test is evaluating whether an act or omission is attributable to the state in question and subsequently evaluating whether the act or omission constitutes a breach of that state's international obligation.[142]ILC Articles on State Responsibility under Article 8 states that 'the conduct of a person is considered an act of the state if the person 'is in fact acting on the instructions of, or under the direction or control of, that State.' Here the instructions, direction or control must relate to the specific conduct that turns out to be in breach of international law. In this analysis there are two key issues: whether the state in question exercises exclusive or effective control over its troops in the receiving country and whether human rights obligations have extraterritorial application to the sending country or whether that act is breach of states obligation. This article attributes conduct on the basis of instructions or control to specific conduct. Therefore, attribution is not based on a legal relationship between the actors and the State but on the basis of a factual link: conduct following the State's instructions or under its direction or control. Regarding the second criteria, international human rights law apply extra-territorially whenever the state exercises effective control over the foreign territory or over individuals.

3.2.2The UN Responsibilityfor the Wrongful Conduct of its Peacekeepers under DARIO

In 2002 the ILC started the work on responsibility for IO'sand the work, known as DARIO,was completed in 2011.[143]Article 3 of the DARIO contains themost important principle regarding

[140]ARSIWA (2001), Supra, n, 338, Art. 1.
[141] Ibid, Art.2
[142] Ibid, Art. 3.
[143] ILC, Report of the International Law Commission on the work of its 63rd session' (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10 para 87 (DARIO)

UN's responsibility. It states that every internationally wrongful act invites international responsibility.[144] Article 4 defines an internationally wrongful act and determines the characteristics of such an act of an international organization. It holds that an action or omission, which is attributable to that organization under international law and that act should be a breach ofaninternationalobligation of that organization, is an international wrongful act of that organization.[145] The process of attributing conduct of troops toIO's rests on some links the IO's has with wrong doers. These are rules concerning 'institutional links,'[146] 'factuallinks'[147]and thata state or an organization 'may adopt a certain conduct asits own after the conduct has taken place.[148] When we say institutionallink, if all *de jure* IO's organs and other agents exercising IO's functionscommit wrongful act, their act can be automatically attributed to a state or aninternationalorganization. While factual link, occurs when a person is actingunder theinstructions, direction or control of IO's and the wrongful act of those persons attributed regardlessofthe statusofthose individuals. But in orderforconduct to be attributed under the factuallink rule, institutionally linkedactors mustinstruct, direct or control them.

At first glance the concept ofattribution of conduct and establishment of responsibility may appear simple and clear concepts; however inpracticethere seemsto be a problem regarding clarity on the rule of attribution of conduct.This, in turn, contributes to an issue of attribution of conduct to wrong entity and evasion of responsibility; eventuallyhuman right victimsbeing left with no remedy.[149] In this part ofthe paper the author examine under what circumstances

[144] DARIO (2011), Supra, n,137, Art .3.

[145] Ibid, Art. 4. The ILC has defined "internationally wrongful act": "There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributed to the international organization under international law; and (b) Constitutes a breach of an international obligation of that international organization." Report of the International Law Commission on the Work of its Fifty-Fifth Session, U.N. GAOR, 58th Sess., Supp. No. 10, n.24, U.N. Doc. A/58/10 (2003).

[146] Klein, P *The Attribution of Acts to International Organizations,* in Crawford, J *et al* (eds.) *The Law of International Responsibility* (Oxford University Press, 2010) ,p.296. ; If a person or entity is characterized as an organ by virtue of 'formal organic ties'31 with the organisation, that characterization will determine the attribution of the act of the organ to the organisation regardless of the position of the organ in the organisation.

[147] The rules concerning factual links are when a person is acting under the instructions, direction or control of a state/IO.

[148] Messineo, F 'Multiple Attribution of Conduct', SHARES Research Paper No. 2012-11, pp7-10.at: *http://www.sharesproject.nl/wp-content/uploads/2012/10/Messineo-Multiple Attribution-of-Conduct-2012-111.pdf*

[149] Faryma, B 'Attribution of conduct to international Organizations' (2014) LL.M(R) thesis University of Glasgow,P.11.

internationally wrongful acts committed by UN peacekeeping forces can be attributed to the UN and thus the UN be held liable for such unlawful acts.[150]

3.3 Attribution of Conduct of PSO's to the UN and TCS's under International Law

As Shaw states,imputability has beendescribed as a legal fiction which associates the actions or omissions of officials, organs, or individuals to the State or the UN.[151]If both the UN and TCS have obligations not to violate humanrightsextra-territorially;theprecariousissue that leftovers to be scrutinized is to whom the human rights violation imputed or who should be held responsible for the actions ofpeacekeepers.[152] The issue of attribution is important in peace support operations;where a state's military forces placed at the disposal of UN and it is unclear if the state or the UN is ultimately responsible for certain acts taken by the soldiers.[153]

Hereassessingthe impact of the command and control structures in the UN operations is important on the rule of attribution of conduct.This partalso consider the tests that have been developed by the various courts and the ILC draft articles to determine issue of attribution of conduct to States orUN, and the possibleimplications of these approaches for attribution of conduct. And whether, and underwhatcircumstances, thesameconduct may be attributed to both state and UN. The analysis will mainly rely on the interpretation of the rules of attribution set forth in the ILC's Articles on the responsibility of states, adopted in 2001, and in the Articles on the responsibility of international organizations adopted in 2011[154]and jurisprudence of different court decisions on the issue.

[150] In order for an international organisation to be held legally responsible for an internationally wrongful act two requirements must be established. First, that that the act committed can be attributed to the organisation. Secondly, the act must constitute a breach of an international obligation.

[151] Shaw, M *International law* 6th Edition, (Cambridge: Cambridge University Press, 2008), p. 786.

[152]Zwanenburg, M'UN Peacekeepers: Who Is Accountable for Their Misdeeds?, The World Today'70.No.3 (2014); See also Bell, C 'The international law commission and the Behrami and Saramati decision' 42 *International Law and politics* (2010),p.502.

[153]Larsen, K 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test'19 Iss 3 *European Journal of International Law* (2008), P.512.

[154]ARSIWA (2001), Supra, n, 138 and DARIO (2011),Supra,n,137.

3.3.1 The Conduct Attributable to UN and Troop Contributing State

The military personnel voluntarily contributed by member states are placed under the control of the UN, nevertheless they remain in their national service and their sending states retain certain powers of control over them.[155]

According to ARSIWA[156] and DARIO[157] an internationally wrongful act, is perpetrated when conduct attributable to a state or IO's is in breach of that state's or IO's international obligations. The elements of an internationally wrongful act of an international organization are set out in Article 4 of the DARIO. Accordingly there is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
(a) Is attributable to that organization under international law; and
(b) Constitutes a breach of an international obligation of that organization.

Here we can draw two cumulative criteria. Firstly, the act or omission in question must be attributable tothe state ororganization. Secondly, the act or omission in question must constitute a breachofan internationalobligationof thestate or organization.Hence, the UN will bedeemed to have committed a wrongful actif the act breaches any of its international obligations, for instance if the organisation breaches a Security Council resolution during a peacekeeping operation.[158]As stated in Article 4 of the DARIO, the conduct may be action or omission. The DARIO set out the positive criteria for attribution of conductwhich means itdoesnot express which and which conduct may not be attributed to an IO's.[159]In order for a conduct to be attributed to an IO's, firstly it has to be performed by an organ or agent of the IO's, when carrying out functions entrusted to it by the IO's.[160] Secondly, a conduct that is performed by organ of a state or an organ or agent of another IO's, which is placed at the disposal of anIO's, may be attributed to the organization, if it retained sufficient level of control over the conduct.

[155]Zwanenburg(2014), Supra, n, 151, P.54.
[156] ILC, 'Report of the International Law Commission on the work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 para76.
[157]ILC, Report of the International Law Commission on the work of its 63rd session' (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10 para 87.
[158] Guglielmo (CUP 2011), Supra, n ,123 ,p. 215.
[159] Pimia, A 'The Responsibility of international organizations in humanitarian action Victims' rights for reparation against impunity'(2015),LLM thesis, on file at University of Helsinki,pp.34-35.
[160] DARIO, Art 6(1)and 8, ultra vires acts also attributed, however, it does not include unlawful acts that are committed in a 'non-official capacity'; See also *'Liability of the United Nations for Claims Involving Off-Duty Acts of Members of. Peace-Keeping Forces Determination of "Off-Duty" versus "On-Duty" Status' [1986].UN Juridical Yearbook, vol24, UN Doc ST/LEG/SER.C/24*, p.*300*.

3.3.1.1Attribution of Conduct of Organs and Agents of IO's

In order for a certain conduct to be attributable to an international organization, it has to be performed by its 'organs'[161] or 'agents.'[162]Accordingly Article 6 of DARIO stated as follows:

> *''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.''*[163]

Howeverfor the conduct to be attributedto the international organisation, the conduct of the agentor organ should beperformedas a function of a givenorganoragent. When the organ or agent acts in a private capacity,the conduct is not attributed to the organization,[164]which means it does not include unlawful actsthat arecommitted in a 'non-official capacity' oroff-duty actsof troop,like sexual violence, human and drug trafficking.Article 7 of DARIO does notspecify whattype of acts maybe attributable and covers a wider scope of actions becauseit can include any action than the corresponding Article 8 of ARSIWA, which is limited to the exercise of 'governmental authority'.[165] Even if, UNpeacekeeping forces are regarded as subsidiary organs of the UN, nonetheless those forces can consist of UN staff, volunteers, independent contractors and members of national armed forces and therefore the question of attribution of conduct is not clear-cut.[166] Private military company hired for pace keeping purpose directly by the UN can be considered as agent of the UN and their act is attributable to the UN. Because, sincetheyarecontractedby the UN they

[161]DARIO(2011),Supra,n 137,Art.2 defines 'agent' as ' an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

[162] According to DARIO 'organ' means 'any person or entity which has that status in accordance with the rules of the organization'. The ICJ, in its advisory opinion in *Reparations* case stated that it takes 'the word "agent" in the most liberal sense' as essentially meaning '*any* person through whom the IO acts'.

[163]DARIO (2011), Supra, n, 137, Art.6.

[164]ILC, Report, Sixty-third session (26 April–3 June and 4 July–12 August 2011), General Assembly, Sixty-sixth session, Supplement No. 10 (A/66/10) at: *http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (*DARIO commentaries here in after), P.18. Attribution of conduct *ultra vires* is addressed in article 8.

[165] Montejo, B 'The Notion of 'Effective Control' under the Articles on the Responsibility of International Organizations' in *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, Leiden, Boston, 2013), P. 393.; See also Second report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, ILC Fifty-fifth session, Geneva, 3 May-4 June and 5 July-6 August 2004, A/CN.4/541, Geneva (2004), para. 67.

[166] Notar, S 'Peacekeepers as perpetrators: Sexual exploitation and abuse of women and children in the Democratic Republic of the Congo'14 issue 2 *American University Journal of gender, social policy & the law* (2006),P.421.

are answerable to the UN and have no link withthestate like national peace keeping contingents.[167]

3.3.1.2 Attribution of Conduct of Organs Employed at the Disposal of IO's

Regarding the responsibility of UN for the conduct of a state organs placed at the disposal of the UN, DARIO Article 7 states that this attribution depends on effective control that either IO's or states exercise in that particular operation.[168]For the conduct of state organs to be attributed to the IO's there are elements under DARIO Article 7, firstly if the organ was placed "at the disposal of" this organisation; secondly if the organisation exercised "effective control" over that conduct. Here the main difference between attribution of conduct of IO's organ and state organ placed at the IO's disposal is that, while Article 6apply to the situationswhere an entity is fully seconded to an organization, Article 7 applies to cases where a seconded entity still acts 'to a certain extent' as an organ of the sending state or organization.[169]Article 7 of DARIO doesnot resolvewhether acertainconduct is attributed to a state or UN at all, but ratherresolve to which entitycertain conduct has to be attributed. [170] According to the ARSIWA, the acts need tobeperformed in the '*exercise of governmental authority'*[171], whereas Article 7 of DARIO applies to any acts and the scope of Article 7 of DARIO is wider than thecorresponding provisionsof the ARSIWA.DARIO articles 7 stipulate that:

> *''any act committed by an organ of a state or agent of an international organization that has been placed at the disposal of an international organization, may be attributed to the receiving organization, if the organization has 'effective control' over such conduct.''*[172]

The "effective control" test does not apply generallytoall acts of the lent organ, rather in each case it should be scrutinized whether a specific wrongful act was executed under control of the state or IO's.It seems as if the DARIO Commentary considered the "factual" or "effective control"overparticular conduct is the same as "*exclusive direction and control*" overtheorganitself.If peace keeping personnel was acted under control of the TCS and the

[167] Planck, M 'Private military companies in UN peace keeping' *13 United Nation year book*(2009),pp.363-365, See also Garcin 'The Haitian Cholera Victims' Complaints Against the United Nations' (2015) ,p. 680.
[168] International Law Association, "Final Report on Accountability of International Organisations" Berlin Conference (2004), pp.28-29.
[169] DARIO Commentaries (2011), Supra, n, 164, p.87, para. 1.
[170] Ibid, p. 88.
[171] Montejo (2013) ,Supra, n, 164, p.393.
[172] Ibid, PP. 390-391.

conduct attributedto the TCC due to the fact that the state retain the control over the troops during the commission of the act.[173] This means the attribution is based on a "factual criterion"existing on the ground.[174]

3.4 Command and Control Structures of UNPKO and its Effect on Rule of Attribution

As discussed in the above parts, the attribution of unlawful conduct is based on the factual control exercised on the conduct; then it is essential to inspect the command and control structure within the present-day UN peacekeeping missions.[175] The Capstone Doctrine of the UNDPKO (UN Department of Peacekeeping Operations) developed in 2008 [176] contain briefcommand structure of the missions. However, while the command and control structures of UN peace keeping mission seems clear-cut in theory, it is complex in practice.[177] This is for the very reason that; while soldiers are still intheir domestic national service, they are also international personnel for the time being placed under the control of the UN.[178]This dualism gives birth to a chain ofcommand wherebypeacekeepers remainprimarily within the control of their sending statesthrougha National Contingent Commander (NCC)[179] and at the same time directed by UN Force Commander (UNFC) who is the UN senior military official for the mission.Operational directives will be issued by the UNSG to the UNFC is conferred 'operational control' over the peacekeeping force in order to implement the SG's operational directives.The NCC thus arguably represents the interests of the contributing state on the ground, and may contravene the direction of the UNFC.[180]Due to this some scholars argue that the UNhas onlyoperational control over the troops, while the effective control remains with the state.[181]In generalcommand and control is structured as a hierarchy; national contingents leadby anational contingentcommander, areunderthe command of the UN representatives in the field (UNFC). The commanderin chiefis underthe command and control of the SG who is under the UNSC on top of the hierarchy.

