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THE PHENOMENON OF SEXUAL EXPLOITATION AND ABUSE IN UNITED NATIONS PEACE OPERATIONS – WITH SPECIAL REGARD TO IMPLICATIONS OF RESPONSIBILITY IN INTERNATIONAL LAW

PhD Thesis

DRAFT

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Abbreviations

AO	Advisory Opinion (of the International Court of Justice)
ARIO	Articles on the Responsibility of International Organizations
AU	African Union
CEDAW	Convention on the Elimination of Discrimination against Women
CAR	Central African Republic
Convention	Convention on the Privileges and Immunities of the United Nations
CDU	Conduct and Discipline Unit
CoE	Council of Europe
DPO	Department of Peace Operations
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
FFPU	Female Formed Police Unit
GA	General Assembly
GLE	Group of Legal Experts
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Former Yugoslavia
ICTY	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IO	international organization
KFOR	Kosovo Force
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali

MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MoU	Memorandum of Understanding
NATO	North-Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
OIOS	Office of Internal Oversight Services
ONUC	United Nations Operation in the Congo
OSCE	Organization for Security and Cooperation in Europe
PMSC	private military and security companies
PoC	Protection of Civilians
R2P	Responsibility to Protect
RoE	Rules of Engagement
RSIWA	Responsibility of States for Internationally Wrongful Acts
Safety Convention	Convention on the Safety of United Nations and Associated Personnel
SC	Security Council
SCSL	Special Court for Sierra Leone
SEA	Sexual Exploitation and Abuse
SG	Secretary-General of the United Nations
SoFA	Status of Forces Agreement
SRSG	Special Representative of the Secretary General
TCC	Troop-contributing Country
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNAMI	United Nations Assistance Mission for Iraq
UNAMID	United Nations – African Union Hybrid Operation in Darfur
UNAT	United Nations Appeals Tribunal
UNDOF	United Nations Disengagement Observer Force
UNDP	United Nations Development Programme
UNDT	United Nations Dispute Tribunal
UNEF	United Nations Emergency Force

UNFICYP	United Nations Peacekeeping Force in Cyprus
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNIFIL	United Nations Interim Force in Lebanon
UNISFA	United Nations Interim Security Force in Abyei
UNITAF	Unified Task Force
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISS	United Nations Mission in South Sudan
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNOCI	United Nations Operation in Côte d'Ivoire
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNTSO	United Nations Truce Supervision Organization

Chapter 1.: Introduction

"Justice is an unassailable fortress, built on the brow of a mountain which cannot be overthrown by the violence of torrents, nor demolished by the force of armies."
–Joseph Addison

1.1. Hypothesis

The main dilemma of the thesis is that although peace operations conducted under the aegis of the United Nations have proven to be a great asset to the maintenance of international peace and security, acts of criminal nature conducted during these operations have tarnished the organization's reputation, severely undermining efforts to attain peace. Therefore, the question arises: is the current international legal framework of international law and specifically the UN inadequate in handling the situation or whether the problem is in fact caused by lacking enforcement? In order to answer this question, one has to look at vastly different domains of international law, with often differing regulation, where navigation may very well feel like a legal quagmire with numerous pitfalls.

Crimes committed by armed forces of a state cannot be considered as a new phenomenon: it existed since the dawn of humanity and it has been a major issue for peace operations ever since large scale operations became frequent.[1] Both domestic law and international law tried to either limit or eliminate it as best as they could by using either criminal codes or international treaties respectively.[2] In the second part of the twentieth century, when these crimes were noticed by the media and the broader international community, there has been a noticeable outrage as a result. This signalled the lowering of the threshold, the point, above which these acts are no longer tolerated. Recent attention to the issue is mainly caused by the special circumstances of these crimes. Firstly, because these acts are caused by those

[1] CSAPÓ, Zsuzsanna: Fegyverekkel szemben, fegyverekkel kézben: Nemzetközi jogi védőháló a fegyveres konfliktusokban érintett gyermekek oltalmára, Publikon, 2011.; CHINKIN, Christine: Rape and Sexual Abuse of Women in International Law, European Journal of International Law, 1994, pp. 326-341.; HIGATE, Paul: Peacekeepers, Masculinities and Sexual Exploitation, Men and Masculinities, Vol. 10. No. 1. Sage Publications, 2007. pp. 99-119.

[2] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. 11 Convention on the Rights of the Child, New York, 20 November 1989, UNTS Vol. 1577.

who were sent to protect the local population. Secondly, because the victims of the crimes almost always belong to vulnerable layers of society: women, girls and young boys. Thirdly, although according to the statistics compiled by the UN's Conduct and Discipline Unit the number of allegations has fluctuated in recent years,[3] the public outcry calling for the UN to take action seems to be ever louder, as the measures adopted by the UN do not seem to be sufficient in eliminating sexual exploitation and abuse (SEA).[4]

The first question that comes to mind, is 'Aren't the perpetrators prosecuted?' To which only an enigmatic answer can be given: sometimes. In the first part of the thesis I endeavour to find out what the legal framework is for holding the peacekeepers to account and how does rules vary for each category of peacekeeping personnel. However, in oder to be able to answer these questions, it is imperative to see clearly regarding applicable terminology. Defining how a peace operation is different from other types of armed action is just as vitally important as defining what sexual exploitation and abuse is.

The onus of responsibility does not rest solely on the peacekeepers. The responsibility of the United Nations, the organization responsible for creating the mandate upon which the peacekeepers act, also needs to be analysed. But is the existence of the mandate and wearing the blue helmet enough for an international organization to be held responsible? Or is it feasible, that more is needed for responsibility to be established? The second major part of the thesis (Chapters 5 and 6) sets to find out whether international law has developed sufficiently to decide on the responsibility of one of its principal subjects as well as analysing concepts of shared responsibility which could be evoked in the interest of the victims.

Last, but not least, one should not forget the third party in this dilemma: the state. The state, which sends the peacekeepers. Do they give explicit orders the peacekeepers through the chain of command or do they transfer control over the troops to the UN? Deciding this question will be vital in determining which way responsibility will be leaning. Various courts like the International Court of Justice, the International Tribunal for the former Yugoslavia and the European Court of Human Rights, among others, tried to answer this question through the application of different test of attribution. These tests served to decide whether the state or the international organization is responsible for the acts committed during the peace operation.

[3] United Nations Conduct and Discipline Unit: https://conduct.unmissions.org/sea-overview (accessed: 28.05.2020.)

[4] As it is going to be detailed later on, both the civil sector, various governments and the UN itself appears to be more sensible to the issue.

Therefore, the main research questions are firstly conceptional ones dealing with the connection of sexual crimes and peace operations, of why the phenomenon arose and persisted despite numerous attempts to eradicate it. Secondly, the normative framework needs to be unravelled to decide whether there is substantial legal background in order to combat the phenomenon. Thirdly, two main questions regarding responsibility need to be addressed: whether besides the individual criminal responsibility of the perpetrator the responsibility of States and international organizations can be ascertained (the dogmatic base for responsibility) and how courts possess the possibility to decide on the issue of responsibility (the jurisdictional question).

It is the ambition of this thesis to not only analyse the mechanical aspects of the current system, but also to provide alternatives, possible paths for the future. In the last chapter various ideas of reform will be addressed, which came from renowned scholars of the international community or from NGOs devoted to the subject or from the author of the thesis himself. The *de lege ferenda* section is based on two primal notions. One of these notions is the amount of political will required by stakeholders (mainly States and the UN) in order for initiatives and improvements to be incorporated into the current structure of norms. This idea led to a so-called tiered approach, where actions are categorized based on amount of political will necessary in oder to adopt and implement them. The other notion is the realistic aspect. Unrealistic concepts, such as compulsory on-site court martials which would require changing close to 200 criminal codes and possibly some constitutions were discarded. Furthmore, only those solutions can be accepted which do not endanger the system of peacekeeping as a whole. The goal of this thesis is not to provide theoretical grounds to dismantle peacekeeping as it has proven to be a major accomplishment of the international community and the UN - helping numerous areas where no single state was sufficiently interested - but to help renew and revitalize the system by eradicating the stain which threatens to overshadow its many extraordinary feats.

1.2. Methodology

The main analysis used four distinctive methods while compiling the thesis.[5]

[5] The systematic approach is widely used by scholarly literature, while treaties and customary law form the basis as sources of international law along with 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law' as phrased by Article 38 of the Statute of the International Court of Justice also form the basis of the research.

Firstly, the systematic approach. The author has looked into the issue of finding the place of the individual legal institutions in the order of international law and by doing so remarking on the nexus between these institutions.

Secondly, grammatical, logical and teleological interpretations of the norms of international law, both in terms of treaties and their additional protocols with commentaries and also international customary law as well as certain aspects of soft law, such as the resolutions of the United Nations General Assembly and the Secretary-General's bulletins were used.

Thirdly, the practice of various international and national tribunals was analysed with the goal of finding tendencies which could determine the future application of international law. This was supplemented by empirical research found during interviews with different Hungarian officials, serving in the army, police, prosecutor's office and court.

Last, but not least contemporary jurisprudence has been observed in order to process the results of the theoretical accomplishments of scholars and moving beyond a simple factual description, the various ideas were faced against each other in an attempt to find the best possible solution with numerous personal reasoning attached to it.

Additionally, statistics and data was used to form and supplement the factual basis of interpretations and conclusions in the analysis from either the UN's own websites or other international organizations and NGO's own disclosed material as well as self-made charts and simplified graphs of process to help better understand the phenomena or to be used later in education.

1.3. The phenomenon and its correlations

There is more or less a general consensus among scholars and experts on peacekeeping that the institution of peacekeeping itself is generally beneficial to the United Nations because of several factors. First of all, it serves as a principal method of the Security Council to tackle crisis all over the world, it promotes the idea of a caring and responsible international community to states that are entangled in crisis, strife or civil war and lately it serves as a multidimensional problem solving and peace-building organ that provides aid in post-conflict reconstruction areas.[6,7] As UN officials claimed, none of the peacekeeping missions ended with

[6] RADA, Mátyás: *ENSZ-Békefenntartás: Növekvő igények, növekvő terhek*, Biztonságpolitikai Szemle 4. évfolyam, 1. szám 2011, p. 4.
[7] TISOVSZKY, János: *Az ENSZ és a békefenntartás*, Magyar ENSZ Társaság, Budapest, 1997, pp. 42-43.

failure, there have only been missions with 'disputed results', such as Bosnia, Rwanda or the Congo, where circumstances didn't play out as well as the UN had hoped.[8]

1.3.1. The balance of decades

Ever since it was first employed in 1948 peacekeeping has played a pivotal, although sometimes undervalued role ensuring international peace and security. 71 peace operations have been launched since then, the majority of which was a quiet but important success.[9] The United Nations Security Council set up the mandate of the first peace operation in 1948 to monitor the armistice agreement between Israel and its Arab neighbours.[10] The Security Council chose to fulfil its duty of safeguarding international peace and security utilizing a peace operation, because it was deemed to be the best possible solution. During the following 7 decades a lot of circumstances have changed in the world of international law and international relations, but peacekeeping has gradually evolved and adapted to the changes.[11] After the disasters of Rwanda and Srebrenica peacekeeping mandates have become more robust, with mandates that encompass a wide area of tasks, such as the disarmament of militant groups, monitoring elections, helping to train the local police and rebuilding the justice system of nations that have fallen on hard times – just to name a few. Secretary General Boutros-Boutros Ghali's 1992 Agenda for Peace set the grounds for these multidimensional or third generation peacekeeping missions.[12] In most cases peacekeeping has fulfilled its original purpose as the instrument of ensuring peace and security in areas where it was mostly needed.

The situation is nonetheless far from ideal. The international community is showing less and less interest in international engagements and the Department of Peacekeeping Operations is finding itself in a difficult position to retain the favor of troop contributing countries. Financing has always been a critical issue. The approximately 6-7 billion dollars per year is hard enough to obtain, however even this seemingly gigantic amount shrinks in comparison

[8] DOBBINS, James: *A Comparative Evaluation of United Nations Peacekeeping*; Testimony presented before the House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight on June 13, 2007, http://www.rand.org/content/dam/rand/pubs/testimonies/2007/RAND_CT284.pdf (accessed: 28.05.2020.).
[9] United Nations – Peacekeeping fact sheet, available at: http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml (accessed: 28.05.2020.).
[10] United Nations Security Council, Res. 50. Adopted: 29. May 1948. Art. 6. (S/RES/50).
[11] For the effort shown in protecting international peace and security, the United Nations Peacekeeping forces were awarded a Nobel Peace Prize in 1988. http://www.nobelprize.org/nobel_prizes/peace/laureates/1988/press.html (accessed: 28.05.2020.).
[12] GHALI, Boutros-Boutros: An Agenda for Peace – Preventive diplomacy, peacemaking and peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, On: 17 June 1992 (A/47/277), para 34.

with the world's global expenditure on arms, which exceeds it approximately 200 times.[13] Analysts therefore raise the question of how effective peacekeeping can be if it can muster 0.5% of the global expenditure on arms. The lack of clear and well-defined mandates proved to be another setback for peacekeeping missions. The rules on whether or not to use force, what the expectations from the mission are would be instrumental in achieving success.[14]

Besides overwhelming successes, peacekeeping faces great challenges as well, like the lack of funds, manpower, and attention of the international community or clear mandates. However, among the myriad of political and financial challenges, the lack of responsibility in peace operations stands out, because it seriously damages the image and public confidence in peacekeepers and the UN in general, thereby jeopardizing the United Nation's goals of maintaining international peace and security.

1.3.2. Black stain upon the blue helmet – SEA in peace operations

The general notion of responsibility has several aspects. In the thesis, the scope of the research is limited to responsibility related to crimes of sexual nature, while notions such as managerial, command, financial and moral responsibility will only be tacked where it comes into direct contact with SEA. Sexual exploitation and abuse can be labelled as the black stain upon the blue helmet, which is threatening to undermine the noble role played by a vast number of UN peacekeepers since the 1940's which presents the international community with a heavy dilemma: what if the very people who were sent to bring peace to zones engulfed by conflict are the root of new ones? What if some of these people are responsible for crimes that are penalized by the vast majority of criminal codes – albeit in a different manner - on Earth? So far the international community has not been able to address the issue in its entirety and failed to provide an adequate answer.

It is the interest of the international community that peacekeeping remains a valuable tool to protect international peace and security. However, at present the UN's reputation is stained by scandals of sexual exploitation and abuse committed by some of its peacekeepers. The damaged reputation and broken trust that may result from the wrongful acts committed during peacekeeping missions can have serious detrimental results. It can undermine the credibility of the UN causing irreparable harm to the organization's reputation and hinder the

[13] http://www.un.org/en/peacekeeping/operations/partnerships.shtml#partners (accessed: 06. March 2015.).
[14] Comprehensive review of the whole question of peacekeeping operations in all their aspects, 21 August 2000, United Nations Security Council and General Assembly (A/55/305-S/2000/809). Hereinafter: Brahimi report, paras 48, 61.

success of the mission by alienating the very population the organization strives to defend. Therefore it reduces the UN's ability to carry out its mission in bringing about international peace and security.[15]

News of outrageous conduct by the peacekeepers like in the Democratic Republic of the Congo or Haiti caused the confidence in peacekeeping missions to plummet.[16] However, the situation is not as bad as it seems. Reports show that out of approximately 100-120.000 peacekeepers being deployed in the field, 50-130 cases of misconduct were reported per year according to the UN's own statistics. When translated to percentages it means around 0.04-0.1% of peacekeepers could potentially be responsible for misconducts.[17] Compared to the criminal activity in states this number is infinitely small. Nevertheless, all possible measures must be taken to strive to eliminate that number. Not even one incident of sexual misconduct is acceptable among peacekeepers. Unfortunately the UN's zero-tolerance policy, promoted by Secretary Generals Kofi Annan, Ban Ki-moon and António Guterres[18] presents a goal, rather than a result.[19]

The reason why scandals were so widespread and loud is because media attention is directed towards 'sensation' in a negative sense. Media outlets seem eager to report sexual crimes and failures in general on the part of the UN, however the multitude of successful missions and counter-initiatives bringing success remain untold. Of course this doesn't mean that a problem would not exist. On the contrary: the misconduct of peacekeepers during missions must be addressed by the UN and firm steps must be made to reduce the number of wrongful acts committed. One of the most remarkable of these steps - after a vast number of allegations surfaced in the Democratic Republic of the Congo (DRC) - [20,] was the 2005 report

[15] DURCH, William J., ENGLAND, Madeline: *Ending Impunity: New Tools for Criminal Accountability in UN Peace Operations,* Stimson Issue Brief, 2009, p. 6.
[16] The scandal started with a news article in the Independent magazine in 2005: https://www.independent.co.uk/news/world/africa/sex-and-the-un-when-peacemakers-become-predators-486170.html (accessed: 28.05.2020.).
[17] The latency of these conducts is unusually high due to the nature of the crimes in question. More on the issue of latency in Chapter 4. Statistics on alleged perpetrators: https://conduct.unmissions.org/sea-subjects (accessed: 28.05.2020.).
[18] Secretary-General Guterres has also expressed his commitment to enforcing the zero-tolerance policy regarding SEA as laid out by his predecessors after taking his oath of office. https://www.un.org/sg/en/content/sg/speeches/2016-12-12/secretary-general-designate-ant%C3%B3nio-guterres-oath-office-speech (accessed: 28.05.2020.).
[19] As of May 2020, out of 80 allegations in 2019, only 1 ended with jail sentence according to data available to the UN and shared by the organization. See also: https://conduct.unmissions.org/sea-actions (accessed: 28.05.2020.).
[20] NOTAR, Susan A.: *Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo*, American University Journal of Gender, Social Policy & the Law, Vol. 14, Issue 2, 2006, p. 414.

of Jordanian prince Zeid Ra'ad Al Hussein, who served as the special advisor of the Secretary General in the DRC in 2005.[21] Prince Zeid revealed in his report that there are serious problems – among others - in the prevention, alert systems and investigation mechanisms of peacekeeping missions and argued for a multidimensional change in the mentality concerning allegations of misconduct during peacekeeping missions.[22] For an organization whose Charter names the promotion of human rights as one of the organization's goals,[23] yet fails to call to account its own personnel for the violations of these very same rights is untenable.[24] Unfortunately, after 15 years of accepting his report, a lot of tasks remain undone.[25]

1.3.3. The legal quagmire

Who are the perpetrators and what can be done to call them to account? The main actors are the UN, the troop-contributing countries (TCCs) and the peacekeepers themselves. As it will be detailed in later chapters, the host state does not play a vital role in the equation since there are structural treaties eliminating its jurisdiction and in general, its capacity to act. The current legal background enables establishing the responsibility of states and international organizations, while most national criminal laws would make it possible to initiate criminal procedure against peacekeepers. In practice however, this is rarely the case. Peacekeepers are protected by legal immunity while states and international organizations are proving to be reluctant in bearing the burden of responsibility.

As mentioned before, there are three sides involved in the legal issue: the United Nations, the troop-contributing countries and the peacekeepers themselves. The legal status as well as the rights and obligations of each party are regulated by different parts of international law. The responsibility of states is detailed in the International Law Commission's 2001 The Responsibility of States for Internationally Wrongful Acts (RSIWA), which enables the theoretical normative framework for the establishment of state responsibility for the conduct of

[21] REHN, Elisabeth, SIRLEAF, Ellen Johnson: *Women, War and Peace: The Independent Expert's Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building*, Progress of the World's Women, Vol. 1. 2002, available at: https://www.unwomen.org/en/digital-library/publications/2002/1/women-war-peace-the-independent-experts-assessment-on-the-impact-of-armed-conflict-on-women-and-women-s-role-in-peace-building-progress-of-the-world-s-women-2002-vol-1#view (accessed: 28.05.2020.).
[22] United Nations General Assembly: Report of the Secretary General's Special Advisor, Prince Zeid Ra'ad Al-Hussein on 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' A/59/710 2005, (hereinafter: Zeid Report).
[23] Charter of the United Nations and the Statute of the International Court of Justice, San Francisco, 26 June 1945. Preamble, 2nd turn, Art. 1. Section 4.
[24] DURCH-ENGLAND, *ibid*, p. 5.
[25] STERN, Jenna: *Reducing Sexual Exploitation and Abuse in UN Peacekeeping – Ten Years After the Zeid Report*, Civilians in Conflict Policy Brief No. 1, 2015, p. 19.

peacekeeping personnel.[26] As of 2011 the International Law Commission has regulated the responsibility of international organizations in its Articles on the Responsibility of International Organizations (ARIO).[27] Unfortunately as both of these documents were accepted by UN General Assembly and the Assembly only advised states to take it into consideration these documents are not legally binding as international treaties. However, based on the widespread use of the RSIWA by the international community, it can be argued that it has become part of customary international law. On the other this cannot be said about the ARIO. Its reception by scholars of international law was quite mixed and the four years since its creation has not been sufficient to deem it as part of customary international law. It has successfully made the first steps and has been widely quoted by international and national tribunals. It can be stated here that peacekeepers are protected by total immunity under international law, as they are protected by both the Charter of the United Nations[28] and the 1946 Convention on the Privileges and Immunities of the United Nations.[29] Moreover the Status of Forces Agreements (SoFA) also ensures that during a peacekeeping operation criminal jurisdiction remains at the hands of the troop-contributing country.

The practice is therefore the following. Peacekeepers cannot be called to account but rather labelled *persona non grata* by the UN and repatriated.[30] The troop-contributing country can then decide to prosecute the person or not. There is scarce evidence that allegations of criminal activity or other wrongful acts are thoroughly prosecuted at home. Even though theoretically states are required to initiate proceedings as enshrined in the Memorandum of Understanding (MoU), state practice thereto varies greatly. As a result of this relative legal and *de facto* uncertainity, the UN and the troop-contributing country could theoretically both be considered responsible for the criminal conduct of peacekeepers, however the UN is protected by its immunity as set in the UN Charter and the ARIO does not handle jurisdictional questions concerning international organizations. Even the International Court is ruled out as it is the practice of international law - laid down by the International Court of Justice in the Monetary

[26] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' General Assembly Resolution 28 January 2002, A/RES/56/83. Art. 4.,5.,6.,47. (hereinafter: RSIWA).
[27] International Law Commission, 'Articles on the Responsibility of International Organizations' General Assembly Resolution 27 February 2012, A/RES/66/100. Art 6.,7.,33.,48.
[28] UN Charter, Art. 105, para (2).
[29] Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946. Art. 18. para (a).
[30] BURKE, Sarah Róisin: Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law, Leiden, 2014, p. 82.

Gold principle - that it has no jurisdiction in cases where not every party is involved. [31] As the UN cannot be sued at the Court, the ICJ can dismiss these claims based on the aforementioned principle. This means that the only party which can be responsible for a breach of international obligations is – in reality - the TCC. However, judicial practice is far from unified when it comes to establishing responsibility for multinational military operations. For some courts, namely the European Court of Human Rights (ECtHR) for a substantial amount of time it was sufficient to prove that the operation was organized under the auspices of the UN, therefore the acts committed during the mission are attributable to the UN since the organizations possesses "overall control" regarding the operation. Undoubtably, the ECtHR is observing the question from the side of attribution: in a simplified equation the party is responsible for a conduct, to which the act is attributable. The Court employed various attribution tests to decide the question. When the Court first faced the problem during the *Behrami* and *Saramati* v. France, Norway and Germany in 2007, it resolved the question with a simple answer: the UN had "overall control" over the mission in question as the authorization came from the Security Council and the operation was conducted in the interest of the United Nations, in order to protect international peace and security.[32] The judgment caused great uproar among the scholars of international law as according to this reasoning the international organization would always be held responsible and because of the lack of jurisdiction no one would bear responsibility. The 2011 *Al-Jedda* decision turned this solution upside down. In its judgment the court argued that the Security Council had no "ultimate control" over the acts of the officers of troop-contributing counties and therefore effectively it's the troop-contributing country that should be responsible for the conduct.[33] The decision merely stated another axiom and shifted responsibility to the states while granting impunity to international organizations. A different reasoning arose, when in November 2014 the Court pronounced judgment in the *Jaloud* case. Here the ECtHR argued that the troop-contributing country had retained "full control" i.e. criminal jurisdiction over the peacekeepers and this factor is the basis of its responsibility.[34] Once again, criminal jurisdiction always remains at the hands of troop-contributing countries, so this reasoning is insufficient to determine where responsibility lies. Much more remarkable are the decisions of certain courts

[31] Case of the Monetary Gold Removed from Rome in 1943. ICJ Reports, 15 June 1954. There are several other reasons disabling the jurisdiction of the ICJ, such as the simple fact that according to Art. 34. Section 1. of the ICJ's Statute, only states can be parties before the Court. From a legitimacy standpoint, it would also be highly undesirable for one of the main bodies of the UN to possess jurisdiction regarding the organization.
[32] Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway. (2007) ECHR application no. 71412/01., 78166/01.
[33] Case of Al-Jedda v. United Kingdom, (2011) ECHR application no. 27021/08.
[34] Case of Jaloud v. the Netherlands, (2014) ECHR application no. 47708/08.

in the Netherlands. The Supreme Court of the Netherlands found in 2013 in the *Nuhanovic* v. the Netherlands case that the Netherlands was responsible for certain actions of its military at Srebrenica, as government officials gave direct orders to the military officers in the field.[35] The verdict was reinforced in 2014 by The Hague District Court in the Mothers of Srebrenica v. the Netherlands, also stating that it may be feasible that the immunity of the UN be waived in certain cases.[36] Even though the case had reached an anticlimactic ending before the Dutch Supreme Court in 2019, they mark the frist steps from established legal theory as well as practice. These cases are remarkable because they show a shift towards a better understanding of the depths of international law by various tribunals as well as moving towards a legal regime, where states and international organizations can both be held responsible and can even provide practice on how to apply dual or multiple attribution for conduct in a multinational military operation environment.

On the one hand, it is becoming more and more apparent that the legal stance of establishing the responsibility of solely one party is becoming rather debatable. Further complicating the matter, other courts have different ideas concerning the applicable test of attribution. Therefore, there is no consensus on universal, regional or even domestic level most of the time on the application of norms. On the other hand, the teleological interpretation of ARIO must be evoked as the articles were compiled with the goal of that someone must bear the burden of responsibility so that 'shifting the bucket of responsibility' won't lead to impunity.[37] Novel solutions must bear these factors in mind when trying to remedy the problems caused by SEA.

1.3.4. Understanding contemporary issues

The current system is problematic of reasons and these issues start with the mandate established by the Security Council. Peacekeeping is not mentioned *per se* in the UN Charter, however, it can still be argued that it is based on the Charter following its 'spirit'. The major downside of this argument is that if someone refers to the spirit of the UN Charter now, it could mean fundamentally different things than what it meant 70 years ago - the voting in the SC was

[35] Case of Nuhanović v. the Netherlands. (2013) Supreme Court of the Netherlands Case no. 12/03324.
[36] Case of Mothers of Srebrenica v. the Netherlands. (2014) Hague District Court Case no. C/09/295247 / HA ZA 07-2973.
[37] GAJA, Giorgio: First report on the responsibility of international organizations, 2003. http://legal.un.org/ilc/documentation/english/a_cn4_532.pdf (accessed: 28.05.2020.).

envisaged otherwise, to provide an example. [38] The geopolitical situation and the legal framework have changed fundamentally during the last several decades.

Secondly, there is a considerable amount of uncertainity regarding procedure – i.e. the process of reporting, investigating and estavlishing responsibility on various levels (individual and international). [39] For instance, it is not evident who should be notified about the situation first. Is it the UN? Is it a violation of the national military code if the commanding officer reports the presumed crime to an international organization instead of the government of the TCC? If so, is the commanding officer required to abide by the UN's standard when it might contradict domestic criminal or military regulation based on which the individual might face judicial process in the TCC?

This raises a further concern: responsibility in peace operations is a mix of ordinary criminal law, military law and international law.[40] As an interdisciplinary subject, it lies between the aforementioned areas of law, and all of these fields must be taken into consideration before making assessments.[41] From the point of view of military personnel, peace operations are extremely valuable: the missions are often simple and the duration of service is always limited in time. It provides greater value than a military drill, as it is a live situation and there is the goal: helping out the local populace, who are actually in need of aid. Because of these factors, preparation for peace operations has often proven to be inadequate,[42] especially without a unified system of vetting and training. [43] The feeling that soldiers are not there as participants to the conflict, coupled with the knowledge of impunity for their actions is a dangerous concoction.

What are the reasons for this seeming impunity? Firstly, there seems to be a near complete immunity from prosecution for extraterritorial acts which applies to both military and civilian

[38] SOREL, *ibid*, p. 133.
[39] SOREL, *ibid*, p. 128.
[40] ROWE, Peter: *Maintaining Discipline in United Nations Peace Support Operations: The Legal quagmire for military contingents*, Oxford University Press 2000, Journal of Conflict and Security Law, 2000, Vol. 5, p. 45. Rowe lists four cases by which the military code of a nation can be violated: failing to discharge duty, failing to obey a lawful command, imperilling the success of any action or operation and assisting the enemy. Based on these four separate types of acts, it can be argued that it is not the military code, but the criminal code of the TCC that will apply, albeit with different process as the alleged perpetrators being members of the armed forces. See also: ROWE p. 47.
[41] ROWE, ibid. p. 45.
[42] ROWE, ibid. p. 46.
[43] LEWIS, Felicity: *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, Southern California Interdisciplinary Law Journal, Vol. 23, Issue 3, Spring 2014, pp. 598-599.

personnel. The International Criminal Court (ICC) is not likely not call the perpetrators to account, especially since the perpetrator often acts alone or in small groups, which does not reach the threshold for the ICC's jurisdiction regarding war crimes.[44] The only actor capable and allowed to prosecute according to the SOFA is the TCC, which is often reluctant to do so, while the host state is powerless to act. In order for the perpetrator to be prosecuted, it first needs to be repatriated. If the TCC does not repatriate the individual, the UN may ask the TCC repatriate. However, there seems to be reluctance from the UN's side to call for repatriation as factors not only legal considerations, but economic and political ones.[45] Another reason for the UN's reluctance is that there is a great deal of divergence in the criminal justice systems of the TCCs and some of them may only be able to provide a process that is deemed unfair or inadequate by international standards or even worse, there is a serious dysfunction in the system, e.g.: the frequent use of torture. All the while political reasons from the state's part inhibit these states to admit their shortcomings to the international community. From time to time states whose peacekeepers are involved in SEA may even cover up the crimes just to avoid damaging the state's reputation before the international community. [46]

1.3.5. A challenge to the current system?

After taking into account the abovementioned problems, it may seem that the whole system of peacekeeping is in jeopardy and that this Gordian Knot cannot be resolved by the UN or by the courts of the TCCs. Therefore, when faced with the situation of peacekeepers acting against their mandate and prey on the population they set out to protect, the legitimacy, the *raison d'être* of peacekeeping is challenged. Is peacekeeping still a valid tool for protecting the rights of individuals and the interests of the international community – as is its purpose - or has it become a liability which needs to be reformed at its very core?

Does this mean that peacekeeping presents a danger to international security? The answer to this question is definitely not. Peacekeeping has been an invaluable tool of the international community in handling dangerous situations and helping countries in a desperate state. However, it is not a system without errors and therefore must be strengthened and reformed. There are several important factors to consider when dealing with misconduct in

[44] For a detailed analysis on the gravity treshold of the ICC's procedure see: BURKE, *ibid*. pp. 198-211.
[45] In recent years, the conduct of peacekeepers from Burundi raised alarm, while the UN was perceived not to respond adequately to to the risen issues. See also: Code Blue campaign: https://static1.squarespace.com/static/514a0127e4b04d7440e8045d/t/5e501ffc3a2ab25c3d4a6fda/1582309390358/UN%27s_Deal_With_a_Dictator.pdf (accessed: 13. July 2020.).
[46] DURCH-ENGLAND, ibid. 7.

peacekeeping operations. First of all, an able preventive and alert system needs to be set up in order to handle allegations should they arise. The lesson of past operations shows that as allegations were investigated by the very people who are sometimes responsible it leads to dismissing these claims. An independent investigative and report organ has to be set up, with gender officers to reduce the latency of criminal conducts of sexual nature. This coupled with training programs for peacekeepers and victim support programs could prove to be a promising first step in reaffirming confidence in peacekeepers. Evaluation of the implemented changes and cataloguing the persistent challenges is also necessary for constant development. As a next step, the UN must be prepared to face these allegations however uncomfortable a situation this may result. The United Nations cannot be seen in the eyes of the international community as an organization which condones these misconducts. Last but not least, a firm political will is essential from both the UN and troop-contributing countries so that the prosecution of individuals charged with criminal activity is ensured. These steps are not easy and may very well create serious political tension; nonetheless, they are absolutely necessary so that peacekeeping can fulfil its role as an indispensable tool for protecting international security. Over the course of the last decade, the UN made promising steps towards these goals, however, the measures themselves and especially their implementation leaves room for improvement.

1.3.6. Relevance of the topic and further usage of the thesis

The issue being addressed in the current thesis is an incredibly complex one. This derives from the fact that it combines different aspects of everyday life, such as sociology, psychology, politics as well as various fields of law e.g. international law, criminal law and military law, to name a few examples. The thesis does not aim to provide a full diagnosis, and unfortunately is not capable of solving the phenomenon, however, it aims at analyzing the roots of the problem and the most relevant legal issues, while aiming to provide a complex set of remedies that could one day be implemented to the benefit of the system of peacekeeping operations and the international community.

Upon researching the subject, it has become evident that although acts of SEA are relatively well-documented by the media, there is a lack of coherent analysis and even fewer ideas on how to move forward.[47] It is the author's ambition that the current thesis can be used in university education for both law students and those interested in international relations.

[47] The most notable exception is Burke's 2014 study on the subject, which provides an accurate and well-written basis for all future research.

Since the curriculum at universities vaguely touches this subject the thesis could serve as groundwork for further reading for students or in seminars. It could also help raising awareness to the issue by promoting the work of peacekeeping personnel and the UN and facilitate talks on how to implement changes that one day may eliminate SEA in peace operations once and for all.

Chapter 2: Peace Operations

„The failings of some
should not make us forget
the magnificent work of others."
– Stephen Lewis

2.1. Peacekeeping – general limitations of the thesis

For the purposes of the current thesis, the scope of observation is limited to peace operations initiated or condoned by the Security Council of the United Nations. This limitation has several reasons. First of all, other multinational operations, such as NATO, utilize specific sets of rules. For the NATO, this is the NATO SoFA, which operates under distinctly different conditions concerning responsibility, waivers and legal aid.[48] The comparison between the NATO's and the UN's SoFA and their regulations could very well be the basis for another, separate thesis.[49] Peace operations launched by other international organizations, such as the African Union often cooperate with the UN in the form of joint missions, dividing the mandate or aiding the organization with the execution of the SC's mandate.[50]

2.2. Generations and Evolution

2.2.1. Genesis and Legal Background

It can be established that UN peacekeeping missions to have emerged out of nowhere soon after the establishment of the Organization. The reason for this is because the Charter still referred to a Military Staff Committee, which would have served as the extended arm of the Security Council controlling the pooled military contribution of member States. Nevertheless, the Military Staff Committee never came into existence because of Cold War hostilities, although there was a grave need for the United Nations to possess some sort of military capacity. The solution was based on customary law and a broad interpretation of the Charter by then

[48] Agreement between the parties to the North Atlantic Treaty regarding the Status of their Forces, (NATO SoFA) 19.06.1951. Updated: 14.10.2009.
[49] HÁRS, András: *Comparative Analysis of UN and NATO Status of Forces Agreements and Their Practical Implications,* In: Lucian, Bercea (ed.) Studii și Cercetări Juridice Europene = European Legal Studies and Research, Conferința Internațională a Doctoranzilor în Drept = International Conference of PhD Students in Law, Timisoara, România : Universul Juridic, 2017 pp. 533-541.
[50] Joint United Nations – African Union Framework for Enhanced Partnership in Peace and Security https://unoau.unmissions.org/sites/default/files/signed_joint_framework.pdf (accessed: 01.04.2019.).

Secretary-General Dag Hammarskjöld, who was the first to promote the deployment of the blue helmets during the 1956 Suez Crisis.[51]

It could be regarded as a prelude to peacekeeping when in 1947 the Security Council authorized the use of observers during the conflict between the Dutch and the Indonesians.[52] The archetypical 'Blue Helmets' were also used earlier in the 1950 Korean War, which is regarded, however, as the enforcement of the UN Security Council's coercive measures. It is likely the cause of the misconception that in everyday life peacekeepers are considered to be a UN army, and peace operations are classified as coercive measures, incorrectly. Peacekeeping arose out of necessity, to which the Organization has been forced to resolve to lacking the tools promised by the Charter to reach its goals. As a result, Secretary-General Hammarskjöld called peacekeeping a 'six and a half' competence of the UN, as it could be placed somewhere between the recommendations for peaceful settlement of disputes (found in Chapter VI of the Charter) and the obligatory coercive measures (found in Chapter VII of the Charter), if States ever decided to include it.[53] The role of the General Assembly regarding peacekeeping also deserves mention. Technically the powers of the GA concerning peacekeeping are enshrined in the Charter, however the Charter itself also doesn't mention peace operations explicitly, as any possible reliance on the Charter is merely academic logic and interpretation being applied. [54] As KAMTO put it: *'peacekeeping is not included nor excluded by the wording of the UN Charter, rather it has developed on its side note.*'[55] As a result, it is safe to conclude that peacekeeping developed via customary law, based on the needs of the international community as dictated by the demand for international peace and security and the UN as it has searched for ways to improve upon its arsenal in fulfilling its primary purpose: the maintenance of international peace and security.