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[173]DARIO Commentary(2011),Supra,n,164, to Art. 7.
[174] Ibid.
[175]Buchan, R 'UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?' 32 No. 2 Legal Studies (June 2012), p.284.
[176]Capstone Doctrine (2008), Supra, n, 9.
[177] Leck,(2010),Supra,n, 83,p.352.
[178]Dannenbaum (2010), Supra, n, 16, p.114.
[179]The NCC is the national commander of the contributed contingent, and transfers the orders from the Force Commander to the respective contingent.
[180] Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations* (2003),pp.67-68
[181]Dannenbaum (2010), Supra, n, 16, p. 85.

3.4.1 Determining the Proper Test for Attribution

On review of jurisprudence, essentially three tests for attribution of conduct have emerged, namely: 'effective control', 'overall control or ultimate authority and control', and 'effective overall control' test.However, theauthor arguesthat these tests have their own deficits, so neither ofthem affords a suitable legal ground for determining for which entity unlawful conduct attributed in thecontext of peacekeeping missions. So under this part thepaper aims after outlining thedeficienciesof these tests, to suggest a more suitable approach in determining attribution of conduct.

3.4.1.1 The Effective ControlTest

Due to the fact that, no definition is provided under the DARIO for the test effective control there is no unanimity to the precise meaning of effective control test. However DARIO commentary states that attribution isbased on the factual control exercised over the specific conduct.[182] Due to this 'effective control' test under article 7 seems to require factual control over the exact conduct in question, or operational control,[183] which means over the specific action causing the human right violation rather than over the operation as a whole. Here when we say factual control, we mean that who had the ability to prevent misconduct or to punish the perpetrator.[184] So effective control is held by the entity that is in a best situation to control effectively and within the law to prevent the abuse in question. Arguably the actor who held responsible should be the actor most capable of preventing the human rights abuse.[185]

In the *Nicaragua* case the ICJ advocated 'effective control' test in determining who is responsible for the action of *contras*. In doing so, the court accessed whether the US had

[182] DARIOCommentary (2011),Supra,n,164, to Art.7, para 4. ; see also The ILC defined "effective control" as "the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal." Report of the International Law Commission on the Work of its Fifty-Sixth Session, U.N. GAOR, 59th Sess., Supp. No. 10, U.N. Doc. A/59/10 (2004) ,p. 111; The International Law Association [ILA] in a 2002 report defined 'effective control' as both 'operational command and control'.

[183] ILC 'Report of the International Law Commission on the Work of its Forty Sixth Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/59/10 (ILC Forty Sixth Session)

[184]Mohammed, S 'Responsibility under international law for Human Rights violation committed by the personnel of UN peace support operation' (2014) LLM thesis on file Atlantic University of Norway, p.35.

[185]Dannenbaum (2010), Supra, n, 16, p.158.

sufficient control over specific operations in order for those acts to be attributed to it.[186] A determination that weather 'effective control' had been exercised, demanded the issuing of specific instructions by the US, so the general dependence and support would not be insufficient.[187]The ICJ contended that the State must have been in control over the specific operation or directed the act which is perpetrated contrary to human right.[188] In the *Genocide* case,[189]the ICJ again applied an 'effective control'test. [190]The case related to whether the conduct of non-state actors, while not a *de jure* state organ could be attributed to Serbia as a *de facto* state organ. The court considered whether the acts of these persons or groups could nevertheless be attributed to the respondent State on the basis of effective control as set out in Article 8 of the ARSIWA which requires that in order for conduct of a person or group to be attributed to a State the persons in question must have acted under its'instructions', 'direction' or'control'.

3.4.1.1.1 Which Entity has Effective Control over the acts of PSOs?

Peacekeeping operations can be UN-led operations andUN-authorized operations. In the case of the UN-led operations, contingents are put at the disposal of the UN and deployed as UN peacekeeping operation, which has the legal status of a subsidiary organ of the UN.[191] The UNFC has 'operational control' over them while a contingent commander, commands these forces. However in case of UN-authorized peace operations, which isauthorized by the SC, the UNhas a limited formal involvement in the day-to-day management of the operation since the SG's role is restricted to acting as the channel by which the multinational force reports to the

[186] Greenlees, A 'The Responsibility of the United Nations for the Wrongful Conduct of its Peacekeepers'(2015) LLM thesis on file University of Oslo,p.29.

[187]The Court has taken the view [...] that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the US the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.

[188]*Nicaragua Case,* Merits, Judgment, ICJ, 27 June 1986, para.115.

[189]*Bosn.& Herz. V. Serb. & Mont.* Merits, Judgment, 26 February 2007, para. 400 ('Genocide Case'); for a detailed analysis of the case see: Milosovic, M 'State Responsibility for Genocide: A Follow up' 18, no. 4 *European Journal of International Law*(2007), p. 669.

[190]Both the ILC and the International Court of Justice (in Military and Paramilitary Activities (Nicar. v. U.S.), 1986 ICJ 14 (June 27) and the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Serb. & Mont.), 2007 ICJ 91 (Feb. 26) have adopted the "effective control" test to determine whether an organ is exercising the authority of its state, or international organization, or the authority of the state, or international organization, to which it has been lent.

[191]Maarit ,P 'The Responsibility of international organizations in humanitarian action Victims' right for reparation against impunity'(2015)LLM thesis on file at University of Helsinki,p.36.

SC.[192] So, in such operations, the UN hasno command or control over peacekeepers.During UN run military operations, the state remains in factual control as the UN uses states' National officers as part of its force commander's personnel to issue directives to national contingents in order to overcome restrictive national laws and policies.

The UNFC has operational command and control over the entire Force and answerable to the Head of Mission (HOM) who is in charge of conductingthemission.The daily management of the operations below the HOM is the tactical level of command and control. [193] At this level command and control relate to the detailed "direction and control of movements" to carry out specific duties which is governed bytactical level commander who is representative for the TCS.[194]In practice NCCs often seeks advice and instructions from their TCS and may disobey the orders of the UNFC.[195]In addition to this occasionally the TCStry to interfere with the control system which is under the UN Commander; due to this UN lack effective command authority over the national contingents. In such a case it is difficult to talk about exclusive command and control or effective operational control of the UN over such PSO, even though it was formally led by the UN. In this case the national contingent may in fact act on behalf of the national state, which leads to the attribution of the PSO's conduct to the TCS again and again ;in turn this have its own effect on the willingness of states on future contribution of troops.[196]

It is the state's National Commander who issues specific orders to military contingents. The UNSG for Peacekeeping Operations appears to act as a link between the UN and the implementing state and communicates the decision of the UNSC to the National Commander and the national contingents only implement the decision once it has been communicated to them by their National Commander.The result is that the UN cannot issue orders in relation to specific tasks or watch over specific actions and so it can not exercise 'factual controlover the specific conduct'.[197]The presumption in DARIO, that IOs exerciseeffective factual control over PKFs, cannot be seenin the practice of IOs and PKO.

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[192] Ibid.
[193]Greenlees(2015), Supra, n, 185, p.14.; See also Antall, O 'The Responsibility of the United Nations for the Wrongful Conduct of its Peacekeepers' (April 2015), p.14.
[194] Ibid.
[195] Murphy, R *UN peacekeeping in Lebanon, Somalia and Kosovo: operational and legal issues in practice* (Cambridge University Press, 2007), PP.124-125.
[196]Zwanenburg (2005), Supra, n, 151, p. 128.
[197]DARIO Commentary (2011), Supra,n,164, para. 4.

3.4.1.1.2 Can the UN have Effective Control over Military Personnel in Fact?

As it is mentioned somewhere above; there is differences between the UN and TCS's degree ofpotential control over PSOs, the DARIOcommentary,stated that

> *"While it is understandable that, for the sake of efficiency of military operations, the UN insists on claiming exclusive command and control over peacekeeping forces, but attribution of conduct should also be based on a factual criterion."*[198]

Due to this to know whether the UN exercising effective control, we should relay on analyzing factual situation on the ground and in addition we need to be sure that whether national contingents are acting according to the order given by UNFC's by obeying the order. Here what is important is having effective control over particular conduct of individual members of the forces. Even if the UN normally claims to have operational control over national contingents, it does not have full command andcontrol over contingents, which rests in the hands of TCS.[199] The UNFC has no power of prosecution and taking disciplinary measure which is the most effective means to enforce his orders. This makes his operational control over the operation meaning less.

This situation may contribute to inability of the UN to exercise effective control over the troops and ensure that the law is respected by them because of the UN's lack of direct control over discipline and execution of orders by members of national contingent.[200]In this regard Leck notes that:

> *"effective control only has 'teeth' and is realistic when the entity exercising effective control has the real authority and means to exercise it" and "the UN has no real authority or means to control peacekeepers, absent the TCC's concurrence."* [201]

Dannenbaum, 'whoargues thateffectivecontrolis held bythe entity that is in a best position to and within the law to prevent the abuse in question.'[202] It is crucial that TCS retain disciplinary powers and criminal jurisdiction over their national contingents and these powers serve as the

[198]Ibid, to Article 7, para. 9.
[199]Perova,N 'The United Nations, member states and individuals sharing international responsibility for serious violations of international law committed during peace support operations'(2014) PHD thesis on file atUniversity of Birmingham,p.77.
[200]Leck (2009), Supra, n, 83, p. 363.
[201]Ibid.
[202]Dannenbaum (2010), Supra,n , 16 ,p.158.

meansto prevent wrongful acts.[203] All these powers are in the hands of states national contingent commanders but not of the UNFC, he can only able to report about misconduct to the UN Headquarters and take only administrative measures; like sending back them to home, but TCCs acting through the national contingent commanders are responsible for the executions of the UNFC's orders, for administration of national contingents, discipline of troops and exercise of criminal jurisdiction over the acts committed by members of national contingents.[204] Here it is possible to conclude that effective control over particular operation and effective control over particular conduct are two different concepts. [205]

Dannenbaum writes that 'effective control is held by the entitythat is best positioned to act effectively and within the law to prevent the abuse inquestion.'[206]His interpretation aims at 'ensuring that the actorheld responsible is theactor most capable of preventing the human rights abuse.'[207]If one accepts this position, conduct of peace keeping forces almost by definition can be attributed to the state since there was always the possibility for the state to exercise control in a way that prevents the impugned conduct from occurring.[208]In turnthis has negativeeffect onfuture troop contribution of states.For example in Nuhanovic case[209]the Netherlands court of appealconsidered the Dutch state was in a position to prevent the wrongful acts of Dutchbat in evicting MrNuhanovic's family at a time by which it was reasonably evident that the family would be killed.[210]The Court also highlighted that the Dutch state heldpower to discipline Dutchbat and could have done so to prevent the acts complained of.[211]We can understand from this decision that effective control includes consideration ofthecapacitytoprevent the wrongful act.

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[203] Anna, SH "A strategy to address sexual exploitation and abuse by United Nations peacekeeping personnel" 39 *Cornell International Law Journal* (2006),p.103.

[204] Perova (2014),Supra,n,198,p.79.;See also Murphy (2007),Supra,n,194, p. 118.

[205] The UN's claim that it exercises effective command and control over particular operation may be perfectly true and relevant, but it does not mean that it will exercise effective control over particular conduct and that conduct is attributed to it by the reason of effective operational control.

[206] Dannenbaum (2010), Supra, n,16 ,p.158.

[207] Ibid.

[208] Nollkaemper, A 'Dual attribution: liability of the Netherlands for conduct of Dutch bat in Srebrenica' ACIL Research Paper No 2011-11 (SHARES Series September 2011) Amsterdam Center for International Law University of Amsterdam, pp.5-7.

[209]*Nuhanović vs. The State of the Netherlands* Case No: 265615/HA ZA 06-1671, District Court of The Hague, 10 Sept 2008 (*Nuhanović I)*; *Nuhanovićvs The State of the Netherlands* Case No: 265618/ HA ZA 06-1672, Appeals Court of The Hague, 5 July 2011 (*Nuhanović II)*; *Nuhanovićvs The State of the Netherlands* Case No: 12/03324, Supreme Court of the Netherlands, 6 September 2013; (*Nuhanović III)*

[210]Ibid, 6.7

[211]Ibid, 5.18.

3.4.1.1.3Difficulties withEffective Control Test in Practice

Since DARIO do not clarify how effective control could beexercised in practice; one of the real difficulties hereis what exactly constitutes 'effective control' in the context of UNPKO. On review of the jurisprudence and legal literature on attribution of responsibility to IOs there is considerable uncertainty as to the degree of control required for it tobe 'effective.'[212]In order to determine whether acts or omissions of troops should be attributed to the UN or TCC it is essential first to ascertain, based on the factual circumstances of each instance, at what level 'effective control' is exercised. [213]TCS have repeatedly reaffirmed that exclusive disciplinary and criminal jurisdiction over militarypersonnel remains with the TCS. TCS also have control over the selection, training and promotion of military contingents. Therefore, the prevention and punishment of individual members of contingents arguably falls within the 'effective control' of TCS. This is recognized by the ILC in its Commentary on Article 7 DARIO wherein it stated that:

> *''in the context of UN peacekeeping operations the 'lent organ or agent still acts to a certain extent as an organ of the lending State … since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.''*[214]

TheCommentaryfurther explainedthat it may be 'possibletodistinguishintheir regardareas of effective control' pertaining to the UN and TCC based on 'factual criterion'. The memorandum of understanding (MOU) places burden on States to investigate and hold to account their military personnel involved in serious misconduct and to ensure contingent Commanders havethe necessary authority to discipline troops.[215]

To interpret effective control test as requiring such a high threshold of control would significantly complicate attribution of an act to the organization, as in many cases it would be extremely difficult to prove the existence of such an 'effective control'. This could lead to the unreasonable result that in many cases the sending state could risk to bear responsibility for acts taken by its national contingent in the performance of functions ofthe organization. Once it is determinedthat the conductofanational contingent cannot be attributed tothe organization for

[212]Larsen (2008), Supra, n, 152, p. 513.
[213]Greenlees (2015), Supra, n, 185, p.31; See also Larsen (2008), Supra, n, 152, pp. 515-516.
[214]Commentary on Article 7 DARIO.
[215] Perova (2014), Supra, n,198,p.81.

the lack of effective control, attribution to the sending state would be justified by the status of the contingent as organ of that state.

3.4.1.2 The Overall Control Test

The ICTY in the case of Prosecutor v. Tadic applied a test of 'overall control' to impute responsibility to a State for activities of organized armed groups.[216]

The Appeals Chamber found the effective control test, as applied in the Nicaragua case, is against the system of international responsibility andbysettingthe threshold too high it would enable UN to act through private individuals.[217]In the overall control test it is sufficient to exercise "overall control over the group, not only by equippingandfinancingthe group, but also by coordinating or helping in the general planning of its military activity". Whereas the effective control test would be more appropriatein relationto the acts of private individuals[218]the overall control test was more suitable for the acts of armed groups.[219]

The 'overall control'testdevised in Tadic cannot readily be applied by analogy to acts of peace keepers by members of UN militarycontingents. Firstly, Tadicinvolved irregulararmed forces, notmilitarycontingents intheemploy of a Statewhile acting as agents of UN. Secondly, the test was devisedinorder toascertain the nature of the conflict as opposed to determiningState responsibility.[220] Furthermore, it is apparent that the ICTY had States in view and the rationale applied does not readily transfer to the realities of UN peacekeeping operations. Some of the ICTY's described elements of 'overall control' simply do not fall to either the UN or the TCC exclusively.Leck argues that the test would setthe thresholdtoo low and the UN would automaticallybecome responsible thus creating unjust results.[221]

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[216]*Prosecutor v. Tadic*, Appeals Judgment, ICTY (Case No T-94-1-A) 15 July 1999, para. 137 ('Tadic ').The ICTY in the case of Prosecutor v. Tadic applied a test of 'overall control' to impute responsibility to a State for activities of organized armed groups. It described the required level of control as: when a State has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training, that group. Acts performed by the group or member thereof may be regarded as acts of the de facto State organs regardless of any specific instruction by the controlling State.

[217]Tadic , paras.116-117.

[218] Ibid, paras.118-119, 141.

[219] Ibid, paras.131, 137.

[220]Cassese, A 'The *Nicaragua and Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia'18, Issue 4 *European Journal of International Law*(September 2007), P.656.

[221]Leck (2010), Supra,n,83, p.17.

3.4.1.3 The Ultimate Authority and Control Test

ECtHR did not apply effective control test as provided under DARIO. Instead it relied on the "ultimate authority and control" test.[222]The ECtHR concluded in the Behrami and Saramati cases that the conduct by UN Mission in Kosovo (UNMIK) and NATO Kosovo Force (KFOR)[223] is attributable to the UN by using the 'ultimate authority and control' test.[224] The two cases were joined before the ECtHR, and the Court came to the conclusion that it was within the mandate of KFOR to issue detention orders and the supervision of demining was in UNMIK's mandate.[225] ECtHR found it sufficient to refer to the status of UNMIK as 'a subsidiary organofthe UN created under Chapter VII ofthe Charter' to justify itsfindingthatthe acts of UNMIK were attributable exclusively to the UN.[226]In regards to KFOR the Court saw the question as being "whether the UNSC retainedultimate authority and control so that operational command only was delegated."[227]SC Resolution 1244 (1999) authorized the creation of an international military presence (KFOR) led by NATO, an international civil presence (the United Nations Interim Administration Mission in Kosovo (UNMIK), and laid down a framework for the administration of Kosovo.[228] Accordingly the court by interpreting the resolution found that the UNSC delegated to NATO the power of operational control on KFOR, but by retaining ultimate authority and control over it.[229]As for UNMIK, the Court found that it was a "subsidiary organ of the UN, institutionally and directly answerable to the UNSC" and therefore its "inaction was, in principle, 'attributable' to the UN in the same sense.[230]

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[222]Larsen(2008) ,Supra,n,152 ,p. 509-531, see also Bell, C 'The international law commission and the Behrami and Saramati decision' 42 *International Law and politics* (2010),p.502. See also, DARIO commentaries, p.23.

[223]In the Behrami case, it was argued that the French KFOR troops had failed to demine or mark the areas where they knew cluster bombs were. This caused the death of Gadaf Behrami and the injuries of Behrami, and the application was founded on article 2 ECHR. In the Saramati case, Saramati was arrested and the KFOR Commanders extended his detention period. Since the commanders who extended his detention period were Norwegian and French, the case was brought against Norway and France.

[224]App. No. 71412/01 Agim Behrami and Bekir Behrami v. France, Grand Chamber decision of 2 May 2007. App. No. 78166/01 Ruzhdi Saramati v. France, Germany and Norway, Grand Chamber decision of 2 May 2007, paras.8-17

[225] Ibid, para.127

[226] Ibid, para.130

[227]Sturma,P 'Drawing a line between the responsibility of an international organization and its member states under international law '2 CYIL (2011),P.12.

[228] UN Security Council, *Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo]*, 10 June 1999, S/RES/1244 (1999), available at: *http://www.refworld.org/docid/3b00f27216.html*[accessed 21 April 2018]

[229]*Behrami v France*, Application No. 71412/01; *Saramati v France, Germany and Norway*, Application no. 78166/01, 2 May 2007para. 135.

[230]Ibid, paras. 142-143.

The ultimate authority and control test has been criticized[231]for simply attributing conduct and responsibility to the UN as long as it was the UN who had given the mandate.[232] As a test for attribution of conduct, the test is very wide.[233] Furthermore, the ILC and several scholars rejectedthe ultimate authority and control test,[234] as did the SG when he stated: "It is understood that the international responsibility of the UN will be limited to the extent of its effective operational control."[235]If giving the mandate would be sufficient for conduct to be attributed to the UN, the UN would be held responsible simply because they authorized the operation. The threshold for attribution of conductwould be too low, thereby relieving states frombecomingresponsible. Furthermore,the states mightlosethe incentive to make sure their troops act in conformity with international law since they would not be held responsible.[236] If the ultimate authority and control test is the appropriate test, "it would produce grossly unjust results" and victims would often "be without remedy for the harm done to them."[237] The exchange of the "effective control" test with the "ultimate authority and control" test would expand UN responsibility to a wide range of conduct which even slightly associated with its organs and spread impunity for the conduct of states under the cover of the UN immunities.[238]

3.4.2 The Proposed Interpretation of Effective Control Test.

Effective control test should be interpreted to include or depend both on normative and factual control to beappropriate standard for imputability. So the concept of 'effective control' can be interpreted as inclusive of 'normative control'. As to the normative control the ability to prevent

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[231]Gaja, G 'Seventh Report on Responsibility of International Organization's (27 March 2009) UN Doc A/CN.4/610 (Gaja Seventh Report) para 30. criticized by the UN ILC Special Rapporteur (SR),The SR rejects the ECtHR's reasoning by stating that it would lead to attribution to the UN of 'conduct which the organization has not specifically authorized and of which it may have little knowledge or no knowledge at all'. This implies that the UN usually authorizes specific conduct and has knowledge of how decisions are implemented.

[232] Leck (2009), Supra , n,83, pp.17-18.

[233] Larsen (2008), Supra,n ,152 , p.523.

[234] DARIO commentaries, p.23, para.10

[235]UN Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 12 June 2008, S/2008/354, available at: *http://www.refworld.org/docid/485674f22.html*[accessed 20 June 2018] , para.16

[236]Nicholas , M 'Attribution of Wrongful Conduct Via 'Effective Control as Intended in the International Law Commission's Draft Articles on the Responsibility of International Organizations' Express (2012), P.28.at: *http://works.bepress.com/nicholas_mull/1*

[237]Ibid, p.27.

[238]Keir, S 'Responsibility for troops abroad: UN mandated forces and issues of human rights accountability'3 *EuropeanHuman Rights Law Review* (2008), PP.328-329. In this regard Starmer points out that the case might undermine the accountability of troops operating abroad under international human rights law and that "such political accountability as there may be for the [UN] through the [UNSC] is no substitute for legal accountability under international human rights law."

an act or the existence of effective control should be connected with the normative control or legal power. The proposed interpretation of effective control test to add a normative control,which is intended toincludespecial rule on attribution of conduct in cases of implementingbinding acts of the UN. Under the proposed rule, a conduct of an organ of a member state taken in order to implement a binding act of an international organization would be attributed to that international organization. Such an assertion is justified as far as member states implementing these acts have no discretion as to their enforcement.

Without such an interpretation, article 7 DARIO serves a very limited function and also goes against the 'general application' nature of DARIO, which applies to a great variety of IOs.State organs do not take specific instructions from the UN but implement the UNSC Resolutions in accordance with the instructions of the state legislature. Hence, the situation in which a member state has no discretion as to the implementation of a decision, in either case the state organs act pursuant to a decision of the UN, only once the decision has been communicated to them by a representative of their national state and they are bound to implement the decisions of the IO, due to the 'normative' power of the IO. Where the exercise of such a power obliges member state to strictly implement the IO's will, leaving no room for manipulation the IO can be said to be exercising effective normative control over the state organ.The ICJ in Nicaragua, as discussed above, held that there can be effective control if an entity is shown to have 'directed' another entity to carry out a certain act; whilst the commentary to article 15 DARIO states:-

> *''The adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the Commission of an internationally wrongful act.''*[239]

Byincluding the concept of normative control we allow DARIO to reflect the exact practice of IOs and give the Courts discretion in attributing conduct and help to achieve more logical reasoning and decisions. On the issue of Sabarmati's detention, the court concluded thatthe detention was attributable to the UN, given that the SC, in delegating its security powers, exercised the 'ultimate authority and control' over the conduct of KFOR. The ICJ pointed out that since the SC resolution obliging member states to act and could have attributed to the UN with the failure to ensure safeguards in Saramati and the failure to ensure marking and demining in Behrami by issuing the necessary orders. These failures would be attributable to the

[239]DARIO Commentary (2011), Supra, n, 164, to Art. 15, para. 4.

UN because the military forces were acting as a result of the UN's exercise of effective normative control.

The main conclusions drawn from this study are that there is confusion in relation to the grounds on which conduct can be attributed to an IO and that DARIO is not currently interpreted in a manner reflective of practice. This often results in conduct being attributed to the wrong entity, or else to only one entity where in fact there should be concurrent attribution. This thesis suggestswider interpretation of DARIO, in a manner reflective of practice.

3.4.2.1 Dual Responsibility

Dual responsibility is the circumstances, in which the same conduct may give rise to the responsibility of both subjects (state and UN).Though the possibility of dual attribution has indeed been acknowledged in legal scholarship[240]and also the ILC recognized the possibility of dual attribution,[241]the proper basis for such dual attribution is not well established. Indeed, the definition of effective control given by the ILC makes it unclear whether there can be dual attribution if one of the actors involved exercises effective control. The ILC emphasized 'the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'[242]and the question is whether and in what cases such factual control over specific conduct can be exercised simultaneously by two actors.The Draft Articles and their Commentaries[243]allow for the possibility of multiple attribution of conduct and the assignment of plural responsibility to several involved entities. They also contain aclear recognition that states may act jointly, and states with international organization which cause multiple attribution.[244]It may also happen when a conduct attributable to a State is nevertheless 'acknowledged and adopted by an international organization as its own' within the meaning of Article 9 DARIO.

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[240]Tsagourias, N '*The Responsibility of International Organisations for Military Missions*' in M. Odello, and R. Piotrowisz (eds.), *International Military Missions and International Law* (Brill, forthcoming), whom discusses the criterion of effective control as aprerequisite for attribution of wrongful conduct and recognizes the possibility of multiple attribution ofconduct to both international organizations and troop-contributing states in case of application of thiscriterion; See also Sari, A 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' 8 *Human Rights Law Review* (2008),PP. 151-170.; Dannenbaum(2010), supra ,n, 10.

[241]DARIO (2011), Supra,n 137, Art. 19 and 63. ; see also DARIO commentary (2011), Supra, n, 164, p.56.

[242] Ibid, p.63.

[243]DARIO Commentary to Chapter II, para. 4 Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an [IO] does not imply that the same conduct cannot be attributed to a State, nor vice versa does attribution of conduct to a State rule out attribution of the same conduct to an IO.