2.2.1.1. The Certain Expenses Case of 1962 – Advisory Opinion by the ICJ

[51] The first operation that was considered to be a peacekeeping mission was established even earlier, 1948 and was tasked with supervising the peace-process in the Middle-East (UNTSO).
[52] KOOPS, Joachim A. – MACQUEEN, Norrie – TARDY, Thierry – WILLIAMS, Paul D.: *The Oxford Handbook of United Nations Peacekeeping Operations*, Oxford University Press, 2017, p. 114.
[53] TISOVSZKY, *ibid*, p. 18.
[54] UN Charter Articles 10, 11, 14 and 35.
[55] KAMTO, Maurice: *Le cadre juridique des operations de maintien de la paix des Nations Unis*, International Law Forum de droit international, Vol. 3, 2001. p. 99.

The International Court of Justice cleared some of the confusion concerning the legality of peace operations in its advisory opinion 'The Certain Expenses' case of 1962.[56]

The main line of logic applied by the Court was the following. Taking action in the three most serious scenarios (threat to peace, breach of peace, aggression) remain the sole prerogative of the Security Council, while the Secretary-General and the General Assembly retain their competences as detailed in the UN Charter but neither can take competences from the Security Council. [57] As peace operations are exceptionally expensive (compared to the UN's budget and not compared to waging war in general), it is not negligible to find adequate legal grounds for these actions. According to the Court peace operations wouldn't incur *ultra vires* expenses, but treated as the expenses of the Organization. In the ICJ's own words:

'As the United Nations Charter included no procedure for determining the validity of the acts of the organs of the United Nations, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council adopted a resolution purportedly for the maintenance of international peace and security and if, in accordance with such resolution, the Secretary-General incurred financial obligations, those amounts must be presumed to constitute 'expenses of the Organization'. ' [58]

The Court's reasoning can be interpreted the following way: if the expenses are incurred in order to fulfil the purpose set out in the Charter, then the SC has had the jurisdiction to enable those actions and incur necessary costs.

Regarding UNEF, the Court noted:

'As regards UNEF, the Court recalled that it was to be set up with the consent of the Nations concerned, which dismissed the notion that it constituted measures of enforcement. On the other hand, it was apparent that the UNEF operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and maintain a peaceful settlement of the situation. The Secretary-General had therefore properly exercised the authority given him to incur financial obligations; the expenses provided for by such obligations must be considered 'expenses of the Organization'.' [59]

[56] Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151. (hereinafter: ICJ Certain expenses case).
[57] UN Charter, Art. 10, 11 para (2), 12 para (1).
[58] ICJ Certain expenses case, p. 62. para (1).
[59] ICJ Certain Expenses case, p. 62. para (3).

With its advisory opinion the Court created an apparent clarity in separating peacekeeping from peace enforcement, a fundamental difference that will be addressed later in the thesis.[60] It has to be noted however that should the situation deteriorate, the Council would retain the option to change the mandate of the mission from a peacekeeping-observer nature to that of peace-enforcement or recalling peacekeepers altogether and use the 'coercive-fist' of the UN.

2.2.2. Terminology and the Generational Approach

As Kenkel notes regarding terminology – adopted by the author of the thesis as well – 'peace operations' serves the most apt term used to define the phenomenon. Since SG Boutros-Boutros Ghalis separation of the different aspects of peace operations, 'peacekeeping' in its current sense encompasses a fraction of the UN's peace-related activities while leaving peacebuilding and peace enforcement out of the scope of observation. In military jargon, an 'operation encompasses a multitude of activities whereas a 'mission' is much more limited or narrow scope of tasks'.[61] Therefore the correct terminology thereafter will be 'peace operations'. [62]

Regarding the generational distinction of peace operations Kenkel separates five different generations:

- 1st generation: traditional peacekeeping which evolved during the Cold War period, utilizing the so-called 'holy trinity' of principles: neutrality and impartiality, consent and the use of force in self-defence only.[63]

- 2nd generation: civilian tasks becoming prevalent. With the end of the Cold War peace operations were applied in a number of different situations which also increased interaction with local population.[64]

[60] BELLAMY, Alex J. – WILLIAMS, Paul D.: *Understanding Peacekeeping*, Polity Press, Cambridge, Second Edition, 2011, pp. 214-215.
[61] KENKEL, Kai Michael: *Five Generations of Peace Operations: from the 'thin blue line' to 'painting the country blue'*; Revista Brasileira de Política Internacional; Vol. 56, Issue 1, p. 122.
[62] The most appropriate Hungarian translation would be „békeműveletek". However, the current expression used by both layman and most academics remains „békefenntartás", which as explained above is not a bad expression *per se*, but it does not cover the entirety of actions carried out during a peace operation. (source: SZENES, Zoltán: A HIPPO-jelentés; 2016.05.11. – Békefenntartás-konferencia, Szolnok)
[63] KENKEL, *ibid*. pp. 123-127.
[64] KENKEL, *ibid*. pp. 127-129.

- 3rd generation: peace enforcement marked by examples of Somalia, Rwanda and Bosnia – less successful operations leading to the Brahimi-report and the emergence of R2P norms being incorporated in the mandate.[65]

- 4th generation: peacebuilding from 1999 onwards with the extreme form of which is transitional government supported by the UN (such as in Haiti, Kosovo and Timor-Leste).[66]

- 5th generation: hybrid missions characterized by the application of wider use of force, continuous cooperation with regional organisations, deployment of military, police and civilian personnel at the same time as well as reliance on Chapter VII of the UN Charter.[67]

While Kenkels typization is convincing, it might not be ideally suited for this paper. Firstly, peace enforcement cannot be categorized as a peace operation as it is in nature more akin to coercive action by the Security Council. Hybrid missions and peacebuilding operations are essentially the same as the military component, reliance on Chapter VII and a possibility of an increased use of force serve as necessary deterrents and guarantees that peacebuilding via police and civilian personnel can take place with the assistance of regional international organizations. These are two sides of the same coin that take place one after the other currently and also prove to be invaluable and inseparable to another as without a military component there is no weight and a sense of security during the operation while without peacebuilding there is a plausible threat of relapse into hostilities. Truth rests in the eye of the beholder in this matter as a typisation with the correct analysis and reasoning provides more variance to scholarly literature on the one hand while it doesn't decrease the value of other interpretations on the other.

2.2.3. First Generation (1948-1990)

The first missions were built on three core principles: neutrality and impartiality, consent, and use of force in self-defence only. According to the principle of neutrality and impartiality, peacekeepers have no interest in the conflict, they do not support the objectives of either side, nor do they interfere with the affairs of either side. Their sole purpose is to close the

[65] KENKEL, *ibid*. pp. 130-132.
[66] KENKEL, *ibid*. p. 133.
[67] KENKEL, *ibid*. pp. 135-136.

conflict as soon as possible and to minimize human casualties and material losses. The principle of consent requires the permission and support of the receiving States and all parties involved prior to the deployment of troops. As such, the UN cannot force its help on the State, but the State must request the UN to initiate the mission. The use of force in self-defence initially meant that peacekeepers could only return the fire, meaning that they had to wait until they, their vehicle or camp were fired on and were able to return fire after that point to repel the armed attack. This extremely restrictive interpretation later caused a substantial amount of problems to the Organization until the contents of the principle were revised by the end of the 1990s. While extrapolating on the principles, Sir Brian Urquhart, long-time under-secretary for peacekeeping operations listed the following as core values and prerequisites to a successful peace operation: consent of the parties, continuing support of the Security Council, clear and practicable mandate, nonuse of force except as a last resort and in self-defence, the willingness of troop contributors to furnish military forces and the willingness of member states to make available requisite financing.[68] Out of these six main points the financial support and personnel contribution would serve as prerequisites for the establishment of peace operations, while the clear mandates and the continuous support of the SC would be highlighted as necessary requirements after the less-successful peace operations during the 1990's. The current holy trinity of principles: neutrality and impartiality, consent and the limited use of force are to be understood together with the prime origin being the consent. When seeking to acquire consent, not only the receiving state(s) must agree to the terms of the operation, but all relevant power brokers in the area. In case there are multiple actors involved in the armed conflict it is not merely prudent, but necessary to obtain the implicit consent of all parties. If the consent is given and the mandate is established in a manner acceptable to the parties, long-term success can be reached just as UNDOF proved which oversaw disarmament in the Middle-East with relative success between 1974 and 2005, building on the support of both Israel and Syria. In cases however where the parties are changing by the hour, or in practically civil-war like situations alter on, such as UNOSOM I and II as well as UNITAF in Somalia 1992-1995, where consent was not given, the UN could feel losses mounting and the goal of the mandate jeopardized. The example of Somalia can also be used to underline a key intersection between consent and the principle of neutrality and impartiality. If prior consent is not given or the mission loses the consent after deployment, peacekeepers will no longer be treated as the support of the

[68] TISOVSZKY, *ibid*. p. 37.

international community lending a hand for the areas and population in need but rather as a foreign intervention taking on the role of another party to the conflict.

The Commander-in-Chief in all peace operations is technically the Secretary-General of the United Nations, but as a civilian person without military expertise, the Secretary-General, while maintaining the nominal leadership, in practice, gives way to the force commander or special representative. His nominal leadership also means he can appoint and discharge the force commander and the special representative at will. The organization of operations, starting from contacting the host State through the synchronization of contributing States' forces, to the providing of the conditions of the mission, is carried out by two departments of the Secretariat. Formerly known as the Department of Field Support and the Department of Peacekeeping Operations, these two units responsible for peace operations were restructured and starting in 2019, the two units handling operation-related matters are Department of Peace Operations (DPO) and the Department of Political and Peacebuilding Affairs.[69] The goals of the mission are defined in the mandate, which is compiled by the Security Council. Currently, more than a dozen operations are in progress, focusing mainly on the Middle East and Africa, but are not limited to those regions. There are several long-ongoing missions currently in operation, which have been set up decades ago, such as the UNFICYP in Cyprus since 1964, and the UNMOGIP in India and Pakistan since 1949. The contribution of each State is different to peace operations. Generally speaking, States with developed economies are more likely to provide funds, while developing states contribute by providing manpower, although the exact scope of contribution varies greatly.[70]

In these early operations, the primary task of peacekeepers has been twofold: observing peace insofar as the maintenance of existing truces and ceasefires went and reporting any potential breach to the Security Council and keeping the peace as a buffer between belligerents. Armed with light weapons and equipment from the contribution of UN member states peacekeepers during the first generation of peace operations were not renowned of their military prowess but rather acted as deterrent to the parties of the conflict by indicating that the watchful eyes of the international community are present and now what is happening in the region. It has to be noted however, that the mere presence of peacekeepers have not always

[69] Organizational structure of peacekeeping-related departments at the UN since 1 January 2020: https://peacekeeping.un.org/sites/default/files/dppa-dpo-org-chart-2019.pdf (accessed: 13 July 2020).
[70] For instance, Vietnam has decided to contribute only from 2018 with a medical team. See also: https://peacekeeping.un.org/en/historic-arrival-vietnam-and-united-nations (accessed: 13 July 2020).

been sufficient to bring the parties to a negotiating table, let alone guaranteed the success of negotiations.[71] A telling example is how several of the peace operations established in this period still operate to this day as there is a palpable need from all of the parties involved to be separated by an international force.[72]

The first generation of peace operations (1948-1990) had a precisely defined mandate with a narrow set of functions. They were usually given the task to monitor ceasefire agreements, and their job was to promptly and precisely inform the Security Council in the event of a breach of the ceasefire or truce. They operated with a very small number of troops, forming small contingents with only a few dozen or a few hundred personnel in each. Strict compliance with the core principles, in particular the requirement of the use of armed force in self-defence only, was adhered to. Actual armed clashes occurred rarely.[73] The abovementioned missions in Cyprus and on the border of India-Pakistan have proven to be able to preserve lasting peace. It reflected the acknowledgment of the international community that the UN peacekeeping forces had received the Nobel Peace Prize for their commendable work in 1988.

2.2.4. Second Generation (1990-2000)

During the first generation of peace operations the tensions of the Cold War and the hostility of the two power blocs did not allow the Security Council to fulfil its role.[74] As a result the first generation peace operations can be characterised by a clear and simple mandate issued by the Security Council or in special cases by the General Assembly (such as in the case of UNEF – 1956); consent of the parties involved; use of force in self-defence only (except during the Congo operation 1960-1964 – more on the special status of the mission later in the Chapter); voluntary contribution by member states, organization by the Secretariat and overseen by the Secretary-General who appoints the leader of the mission and with the Secretary-General reporting to the Security Council.[75]

The status quo changed rapidly with the dissolution of the Soviet Union in 1991 and an unprecedented unity descended on the Council for the first time in its history. New conflicts supplied the UN with necessary proving grounds on how it envisions its international

[71] TISOVSZKY, *ibid*. p. 36.
[72] E.g.: UNFYCIP from 1964, UNTSO from 1948, UNDOF from 1974 or UNMOGIP from 1949.
[73] TISOVSZKY, *ibid*. p. 18.
[74] PRANDLER, Árpád: *Az ENSZ szerepe a konfliktuskezelésben és a békefenntartásban - A Biztonsági Tanács* p. 31.
[75] PRANDLER, *ibid*. pp. 32-33.

commitments in the new world order with internal conflicts erupting in Angola, Nicaragua and El Salvador among others. New types of conflicts brought new tasks, and gradually, humanitarian goals were not only incorporated in the mandates but served as the backbones of a new generation of Security Council resolutions.[76] Another non-negligible cause of the UN's sudden burst of activity was the so-called CNN-effect, which had profound ripples in the work of the UN and especially peacekeeping.[77] Therefore, it was not a surprise that as media pressure mounted, the UN felt obliged to act. Contrary to popular belief, not every one of the early second generation peace operations was unsuccessful. Some early examples of successful multi-dimensional efforts include Namibia, Cambodia, Mozambique, El Salvador where the UN successfully completed arduous tasks.[78]

During the euphoric mood after the end of the Cold War, the international community came to the false conclusion that as peacekeeping was used with success before, perhaps it can provide remedy for contemporary challenges. In reality, the international community attempted to use the simple tool which had been the first generation of peace operations in a vastly different, complex environment. Operations belonging to the second generation (1990-2000) were often deployed in civil war-like situations without providing adequate means, but expecting peacekeepers to bring the same high efficiency they could reach previously in simple observation missions. The insoluble disagreement between the expectations and opportunities led to the disasters of the infamous Rwandan, Bosnian and Somali missions. Nonetheless, there were also remarkable initiatives in this era, such as the UN Secretary-General Boutros-Boutros Ghalis Agenda for Peace in 1992, which considered the peace operations as a complex, multi-tiered and long-lasting process.[79] In his understanding, *preventive diplomacy* must be used to avoid conflicts before the parties come to blows and to reduce the chance of an escalating crisis. If this does not hinder the outbreak of violence, peace-making follows, per Chapter VI of the UN Charter the Security Council would help to restore peace with its recommendations by calling upon the parties to negotiate or use any other desired dispute resolution mechanic. *Peace-making* can be understood as a soft pressure by the international community signalling parties that the Council is watching the events unfold and its members are highly against the escalation of violence. In case this does not lead to success, then the Security Council may

[76] PRANDLER, *ibid*. pp. 33-34.
[77] THAROOR, Shashi*: The Future of Peacekeeping*, The Brown Journal of World Affairs, Vol. III., Issue 1. Winter/Spring 1996, p. 87.
[78] THAROOR *ibid*. p. 87.
[79] GHALI, *ibid*. para 74.

resort to *peace enforcement*, using force. As the strongest card up the Council's sleeve, coercive action – and especially its armed variant – must only be used as a last resort, in case the Council has no other tools left to help the parties resolve the situation. Should peace be reached, traditional *peacekeeping* can be used to separate parties and prevent armed hostilities from recommencing with the consent of the parties relying on truce-supervision and monitoring the situation.[80] Finally, the most time-consuming phase comes with *peace-building*. The essence of this last phase occurs when the United Nations provides assistance in reconstruction, be it the restoration of public services, law enforcement, or infrastructure of the devastated area. [81]

Secretary General Boutros-Boutros Ghalis idea, however, has been criticized for many over the years, primarily because it does not make a clear distinction between coercive measures and peacekeeping, thereby blurring the boundary that was constantly reaffirmed by a strict adherence to the core principles of first generation operations.[82] Some of the most prevalent cases when peacekeeping has exceeded the its original purpose include: UNUSOM I. 1992-1993 Somalia, UNOSOM II. 1993-1995 Somalia.[83] Extending the use of force lead to blurring the line between peacekeeping and peace enforcement and as Tharoor noted: „mixing peacekeeping and peace enforcement is an effective and at the same time dangerous example".[84] Indeed, there are plenty of examples when the parties to the conflict didn't consider the UN to be an impartial organization and rather disregarded even the most basic norms concerning the dignity and safety of its agents.[85] The second generation of peace operations are marked by unclear frontlines, parties that are difficult to identify and therefore acquire their consent as well as reluctance and fatigue by UN member states to provide support.[86] It was also during the late second and early third generation peace operations that the operations donned a more complex visage. By taking on additional roles and functions such a combination of political and humanitarian activities, supervising elections, training local police, establishing civilian

[80] KOOPS – MACQUEEN – TARDY - WILLIAMS, *ibid*. pp. 48-49.
[81] GHALI, *ibid*. paras 15, 21, 49.
[82] BERTRAND, Maurice: *The UN as an Organization. A Critique of its Functioning*, European Journal of International Law, Vol. 6., Issue 3., 1995, pp. 352-353.
[83] MUBIALA, Mutoy: *Le Respect du Principe de Non-Intervention par les Forces de Maintien de la Paix des Nations Unis* (Cas de l'ONUC et l'UNOSOM), 1995 p. 163.
[84] THAROOR, *ibid.* p. 91.
[85] ERDŐS, André: *A békefenntartó műveletek fejlődése* in: Szenes Zoltán (ed.): Válságkezelés és békefenntartás az ENSZ-ben, Nemzeti Közszolgálati Egyetem Tanulmánykötet, 2013. p. 28.
[86] ELIASSON, Jan: *Humanitarian Action and Peacekeeping*, in: OTUNNU, Olara A., DOYLE, Michael W.: Peacemaking and Peacekeeping for the New Century, Rowman and Littlefield Publishers, 1998, pp. 203-204.

institutions, reconstruction of state and society, peace missions have evolved into something similar to what we currently witness.[87]

2.2.5. Third Generation (2000-)

„We can move beyond traditional
peacekeeping without necessarily moving
beyond traditional peacekeeping principles."

-Shashi Tharoor, Under-Secretary-General, 1996,[88]

As early as 1992 the UN felt the demand to implement multi-dimensional peace operations as a response to the changing needs. The experience of the early 1990s have shown that an operation that is coercive in nature and therefore lacks the consent of the parties involved rarely succeeds. Operations with a negative evaluation in scholarly literature, such as the ones in Somalia, Bosnia and Rwanda have prompted the emergence of the expression: 'Mogadishu-line' which formally separates operations conducted with the consent of the receiving state (and most of the parties) and one without such consent provided.[89] The UN aims to respect and not to cross that line again and at the same time tries to involve as many local, regional and international actors as possible so as to provide wide-legitimacy to its operations.

A systematic evaluation of peace operations arrived with the Brahimi report, released in 2000, which paved the way for this new type of operation by being the first comprehensive review of peace operations by a group of experts for the United Nations and the international community. The report envisioned a clear, realistic and feasible mandate as a precondition for the mission, coupled with continuing support from the Security Council as well as from contributing states, and more precise co-ordination between commanders and representatives in the field and the New York headquarters. All operations must receive sufficient military, financial and institutional background relative to the needs of the operation - the report finds. The Brahimi report also considered the main task of peacekeeping to be the prevention of conflict and to make sure a conflict does not re-emerge following the departure of peacekeepers. Efforts to reduce the number of crimes committed in the course of the mission and responsibility

[87] ELIASSON, *ibid*. p. 204.
[88] THAROOR *ibid*. p. 88.
[89] ROSE, Michael: *The Bosnia Experience*, In: THAKUR, Ramesh (ed.), *Past Imperfect, Future UNcertain: The United Nations at Fifty*, Macmillan/St. Martin's Press, London/New York, 1998, p. 139.

for the acts committed was underlined for the first time. The Secretariat endeavoured to incorporate the findings of the report during current operations to a great extent. [90]

Third generation peace operations could be best characterized by the epithet: robust. A 'robust' peace mission simultaneously means the presence of a large number of military, police and civilian personnel, active involvement of regional organizations, States and NGOs, as well as the effective implementation of complex tasks. Archetypes of "robust" operations are for instance Haiti, operations in the Sudan - South Sudan - Darfur region, Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) among others. Their complex mandates are also specifically targeting post-conflict reconstruction, diverse interaction and trust-building with local population, a use of force not only in self-defence but in order to protect civilians or the mandate itself and a heavy reliance on cooperation with regional international organizations such as the AU, EU and the OAS.[91]

As mentioned above, a telling example of the UN's holistic approach can be traced by looking at the Sudan-South Sudan-Darfur regions. Currently three separate operations are being conducted in the region, one from 2007 (UNAMID) and two from 2011 (UNMISS, UNISFA). Although technically they are maintained as three distinctly differently operation missions they can still be understood as the response of the international community to a single regional problem: the compex etnic, religious and socio-political conundrum in the wider Sudan region. The paradigm shift can be seen clearly from the fact that in these three missions approximately 30-40.000 peacekeepers operate, a number previously almost unheard of in previous practice of the Organization.[92] Still ongoing first generation operations are manned with several hundred or little more than a thousand personnel (UNFICYP: 800-1000,[93] UNTSO: 350-400,[94] UNMOGIP: 40-120[95]) which are dwarfed by the current large number of

[90] Brahimi report, paras 6, 10, 15, 29.
[91] The reasons why the extremely limited use of force has been enhanced over the course of the last three decades is detailed in the next subchapter.
[92] Numbers fluctuate as UNAMID operate with 6-20.000 personnel, UNISFA maintains 4-5.000 while UNMISS possesses approximately 7.900-19.500 troop strength. Source: UN websites of the missions and related Security Council authorization. https://peacekeeping.un.org/en/mission/unamid; https://peacekeeping.un.org/en/mission/unisfa; https://peacekeeping.un.org/en/mission/unmiss (accessed: 13 July 2020).
[93] UNFUCYP, Cyprus, mission fact sheet: https://peacekeeping.un.org/en/mission/unficyp (accessed: 13 July 2020).
[94] UNTSO, Middle-East, mission fact sheet: https://peacekeeping.un.org/en/mission/untso (accessed: 13 July 2020).
[95] UNMOGIP, India-Pakistan, mission fact sheet: https://peacekeeping.un.org/en/mission/unmogip (accessed: 13 July 2020).

peacekeepers deployed in a single zone or operation (MINUSMA-Mali: 15-16.000[96], MONUSCO-DRC: 18-21.000[97], MINUSCA-CAR: 13-15.000[98]).

Third generation missions are characterized by a return to the core principles, but it was not possible to return to the original form. For instance, it has become clear that use of force purely in self-defence cannot be maintained. Instead, the mandate is currently formulated in such a manner, that peacekeepers are allowed to use their weapons to protect the civilian population. Another possibility – used extensively since 1999 - is to use force 'in the defence of the mandate'. On the one hand, 'use of force for the protection of the mandate' can serve as a powerful flexible tool to make sure peacekeepers do not remain incapable observers, but the risk lies in the fact that it also broadens the interpretation to unknowable depths, which may create problems in the long run if the leadership of the mission is lacking. These new types of missions provide active help to the governments in conducting elections, ensuring a fair environment, taking part in the training of police forces, judges and prosecutors, providing the State with economic advice and development opportunities as needed. As a result, these robust operations are long-term missions, with an average duration of 10 to 14 years. A recent positive example is Liberia and Côte d'Ivoire, where peacekeepers aided the States to hold two successful, democratic elections, and when the State concerned and the United Nations were having the impression that the country is sufficiently stable, they gradually began to recall blue helmets.[99] However, a small number of observers remain in both countries, constantly checking whether the State retains its stability and does not sink back to the previous strife.

2.2.6. Future prospects

Despite obvious and profound advancements there are certain fields in need of reform. Generally speaking, there are still too many areas in need of aid or in several instances the UN's own decision-making mechanism or the lack of consent hinders the establishment of an operation. Furthermore, it doesn't help stability that financial contributions need to be renegotiated every year, nor the fact that peacekeepers might not receive adequate training by their sending states prior to deployment. Coordination between headquarters in New York and

[96] MINUSMA, Mali, mission fact sheet: ttps://peacekeeping.un.org/en/mission/minusma (accessed: 13 July 2020).
[97] MONUSCO, DRC, mission fact sheet: https://peacekeeping.un.org/en/mission/monusco (accessed: 13 July 2020).
[98] MINUSCA, CAR, mission fact sheet: https://peacekeeping.un.org/en/mission/minusca (accessed: 13 July 2020.).
[99] For the latest figures on UN peacekeeping, see Annex 1. For details on how a UN peace operation can bring change to a post-conflict environment, see Annex 2 (Côte d'Ivoire) and Annex 3 (Liberia).

personnel on the field can be difficult, especially since the interests of the UN and the troop-contributing countries may not align. As we will see in the following subchapter, figuring out the contents of the mandate might prove to be a challenge as well. Using as limited force as possible while providing protection for local civilians while also deterring local militants is not an easy feat. The concept of negative peace where the use of force is monopolised by a legitimate actor – in this case the peace operation mandated by the UN SC – serves as a principle adopted by the UN in recent missions such as the Ivory Coast or Liberia.[100] The goal is easy enough to understand but still complex to execute: undermining the spoiler's strategy by trust building with the local population, an act that requires massive interaction with locals and one that is prone to be abused. However, strengthening the UN's capabilities and its understanding of local circumstances is vital.[101] Last but not least, the topic of the thesis also raises the question: how can this drastically improved volume of interaction with the local population be maintained while eliminating the option for peacekeepers to be engaged in criminal acts of sexual nature? Or if the goal of prevention cannot be realistically reached in every scenario, there must be some form of accountability meted out for the perpetrators and justice for the victims.

While all contributors nominally agree that the abovementioned points need to be addressed, their reaction to the type of response provided is not nearly as unified. Initial fears of the UN in becoming an international organization capable of waging war on its own not founded; few hundred international civil servants working at the DPO lent by member states to 2 years of service in general, with an annual budget to be gathered every two years doesn't cut it for an organization aiming at monopolizing *ius ad bellum* from a realistic point of view.[102] On the other hand, increase in global trade also brings an increase in firearms; massive amount of non-state actors such as warlords involved in a situation who won't provide consent for an international military operation as they are interested in instability where they can preserve their own power serves as another barrier for the UN.[103]

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[100] https://medium.com/@UNPeacekeeping/the-success-of-peacekeeping-in-liberia-9efd440d19d (Accessed: 21.12.2019.).
[101] NADIN, Peter: *Peace Support: A New Concept for UN Peacekeeping*? (source: online https://unu.edu/publications/articles/peace-support-a-new-concept-for-un-peacekeeping.html) (Accessed: 22.08.2019.).
[102] FULCI, Francesco Paolo: *The Future of Peacekeeping*; The Brown Journal of World Affairs, Vol. III. Issue 1. 1995-1996 Winter; p. 51.
[103] ROTTENBERGER, Nikolaus: *Challenges of UN Peacekeeping in the 21st century*, In: Markéta Novotná (ed.): XVIIth International Conference of Young Scholars – Collective Memory and International Relations, Vysoká škola ekonomická v Praze, Nakladatelství Oeconomica, Prague, 2013, p. 179.

A prognosis for the future by several scholars includes an increased reliance on and cooperation with regional organisations such as NATO or AU.[104] Challenges concerning manpower are accentuated by the fact that western States with highly trained and equipped elite special forces are lacking the political will to contribute, while developing countries with masses of recruits who are often poorly trained and ill-equipped but made ready for the UN for a certain amount of payment raise issues of their own.[105] Some of the ways to improve the UN's military capabilities would include relying on regional organizations, PMSCs, or even single states.[106] One of the longest-standing *de lege ferenda* ideas is one of a so-called 'UN legion'.[107] According to the initiative, peacekeepers would be recruited individually which would lead to enhanced vetting and psychological background check, minimised risk of unwanted state influence, true neutrality and impartiality in the conflict, etc. Counterarguments can also be raised however primarily on the part of being realistic, as the proposal would be extraordinarily expensive, time and energy consuming and most of all, not supported by the TCCs. According to its critics, too much power would be centralized in the hands of the UN. For the proponents of a strong, UN-lead world the idea of a UN-legion or individual troop-recruitment in general would be a desirable outcome for the far future, however it is not realistic under current circumstances. It is also assumed that civilian component becoming more prominent, while western states will continue to withdraw while developing countries will contribute more.[108] Region-wise, a decreasing role of the central-Asian region and an ever-increasing importance of Africa stand as a confirmed prognosis of the last few years.[109]

From 2013 to 2020 it can be seen that some of the previous assumptions have been proven correct, albeit to different extent (role of PMSCs increased only slightly, while the civilian component of operations was enhanced dramatically). However, the role of states in peace operations are not as simple as their decision to contribute changes on the political inclination of their respective governments. For instance, President Obama pledged to double US contribution during the 2015 Peacekeeping Summit to double the manpower contribution of the US, only to be reversed by the announcement by President Trump in 2017 to halve all

[104] FULCI, ibid. pp. 52-53.
[105] ROTTENBERGER, ibid, p. 183.
[106] ROTTENBERGER, ibid, p. 184.
[107] THAROOR, ibid, pp. 92-93.
[108] VAN DER LIJN, Jair: *The Future of Peace Operations*; Netherlands Institute of International Relations 'Clingaendael'; Scenarios Paper, 2013. p. 4.
[109] GOWAN, Richard – GLEASON, Megan: *UN Peacekeeping: The Next Five Years*; report by the New York University Center on International Cooperation Commissioned by the Permanent Mission of Denmark to the United Nations; 2012, pp. 20-22.

US financial contribution in the future. While not mutually exclusive ideas *per se*, the two statements clearly show the differing attitude of leaders on other ends of the political spectrum of the same country towards an organization as seemingly neutral as the UN.[110]

2.3. Forming a definition

"A peacekeeping operation is not an army,
or a counter-terrorist force,
or a humanitarian agency.
It is a tool to create the space
for a nationally owned political solution."

- Antónió Guterres, UN Secretary-General, 2018

Peace operations by their nature are composite tasks often encompassing complex meaning. Having no written source and definition to rely several long-standing diplomats and scholars have come up with definitions of their own. In this sub-chapter the main elements of peace operations are going to be identified and hopefully an adequate definition can be coined as a result.

One of the very first to tackle – if not the exact definition, but the role of peace operations – was Secretary-General Dag Hammarskjöld who however only emphasized the *sui generis* nature of peacekeeping by calling it '*Chapter six and a half powers of the UN'*.[111] Decades later Secretary-General Boutros-Boutros Ghali expanded the notion by stating that not only peacekeeping in its narrow sense as observation missions, but preventive diplomacy, mediation and an integrated approach towards missions (peacemaking, peacekeeping, peacebuilding) while also bringing in the controversial element of his era, peace enforcement.[112] Both Secretary-Generals Ban ki-Moon and António Guterres have used peacekeeping in their annual reports in their own understanding.[113] An interpretation useful for them, but not exactly beneficial for later generations as the contents of peacekeeping are gradually changing as most

[110] Speech by President Barack Obama: https://obamawhitehouse.archives.gov/the-press-office/2015/09/28/remarks-president-obama-un-peacekeeping-summit, President Donald Trump on budget and peacekeeping: https://www.passblue.com/2019/04/29/trumps-strong-arm-cuts-put-un-peacekeepers-out-in-the-cold/ (both accessed: 21.12.2019.).
[111] BELLAMY – WILLIAMS, *ibid*. p. 84.
[112] GHALI, *ibid*. para 44.
[113] Ban-ki Moon: Partnering for peace: moving towards partnership peacekeeping Report of the Secretary-General, S/2015/229, 1 April 2015, António Guterres: S/PV.8407, 20. November 2018.

scholars agree that peace operations are taking on additional roles and changing their setup based on local circumstances and on the mandate provided by the Security Council.[114]

Of the relatively recent definitions, diplomat, scholar and Judge Prandler of the ICTY has coined a remarkable one:

'Peacekeeping is an activity for the purpose of maintaining international peace and security primarily consisting of observance, mediation or military action which is not included among enforcement measures encompassed in Chapter VII of the UN Charter, but goes further than dispute resolution mechanics detailed in Chapter VI. '[115]

Prander's definition is multi-faceted and aspires to contain the essence of peace operations while also highlighting its limits and difference from coercive action. The definition links peace operations to the primary purpose of the UN, the maintenance of international peace and security as peacekeeping evolved to solve the seeming impotence of the SC in fulfilling its elementary function. Influenced heavily by first generation peace operations, the observance part of peacekeeping is emphasized, while the enlargement of function seen in SG Boutros-Boutros Ghalis Agenda for Peace can be seen in the 'mediation' aspect of the definition insofar as it aims to help the SC with preventive diplomacy on the one hand and maintaining diplomatic channels for peaceful dispute resolution on the other. Still leaving room without specifying the circumstances of its application, Prandler mentions the possible coercive element as well. The author identifies with SG Dag Hammarskjöld's idea of a 'Chapter six and a half' approach while distinguishing peacekeeping from disputes resolution mechanics contained in Chapter VI of the UN Charter and coercive action by the SC encompassed in Chapter VII. It is a remarkably comprehensive approach to grasping the nature of peace operations, however it may not be adequate in 2019. As it is going to be shown in the next subchapter, designating peace operations as 'Chapter six and a half' competences of the SC is anachronistic, as nearly all mandates are issued invoking Chapter VII. The primary function of a peace operation is no longer mere observance, but a large number of humanitarian tasks ranging from providing food, water and aid supplies through maintaining security in the region to helping rebuild the conflict-torn areas through peacebuilding projects.

2.3.1. Coining a definition

[114] ELIASSON; NADIN, 2013: http://unu.edu/publications/articles/peace-support-a-new-concept-for-un-peacekeeping.html (accessed: 02.09.2019).
[115] PRANDLER, *ibid*. p. 32.; translation by the author of the thesis.

A peace operation is humanitarian assistance type of action aimed to diffuse the conflict and/or stabilize the region as well as to protect local population, based on the mandate issued by the Security Council while relying primarily on Chapter VII of the UN Charter, preferably with the consent of the host state and the other parties, with the use of force regulated in the mandate itself.

The definition coined by the author of the thesis emphasizes the vast array of humanitarian responsibilities handled by the operations while not neglecting the primary task: the maintenance of international peace and security in the form of peaceful resolution of conflict while controlling the given territory. A novel aspect is the Protection of Civilians (PoC) principle, which gained significance after the operations in Bosnia, Rwanda and Somalia as a key element incorporated into every mandate since the late 1990s. Nowadays scholars are in a relatively simple situation concerning the place of peacekeeping as mandates explicitly refer to Chapter VII of the Charter. As it will be seen later in the chapter, this does not make each and every operation a peace enforcement mission or a coercive action. It merely means that UN member states are obliged to acknowledge and cooperate with these operations.[116] The use of force as enabled in the mandate bears significant interest as the mandates vary regarding the contents of the norm, however on a general note, the use of force has been extended to encompass not only self-defence and the protection of civilians, but the enigmatically-worded: 'defence of the mandate' as well.[117] Consent is another vital aspect of peace operations. First and foremost, the host-state must provide consent preferably before the commencement of the mission. Secondly, not just the host state itself, but all of the parties involved shall acquiesce to the presence of UN forces on the territory they control. A lack of consent might lead to heavy casualties and might endanger the success of the operation as was seen during UNOSOM I-II and UNITAF in Somalia. A more nuanced question is what happens when one of the parties refuses to provide consent or if the consent is not valid (change of regime or in case of a failed state). The next subchapter will tackle the latter two issues.