[244]Messineo (2012),Supra,n,147,p.53.

CHAPTER FOUR

THE POSSIBILITY OF FILING A CLAIM AGAINST THE UN BY VICTIM OF HUMAN RIGHTS VIOLATION AND MECHANISMS TO REDRESS VICTIMS OF HUMAN RIGHTS VIOLATION

Introduction

For the UN to realize its purposes under the Charter its enjoyment of immunity from domestic jurisdiction is imperative since immunity guarantees the proper functioning of the UN and empowers the organization to accomplish its functions without interferences.[245]This means there are limitations on the possibility of bringing a case against the UN before a third party dispute settlement system. However, if the UN itself causing human rights violations the endowment of immunity may clash with individuals' right to a remedy.It further thwarts individuals from successfully filing a claim before a domestic or international court.[246] Here when the UN fails to provide procedure which enable individuals to bring claim against the UN, the grant of immunity has increasingly been challenged in both domestic and international courts since it is incompatible with the right to access to court.[247]This chapter addresses the conflict between immunity and the right of access to courts and right to seek a remedy. Due to the disproportionateness between jurisdictional immunity enjoyed by UN and the right to access to justice causes a remedy gapat the expense of individual's right to remedy.Furthermore the chapter suggests a way out to resolve the existing gap, since the immunity should not shield the organization from responsibility, but the situation remains today that no independent court where private individuals can file claims against the UN has been set up which is contrary to the rule of law, and the right to access to court and remedy. This chapter also describes and clarifies the internal dispute resolution mechanisms within the UN today. The chapter after showing some human right abuse committed by UN peace keeping troops ; deal with challenges affecting institutional accountability of the UN, like the immunity enjoyed by the UN and it also highlights the proper limitations on immunity enjoyed by UNbased on human

[245]Boon, K 'The United Nations as Good Samaritan: Immunity and Responsibility' 16(2) *Chicago Journal of International Law* (2016), p. 343.
[246]Rydberg, A 'Immunity of the United Nations Versus Right to Access Justice: Addressing the Remedy Gap' (2017) LLB thesis on file at Orebro university, p.3.
[247] Provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) European Treaty Series No 5 (ECHR) art 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art .14.

right based challenges, especially by providing an assessment and analysis of judicial decisions and judgments by various courts. Then after the chapteranalyzes themechanismsfor holding the UN accountable in order to fill the remedy gap and intends to find various forums in which UN can be prosecuted.

4.1 Gross Human Rights Violations Committed by UN Peacekeeping Troops

Traditionally, IOs have been considered as guardians ofinternational law rather than as potential violator of human rights. However UN peacekeeping soldiers commit mayhems while deployed in the face of protecting civilians from mischief.[248] It may sound like ridiculousness, butthose whoare sent by the UN to keep the peace and protect local population from atrocities, commit crimes themselvesand deteriorate international law and human rights. For instance allegationsofsexual abuses were made against the UN peacekeepers takingpartin the UNOCI.[249]

Violations of the right to life, of the prohibition on torture and cruel, inhuman and degrading treatment orpunishment, and ofthe right to liberty and security have been reported on plentiful incidentsduringpeacekeepingoperations. Michael Kelly noted a significant incidence of such abuses inthesituationof operations in states disordered by a protracted andbrutal internal conflict where the system for the administration of justice has almost completely failed.[250]

Mainly when UN function military activity in states with view of bringing international peace and security, the personnel of UN has been violating human rights such as sexual violence, using excessive force resulting in the death of civilians & distraction of civilian property, abuse, torture, arbitrary detention of individual persons[251] in host state like Bosnia[252] Cambodia, East Timor, Somalia[253],Yugoslavia, Rwanda, Haiti[254] and Namibia.[255]

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[248]Rodriguez, M and Kinne, B 'Bad Apple or Rotten Tree? Institutional, Societal, and Military Determinants of Peacekeeping Abuses Department of Political Science' University of California Under review at International Studies Quarterly (June 2, 2017)

[249]Ferstman, C 'criminalizing sexual exploitation and abuse by peacekeepers' United States Institute of Peace (2013)*at*[*http://www.usip.org/sites/default/files/SR335Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf*](http://www.usip.org/sites/default/files/SR335Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf);> (last accessed December 23,2018)

[250]Kelly, M 'Transitional Justice in Peace Operations: Shaping the Twilight Zone in Somalia and East Timor'4 *Yearbook of International Humanitarian Law* (2001), p. 213.

[251]Lynch, C 'U.N. Faces More Accusations of Sexual Misconduct; Officials Acknowledge "Swamp" of Problems and Pledge Fixes New Allegations in Africa, Haiti' Wash. Post(2005), p.22 (describing a United Nations Official's response to sexual abuse allegations in Cambodia in 1990 as "boys will be boys"). Other abuses reported Include murder, torture, and pillage, all of which constitute violations of international humanitarian law.

[252] The Srebrenica Massacre during the Bosnian War of 1992-95 happened on the watch of Dutch UN peacekeepers.

[253] For instance, troops deployed to Somalia in the early 1990s were accused of sexual assault, rape, torture, deaths in custody and the defacing of local cultural objects.

In 1997 journalists publishedthe allegations ofa formerBelgian paratrooper that human rights abuses had been committed against Somali citizens by members of the Belgian armed forces who served in the multinational task force operating in Somalia in 1993.[256]For example in Somalia, UN forces held prisoners without charge and without informing their families, rejecting them access to a lawyer and right of appeal. But graver allegations were also made, including theextra-judicial execution of detainees,and the application of mortal force in cases of theft.[257]These accusations were escorted by photographs, one of which disclose two uniformed soldiers swinging a Somali boy over an open fire and the boy in this case had been threatened with being burnt alive which amount to torture.[258] Photographs also showed a soldier urinating on the inanimate body of a Somali man lying on the ground, with a foot pressed on the man's body, and of soldiers holding a Somali man by his hair.These incidents representcommission of a transnational crime of torture by the peacekeepers. There were other military contingents involved invariousatrocities committed against Somalis: beatings, looting, rapes, assaults, shooting down civilians, indiscriminate firing on crowds,etc.

The Dutch contingent of the UN peacekeeping force in Bosnia and Herzegovina, the UN Protection Force ("UNPROFOR"), has been accused of extremely and forcibly expelling Bosnian Muslim civilian refugees from the Dutch military base in Srebrenica, condemning them to immediate death at the hands of the Bosnian Serb forces in Europe's most recent genocide.[259]

Recently the report by the human rights division of the UN missionin South Sudan (UNMISS) and the UN Human Rights Office report published in May 2016 released the findings of an in-depth investigation into human rights violations and abuses committed in and around Yei town, Central EquatorialGuinea between July 2016 and January 2017.[260] The report exposes cases of indiscriminate bombardment of civilians; targeted killings; pillaging and burning of civilian property and cases of sexual violence perpetrated against women and girls, including those

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[254] MINUSTAH soldiers have conducted several smaller-scale raids as well as incidents of murder, unlawful detention, and rape. In addition to direct perpetration of human rights abuses against civilians, MINUSTAH forces have stood by as members of the HNP carried out mass killings of Haitian civilians.

[255] Dannenbaum (2010), Supra,n,16, p. 113.

[256] Maogoto (1999),Supra,n,113, P.10.

[257] Verdirame, G *The UN and Human Rights: Who Guards the Guardians*? (Cambridge university press New York, 2011), p.219.

[258] Ibid

[259] *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-A, (Apr. 19,2004) *available at* http://www.icj-cij.org/docket/files/91/13685.pdf

[260] UN report exposes human rights violations and abuses against civilians in and around Yei, South Sudan Geneva/Juba(May 2017); See also Human rights violations and abuses in yei July 2016 – January 2017 Human right office of high commissioner.

absconding fighting.In April 12, 2018 in Central African Republic the protesters accused UN troops of firing on civilians during operations in clashes between UN troops and armed groups and the corpsesof 17 civilians were laid out in front of the UN peacekeeping offices.[261]

Even if UN receives a report of a human rights violation and it has a duty under the UN's human rights policy framework to investigate, report, and follow up on those violations the UN failed to meet these obligations in a number of significant ways.[262]These failures are an indicative of a broader problemof fragmentation ofresponsibility within the organization. The human rightsabuseby foreigners, whose very deploymentis intended toheraldlong-awaited human rights protection, is uniquely intrusive and harsh.The feelings of disaffection, terror, and disloyalty among local populations reveal the devastating impact of human rights abuses on the UN peacekeeping mission andillustrate thechallengeof recoveringthe trustthatis essential to its work.[263]

4.2 The UN's Accountability and the Main Obstacles for Human Right Violation Perpetrated by Peace Keeping Personnel

As it was discussed in chapter three, the UN is bound by human rights obligations under its own constitutive document and CIL.Another element which makes the UN apart from another international organization is its role as the guardian of human right, international norms and order. This role not only confers the UN what is commonly referred to as a 'moral authority', but conveys with it a special responsibility to discharge duties in a way that is consistent with the actual values it pursues to promote its purpose. By failing to hold itself accountable for human right violation committed by its peace keeping personnel, the UN violates the very principles of accountability and respect for rule of law that it promotes worldwide. This is to mean that there are obstacles for ensuring the UN accountable for human right violation committed by its peace keeping personnel. The main barrier, limiting claims against the UN before national courts,is the privileges and immunities which the UN enjoys. Besides there is no independent forum in which victims can file claims against the UN. Due to this there is remedy gap and the paper try to suggest alternatives to fill up those remedy gaps.

[261]Kokopakpa, L Civilians killed in Central African Republic were 'manipulated' :U.N.(April,12,2018) available at *http://www.google.com/amp/s/mobile.reuters.com/article/amp/* idUSKBN1HHJ3FQX accessed on June 1, 2018.
[262] Cheir (2015), Supra, n, 156, p.5.
[263] Dannenbaum (2010) ,Supra,n,16, p.120.

4.2.1 The Theoretical Justification ofImmunitiesEnjoyedbyUN

The notion of UN immunity stalks from the concept of state immunity the law governing the immunity of foreign governments. State immunity is intrinsicallylinked to the development of the concept of state sovereignty and sovereignequalityof states.However, the legal basis and justificationfortheimmunityofUN differs significantlyfromthatof state immunity.[264] The main justification for the UN's absolute immunity is that : it would be objectionable for national courts to determine the legality of the UN's acts because (a) those courts would have very different interpretations from one another; and (b) allowing national courts to determine the legality of UN's acts might leave the UN open to predisposition orfrivolous actions within some countries or the possibility that courts of member states will interpret the legal effects of their acts in different ways which cause inconsistent judgment(c) to protect the UN from prejudiced domestic courts; (d) groundless actionsbrought with indecorous motives.[265] The UN may possibly be subjected to abusive lawsuits before national courts,[266] which could render the UN's budget shoddier; in turn this makes the UN not to play its role in maintaining its purpose.[267] In addition the immunity is also granted due to the fear of opening the door to disparate decisions of the courts of different UN Member States with regard to the UN, and to the leeway of uncertainty and tensions arising between international actors. In thecontext of peacekeeping missions, immunity from local courts guarantees the independence of the mission, which would otherwise risk judicial interference.[268]

4.2.2SourceandScopeofUN Immunity

There are three types of treaties which can be raised as a source of the privileges and immunities of the UN. First the UNCharter deliversrudimentary provisions necessitatingStates to bestow the

[264]Choudhury, F 'The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability' *104 The Georgetown Law Journal (2016)*,p.731.; See also Freedman, R 'UN Immunity or Impunity? A Human Rights Based Challenge' 25, Issue 1 *European Journal of International Law*, (1 February 2014), P. 242. https://doi.org/10.1093/ejil/cht082.
[265] Rydberg, A (2017),Supra, n, 245, p.8.
[266] Rashkow, B 'Immunity of the United Nations Practice and Challenges' *10 International Organisation Law Review (2014)*, PP.332-335.
[267] Boon (2016), Supra, n, 244, p. 351.
[268] Megret, F '*The Vicarious Responsibility of the United Nations for "Unintended Consequences of Peace Operations"*' in Cooning, A and Thakur, R (eds), The *'Unintended' Consequences of Peace Operations* (Tokyo: United Nations University Press, 2007).

UN with immunities.[269]The other source is general multilateral agreements dealing with the privileges and immunities of the UN, namely, CPIUN[270] and the 1947 Convention on the Privileges and immunities of the Specialized Agencies, but this convention is not discussed here.[271]Lastly there are bilateral agreements between the UN and individual host States. These are typically referred to as SOFAs.

According to article 105 of the UN Charter the organization shall enjoy in the territory of each of its memberssuchprivileges and immunities as are necessary for the fulfillment of its purposes.[272]Thus it is clear from this article that 'functional necessity' is the basis of the Organization's immunities, so the immunity was envisioned to be functional rather than absolute.[273]The underlying rationale is that the UN will not be able to fulfill its duties unless the impartiality of the organization and the proper functioning is ensured and to guarantee the UN from unilateral control of host states.

The Charter is further complemented by the CPIUN provisions, the so called General convention. However there is a peculiarity between the immunity provided for in the CPIUN and the UN Charter; whereas Article 105 of the Charter provides the UN with a functional immunity such that the act concerned must be consistent with the fulfillment of the organization's purposes, but the Convention enlarges the immunities of the UN, by alienating the doctrine of functional immunity in favor ofunconditional and absolute immunity.[274] The *Stichting Mothers* case is an example which clearly displays the very broad immunity of the UN. In that case, the applicants argued that their claim was based on a prohibition of genocide, which is a rule of *jus cogens* and should remove the grant of immunity to the UN. Nevertheless, the ECtHR held that international law does not supportthe positionthat a civil claim, even being basedon a violation of a norm of *jus cogens*, overrides the rules on immunity.[275]

The convention on privilege and immunity of the UN enshrined the immunity regime of the UN,

[269] The United Nations Charter (1945), Supra, n, 2, Art.105.
[270] General Convention (1946),Supra,n,22.
[271]UNGA, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, United Nations Treaty Series, Vo. 33, 261-291. Available at: *http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.htm*
[272]TheUnitedNationsCharter(1945),Supra,n,2, Art .105(1) and (2).
[273] Paust, J 'The UN Is Bound By Human Rights; Understanding the Full Reach of Human Rights, Remedies, and Non immunity' 51 *Harvard International Law Journal* (2010), p. 1.
[274]Chang, K 'When Do-Gooders Do Harm: Accountability of the United Nations toward Third Parties in Peace Operations' *20 Journal of International Peacekeeping* (2016), p.7.
[275]*Stichting Mothers of Sebrebrenica and Others v The Netherlands*, ECtHR, App no 65542/12 (dec) (11 June 2013), Para 158.

Concerning UN jurisdictional immunitiesthe CPIUN Convention provides:

> *''The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity.''*[276]

The words "from every form of legal process" have been interpreted literally as endowing the organization with an absolute immunity from every form of legal process before national authorities, whether judicial, administrative functions according to national law.[277] Concerning this issue Reinisch also maintains that 'national courts regularly interpret 'immunity from every legal process' pursuant to article II, section 2 of the General Convention to constitute absolute immunity.'[278] When we read article 2 of the CIPUN together with Article 105(1) of the Charter seems that the jurisdictional immunity required by the organization to fulfill its purposes is unlimited.[279]Alternative readingwould be that the immunity from every form of legal process in section 2 is limited by the notion of functionalnecessity in Article 105(1) of the Charter. Thus whilst Section 2 might be operative in relation to any form of legal process, it does not extend the scope of the immunity *ratione materiae* beyond what is functionally necessary according to Article 105(1) of the Charter.

The legal framework under which a UN peacekeeping mission operates in a host state is governed by a Status of Forces Agreement (SOFA)[280] concluded between the UN and the host government.[281] The SOFA sets out the rights, responsibilities and procedures for both signatories with respect to the deployment, presence and safety of the mission personnel in fulfilling the mandate authorized by the UNSC. The UN Model SOFA which forms the basis of SOFA for all UN peacekeeping operations, gives effect to the immunity provided for in the CPIUN.[282] SOFAs elaborate the CPIUN immunity provisions in great detail, enumerating their application

[276]General Convention(1946),Supra,n,22, section 2, Art.II.
[277]Choudhury (2016), Supra, n, 265, P.732.
[278] Reinisch (2000), Supra, n,275, p.162.
[279]Bode, T 'Cholera in Haiti: United Nations immunity and Accountability' *47 Georgetown Journal of International Law* (2016), pp.768-769.
[280] SOFA is a bilateral agreement, which is negotiated between the United Nations and the mission host state. It governs the conditions of the presence of the United Nations in the host state and its activities there, dealing with issues such as freedom of movement, jurisdiction, and dispute resolution.
[281]The SOFA sets out the rights, responsibilities and procedures for both signatories with respect to the deployment, presence and safety of the mission personnel in fulfilling the mandate authorized by the Security Council.
[282]United Nations, Model Status-of-Forces Agreement for Peacekeeping Operations. Doc. A/45/594, 9 October 1990. available at*http://www.ilsa.org/jessup/jessup09/basicmats/UNsofa.pdf*Accessed on 4 March 2018.

to specific mission personnel. They also enumerate the coverage of immunity with respect to actions of UN personnel, and relating to the UN's property and assets.[283]

4.2. 3 Limitation to the UN's Absolute Immunity arisingfrom its Human Rights Obligations

The point madein this partof thepaper is that the absolute immunity defense raised by the UN does not survive different factors which can limit the UN's absolute immunities and reconnoiters whether, and on what grounds, victims can pursue a legitimate human rights claim that might challenge the UN's immunity.[284]Even if UN's immunity is extremely broad, there is no upright justification for absolute UN immunity in our contemporary world. Here From a fair-mindednessview, it is no less terrifying when injury or loss of life is caused by UN which seems god parent shielding civilians and avoid its responsibility by using immunity as a defense. Under the Charter of the UN Articles 1(3), 55, and 56 which can be raised as source of the human rights obligations can be used as a means to control the UN's immunity, since any actions that violated human rights would contradictory to the UN's purposes and surely would not be 'necessary' for the achievement of the purpose.Absolute UN immunity stands in contrast to the UN's agenda to promote the rule of law and human right protection. Besides, it is revealing a momentous asymmetry between UN Responsibility and its immunity, this is due to the fact that, while the UN regularly affects individuals during the PKO and rejects its responsibility via immunity, this immunity have shielded it from any outside review at the expense of individual right to redress and access to court. Since individual's rights to access to court and remedy is enshrined not only under human right treaties but also has achieved the status of CIL, the grantof absolute immunity to the UN is against this stipulation.

According to a human rights-based approach defense against wide immunity, UN immunity ought not to be upheld where it precludes any individual realizing his or her right to access a court and a remedy.[285] So courts failure to receive claim by upholding UN immunity is both unlawful and immoral and is part of developinginclination of the UN abdicating its legal and moral responsibilities.[286]Here the author argues that immunity cannot be so broad as to constitute

[283]Ibid, pharas, 3, 4, 15,24-28,46,57.
[284]Boon (2016), Supra, n,244, p. 346.
[285] Freedman, R andLemay,N 'Towards an alternative interpretation of U.N. immunity: a human rights-based approa ch to the Haiti cholera Case' 19 *Questions of International Law* (2015),p.4.
[286] Zwanenburg (2005), Supra,n,151, p.288.

impunity, since the right to an effective remedy is an essential component of IHRL.[287] Here the paper in the following parts try to access the knack of the UN to rely on absolute immunity where in so doing an individual's fundamental rights are violated.

4.2.3.1 Limiting UNImmunity when it hasViolated itsTreaty Obligations

The latitude and boundaries of immunity has been the topic of unending debate both in scholarship and in jurisprudential practice.The very purpose of granting immunity to the UN; such as independence and efficiency of the UN, now a day's tarnished by the introduction of absolute immunity defense where treaty obligations have been unequivocally violated.The UN is obliged to provide alternative dispute settlement mechanism, under CIPUN and SOFA provisions, where victims can bring claim against the organisation. Unfortunately the UN fails to doso.[288] For example the UN'sregime of absoluteimmunity is deceptive due to its refusal to establish an alternative mechanism for adjudicating victims' claims; here the UN deprived victim's adequateaccountability mechanisms.[289] Absolute immunity turns afoul of the UN's stated missions, and the negative implications of such immunity will thwart the UN's legitimacy. The UN has a moral obligation to fulfill its treaty obligations, like its obligation under article VIII Section 29 of CIPUN and article 51 of SOFA which require establishment of standing claim commission and accepts responsibility where it has failed to do so. Since accountability is required to further the UN's stated missions neglecting treaty obligations to provide an adequate dispute resolution mechanism is directly contrary to the UN's purpose of promoting respects for human rights and limits its stated missions. In conclusion absolute immunity for the UN undermines the basic right to life and liberty recognized by the institution and runs afoul of the UN's self-proclaimed commitments.

[287]The fundamental right to a remedy exists for victims of gross violations of international human rights law and serious violations of international humanitarian law. Recognition of this right is guided by the U.N. Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments, and the Vienna Declaration and Programme of Action.

[288]Choudhury (2016), Supra, n, 265, P.735.

[289]Rawski, F 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' 18 *Conning Journal of International Law* (2002), pp.103-104. This rationale does not support such a far-reaching impediment to legal protection when the enforcement of human rights violations is at issue.

4.2.3.2 Limiting UN Immunity Based on victimsRight to Access to Court and Remedy

GrantingUN immunity pursued a legitimate aim, sincethe attributionof privilegesand immunities to IO's is an essentialmeans of securing their proper functioning.[290] The wide immunity, however, conflict with an individual's right to access to court and the law's ordinary principles of assigningresponsibility for causing harm.

As it is clearly stipulated under article 14, 1 of the ICCPR and 6(1) of the ECHRindividuals have a right to access to court, due to this one of the lacunas in the grant of immunity is the fact that it may conflict with the right to access to court.National courtshave long understood the UN to have absolute immunity from their jurisdiction, based up on CIPUN provisions.[291]Even if; article VIII, section 29 of CIPUN has been characterized as an acknowledgment of the right to access to court as contained in human rights instruments the UN fails to up hold its obligation under this provision.[292]This inherent conflict between rights to access to court and attribution of absolute immunity to the UN has evolved into a very public rift in recentcases brought against the UN, [293]where the independentfunctioning of the UN is supposed by some to have trumped the dignity of affected individuals.

In addition to access to court UN also enjoy immunity at the expense of victim's right to remedy.Since the right to an effective remedy is apparently embodied under human right instruments, it undeniably means that the UN itself is obliged to provide an effectiveremedy for victims of humanrights violations, since the UN is bound by human right under CIL.[294] Where there is a right, there is a remedysince having a right without a remedy is like having no right at all. This meanswhen human rights are violated, a corollary right to remedy is usually triggered , because respectand protection of human rights can be guaranteed only by the availability of effective remedies.Under customary international human rights law, the right to effective remedy

[290]*Beer and Regan v. Germany*, Judgment, ECtHR, Appl. No. 28934/95, (18 February 1999), para. 59; *Waite and Kennedy v. Germany*, Judgment, ECtHR, Appl. No. 26083/94, (18 February 1999), para. 68.
[291] Freedman (2014), Supra, n,129, p.239.
[292]Reinisch, A 'Convention on Privileges and Immunities of the United Nations, Convention on Privileges and Immunities of the Specialized Agencies' *United Nations Audiovisual Library of International Law* (2009),P.2.available at, *http://untreaty.un.org/cod/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf* .
[293]*Stichting Mothers of Srebrenica v. Netherlands* (Admissibility), App. No. 65542/12, 57 Eur. Ct. H.R. 114 (2013), available at *http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-12225*. And the Kosovo Lead Poisoning case where Kosovo: Poisoned by Lead A Health and Human Rights Crisis in Mitrovica's Roma Camps Human Rights Watch 350 Fifth Avenue, 34th floor New York, NY 10118-3299 USA
[294]Rydberg (2017), Supra, n, 245,p.18.

may include the multipleguaranteesof theprocedural right to access to a remedyandthe substantive right to a real remedy.In the light of the existing legal situation, the grant of absolute immunity to the UN bars the right to a remedy.

Individual claimants before domestic court advancedthatgranting immunityto the organization violated the right to effective remedy before a court as guaranteedbyrelevant international orregional human rights provisions. For example in caseof *Waite and Kennedy*, and *Beer and Regan*, the ECtHR, applying Article 6 of ECHR ; explained that such courts can limit the right to access to court if and only if reasonable alternative means allow for the protection of the claimants' rights.[295] This implies that domestic courts are expected to evaluate whether alternative means of dispute settlement mechanism provided by UN to the victim allow for the protection of claimants right. Based on a 'reasonable alternative means' test which means, 'reviewing the balance between the right to an effective remedy provided by the UN and the immunity enjoyed by UN', states can deny or up hold immunity of UN.[296] This is based on explicit duty imposed under Article VIII; Section 29 of CIPUN on UN constitutesan acknowledgement of victim's right to access a process by which they can seek remedy. By doing this we can reconcile individual rights and the rights of the organization.

The conception of remedy include not only remedies of formal meansbut also other means of redress which might be appropriate to the relevant circumstances of a particular case, like other means of redress such as changes of policy or practice by the Organization.[297]
In general the UN had obligations to provide compensation under treaty law, CIL and the DARIO provisions. So the UN is expected at list to give full reparation like compensation, restitution and satisfaction. Satisfaction may consist of an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.[298] However, the UN

[295]*Beer and Regan v. Germany*, Judgment, ECtHR, Appl. No. 28934/95, (18 February 1999), para. 59. ;*Waite and Kennedy v. Germany*, Judgment, ECtHR, Appl. No. 26083/94, (18 February 1999), para. 68.
[296]Ibid.
[297]Committee on Accountability of International Organizations' 'Final Report' in the International Law Association Report of the Seventy-First Conference (International Law Association, Berlin 2004),PP. 205-06.
[298]DARIO (2011),Supra, n, 137, Art. 31 and Art .43.

maintains refusal to acknowledge legal responsibility, or issue a formal apology, for the Haiti Cholera outbreak.[299]

4.2.3.3Limiting Immunity based on the Lack of Functional Necessity

The immunity of IO's should be limited within the scope of their functional boundaries in the sense that the immunity only applies if necessary for the fulfillment of the purposes of the organization.[300]Adopting the opposite view would privilege the protection of the UN over all other considerations.

Despite the broad wording of the CIPUN, Article 105 of the UN Charter limits the immunities of the UN before national courts to the extent it is functionally necessary. At this point there is a tension between Article 105 of the Charter, which provide 'functional immunity' and the Convention which provides the UN with 'absolute immunity.' When we consider the relationship between the CIPUN and the UN charter, as it is provided under article 103 of the Charter member states obligation under the Charter prevail over its obligations under other treaty like CIPUN. This means that states have to up hold the functional immunity under the charter rather than absolute immunity of the general convention.The UN could only possess a strict-functional immunity, on the basis that the Convention cannot extend further than the superior ranked UN Charter.