2.3.1.1. Use of Force

Concerning the use of force Sloan provides a different approach:

'U.N. peacekeeping is a Security Council-authorized force, composed of personnel voluntarily provided by member states and/or members of the U.N. Secretariat, operating under the

[116] UN Charter Art. 24.
[117] More on the use of force in the next sub-chapter.

authority of the United Nations and mandated to assist with the maintenance or restoration of peace through its activities in situ.' [118]

Deliberately omitting the use of force element as Sloan considers the issue to be problematic and prone to change in the eyes of the Security Council and other agents and organs of the UN. At first, the use of force had an excessively narrow interpretation. Force could only be used in self-defence if the personnel was directly targeted. Nonetheless, quite early on there were several instances where this narrow and often endangering limitation on the use of force was set aside for a more practical use. An expansion on the reliance on the self-defence aspect of the use of force: in defence of the mandate where the mandate of the mission was interfered with.[119] A solution that will gain widespread use few decades later. The first iteration was seen as early as the ONUC mission of 1960-1964.[120] From a practical standpoint the enlargement of the use of force is understandable as the SC cannot possibly by prepared for all eventualities stretching the missions use of force to its limits, however since the interpretation no longer rests solely with the SC, the interpretation can be understood differently by the Secretariat or on the field by the force commander or *ad absurdum* by the contingent commanders themselves.

Rules of Engagement (RoE) in ONUC – 1960:

Operations Directive no. 9 - Use of force in self defence 4 March 1961. Confidential [...]

1. The instances of UN military personnel giving up their arms to the Congolese Army are on the increase. Such incidents are most undesirable and have a detrimental effect on the morale of the troops. I direct that commanders at all levels take immediate steps to stop any recurrence of such incidents.

2. Military personnel are authorized to open fire in self defence. The use of force to prevent being disarmed falls under self defence as directed in para 7(b) of Operation directive No 6. Special measures as outlined in succeeding paragraphs will be taken by all units/sub units of ONUC [...]

[118] SLOAN, James: *The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?* Hastings International & Comparative Law Review, Vol. 30, Issue 3, 2007. p. 389.
[119] SLOAN, *ibid*. p. 403.
[120] S/RES/143, 14 July 1960; S/RES/161, 21 February 1961.

5. It should be noted that use of force is authorised whenever there is any danger to UN personnel or property. Although discretion is essential in the use of force, whenever the circumstances justify it, commanders at all levels must use their initiative and take bold action.

Lieut General Commander UN Force in the CONGO (S MAC EOIN) No. 1001/11 (OPS) [121]

The operations directive is valuable because of several factors. Firstly, it cites the reasons for the directive, which can be interpreted as a distinctly different path to what previous practice has been. Secondly, the directive is both an elaboration as well as an extension of the mandate provided by the SC as it not only provides content to the wording of the Security Council, but from a teleological standpoint expands its meaning. Thirdly, the document clearly shows how much wiggle room a competent commander can have as the force commander makes the unprecedented move to interpret the mandate in a way as to enable his subordinates to '*use their initiative and take bold action'* – a great stride from the narrow interpretation of self-defence applied during other operations of the Cold War period.

From 1992 to 2002 a systematic departure can be seen from the self-defence terminology by the Security Council as a schism between the rhetoric of the SC and practice widens. Some scholars, such as Findlay, Tharoor, Sloan and Akashi note that the Council was making a conscious decision by creating a grey area between what could be accepted by the SC and what is possible to do on the ground.[122] From 1999 onwards, explicit reliance of Chapter VII of the Charter as well as the use of force in 9 of out 10 operations can be witnessed.[123] Moving considerably beyond the PoC considerations of previous operations as well as transforming previous missions that applied narrow interpretation, such as the UNIFIL mission in Lebanon established in 1978 and reformed in 2006.[124]

Akashi argued for dogmatic clarity regarding traditional peacekeeping and peace-enforcement operations for a clear distinction to be made whether they are created based on Chapter VI or VII of the Charter.[125] A distinction quite important in the 1990's but one that lost relevance since from 1999 nearly all peace operations are based on Chapter VII of the UN

[121] FINDLAY, *ibid*, pp. 414-415.
[122] FINDLAY, Trevor: *The Use of Force in UN Peace Operations*, 2019, p. 265., THAROOR, Shashi: *Should UN Peacekeeping Go 'Back to Basics'?* 37/4 Survival 52., 1995-1996, AKASHI, Yasushi: *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 Fordham International Law Journal, 1995-1996, p. 184., SLOAN, *ibid*. pp. 419-420.
[123] SLOAN, *ibid*. p. 429.
[124] SLOAN, *ibid*. p. 437
[125] AKASHI, *ibid*, pp. 321-322.

Charter. The current understanding of use of force during the 'robust missions' includes the SC reliance on Chapter VII and the often quoted 'all necessary means' which traditionally includes the use of force. It can be interpreted as a message by the SC to the parties involved: the mandate will be carried out – by force if need be.[126] In a way it is both deterrence used by the Council as well as an obvious departure from previous terminology.

2.3.1.2. Consent

Consent is both an element in the definition of peacekeeping and one of its most important principles. It appears to be the easiest principle to decide and certainly it is the case where there is an inter-state conflict. However, this is the rarest of occurrences in its purest form in our times. Most likely the UN will face either an intra-state conflict with several internal actors (DRC, Mali, South-Sudan) or an international conflict with several foreign actors intervening (Syria, Venezuela, Yemen, etc.) The latter category most often than not doesn't even enable the UN to take action nor would it be prudent for the Organisation to do so.[127] In realistic terms the party who is in effective control of the territory and exercises governmental-like powers over the population is the party required to provide consent. Quite frequently there is a palpable difficulty in either identifying all of the parties to the conflict or react rapidly when the parties change as a result of rising and falling militant groups, warlords or local/regional regimes.

Macqueen and Tsagourias argue there is a palpable difference between peace enforcement and coercive action regarding consent by stating that multidimensional peace operations can have a coercive element, but the use of force it involves is incidental and not primary, there is no target enemy and the parties are considered equal and there is no imposed solution but rather the UN aids the parties to reach some form of concord acceptable by all of those involved.[128] Latif and Khan propose the relativization of Westphalian model of sovereignty as they propose it to be acceptable for the SC to rely on the norms of humanitarian intervention in case of human security (i.e.: the most serious human rights abuses such as genocide) the international community may provide consent.[129] This approach however may

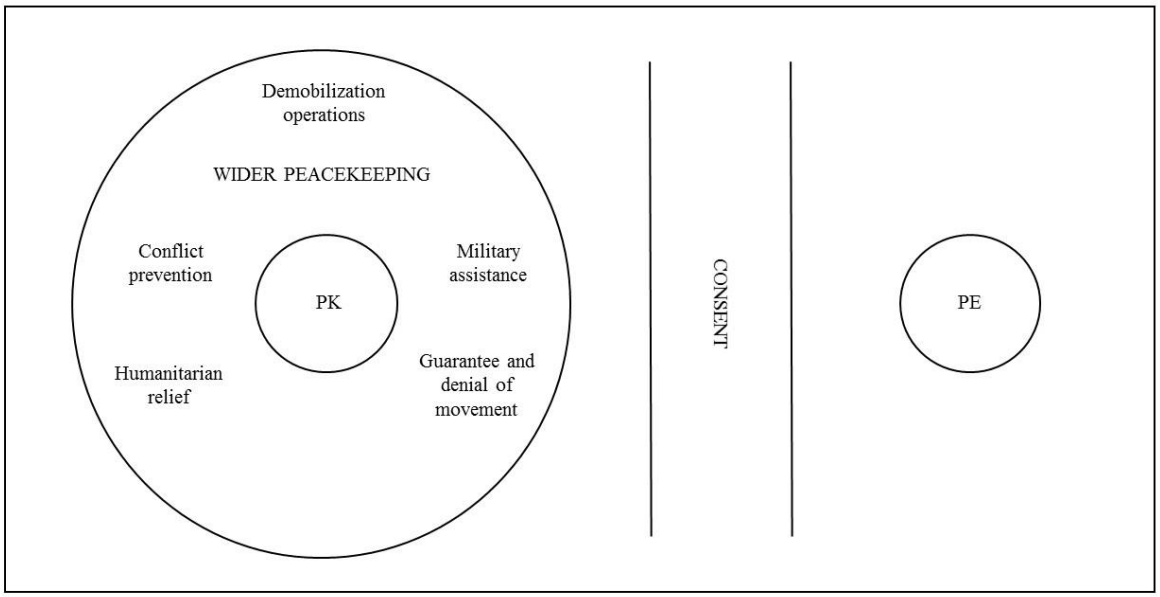
[126] SLOAN, *ibid*. p. 445.
[127] LATIF, Muhammad Ijaz – KHAN, Rehman Afzal: *Peacekeeping Operations and State Sovereignty: Dilemma of Host State Consent*; Pakistan Journal of Social Sciences, Vol. 30, No. 2, 2010. p. 237.
[128] LATIF - KHAN, *ibid*. pp. 237-238., MACQUEEN, *ibid*: Peacekeeping and the International System, Routledge, London, 2006, p. 9.; TSAGOURIAS N.: *Conent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension*, Journal of Conflict and Security Law, Vol. 11, Issue 3, p. 469.
[129] LATIF - KHAN, *ibid*. p. 240.

stretch both the notions of humanitarian intervention and peace operations too far by mixing consent into humanitarian intervention where they do not belong. Applying such an unrealistic fiction to peace operations is neither realistic nor feasible, as without the explicit consent of the host state, its agents and sympathizers might not restrain themselves and look at peacekeepers as parties to the conflict or even an intervening third party. A prime example occurred in 1992, when the catastrophic effect of a withdrawn or insincere consent endangered the UNPROFOR mission when Croatian President Tudjman was reluctant to provide consent in 1992.[130] Past experiences show that the UN is well-aware of the importance of consent as in 1967 when Egypt had withdrawn its consent to UNEF I. Secretary-General U Thant ordered the withdrawal of the operation. A positive instance when consent and continued cooperation was vital to the success of the operation took place during UNDOF in 1974 when a 1.000 strong lightly equipped buffer force separating Israelis and Syrians was made possible by dedicated liaison officers of the respective countries.[131]

Another factor hindering states from providing consent is their reluctance regarding internal armed conflicts for fear of infringing state sovereignty and/or creating the impression of other states and elements that they cannot handle a situation themselves; intervention by the UN can also serve as legitimizing factor for the parties seeking international recognition as parties or lawful combatants.[132]

Chart No. 1. Differentiation between peacekeeping and peace enforcement

[130] GRAY, Christine: *Host-State Consent and United Nations Peacekeeping in Yugoslavia*; Duke Journal of Comparative & International Law; Vol. 7, 1996. p. 247.
[131] ELIASSON, *ibid*. p. 209.
[132] ELIASSON, *ibid*. p. 208.



Source: FINDLAY, Trevor: The Use of Force in UN Peace Operations, 2019, p. 400.

A prime example of how important consent is when distinguishing between peacekeeping and peace enforcement can be observed from the British Army's conceptual model of peace support operations chart. It is clear that consent is an absolute requirement to a wide array of humanitarian relief and peace operations in a broader sense. However, when consent is missing the sole type of operation is peace enforcement.[133]

2.4. Differentiation

In order to grasp the nature of peace operations it is necessary to understand how it is different from other actions by the international community. For this comparison, choosing humanitarian intervention and coercive action by the Security Council will be used, because although seemingly similar, vast differences can be underlined upon closer inspection.

2.4.1. Comparative Chart

Chart No. 2.: Differentiation of peace operations from humanitarian intervention and coercive action by the Security Council

[133] The British Army's conceptual model of peace support operations
Notes: PK = peacekeeping. PE = peace enforcement.
Source: British Army, *Army Field Manual, Vol. 5. Operations Other than War, Part 2: Wider Peacekeeping*, D/HQDT/18/34/30 (Her Majesty's Stationery Office: London, 1994), p. 2-11. in: FINDLAY, *ibid.* p. 400.

	peacekeeping	humanitarian intervention	coercive action
use of force	in the defence of the mandate / protection of civilians / self-defence	per the decision of parties involved (theoretically the applicable minimum)	as defined in the mandate (usually defined by the phrase “all necessary steps”
goal	fulfilling the mandate; protection of civilians	protection of civilians by way of cessation of systemic and serious human rights abuses	bring an end to the threat or breach of peace or aggression
legal background	no mention in the UN Charter, customary international law, mandate	no mention in the UN Charter, practice of certain States, scholarly literature	UN Charter Art. 42.
participants	States (voluntarily contributions, although theoretically obliged by the UN Charter Art. 24. Section (1)) supported by regional international organizations (AU, EU, OAS, NATO etc.)	State(s) and/or international organizations	States (voluntarily contributions, although theoretically obliged by the UN Charter Art. 24. Section (1)) supported by regional international organizations (AU, EU, OAS, NATO etc.)

consent of the host State	yes (before deployment)	no	no

* Source: own chart of the author

2.4.2. Humanitarian intervention and peacekeeping

Humanitarian intervention and peacekeeping share several similarities. Both actions aim to reduce the suffering of local population, both of them are based on voluntary contributions and neither has any firm basis in treaty law. Humanitarian intervention and peacekeeping find common ground in humanitarian assistance concerning the development of humanitarian diplomacy, i.e.: creating humanitarian corridors in Sudan and Angola – almost the equivalent of ceasefires.[134] The UNDP also gathered 6 telling signs of an imminent humanitarian crisis with a danger of becoming an armed conflict for when peacekeepers might be used pre-emptively to avoid the escalation of the conflict. [135]

OCRAN envisions a situation where the 3rd generation of robust peace operations serve as a special case of humanitarian intervention, where the legal basis is provided by the UN Charter and not one State but a multitude on behalf of the international community decide how to handle the needs and apply force.[136]

ÖSTERDAHL argues that the SC should rethink the use of humanitarian intervention and apply it not only in case of the threat to international peace and security as a lowest threshold, but also in case of large-scale human rights violations which would fit the broad interpretation of Art. 39 of the UN Charter.[137] The possibilities in this regard can be most easily grasped by using a negative approach. Based on customary international law the SC can apply humanitarian intervention if there is a support by the member states. On the one hand this idea brings dangers as there is no judicial organ to overrule a political decision by the Council and an activist Council can cause considerable mayhem. On the other hand, the indecision and political

[134] ELIASSON, *ibid*. p. 207.
[135] These 6 signs are: food shortage, high unemployment and decreasing wages, human rights violations, ethnic violence, regional imbalance, excessive military expenditure; ELIASSON ibid. p. 204-205.
[136] OCRAN, T. Modibo: *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*; Boston College International & Comparative Law Review, Vol. 25.1., 2002. pp. 53, 58.
[137] ÖSTERDAHL, Inger: *By All Means, Intervene! – The Security Council and the Use of Force under Chapter VII of the UN Charter in Iraq (to protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti*; Nordic Journal of International Law, Vol. 66, 1997, pp. 253., 262., 270-271, see also: TESÓN, Fernando R.: *Collective Humanitarian Intervention*; Michigan Journal of International Law, Vol. 17, 1996, pp. 341-342.

deadlock of the SC may prohibit it from ever using the tool of a SC mandated humanitarian intervention.

2.5. R2P in peacekeeping – a valid crouch?

The goal of the present subchapter is twofold. Firstly, it aims at sheding some light on the different natures of R2P and PoC, and to help decide which of the two are being referenced in the terminology of the Security Council. Secondly, it aims at analyzing the evolution of peacekeeping operations in the context of the protection they provide, based on the mandates created by the Security Council as well the current trends and demands in peacekeeping. Therefore, the subchapter examines the resolutions of the Security Council and how those manifest in the actual missions.

2.5.1. Emergence of R2P in international law

The failures of the peace oeprations in the early 1990's, which manifested in the massacres of Rwanda and Srebrenica clearly pointed out systemic defects. Although peacekeepers were on deployed on the field, they were not able to prevent the large scale loss of human life. Therefore, then Secretary-General Kofi Annan rightfully posed the question in his renowned 2000 report titled 'We the Peoples' whether it is still prudent and feasible to follow blindly the principles of classic international law, such as state sovereignty and the prohibition of intervention, when some actors are committing heinous mass atrocities covering behind them. Wouldn't it be better to create a system which aims at eliminating human suffering? The main duty of the UN and the Security Council is after all the maintenance of international peace and security which cannot be fulfilled while the organisation does nothing in the face of genocide, war crimes and crimes against humanity.[138]

With this thought the conception of Responsibility to Protect took root and it provoked strong responses from the international community. In the very same year, in 2000 the African Union adopted Article 4. paragraph h.) in its Constitutive Act, which allows the African Union to intervene in the affairs of its member states in case of war crimes, crimes against humanity and genocide.[139]

Also in 2000, the Canadian government set up an international committee (the International Commission on Intervention and State Sovereignty) which was tasked with

[138] ANNAN, Kofi, We the Peoples, United Nations, New York, 2000, 46.
[139] CONSTITUTIVE ACT OF THE AFRICAN UNION Art. 4. para. h.

analyzing the contemporary issues of state sovereignty and intervention. Their 2001 report in which the Commission defines the theoretical basis of the responsibility to protect is still considered the cornerstone of the area.[140] It is clearly stated in the document that state sovereignty does not only mean that the state has a set amount of rights, but it also has obligations, first of which is the protection of its citizens even against the state itself.[141] The report has created a well-founded but hard to apply set of criteria, which - if fulfilled – legitimizes intervention and even armed intervention. These criteria are the following: just cause, right intention, last resort, proportional means, reasonable prospects and last but not least right authority, which means that the intervention can only be ordained by the Security Council.[142]

The aforementioned six criteria did not come through during the negotiations of the 2005 World Summit Outcome Document, but continued to linger in the thoughts of the international community as the minimum standards for applying intervention. During the World Summit as a result of recent events (the occupation of Iraq by the US-UK lead coalition forces) the field of R2P application was narrowed down. According to the adopted document, only in four cases was it possible to utilise the R2P principle: war crimes, crimes against humanity, genocide and ethnic cleansing when the state in question cannot or would not act in order to protect civilian population on its territory.[143]

Two years after his election, in 2009, UN SG Ban Ki-moon expressed a firm interest in the question of R2P when he issued his 'Implementing the Responsibility to Protect' report. In the report he expresses a firm commitment to transfer R2P from the theoretical world to the practical and make it a guiding principle of the UN during decision making mechanics.[144] In order to make it easier for states to accept the notion of the responsibility to protect the Secretary General created a three-pillar design. The three-pillar system has to be applied gradually, meaning that the second pillar can only be applied if the first pillar cannot be called upon and the third pillar only comes in the picture when the first and second pillars cannot be applied. The first step or pillar in this system encompasses the obligations of states to protect their own

[140] WELSH, Jennifer – THIELKING, Carolin – MACFARLANE, S. Neil: *The Responsibility to Protect: Assessing the Report of the Report of International Commission on Intervention and State Sovereignty*, In: International Journal, Vol. 57. No.4., 2002, p. 489.
[141] Report of the International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, Ottawa Development Research Centre, Ottawa, 2001. Art. 2.15.
[142] ICISS, ibid. Art. 6.2.
[143] 2005 World Summit Outcome Document, United Nations, New York, 2005, para 3.
[144] Implementing the Responsibility to Protect, Report of the Secretary-General, 2009, GA Res. A/63/677.

citizens. If they don't meet this obligation, then the second pillar can be used and it the international community comes to the aid of the state in question. This can be done via the request of the country to the international community or the UN specifically. The third pillar is applied when the state cannot or will not protect its population. In this case an obligation arises on the part of the international community to solve the matter in a firm and quick way. This can be done via various measures and if none of those help, via armed intervention.[145] Since 2009 the Secretary General files a report every year about the realisation of the R2P principle analysing the current challenges and the responses given by the UN and the international community.[146] The reports of the Secretary General playing a pivotal role in not only keeping the issue of R2P on the table but they adjust the R2P principle to a gradually shifting international political situation while trying to take into consideration the accomplishments of contemporary jurisprudence.

2.5.2. Distinguishing between the responsibility to protect and the protection of civilians

When speaking of peacekeeping operations R2P and PoC need to be firmly differentiated. Both spring form the same roots however: the experiences of Srebrenica and Rwanda and the realization that civilian population has to be spared from unnecessary suffering, especially crimes against humanity, war crimes, genocide and ethnic cleansing. This demand came from the international community and also represented public opinion of the era aiming mainly at protecting human life. It applies a responsibility of moral nature to the states concerned, the UN and the international community in general. Problems arise nonethless, when we want to convert moral obligations to legal ones. Civilians, who are not considered combatants, *i.e.* persons not participating in the hostilities, are protected by international law. The international community is firm about this axiom which can be seen in a vast number of Security Council resolutions. It has to be noted that the protection of civilians is the basis of

[145] SZALAI, Anikó: *A védelmi felelősség koncepciója, avagy van-e új a nap alatt?* Pro Futuro, Debrecen, 2013/1, pp. 70-76.
[146] Early warning, assessment and the responsibility to protect, Report of the Secretary-General, 2010, GA Res. A/64/864.
The role of regional and subregional arrangements in implementing the responsibility to protect, Report of the Secretary-General, 2011, GA-SC Res. A/65/877-S/2011/393.
Responsibility to protect: timely and decisive response, Report of the Secretary-General, 2012, GA-SC Res. A/66/874-S/2012/578.
Responsibility to protect: State responsibility and prevention, Report of the Secretary-General, 2013, GA-SC Res. A/67/929–S/2013/399.
Fulfilling our collective responsibility: International assistance and the responsibility to protect, Report of the Secretary-General, 2014, GA-SC Res. A/68/947-S/2014/449

international humanitarian law and constitute a part of effective international law through the four Geneva Conventions and their additional protocols as well as through customary law.[147]

In contrast, R2P is basically a set of goals, akin to an ideology, a new way of thinking which places hard-to-comprehend obligations on the international community. No coercion mechanism exists, as this would need to be enforced by the UN SC. Since the SC is a political organ, it cannot be called to account, but merely reminded of its obligations and duties. It further complicates the question that the Security Council is obliged to maintain international peace and security and also it is the only organ with sufficient authority able to force states to live up to their obligations. This way the Security Council faces the ungrateful task to act in cases where the obligations from the R2P principle should be forced, meanwhile also being an obligor itself. Regarding the hierarchy of the sources of law it can be stated that the documents forming the basis of R2P (reports of the Secretary General, political declarations by states, or the report of a committee set up by a government) cannot be considered binding sources of international law. It also cannot be considered part of international customary law as there are numerous states that do not accept the R2P principle even tacitly.

The Security Council discussed the issue in June 2012. During the meeting the majority of the states present were of the opinion that PoC and R2P must be firmly differentiated and never confused with one another. Most states present on the council argued that PoC is considered a primary obligation of the SC as part of international customary law, some denounced R2P as the means for the west to strengthen its ideological grip on the rest of the world and to re-colonize dissenting nations as well as disrupt the current international order by doubting one of its basic principles, the sovereignty of states.[148] As of 2020, the Secretary-General is still compling the annual reports of R2P, even though for the international community, the idea of R2P seems to have lost its momentum. Even though, one of the most remarkable areas where the notion of R2P appears to have fallen on fertile soil is its influence on more accentuated forms of PoC in the mandates of the SC.

2.5.3. The emergence of R2P in the mandates of the Security Council and in peacekeeping

[147] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva 12 August 1949. Art. 3., Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims in International Armed Conflicts (Protocol I) 8 June 1977. Art. 1. para. 2.
[148] The Responsibility to Protect and The Protection of Civilians in Armed Conflict, UNSC Debate 25th June 2012. Secretary-General's remarks: https://www.un.org/sg/en/content/sg/statement/2012-06-25/secretary-generals-remarks-security-council-open-debate-protection (30. July 2020.).

The protection of civilians became on accepted norm in connection with peacekeeping operations sincet he adoption of UN SC Resolution 1265 of 1999. This can be considered an important stepping stone through which the protection of civilians in armed conflicts and peacekeeping in particular was deemed a major issue.[149] For the first R2P-inspired resolution however, the 2005 World Summit provided the incentive. As a result of the event, the UN SC adopted resolution 1674 on the 28th April 2006.[150] The resolution explicitly names the R2P principle and reiterates the four criminal offenses, upon which the obligation of the states in question and the international community arises.[151] The decision of the Security Council was adopted without objection, although China and Russia proved to be reluctant concerning the *expressis verbis* usage of the R2P terminology. It did not take long for the Security Council to form the first peacekeeping mission which relied on R2P in its mandate. As early as August 2006 in the resolution concerning the situation in Darfur, both the protection of civilians and the responsibility to protect was invoked.[152] Although not vetoed by China and Russia, it was heavily criticized by both states because of the strong usage of 'interventionist' terminology. Perhaps it was because of this resentment that the mandate hasn't been realized in the previously envisioned form. Only in 2007 was the SC able to set up a peacekeeping mission, although this time R2P wasn't specifically mentioned in the mandate. The resolution emphasized that the conflict cannot be solved through arms, thereby distancing itself from the 'interventionist' nature of R2P.[153] It is worth mentioning though, that the SC has called upon the R2P principle in several resolutions concerning peacekeeping mandates after the first Darfur one, namely in 2011 concerning Ivory Coast[154] and Sudan[155], 2012-2013 concerning Mali[156] as well as in 2013 concerning South Sudan[157]. There is a great difference in the wording of these resolutions. Softer forms include the protection of civilians and a call to the parties in question to observe the rules of international humanitarian law and human rights law.[158] In contrast it is extremely rare that the SC relies on the explicit R2P terminology. A good example of this is the 2011 mission to Sudan and the 2013 mission to Mali, where the mandate states the responsibility and the obligation of the state in question to protect its own citizens. These mandates interpret

[149] UN SC Res. S/Res/1265 (1999).
[150] UN SC Res. S/Res/1674 (2006).
[151] UN SC Res. S/Res/1674 (2006). Art. 4.
[152] UN SC Res. S/RES/1706 (2006). Art. 9. para b.
[153] UN SC Res. S/RES/1769 (2007)
[154] UN SC Res. S/RES/1975 (2011) Art. 6.
[155] UN SC Res. S/RES/1996 (2011) Art. 3. para b.
[156] UN SC Res. S/RES/2085 (2012) Art. 18., UN SC Res. S/RES/2100 (2013) Art. 26.
[157] UN SC Res. S/RES/2109 (2013) Art. 3.,4.
[158] E.g. the wording of the Ivory Coast mandate.

themselves as the aid of the UN and the international community according to pillar two, supplementing the obligation of the State under the first pillar.[159] Direct reference is of course rare in the practice of the SC, therefore in cases where the mandate only mentions the protection of civilians it is hard to decide whether it's referring merely to PoC or trying to conceal the core element of R2P.

The two main opponents of the R2P principle deserve special mention. China and Russia as two permanent members of the SC have always been suspicious of R2P, but after the 2011 Lybia scenario they believed that their fears were realized, that R2P is the tool of the West in enforcing their system of government on others. [160] In their understanding, what happened in Lybia was an intervention aimed at bringing down the government of another state by NATO forces under the flag of R2P and PoC. The results are a continuous anarchy up to this day, the expansion of religious radicalism in the region and the flood of refugees to Europe. It has become clear that the six criteria established in 2000 haven't been applied, and right intent is not sufficient to launch an international operation of this magnitude, which resulted in internal chaos and the destabilization of the region. These are the main reason that turned China's and Russia's hesitation and reluctance into an adamant opposition against a similar sort of action in Syria. The failure in Lybia also evaporated any domestic support in NATO countries for a large-scale, coordinated military action.

2.5.4. Paradigm shift – the new type of peacekeeping missions

Although evidence is relatively scarce, it is undeniable that R2P had and continues to have a profound influence on peacekeeping. During the last ten to twenty years we witnessed the birth of a new type of peace operation. The so-called 'robust peacekeeping missions' have a number of defining features, like vast manpower, extensive objectives and not least the fact that the PoC plays an integral part in their mandates.[161] These improvements in peacekeeping can partly be attributed to the influence of R2P, as the main goal of peace operations is to save the population living in conflict zones from unnecessary suffering. Prime examples of the new system are the massive peace operations in the region of Sudan and South Sudan. Three peacekeeping operations currently exist in the area: UNAMID from 2007, UNMISS and

[159] UN SC Res. S/RES/2100 (2013) Art. 24., [159] UN SC Res. S/RES/1996 (2011) Art. 3. para b. point iv.
[160] GARWOOD-GOWERS, Andrew: *Lessons Learned from the Lybian and Syrian Crises*, In: SANCIN, Vasilika – DINE, Masa Kovic (ed.), Responsibility to Protect in Theory and Practice, GV Zalozba, Ljubljana, 2013, pp. 306-307.
[161] See also: MÉGRET, Frédéric: *Between R2P and the ICC: „Robust Peacekeeping" and the Quest for Civilian Protection*, Criminal Law Forum, Springer Science, 2015, pp. 101-151.

UNISFA from 2011. Albeit we are talking about three separate missions, they can be considered the response of the international community to a singular problem. There are two factors which clearly underline the paradigm shift in the UN during the last few years. First of all, is that these missions operate with an approximate personnel of 30-40.000 peacekeepers in total, which is a vast increase in numbers, especially compared to previous missions. The first generation peacekeeping operations which are still running have shockingly low compared to the robust operations launched these days.[162] The other fundamental difference can be found in the mandates. It is widely accepted that peacekeepers can only use weapons in self-defence. This means they could only return fire if they were shot on. The narrow interpretation of justifiable self-defence contributed to the inability of peacekeepers to prevent the Rwanda and Srebrenica massacres in the 1990's, where peacekeepers had to sit back and watch atrocities being committed on the civilian population. According to the current interpretation peacekeepers can use force to protect themselves, the mandate and for the protection of the civilian population as well.[163]

These R2P inspired 'robust missions' have their own dangers embedded in them. The principle of R2P is at the end of the day an obligation, a form of pressure on the international community to act or to intervene. This intervention however cannot take on the form of coercive action in the context of peace operations as it would stretch or even overextend the boundaries of peace operations. Therefore, if we want to use R2P in peace operations it must necessarily be attached to the second pillar, when the state in question asks the international community for help in order to protect its own citizens.[164] It's worth noting that these missions are will remain peace missions, which doesn't leave room for the toolkit of humanitarian intervention or the coercive measures defined in Chapter VII of the UN Charter, as peace operations need to be established with the consent of the state in question.[165]

On 31 July 2018 a significant portion of states – including two members of the P5 – adopted The Kigali Principles on the Protection of Civilians.[166] The document reinforces the

[162] For precise data on robust peace operations, see also Chapter 2.2.5. See also the UN Peacekeeping website for up-to-date information on exact troop numbers at: https://peacekeeping.un.org/en/where-we-operate (accessed: 30. July 2020.).
[163] See also: mandates cited earlier in the article e.g.: Mali, Sudan, etc.
[164] The Security Council followed the same logic when forming the mandate for Sudan and Mali.
[165] SULYOK, Gábor: *A humanitárius intervenció és a védelmi felelősség fogalmi elhatárolása,* In: CSAPÓ Zsuzsanna (ed.), Emlékkötet Herczegh Géza születésének 85. évfordulójára: A ius in bello fejlődése és mai problémái, Pécs, University of Pécs, Faculty of Law, 2013, 247-249.
[166] The Kigali Principles on the Protection of Civilians, available at: https://www.globalr2p.org/resources/the-kigali-principles-on-the-protection-of-civilians/ (accessed: 31 July 2020).

firm commitment of the signatories regarding training of the troops on PoC prior to deployment,[167] ensuring that those in leadership positions are capable of meeting the challenges PoC brings represents in a mission,[168] committing to armed action against actors "with clear hostile intent against civilians",[169] harmonizing the RoE with PoC obligations[170] and most importantly leading the charge against human rights abuses by engaging in disciplinary procedures as well as "prosecuting incidents of abuse".[171] Although more of a policy document in nature, with no enforcement mechanism attached, the Kigali Principles showcase a direct influence of the norms of R2P, made manifest on heightened PoC standards for UN peace operations. Implementation can be proplematic as the onus of carrying out commands in such a complex structure rests to a large degree on the chain of command. As Bourgeois points out, the failure to carry out PoC norms on the field might result in looking for a scapegoat by either the UN or the TCC and in order to avoid this outcome the UN must improve its own internal accountability mechanisms while striking the delicate balance of not alienating TCCs.[172]

Putting PoC into practice can be observed in MONUSCO. In the DRC, home to one of the largest and longest standing missions, the UN has gathered valuable firsthand experience concerning providing protection to a large population. The current iteration of MONUC's mandate operates with an ambitious and overarching PoC definition requesting the continued and thorough performance of all actors and stakeholders involved.[173] Specific measures involve:

a) Providing physical protection through early warning and response as well as neutralizing armed groups through targeted strategies,

[167] Kigali Principles Art. 1.
[168] Kigali Principles Art. 2.
[169] Kigali Principles Art. 3.
[170] Kigali Principles Art. 8,9.
[171] Kigali Principles Art. 12,13,15.
[172] BOURGEOIS, Hanna: *Failure to Protect Civilians in the Context of UN Peace Operations: A Question of Accountability?* – 5. September 2018, Available at: https://www.ejiltalk.org/failure-to-protect-civilians-in-the-context-of-un-peace-operations-a-question-of-accountability/ (accessed: 17.12.2019.).
[173] UN SC Res. S/RES/2409, 27 March 2018, Art. 36.
(i) Protection of civilians
(a) Ensure effective, dynamic and integrated protection of civilians under threat of physical violence through a comprehensive approach, including by preventing, deterring, and stopping all armed groups and local militias from inflicting violence on the populations, and by supporting and undertaking local mediation efforts to prevent escalation of violence, paying particular attention to civilians gathered in displaced persons and refugee camps, peaceful demonstrators, humanitarian personnel and human rights defenders, in line with the basic principles of peacekeeping and with a focus on violence emerging from any of the parties engaged in the conflict, outbreaks of violence between ethnic or religious rival groups or communities in identified territories, as well as in the context of elections, and mitigating the risk to civilians before, during and after any military operation; […]

b) Supporting the military justice for the prosecution of grave human rights violations by armed groups and security forces,

c) Managing small arms and weapons for national security forces, who are often a source of weapons for armed groups, and

d) Strengthening prison security to minimize prison breaks which had become a source of new recruits for armed groups.[174]

The most prominent manifestation of PoC is the establishment of an early warning system in MONUSCO, thorugh which peacekeeping personnel can identify areas with vulnerable populations where there are multiple elements vying for control over a given territory and population and can alert larger segments of military personnel to raipidly deploy to the designated area, thereby deterring any large-scale harm to the civilian population. Unfortunately, in the mandate itself there is scarce mention of human rights abuses of sexual nature against the civilian population. The resolution itself focuses on prevention and a firm commitment regarding 'zero-tolerance policy' and fighting impunity without detailing individual measures to be taken should a violation occur.[175] Although it could very well be argued that it is not the role of a UN SC mandate on the exact measures to be taken in case of SEA, it would benefit clarity – at least legally speaking – if the SC at least referred to existing prevention and enforcement mechanisms.

2.5.5. Conclusion

This subchapter aimed at presenting how the principle of the Responsibility to Protect emerged in international law and peacekeeping in particular. Furthermore, the goal of the present subchapter was to prove that responsibility to protect and protection of civilians, although sharing the same roots are fundamentally different phenomena of international law. The first one exists as a principle, a guideline for the international community, whose goals

[174] GRESSLY, David: *Protection of civilians in the Democratic Republic of the Congo: A New Approach*, 8 January 2019, Available at: https://medium.com/@UNPeacekeeping/protection-of-civilians-in-the-democratic-republic-of-the-congo-a-new-approach-9fa6f00df4d7? (accessed: 17.12.2019.)

[175] UN SC Res. S/RES/2409, 27 March 2018, Art. 36.
(i) Protection of civilians
[…]
(g) Provide good offices, advice and support to the Government of the DRC to promote human rights, in particular civil and political rights, and to fight impunity, including through the implementation of the Government's "zero tolerance policy" with respect to discipline and human rights and international humanitarian law violations, committed by elements of the security sector, and to engage and facilitate mediation efforts at local level to advance sustainable peace; […].

however noble are extremely hard to put into practice. In contrast PoC is a part of existing international law by forming the basis of international humanitarian law. It cannot be said, however that certain elements of R2P are not present in peacekeeping, as it played a vital role in the forming of various mandates, as well as inspiring a new form of peace operations which are better equipped to face the UN's current challenges. Despite the lack of direct evidence, R2P had and still has an effect on peacekeeping as shown by the Kigali Principles. Over the course of the last almost two decades the international community has witnessed the emergence of a new type of peace operation. One of the main characteristics of these so-called 'robust missions' – besides the large number of deployed personnel and expanded mandate is the special task assigned to peacekeepers in the form of PoC both on the level of principle and in practice. This outcome is partly due to the influence of R2P and highlights the commitment of the international community in safeguarding the population of the affected areas from unnecessary suffering. Furthermore, the obligation to protect the civilian population, especially if it is based on the principle of R2P provides a solid legal obligation of protecting some of the fundamental human rights of the population in question. It also helps to understand other obligations binding the personnel of peace operations respecting for instance international humanitarian law and also serves as the foundation for the UN's own zero-tolerance policy, both elaborated upon in the following chapters.