The functionally[301] limited immunity provided in the Charter has historically been regarded as embodying immunity, insofar as 'international organizations can only act within the scope of their functional act and there is no room left for non-functional acts to be protected by immunity.'[302]Since the immunity of the UN is based on the functional-necessity doctrine and the functions and purposes of the organization are inter alia to maintain international peace and security and to promote and encourage respect for human rights rather than subjecting individuals to breaches of human rights.[303] Individuals are the ones who should benefit from

[299]Alston, P *UNGA Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc A/71/367 (26 August 2016), paras 74-75.
[300]Gaillard, E and Lenuzza, I 'International Organizations and Immunity from Jurisdiction: to Restrict or to Bypass', 51 issue 1*International & Comparative Law Quarterly* (2002), pp.2-5.
[301]Singer, M 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns'*36 Vanderlin Journal of International Law* (1995), P.58. Like states, IOs require jurisdictional immunity in order to carry on "their autonomous and independent business in the world."
[302] Reinisch (2000), Supra, n, 275, p.331.
[303] Boon(2016) ,Supra, n,244, p. 343.

theprotection of the organization, and immunity is not intended to alter responsibility by creating a shield of impunity.

4.3 The Possibility of Filing a Suit against the United Nations

Since regional and international judicial tribunals only accommodated for a case against states, international organizations including UN, cannot be sued before those judicial tribunals. The international legal field does not provide a forum for mandatory judgments on breach of international obligations and the subsequent enforcement of judgments for the UN at all. ICJ for instance only has competence to hear State parties and cannot hear a case to which an IO is party and individuals have no standing right.[304] Akin to this Section II of the ECHR established the ECtHR and defined its scope and function whilst article 34 provided individuals with the right to bring applications to the ECtHR against contracting States that have violated their rights, due to this ECtHR can't have jurisdiction on the UN too since UN is not part to the convention. In addition even if the IACtHR and ECtHR accept individual complaints, but none of the systems provide for options to hold other actors than states accountable. Due to this the only card victims have is to bring a case against UN before domestic courts. However the UN most of the time defended those cases by raising absolute immunity entitlement under the general convention which provide UN isimmune from every form of legal process of domestic court's jurisdiction. In this section try to find out whether there is any forum where individuals can bring a case against the UN.

4.3.1 The UN's obligation to offer alternative dispute settlement mechanism

The UN has obligation to establishan accountabilitymechanisms for victims under the terms of the CIPUN. When human right violation is committed by peace keeping force and if that act can be attributed to the UN, the UN has theobligation to establish dispute settlement method as it is clearly stipulated under section 29 of the General Convention. Even if the CIPUN give defacto absolute immunity to the UN under article 2 sections II, again the convention impose obligation on the UN and article VIII, section 29 of the General Convention requires:

[304]United Nations, *Statute of the International Court of Justice*, 18 April 1946, Chapter II article 34 (1) available at: *http://www.refworld.org/docid/3deb4b9c0.html*accessed 7 June 2018]

> ‘‘*The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.*’’[305]

When we say the private law disputes, we mean that third-party claims concerning compensation for personal injuries, deaths, or property loss, which caused by UN peacekeeping troops.[306] The General Convention imposing obligation up on UN seems like designed in giving effect to the right of access to court/remedy or as a counterbalance to absolute immunity which is an obstacle for victims to bring a case against the UN.[307]Regarding this issue as mentioned by Reinisch those alternative mechanisms are increasingly also seen ‘*as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice’.* [308]Nevertheless, Section 29 of the CIPUN does not explicitly require any impartial and independent international court or tribunal, but the choice is left solely to the organization.

In a series of reports interpreting Article VIII,Section 29 of CIPUN the Secretary General Kofi Annan explained that ‘the UN has an international responsibility for the activities of UN peacekeeping forces, and this responsibility is fulfilled by the assumption of liability through claims commissions.’[309]A kin to CIPUN the model SOFA also requires the establishment of a standing claims commission.Those provisions obliges the UN to propose for dispute settlement mechanismswhich enable victims to claim remedy; if this is not the case victims would have no legal means of pursuing their interests due to the *absolute* immunity UN invokes. However, a private law claims has been denied by the UN many times when group of individual complainant brought a claim by reading article 2 of the CIPUN as according absolute immunity whether section 29 is violated or not, this understanding not only restrict the right of victims, but it also extinguishes the right itself.[310]

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[305] General Convention (1946),Supra,n,22, Art. VIII, section 29.

[306] UN Secretary-General, ‘Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946’ (1995) A/C.5/49/65, p. 15.

[307] Reinisch (2009) ,Supra, n,289, p.209.

[308] Reinisch ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’ 7 *Chinese Journal of International Law* (2008) ,p.285.

[309]U.N. Secretary General, Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters: Report of the Secretary-General, Mar. 19, 2001, U.N. Doc. No. A/51/389, available at *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/249/39/PDF/N9624939.pdf*.

[310]For example, the UN declined to review the petitions of 5000 applicants, whom allegedly been injured by a cholera outbreak caused by peacekeepers in Haiti, simply by stating that it did not revolve around a private law

Due to this it is quite difficult for the UN to rely on immunity in proceedings before national courts if individuals thereby suffer acomplete denial of justice, since that is acting at the expense of individual's right.[311]Reinisch insists that an adequate implementation of article VIII, section 29 of the General Convention should mitigate absolute immunity of the organization and narrow the remedy gap.[312] Here we can conclude that the UN can only enjoy proportionate immunity from domestic jurisdiction, and if the UN fails to grant any adequate alternative dispute settlement mechanism absolute immunity should not be up held.

4.3.2 Improving the UN's Responsibility to Increase Victim's Right to Remedy

We are witnessing that UN is denying victims claim brought before different courts, due to the broad asymmetry between the UN immunity and its responsibility for victim's, this leads in examining how to upgrade some of its internal mechanisms and how UN's liability can be evolved towards a human rights-based approach.In an attempt to increase victim's right to remedy, domestic courts should not be denied the authority to assess whether the internal system within the UN enables individuals to claim against the UN. Here as long as the UN fails to provide a procedure which satisfies all the relevant requirements, there would be a role to be filled by national courts. And it is essential that any national court carries out a profound assessment of the existing mechanisms within the UN. This assessment requires a thorough analysis, and the minimum requirement is, whether the right to access to court is restricted to an extent which impairs the very essence of access to justice. The grant of jurisdictional immunity from suit should not shield the organization from responsibility for human rights violations, particularly for grave violation like *jus cogens* norm. If not, that may amounts to allowing the UN to operate above the law and with impunity at the expense of individual right.

Here different mechanism can be proposed to increase the accountability of UN, here there is a vital need to establish sufficient mechanisms to increase individual's right to remedy and a better accountability may be achieved by giving effect to existing mechanisms by applying a balancing approach to immunity and strengthening internal redressing mechanisms.[313]

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matter. See also Lewis, p 'Who Pays for the United Nations 'Torts: Immunity Attribution and Appropriate Modes of Settlement' 39 *North Carolina Journal of International Law and Commercial Regulation* (2014), p. 270.

[311] Reinisch (2008), Supra, n, 316, p.291.

[312] Reinisch (2009) ,Supra, n, 289, p.209.

[313] Chang (2016) , Supra,n, 279, P.1.

Generally this part of the paper intends to distinguish different mechanisms which can help to enhance or to hold the organization responsible for human rights abuses and ensure the right of individuals to access court. Those are waiver of immunity of the UN or limiting immunity where it is not essential for the organization's functioning or in cases of severe human rights violations then bringing the UN beforedomestic courts; increasing the availability of international forum in which the acts of IO's can be challenged; improving their internal accountability mechanisms and subjecting them to independent judicial scrutiny, and encouraging international organizations to better scrutinize their own programmes prior to implementation in order to preemptively locate and address possible human rights concerns, the creation of an Ombudsperson, the creation of an independent human rights body and, the possibility of establishing world human right court having jurisdiction on IO's(UN).

4.3.2.1 The Various Forums to Receive Claims against the UN by Human Right Victims

Certain mechanisms have been established by the UN, such as the local claims commissions for its peacekeeping operations and the administrative jurisdictions for its employment-related disputes.[314] However, these measures have a limited scope.No independent and impartial international court has been established before which private individuals can file claims against the UN. An individual claimant who wants to challenge an act of the UN has often no real other option than to seek a remedy before national courts. As a consequence, individuals are dependent on the will and ability of domestic courts to decide on their case. Another question at hand is in which country and to which body the proceedings can be brought; standing claims commission, UN local claims review boards, UN human rights treaty bodies, [315] domestic courts?

4.3.2.1.1 Waiver of UN Immunity andbringing the Claim against UN before Domestic Court

If the UN continue to enjoy absolute immunity even at the time gross human rights violation like for *jus cogens norms*, and at the same time fails to provide an effective system of judicial remedy, this is impunity with in immunity for the UN. However Immunity should not be used to the extent of exempting the organization from its obligation or to abdicating its responsibility. However, currently the *de facto* absolute immunity from domestic jurisdiction of the UN is upheld at the expense of individual's interests who, according to the primary objectives of the

[314]Administration of justice at the United Nations, UN General Assembly Resolution 63/253 (2009).
[315]The Human Rights Committee monitoring the implementation of the International Covenant on Civil and Political Rights and its optional protocols of 19.12.1966, UNTS, Vol. 999, 171.

organization, are the ones who should benefit from UN protection and it is against the primary purpose for which it is established.[316]

Even if, the CPUIN provides express waiver as an exception to the grant of absolute immunity[317] yet, the express waiver method does not provide a guarantee for victim's right to be brought before a courts.In case of UN personnel as it is stipulated under, section 20 and 23 of the CIPUN the Secretary General has a 'duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN.'[318] However, for the case of UN the SG has no obligation to waive, rather he has a discretionary waiver power to allow a suit against the UN before a national court. The SG uses this discretionary power to benefit the UN and unwilling to waive immunity if the case require huge damage awards and moral culpability.[319]But one can argue that there should be a duty to waive the UN immunity and section 20 and 23 of the general convention should apply to the UN too. This is based on the argument that the UN is one of the greatest organizations meant to protect and promote human rights, so if its act causes gross human right violation without doubt there is impediment of justice when victims left without any remedy and recognition. We can raise the case of Haiti where, the UN has violated several fundamental human rights such as, the right to clean water, the right to health, and over all the right to an effective remedy.[320]

There is a possibility for the UN waiving its immunity by agreeing to the judicial proceeding or by withdrawing from its immunities when concluding SOFAs. Some writers argue that the provision under SOFA which mandates the UN to create claims commissions, as an express waiver of immunity in case the UN fails to establish the commission and imposing substantive requirements on the duty to have an appropriate dispute resolution mechanism will better ensure the accountability of the UN and improve compliance with its legal obligations.

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[316] The United Nations Charter (1945), Supra,n,2, Art. 1 and (2).

[317]Absolute immunity can be contrasted with functional immunity, in which the privileges and immunities of an entity should closely correspond to the needs of the entity for the fulfillment of its purposes and the exercise of its functions.

[318] General Convention (1946),Supra,n,22, Section 20 and 23.

[319] Secretary-General Kofi Annan did not waive immunity and allow a claim of institutional negligence and responsibility for the 1994 Rwandan genocide to proceed.; Secretary-General Ban Ki-Moon did not waive immunity and allow the claims in Georges v. United Nations to proceed.; U.N. immunity was asserted in the Mothers of Srebrenica case, where peacekeepers were alleged to have negligently failed to prevent to the death of 8,000 -10,000 people.

[320] The responsibility of the United Nations (U.N.) for the cholera epidemic in Haiti Peacekeeping without Accountability, pp.37-40

Domestic court will have to inquire into whether the victim of gross human right violation can sufficiently exercise his right to access to court and remedy before upholding UN as immune and rejecting the case on lack of jurisdiction due to the immunity privilege it has. If the UN fails to provide amechanism to dissolve claims lodged by third-party claimants, it is a possible solution to bring a claim against the UN before domestic courts, where the interest of individual's access to court prevails.

On this issue Boon maintains:

> *''if the organization does not provide effective means of redress for victims, this might result in a legal status quo where contracting states are constitutionally unable to grant the UN immunity, since it would conflict with the very own norms of the organization.''* [321]

Stephen Lewis is also support the above quoted idea and he said thatregarding cholera outbreak: 'Immunity should not be blanket; it should not be wholesale, because there are exceptional cases where immunity should be lifted, like violation happened in Haiti.'[322]This will at least ensure reparations for victims who have suffered from human right violation when the conduct by peacekeepers exceeds what is necessary or, as what started the cholera epidemic, negligent behavior.

4.3.2.1.2 Standing Claim Commission

Akin to the dispute settlement mechanism expected to be established by the UN under section 29 of CIPUN there is also stipulation with this regard under article 51 of Model SOFA for the establishment of a claim settlement mechanism which is called standing claim commission giving effect to Article 29 of CPIUN.

Article 51 of the UN Model SOFA promulgates that:

> *''any dispute of a private law nature to which the UN peacekeeping operation is a party, and over which the domestic courts in the host state do not have jurisdiction, shall be settled by a standing claims commission.''* [323]

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[321]Boon (2016) Supra, n,244 ,pp. 341- 358.

[322]Lewis, Stephen, curtail the U.N.'s legal immunity, October 11, 2013 *http://www.cbc.ca/radio/day6/episode-151-tales-of-corporate-espionage-specialrights-for-police-dogs-suing-the-un-and-more-1.2906226/stephen-lewis-curtail-the-un-S-legal-immunity1.290623.*

[323] Model SOFA (October 1990) , art 51.