Chapter 3.: Applicable norms regarding peacekeeping personnel

"Blessed are the peacemakers:
for they will be called
the children of God."
– Bible, Matthew 5:9

3.1. Legal framework for peacekeeping personnel

3.1.1. Rationale of the regulation and types of personnel

Over the last 60 years we have witnessed a massive expansion in the number, scope and mandate of peacekeeping missions worldwide. This also meant that the manpower required for such operations have also increased exponentially. With such a large personnel it is inevitable that those involved will commit criminal acts, some even as grievous as SEA. These cases may not be as isolated as one thinks, leading to scandals when leaked to the international media and forcing the UN to try to come up with solutions. However, part of what makes it difficult to tackle the issue is, *inter alia*, that the legal status of the different categories of personnel vary greatly. While members of military contingents are protected by SoFAs and MoUs, others, such as UN staff, volunteers, military observers and police are governed by separate legal regimes, each supporting their own distinctive set of regulations. This chapter of the thesis aims at uncovering the intricacies of the various legal solutions and attempts to synchronize them within the framework of international law.

When it comes to the responsibility of the TCCs, it goes along the following line of logic: the peacekeeper as an individual is part of the military of the TCC, therefore considered to be under the supervision of the executive branch of power. The legal basis lies in the International Law Commission's Responsibility of States for Internationally Wrongful Acts. In its Article 4 paragraph 1 the Articles state the responsibility of the country regardless the character of its organ.[176] Of course the question of attribution is not as simple and judicial practice as well as scholarly literature remains uncertain at best of which so-called attribution test most adequately represent customary international norms.[177] These questions will be addressed in the following chapters of the thesis.

[176] RSIWA, Art. 4. para 1.
[177] BOON, Kristen: *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, Melbourne Journal of International Law, Vol. 15, No. 2, 2014, p. 7-8.

The most logical solution would be to call the peacekeepers themselves to account. After all, they are the ones who commit the criminal acts. However, before we accept this seemingly appealing reasoning, we have to answer the question of who are the peacekeepers? The general perception is that peacekeepers are a homogenous group of soldiers, the blue helmets, who maintain law and order, and oversee ceasefires during missions. In reality it is a diverse group of many different categories of personnel. We can distinguish at least 8 categories, which are the following: military, military observers, police, experts, employees of specialized agencies, UN Staff, volunteers and the members of private military and security companies. The process of bringing perpetrators to account is drastically different in case of military and civilian personnel.

Chart No. 3.: Sexual Exploitation and Abuse Allegations by Category of Personnel

	Military	Non-Military*	UN Agency Staff	Total
Personnel deployed in UN peacekeeping operations	87,538	31,253	No total #s of staff provided	Total cannot be calculated
'Allegations' by category**	24	27	28	79
Percentage of all 'allegations' of sexual exploitation and abuse by category of peacekeeping personnel	31%	34%	35%	100%

Sources: UN DPKO, Peacekeeping Fact Sheets / Conduct and Discipline Unit, Department of Field Support. Statistics

As DEEN-RACSMANY notes, the main difference between military members of national contingents and other groups of personnel participating in the mission is the lack of direct contractual or statutory link between the UN and the troops which hinders the UN's capacity to act in this regard.[178] This is particularly evident while observing the disciplinary authority of the UN: it falls exclusively in the domain of the TCCs, while the UN retains this right over officials and experts on mission.[179]

3.1.2. Possibility for the Host State to serve as forum for prosecution

Legally speaking it is safe to establish first and foremost that according to the current legal regime, the Host State is not allowed to serve as a forum for prosecution by either the

[178] DEEN-RACSMÁNY, Zsuzsanna: "*Exclusive" Criminal Jurisdiction over UN Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy?* MILITARY LAW AND THE LAW OF WAR REVIEW 53/2 (2014), p.5.
[179] ibid. p. 5.

SoFA[180] or the MoU.[181] However, as a prospect it is worth observing why is it not possible and what the ramifications of Host State prosecution would look like.

The first obstacle is achieving this – besides the abovementioned two sources of law – is gaining custody over the peacekeepers who have allegedly committed acts of SEA. Since peacekeepers are usually on short-term stay in the country – more often than not 6 months only – by the time the reporting and investigative stage is over, the alleged perpetrator might already has left the country.[182] If the alleged perpetrator is not present in the county, then the TCC has to extradite him/her,[183] which it may not be willing or able, based on the local laws which may prohibit members of military contingents to face trial abroad.[184]

Per current state practice if there is even a rumour of allegations against a peacekeeper, the TCC immediately repatriates the individual so as to avoid a lengthy process of negotiations with the host country about procedural and factual matters as well as to deny the possibility for the host country to use its potentially superior forces and situation to get hold of the alleged perpetrator.[185] Furthermore, the judiciary may not be adequately equipped to face these challenges, either because there is a lack of legal regulations[186] or the state is not in a position to maintain a well-equipped police, prosecution and judiciary.[187]

3.1.3. The regime of immunities for members of military contingents

Chart No. 4. Legal regime regarding various types of personnel in peace operations

[180] Model Status of Forces Agreement, UN General Assembly A/45/594, 9. Oct. 1990, Art. 46. (hereinafter: Model SoFA).
[181] Revised Model MoU, Art 7 quinquiens para 1.
[182] NDULO, ibid, p. 156.
[183] LEWIS, ibid, p. 615.
[184] NDULO, ibid. pp. 153-155.
[185] The assumptions and conclusions of the present subchapter are the results of conducting extensive interviews at the Hungarian Ministry of Defence, Military Council of the Budapest-Capital Regional Court of Appeal, Public Prosector's Office for Military Matters – Budapest, Szeged during the spring of 2016. Recordings of the meetings as well as transcripts are available by the author of the thesis.
[186] MACKINNON, Catharine A.: *Rape, Genocide and Women's Human Rights,* Harvard Women's Law Journal, Vol. 17, 1994. pp. 14-15.
[187] The *raison d'etre* of peacekeeping missions in the first place is that the government is not able to maintain public security, or there is a serious conflict which impeaches the host state's ability to effectively prosecute acts of criminal nature. In a worst case scenario, the state can be considered a failed state, where government control is minimal and the peacekeeping mission was mandated to maintain law and order and avert a large-scale humanitarian disaster.

<table>
<tr><th>Implementation
Peacekeepers</th><th>i) Application of the Codes of Conduct</th><th>ii) Receiving Allegations</th><th>iii) Investigations</th><th>iv) Disciplinary Actions</th><th>v) Criminal Prosecution</th></tr>
<tr><td>a) UN staff</td><td>SG's Bulletin (2003)</td><td rowspan="8">Received by CDU/CDT and OIOS</td><td rowspan="6">Led by the UN</td><td rowspan="5">The UN has disciplinary authority</td><td rowspan="5">Host states (subject to the UN's agreement[i])

Other member states (the draft Convention[ii])</td></tr>
<tr><td>b) UN volunteers</td><td>The revision of the Conditions of Service</td></tr>
<tr><td>c) Consultants and individual contractors</td><td>The revision of the General Conditions</td></tr>
<tr><td>d) Military observers</td><td rowspan="2">The revision of 'undertaking'</td></tr>
<tr><td>e) Members of UN police (excluding (f) below)</td></tr>
<tr><td>f) Members of formed police units</td><td>'undertaking' MOU</td><td>Same as below[iii]</td><td>Same as below[iv]</td><td>Same as above[v]</td></tr>
<tr><td>g) Members of national military contingents</td><td colspan="2">The revision of MOU</td><td>Led by contingent-contributing states</td><td>Exclusive to contributing states</td><td>Exclusive to contributing states</td></tr>
</table>

Source: Kanetake, Michiko: The UN Zero Tolerance Policy's Whereabouts: on the Discordance Between Politics and Law on the Internal-External Divide, Amsterdam Law Forum, 2012, p. 10.

It is clear that in the case of military personnel the UN has no rights or means to act, therefore we must inspect the possibilities of the TCCs in that regard. This segment aims at finding the sources of law which apply and the immunities which protect the personnel involved.

As the members of military contingents remain part of the armed forces of the TCC, it retains jurisdiction over them.[188] This also means that the criminal code of the state can be applied. As every criminal code prohibits sexual exploitation and abuse in some way, we can state that on the internal side, it is forbidden to commit the aforementioned criminal acts. From the side of international law, the Memorandum of Understanding (MoU) must be taken into consideration. The MoU serves as an agreement between the UN and the TCC defining the nature of the cooperation as well as providing some basic guarantees for the sending state regarding its peacekeepers, namely that it retains criminal jurisdiction over them and that neither the UN, nor the host country is entitled to press charges against the members of the TCC's military contingents.[189] After the scandals of 2002, when the employees of specialized agencies and aid-workers were found taking advantage of the population on a large scale,[190] then Secretary General Kofi Annan issued a bulletin calling for zero-tolerance of sexual exploitation and abuse in peacekeeping missions.[191] The bulletin, called „Special measures for protection from sexual exploitation and abuse" has since been part of the annex of the Revised MoU and as such, takes on the form of a binding source of international law if the UN and the TCCs decide to follow the model agreement.[192] Apart from the bulletin, the 2007 Revised MoU also provides us with the definition of SEA. According to the Memorandum the following acts constitute sexual abuse: actual or threatened physical intrusion of sexual nature, whether by force or under unequal or coercive conditions. The definition of sexual exploitation can be any actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.[193] These definitions are broad enough to fit in nearly all violations of sexual nature and to allow the punishable acts to be categorized to fit crimes in every state's criminal code. The Revised MoU also adds the publication „We are United Nations Peacekeeping Personnel" to the annexes.[194] The latter has served for some time as a pamphlet aiding the training of peacekeeping personnel, ensuring that those involved in peacekeeping abide by the highest ethical standards, fitting their status as peacekeepers.[195]

[188] LECK, Christopher: *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct,* Melbourne Journal of International Law, Vol.10, 2009, p. 349.
[189] Model SoFA, Art. 47., para b.)
[190] UN Doc. A/RES/57/306.
[191] UN Doc. ST/SGB/2003/13 Section 3.2.
[192] BURKE, ibid. p. 47-48.
[193] Revised Model MoU, Art. 4, Annex F.
[194] Revised Model MoU, Art. 5, Annex H.
[195] http://www.un.org/en/peacekeeping/documents/un_in.pdf (downloaded: 05 January 2016).

However it has not been binding on the parties before its inclusion in the 2007 Revised MoU. Currently, the Revised MoU Art. 7bis, Annex H requires states to comply with the bulletin, prevent and enforce norms concerning SEA.[196] Obligations of TCCs per the Model MoU include providing assurances that they will not only be exercising jurisdiction with respect to crimes and offences but to notify the SG of the outcome of such cases at regular intervals. The Model MoU authorizes the UN to investigate in a preliminary manner and concerning fact-finding and the main investigation itself should the state prove to be unable or unwilling to act on the allegation itself and promotes vetting peacekeeper candidates.[197] It should be noted however, that the actual MoUs may differ, but most of the time those are not made available to the general public. Furthermore, there is no sanction attached when the TCC violates the MoU. Besides naming and shaming and not accepting their contribution to the operation there is little the UN can do to enforce compliance with its zero-tolerance policy regarding SEA.

The Model MoU also establishes commander responsibility, albeit in a truncated version.[198] National contingent commanders are responsible to ensure that UN codes of conduct, mission-specific rules as well as local norms are abided by. Failure to take action or report such occurrences to the relevant authorities will have twofold consequence: it will constitute an aspect of their performance appraisal on the UN level while it leaves disciplinary and criminal jurisdiction for failure to take action or report entirely at the hands of the TCCs.[199] As a method to raise the interest of contingent commanders in maintaining discipline, it can be regarded as absolutely realistic, but not a true solution as accountability depends solely in the discretional decision of the sending state.

There are two key documents from which the applicable norms of immunity emerge when it comes to members of military contingents committing criminal acts. The first one is the already mentioned Memorandum of Understanding. It not only serves as the source of definitions and prohibition of SEA, but as the very document ensuring the immunity from the proceedings of both the UN and the host state.[200] To quote the Model MoU:

[196] Revised Model MoU, Art. 7bis, Annex H, See also: BURKE *ibid*. p. 35.
[197] Revised Model MoU, Art. 7 quarter, para 2.
[198] BURKE, ibid. p. 41.
[199] BURKE, ibid. p. 41-42.
[200] CLARK, Roger S.: *Peacekeeping Forces, Jurisdiction and Immunity: A Tribute to George Barton,* Victoria University Wellington Law Review Vol. 77, 2012, pp. 96-98.

„*Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations peacekeeping mission]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes and offences.*" [201]

This is further reinforced by the Status of Forces Agreements (SoFA), which can be considered agreements between the UN and the host state, defining the rights and obligations of peacekeeping personnel in the country. The SoFA mostly serves as a catalogue of immunities, shielding peacekeepers from local proceedings.[202]

„Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country/territory]."[203]

A much more complicated situation occurs, when there is not SoFA in effect when the peacekeepers begin deployment. Can the host state initiate proceedings against peacekeepers committing SEA if they are not protected by the Agreement? As ROWE points out, the legal protection regime evaporates and technically nothing is preventing the peacekeepers from being summoned to a criminal court. [204] It needs to be noted however, that the immediate reaction of governments is repatriation following the „no man left behind" principle.

As both the host state and the UN provides guarantees that members of military contingents won't be charged with criminal offences, it would appear as the TCC can obtain all available guarantees in order to ensure its jurisdiction over its citizen. The opportunities of the UN are very limited. All the Organization can do is to proclaim the person in question *persona non grata* and repatriate him/her. Repatriation serves as a way to ensure that the person won't commit additional criminal offenses during the mission. From the moment of repatriation it is entirely up to the TCC to initiate the criminal proceedings.[205] It has been a recurring problem that nothing prohibits the once repatriated personnel to join other UN missions and commit

[201] Revised Model MoU, quinquiens Art. 7. para 1.
[202] SARI, Aurel: *The Status of Armed Forces in Public International Law: Jurisdiction and Immunity,* (21 January 2015) p. 44. (http://ssrn.com/abstract=2555278, downloaded: 10 January 2016)
[203] Model SoFA Art. 47. para. b.)
[204] ROWE, ibid. p. 51.
[205] FERSTMAN, ibid. p. 4.

violations there, as the UN has no database of alleged perpetrators. One of the reasons is that there is a great deal of divergence in the criminal justice systems of the TCCs and some of them may only be able to provide a process that is deemed unfair or inadequate by international standards or even worse, there is a serious dysfunction in the system, e.g.: the use of torture. All the while political reasons inhibit these states to admit their shortcomings to the international community.[206]

According to the official statistics of the UN, there has been a constant and promising increase in the number of responses the Organization receives from TCCs regarding the criminal proceedings initiated by the state. On the one hand, shortly after the UN began monitoring the situation in 2008, the situation was catastrophic. Only in 8% of the cases did the UN get a response of what happened to the alleged perpetrator. Even in that 8% it is not guaranteed that the case reached the phase where of the sentence or whether there has been proper and proportionate punishment for the perpetrator. On the other hand, we can witness a dramatic increase in the number of responses from the TCCs. Through the utilization of diplomatic tools, the UN has achieved greater feedback from States regarding SEA until 2015, from which point there is a decline concerning the communications received. 2019 and the first half of 2020 show some promising results, but the data is inclonclusive as to what it pertains. Inconclusivity is due to the fact that the UN registers the sheer number of „communications" irrespective of their contents or the amount of perpetrators involved. As a result, it is entirely feasible for the UN to recieve several „communications" on the same allegation regarding a single perpetrator, while there is no feedback regarding an allegations concerning a dozen perpetrators and still the statistic might show a 100% response rate. We can argue that on the one hand anything less than 100% isn't satisfactory, but on the other hand, enhanced visibility of data on what a „communication" entails would serve increase transparency by a significant margin. [207]

3.1.4. The Applicable Law and Immunities Concerning Non-military Personnel

Whereas the scope of possibilities for military personnel is greatly limited, in case of non-military, the UN has more effective methods (if applied correctly and consistently). The United Nations Staff Regulation and Rules serves as a collection of organizational and operational provisions, which although not criminal in nature, explicitly prohibit sexual exploitation and

[206] DURCH-ENGLAND, ibid. p. 7.
[207] See Annex I: Statistics - UN follow-up with member states (Sexual Exploitation and Abuse)

abuse by UN Staff.[208] 'Staff' in this respect means the following categories: UN Staff, employees of specialized agencies, volunteers and experts. It is unclear as well as debated whether military observers, police and members of private military and security companies fall under the category of staff. The Staff Regulation and Rules also states that UN staff does not fall under the jurisdiction of the host state, as a regime of immunities apply.[209] The type of immunity is defined in Article 105 of the UN Charter[210] as well as in the 1946 Convention on the Privileges and Immunities of the United Nations.[211] The protection can be considered similar to diplomatic immunity, as it protects UN staff form all criminal proceedings, those accused with criminal offences cannot be taken into custody, or seized, etc. However the immunity does not apply when the staff member in question fails to observe the laws or police regulations of the state or in case of non-performance of private obligations.[212] In practice, the staff member will always argue that in the specific case the immunity applies. Whether or not the existence of the immunity can be verified, can only be decided by the Secretary General who can waive the immunity if he concludes that one of the abovementioned criteria has been met. This would mean that criminal procedure can commence against the alleged perpetrator in the host country. The main problem is that this process takes very long (often 6 months), during which the alleged perpetrator may disappear, or be reassigned to a new mission, leaving no means for the host country to initiate proceedings. The waiver of immunity by the SG also bleeds from many wounds. This type of legal action should normally be done by a group of highly qualified jurists working in an accountable and independent office, such as attorneys or investigating judges as in the national legal systems. The UN however, didn't go through this evolutionary path. As DURCH and ENGLAND note, the decision on whether to waive or not to waive (and thereby allow the prosecution of civilian members of the mission) still rests in the hands of the Secretary-General. This solution was feasible for a nascent organization operating with a handful of diplomats in 1945, however it is not viable in 2020, when there are tens of thousands of staff members alone, and several times as many international civil servants working for specialized agencies or as volunteers.[213]

As the UN is not a state, it does not possess any form of criminal jurisdiction. As a result, the most it can currently do in its own system is to initiate disciplinary proceedings against an

[208] UN Doc. ST/SGB/2014/1 Rule 1.2 section e.)
[209] UN Doc. ST/SGB/2014/1 Art. 1. Reg. 1.1 section f.)
[210] UN Charter, Art. 105.
[211] Convention on the Privileges and Immunities of the United Nations, 1946, Art. 18. para. a.)
[212] UN Doc. ST/SGB/2014/1 Art. 1. Reg. 1.1 section f.)
[213] DURCH-ENGLAND, ibid, p. 4.

individual which can result in some form of disciplinary sanction or as a last resort, summary dismissal. The situation can turn quite dramatic however, when the state of nationality does not find substantial grounds to initiate proceedings and the host state either does not receive the waiver or the alleged perpetrator leaves the host state. Should this unfortunate, but not exactly rare constellation of events occur, the perpetrator of serious sexual misconduct might be dismissed from the UN as the most serious consequences for his/her actions.

Regarding civilian accountability DURCH and ENGLAND point to problems arising from slow, inadequate or missing accountability include hypocrisy, injustice, equity, morality and more.[214] Although created for a different purpose, the UN's own internal courts are currently handling cases of serious misconduct during peace operations The changes created the current system of a two-tiered legal regime of remedies consisting of the UN Administrative Tribunal (UNDT) and the Appeals Tribunal (UNAT).[215] According to the Statute of the Tribunals the plaintiffs must bring a claim against the Secretary-General of the United Nations. However, in order to do so they must fall in the following categories as defined by Article 3 of the Statute:

UNITED NATIONS DISPUTE TRIBUNAL STATUTE Art. 3.

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.[216]

There are several issues regarding the immunity regime of civilians. Firstly, the UNDT functions akin to a labour court and not a criminal court, and as a result will have sanctions of that nature (fine, dismissal, etc.), which are not adequate responses to crimes. Secondly, just as in the case of military personnel, if the State of origin decides not to prosecute the individual for SEA, the process stops there. Notwithstanding diplomatic repercussions from the UN's part, which are only likely if the event is systematic and can be damaging to the

[214] DURCH-ENGLAND, ibid, pp. 10-11.
[215] UNGA Res. 63/253 on 24 December 2008 and amended by resolution 69/203 adopted on 18 December 2014 and resolution A/70/112 adopted on 14 December 2015.
[216] UNDT Statute Art. 3.

UN's reputation on a large scale before the international community. Thirdly, it is a process initated by the UN *ex officio* if allegations surface against the individual, leaving the victim completely out of the equation, as there is no guarantee that the victim will recieve any form of compensation or even information as to what happened with the perpatrator. Last but not least, several categories of personnel are either completely left out of the UNDT Statute's regulation (PMSCs) or it is dubious whether they fall under the category of personnel regarding whom the UNDT has jurisdiction (volunteers, staff of specialized agencies).

3.1.4.1. Understanding functional immunity in the UN system – The Cumaraswamy advisory opinion

The question of immunity was touched upon by the ICJ in its 1999 advisory opinion: 'Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights'. According to the facts of the case, Mr. Cumaraswamy, who has been a special rapporteur on human rights in Malaysia, was brought to court by Malaysian authorities for his statements given in public television which were considered defamatory by certain companies. The ICJ had to decide on the following issues: firstly whether Mr. Cumaraswamy could be considered an expert and therefore the 1946 Convention is applicable, secondly, who can decide whether immunity exists and when this question has to be decided and thirdly, what are the obligations of the government of Malaysia in this respect.[217]

The jurisdiction of the Court was not questioned as it was clear from the beginning that if the Convention is applicable to the case, then Article VIII Section 30 applies, which expressly states:

'All differences arising out of the interpretation or application of the present convention shall be referred to the international Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties. '[218]

[217] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, International Court of Justice, ICJ Reports, 1999, p. 62. (hereinafter: Cumaraswamy Advisory Opinion)
[218] 1946 Convention Art. VIII, Section 30.

As the UN had initiated negotiations through the SG as well as a special envoy and these negotiations were concluded without success, the ECOSOC had requested a legal opinion from the ICJ. In its advisory opinion the ICJ ruled that the Malaysian government should have informed the local courts about the findings of the SG and that the courts should have dealt with the issue of immunity as a preliminary issue.[219] As an additional decision the Court also decided that the government of Malaysia was obliged to inform the local courts on the advisory opinion of the ICJ.[220]

As some of the judges had iterated in their separate or dissenting opinions, the Court's majority had gone astray in their reasoning and conclusions at some point and got lost in technical issues rather than focusing on the core legal issues which arose.

Vice President WEERAMANTRY emphasized the need to give a meaningful common definition of immunity for UN functionaries, stating the difference and a clear distinction between the nature of immunity of state functionaries and UN functionaries.[221] It can be said that the Vice President's desires have been fulfilled over the last almost two decades as currently the immunity of UN functionaries is more or less respected and courts don't find as difficult to differentiate between the immunity given to states and international organization's agents.

The separate opinion of Judge ODA deserves special mention as he stressed the official capacity of Mr. Cumaraswamy was the core issue and that to what extent and how the government of Malaysia should communicate with its courts is irrelevant.[222] Judge ODA does have a valid point in this matter, as if the official status of Mr. Cumaraswamy stands and the Convention is applicable, then the local courts should have applied to the case as it constitutes a part of international law and the courts should be aware of regulations (even international ones) affecting their judgments and procedure. Under these circumstances it is of no importance how the Malaysian government informs its courts, as it is a mere technicality arising from the error of these courts not applying the correct norms.

Judge REZEK concentrated on another aspect of the problem, when he in his separate opinion underlined that Malaysian authorities not merely had to inform the local courts of the Convention's application and the advisory opinion of the ICJ, but they also had to ensure that

[219] Cumaraswamy Advisory Opinion, para 63.
[220] Cumaraswamy Advisory Opinion, para 67, section 4.
[221] Cumaraswamy Advisory Opinion, Separate Opinion of Judge Weeramantry, pp. 36-37.
[222] Cumaraswamy Advisory Opinion, Separate Opinion of Judge Oda, pp. 48-49, paras 20-24.

the immunity established in the advisory opinion is respected.[223] In my opinion this mean that the ICJ would overstep its competence and interfere with the internal affairs and balance of power of a state. My reasoning goes as follows: if we take a democratic state with a common separation of powers in which the judiciary is an autonomous branch, then the government as another separate branch of power cannot influence the decisions of the judiciary, ergo the government cannot effectively enforce the ICJ's decision of the judiciary. Rather it has the option – as the advisory opinion of the ICJ correctly states – to inform the local courts of the decision, which is otherwise binding on them as it is based on international law.[224]

Judge KOROMA raised his concerns in his dissenting opinion, where objected that the Court used the data supplied by the ECOSOC, the petitioner of the advisory opinion, and accepted it as fact, whereas in deciding the official capacity of Mr. Cumaraswamy, the ICJ should have conducted its own process of fact-finding, as the *'matter is both law and fact'*.[225]

Overall, this advisory opinion of the ICJ bears special significance as it touches upon aspects of immunity, the invocation aspect of immunity and the criteria of official capacity which are paramount in ascertaining the legal status of an expert working for the UN.

3.1.5. Additional challenges of classification

In the previous sections some of the most basic challenges have been covered. However, there are those, which are not obvious at first sight, but seriously hinder our understanding as well as the solution of the issue. First of these problems is the categorization of the personnel involved in a UN peacekeeping mission. When we try to assess the problem at large we have to rely on the statistics provided by the UN. However, it is unclear at best which type of personnel are involved in the statistics. The Unit responsible for publishing the statistics, the Conduct and Disciple Unit lists military, police, civilian and other as categories,[226] the Secretary General lists military and non-military,[227] while various NGOs differentiate otherwise.[228] It also

[223] Cumaraswamy Advisory Opinion, Separate Opinion of Judge Rezek, p. 51.
[224] As a side note, this raises the paradox that in a democratic state, which abides by international law, that state can be held responsible for the decisions of its judiciary (see also the LaGrande case of the ICJ), but the courts cannot be forced by the state to operate lawfully, even though the state is obliged by the decision of international court. Nonetheless, the possibility for the State to abide by international obligations by adopting new domestic regulations remains an option.
[225] Cumaraswamy Advisory Opinion, Separate Opinion of Judge Koroma, para 22.
[226] Code Blue Campaign website available at: https://conduct.unmissions.org/sea-overview (accessed: 31 July 2020).
[227] UN Doc. A/69/779 Chapter 3, Art. 19.
[228] Code Blue Campaign website available at: http://www.codebluecampaign.com/the-problem (accessed: 31 July 2020).

remains unclear to which category military observers fall in, and we have no reliable data about criminal acts carries out by members of private military and security companies or employees of specialized agencies.[229] The reason why categorization is so problematic, is because if there are types of personnel omitted from the reports, it also means that we have no information about the amount of allegations committed by them. It can be stated that employees of specialized agencies, and of private military and security companies never make it to the reports.[230]

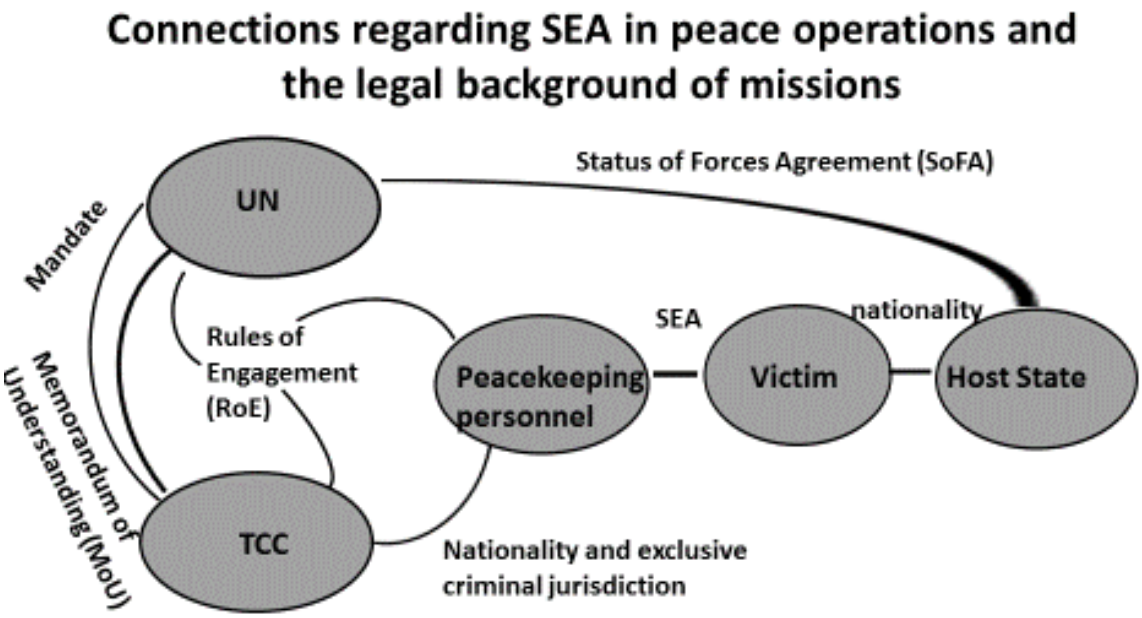
Secondly, the term allegation lacks transparency. As mentioned above, it is quite possible for an allegation to include several injured parties and a dozen perpetrators, given the nature of these crimes, but there are no statistics of how many people are involved in a given allegation.[231] It would serve as a great step for the UN to publish these data in a separate, distinguishable format, so that we could see the number of perpetrators per annum.

Another major factor which hinders our clairvoyance is the underreporting of SEA. Crimes of sexual nature are among the most underreported crimes everywhere on the planet and this is especially true in a peacekeeping environment. The fact that there is often no or only weakened central authority to report to, or to investigate is only worsened by the seeming impunity of the perpetrators. Taking into consideration the difference in power – as the peacekeepers are considered the ones with authority, weapons, food and money - the widespread illiteracy, the vast distances a victim has to take in an often difficult geographical environment only contribute to the desperate situation of the victims. A further problem is that the victim has no idea about the identity of the perpetrator(s), knowing only a surname and perhaps the perpetrator's country of origin. Also, as peacekeepers are exempt from the jurisdiction of the host country, the victims have to file a complaint at the Conduct and Discipline Unit, which lies at the same camp/establishment as the perpetrator. Returning to the place, where the person fell victim to the SEA only serves as a deterrent for the victims not to press charges.[232]

Last, but not least, as seen from the chart below, the complexity of relations does not make it easier to understand how the system works. There are also either vastly different or non-existent relations compared to criminal accountability in most domestic legal systems.

[229] ibid.
[230] See Annex II. Sexual Exploitation and Abuse Allegations by Category of Personnel
[231] Code Blue Campaign website available at: http://www.codebluecampaign.com/the-problem (accessed: 31 July 2020).
[232] CSÁKY, *ibid*, pp. 12-14.

Chart No. 5.: Legal connections between various actors in a peace operation



Source: the author's own chart

One of the main differences is that there is no direct connection between the members of military contingents themselves and the UN or between the members of military contingents and the host state. On the one hand, since the damage is nor realized on the territory or by the nationals of the TCC, the TCC is not directly interested in criminal accountability besides sanctionless obligations in international law and general proximity to adherence to rule of law standards. On the other hand, the host state would be very much interested in bringing the perpetrators into account, however it usually lacks the capacity to do so (hence the need for peace operations in the first place). Even if the host state was in a situation to initiate proceedings, the two aforementioned documents, namely the SoFA and the MoU would ensure that the TCC retains its exclusive criminal jurisdiction at all times. Theoretically, there is a possibility that the TCC would waive this opportunity, however, as criminal jurisdiction is viewed as one of the ultimate expressions of state sovereignty, it is proving to be an unrealistic

expectation from TCCs. Combined with the practice of almost immediate repatriation when information about SEA surfaces, there is practically no chance for the TCC to relinquish its jurisdiction.

Over the course of the last two decades, as peacekeepers are taking an armed stance, largely due to improved SC mandates, the Rules of Engagement are also beginning to play a more pivotal role in the behavior of peacekeeping personnel.[233] The Rules of Engagement, or RoE in short is the collection of rules dictating how a member of the armed forces should behave in a given conflict. As Rowe notes, these are rather considered policy in the context of its contents. As RoEs vary between different states as their policies vary, in a peace operation it is entirely feasible that each national contingent will be bound by its own regulation, causing significant divergence in how soldiers will look upon objectives or the fulfillment of the mission's mandate. The legal implication however goes far beyond the level of policy: a member of the armed forces can be held to account for violating the RoE as it is on par with superior's orders.[234] This also means that just as in the case of a superior's order, if the RoE collides with international law, it won't take precedence, but enable the responsibility of the violators.

3.1.6. Conclusion

This Chapter aimed at highlighting the diverse world of UN peacekeeping personnel, their legal obligations regarding SEA, as well the regime of immunities which protects them. In conclusion it can be argued that both military and non-military contingents have a well-established protection regime. The former is protected by the MoU and the SoFA, granting exclusive jurisdiction to the TCC, while the latter is governed by UN Staff Rules and Regulations, as well as the UN Charter and the 1946 Convention on the Privileges and Immunities of the UN. While both seem like a closed circuit, through a consistent application of its criminal jurisdiction and constant and open communication with the Organization, the TCCs can help remedy the issue. A quick and decisive usage of the waiver can serve as a short-term cure for non-military personnel committing SEA, but it requires the active participation of the Secretary General.

The challenges faced by peacekeeping are numerous and may seem daunting, but there are multiple steps which need to be taken. First of all, the reporting and investigating mechanisms need to be strengthened, as this can be the root of solving the problem. Without accurate data,

[233] NOTAR, ibid. p. 416.
[234] ROWE, ibid. p. 59.

we cannot be certain of the scale of the problem, let alone be able to comprehend it. The OIOS either needs to be reformed to cope with its functions or the competence of investigation in criminal matters delegated to a separate organ. Furthermore, it may be feasible to attain considerable improvement without a new international treaty, which could prove to be hard to realize, through the consistent application of existing norms. As it can be seen through the statistics of the UN, if there's a political will from the Organization and the TCCs it is possible improve the situation in a rapid manner.

3.2. Applicability of IHL norms in peace operations

The applicability of IHL norms in peace operations is a vitally important issue for all UN personnel, as on the one hand it can serve as a basis for specific obligations, such as the protection of civilians and on the other hand it could serve as basis for individual criminal responsibility for acts of SEA in the form of war crimes. There are a few questions that need to be settled beforehand before the applicability of the norms of IHL for peacekeepers could be decided. Firstly, can the UN be considered to be a party to the armed conflict? Secondly, do peacekeeping personnel possess the status of combatants? Thirdly, which special norms of IHL apply to peacekeepers? In order to answer the abovementioned questions, one must take a look at relevant legal provisions, the case law of various international tribunals coupled with academic literature to entangle the web of norms in this particular field. It has to be mentioned at this point that the application of IHL norms in peace operations can be considered a grey area of international law, with the notable uncertainty caused by a lack of clear provisions on the matter and the underlying fact that it might be beneficial for some of the actors involved to avoid the formulation of black and white rules.

3.2.1. Normative framework and application of IHL principles

Concerning relevant legal provisions, the Geneva Conventions, the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter: Safety Convention) as well as the UN SG's Bulletin of 1999 on the observance of IHL (hereinafter: Bulletin) will be analysed in this subchapter.

As a general rule, a subject of international law is bound by treaties if it is party to them.[235] There are of course exceptions to this, but if we accept this as the point of origin, it

[235] Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, Art. 34.

raises several issues regarding the applicability of IHL to the UN. [236] It is worth establishing from the start that the UN not a party to the Geneva Conventions or any major human rights treaties, therefore no treaty-based obligations apply to the Organization. It may seem like an anomaly, as these treaties have taken form under the auspices of the UN. As the Charter of the UN names the promotion of human rights as one of the main goals of the organization it would be illogical if the UN did not have to respect these obligations.[237] The legally binding nature of IHL rules also vary based on whether the operation is conducted under the command and control of the UN. In the first case, if there is actual control by the organization, the SG's Bulletin applies and the troops are bound by IHL. While in the latter case, if there is an operation authorized by the UN, but the organization's command and control cannot be established, the peacekeepers are merely obliged to 'respect' general norms of IHL.[238]

The general approach and understanding of IHL norms is further enshrined by the 2008 Capstone doctrine, which the UN highlights that:

'International humanitarian law is designed to protect persons who do not participate, or are no longer participating, in the hostilities; and it maintains the fundamental rights of civilians, victims and non-combatants in an armed conflict. It is relevant to United Nations peacekeeping operations because these missions are often deployed into post-conflict environments where violence may be ongoing or conflict could reignite. Additionally, in post-conflict environments there are often large civilian populations that have been targeted by the warring parties, prisoners of war and other vulnerable groups to whom the Geneva Conventions or other humanitarian law would apply in the event of further hostilities.'[239]

The Capstone doctrine by itself cannot be considered a binding source of law or a legal source altogether, but it illustrates the line of thought the UN had regarding IHL through the work of its experts and departmental leaders. It clearly highlights the fact that modern peace operations revolve around the protection of civilians and that the UN is poised to defend the civilians and other individuals no longer capable of fighting in their status of *hors de combat*

[236] SHAW, Malcolm N.: *International Law*, Fifth Edition, Cambridge University Press, 2003, pp. 89-91.
[237] UN Charter, Preamble, Art. 1, Sec. 4.
[238] SHRAGA, Daphna: *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, American Journal of International Law, Vol. 94, Issue 2, 2000, pp. 408-409.
[239] United Nations Peacekeeping Operations – Principles and Guidelines (Capstone Doctrine), 18 January 2008, Art. 1.3, p. 15.; available at: https://www.un.org/ruleoflaw/files/Capstone_Doctrine_ENG.pdf (accessed: 11.07.2020.).

and to also maintain their fundamental human rights, thus linking the two sub-segments of international law in the normative framework of peace operations.

3.2.2. The Secretary-General's Bulletin of 1999

The current internal regulation in effect for the UN is the Secretary-General's 1999 Bulletin on Observance by United Nations forces of international humanitarian law. The document can hardly be regarded as a complete novelty however, as shortly after the Additional Protocols to the Geneva Conventions were adopted in 1977, UN officials drew up and 'interoffice memorandum', which establishes that under circumstances which cause UN troops to use their weapons in accordance with their mandates, *'the principles and spirit of the rules of IHL should apply as laid out in the Geneva Conventions and their Additional Protocols and elsewhere'*.[240] Relying on the principles of IHL has been a promising start in the process of adopting the norms of IHL, however, implying that their 'spirit' applies as enshrined in the Geneva Conventions, their additional protocols and 'elsewhere' is murky at best. The SG's 1999 Bulletin has managed to specify the somewhat blurry contents of the interoffice memorandum.

The SG's Bulletin of 1999 on the observance of IHL in peace operations changed the wording of the previous interoffice memorandum and adopted a more nuanced and articulated approach. As formulated in the preamble the Bulletin was conceived:

„[…] for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control […]".[241]

These lines in the preamble are noteworthy for several reasons. Firstly, because the Bulletin establishes not only principles to guide peacekeepers, but rules to bind the personnel involved in peace operations and it can be understood as formal recognition by the UN on the applicability of IHL norms.[242] This latter element implies that the Bulletin is binding on peacekeepers, but only if they operate under the command and control of the UN. The exact

[240] PALWANKAR, Umesh: *Applicability of International Humanitarian Law to United Nations peace-keeping forces*, International Review of the Red Cross, No. 294, p. 3, available at: https://www.icrc.org/en/doc/resources/documents/article/other/57jmbh.htm (accessed: 03.07.2020.).
[241] Secretary-General's Bulletin Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, 06. June 1999, Preamble.
[242] ONYEAKU, Chukwuka: *United Nations Peacekeeping Force Operation in Armed Conflict: A Legal Duty of a Choice to Observe International Humanitarian Law?* Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol. 10, No. 2, 2019, p. 21.

contents of command and control are tackled in Chapter 5 and 6 of the thesis. There is however a great difference between the general notion of respecting obligations and responsibility along with its subsequent accountability for violating them.

Regarding the specific obligations, the Bulletin specifically targets IHL obligations in peace operations as follows:

"Section 1 Field of application

1.1 The fundamental principles and rules of international humanitarian law set out in the present Bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this Bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict."

By 'principles and rules' mentioned in section 1.1 to be adhered in a peace operation, it can be safely ascertained that core principles of IHL apply, such as prohibition of weapons and methods of war causing unnecessary suffering,[243] the protection of civilian population and the distinction between civilian and combatants,[244] the protection of the natural environment,[245] that cultural property must be safeguarded,[246] the prohibition of the 'no quarter' order,[247] the prohibition of violence to life or physical integrity, collective punishment, reprisals, taking of hostages, sexual assaults,[248] to name some of the most relevant. As LATTMANN points out, the SG's Bulletin does not necessarily imply that all of the normative background of IHL becomes automatically applicable to peace operations, as it would also mean the possibility to use lethal

[243] SG's 1999 Bulletin, Sec. 6.2.
[244] SG's 1999 Bulletin, Sec. 5.1.
[245] SG's 1999 Bulletin, Sec. 6.3.
[246] SG's 1999 Bulletin, Sec. 6.6.
[247] SG's 1999 Bulletin, Sec. 6.5.
[248] SG's 1999 Bulletin, Sec. 6.9., 7.2.

force through the application of necessity-proportionality standards, which is regularly counter-productive to the goals set out in the mandate.[249]

In Section 3 of the Bulletin, the attitude of peace operations toward the norms of IHL is specified:

"In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. […]" [250]

The exact contents of the obligation to 'respect' the norms of IHL are somewhat unclear, even though several key aspects of the obligation can be deciphered. Firstly, as stated by the ICJ in the *Nicaragua* case, the obligation is applicable to armed conflicts of both international and non-international in nature. According to the Court's findings:

"The Court considers that there is an obligation […] to 'respect' the Conventions and even 'to ensure respect' for them 'in al1 circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."[251]

As the ICJ points out, 'respect' for the norms of IHL may come in the form of acceding the Geneva Conventions and abiding by the provisions therein, but it might also be derived from the fact that the provisions of the Geneva Conventions encompass a vast portion of the rules of IHL, which by themselves are binding based on customary international law. It still needs to be mentioned, that the ICJ formulated its opinion regarding a case involving two states and not international organizations when analysing the contents of Common Article 1 of the Geneva Conventions. Nonetheless, the Court's findings could be used through analogy as in both cases 'respect' for IHL norms by the armed forces of a subject of international law is detailed. A special understanding of IHL norms can be seen ICRC Commentaries, in which the

[249] LATTMANN, Tamás: *Békefenntartás, ENSZ-műveletek és a nemzetközi jog*, In: SZENES, Zoltán: *Válságkezelés és békefenntartás az ENSZ-ben*, Nemzeti Közszolgálati Egyetem, 2013, p. 20.
[250] SG's 1999 Bulletin, Sec. 3.
[251] Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States), Merits, Judgment of 27 June 1986, p. 14, para 220.

notion is asserted that the Geneva Conventions can not only be seen as multilateral treaties, but 'rather a series of unilateral agreements solemnly contracted before the world'.[252]

Regarding the scope of application, it can also be established that the respect for the norms of IHL are binding on international organizations, as they are also fully fledged subjects of international law and as such they are bound by the general norms of international law. As phrased by Engdahl, on one end of the obligation is the fact that 'respect' for IHL does not entail the possibility of the use of force, while on the other end of the spectrum it also encompasses the duty to report violations of IHL to the relevant authorities.[253] Through analysing the practice of the UN and TCCs, while also taking into consideration relevant SoFAs and MoUs, it can be established that 'respect' for IHL also include an aspect of prevention in the form on norm-creation, vetting and training, while also covering proper investigation.[254] For UN peace operations this brings considerable hardships as on the one hand the organization must ensure the observance of IHL norms, while on the other hand it attempts to enforce regulation for which the TCCs are primarily responsible. This latter notion brings us to the other element of 'respect' of IHL, which is handling violations that might occur. The Bulletin tackles this by stating:

"Section 4 Violations of international humanitarian law

In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts." [255]

As guardian of the system, namely that the rules of IHL are followed by peacekeepers, the Security Council bears responsibility for ending such violations and ensuring that the perpetrators are sanctioned by their respective TCCs.[256] Indeed, the onus of investigating violations of IHL generally falls to TCCs as shown in Somalia, where the alleged crimes have been investigated by Belgian, Canadian and Italian commissions of inquiry and as a result, some of these cases ended up before domestic courts.[257] The most powerful tool in the arsenal of the Security Council regarding the enforcement of IHL norms by peacekeeping personnel is

[252] PICTET, Jean (ed.): *Commentary to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of the Red Cross, 1952, p. 25.
[253] ENGDAHL, Ola: *Compliance with International Humanitarian Law in Multinational Peace Operations*, Nordic Journal of International Law, Vol. 78, 2010, p. 517.
[254] ENGDAHL, *ibid*. p. 521.
[255] SG's 1999 Bulletin, Section 4.
[256] PALWANKAR, *ibid*. p. 6.
[257] VERDIRAME, Guglielmo: *Compliance with Human Rights in UN Operations*, Human Rights Law Review, Vol. 2, No. 2, 2002, p. 269.

undoubtedly the possible referral to the ICC. [258] However, up until today (2020), the Security Council has not invoked this possibility regarding peacekeepers.

Overall, the SG's Bulletin can be considered a relevant document for assessing UN peacekeeping's approach to IHL, nonetheless, as ENGDAHL points out, the rules of customary law would be binding on the UN even without explicit recognition by the SG.[259]

3.2.3. The 1994 Safety Convention

Peace operations are not binary situations of either there is an ongoing armed conflict or there is not. In a peacebuilding scenario for example, there is no armed conflict to begin with and therefore IHL norms are not applicable, however what would happen if the peacekeepers decide to use force to protect the civilian population and engage in an exchange of hostilities. At that moment the general situation could not be considered to reach the threshold of armed conflict so the peacekeepers could use force as established in their respective mandates while they themselves would be protected by the 1994 Safety Convention.[260]

This seemingly contradicts a basic tenet of IHL about the „lawful" combatant status of individuals, *i.e.* they are either combatants or non-combatants. As combatants they have the right to take part in the hostilities – to put it bluntly, they can shoot and be shot. If someone is classified as a non-combatant that individual cannot take part in the hostilities, nor can that person be targeted. Regarding peace operations, providing protection to military members of peacekeeping personnel while also enabling them to take part in the hostilities would create an imbalance. The 1994 Safety Convention therefore first of all establishes categories of protected personnel as follows:

"Article 1.
(a) "United Nations personnel" means:
(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

[258] ROSCINI, Marco: *The United Nations Security Council and the Enforcement of International Humanitarian Law*, Israel Law Review, Vol. 43, 2010, p. 354.
[259] ENGDAHL, *ibid*. p. 519.
[260] OGUEKWE, Adaeze Udeze: *Legal Responsibility for IHL and Human Rights Violations Committed by United Nations Peacekeeping Missions*, Nnamdi Azikiwe University Journal of International Law, Vol. 10, 2019, p. 13.

(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;"

When combined with the subsection c.) of the Safety Convention the contents become clearer:

"Article 1.

(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;"

The scope of application was extended by the 2005 Optional Protocol to the 1994 Safety Convention to encompass robust peace operations and especially peacebuilding activities as well as operations of humanitarian assistance.[261]

Saura iterates a convincing opinion that the role of the 1994 Safety Convention is to provide a written statement, some form of certainty of IHL norms that apply for the UN. In this understanding, peacekeeping personnel is awarded special protection, because they are deployed on a consensual mission and they are not considered to be a 'warring party' because of the principle of neutrality and impartiality that is fundamental to all operations. If they do engage in armed conflict, they will be burdened with the duty to comply with the norms of IHL.[262]

The Safety Convention is not without shortcomings however. FLECK marks 5 distinct problems as follows: a.) the obligations therein primarily bind States and not non-state actors, however, state responsibility is not sufficiently addressed; b.) the application of the Safety Convention is excluded regarding enforcement actions as defined by Chapter VII of the UN Charter; c.) concerning robust peace operations the exact scope of applicable norms is blurred;

[261] Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, New York, 8 December 2005, UNTS: 35457, Art. 2, para 1.

[262] SAURA, Jaume: *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, Hastings Law Journal, Vol. 58, No. 479, 2007, p. 520.

d.) peace operations by states or regional organizations are not explicitly covered; e.) lack of support by host states where peace operations take place.[263]

Some of the issues mentioned by FLECK can be resolved through general international law. For instance, a.) whether the obligation is also binding non state actors, there are two major categories which need to be taken into consideration. Regarding international organizations and parties acknowledged as belligerents there is rarely a problem when formulating the extent of their obligations, as the situation of international organizations is reminiscent of states, while belligerents possess legal personality in international law for the exact purpose as to be bound by the norms of IHL.[264] For other non-state actors, namely terrorist groups, such as the Ansar Dine hindering the efforts of MINUSMA in Mali, there is no clear-cut solution. The latter topic would warrant a separate legal study which far extends the scope of this thesis.

The second issue, b.) non-applicability in certain enforcement actions, can also be resolved, although there is some uncertainty involved. If we apply the logic that during a peace enforcement operation or a coercive action ordained by the SC, the UN effectively becomes party to the conflict and therefore the whole normative framework of IHL will apply without the need of reiteration by an international treaty. In this case, the uncertainty is caused by the blurred lines between peace enforcement and coercive action, which can be resolved upon analysis of the respective SC resolution texts (see also Chapter 2 for differentiation).

Concerning the difficulty brought by emerging robust peace operations (c.) which transcend the boundaries, objectives and tasks of traditional peace operations and the issue of peace operations by regional organizations, the case law of the ICC can help solve the conundrum. As established by the Court, as long as a peace operation adheres by the principles of peacekeeping (neutrality and impartiality, consent and the limited use of force), it can be considered a peace operation, irrespective of the additional tasks and responsibilities entrusted upon it by changing circumstances so long as the tasks do not mandate the operation to take a direct military approach.

"[…] peacekeeping [...] defies simple definition" and that "[o]ver the years, UN peacekeeping has evolved to meet the demands of different conflicts and a changing political landscape […].

[263] FLECK, Dieter: *The Legal Status of Personnel Involved in United Nations Peace Operations*, International Review of the Red Cross, Vol. 95, 2013, p. 621.
[264] BLANK, Laurie L. – NOONE, Gregory P.: *International Law and Armed Conflict – Fundamental Principles and Contemporary Challenges in the Law of War*, Second Edition, Wolters Kluwer, New York, 2019, p. 93.

UN peacekeeping continues to evolve, both conceptually and operationally, to meet new challenges and political realities." [265]

"[…] the Majority notes that three basic principles are accepted as determining whether a given mission constitutes a peacekeeping mission, namely (i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence." [266]

The problem caused by the fact that regional peace operations are not encompassed in the Safety Convention can also be circumvented according to the ICC, which has allowed for the same rules to apply, provided that the regional organization or the state in question possesses the authorization by the UN SC.[267]

Lastly, the lack of support needs to be examined. As of July, 2020 according to the UN Secretariat, the 1994 Safety Convention had 43 signatories and 95 state parties, which incorporates a significant portion of the international community.[268] Even more importantly, out of the 13 ongoing peace operations taking place on the territory of 13 states, only 3 have ratified the Safety Convention (Cyprus, Mali, Lebanon) and only one, Mali, in which a robust peace operation is taking place.[269] Therefore, it cannot be argued that the Safety Convention would be relevant to majority of host states or that it would have binding effect based on international customary law. Alleviating the problem is the fact that relevant provisions of the Convention have been incorporated to SoFAs and as a result, the UN can make sure that the protection awarded by the Safety Convention still applies in most scenarios.[270]

3.2.4. Combatant status of peacekeepers

As long as peacekeepers do not engage as combatants they remain entitled to protection as civilians and as long as they remain civilians they cannot be made legitimate targets during an armed conflict.[271] According to the Statutes of the International Criminal Court and the

[265] Prosecutor v. Abu Garda, International Criminal Court, Case No. ICC-02/05-02/09, 8 February 2010, Decision on the Confirmation of Charges, Pre-Trial Chamber I, Paras 81, 83, p. 37. (hereinafter: Abu Garda case), para 70, p. 31.
[266] Abu Garda case, para 71, p. 31.
[267] Abu Garda case, para 76, p. 34;
[268] UNTC database; available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18 (accessed: 11. July 2020.).
[269] CAR, Cyprus, DRC, India, Israel, Kosovo, Lebanon, Mali, Morocco (Western Sahara), Pakistan, South Sudan, Sudan and Syria.
[270] FLECK, *ibid*. p. 627.
[271] WHITTLE, Devon: *Peacekeeping in Conflict: The Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces*, Georgetown Journal of International Law, Vol. 46, 2015, pp. 863-864.

Special Court for Sierra Leone (SCSL), as a UN peacekeeper is protected in this manner, deliberately targeting them is an act that is criminalized.[272] As some scholars, namely Sivakumaran and Whittle argue, these regulations have since became part of international customary law.[273] Academia's claims of customary law status are further supported by the ICRC, which through its compilation of IHL rules and commentaries thereto has provided substantial backing to these claims. According to Rule 33:

"*Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited."*[274]

Reinforced by significant state practice, such as relevant protection norms to be observed in the military law manuals of a handful of states, the ICRC also notes that no practice exists contrary to the protection regime.[275] At this point a distinction regarding the usage of „combatant" needs to be made. On the one hand, the Geneva Conventions define combatants as a status (*de iure* approach),[276] whereas on the other hand, judicial practice of the ICC and SCSL along with a significant portion of academia define combatants as „persons taking part in the hostilities", which is closer to a conduct or action (*de facto* approach).[277]

Therefore, the question emerges: what are the boundaries of the abovementioned protection or rather, when do peacekeepers lose their protection afforded by IHL? As a general rule of thumb, peacekeepers lose their protected status when they take part in the hostilities. However, a use of armed force purely in self-defence does not constitute a sufficiently strong reason to render the protection inapplicable. As a result, the meaning of self-defence and its

[272] ICC Statute, Art. 8. Sec. 2. b. iii, Art. 8. Sec. 2. e. iii.; SCSL Statute Art. 4. b.
[273] SIVAKUMARAN, Sandesh: *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, p. 324, also at WHITTLE, *ibid*, p. 864. It is also worth noting that the general prohibition has attained customary law status and not criminal responsibility for the acts *per se*.
[274] ICRC Customary IHL Database, Rule 33, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule33 (accessed: 30. July 2020.).
[275] The military law manuals of inter alia Australia, Azerbaijan, Cameroon, Canada, Congo, Georgia, Germany, Mali, Netherlands, New Zealand, Spain, United Kingdom; See also: ICRC Customary IHL Database, Rule 33, Notes 3 and 4.
[276] Additional Protocol I to the Geneva Conventions, Art. 43, para 2.
[277] For further discussion on the de iure and de facto understanding of combatants and the ongoing debate in which the rationale including the USA's point, see also: LATTMANN, Tamás: *Az egyén helyzete napjaink fegyveres konfliktusaiban – különös tekintettel a fegyveres erő terrorizmussal szembeni alkalmazására*, doktori értekezés, Budapest, 2012, pp. 109-110, 203-204, 211-212.

widening application bears special significance.[278] The sufficiently strong link by which peacekeepers lose the afforded protection comes in the form of directly aiding the armed forces taking part in the conflict.[279] In other words, 'peacekeepers may be considered as taking part in an armed conflict whenever providing causally linked military support to any of the fighting forces'.[280] Losing their protected status is not a permanent phenomenon and only lasts during the 'effective contribution' to the armed conflict.

In the *Prosecutor v. Sesay* judgment in 2009 the SCSL iterated the notion that peacekeeping personnel may become combatants and as a result lawful targets *'for the extent of their participation in accordance with international humanitarian law'.* [281] The ICC adopted a similar approach in its 2010 *Prosecutor v. Abu Garda* judgment, where the Court has found that *'personnel involved in peacekeeping missions enjoy protection from attack unless and for such time as they take a direct part in hostilities or in combat related activities.'* While referencing the earlier judgment of the ICTY in the *Strugar* case, the ICC also has also reiterated that whether a person has taken direct part in the hostilities is a decision that needs to be made on a case-by-case basis and not based on general circumstances.[282] As established by the Pre-Trial Chamber of the ICC in the *Prosecutor v. Abu Garda* Case: *[…] Installations, material, units and vehicles involved in a peacekeeping mission … shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to the conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."*[283] The ICC followed this line of reasoning in the 2011 *Prosecutor v. Banda and Jerbo* case, where it applied the threshold it had set up previously in the *Abu Garda* case to the specific circumstances of the situation. The Court established that *'there is no evidence suggesting that prior to the attack or at the time of the attack AMIS personnel took any direct part in hostilities or used force beyond self-defence.*'[284] It needs to be mentioned

[278] See also: Chapter 2.
[279] ENGDAHL, Ola: *Protection of Personnel in Peace Operations*, Martinus Nijhoff, Leiden-Boston, 2007, p. 98.
[280] KNOOPS, Geert-Jan Alexander: *The Transposition of Inter-State Self-Defence and Use of Force onto Operational Mandates for Peace Support Operations*, in: ARNOLD, Robert (ed.): *Law Enforcement Within the Framework of Peace Support Operations*, Martinus Nijhoff, 2003, p. 10.
[281] Prosecutor v. Sesay, Kallon and Gbao, Special Court for Sierra Leone, Case No. SCSL-04-15-T, 2 March 2009, Trial Judgment, Para 233, p. 75.
[282] Abu Garda case, paras 81, 83, p. 37; Also in: MATHIAS, ibid. p. 145.
[283] Abu Garda case, para 89 WHITTLE, ibid. p. 865.
[284] Prosecutor v. Banda and Jerbo, International Criminal Court, Case No. ICC-02/05-03/09, 7 March 2011, Corrigendum of the Decision on the Confirmation of Charges, Pre-Trial Chamber I, para 103, p. 43.

though, that concerning the cases before the ICC, the peacekeepers were not UN peacekeepers, but those of the African Union, however the ICC solved the conundrum by analysing Chapter VIII of the UN Charter, which enables the UN to conduct regional agreements in order to ensure the maintenance of international peace and security.[285]

In the above cited analysis by the ICC, the general principles of IHL are used extensively to determine the existence of a protection regime applicable for peacekeepers in a given scenario on the field. As we can see, there is no general rule that is valid under all circumstances, but rather one must draw upon the principles of military necessity and distinction of IHL to decide whether such a protection exists on a case-by-case basis, which might not be the easiest choice to make in an actual armed conflict. Generally, symbols help commanders to differentiate between lawful targets and civilians, such as the UN emblem or the distinctive light blue helmet.[286] However, these symbols do not help differentiation when peacekeepers are taking active part in the hostilities. When deciding in general whether an operation is peacekeeping in nature or possesses more of an intervention-enforcement nature, both the ICC and the SCSL relied on the fulfilment of the three fundamental principles of peacekeeping. As Whittle has pointed out, the general protection applies when the peace operation functions with impartiality, consent and the use of force only in self-defence. Under these circumstances we can safely designate an operation as a peace operation where peacekeepers are awarded protection as civilians insofar as they do not partake in the hostilities directly.[287] How these factors can be weighed by the acting commander on the field in the line of fire is another matter entirely.

The exception which deviates from the rule can be observed regarding MONUSCO, the operation established in 2013 which was not only tasked with maintaining the functions of a typical peace operation, but also to work alongside the Intervention Brigade to neutralise armed groups.[288] In the case of MONUSCO, since the operation was ordained by the SC to work alongside military forces of the central government, it can be assumed that a direct link is

[285] Abu Garda case, para 76, p. 34; UN Charter Art. 52, para 3.: *'The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.'*
[286] WHITTLE, ibid. p. 867.
[287] WHITTLE, ibid. p. 867.
[288] UN SC Res 2053/2012 (27 June 2012) Art. 4., Sec. a, c.

established via the mandate, through which peacekeeping personnel can be regarded as combatants and hence be considered lawful military targets.[289]

3.2.5. Possible application of special regimes of IHL – occupation

If we take a look at one of the special regimes of IHL, namely occupation, a wide range of uncertainties arise. As the Geneva Conventions do not define occupation, the 1907 Hague Regulations bear significance. Art. 42. states that:

„Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." [290]

Thus, three conditions need to be met for a situation to be categorized as occupation. These three cumulative elements are:

1.) Armed forces of a foreign state are physically present without the consent of the effective local government in place at the time of the invasion.
2.) The local sovereign is unable to exercise his authority due to the presence of foreign forces.
3.) The occupying forces impose their own authority over the territory.[291]

Regarding peace operations two of these conditions are questionable. For the first one, since the consent of the host state is a base principle of peace operations, only those operations can be analysed where consent was not given. For the second criteria, the inability to exercise authority by the local sovereign has most likely happened before the peace operation was deployed, hence the *raison d'être* of the mission. However, the provision can be understood as the operation barring the exercise of the local sovereign, which is only feasible if the consent was given by the host state, but it has since withdrawn it and the peace operation continued nonetheless. Since the three abovementioned conditions are cumulative in nature and two seem to not be met, it would be easy to set aside the applicability of the notion of occupation. Nonetheless, there are practical situations from the recent history of peacekeeping, where either consent was not given (or by not each of the parties in question), such as UNOSOM II in

[289] MATHIAS, Stephen: *UN Peacekeeping Today: Legal Challenges and Uncertainties*, Melbourne Journal of International Law, Vol. 18, 2017, p. 143.
[290] Convention (IV) respecting the laws and customs of war on land and its annex: Regulation concerning the Laws and Customs of War on Land, The Hague, 18. October 1907, Art. 42.
[291] ICRC – Rule of Law in Armed Conflict, Geneva Academy, Military Occupation; available at: http://www.rulac.org/classification/military-occupations#collapse1accord (accessed: 11. July 2020).

Somalia, or in the case of Kosovo, where the shadow of doubt has enveloped the consent given to the UN.[292]

As NAERT has pointed out, what we know for certain is that there are norms of IHL and IHRL to be applied in peace operations, however the exact contents are unclear.[293] By now, it can be stated that the most important provisions of the Geneva Conventions and its Additional Protocols which are binding based in international customary law can and should be applied in UN peace operations either through customary law itself or through its recognition in the 1999 bulletin of the SG. There is no consensus in literature what norms are applicable if the operation is conducted without the consent of the host state and whether or not the situation can be classified as *de facto* occupation.[294]

Analysing state practice does not help considerably with deciphering applicable norms. On the one hand, states rarely rely on the IHL tenet of occupation and on the other hand, the rules of occupation themselves are quite vague.[295] A much more nuanced approach can be seen regarding observance of IHL by armed forces abroad, which may or may not be governed by the rules of occupation, but which possess a far more detailed practice by international courts, namely the ECtHR.[296]

3.2.6. Conclusion

Chart No. 6.: Application of IHL norms in peace operations

	no use of force	use of force in self-defence only	to protect the civilian population	in defence of the mandate	peace enforcement (offensive use of force)
Combatant status	no	no	maybe	maybe	yes
Application of IHL in general	not applicable	not applicable	per general norms of IHL enshrined through the 1999 SG's Bulletin		

[292] ZWANENBURG, Marten: *Pieces of the Puzzle: Peace Operations, Occupation and the Use of Force*, Revue de droit militaire de la guerre, Vol. 45, 2006, p. 242.
[293] NAERT, Frederik*: International Humanitarian Law and Human Rights Law in Peace Operations as Parts of a Variable Ius Post Bellum*, Revue Belge de Droit International, Vol. 44, 2011, p. 37.
[294] NAERT, ibid. pp. 33-34.
[295] ZWANENBURG, ibid. p. 244.
[296] See Chapter 6 for a detailed analysis.

Regulation protecting peacekeeping personnel (passive side)	1994 Safety Convention and its 2005 Optional Protocol		per general norms of IHL (Art. 2 Sec. 2. of the 1994 Safety Convention)
Regulation enabling prosecution for the violation of IHL (active side)	not applicable	only in case of excess (violation of principles)	• Statutes of the ICC, SCS • scholarly literature advocating international customary law nature • national criminal codes

Source: author's own compilation

In order to provide a conclusion, it can be established that the general norms of IHL are applicable to peace operations if some semblance of use of force occurs. It is generally accepted, that in a situation where use of force is interpreted in a narrow manner *i.e.* it is used to protect the peacekeepers themselves, their compound, vehicles, person, they do not fall under the scope of IHL. This understanding is extended by recent examples of use of force applied to protect civilian population or the mandate itself. In these situations, peacekeepers are bound by the norms of IHL, while the SG's 1999 Bulletin only serve as means to convey and specify the exact contents of obligations (from the point of view of the UN). In case of an offensive use of force, i.e. what can be envisaged during a peace enforcement operation, peacekeepers will be bound by IHL without a doubt.

Protection awarded to peacekeepers by IHL linked to their status combatants or non-combatants. In case where use of force is not applied or it is applied only is strict self-defence, peacekeepers are regarded as non-combatants and cannot be lawfully targeted. On the other end of the scale, in case of a peace enforcement operation, they will be deployed on the ground with the purpose of 'taking direct part in the hostilities' and as a result will be deemed to be combatants. The latter test can be invoked in case of extended use of self-defence. If during protecting civilians or carrying out other tasks incorporated in the mandate, peacekeepers 'take direct part in the hostilities' they will be regarded as combatants, however if they do not partake in military activities, they will be regarded as non-combatants eligible to protection. In my opinion, since their role is centred around the protection of civilian population and they serve

as a principal tool for the SC to maintain international peace and security, this protection is warranted. However, a situation should never arise, in which a member of the armed forces of any state, even serving under the emblem of the UN, would find themselves in protected while engaging in military activities all the while they themselves cannot lawfully be made targets. The 1994 Safety Convention and the SG's 1999 Bulletin serve as tools for protecting peacekeepers, while at the same time recognizing the binding effect of IHL, albeit not without uncertainties.

Regulating violations of IHL only bear significance if IHL applies in the first place. As advocated by the statutes of international tribunals (ICC, SCSL and to certain extent ICTY), with academia arguing for customary law nature, and national criminal codes incorporating statutory provisions such as war crimes, repercussions for violations of IHL seem to be encased in strong footing. However, if there is a violation of IHL by peacekeeping personnel, it will be the prerogative of national courts to decide the individual criminal responsibility of the perpetrator. Some uncertainty is caused by the scenario where peacekeepers are using force in self-defence, and therefore remain in a protected status, but they exceed the limits of self-defence and violate IHL by doing so. In that case, since they are not bound by any specific provision, only the general principles of IHL will apply, which will nonetheless be sufficient to ensure legal ramifications for the conduct.

Having a firm understanding of applicable norms of IHL is of paramount importance during a peace operation. In the majority of cases, peace operations are not formed to take active part in the hostilities, but circumstances may change rapidly. When carrying out the mandate to protect the local population and the commander of peacekeeping personnel finds him/herself opposing child soldiers, or for local commanders when trying to ascertain who can be regarded as a combatant, the norms of IHL can be a matter of life and death and later on serve as basis for criminal responsibility.[297]

[297] FOWKES, James: *The Relationship between IHL and IHRL in Peacekeeping Operations: Articulating the , Emerging AU Position*, Journal of African Law, Vol. 61, Issue 1, 2017, p. 22.

Chapter 4.: Sexual Exploitation and Abuse

I was left feeling numb by the extent to which people can be made to suffer. The young women of Bunia, in the Democratic Republic of the Congo, had survived the most gruesome wartime experiences—massacres, multiple rapes, disease and hunger—only to then find themselves tormented by the very people who were sent in to save them. It was clear these people had endured unabashed cruelty.

– Prince Zeid Ra'ad Zeid al-Hussein

4.1. Introduction

The United Nations had a surge of reform ideas related to peacekeeping between 2000 and 2005. The process started with the *Brahimi Report* in 2000 detailing the shortcomings of UN missions on the last decade and providing solutions that were sorely needed to peacekeeping. The Brahimi Report focused on the general problems of peacekeeping however like funding and ensuring the continued participation of member countries and put little emphasis on conduct and disciplinary reform. Still some of its recommendations remained on paper as part of the international community was reluctant to embrace it entirely.

The next step came to pass in 2005 when Prince Zeid Ra'ad Zeid, special envoy of the Secretary General filed his report. The General Assembly lauded Prince Zeid for his efforts in tackling the issue and Secretary General Kofi Annan promised to show a strong hand combatting the problem. Indeed, something began that had beneficial results such as revealing some of the latent crimes and the introduction of a new reporting system. Training and awareness-raising programs were launched and statements were issued that condemned sexual misconduct.[298] A serious mistake the report made was that at certain points it drifted away from realistic solutions and it did not take into consideration the willingness of the states. As an example, it would have required troop-contributing countries to alter their criminal codes to allow on-spot trials in case of allegations against peacekeepers. As expected, the international community officially promoted the Zeid Report but no specific regulations were accepted as a resolution. The importance of the Zeid Report cannot be overstated though. It was the first report which dealt with sexual misconduct committed by peacekeepers, underlined the fact that

[298] LYYTIKÄINEN, Minna: *Gender training for peacekeepers: Preliminary overview of United Nations peace support operations*, UN-INSTRAW working paper 4 on gender, peace and security, 2007, available at: https://www.un.org/ruleoflaw/files/GPSWorkingPaper4-1.pdf (accessed: 31 July 2020).

the UN takes the question seriously and led to the decline of reported misconduct by promoting reform in this field.

4.2. Occurrence of Sexual Exploitation and Abuse and the UN's responses

4.2.1. From the beginning until 2002

The role of the media deserves special attention because it is the primary source of our knowledge of what has happened during the operation, as both the TCCs and the UN are often reluctant to disclose any information regarding these heinous crimes for fear that their reputation would suffer serious damage. There have been reports of SEA since the 1960's, when the first relatively large mission was set up in the Congo and peacekeepers were reportedly took advantage of their situation to rape local women. [299] In the 1990's major uproar resulted from the scandal of Belgian peacekeepers roasting a boy over fire in Somalia as well as peacekeepers organizing human trafficking during the Balkan wars.[300] This was immortalized by the 2010 movie the Whistleblower, which helped raise attention globally to the issue. In 1993 a huge scandal erupted when Bulgarian peacekeepers were accused of rampaging in Cambodian hotels, molesting locals and trying to smuggle drugs, weapons and species from the local wildlife to their home country.[301] Still, the UN was not moved.

Major change came in 2002, when in West Africa, namely Guinea, Liberia and Sierra Leone there were rumours of peacekeepers abusing the refugees in camps. The OHCHR and an NGO – Save the Children investigated the scene and found that officials working in the camps exchanged food, money and basic goods for sexual favours. These officials included locally recruited staff, representatives of NGOs and military members of national contingents. The victims of these crimes were mostly young girls, women and boys, especially those who were in the camp without their parents.[302] After an investigation that lasted more than 5 months it was concluded, that out of 43 claims 10 could be considered substantiated, with no UN staff member implicated. It was acknowledged however that conditions in the camps could give rise

[299] KOVATCH, Bonnie: *Sexual exploitation and abuse in UN peacekeeping missions: A case study of MONUC and MONUSCO*, The Journal of the Middle East and Africa, Vol. 7, Issue 2, 2016, p. 159.
[300] http://edition.cnn.com/WORLD/9704/17/belgium.somalia/index.html?_s=PM:WORLD (accessed: 21.12.2019.)
[301] https://www.washingtonpost.com/archive/politics/1993/10/29/tarnishing-uns-image-in-cambodia/2cc7d6f5-0408-4763-8055-f12dd8e0077c/ (accessed: 21.12.2019.)
[302] SHOTTON, *ibid*. p. 99.

to sexual misbehaviour.[303] I find this to be the first sign of systemic error, where neither the public nor the victims received any information about the alleged perpetrators and what the follow-up in their cases was, if there was a follow-up in the first place. Another problematic point is that an investigation lasting more than 5 months in one of the most volatile regions in those times operates with the serious risk of information, witnesses and evidence disappearing, while the perpetrators could mask their tracks, intimidate victims or simply 'rotate out' of the mission. Nonetheless, the UN began to grasp the severity of the problem SEA posed to peacekeeping as in the very same year, in 2002 the Inter-Agency Standing Committee Taskforce on SEA was set up to harmonize prevention and enforcement.[304]

4.2.2. The Democratic Republic of the Congo and the Zeid Report 2003-2005

Shortly after the events in West Africa, one of the largest scandals broke out in 2004 during the MONUC mission where peacekeepers were found to systematically commit SEA with a sense of impunity. After the MONUC scandal the UN initiated the following steps:

- a ban on all unofficial contact and fraternization by mission personnel with local communities,
- a dusk-to-dawn curfew on military personnel, so that they do not leave their base during night time off-hours,
- the prohibition of civilian dress for uniformed contingents, to ease monitoring and identification of UN personnel,
- increased cooperation with Congolese police to reduce informal contact between UN personnel and local women,
- expanded training in UN codes of conduct and personnel rules regarding sexual abuse and exploitation,
- the designation of some local business establishments, including brothels and some bars, as "off-limits to UN personnel",
- improved amenities and recreational facilities on base,
- improved communications with local communities and civil authorities, including the creation of a confidential "hotline" to report abuses,

[303] http://www.nytimes.com/2002/10/23/world/world-briefing-united-nations-workers-cleared-in-sex-abuse-inquiry.html; http://www.unhcr.org/3c7bf8094.html; http://www.nytimes.com/2002/02/27/world/survey-finds-extensive-abuses-of-refugee-children-in-africa.html (all accessed: 21.12.2019.)
[304] BURKE, *ibid*. p. 15.