The commission is to be composed of three members: one appointed by the UN, one by the host state and a third jointly by the UN and the host state. Even if the SOFA provision require its establishment, in practice, a standing claims commission has never been established in any country that has hosted a UN peacekeeping mission and this shows how the UN fails from its obligation, because the UN signed almost over thirty SOFA agreements.[324] However, the present provision has never been used and no such standing claims commission for third-party claims of a private law nature has been established in practice.[325] However, the notion of a private law dispute has been denied by the UN on several occasions regarding complaints by individuals, simply by stating that it is not around a private law matter.[326]

Establishing a standing claims commission would address victims' claims in an unbiased and meaningful manner, and it constitutes one step the UN must take to uphold its obligations of accountability.When the UN falls through on providing an alternative mechanism to dissolve disputes by third-party claimants, the general understanding is that the enjoyment of absolute immunity violates its obligations under Article 55 (c) of the UN Charter.[327]Hence, it seems that the already existing internal dispute resolution mechanisms within the UN do not completely comply with the right of all individuals to access court,[328] or constitute effective means of holding the organization responsible for human rights abuses or wrongs of a private law nature.

4.3.2.1.3 Local Claim Review Boards

Local claim review boards are specifically established for peace keeping mission purpose, during the mission. And individuals, non staff members can bring claim against the UN before this claim review board.[329]The purpose for establishment of the boards is to investigate, accept

[324] Dannenbaum (2010), Supra, n, 16 ,p. 126;See also Lewis, P 'Who Pays for the United Nations Torts: Immunity Attribution and Appropriate Modes of Settlement' (2014) *39 North Carolina Journal of International Law and Commercial Regulation* (2014) ,p. 268.

[325]Rashkow, B 'Immunity of the United Nations: Practice and Challenges' *10 International Organization Law Review* (2013), p.332.

[326] Lewis (2014), Supra, n, 332, P.269.

[327]The United Nations shall promote: universal respect for, and observance Lewis, P 'Who Pays for the United Nations Torts: Immunity Attribution and Appropriate Modes of Settlement' (2014) *39 North Carolina Journal of International Law and Commercial Regulation* (2014) ,P.269.

[327]The United Nations shall promote: universal respect for, and observance of, human rights and fundamental freedoms for all.; See also Freedman (2014)Supra,n,53,pp. 251-252.

[328]*International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Art 6(1) and 14(1) , available at: *http://www.refworld.org/docid/3ae6b3aa0.html* (accessed 7 June 2018) and *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, art 6, available at: *http://www.refworld.org/docid/3ae6b3b04.html* (accessed 7 June 2018)

[329]UNGA 'Report of the Secretary-General' (1996) UN Doc A/51/389, para 22.

orrecommend a settlement of a dispute arising from a third-party claim regarding a violation committed by peacekeepers.

However the boards have been criticized on so many grounds; like the boards do not fulfill the requirements of objectivity, impartiality and independency.Unlike a claims commission, which requires the independent appointment of three claims commissioners, the local claims review board is made up entirely of UN personnel.[330]Due to this it do not constitute a fair process, since the UN is adjudicating on a dispute to which it is also a party to, thus render independency of the board in to question mark.[331]The local claims review boards, being UN bodies, can be perceived as acting as a judge in their own case.[332]In practice, claims review board determinations are covered in secrecy their decisions are never made public this again put the transparency of its procedure questionable and face long backlogs in reviewing claims which is obstructing the fairness of the trial as well.[333] Due to these and other factors, it is possible to reach on conclusion that the boards cannot be regarded as a sufficient mechanism to protect the rights of individuals.

4.3.2.1.4Establishingan Independent Human Rights Body

An international organization has a 'legitimate interest in its independent functioning including concerns not to be compelled to fulfill unjustifiable judgments from domestic courts, the domestic court may not be impartial.[334] This interest of the organization protected by immunity, however at the same time it is important to minimize the effect of immunity on victim's right to access to court. These two conflicting interests may, preferably, be guaranteed by means of creating an independent body at an international level.[335] The very reason for granting immunity for the UN is, allowing national courts to determine the legality of UN acts might leave the

[330] Dannenbaum (2010), supra, n, 16,p. 126.
[331] An independent court is a requirement of most human rights treaties regarding the right to a fair trial, see for example Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 10; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS no: 005 (European Convention on Human Rights, ECHR) art 6.; Committee on Accountability of International Organizations 'Final Report' in the International Law Association Report of the Seventy-First Conference (Berlin 2004) (International Law Association, Berlin 2004) 39; The International Law Association has also raised concern over the objectivity and independence of the local claims board.
[332]Garcin, M 'The Haitian Cholera Victims' Complaints against the United Nations' 75(2015), P.702.
[333]Shraga, D'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' 94 *American Journal of International Law (*2000), p.406. See also Dannenbaum (2010) Supra, n, 16, p.126; Lewis (2014) Supra,n, 332 ,p.271.
[334] Reinisch (2000),Supra, n, 275, p.389.
[335]Ibid, p. 390.

Organization open to prejudice or frivolous actions. However this fear can be avoided by establishing independent human right body.

As to a tentative establishment of an independent human rights body, this may be the most favorable solution for an impartial, independent and objective adjudication of a dispute between the organization and a private individual. Since the local claims review boards which composed of UN officials, together with the Ombudsperson system as outlined above, received criticism for failing to comply with the requirements of impartiality and independency; establishing independent dispute settlement body is choice less choice.

As a solution for those gaps witnessed in the local claim board and lack of existing appropriate forum, it is recommendable to establish a review mechanism at an international level, because it is in a better position to adjudicate objectively and impartially between the competing interest of the organization and third-parties than the organizations own method of adjudication or by means of self-regulation, itself. [336] It is appropriate for disputes involving international organizationsto be settled on an international, rather than domestic level, as well.

4.3.2.1.4.1 A World Court of Human Rights

Theideaof establishingan independent court of human rights gained momentum in 2008 at the 60th birthday of the UDHR at the initiative of new Agenda for Human Rights.[337]To this end a panel of experts was established which include Manfred Nowak, Martin Scheinin and Julia Kozma proposed an elaborate draft statute in 2010, which endorsed by the panel in the same year.In 2014 the second draft statute of a WCHR (world court of human right) prepared.[338]

The creation of a WCHR attempts to respond to a so called gap in IHRL when it comes to its inability to regulate the activities of what the statute calls "entities". The central aim of the WCHR is to responds to the fundamental belief that the international framework of human rights calls for recourse to fill effective remedy gap by complementing international human right framework. Its purpose and function as described by the international commission of jurists, consists of: providing access to justice and effective redress to victims of human rights violations

[336]Ibid, p.389.
[337]Protecting Dignity: An Agenda for Human Rights, Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights.
[338]The World Court of Human Rights Development Project, the WCHR Statute (Current Draft): 'The Statute of the World Court of Human Rights (The Treaty of Lucknow)' (2014), at *http://www.worldcourtofhumanrights.net/wchr-statute-current-draft*(accessed date12June,2018).

by means of an independent and impartial international judicial mechanism in order to reach the ultimate objective of realizing the promise of universal adherence to international human rights standards.[339]

Regarding jurisdiction *ratione personae*, the court can receive complaints from a natural person; NGO's or group of individuals claiming to be a victim of a violation.[340] The complaint can in principle be lodged against a State Party, the UN or any of its specialized agencies, any other regional or global inter-governmental organization, any non-State actor subject to the jurisdiction of a State Party, and NGO, including business corporations.[341] If the court finds a human right violation it shall directly afford the victim adequate reparation. The judgments should be final and binding under international law.

4.3.2.1.4.2 Why Do We Need A World Court of Human Rights?

WHRC which should complementrather than duplicate existing judicial bodies; could make a wide range of actors more accountable for human rights violations.[342] Especially for non state actors like UN which have less accountability mechanism due to lack of forum having jurisdiction. Designers of the court spelt out a number of excellent reasons why we should support the idea of having a WHRC, in addition the proposal of this court is not only realistic and feasible, it is a necessary step to be taken in order to preserve and enhance the existing treaty bodies system.[343] The proposal for the first time take into account the responsibility of non-state actors in order to brought these "entities"[344] before the future WCHR. This is indeed evolution, since such "entities" has never been brought into the ambit of the jurisdiction especially the *ration personae* of the existing judicial bodies.Concerning the jurisdiction of the proposed WCHR over the "entities", the fault of the UN, in human rights observance is the focus of

[339]International commission of Jurists, 'Towards a World Court of Human Rights: Questions and Answers' Supporting Paper to the 2011 Report of the Panel on Human Dignity, p. 7.
[340]Nowak, M and Kozma, J'A world court of human rights' Swiss Initiative to commemorate the 60th Anniversary of the UDHR. See also *Protecting Dignity: An Agenda for Human Rights* Research project on a World Human Rights Court University of Vienna, Austria, and P.6.
[341] Ibid
[342]Protecting Dignity: An Agenda for Human Rights, Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights. .
[343]Frouville, O 'Strengthening the Rule of Law: The Right toan Effective Remedy for Victims of Human Rights Violations' (2014), P.13.
[344]Scheinin, M 'Towards a World Court of Human Rights, Swiss Initiative to commemorate the 60th Anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights', p.8.
Available at: *http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf*

attention.According to the current statutes, the proposed WCHR will be competent to make an appropriate response.[345]

4.4 Case Study

4.4.1 Duties Neglected, Justice Denied: Cholera In Haiti.

In 2004, the UNSC established the UN Stabilization Mission in Haiti (MINUSTAH)[346] following an armed conflict that over throw the country's president.[347] After a destructive earthquake in 2010, the UNSC increased the number of MINUSTAH troops in Haiti.[348] The UN sent peacekeeping troops from Nepal to join the MINUSTAH troops in Haiti.[349] The UN stationed the Nepalese soldiers close to a tributary of the Antimonite River, which is one of Haiti's main sources of potable water.[350] The UN constructed poor sanitation facilities for the Nepalese soldiers and sewage eventually contaminated the tributary with cholera.In 2010 after experiencing earthquake, cholera suddenly appeared in Haiti and has so far killed 8,977 Haitians.[351]

The cholera crisis in Haiti provides a glaring example of deficiencies in the UN's accountability regime, and represents a significant legal and moral challenge for the organization.On behalf of 5,000 plaintiffs, the Institute for Justice and Democracy in Haiti working together with a human rights group in Haiti[352]submitted a petition to MINUSTAH in November 2011.[353]They sought relief in the form of (1) the establishment of a standings claims commission seeking relief; (2) measures by the UN to improve the water and sanitation system and to provide adequate health

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[345]LiTian 'The Establishment of a World Court of Human Rights and The Design of Its Complementary Jurisdiction Doctoral Dissertation Proposal (Exposé) , LL.M,pp.4-9

[346] UN Security Council, *Security Council resolution 1542(2004)*9 June 2004, S/RES/1542 (2004), available at: *http://www.refworld.org/docid/4c1f2eb32.html*[accessed 7 June 2018]

[347] MINUSTAH: United Nations mission in Haiti, <http:// *www.un.org/en/peacekeeping/missions/minustah/*> (last accessed May 23,2018)

[348]Security Council Resolution.1542,(2004).

[349] Transnational development Clinic, Jerome n. Frank legal serv. Org., Yale Law sch., global health justice p' ship of the Yale Law sch. & the Yale sch. Of public Health, & association Haitïenne de droit de l'environnment, peacekeeping without accountability: the United Nations' responsibility for the Haitian cholera epidemic 1 (2013), <http://*www.law.yale.edu/d*ocuments/pdf/Clinics/Haiti_TDC_Final_Report.pdf

[350] Ibid

[351] Haiti Cholera Response Fact Sheet, United Nations in Haiti. Accessed at *http://www.un.org/News/dh/infocus/haiti/Cholera_UN_Factsheet_Jan_Dec_2015.pdf* accessed on 5 April 2018.

[352]IJDH Petition for Relief, http://www.ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf (June 23, 2018)

[353] Petition for Relief to MINUSTAH Claims Unit (filed Nov. 3, 2011), *http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf*.(Accessed on 20 May 2018).

services in order to prevent the further spread of cholera; (3) compensation; and (4) a public apology.[354]

Surprisingly the UN immediately dismissed the claim as "not receivable pursuant to Section 29 of the CIPUN" because review of the claims "would necessarily include a review of political and policy matters."[355] Such an exception to Section 29 of the CPIUN, however, does not exist in CPIUN or the SOFA.[356]

Following the UN's refusal to the victims' request to resolve the matter through a claims commission under the terms of the SOFA, Bureau of International Lawyers in Haiti and the Institute for justice & Democracy in Haiti (IJDH), filed a class action on behalf of 5000 Haitian and Haitian-American victims[357]in federal court in the Southern District of New York (SDNY) in October 2013 against MINUSTAH.[358] The plaintiffs allege that the UN was negligent, reckless, for its failure to screen troops for cholera prior to deployment to Haiti, failure to take immediate corrective action to properly address the outbreak of disease.[359] In addition petitioners argued that the UN acted 'negligently, recklessly, and lack interest for the Petitioners' health and lives'[360] and that the UN's actions and omissions violated several different international obligations, such as the right to clean environment.[361]When it finally responded in 2013, the UN did not appear in the case and instead requested that the US government intervene and seek dismissal, taking the position that the UN has absolute immunity from suit.[362]

The petitioners cited section 29 of the CPIUN (which requires the UN to 'make provisions for the settlement' of specified categories of disputes) and a provision of the SOFA that calls for the

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[354]Ibid, para VII.

[355] UN Department of Public Information (New York), Haiti Cholera Victims' Compensation Claims "Not Receivable" under Immunities and Privileges Convention, United Nations Tells Their Representatives, UN Doc. SG/SM/14828 (21 February 2013).

[356] Chang, K (2016), supra, n, 279, p.12.

[357]*Georges et al. v. UN*, District Court (Southern District of New York) October 2013.*http://www.refworld/org/*

[358]Inst. for Justice and Democracy in Haiti, *Cholera Litigation*, available *at* <ijdh.org/cholera/cholera-litigation(accessed on 20 June 2018).

[359]Haiti Cholera Complaint Statement.Accessed at http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf on 21 February 2018.