- the establishment of a new office within MONUC to investigate any new allegations. [305]

One of the major findings of the Zeid report is increased participation of the host state in the proceedings.[306] On the one hand it is not a realistic prospect for military personnel, as TCCs have shown that they deeply resent the idea of letting go or even sharing criminal jurisdiction regarding uniformed personnel. On the other hand, this may prove to be a major step forward regarding civilian personnel. For them however, the swift waiver from the SG would be a prerequisite. Still, it is not a solution for every situation as peace operations are first and foremost mandated to keep the peace and help post-conflict reconstruction. As a result, the judicial infrastructure of the host state may not be in a state in which it is capable of carrying out a process against a UN employee.[307] On a general note, the Report endorsed the creation of conduct and discipline units both at headquarter and mission level on the field, the strict enforcement of zero-tolerance policies as well as non-fraternization between peacekeepers and locals. It highlighted the fact that investment in staff and troop welfare is necessary in order to help alleviate the effects of a stressful environment. Last but not least, improved reporting procedures are necessary to successfully tackle SEA.[308]

Even as the Zeid-report was being compiled, occurrence of SEA did not cease. As a result, the UN was forced to take relatively drastic action. As first steps in April 2005 informal relations and fraternization with the local population was prohibited, supplemented by a night-time curfew and a day-time provision where peacekeepers were only allowed to leave camp in uniform. Several establishments such as brothels and bars were blacklisted, and at the same time, more recreational facilities created for peacekeepers. Cooperation with local authorities and NGOs was enhanced with even a reporting hotline and separate reporting office set u pin MONUC. [309] The idea of zero-tolerance as a policy of the UN has several implications. First and foremost, it serves as a guarantee that its agents will respect the laws of the land as well as the contents of the SoFA and the MoU. Secondly, it aims to ensure that the Organization will

[305] DAHRENDORF, Nicola: *Sexual Exploitation and Abuse: Lessons Learned Study, Addressing Sexual Exploitation and Abuse in MONUC*, UN DPKO Best Practices Unit (March 2006);
[306] *Zeid Report* paras, 35, 86.
[307] FERSTMAN, Carla: *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*, Special Report, United States Institute of Peace, 2013, p. 7.
[308] DURCH-ENGLAND, ibid. p. 2.
[309] http://www.un.org/africarenewal/magazine/april-2005/tough-un-line-peacekeeper-abuses (accessed: 21.12.2019.)

take all necessary steps internally and externally to remedy the situation.[310] Since its implementation in the 2003 SGs Bulletin, zero-tolerance has served as both a guideline for concrete action for the UN as well as goal to strive for. However, there is a palpable disparity between policy and legal reality. This is the underlying reality of why the UN must be the flag bearer in the fight against SEA: its negative effects are felt strongly by the Organization, much more so than the TCCs.

The zero-tolerance policy has had a development curve of its own. Based on SC Resolution 1325/2000 in which the Council:

„[...] Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict [...].”[311]

The Council had to strengthen and reinforce its point several times over the next decade, as seen in 2008, when it reiterated its commitment to the zero-tolerance policy while also calling on states to prevent SEA and ensure accountability.[312] Twice again in 2009 firstly repeating its commitment to the zero-tolerance policy and then on training troops on zero-tolerance policy.[313] The annual reiteration of zero-tolerance lets one believe that the implementation was less than successful than expected. The SC went a step further in 2010 when mission-specific procedures to be drawn up in order to prevent SEA by peacekeepers.[314]

From 2003 onwards the UN has been the depository for allegations concerning SEA as all allegations have to be reported to the Conduct and Discipline Unit (CDU), while investigations are handled by the Office of Internal Oversight Services (OIOS).[315] The Conduct and Discipline Unit and Conduct and Discipline Teams were set up in 2005 with the purpose to serve as a conduit for allegations to reach UN Headquarters.[316] The system was supplemented by SEA focal points established to aid the leadership of the mission on how to comply with the SG's bulletin.[317] The OIOS is responsible for handling allegations. It needs to work closely with the TCC regarding military personnel (if it has investigative capabilities regarding uniformed

[310] KANETAKE, Machiko: *The UN Zero Tolerance Policy's Whereabouts: on the Discordance Between Politics and Law on the Internal-External Divide*; Amsterdam Law Forum, Vol.4.4, 2012, p. 53.
[311] SC Res 1325/2000 (31.10.2000) Para 10.
[312] SC Res 1820/2008 (19. June 2008) Paras 2-4.
[313] SC Res 1888/2009 (30 Sept. 2009) Paras 1-4, 1894/2009 (11. Nov. 2009) Paras 7.b-d.
[314] SC Res 1960/2010(16 Dec. 2010) Para 8.; KANETAKE, *ibid*. p. 59.
[315] KANETAKE, *ibid*. p. 55.
[316] BURKE, *ibid*. p. 17.
[317] BURKE, *ibid*. p. 16.

personnel in the first place) and also with the host state regarding civilian personnel (provided the waiver enabled the procedure of the host state and the alleged perpetrator is still in the host state). Over the last nearly two decades' information sharing regarding SEA has also improved considerably, which is helped by persistent inquiries by the CDU's monthly reminders to states. To further enhance cooperation, the Department of Field Support has launched the so-called Misconduct Tracking System which serves as a global database and confidential information-sharing system for all allegations.[318] During the following decade after 2003 the zero tolerance policy has seeped in all sub-systems of peacekeeping, with its standards being applicable to all 8 categories of personnel.[319]

Per the Zeid report's recommendation the work of the GLE or Group of Legal Experts began and the group has submitted their reports in 2006. GLE I was tasked with finding ways for the SG's 2003 Bulletin to be legally binding, while GLE II was created with the goal of mapping criminal accountability avenues concerning SEA in peace operations.[320] The first Group of Legal Experts found that since the Secretary General's 2003 bulletin enabled the SG to apply administrative action in the form of repatriation, the SG could also create binding administrative norms in the form of bulletins if need be.[321] While the SG's power to initiate administrative action against civilian and military personnel (albeit only repatriation in the latter case) is undeniable, it is quite far from exercising criminal jurisdiction, which would be the only avenue of remedy of sufficient magnitude. It was noted by the GLE that it would be desirable to include SEA in the domestic criminal codes of TCCs.[322] A highly desirable act from the UN's side and if voluntarily followed could bring about a real difference, although it is highly unrealistic that the UN could bring about the harmonization of 193 member states criminal codes concerning SEA in the foreseeable future. As the GLE observed the conduct material used by the Department of Peacekeeping Operations during training combating SEA was not legally binding in nature, but the MoU (and later the amended MoU) created explicit obligations for TCCs.[323] The downside was enforcement. If the TCC refused to prosecute individuals allegedly committing SEA, the UN was powerless to commence legal process against the alleged perpetrator. The GLE report also recommended the creation of hybrid tribunals where the occurrence of SEA is systematic and widespread. Special hybrid tribunals

[318] STERN, *ibid*. p. 14.
[319] KANETAKE, *ibid*. p.55.
[320] BURKE, *ibid*, pp.13-14
[321] BURKE, *ibid*. pp. 14-15.
[322] BURKE, *ibid.* p. 15.
[323] BURKE, *ibid*. p. 15.

would be based on previous examples of Sierra Leone, East Timor and Cambodia.[324] The first group of legal experts argued for an international convention on the subject as well as enhanced jurisdiction of the host states. The idea of an international convention was dropped as a result of a lack of interest from the TCCs, while the improved host state jurisdiction met with outright hostility from these very same contributors. As for State representatives of countries where occurrence of SEA has been prevalent (e.g.: DRC) have been vocal in their support of a specific convention on SEA and emphasized the need in their respective government's eyes, although there is little political will in the larger international community to do so.[325]

In 2007 a commendable initiative took place which resulted in the creation of a so-called 'value-neutral' criminal code which could provide a basis for rebuilding the criminal justice system in states ravaged by conflict. Although the publication was lauded by several scholars, its recommendations were not implemented in the form of a convention and therefore remains an expert material. It would also have regulated the sexual misconduct of peacekeeping personnel whether military or non-military.[326] This has been one of the first instances of a two-step solution in dealing with criminal matters by peacekeeping personnel as the report advocated a primary sending state-jurisdiction complemented by a secondary host state jurisdiction. In my opinion this was one of the weaknesses of the report as in the case of non-compliance by the TCCs it would have relied on the UN to bring the justice system of the host state to the international level in order to enable it to prosecute the perpetrators. This idea poses several difficulties. Firstly, as the *raison d'être* of peace operations is to help a traumatized state which is still often a battleground for conflicting groups of people and interest, the main goal, the maintenance of peace and the cessation of hostilities is the primal concern. The recreation of the justice system as well as the rebuilding of the state is an integral part of that long-term mission, however it remains a long-term one. The essence of criminal justice relies on its swiftness and inevitability, which can be an arduous process in well-established and stabile states, let alone in weakened or *horribile dictu* failing states. To put it plainly, the perpetrators cannot and shouldn't wait for years and decades for the establishment of a functioning justice system. Therefore, it is my view that the two-step accountability is not a viable path and that

[324] FERSTMAN, *ibid*. p. 7.
[325] WILLS, Siobhán: *Continuing Impunity of Peacekeepers: The Need for a Convention*; Journal of International Humanitarian Legal Studies Vol. 4. 2013. pp. 71-73, 80.
[326] O'CONNOR, Vivienne and RAUSCH, Colette eds., with Hans-Joerg Albrecht and Goran Klemencic, *Model Codes for Post-Conflict Criminal Justice, Volume 1: Model Criminal Code* (Washington, DC: United States Institute of Peace Press, 2007.

currently as well as in the near future accountability in and by the TCC is the only reasonable and sustainable way to go.

2007 saw the adoption of the UN Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel which called for the establishment of assistance mechanisms for victims of SEA in every state where peacekeepers are deployed.[327] The project paved the way for a more holistic approach that would be adopted in 2017.

4.2.3. The events in the Central African Republic and the Deschamps Report 2013-2015

The major event of 2014 was the launch of the Code Blue Campaign, an initiative of the NGO Aids-Free World. As part of the campaign, senior UN officials, public figures and a former commander of operations came together with the purpose of stopping SEA in peace operations. The Campaign primarily aimed at changing the system of immunities of UN staff members, currently protected by the 1946 Convention. The initiative named the lack of transparency, focus on damage control and non-existing checks and balances as the main problems of the current regime. Since its foundation the campaign battled the issue by leaking information, garnering media attention and by holding the UN to its word by reminding the Organization to its promises and analysing the actions taken in the matter.

The 2015 SG's report highlights some of the key areas of progress regarding SEA and the implementation of several of the report's recommendations. A point of further improvement according to the SG's findings would be increased vetting and training, cooperation and feedback from contributing states as well as providing aid to victims, whether it would constitute psychological, medical, legal or financial help. The report also foreshadows the potential need for an independent systematic inquiry by experts.[328] An initiative that would soon become essential as a major scandal was looming over the horizon.

One of the greatest scandals concerning SEA in UN peace operations broke out in 2015, when French peacekeepers have allegedly committed numerous acts of SEA while on mission. According to the case, the violations happened between December 2013 and June 2014 in Bangui, CAR. Reports have been filed to the OHCHR detailing the circumstances of the case, however they fell on deaf ears in Geneva. One staff member however, Anders Kompass, who

[327] STERN, ibid. p. 15.
[328] http://www.nationalinterest.org/feature/take-back-the-fight-fixing-the-uns-rape-culture-12365 (accessed: 21.12.2019.).

decided to turn to the media, after attempting without success to push his superiors to act. Two things happened as a result. The first thing was that French authorities decided to investigate the matter immediately and thanked Mr. Kompass for the information. On a side note, after 19 months of investigation, by the end of 2015 there is still no information whether the alleged perpetrators have been called to account or not.[329] The second event, was that the OIOS and the OHCHR started a witch-hunt, claiming that Mr. Kompass has leaked confidential information to a third party. Consequently, he was suspended from work and a lawsuit began at the UN Administrative Tribunal.[330] In May 2015, the UN Appeal Tribunal cleared Mr. Kompass of the charges, with Judge Thomas Laker citing from the judgment, that there have been serious and well founded doubts concerning the legality of Mr. Kompass' suspension.[331] It is disheartening that the same Zeid Ra'ad Al-Hussien, who compiled the famous Zeid-report in 2005, which detailed the phenomenon of SEA in peace operations and how to resolve it, now heading OHCHR decided to opt for the punishment of the 'whistle-blower'. Since 2015, both the UNAT and the independent investigation by Justice Marie Deschamps has exonerated Mr. Kompass of any misconduct, however a few months later he has decided to leave the UN.[332] The story of Mr. Kompass could prove to be disheartening to any would-be whistleblowers, as even a decades-long career by an official can easily be broken by repercussions of UN staff trying to avoid a scandal or simply making an example.

By June 2015, it became clear that the UN had to take the issue seriously, if it wanted to maintain the image of on organization which acts the warden of global peace and security and not as one which condones SEA. In late August 2015, Secretary-General Ban Ki-Moon accepted the resignation of Babacar Gaye, the head of the mission, who resigned as a result of shocking allegations of SEA in CAR by Amnesty International. The SG emphasized once more that the Organization will not tolerate crimes of sexual nature in peace operations.[333] By late December 2015, the UN was forced to send a fact-finding team to Liberia, where peacekeepers have allegedly brutally beat up a local boy. There have been no information on what has really happened or on the follow-up of the investigation.[334] With mounting media pressure calling for

[329] http://www.theguardian.com/world/2015/dec/08/french-soldiers-interrogated-in-child-sex-abuse-inquiry-central-african-republic (accessed: 21.12.2019.).
[330] http://www.theguardian.com/world/2015/apr/29/un-aid-worker-suspended-leaking-report-child-abuse-french-troops-car (accessed: 21.12.2019.).
[331] http://www.theguardian.com/world/2015/may/06/un-suspension-of-sexual-abuse-report-whistleblower-is-unlawful-tribunal-rules (accessed: 21.12.2019.).
[332] https://www.theguardian.com/world/2016/jun/07/child-sex-abuse-whistleblower-resigns-from-un (accessed: 28.08.2020.)
[333] http://www.un.org/apps/news/story.asp?NewsID=51618#.Vr2sO7ThAdU (accessed: 21.12.2019.).
[334] http://www.un.org/apps/news/story.asp?NewsID=52927#.Vr2s6bThAdU (accessed: 21.12.2019.).

the enforcement of various Security Council resolutions,[335] such as UN SC Res. 1325 on Women, Peace and Security[336] and UN SC Res. 1820 calling for a cessation of SEA in armed conflicts,[337] SG Ban Ki-Moon called for the establishment of an independent group of experts, lead by Justice Marie Deschamps.[338]

Among unfortunate events, a ray of hope came in the form of the September 2015 peacekeeping summit, where world leaders have promised enhanced support for peacekeeping, with President Barack Obama calling out to end SEA by peacekeepers, calling it one of the greatest contemporary challenge for the Organization which is capable of destroying trust of local communities towards the mission and the UN. Therefore, zero-tolerance must be strictly enforced in these scenarios.[339]

Parallel to the Deschamps inquiry a more general and systematic overview was being conducted in order to re-evaluate the status of peace operations. Led by Nobel Peace Prize laureate José Ramos-Horta of Timor-Leste, the independent panel of experts sought to overview the implementation of the Brahimi Report's findings and in what direction peace operations moved from that point. The so-called Ramos-Horta Report is not a critique *per se*, but a comprehensive overview with practical recommendation directed towards member states and the Secretariat. It is a cautious report, non-radical in nature, nudging the parties to have the required political will to act. On many occasions it echoes the Brahimi Report, which indicates that several findings of 2000 have not been incorporated fully after 15 years. The report also highlights the essential policy considerations of peacekeeping while attempting to find not only theoretical answers, but also practical solutions.[340]

The year of 2016 started with shocking revelations, as new allegations surfaced concerning criminal acts of sexual nature in the Central African Republic. This time the NGO Human Rights Watch revealed the allegations and the OIOS sent a fact-finding team to help MINUSCA investigate. The team found that indeed acts of SEA happened between 14-17

[335] http://www.thestar.com/opinion/editorials/2015/06/25/probe-of-sex-abuse-by-un-peacekeepers-is-long-overdue-editorial.html (accessed: 21.12.2019.).
[336] S/RES/1325, 31 October 2000.
[337] S/RES/1820, 19 June 2008.
[338] M. Deschamps, H. B. Jallow and Y. Sooka, *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* 17. december 2015 at http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf (hereinafter: Deschamps Report).
[339] https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-un-peacekeeping-summit (accessed: 21.12.2019.).
[340] NADIN, *ibid*. p. 3.

December 2015 and that the perpetrators were members of the armed forces of the Republic of the Congo and of the Democratic Republic of the Congo. The authorities of all three countries have been notified of the incident. As a provisional measure the UN ordered the confinement of all 120 soldiers, among who were the likely perpetrators as well as the repatriation of those troops as soon as possible.[341]

On January 29, 2016, Anthony Banbury, UN Assistant Secretary-General for Field Support explicitly named states whose nationals have committed SEA, namely Bangladesh, DRC, Morocco, Niger and Senegal. As also a first occasion in case of the DRC and Niger the UN, for the first time in its history has conducted its own investigation into the allegations, as the aforementioned countries have not provided any feedback to the UN and refused to communicate altogether.[342] By February 7, the OHCHR and Prince Zeid himself have admitted there have been allegations concerning French and Georgian troops committing acts of SEA in the CAR.

As a side note I find it disturbing that the UN only became aware of the situation as a result of the work of an NGO and not through its inner reporting or monitoring mechanisms. Furthermore, it is even more troubling that the UN – out of fear of a media storm – is more concerned with creating the image of a strong organization capable of holding the reins in peacekeeping than actually investing energy in eliminating SEA in peace operations. It raises further concerns that confinement to the barracks and repatriation of the whole battalion was used instead of a proper investigation. Punishing a group of people indiscriminately – although not in the sense of criminal punishment – can be considered as violation of certain procedural guarantees, such as the presumption of innocence. Moreover, it can cause financial damage, because as a result of repatriation, the soldiers won't receive the higher income for participating in a peace operation.

In April 2016 Aids-Free World received leaked information that 41 new allegation surfaced in CAR, the currently most problematic UN peace operation to date regarding SEA. The new data, when compared to the list of cases complied by UNICEF found that by 7th April 2016 41 new cases were found, that were never reported by the UN.[343] These new allegations

[341] http://www.un.org/apps/news/story.asp?NewsID=53163#.Vr2qkrThAdU; https://minusca.unmissions.org/en/new-allegations-sexual-abuse-emerge-against-minusca-peacekeepers (both accessed: 21.12.2019.)
[342] http://www.un.org/apps/news/story.asp?NewsID=53120#.VsXGSbThAdU (accessed: 21.12.2019.)
[343] http://www.aidsfreeworld.org/Newsroom/Press-Releases/2016/41-New-Allegations.aspx (accessed: 21.12.2019.)

were especially embarrassing for the UN, because just a day later, before the NGO came public with the information, UN Special Coordinator Jane Holl Lute claimed in a video interview that transparency is the most crucial aspect of dealing with SEA.[344] By then the UN Special Coordinator had to have received report on the new allegations, which had an extremely negative effect of the trustworthiness of the UN.[345] In May 2016 Under-Secretary General for Field Support Mr. Atul Khare pronounced that the Trust Fund is operational according to UN officials with funding provided by contributions of member states.[346] The previous idea which is still in place in some instances consisted of the retention of allowances of perpetrators raised a lot of concerns mainly regarding legality issues as the UN had no right to carry out such a measure.[347] It would even violate some of the basic principles of international criminal law, as it would have proposed a punishment or coercive measure before the sentence was carried out – contrary to the principle of presumption of innocence.[348]

Later in 2016, in his final speech to the General Assembly, Secretary-General Ban Ki-Moon addressed the issue of SEA in peace operations. The SG expressed his regret over the actions of certain soldiers participating in peace operations who committed crimes of sexual nature, which have an adverse effect on the reputation of the organization as well as traumatizing the local population. He emphasized the need for the protectors of peace not to aggravate the suffering of those they were meant to protect, nor to tarnish the works of thousands, who labour as agents of peace. The SG also called on member states and the Secretariat to redouble their efforts in applying and enforcing the UN's zero-tolerance policy in this matter.[349]

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[344] https://un.org.au/2016/07/28/interview-with-jane-holl-lute-special-coordinator-on-improving-the-united-nations-response-to-sexual-exploitation-and-abuse/ (accessed: 21.12.2019.). Recently however, Ms. Jane Holl Lute herself has come under heavy criticism for her seeming lack of commitment in visiting operations heavily affected by SEA. See also: Open letter to Secretary-General António Guterres by the NGO Code Blue on 1 June 2020. Avalilable at: http://www.codebluecampaign.com/press-releases/2020/6/1 (accessed: 30.07.2020.)

[345] http://us6.campaign-archive1.com/?u=86708d9deb7fbd282b2aaab05&id=52a210eb9d&e=5f1fe10b47 (accessed: 21.12.2019.)

[346] http://www.un.org/apps/news/story.asp?NewsID=53939#.VzwjPTWLQdU (accessed: 21.12.2019.)

[347] Disciplinary and administrative measures can be found on an itemized list of the UN Staff Rules and Regulations – Chapter 10 Rule 10.2.

[348] See also: FREEDMAN, Rosa: *Failing to Protect – The UN and the Politicisation of Human Rights*, 2017.

[349] The Secretary-General's speach was given in 20 September 2016 to the General Assembly in French. The original text was the following: *Je saisis cette occasion pour exprimer mes regrets au sujet de deux situations qui ont terni la réputation de l'Organisation et, pire encore, traumatisé les nombreuses populations que nous servons. Premièrement, les actes odieux d'exploitation et de violence sexuelles commis par certains soldats de la paix et d'autres membres du personnel des Nations Unies ont aggravé les souffrances de populations déjà prises dans un conflit armé et sapé les efforts accomplis par tant d'autres agents de l'ONU dans le monde. Les protecteurs ne doivent jamais devenir des prédateurs. Les États Membres et le Secrétariat doivent redoubler d'efforts pour faire appliquer et renforcer la politique de tolérance zéro de l'Organisation*. https://www.un.org/sg/en/content/sg/speeches/2016-09-20 (accessed: 27 October 2016.)

With the advent of robust peace operations and the increased number of personnel dedicated to these missions, a new trend emerges. With countries such as China, India and Ethiopia pledging more funds and troops to peace operations[350] and then turning these pledges into action by sending larger contingents we see that these troops often fail their mandate. What happens is that these either don't leave their fortified camps to protect the outlying areas or simply abandon the area entirely.[351] The reasons for these actions are yet unclear. These failings could be caused by a variety of reasons: lack of training and discipline of the troops, a direct order from the TCC to the troop-commander not to engage in the fighting, unclear communication with the UN regarding the situation and the expectations of the organization or a combination of any these. What is clear though is that officially these missions have the manpower and the clear mandate to protect civilians and some of these troops fail their missions. Abandoning those in need and the aid workers sent there to alleviate the suffering of the population goes against everything peace operations stand for. This new phenomenon hints at another form of responsibility – when SEA is not committed by the peacekeepers directly, but made possible because of their passive behaviour or legally speaking because of the omission to act when they were obliged to act. Undoubtedly, these acts can only serve to cause harm to the Organization, as while standing by, the UN appears weak, its agents cowardly and not able to protect even their own people, let alone the civilians. Therefore, the UN finds itself in a catch 22 situation, where it has to ask itself: is it worth it to send inadequately trained troops who are solely under the control of their own governments or reduce the number and staff of missions in order to fulfil the mandate. The answer to this question remains elusive and depends largely on the actions taken by the UN, further media storms and future failings.[352]

4.2.4. The Guterres Initiative 2017-

[350] https://peacekeeping.un.org/en/leaders-summit-peaceekeeping (accessed: 21.12.2019.)
[351] Disturbing reports indicate that peacekeepers from India, Rwanda and Ethiopia stood idly by in February 2016 as a civilian protection site was attacked in Malakal, resulting in 30 civilian casualties. Another report from September 2016 show Chinese peacekeepers refusing to leave their camp as violence broke out in Juba. https://www.theguardian.com/world/2016/oct/06/un-peacekeepers-refused-to-help-south-sudan-rebels-raped-aid-workers-report (accessed: 21.12.2019.)
[352] https://news.un.org/en/story/2016/04/526082-un-enforce-zero-tolerance-policy-sexual-exploitation-and-abuse-senior-official# (accessed: 14.09.2019.); Also: https://www.independent.co.uk/news/world/africa/french-troops-accused-of-forcing-girls-to-have-sex-with-dog-in-car-as-rape-claims-against-un-a6961711.html (accessed: 14.09.2019.)

Upon his election, Secretary-General António Guterres has proposed a new, bold and comprehensive strategy on how to combat SEA.[353] According to the SG's vision, the UN would take a multi-pronged approach to tackle the phenomenon by:

- appointing a Victim's Rights Advocate who represents the voice of victims to the outside world and communicated their plight effectively,[354]
- a restructuring of the Trust Fund for victims so that it would cover costs of victims attending trials among others,[355]
- enhanced reports mechanisms to be put in place, for example the community reporting mechanism, where the complaints are gathered by the leaders of smaller communities and communicated towards the UN,[356]
- less time-consuming investigations, with stronger tools available for the OIOS,[357]
- the creation of a circle of leadership, where heads of state can share their ideas, proposals and formulate strategies on how to combat SEA,[358]
- improved communications with TCCs and host states concerning all aspects of SEA,[359]
- annual compilation of best practices by states,[360]
- a voluntary compact with partners reinforcing the commitment of states to tackle SEA,[361]
- introducing a heightened level of cooperation with external partners (other states, NGOs and members of civil society, local leaders, etc.) in order to provide much-needed transparency.[362]

[353] Special measures for protection from sexual exploitation and abuse: a new approach Report of the Secretary-General, A/71/818, 28.02.2017.
[354] SG's report of 2017 ibid., paras 29,32. In August, 2017, Ms. Jane Connors has been appointed first UN Victim's Rights Advocate, who has vowed to provide voice for the victims of SEA. https://www.un.org/sg/en/content/sg/personnel-appointments/2017-08-23/ms-jane-connors-australia-victims%E2%80%99-rights-advocate (accessed: 26.09.2019.), also at: https://news.un.org/en/story/2017/11/569922-un-advocate-vows-give-visibility-victims-sexual-exploitation-and-abuse (accessed: 26.09.2019).
[355] SG's report of 2017, ibid. paras 35-36. The Trust Fund itself was established in 2016 following the Secretary-General's report that year in A/69/769, Annexed to UN GA resolution 62/214. See also: https://conduct.unmissions.org/remedial-trust-fund (accessed: 26.09.2019.)
[356] SG's report of 2017, ibid. para 42.
[357] SG's report of 2017, ibid. paras 45, 47, 48.
[358] SG's report of 2017, ibid. Annex I. Action 30.
[359] SG's report of 2017, ibid. para 54.
[360] SG's report of 2017, ibid. para 53.
[361] SG's report of 2017, ibid. paras 57-59. The voluntary compact has 103 signatories as of 24 September 2019.
[362] SG's report of 2017, ibid. paras 65, 68-73.

The initiatives of SG Guterres must be lauded for their comprehensive and detailed methodology, victim-centred approach and commitment to transparency. Indeed, in 2017 it appeared that a new era has dawned in the combat against SEA in the UN system. However, since then, it seems as if the flames of enthusiasm have died down in the Secretariat over the course of the last two years. The reports of the SG on SEA have become less concise, much shorter and often not going beyond general policy-reiterations. In some cases, it is extremely hard to evaluate the effectiveness of an action. For example, regarding the Trust Fund for victims, the SG notes that 2 million $ have been accrued by 2019, which was used to finance several projects.[363] However, since we have no data on the number of victims of SEA, there is no way of telling the per capita ratio of financial assistance or whether the amount of money directly reached the victims or was used for legal, psychological and medical aid. Even after two years have passed after the SG's plans were drawn up, there are only vague promises of comprehensive and thorough data availability.[364] Regarding terminology, the term allegation is still used as an umbrella, however, using it a s single measurement without disclosing the number of perpetrators or victims, data can seriously be distorted. As a Code Blue report points out, in one case, an "allegation" against police personnel involved 12 perpetrators and 6 victims.[365] The Circle of Leadership initiative has been criticized by having to show only a statement of commitment and further work to be done in autumn 2019. Over the course of the last two years, no palpable results have been achieved by the group.[366]

4.3. Defining of SEA

4 3.1. Applicable definitions

The wider UN family has created several definitions of SEA over the course of the last few decades. Serving as an immediate predecessor of these definitions can be traced to UN SC resolution 1325/2000 which not only explicitly prohibits SEA in Article 10, but appears to encompass SEA into the category of war crimes in Article 11:

[363] Special measures for protection from sexual exploitation and abuse Report of the Secretary-General, A/73/744, 14.02.2019, para 38.
[364] A/73/744, 14.02.2019, para 45. As the report quotes: "[…] United Nations policies and standards of conduct, training materials and tools on combating sexual exploitation and abuse will be digitized and made accessible online in due course."
[365] Code Blue: Secretary-General's Special Measures Report on Ending UN Sex-Abuse Crisis Fails on Every Front, 18.03.2019. http://www.codebluecampaign.com/press-releases/2019-3-18 (accessed: 26.09.2019.)
[366] http://www.codebluecampaign.com/circle-of-leadership (accessed: 26.09.2019.)

Art. 10. Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;[367]

Art. 11. Emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions;[368]

While calling upon the legal background and the general perception of the norm of prohibition of SEA, the SC revisits, inter alia, certain international treaties and their additional protocols, such as the Geneva Conventions, the Refugee Convention, CEDAW, United Nations Convention on the Rights of the Child and the Statute of the ICC:

Art. 9.: Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court;

Through its citation of international treaties, the resolution implies that various segments of international law already have provisions to combat SEA, subtly suggesting it has become part of international customary law and can even be subsumed to an international crime. The most widely accepted and applied version has been established in the 2003 SG's Bulletin and further reinforced by prevention and enforcement measures in later years by SC resolutions:[369]

Section 1

[367] UN SC Res. 1325/2000 (31 October 2000), Art. 10.
[368] UN SC Res. 1325/2000 (31 October 2000), Art. 11.
[369] ST/SGB/2003/13 (9. October 2003)
UN SC Res. 1820/2008 (19 June 2008), Art. 4.
UN SC Res. 1888/2009 (30 September 2009), Art. 1,3.
UN SC Res. 1889/2009 (5 October 2009), Art. 3,18.
UN SC Res. 1960/2010 (16 December 2010), Art. 1,7,8.
UN SC Res. 2106/2013 (24 June 2013), Art. 2,10.
UN SC Res. 2122/2013 (18 October 2013), Preambulatory clause 9.
UN SC Res. 2493/2019 (29 October 2019).

Definitions

"For the purposes of the present bulletin, the term "sexual exploitation" means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term "sexual abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."

The Bulletin continues with a list of how various means SEA can be committed:

Prohibition of sexual exploitation and sexual abuse

3.1 Sexual exploitation and sexual abuse violate universally recognized international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for United Nations staff. Such conduct is prohibited by the United Nations Staff Regulations and Rules.

3.2 In order to further protect the most vulnerable populations, especially women and children, the following specific standards which reiterate existing general obligations under the United Nations Staff Regulations and Rules, are promulgated:

(a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;

(b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence;

(c) Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;

(d) Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged;

(e) Where a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms;

(f) United Nations staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a particular responsibility to support and develop systems that maintain this environment.

3.3 The standards set out above are not intended to be an exhaustive list. Other types of sexually exploitive or sexually abusive behaviour may be grounds for administrative action or disciplinary measures, including summary dismissal, pursuant to the United Nations Staff Regulations and Rules.

As highlighted by point 3.3, the list is not exhausted. Other types of conduct might just as well be considered SEA if they fall under the general definition enshrined in Section 1. The definition and highlighted examples remain almost identical in the Revised Model MoU with the addition of stressing the responsibility of contingent commanders in maintaining discipline and standard:

Annex H Article 3. Para f)

"Personnel of national contingents are obliged to help create and maintain an environment that prevents sexual exploitation and sexual abuse. Commanders at all levels of a national contingent have a particular responsibility to support and develop systems that maintain this environment."[370]

The extended UN family is largely unified in its view that SEA needs to be condemned and either applies the definition of the SG or avoid providing a definition altogether. A prime example is the OHCHR which also condemns all kinds of SEA, but so far hasn't provided the international community with a definition of its own, but merely lauds the SG's initiatives.[371] UNHCR understands SEA in a wider context, as part of SGBV or sexual and gender-based violence.[372] UNICEF applies its own definition in connection with child abuse:

"Sexual abuse, should be understood not only as violent sexual assault but also other sexual activities, including inappropriate touching, where the child does not fully comprehend, is unable to give informed consent, or for which the child is not developmentally prepared."

"Exploitation is the abuse of a child where some form of remuneration is involved or whereby the perpetrators benefit in some manner – monetarily, socially, politically, etc. Exploitation

[370] Revised Model MoU, A/61/494 (3 October 2006) Annex H, Art. 3. para f) (Hereinafter: Revised Model MoU).
[371] https://www.ohchr.org/EN/Issues/SexualExplotationAbuse/Pages/SEAIndex.aspx (accessed: 26.09.2019.)
[372] http://unhcr.org/3db54e985.html (accessed: 21.12.2019.)

constitutes a form of coercion and violence, detrimental to the child's physical and mental health, development, and education." [373]

The UN's own HR manual[374] and the terminology of NGOs such as Save the Children are using the definition of the Secretary General's Bulletin of 2003.[375]

A short note on the *rationae temporis* of conduct deserves mention here. Every conduct, not limited to those committed during the mission, but traveling to and from the mission, while discharging the functions under the mandate. For example, an act of SEA during the mission is self-explanatory, however after the airplane lands and before the force commander takes over the mission and the briefing happens still considered to be under the *rationae temporis* – will still be considered to be conducted during the mission.

Another aspect facilitation the commission of SEA is the apparent power imbalance between peacekeeping personnel and the local population.[376] Firstly, the local population is already in a difficult situation where local infrastructure is damaged, work opportunities are severely limited and poverty and possibly violence is widespread. In this often abysmal situation arrives the peacekeeper, who possesses a fixed income and employment as well as status in society and power over the locals. Aggravating factors increasing the occurrence of SEA and hindering accountability mechanisms from working are a masculine approach of "boys will be boys" by contingent commanders, a lack of strong leadership and commitment from the force commander of the operation to tackle SEA, lack of recreational abilities and a possible fear of shaming by the TCC on the international theatre. From the point of view, inefficient force commanders and SRSGs have proven to be a recurring problem for the UN. As Nadin points out, the selection of force commanders is a political choice, based on the ebb and flow of international power dynamics and deals as no competency-based recruitment or evaluation process exists nor there can be seen traces of a unified training prior to deployment that would highlight the implications of SEA. As a result, force commanders with greatly varied capabilities have served over the years.[377] SEA possess the ability to weaken the credibility of a peace operation as well as enhance the emergence of criminal networks. It might also lead to

[373] http://www.unhcr.org/3bb81aea4.pdf (accessed: 21.12.2019.)
[374] https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English_0.pdf (accessed: 26.09.2019.)
[375] ST/SGB/2003/13, 9 October 2003.
[376] SHOTTON, Anna: *A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel*, Cornell International Law Journal, Vol. 39., 2006. p. 103.
[377] NADIN, Peter: *From Brahimi to Ramos-Horta, a 15-Year Peacekeeping Quest*, 2015, p.2.

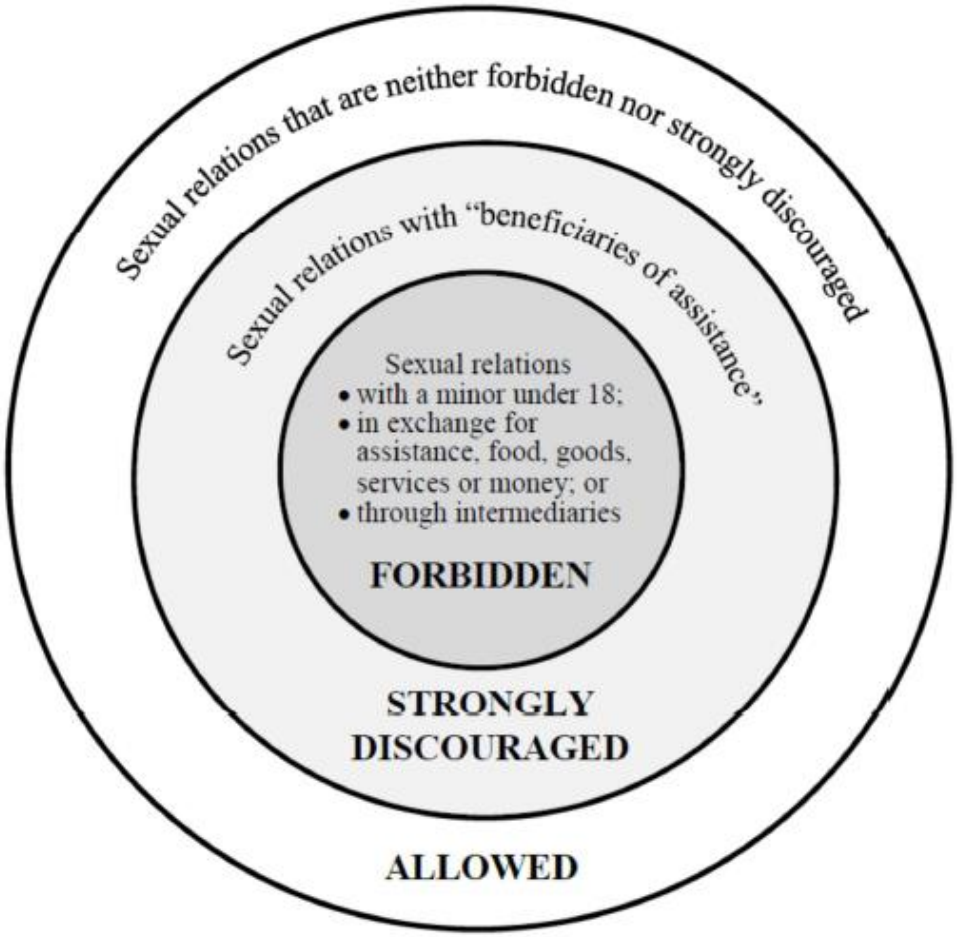
a lowering of respect regarding human rights by the host state while damaging the precarious steps taken towards stability in the area.[378]

Grey areas between strongly discouraged and prohibited conduct hard to understand in practice.[379] There is an inherent difference in the power balance between peacekeeping personnel and locals. As the OIOS officers handling the investigation put it: the line is blurred in case of "real" relationships and the abuse of a power-dynamic i.e. having sexual relation with a paid house-keep or with an older minor over the age of consent in the host state.[380] Such an implication of grey zones, tolerated practice, and lesser SEA are obviously not what the SG's bulletin envisioned for the UN as it might result in the belittling of "real" abuses and mockery of the zero-tolerance policy.[381]

Chart No. 7.: Possible relationships in UN peace operations

Source: OIOS Inspection and Evaluation Division – Evaluation Report - Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations, 15.05.2015.