[360]Ibid

[361] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Art 6(1) and 14(1) , available at: *http://www.refworld.org/docid/3ae6b3aa0.html*[accessed 7 June 2018]

[362]Informing the court that 'on December 20, 2013, Miguel de SerpaSoares, the United Nations Legal Counsel, wrote to Samantha Power, Permanent Representative of the United States to the United Nations, stating, 'I hereby respectfully wish to inform you that the United Nations has not waived and is expressly maintaining its immunity with respect to the claims in [the instant] Complaint'.... [and] requesting 'the competent United States authorities to take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials''.

establishment of a standing claims commission to settle 'third-party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to MINUSTAH'.[363]

In January 2015 the Court once again dismissed the case on grounds of lack of subject matter jurisdiction as per CPIUN.[364]The plaintiffs appealed before the US court of appeal for second circuit. The plaintiffs argued that the UN's immunity is conditioned on the provision of alternative modes of redress /the establishment of a standing claims commission.[365] The principal question presented in this appeal is whether the UN's fulfillment of its obligation under Section 29 of the CPIUN to make provisions for appropriate modes of settlement of dispute if immunity has not been waived by the Secretary-General, is a condition precedent to its immunity under Section 2 of the CPIUN.

The plaintiffs raise UN's failure to establish an alternative mechanism for adjudicating victims' claims constituting a violation of its legal obligations and a denial of the victims' basic right to a remedy as defense against the assertion of immunity by UN. Here the Yale law Report concluded that: (i) the UN's refusal to establish a standing claims commission violates its contractual obligation to Haiti under international law; (ii) by denying any form of remedy to its victims, the UN has failed to uphold its duties under international human rights law; and (iii) the UN's refusal to accept responsibility has violated principles of international humanitarian aid.[366]

The plaintiffs-appellants and the US government had radically different views on the significance of access to a remedy. For the US government, whether or not the plaintiffs had access to a remedy was immaterial because the only exception to UN immunity is an 'express' waiver of immunity by the organization itself. On the other hand, the plaintiffs claimed that access to a remedy was crucial to a finding of UN immunity that is 'compliance with Section 29 must be interpreted as a condition precedent to UN immunity.'[367] The court holds that the UN's fulfillment of its obligation under Section 29 is not a condition precedent to its Section 2

[363]Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti 2004, 2271 UNTS 235, Arts 54–55.

[364]UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Art. VIII section (29). available at: *http://www.refworld.org/docid/3ae6b3902.html*[accessed 7 June 2018]

[365]Kombo, B 'Closing the 'Remedy Gap' The Limits and Promise of Diplomatic Protection for Victims of the Cholera Epidemic in Haiti' 5 Groningen *Journal of International Law* (2017), P.121.

[366] Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Outbreak, p. 2.

[367]Kombo (2017), supra, n, 376, p.122.

immunity. The United States Court of Appeals for Second Circuit affirms the District Court's judgment.[368]

Haiti Cholera is the first known case where the victims have claimed for establishment of claims commission, but have been denied from being allowed to access them. Despite the fact that a standing claims commission has never been established in the UN's history, it is unclear why MINUSTAH did not receive claims through a local claims review board to hear victims and attempt to settle amicably. The UN's handling in this case represents a departure from its established practice of locally settling disputes, and in doing so, signifies a novel approach to apply absolute immunity as a shield to deny effective remedy to its victims.As expected in a national jurisdiction, the Court in Haiti Cholera upheld the absolute immunity of the UN under Section 2 of the CPIUN, and dismissed the case due to its lack of subject matter jurisdiction, while rejecting the plaintiffs' claim that the UN's immunity is conditioned on its provision of alternative modes of dispute settlement.[369]This decision has been upheld by the US Court of Appeals too.[370]Finally, and the most important argument for this thesis, rose by the petitioners that the law of IO responsibility requires the UN to 'make full reparation for the injury caused by the internationally wrongful act' so that the UN's rejection of the victims' administrative claims breached its obligation under CIPUN and thus precluded the application of immunity.[371]This cholera outbreak in Haiti helps as a lead to challenge the UN's absolute immunity defense. Since the UN argument on claims to be 'not receivable' which denies the claimants rights to access a court and to a remedy may continue in the future too unless resolved.

4.4.2 The Mothers of Srebrenica Case beforethe European Court of Human Rights

The case originated from the failure of the UN to prevent the genocide of about 7,600 Muslim civilian inhabitants in Srebrenica in 1995. Dutch UN peacekeeping troops had been deployed to guard a safe area, but failed to prevent the Bosnian Serb forces.The Mothers of Srebrenica[372]bought proceedings in a Dutchlocal court regarding the Srebrenica massacre citing

[368]Delama Georges et al. v United Nations et al. US District Court for the Southern District of New York (9 January 2015) No. 1:13-cv-7146.,*http://www.refworld.org/case* (last accessed June 7, 2018)
[369]Ibid
[370]Ibid.
[371] Ibid
[372]Leyersdorff, S & Melvern, L 'The Dutch Supreme Court Grant Immunity to the UN Regarding Serbrenica: A legal Summary with Comment' Genocide Prevention Now, 2012,No.10 The Mothers of Srebrenica is an activist and lobbying group based in the Netherlands, and represents 6,000 survivors of the siege of Serbrenica , during the

that a Dutchbattalion under UN oversight was responsible for the safe haven at Serbrenicain 2007, that both the UN and Netherlands breached that duty of care, and they were negligent. The Netherlands district court held that under Article 105 of the UN the UN has immunity in this instance, so they did not have jurisdiction to even hear the case.[373]Even if the decision was appealed, the Court of Appeal upheld the lower court's ruling in 2010.[374]Again, the decision was appealed to the Dutch Supreme Court and the court held that article VII, section 2 of the General Convention must be interpreted in the light of article 31 of the VCLT and the UN cannot be summoned before the domestic courts of any contracting party since it enjoys absolute immunity regardless of the nature of the claim against it, and the claim was thus rejected.[375]The matter was appealed in 2012, before the ECtHRwhere it was argued by the applicants that the UN denied the party the right to a trial, which is guaranteed in the ECHR. Since their claim was based on an act of genocide, being a rule of *jus cogens,* the applicants held that grant of immunity protecting the UN should be removed. The appellant court held the UN Charter had primacy over domestic laws, based on Article 103 of the UN Charter, and it remained absolute even in the face of claims of violation of *jus cogens.* The Court recognized the prohibition of genocide as a rule of *jus cogens*, but argued that international law does not support the position that a civil claim should override immunity on the basis of allegations of grave violations of IHRL, even being violations of *jus cogens norms*.[376] The court argue this way based on the judgment of the ICJ in Nicaragua v.US case in which the ICJ interpreted Article 103 of the Charter to mean that the Charter put obligations on Member States which prevail over other obligations from another international treaty, whether earlier or later in time than the Charter.Therefore any right of access to courts contained in Article 6 of the ECHR and 14 in ICCPR did not prevail over the immunity of the UN even given the gravity of the alleged charges.

Balkan War of the 1990s. The organization is best known for bringing a civil action against the United Nation for a breach of duty of care for the failure to prevent the genocide at Srebrenica.

[373] *Mothers of Srebrenica et al. v State of The Netherlands and the UN* (Hague District Court), 295247/HA 072973paras 5.14-5.27.

[374] The Association of Citizens Mothers of Srebrenica v The Netherlands and the UN (Hague Appeal Court), 200.022.151/01.

[375] *Mothers of Srebrenica Association v The State of The Netherlands and the UN* (Supreme Court of the Netherlands), 10/04437 EV/AS (13 April 2012) para 4.2.

[376] Ibid , paras 156-158.

CHAPTER FIVE

CONCLUSION AND RECOMMENATIONS

5.1 Conclusion

Until recent times, international law scholars have given little attention to the UN's involvement in gross human right violation which is against the purpose for which it is established. This is due to the fact that UN has unique character and position under international law. However, today due to its engagement in multidimensional activity and the expansion of the UN's role over the decades has triggered greater awareness of the organization's accountability gap regarding human right violation. The accountability gap is witnessed due to new role attributed to the Organization, and its involvement in peacekeeping operation, which was not envisioned when the Charter was drafted. While many peacekeepers promote the standards of the UN, and contribute to peace and protection of civilians, there are problems, mistakes and incidences of serious misconduct committed such as gross human right violation by peace keeping personnel. Those gross human right violation committed by peace keepers who are deployed to protect civilians show the breach caused on them, besides the victims are left without solution. We can take Haiti cholera victims. This fact initiated to search which entity, the UN or the TCS is responsible for human right violation committed by troops. Here the issue of attribution comes in to picture, which means that whether the wrongful act of peace keeping force which is collected by voluntary contribution from contributing state is imputed to the UN or the contributing state. This can be accessed based on DARIO and ARSIWA provision. DARIO article 7 and ARSIWA article 8 respectively deal with rule of attribution and responsibility of the UN and TCC. Here under article 7 of DARIO, in order to attribute troops wrongful act effective control test used as appropriate standard, but this test have its own difficulty in practice due to the existing command and control structure in the UNPKO. The problem is that since this test requires factual control to the extent of preventing the commission of that act, responsibility most of the time inclined to the contributing states; and then this has its own adverse effect on future contribution of troops by states.

One reason for the accountability gap is the immunity which is granted to the UN. This immunity has based itself on Article 105(1) of the UN Charter and Section 2 of the CIPUN. The nature of this immunity was intended to be a functional one, which support the UN to be able to act independently and to save it from sluggish or inactive court proceedings in domestic courts. However, the protection of the UN by the immunity, which is understood by several courts as an absolute one, has resulted in impunity. The lack of mechanisms for judicial review in both domestic and international spheres, combined with its inordinate assertion of immunity and lack of internal preventive measures, has often placed the UN beyond the scope of legal or moral accountability. By refusing to acknowledge legal responsibility for harms inflicted the UN jeopardizes its own standing and moral authority, and weakens its credibility as a promoter of human rights and the rule of law. Immunities, however, conflict with an individual's right to a remedy and the law's ordinary principles of assigning responsibility for causing harm. This inherent conflict at the center of the immunity doctrine has been observed in recent cases which were brought against the UN, where the independence of the organization is perceived by courts as to have trumped the dignity of affected individuals by upholding the UN immunity. The UN's broad immunities, the limited jurisdiction of domestic courts over UN due to its immunity, the weakness of the UN's own internal review mechanisms like claim review board which is criticized as impartial, lack of an independent court having jurisdiction are the main impediment to victims access to justice and they are left without compensation or access to domestic courts. The determination that the UN is absolutely immune is normatively problematic and, from a political legitimacy perspective, untenable in light of the UN's contemporary mandate and impact on individuals.

5.2 Recommendations

- In order to narrow down lack of access to justice and remedy the UN itself is recommended to establish a mechanism to satisfy the notion of the right of access to court and the right to seek a remedy. Until the UN provides such a mechanism, the role of enforcing responsibility of the organization could most effectively be envisaged for national courts. Moreover, the existence of alternative means to settle disputes should have to be a precondition for the enjoyment of immunity from domestic jurisdiction. UN can only enjoy proportionate functional immunity from domestic jurisdiction, and if UN fails to provide adequate, alternative settlement mechanism domestic courts should deny the grant of absolute immunity.
- The UN practice on waivers is narrow; the UN can adopt new approaches to its waiver practice and has been urged to do so in other contexts. Here the author recommended that the UN have to waive its immunity in cases where serious criminal acts were committed with some connection to an official position, and in case of some gross human rights violation and where continued immunity would impede the course of justice and where immunity can be waived without prejudice to the interests of the UN, since the failure to exercise this option can result in abuse of immunity which is impunity with immunity.
- The third recommendation is for the UN to assume full responsibility for the selection of all peacekeeping troops. The department of peace keeping operation (DPKO) should create a separate department that screens all individual candidates for human rights abuses and general criminal conduct. Under this system, a neutral investigator will bear the responsibility of clearing individuals for service with the UN, thus creating a standardized and independent system of review.
- The legal immunity that UN entitled under international or national laws should be limited as the existence of non-functional immunity is in conflict with the duty of organisations to scrutinize alleged human rights violations in particular, their adherence to *jus cogens* norm. So that the immunity of the UN should have to be limited to the degree that the courts involvement is necessary without amounting to

undue interference to the UN, since immunity should never serve as a defense to abdicate its responsibility for human right violation.

- ❖ It is recommended that an international organization should establish a mechanism to rule on the criteria for offering compensation as an alternative means of remedial action towards third-parties.
- ❖ The UNSC should ensure that all UN efforts to restore peace and security respect the rule of law. When authorizing a UN operation the Council should take appropriate measures to support the implementation of the Secretary-General's zero-tolerance policy on sexual exploitation and other human right abuse by UN personnel. In particular:

(i) The Council should encourage Member States contributing or seconding personnel to take appropriate preventative action, including the conduct of pre-deployment training, and to be in a position to hold their nationals accountable for criminal conduct;

(ii) The Council should affirm its commitment to put victims at the center of its attention by expressing its support for the Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse.

(iii) The UN should learn a lesson from the past failure and improve its management of such a situation by making sure that the screening policies, the hygiene policies and camp managements are properly maintained, as a safeguard for the future.

- ❖ Some authors in response to the argument in favor of limited UN immunity raise that when UN paying out compensation for victims this might bankrupt the organisation. Here to avoid this problem, it is recommended for the UN to develop appropriate insurance mechanisms to get liability insurance or consider a new policy to purchase insurance for claim above$50,000 because UN chosen a self-insurance mechanism for claim up to $50,000.
- ❖ Since it is more appropriate for disputes involving international organizations to be settled on an international, rather than domestic level, the creation of independent human right tribunal, like world human right court is recommended.

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