[378] KOLBE, Athena R.: *„It's Not a Gift When It Comes with Price": A Qualitative Study of Transactional Sex between UN Peacekeepers and Haitian Citizens;* Stability: International Journal of Security & Development, Vol. 4.1. p. 2.
[379] JENNINGS, Kathleen M.: *Protecting whom? Approaches to sexual exploitation and abuse in UN peacekeeping operations*; FAFO report; 2008, p. 23.
[380] JENNINGS, *ibid*. p. 23.
[381] JENNINGS, ibid. p. 24.



4.3.2. Elements of the definition and types of SEA

As GRADY notes the flux in applied terminology, in the 2007 report 'exploitative sexual relationships' was defined as referring to 'exchanges of sexual favours for money, food, employment or other goods or services, excluding engaging in prostitution', the most common form of the aforementioned conduct. However by 2015, *'exchange of money, employment, goods or services for sex' now explicitly '[i]ncludes solicitation of a prostitute'*.[382] As a result, comparing data from various years might only be done with a substantial degree of caution. Another discrepancy in the system is that numbers most of the time simply doesn't add up. Another prime example can also be seen in Grady's study, who notes that:

„For example, in the 2006 report 'other' included 'allegations of distribution of pornography over e-mail', 'inappropriate relationships with the local population', 'allegations of food in exchange for sex' and 'paternity claims'. However, the figures given for these

[382] GRADY, *ibid*. p. 941.

allegations do not add up to the total number classified as 'other', so presumably there were other 'other' allegations for which no explanation is provided."

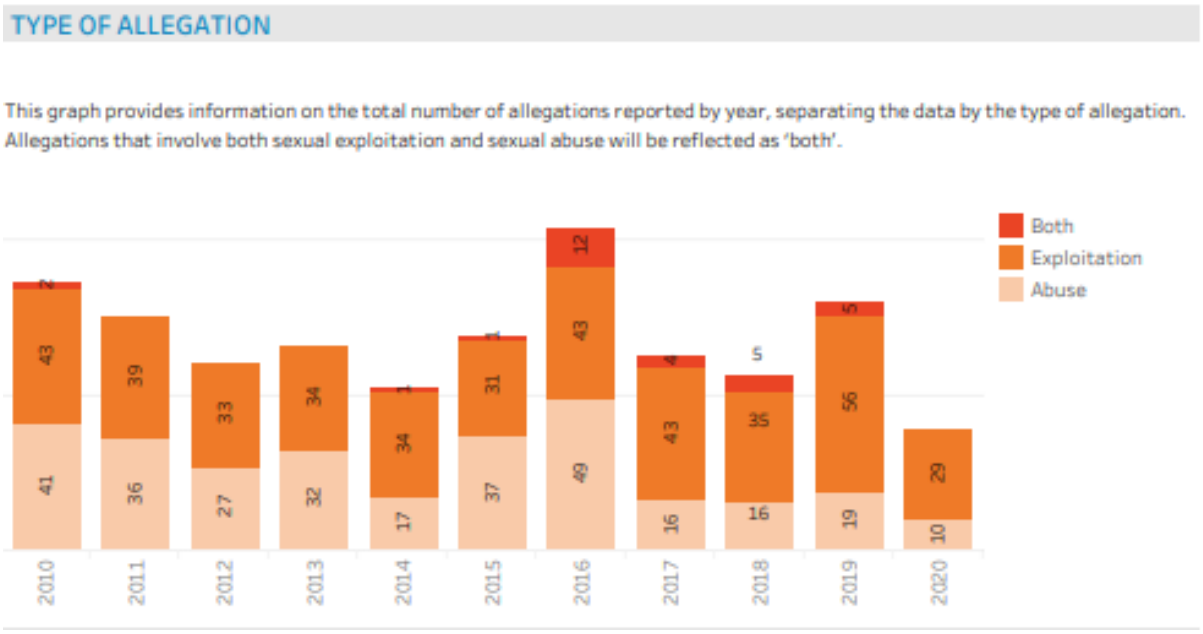
The different types of conduct were summarized by Save the Children, an NGO aiming to reduce abuses against children worldwide. Although the examples were created with a child victim in mind, analogy can be drawn with cases where the victim is an adult.

- trading sex for food and non-monetary items or services
- forced sex, where an adult physically forces a child to have penetrative sex with them
- verbal sexual abuse, where an adult says sexually indecent word to a child
- child prostitution, where an adult pays money to have sex with a child
- child pornography, where a child is filmed or photographed performing sexual acts
- sexual slavery, where a child is forced to have sex with an adult by someone else who receives payment
- indecent sexual assault, where an adult touches a child in a sexual manner or makes a physical sexual display towards them
- child trafficking linked with commercial sexual exploitation, where a child is transported illicitly for the purposes of child prostitution or sexual slavery.[383]

Evaluating the various forms of SEA is by no means a simple task. Categorizing will depend on the domestic criminal system of the victim and the perpetrator, however, the severity of these crimes range from misconduct (verbal abuse), to serious crime under most domestic criminal law (child pornography), to transnational crime (human trafficking) to veritable international crimes (sexual slavery as either a war crime or crime against humanity – the latter possibilities will be addressed in a later chapter of the thesis). Other acts include kissing, groping and lesbian sexual displays.[384] Case study in Haiti shows that under those mission-specific circumstances the most prevalent type of SEA was coercion into sex or into an unwanted type of intercourse, verbal abuse such as yelling, screaming and name-calling, and limiting freedom of movement: grabbing the arm of the victim or barring exit from the room.[385]

Chart No. 8.: Reports of allegation concerning sexual exploitation and abuse in UN peace operations

[383] CSÁKY, Corinna: *No One to Turn To – The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers*, Save the Children Fund, 2008, p. 5.
[384] CSÁKY, ibid. p. 5.
[385] KOLBE, ibid. p. 26.



Source: UN Peacekeeping Website at: https://conduct.unmissions.org/sea-overview (accessed: 28.08.2020).

4.3.3. Victims and perpetrators

In order to better understand the phenomenon and those involved a few key remarks should be stated about the tendencies of who are becoming victims and a few notions about perpetrators as well.

Typical age group concerning child victims is 14-15 years old, but there also have been reports of victims of age 6. Gender differentiation can be regarded as quite typical, with girls much more likely to be victims as boys. In some instances there were no boy victims at all (South Sudan, Cote d'Ivoire), while in other operations, boys have also been targeted by SEA focus studies have found.[386] Victims in general but children specifically are discouraged from speaking out against abusers. Aggravating the issue is an acute investment in identifying and tackling the underlying causes of SEA regarding children by international and local actors as well.[387] Case studies conducted in Haiti show that the vast majority of victims had either poor, very poor or working class living standards.[388] Interviewees report first contact was established with peacekeeping personnel for transactional relations through word-of-mouth or personal introductions or in some rural areas through professional contact.[389] Motivation why local

[386] CSÁKY, ibid. p. 7.
[387] CSÁKY, ibid. p. 1.
[388] KOLBE, ibid. p. 8.
[389] KOLBE, ibid. p. 8.

women are engaged in transactional consensual relationships usually involves informal jobs at the base camp, access to food aid or cash for work programs.[390]

Based on victims' testimonies and data analysis it can be stated that rank within the Organization played no factor. Perpetrators of all ranks or status can be identified from the findings even regardless of colour of skin. Most perpetrators are men, but few participants described women abusing young boys.[391] Earlier reports until the year 2008 show a tendency that has continued since: every single type of UN personnel is affected by the phenomenon; police, civilian and military components as well.[392] Currently, as the number of personnel belonging to the civilian component is rising. Studies show that SEA is a common problem in all three major groups of personnel (military, police and civilian) with highest occurrence regarding civilian personnel per capita.[393] Therefore, it is no surprise that scandals are reaching them more and more often, such as UNAIDS in 2018.[394]

4.3.4. Data analysis and reliance

From a data analysis standpoint, the starting date can only by 2003 for two reasons. Firstly, that is the year the SG's bulletin formed the almost universally applied definition of SEA and secondly, that was the year the Secretariat began reporting on SEA to the GA.[395] The reliability of data provided by the UN is prone to receive criticism by analysts. In 2004 the UN provided data on "cases" while a year later the expressions "allegations" and "cases" were used in conjuncture without any explanation of what the difference is between the denominations. In 2005 and 2006 the data was organized in 6 different sub-groups detailing some of the facets of SEA ("sex with minors", "employment for sex", "sex with prostitutes", "sexual assault", "rape" and "other"). [396] In 2007 and 2008 the label "employment for sex" was changed to "exploitative sexual relationships" with no explanation given whether or not these terms are interchangeable. In the 2009 report the six previous categories were discontinued in favour of eight completely different ones ("'rape (victim under age 18 (minor))',' rape (victim 18 years of age or over)', 'sexually exploitative pornography', 'transactional sex (including for food, work, money)',

[390] KOLBE, ibid. p. 9.
[391] CSÁKY, ibid. p. 9.
[392] FERSTMAN, ibid. p. 19.
[393] BURKE, ibid. p. 2.
[394] https://www.aljazeera.com/news/2018/12/leadership-unaids-chief-quit-early-scandal-181213152919432.html (accessed: 09.09.2019.) For non-UN-related humanitarian aid worker scandals see also the Oxfam scandal also in 2018 https://www.bbc.com/news/uk-43112200 (accessed: 09.09.2019.).
[395] GRADY, Kate: *Sex, Statistics, Peacekeepers and Power: UN Data on Sexual Exploitation and Abuse and the Quest for Legal Reform*, The Modern Law Review, Vol. 79. No. 6., 2016, p. 933.
[396] GRADY, *ibid,* pp. 937-938.

'exploitative relationship', 'sexual abuse (non-consensual physical or emotional contact) (victim under age 18(minor))', 'sexual abuse (non-consensual physical or emotional contact) (victim 18 years of age or over)' and 'other'.[397] As of 2011 data categorized according to the various sub-categories of SEA was no longer available, but rather by the type of personnel alleged to have committed the act (military, police, civilian).[398] In the 2014 report allegations were divided into three categories as "abuse", "exploitation" and "exploitation (paternity)" only to add the concept of "abuse (paternity) a year later in 2015. The 2016 report has improved on the format by adding a categorisation of its own 'exploitative relationship', 'exploitative relationship (paternity)', 'transactional sex', 'transactional sex (paternity)', 'sexual activity with minor', 'sexual activity with minor (paternity)', 'sexual assault', and 'sexual assault (paternity)'. [399]

Severe disparity and fluctuation can be observed regarding the reported cases of SEA. For example in 2014: 121, 2005: 373, 2006: 371, out of 41 UN agencies.[400] Under-reporting of SEA might result in a lack of response by the UN and the international community who will not be able to grasp the severity of the problem. Furthermore, it creates a sense of impunity as the perpetrator will not be held accountable and the victim cannot receive the necessary aid.[401]

Factors which contribute to the phenomenon of underreporting include a fear of stigmatization by the local community making the victims pariahs in society. Becoming "damaged goods" in the eyes of the community also means losing marriage prospects and the negative economic impact of a missing dowry is further acerbated by the lack of employment by peacekeepers or the lack of "gifts" in return for sexual favours. The threat of retaliation by the victim's own family, the community, the UN or the individual peacekeeper accused of SEA serves as yet another hindrance in reporting. In some societies existing cultural norms also force the victims into silence while requiring the person to accept this "fate" with resignation. Sometimes, the cause of underreporting can be quite trivial, as the victims have no knowledge on how to report SEA.[402] As a realistic example, how could it be expected of a 14-15 year old girl in the middle of the Congolese jungle to know how to file a report in English on the UN's Conduct and Discipline Unit's website? As with all crimes of sexual nature, victims often feel

[397] GRADY, *ibid,* p. 938.
[398] GRADY, *ibid,* p. 938.
[399] GRADY, *ibid,* p. 939.
[400] CSÁKY, *ibid,* p. 11.
[401] CSÁKY, *ibid,* p. 12.
[402] CSÁKY, *ibid,* pp. 13-14.

powerless to report the individual as their own families or the authorities might question the credibility of the claims. A lack of effective and available legal services and a lack of faith in an adequate and proportionate response further hinders victims capabilities to report SEA.[403]

The 2017 report of the SG has been the most comprehensive one as of late. Submitted by the newly selected António Guterres, the report summarizes best practices, with Annex IV providing some much needed clarity on the terminology.[404] Unfortunately, it does not delve into a deeper analysis of why it uses differing terminology regarding "peacekeeping and other special political missions" and the "other" category, while also not detailing the type of personnel involved in either of the groups. However, the dissemination of information on mission-specific conduct as well as detailed charts on the nationality of the alleged perpetrator, the number of allegations per personnel type as well as data on the state of pending investigations has been a welcome improvement.[405] As a depressing side-note, later report compiled in 2018 and 2019 have not been nearly as comprehensible or detailed as the previous one in 2017.[406]

Lack of empirical data can be seen by sources other than the UN. The main reasons for this is that firstly, vulnerable victims are hard to track, secondly, the conduct takes place in an unsafe and often hostile environment.[407] Other aspects further increasing the obstacles are that peacekeepers are usually on rotation and might be on schedule to leave the place where the crimes took place, and that the data is sensitive in many regards resulting in the UN and the states involved not to share it with actors outside the system.

With only sporadic reports available and estimates from various sources, it is practically impossible to provide a correct estimate concerning the underreporting of the SEA phenomenon. Ndulo, Rehn and Sirleaf report that during 1992-1993 UNTAC in Cambodia 24.500 "peacekeeper babies" were born, while 6.600 babies have been reported to have been fathered by peacekeeping personnel in Liberia over the course of 8 years.[408] An incremental

[403] CSÁKY, *ibid*, pp. 13-14.
[404] A/71/818 (28.02.2017.) Special measures for protection from sexual exploitation and abuse: a new approach Report of the Secretary-General
[405] A/71/818 (28.02.2017.) p. 69-71, 73.
[406] With only suspicion and malignant rumors to get information as to the reasons of the lapse in information by the Secretariat, the author will not indulge in attempting to find the causes for the phenomenon.
[407] GRADY, *ibid*. p. 947.
[408] NDULO, Muna: *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions,* Berkeley Journal of International Law, Vol. 27., Issue 1., pp. 127, 157.;
UN General Assembly Res 57/306 (2003), para 10. This was the first time that such data had been collected centrally: REHN-SIRLEAF, *ibid, p.* 71. See also: Grady, ibid. p. 947-948.

OIOS survey in 2012 found that in Liberia, Monrovia in 2012 approximately 58.000 women of age 18-30 engaged in transactional sex with peacekeepers.[409] When the OIOS attempted to deduct the amount of underreporting from the voluntary counselling and confidential testing for HIV infection in 2005, the results showed that based on the mission the number of women having transactional sex with peacekeepers ranged somewhere between 1 and 37.710.[410] According to a recent study, peacekeepers have also left behind several hundred children in Haiti, whose future remains uncertain as their fathers have abandoned them after leaving the mission.[411]

When comparing the abovementioned numbers with the average allegations the UN received over the last years (52-127 between 2007 and 2019) it is safe to say that the reported numbers show only a tiny fragment of the total criminal acts committed, merely a tip of the iceberg.[412] Grady's own charts compiled from the SG's reports from 2004-2016 show significantly higher numbers, even peaking at 350 allegations reported in 2007.[413] Compared to available data on the UN's website which does not rise beyond 127 regarding the total number of allegations.

Another different aspect to be briefly analysed is the gender prospect of SEA. Data analysis by Karim and Beardsley in the 2007-2013 timeframe underlines the presumption that peacekeepers from states with a better record of gender equality and missions with a higher number of female peacekeepers experience less allegations of SEA.[414] Data also supports the notion that behavioural patterns such as approach to women can be adopted and multi-ethnic peace operations might serve as a melting pot to promote the idea of gender equality.[415] Of course the authors couldn't have predicted the 2014-2015 scandal caused by massive SEA allegations against French peacekeepers in the CAR. Nonetheless, their final conclusion

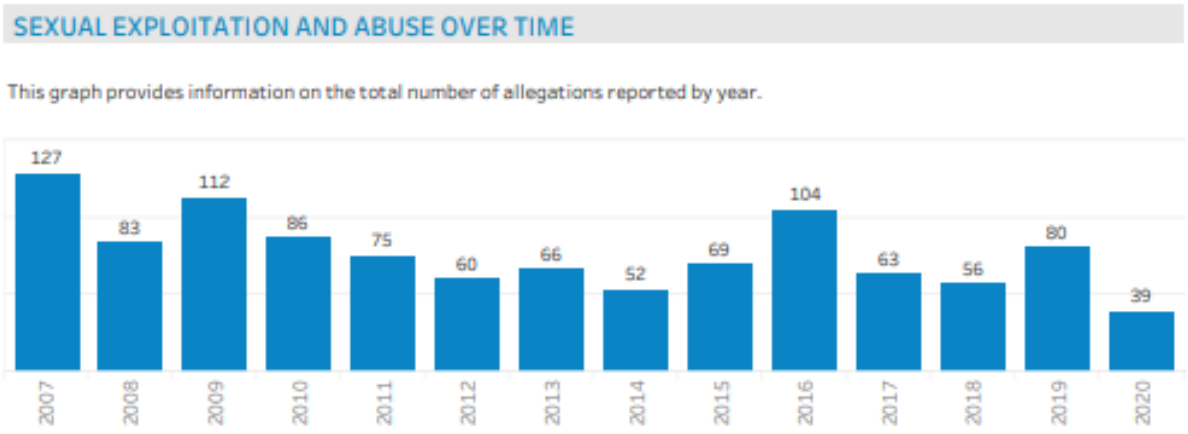
[409] Deschamps Report, para 16.
[410] Office of Internal Oversight Services, *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations* 15 May 2015 (reissued 12 June 2015) at https://oios.un.org/page/download2/id/13, 22; See also: GRADY: *ibid* p. 948.
[411] LEE, Sabine – BARTELS, Susan: "*They put a few coins in your hands to drop a baby in you" – 265 stories of Haitian children abandoned by UN fathers*, 17. December 2019, Available at: https://theconversation.com/they-put-a-few-coins-in-your-hands-to-drop-a-baby-in-you-265-stories-of-haitian-children-abandoned-by-un-fathers-114854 (accessed: 21.12.2019.).
[412] See also Chart No. 9.
[413] GRADY, *ibid*. p. 935.
[414] KARIM, Sabrina – BEARDSLEY, Kyle: *Explaining sexual exploitation and abuse in peacekeeping missions: The role of female peacekeepers and gender equality in contributing countries*; Journal of Peace Research, Vol. 53.1.; 2016., pp. 107,109
[415] KARIM - BEARDSLEY, *ibid*. pp. 112-113.

appears to stand the test of time: the greater amount of female peacekeepers work in an operation, the less frequent acts of SEA will become.

4.4. The Process

Before the analysis of the process it must be stated that the vast majority of the people involved in a peacekeeping mission are doing an outstanding job, facing constant danger and adversity while holding themselves to the highest behavioural standards of the Organization. There are those however, who do not abide by these standards and abuse their status as peacekeepers in order to commit criminal acts. This chapter aims to briefly discuss what happens in such a situation. Long-standing problems regarding the process include a lack of transparency, high threshold for the initiation of proceedings, a power differential between the actors involved in SEA as well as fear on almost all sides, a great deal of latency, and of course timeliness.[416] Obstacles of a proper accountability system include the stigma, fear, trauma, isolation caused by such crimes and from the part of the TCC: lack of interest in a rigorous investigation.[417]

Chart No. 9.: Number of reported allegations according to the UN's own estimates (2007-2020)



Source: UN Peacekeeping Website at: https://conduct.unmissions.org/sea-overview (accessed: 28 August 2020)

First of all, when it seems feasible that a criminal act has occurred, the authorities – at first the UN – receive a form of complaint, called an allegation. An allegation can be considered a unique form of suspicion in written form, which serves as the basis of the inquiry. A major

[416] NOTAR, *ibid*. p. 418.
[417] FERSTMAN, ibid. p. 3.

default of the allegation is that it only refers to an incident, therefore as far as official reports go, it can very well happen that an allegation means that several peacekeepers committed sexual exploitation and abuse against several victims.[418] The allegation is handled by the Conduct and Discipline Officer of the mission who reports the findings to the Office of Internal Oversight Services (OIOS). The OIOS, established in 1994, serves as the UN's internal audit organ, with a mandate to assist the Secretary General in matters regarding oversight, inspections and investigations as well as monitoring the efficiency of various programmes.[419]

What happens after the OIOS concludes the investigation depends on the type of personnel involved? For military personnel, all of the collected evidence as well as the materials of the process are handed over to the authorities of the TCC. From this point it is the discretional decision of the TCC to conclude its own investigation. As the justice system of most TCC's only accept the criminal process conducted by their own authorities, a large number of TCCs have proven to be reluctant in prosecuting their own citizens based on evidence collected by a foreign agency. For civilian personnel an internal disciplinary process begins. The final sanction of the process could be the termination of employment. Unfortunately, the UN does not have the adequate means in either if these situations to effectively combat sexual exploitations and abuse. As in the first case concerning military personnel, the UN has no influence over the proceedings after handing over the evidence to the TCCs. When it comes to non-military personnel, there is a large disparity between termination of employment as an ultimate sanction and the type of criminal act committed. One of the main problems - as it will be addressed later in the thesis - lies with exclusive criminal jurisdiction and prosecution is retained by the country of origin – namely the TCCs for military members of national contingents (MMNCs) and the state the UN Staff member is a national to. In the past however, some states have been reluctant to even start the investigations in case of allegations surfacing. As a result, it is of primordial importance that evidence is collected and preserved, as well the testimonies of victims in a timely manner. This fact was acknowledged by the UN as it strives for new regulation concerning the investigation carried out by the OIOS in case the state refuses to respond in a timely manner allowing the OIOS to conduct its own investigation. It is also possible for the OIOS to work in tandem with the authorities of the TCC. [420]

[418] NOTAR, *ibid*, p. 417.
[419] UN Doc. A/RES/48/218B, 12 August 1994.
[420] DURCH-ENGLAND, ibid. pp. 10-11.

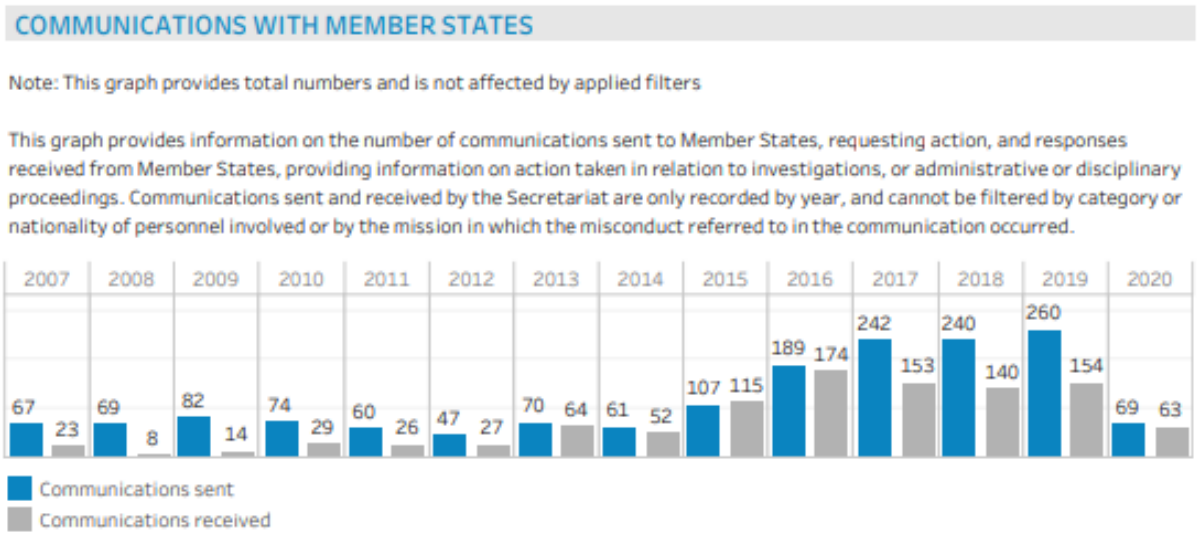
Reporting mechanisms have improved over the last several years with the 2005 creation of the Conduct and Discipline Unit the gradual introduction of local community reporting, the establishments of websites, telephone and email hotlines, supplemented by the focal points.[421] By now, the CDU is the body handling the allegations while the OIOS is in charge of investigations, which is a most welcome improvement. The major issue comes in the form of the path an allegation must take before it can be properly investigated. As major forums for reporting the UN offers a multitude of choices, such as focal points, local community leaders, Secretariat, military contingents, OIOS, SRSG's, United Nations Staff Association, Field Staff Unit, and also in the wider UN family such as specialized agencies, or even outside of the UN to for instance NGOs or the authorities of the host state to name some of the most prominent ones. The challenge comes with gathering the information from various sources as allegations might not be reported adequately, at all or relevant information might get lost in the chain of reporting as the story of Mr. Anders Kompass shows brutally bluntly. A major hindrance lies in the setup of the Organization as the UN cannot *de facto* forces either the host state or the TCC to provide necessary information (although both are obliged to do so by SoFAs and MoUs respectively). Not even regarding the extended UN family can the UN exercise its will as the autonomy these entities possess often shuts the door before OIOS and CDU agents. Even for those sources inside the Organization the UN must ever attempt to increase the efficiency of reporting mechanisms and the accountability of its officials for not reporting or outright obscuring SEA. Interference from senior officers in UN investigations, completely disregarding international expectation and standards and only adhering to national ones also causes major headaches for the Organization.[422]

A novel and holistic approach lies with National Investigation Officers (NIO) who should be appointed in case of allegations of SEA. The MOU provides 10 days for the authorities to react to a communication by the UN. A seemingly strict deadline, although the UN is attempting to reach an average 5-day deadline goal. [423] From 2017 the SG's report also lists positive examples, such as Tanzania, Republic of Congo which responded positively the UN's initiatives, or Morocco as it started deploying NIOs and South Africa with the creation standby NIO teams, ready to be deployed in 72 hours. Concerning positive cases of investigation and process, Egypt has been highlighted in the best practices section on how the state dealt with an allegation of crime of sexual assault. The investigation has been conducted

[421] GRADY, *ibid*. p. 933.
[422] NOTAR, *ibid*. p. 419.
[423] Revised Model MoU – Art. 3 para a.)

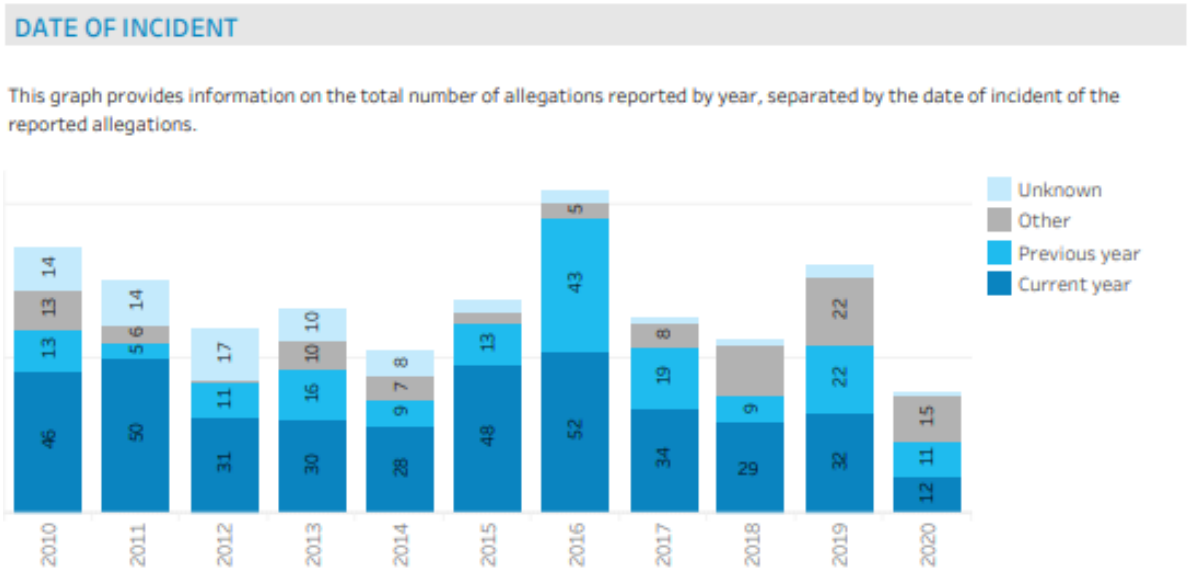
within 29 days and after the claims have been substantiated, a sanction of 5 years' imprisonment and dismissal from service has been imposed on the perpetrator. Bangladesh has also been showing considerable sincerity in combating SEA. During a case involving sexual activity with a minor the investigation was concluded within 3 months and the perpetrator was sentenced to one year of imprisonment coupled with dismissal. Over the course of the last few years' considerable improvements can be noticed, the positive reinforcement practice by the Secretariat is commendable, but the situation is still far from ideal. There is still a large disparity in the sanction and the time spent on investigation – however this can be caused by the diverse criminal law systems of the countries in question and this factor cannot be realistically improved upon in the near future.

Chart No. 10.: Communication and feedback from member states in cases of SEA (2007-2020)



Source: UN Peacekeeping website at: https://conduct.unmissions.org/sea-overview (accessed: 28.08.2020).

Chart No. 11.: Number of cases carried over to the next year out of allegations concerning SEA (2010-2020)



Source: UN Peacekeeping website https://conduct.unmissions.org/sea-overview (accessed: 28.08.2020).

4.4.1. The latest step in enhancing the process

The latest round of reforms concerning process predate the initiatives of SG Guterres. In March 2016 SG Ban Ki-Moon's report listed the country of origin for those involved in SEA, finalized the establishment of the trust fund as to include voluntary contribution by member states as well as payments withheld in substantiated cases of SEA. TCC's were urged to designate paternity focal points, so that children who were born as a result of SEA could receive proper care, protection and support. At the same time, the UN set an ambitious aim that investigations had to be concluded in 6 months, or in 3 months in urgent cases with cooperation with the OIOS strongly advised. New guideline type of measures were introduced including limiting social activities and designating off-limit areas, where peacekeepers were not allowed to visit. [424]

At the same time the SC endorsed the decision of the SG to repatriate whole contingents of peacekeeping personnel, in case there is credible evidence of systemic or widespread SEA. As a breakthrough measure, the names of countries disclosed for the first time in case the country refused to cooperate with the UN and its relevant authorities. The resolution also made it possible for the SG to replace all troops of a TCC if either the appropriate steps have not been

[424] A/71/97 (23 June 2016) Combating sexual exploitation and abuse Report of the Secretary-General, Art. 16.

taken to investigate the allegation or the perpetrators have not been held accountable or there has been a failure to inform the SG of the progress of the investigation or the actions taken. [425]

From an academic standpoint the measures are remarkable because of three things. This was the first time a list of countries was disclosed about the perpetrators origins. Previously, naming and shaming was strictly avoided by the UN, however, because of the increase in support by TCCs announced at the September 2015 Summit and a stricter enforcement of the zero-tolerance policy, these actions were finally viable. The UN thus hoped to mount a sufficient amount of pressure on the non-cooperating states that would compel them to take action while remaining supporters of UN peacekeeping. Secondly, by strengthening the competence of the SG the Council aimed at developing the Secretariat and its subsidiary bodies into a veritable authority regarding peacekeeping operations. Although *de facto* the SG had this authority before, it didn't utilize it before because of political reasons: there were simply not enough troop contributions from member states, so in case a country was singled out in front of the international community and condemned because it failed to investigate or prosecute, the possible political repercussions would have been for that country to refrain from participating in future peace operations. Thirdly, this move provided researchers on the subject with some ammunition to look into the conduct and practice of non-cooperating states.

In a lot of ways, 2016 was one of the turning points on the UN's attitude on SEA. According to the report of the Secretary General on Special measures for protection from sexual exploitation and abuse before the General Assembly it clearly showed an increase in reported allegations from previous years.[426] Which means that either there were more cases that have been reported to the UN or the effectiveness of reporting mechanisms have increased tremendously. The report showed that 55% of the reported cases arose from two operations: MINUSCA in the CAR and from MONUSCO in the DRC. Other problematic locations include MINUSTAH – Haiti, UNMIL – Liberia, UNOCI – Cote d'Ivoire and to some extent MINUSMA – Mali. The severity of the situation is illustrated by the fact that over half of the allegations concerned the most egregious crimes – sexual activities with minors and non-consensual sex with persons under the age of 18. Altogether, 32 allegations received concerning 49 personnel showing that in quite a lot of cases, the acts are committed through some form of aid. Acts committed with the aid of others further aggravate the problem, increasing the trauma,

[425] S/RES/ 2272, 11 March 2016.
[426] UN GA Res. A/70/729 (16 February 2016) *Special measures for protection from sexual exploitation and sexual abuse*, Report of the Secretary-General.

making it harder for the victims to recover. Out of 32 investigations 24 were carried out by the TCC and 8 by the OIOS, as in the latter cases the TCCs concerned refused to commence the process or failed to respond to the UN altogether. Factors that may have contributed to the unusually high number of allegations received from 2015 coupled with general remarks related to the receiving country include a high level of sexual violence associated with the conflict, extreme poverty, displacement of vulnerable populations, a large number of women and girls being forced into prostitution because of the lack of employment opportunities. From the TCC's side there are several fields which could be improved upon with the aid of the UN as well such as the absence of pre-deployment training on standards of conduct, excessive length of the deployment for certain contingents, lack of welfare and communication facilities, camps in proximity to and not separated properly from the local population and a lack of discipline.

Chart No. 12.: Obligations of the UN and TCCs in case of reports of SEA

Selected procedural requirements of the United Nations and TCCs

Event	United Nations obligation	TCC obligation
The United Nations has prima facie grounds indicating SEA may have been committed by military personnel	Inform the TCC 'without delay'	Notify United Nations within 10 working days if it will conduct its own investigation
TCC decides to investigate		'Immediately inform' the United Nations of the identity of its national investigation officer(s)
Investigation is being conducted by TCC		Notify United Nations of progress 'on a regular basis.'
Investigation is concluded by TCC		Notify United Nations of the findings and outcome of investigation subject to its national laws and regulations

Source: Summarised from MOU by OIOS-IED; A/61/19/Part III, paragraph 3 and A/RES/61/267B.

As the findings of the 2016 report go, transparency and accountability, two areas severely criticized by the international community before have remained at the forefront. The UN aspired to resolve the persistent issue of lack of transparency by presenting a report which shares the names of the perpetrators by country of origin and by disclosing the summary of the results of the investigations to be shared with the public via the OIOS website. Prevention measures applied by the SG have included a Secretariat-wide information strategy aimed at key audiences

to raise awareness, promoting prevention and stressing the zero-tolerance policy, providing e-learning materials and pre-deployment training. Advanced vetting methods were being applied supplemented with the exclusion of those who had a previous history of misconduct while in the service of the UN. TCCs were requested to certify 'operational readiness'. Besides military aspects, this would mean that the persons participating in the operations have completed the aforementioned pre-deployment training and have not engaged previously in misconduct while in a peacekeeping mission. Regarding accountability mechanisms, the report ushered in a milder tone by encouraging complainants to come forward through confidential pathways in local communities. A common challenge has been a lack of knowledge of reporting mechanisms, difficulties in reaching communities and reluctance to report transactional sex. The SG also requested the establishment of task forces on SEA in every mission with immediate response teams to help preserve evidence. Strict time limit of 6 months was introduced to conduct the investigation – on the part of the UN (OIOS) member states have been asked to adhere to these standards with the time limit reduced to 3 months in case of greater urgency. The report strengthens the investigation by applying uniform standards for the OIOS as well the requirement of the appointment of a National Investigation Officer on the part of the TCC within 10 days (5 days in case of urgency). The report also promoted the idea of bilateral agreements between TCCs and the OIOS in order to allow the OIOS to investigate all matters related to SEA.

Investigation by the OIOS possesses many advantages such as uniform standards and undoubted impartiality. However, a great disadvantage is the somewhat slower (although has been improved upon in recent years), and the fact that evidence collected by OIOS might not be universally accepted by the authorities of the TCC, rendering the allegation to become "unsubstantiated" because of the lack of reliable evidence per the domestic criminal code of the TCC. Nonetheless, investigation by the OIOS could serve as a crouch for states who are not able to investigate due to lack of infrastructure, experience of because of financial reasons, as the cost of sending a criminal investigation team to a hostile environment can prove to be quite a costly venture.[427]

[427] Information herein is based on interviews conducted in the spring of 2016 at the Hungarian Ministry of Defence, Regional Court of Appeal, Budapest, Investigative Prosecution Office of the Capital and at the Investigative Prosecution Office, Szeged. The author is grateful to the expert colleagues working at the aforementioned institutions for their valuable insight regarding the issue and the subsequent insight to Hungarian practice. Transcript of discussions available at the author.

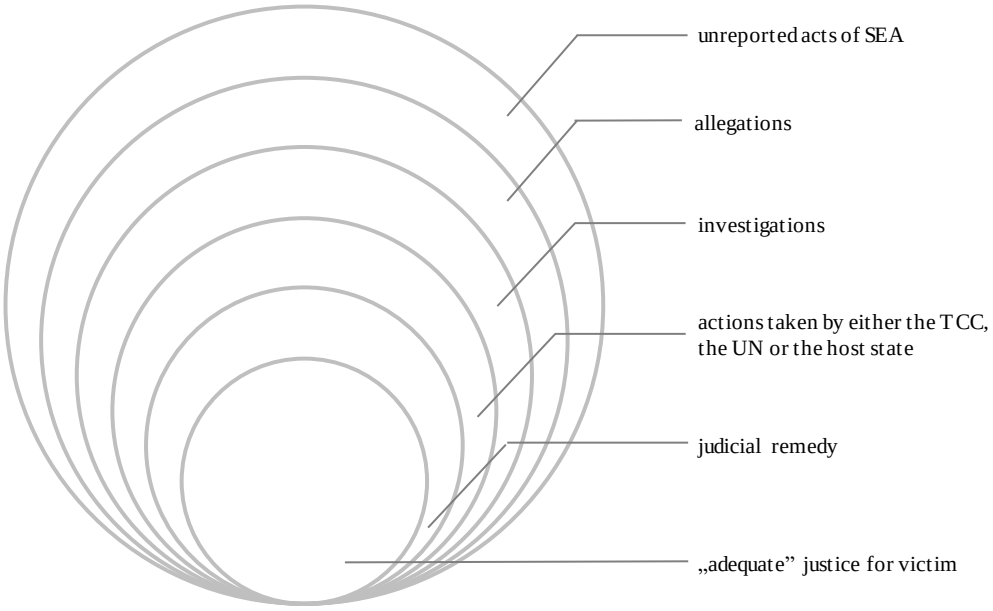
The report has been quite ambitious at some points by for example requesting member states to make sure their criminal codes allow the punishment of SEA, even going as far as demanding the harshest punishment available for the aforementioned acts while also promoting the idea of extraterritorial jurisdiction. As it will be addressed in the next chapter, TCCs retain their exclusive jurisdiction, but there is no hindrance in international law that would bar them from exercising that exclusive jurisdiction abroad.[428] Promoting the possibility of on-site court martial proceedings is a vital point of consideration for TCCs as emphasized by the proximity to evidence and witnesses and sense of satisfaction for the victims and the local community upon seeing the perpetrator being punished and justice being served. Practically speaking however, it is highly doubtful that TCCs would allow on-site court martials since as a first action in case an allegation emerges the TCC repatriates the alleged perpetrator, sending the individual back to the country of nationality, away from possible repercussions by the local community. From a legal perspective, a substantial number of criminal codes in TCCs doesn't allow on-site court martials at all. From a security perspective, in these cases there is a great amount of hostility from the part of the local population, therefore the safety and security of those involved in a possible trial may not be maintained as this is one of the reasons for repatriation in the first place.

The SG's report commended the voluntary donation of DNA sample in case it is needed for paternity claims. With the establishment of focal points, paternity claims are to be facilitated, albeit it is still dependent on the TCCs whether they request their peacekeepers to provide DNA samples before deployment or not. TCCs were urged to accept claims form victims, while the UN provided a safety net by allocating funds from the mission's budget to assist victims immediately. Later on, deductions from the Trust Fund and from the allowance of perpetrators were introduced to compliment the system.

Last, but not least, cooperation with regional organizations (especially the African Union) was deemed a priority as well as helping them adopt the aforementioned measures.

Chart No. 13. The "SEA onion" - from allegations to adequate judicial remedy

[428] Under domestic regulation though, there is no guarantee that the state in question acknowledges the possibility of for example an on-site court martial or merely a general conduct of investigations abroad.



Source: author's own chart

The measurement of "adequate justice" rests in the eye of the beholder, although there have been reports of an 800-men strong Moroccan peacekeeper unit being punished for allegedly violating norms on SEA concerning minors by not being allowed to leave their compound.[429] No further reports of any investigation or punishment has been disclosed since.

4.4.2. Mission-specific response possibilities – the two extreme policy approaches in practice

Taking on a so-called minimalist approach in handling SEA would include: keeping the anti-SEA message entirely in the mission; limiting public outreach about the zero-tolerance policy; emphasizing prevention by deterrence and sanctions based argumentation; limiting contact between peacekeepers and locals. A prime example to this approach would be Haiti, where the UN couldn't rely on local authorities to facilitate counter-SEA action or an active civil society cooperation. A caveat to this approach is the possible damage to the UN's image in the area, the necessity to have effective enforcement mechanisms in place, a heavier burden on reporting and the involuntary encouragement of mistrust and suspicion between contingents of different ethnicity and religion.[430]

[429] LEWIS, ibid, p. 602.
[430] JENNINGS, ibid. p. 66.

To observe the opposite end of the response-scale, a maximalist approach could be taken which would include a comprehensive public outreach strategy consisting of providing information to the local population about the zero-tolerance policy and its implications, as well as avenues for reporting and the outcome of the investigations. The maximalist strategy would also incorporate lowering barriers for reporting by locals, establishing formal or informal working relations with local women's rights groups, NGO-s, police, public health officials, media outlets and ministries responsible for women's rights. A holistic approach would include – dependent on the financial capabilities of the operation and whether SEA is a systematic phenomenon or not – the establishment of crisis centers harmonizing assistance for victims and handling allegations reports. For a future prospective, relying on a human rights based argumentation regarding SEA would enhance the local population and the peacekeeping personnel's sensitivity to fundamental rights and only using deterrence and sanctions as a secondary tool. This approach could be observed in Liberia, one of the most successful peace operations concluded in recent years where the UN cooperated closely with local authorities tackling SEA (with a palpable effort from local officials as well), and with the Organization adopting a robust approach, signaling on various forums that SEA is a chief concern of the operation and the leadership is keen on prevention and enforcement.[431]

The author of the comparative report, Kathleen M. Jennings also highlights that the maximalist approach may not be applicable in every situation and has its own inherent dangers. For example, lowering the threshold for reporting will inevitable increase the amount of allegations received, including false allegations. Having a large number of false allegations might result in mistrust towards local population and may hinder effective day-to-day cooperation. Combing false allegations may reinforce existing stereotypes concerning the local population or its cultural habits. Furthermore, if the Organization's focus on SEA is disproportionate, it can lead to the dismissal of the policy entirely by the personnel.

4.4.3. The end of the road for victims – the local claim review boards

A possible end of the process for the victims could be the local claim review boards which serve as forum for civil redress.[432] While operating on an *ad hoc* basis, according to the Model SoFA there should be a standing claims commission for each and every operation,

[431] JENNINGS, *ibid*, pp. 67-68.
[432] LEWIS, ibid, p. 605.

however these are not set up most of the time.[433] The board should consist of three UN staff members, while the special representative of the Secretary-General (SRSG) has the authority to set up these boards, if he/she finds out that violations of humanitarian law have occurred during the mission. Some authors (Lewis, Dannenbaum) argue that this system places no duty on the UN to develop these boards, however as recent events show (e.g.: in the CAR), international media can force rapid response from the UN in these scenarios. Although legally speaking this is not an ideal state of affairs that there has to be outside pressure in order to force an organization to adhere to its own rules. The current manner of establishment of the local claim review boards also raises questions of what will happen if and when the media attention subsides. Illustrating how tedious such a situation can be in a multinational peace operation is the situation in Kosovo, where after a bus bombing has taken place, over 70 persons were detained. Although international judges and the OSCE deemed the prolonged detention unlawful only after substantial international pressure did the SRSG appoint a review board, which indeed found that the detentions were lawful.[434] A further hardship to evaluate the effectiveness of the current system is caused by the fact that information regarding the work of review boards are not released to the public and there is no outside control over the fairness of the decisions.[435]

4.5. Conclusion

Chapter 4 aimed at compiling all of the UN's responses from first encountering the phenomenon of SEA in peace operations to the modern solutions the Organization is using in robust missions. Even though there are many uncertainties regarding statistics and the problem of underreporting is prevalent, a gradual learning process and to some degree experimentation can be observed from the UN's part. The process itself is already a complicated one with many remaining imperfections, however promising developments over the last half decade have augmented the UN's handling of SEA considerably.

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[433] SHRAGA, Daphna: *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage,* American Journal of International Law, 2000 p. 409.
[434] ABRAHAM, Elizabeth: *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detention in Its Mission in Kosovo*; American University Law Review, Vol. 52, Issue 5, October 2003, pp. 1330-1331.
[435] DANNENBAUM, Tom: *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, Harvard International Law Journal Vol. 51, Issue 1, 2010, p. 128.

Chapter 5.: Responsibility

„It is a myth that rape is an inevitable part of conflict.
There's nothing inevitable about it.
It is a weapon of war aimed at civilians.
It has nothing to do with sex, everything to do with power."

Angelina Jolie, UNHCR Special Envoy, 2014

5.1. Introduction

As an axiom applicable to every domestic legal system that an unlawful act leads to responsibility, the same tenet can be applied to the realm of international law. As Giorgio Gaja, the special rapporteur of the International Law Commission (ILC) on the responsibility of international organizations has put it: *„Someone must always bear the burden of responsibility."*[436] However, appying this principle in practice one faces several hurdles. Although in theory every State and international organization portrays itself as a law-abiding member of the international community, in practice, they would rely on a vast variety of circumstances in order to avoid such responsibilities.[437] It is a widely accepted fact, that if international organizations can be considered to be subjects of international law and they can be the subject of certain rights and privileges that the other side of that equation, responsibilities also apply, just as it does in case of a state.[438] Fortunately, in international law there are two key documents detailing the responsibility of both States and IOs. The articles on the Responsibility of States for Internationally Wrongful Acts (RSIWA) has been finalized by the ILC in 2001, while the Articles on the Responsibility of International Organizations (ARIO) has been completed in 2011.[439] Both documents have been adopted by the UN General Assembly as a resolution and it is safe to establish that they possess at least a semblance of soft-

[436] Seventh report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, 27 March 2009, A/CN.4/610, Commentary on Art. 3 of ARIO, Art. 18. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_610.pdf (accessed: 15. December 2019); See also: KLABBERS, Jan: *An Introduction to International Organizations Law,* Cambridge University Press, 2015, pp. 315, 317.
[437] Should States and IOs portray themselves any differently than law-abiding members of the international community, there would be little incentive for other actors of international relations to have any treaty-based obligations with them, hence the usage of the *pacta sunt servanda* principle.
[438] SOREL, Jean-Marc: *La responsabilite des Nations Unies dans les opéations de maintien de la paix,* International Law FORUM du droit international 3, 2001. p. 127.
[439] RSIWA: Responsiblity of States for Internationally Wrongful Acts, UN General Assembly 56/83, 12.12.2001. corrected by document A/56/49(Vol. I)/Corr.4.; ARIO: Articles on the responsibility of international organizations, UN General Assembly A/66/10, Supplement No. 10. 09.11.2011.

law character.[440] It deserves mention that the two documents have a distinctly different legal nature. For RSIWA, it can be safely established that it has mostly codified international customary law, while its more progressive articles can shape state practice. With the necessary *opinio juris* attached, it is safe to say, that most of the provisions of RSIWA - since their adoption nearly two decades ago - have since become part of the normative material of international customary law. However, for ARIO, the situation is far from self-explanatory. Even Giorgio Gaja acknowledged in his 2014 introduction to the document that since several articles "*are based on limited practice moves the border between codification and progressive development in the direction of the latter*".[441] The quote is a near perfect description of the status of ARIO. It codifies major elements of the legal norms related to IOs, but a vast portion of its articles is progressive in nature and haven't found adequate support over the course of the last few years in the practice of States and IOs.[442]

The basic formula to establish responsibility in international law is quite simple as it merely requires an internationally wrongful act and attribution linking the conduct with a State or IO.[443] Complicating matters slightly, it also needs to be taken into consideration if certain circumstances precluding wrongfulness apply, preventing the establishemnt of responsibility.[444] Using the thought process of *argumentum a contrario*, if there are no circumstances precluding wrongfulness, but an internationally wrongful act has taken place that is attributable to the State or the IO, responsibility can be established. The internationally wrongful act is the first step along the path the responsibility, which can happen through active conduct (act), or passive conduct (omission) as well.[445] Regarding SEA, omission is a feasible scenario when for example there is no mission-specific policy in place to combat the occurence of SEA, or the force commander or the SRSG does not act, even though there is substantial

[440] Based on the approval of both documents by the GA it can be stated that the soft-law nature of these documents as orientation points on the opinion of the majority of States of the international community even if they do not rise to the level to be „subsidiary means for the determination of the rules of law" as articulated by Art. 38, para (1), subpara (d) if the Statute of the ICJ.
[441] GAJA, Giorgio: Articles of the Responsibility of International Organizations, 2014, available at: http://legal.un.org/avl/pdf/ha/ario/ario_e.pdf p. 7, Art. 13. (accessed: 29 August 2020).
[442] Since the articles detail the responsibility of IOs, it is the opinion of the author that it is sufficient to merely observe the practice of States as in the basic scenario of confirming the existance of norms of customary nature, but to also take into consideration to what extent the articles are coming across in the practice of both States and IOs as well.
[443] HIRSCH, Moshe: *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, Martinus Nijhoff, 1995, p. 62.
[444] RSIWA Chapter V., ARIO Chapter V., SHAW, ibid, pp. 707-708.
[445] SOREL, ibid. p. 135.

evidence of SEA taking place. Concerning attribution, it is debatable whether it is the UN or the TCC who should bear the burden of responsibility for SEA taking place in peace operations.

This chapter will analyse several contentious issues arising from this unclear status, such as the various modalities of attribution, the issue of "aiding and assisting" as well as *ultra vires* conducts. As a possible or necessary precondition, the legal personality of Ios will also be discussed. The chapter attempts to move from the gridlock of singularity on responsibility and delves into the possibility of a so-called shared responsibility, which through the acknowledgement that both can be responsible for the same conduct at the same time, might be able to pressure States and IOs sufficiently to alter their conduct towards a more sensible and for lack of a better word, responsible attitude. Last but not least, two aspects of individual criminal responsibility will be addressed, namely the feasibility of International Criminal Court's procedure on the one hand and the proposal for the establishment of the so-called tri-hybrid court promoted by academia on the other.

5.2. Differentiation: accountability vs. responsibility vs. liability

The differentiation between accountability and responsibility also needs to be addressed before venturing deeper into the question of responsibility itself.

The International Law Association has completed extensive research in the field of accountability, dedicating a separate committee to the issue from 1996 to 2004 and in their final report have found that accountability is best described by a tree-level structure as follows:

"The Committee considers that accountability of IO-s consists of three levels which are interrelated and mutually supportive:
- [First level] the extent to which international Organisations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;
- [Second level] tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);
- [Third level] responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian

law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires or violate the law of employment relations).”[446]

From the well-illustrated levels, it is becoming clear that the concept of accountability is becoming a well-researched field of international institutional law, however it is also apparent that responsibility is either understood as the second level of accountability or a different concept entirely.

Generally speaking, accountability has been criticized for being vague, lacking a proper definition while also flexible and “multifaceted”.[447] In the context of IOs it can be applied with a meaning of the duty international organizations are bound by regarding the rights of individuals, but also holding these individuals to account. It can allude to limits of power, but also as self-explanatory expression.[448] Accountability is considered to be the broad category, encompassing mechanisms aimed at transparency, reporting and evaluation mechanisms financial review and more inclusive participation in decision-making.[449] The term is used in a variety of different fields, such as international relations theory, international law, domestic constitutional and administrative law, and the list goes on. Each field used accountability with a different meaning depending on the field in question. The interdisciplinary nature of the term becomes truly problematic if legal connotations are to be added, as it is evidently not a legal concept by origin. Within the broad concept of accountability, many sub-domains have developed, such as financial, administrative, hierarchical, market reputational, etc., while the most common distinction is made between legal and political accountability.[450] Considering the political side of accountability, the term can refer to the personnel exercising power within the organization or the adopted policies, whereas within that wider understanding of accountability a set of legal norms can be observed which are best categorized as responsibility.[451] This is the terminology adopted by the ILC while compiling ARIO.

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[446] International Law Association: Accountability of International Organizations, Final Report at the Berlin Conference in 2004, p. 4, available at: https://www.ila-hq.org/index.php/committees (accessed: 30 August 2020).
[447] TZANAKOPOULOS, Antonios: *Disobeying the Security Council – Countermeasures against Wrongful Sanctions*, Oxford University Press, Oxford, 2011, p. 2.
[448] TZANAKOPOULOS, *ibid*. p. 3.
[449] BOON, Kristen E.: *New Directions in Responsibility: Assessing the International Law Commission’s Draft Articles on the Responsibility of International Organizations*, The Yale Journal of International Law Online, Vol. 37, 2011, p. 4.
[450] TZANAKOPOULOS, *ibid*. pp. 4-5.
[451] TZANAKOPOULOS, *ibid*. p. 5.

Reversing this logic, some scholars argue that responsibility in its strictly legal understanding is not flexible enough, but condenses in a rather formal and limited set of rules.[452] Therefore, it can be established that while responsibility will serve as the narrow interpretation, accountability is used in a much broader sense which encompasses not only legal terms, but – among others - also institutional and financial aspects.[453] Strictly speaking however, these will only be alluded to and not explained in detail due to the constraints of the thesis.

Another distiction must be made regarding responsibility and liability. Liability can be understood in a broader fashion than responsibility, also encompassing acts that are not unlawful under international law, "but may nevertheless have injurious consequences". In contrast, responsibility is used in a narrower meaning, regarding situations where the act in question breaches obligations under international law.[454]

5.3. Nature of ARIO

It is important to note from the start that ARIO is not about establishing primary norms, but rather endeavours to address secondary norms which are applicable upon the breach of obligations from already existing primary norms. A clear example can be seen regarding human rights obligations found in numerous universal and regional declarations, for the violation of which responsibility can be ascertained. The ILC has been accused of going beyond the current set of customary norms and that it has progressed international law far beyond existing practice of States and IOs. As a result, ARIO is not merely a work of codification, but much rather progressive development, building on the practice of States and IOs.[455] Examples of novelties can be seen concerning the conduct of independent contractors, the definition of an agent, *ultra vires* acts as well as a seeming standardization of the effective control test – to name a few.[456] BOON stresses some of the implications of the ILC's material, notably the breach of obligations via omission, which was extrapolated upon by the ECtHR in the *Behrami* case to prevent the loss of life, articulating the possibility of joint or parallel responsibility and the matter that it isolates and removes the sphere of collective security from the scope of the regulation.[457] The

[452] DEKKER, Ige F.: *Accountability of International Organizations: An Evolving Legal Concept?* In: WOUTERS, Jan – BREMS, Eva – SMIS, Stefaan - SCHMITT, Pierre (eds.): *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Cambridge-Portland, 2010, p. 21.
[453] TONDINI, *ibid*. p.126.
[454] SCHEMERS, H.G. – BLOKKER N.M.: *International Institutional Law*, Brill, 5th edition, 2011, p. 1005; GERLICH, Olga: *Responsibility of International Organizations under International Law*, Folia Iuridica Wratislawiensis, 2013, p. 12.
[455] GERLICH, *ibid*. p.22.
[456] BOON, *ibid*. pp. 5-6.
[457] BOON, *ibid*. pp. 6-7.

first two issues will be reflected on later in this chapter as well as chapter 6, but the issue of collective security and its ramification concerning responsibility need to be analysed at this point.

Art. 59 of RSIWA and Art. 66 of ARIO contain the norm that all the provisions set forth in those two documents are *"without prejudice to the Charter of the United Nations"*.[458] On the one hand, it seems as reference to a well-established norm of international law, namely that the UN Charter supersedes all other treaties and especially General Assembly resolutions, which is the current final form of both RSIWA and ARIO.[459] However, it raises the question responsibility for the conduct during peace operations. Since peace operations are mandated by the Security Council and are created in order to maintain international peace and security - as per the primary function and goal of the UN - it is considered to be a strong tool in the toolbox of the SC (as established in Chapter 2). Nonetheless, when the Security Council is forced to act, specifically in situations concerning the breach of peace, the threat to peace and the act of aggression in order for Chapter VII of the UN Charter to be invoked, we arrive at scenarios which are particularly vulnerable to breach existing obligations. In other words, where *ius cogens* norms and *erga omnes* obligations are concerned, such as the prevention of genocide, and the unlawful use of force, exactly where the Security Council can and should act, it is exempt from the norms of responsibility, since that would mean a collision between ARIO and the UN Charter enabling the Security Council to act.[460] There are two legal arguments which could help in solving this problem. Firstly, since peacekeeping is not explicitly mentioned in the UN Charter, one might argue that it is the "gap" in the system and that it is therefore not covered by the protection awarded by the Charter. In my understanding, it is quite weak argument as the Charter is not exhaustive regarding the possibilities of what methods and means the Security Council may find appropriate in handling a situation. Secondly, there is the argument that ARIO and the UN Charter can exist side-by-side not infringing upon the other's domain.[461] In my opinion, this is closer to wishful thinking than an argument, as illustrated by the abovementioned example of *ius cogens* obligations or even human rights and IHL obligations as explained in the previous chapter. The fact of the matter is that the relation between the UN Charter and ARIO is far from being an ordered solution and leaves several

[458] RSIWA Art. 59., ARIO Art. 66.: „These draft articles are without prejudice to the Charter of the United Nations."
[459] UN Charter Art. 103.
[460] BOON, *ibid*. p. 7.
[461] BOON, *ibid*. pp. 6-7.

unanswered questions to be resolved, but still serve as one of the origins for criticism regarding the work of the ILC.

5.3.1. Role of international organizations in developing international customary law

Deviating from the main line of thought a slight excursion might be excused, albeit reasonable at this point as the conduct of various IOs and especially the UN is analysed, while so far it has been unclear to what extent IOs can formulate the norms of international customary law. The ILC has established the notion that concerning the formation of international customary law, State practice is of primary importance, it is also possible that IOs can influence this process in certain fields, where their own practice is well-established and numerous.[462] Even this seemingly self-evident idea has been strongly rejected by certain States by going too far. In my opinion, IOs with extensive practice should and do contribute to the development of international customary law. States opinion in this regard rather reflect policy statements and a line of thought that would exclude "supranational" entities from law-making process than a legal standpoint. This is supplemented by the ILC itself, which points out three fields where the practice of IOs have a profound influence on customary international law, namely their role as treaty depositaries guiding the development of the law of treaties, the deployment of multinational military (especially in peace operations) and also in the category of privileges and immunities of IOs and their officials.[463] Another way IOs can influence international law is through their officials. When a high-ranking official issues a statement that can be regarded as the official standpoint of the organization itself or rather as the *opinio juris* of the organization. This is especially relevant in the case of condemnation of a State for its conduct by officials of IOs. Such a condemnation regarding human rights, use of force, or international refugee law to name the most frequently influenced areas can serve to determine either the existence of an obligation or can be regarded as a statement concerning its contents.[464]

5.4. Definition of an international organization

[462] Report of the International Law Commission, A/71/10, 2 May-10 June and 4 July-12 August 2016, paras 76-117.
[463] ibid, para 88.
[464] DAUGIRDAS, Kristina: *International Organizations and the Creation of Customary International Law*, University of Michigan Law, Public Law and Legal Theory Research Paper Series, Paper No. 597, 2018, p. 27.

In order for the elements of responsibility applicable to IOs to be adressed, the question of what constitutes and international organization has to be discussed. According to Art. 2. Section a.) of ARIO an:

"international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

The definition used by the ILC is quite straightforward. It stipulates that the fundamental criteria if an IO is on the one hand its creation by governments via an international treaty (hence the other widely used name for them: inter-governmental organizations as used by the 1986 Vienna Convention),[465] and on the other hand they possess legal personality of their own. There is some debate among scholars whether at this point the ILC has codified current customary law or moved in a more progressive direction as it did in several other cases. SANDS and KLEIN argue that legal personality is the "*most important, constitutive element of international organizations*", while CRAWFORD states that "*it is possible for an international organization to have no such personality but still – by virtue of its treaty-based, interstate character and activity – be considered an international organization.*"[466] Meanwhile, TONDINI shares to opinion of the former by expressing the view that legal personality "*represents the minimal precondition*" of any international organization and serves as an absolute requirement to establish any form of accountability.[467] BOUWHUIS appears to agree with the latter point by citing the analogy of domestic companies who can still be held responsible without a distinct legal personality before domestic courts.[468] In my opinion, the former argumentation is much more convincing. If we are to conceptualize IOs as general subjects of international law – much akin to States – it is imperative that they possess legal personality. That way they can undoubtedly be the subjects of obligations and rights and be separated from member states. In the UN's case, there is no dilemma however, as its legal personality (along with its unique objective nature) has been reinforced by the ICJ in the Bernadotte case.

[465] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted: 21 March 1986, Vienna, Art. 2, para i).
[466] BOUWHUIS, Stephen: *The International Law Commission's Definition of International Organizations*, International Organizations Law Review, Vol. 9, 2012, pp. 454-455.
[467] TONDINI, Matteo: *The „Italian Job": How to Make International Organizations Compliant with Human RIghts and Accountable for their Violation by Targeting Member States*, In: WOUTERS, Jan – BREMS, Eva – SMIS, Stefaan - SCHMITT, Pierre (eds.): *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Cambridge-Portland, 2010, p. 172.
[468] BOUWHUIS, *ibid*. p. 455.

The first time the ICJ faced the question of legal personality of an international organization, it was the so-called Bernadotte case. In the 1949 case where Count Bernadotte, a Swedish national appointed by the UN Security Council to negotiate between the Israelis and the Palestinians, was killed while carrying out his task, the Court was asked two questions. [469] The first question - detailed here - formulates an opinion on the UN's legal personality, while the second question answers the situation of an "agent" of the organization – as detailed later in the chapter.

The Court decided in its advisory opinion that the UN possesses a legal personality, which is objective in nature. It is conferred upon it by the Charter and that this legal personality – including the capacity to be the subject of rights and obligations - is fundamentally different from those of its member states. The ICJ argued that although the UN cannot be considered a super-state, it has to have a legal personality because of the vast political tasks placed upon it by the Charter: namely the maintenance of international peace and security, which warrants the ability of the Organization to participate in international relations to the fullest extent.[470] Therefore as a subject of international law, the Organization can be bound by international obligations and in the mean time can have rights and claims towards other subjects, such as states.

If we agree with the notion that legal personality is an essential component in the definition of international organizations, the problem of a possible independent legal personality of the individual operations still exists. Even though the ECtHR contemplated the issue in its *Behrami* decision regarding KFOR (analysed more thoroughly in chapter 6), the majority of scholarly literature is of the opinion that peace operations are not subjects of international law in their own right, but rather can be considered subsidiary organs of the organization that establishes them.[471]

5.5. Breach of obligations

[469] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, International Court of Justice, ICJ Reports 1949, p. 174. (herinafter: Bernadotte case).
[470] Bernadotte case pp. 12-15.
[471] HÄUßLER, Ulf: *Human Rights Accountability of International Organizations in the Lead of International Peace Missions*, In: WOUTERS, Jan – BREMS, Eva – SMIS, Stefaan - SCHMITT, Pierre (eds.): *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Cambridge-Portland, 2010, p. 231.

An interesting, albeit necessary question to answer is how the individual's conduct can be linked to the State or IO. This is the point where omission begins to play a crucial role.[472] If the individual criminal act is coupled with inaction by the State or IO, it results in the breach of obligations of the State or IO due to the lack of prevention or prosecution. The due diligence policy by which the subjects of international law must act can be identified the easiest through human rights standards and their respective violations, as described by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case:

„The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[473]

If such a clear obligation to prevent and prosecute exists for States, it can be ascertained through analogy that a similar obligation for IOs should exist, especially for individuals under its power or regarding territories administered by the organization.

The duty to punish encompasses an obligation to initiate proceedings against the perpetrator on the one hand, but also to provide victims the guarantee of an efficient recourse in the form of a competent tribunal to decide their case.[474] However, concerning the UN, effective recourse is severely limited, especially in legal terms as highlighted by the Venice Commission in 2004.[475] This is the fundamental reasoning why the practice of human rights courts will be analysed in chapter 6. Since no court possesses jurisdiction over the UN, the practice of the forums is the closest we can get to evaluating how breach of obligations in a multinational military operation can be evaluated.

5.5.1. The notion of transfer of power

A notion related to the breach of obligations - as proposed by DE SCHUTTER - occurs when States transfer some of their powers to International Organizations, especially if at that

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[472] ARIO Art. 4.
[473] *Velasquez Rodriguez v. Honduras*, Inter-American Court of Human Rights, Judgment on 29 July 1988, IACHR Series C No 4, para 174.
[474] MURRAY, Jennifer: *Who Will Police the Peace-builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, Columbia Human Rights Law Review, Vol. 34, 2002, pp. 516-517.
[475] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW: *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, Opinion No. 280/2004, Strasbourg, 11 October 2004, para 75. Also in: LEWIS, Patrick J.: *Who Pays for the United Nations' Torts?: Immunity, Attribution, and „Appropriate Modes of Settlement"*, North Carolina Journal of International Law and Commercial Regulation, Vol. 39, 2014, p. 266.

point they do not realize that through the actions of the IO the powers that have been used are capable of violating the obligation of the State in question. If the State does not participate in the decision-making process or a decision is accepted that is contrary to the stance taken by the State, the State must nonetheless carry out the decision since it has agreed to do so in the constituent document.[476] Could the State be responsible for carrying out the decision and thus for violating its international obligations?

Translating this notion to the UN's situation: as States have signed and ratified the UN Charter, transferring significant powers, such as the monopoly of use of force to the Organization, they then agreed to carry out its decisions (Art. 24 para 1). It is not guaranteed however, that the State is one of 15 among 193 members to sit on the Security Council (save for the permanent members), and it might not be among the – at least – 9 States who vote affirmatively on the proposed resolution. Nevertheless, the resolution – if accepted - must be carried out.

To counterbalance this issue and to ensure that violations of international obligations are avoided, one of the most successful method is self-regulation. It can be done through a judicial body (as in the case of the European Union) used to interpret constituent documents and to make sure that the transfer of power is applied in the same manner and content as was intended by the founding States (teleological interpretation). Another avenue is regarding possible human rights violations. A prime example for this is when in 2004 UNMIK signed a framework agreement with the Council of Europe (CoE) agreeing to observe the protection of national minorities while also allowing monitoring by the CoE. This agreement was later extended to apply for KFOR as well.[477] Another method would be accession of human rights treaties by IOs which would put the explicit obligation on the IO to observe the human rights contained in these treaties and also the burden to prevent and prosecute violations.

Unfortunately, in our case, the UN has been reluctant to join human rights treaties, although "agreed" with the contents on numerous occasions publicly and pointing to the preamble of the Charter, nor has agreed to be subjected to independent review mechanisms on a wider scale.

[476] DE SCHUTTER, Olivier: Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility, In: WOUTERS, Jan – BREMS, Eva – SMIS, Stefaan - SCHMITT, Pierre (eds.): *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Cambridge-Portland, 2010, pp. 102-103.
[477] DE SCHUTTER, *ibid*. p. 106.

5.6. Attribution[478]

The role of attribution is to establish the link between the individual(s) or wrongdoers and one or more subjects of international law. Traditionally, there are three avenues of attribution: the institutional link, the control link and the territorial link, with the control link possessing a primus inter pares role in some instances.[479] The institutional link can be applied when an organ in official capacity has performed the illicit act.[480] Corresponding section in ARIO is Article 6: Conduct of organs or agents of an international organization.[481] For the control link to be established, the act of a private person acting on behalf of the organization and the organization itself must exist.[482] In other words, if the organization possesses sufficient authority over the person(s) and their conduct, the act could be attributable to the organization. In ARIO, it is enshrined in Art. 7: Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization.[483] Differentiation must be made between situations of UN command and control and operations authorized by the UN. In the former case, the UN's responsibility is acknowledged by both the legal counsel of the UN as well as scholarly literature, whereas in the latter, conduct is attributed to the states and organizations authorized by the UN.[484] HIRSCH widens the category of the control link with the case where the organization „endorses" or „authorizes" the wrongful act.[485] This idea appears to rather heterogeneous however. Endorsing a conduct can be related in the terminology of the ILC to „acknowledgment" and „adoption" of a wrongful act, however, the term „endorses" is generally regarded as insufficient in order to establish a valid link of attribution. Practice of the ICTY in the early 2000's will aid in illuminating the complexity of the phenomenon later on in this chapter.

Concerning the territorial link however, where the organization is responsible for the administration of a given territory, we see no equivalent in the ILC's articles. This seemingly perplexing lack of codification can be solved by applying the previous notion of the control link and also explains why the control link takes precedence. Since contrary to States, IOs do not

[478] Regarding Hungarian terminology, see also: KAJTÁR, Gábor: *Betudás a nemzetközi jogban*, habilitációs disszertáció, ELTE, Budapest, 2019.
[479] HIRSCH, Moshe: *The Responsibility of International Organizations toward Third Parties*, Martinus Nijhoff, Dordrecht-Boston-Leiden, 1995, p. 62.
[480] HIRSCH, *ibid*. p. 62.
[481] ARIO Art. 6.
[482] HIRSCH, *ibid*. p. 63.
[483] ARIO Art. 7.
[484] PERISIC, Petra: *Attribution of Conduct in UN Peace Operations*, Pécs Journal of International and European Law, Issue I, 2020, p. 11.
[485] HIRSCH, *ibid*. p. 63, para 2.

possess territory (notwithstanding headquarters agreements), any IO having direct control over a territory can be considered *lex specialis*. Even though it there was widespread practice during the League of Nations era concerning mandates and for the first few decades of its existence, the UN as well in the form of trustee territories, the idea of IOs possessing territory can only be perceived through peace building or peace enforcement actions. However, this is where the territorial link could be quite relevant, as through a modern peacebuilding, robust operation, the UN can be in *de facto* control of a large amount of territory. At this point we see the control link taking over in importance and as we will see in later chapters that it will be key in understanding the perspectives of the UN and the TCCs regarding actual authority in a given peace operation.

In order to demonstrate how the abstract terminology of RSIWA and ARIO can be translated to practice, here is a chart containing avenues of attribution regarding States and IOs coupled with strictly fictional scenarios.

Chart No. 14.: Instances of attribution in RSIWA and ARIO illustrated by fictional examples

Source: author's own compilation

Instances of Attribution	**Fictional Examples**
Conduct by organs of the State (RSIWA Art. 4.) / Organs or agents of the IO (ARIO Art. 6.)	Government gives direct order to national military contingents to protect themselves and disregard the intersts and survival of the civilian population.
Conduct of persons or entities exercising elements of governmental authority (RSIWA Art. 5.)	Local government issues a decree making it possible to detain people indefinitely who have been accused of committing a crime.
Conduct of organs placed at the disposal of another State or IO (RSIWA Art. 6. / ARIO Art. 7.)	Police officers seconded to the UN witness crimes committed against the local population but do not investigate as the force commander instructs them not to.

Conduct directed or controlled by the State (RSIWA Art. 8.)	Private contractor disregards security protocols per the SRSG's orders, because he/she has received different instructions from the TCC regarding the compound of the national contingent of the TCC
Conduct carried out in the absence or default of the official authorities (RSIWA Art. 9.)	Multinational peacekeeping forces in Somalia fail to de-mine the area they control, resulting in the death of dozens of local civilians
Conduct of an insurrectional or other movement (RSIWA Art. 10.)	South Sudanese soldiers burn villages before the 2011 independence
Conduct acknowledged and adopted by the state or the IO as its own (RSIWA Art. 11 / ARIO Art. 9.)	Secretary-General acknowledges that the UN violated certain norms of international law and approves the conduct, even though it cleary breaches an international obligation

As it can be seen from the chart above, there are 7 avenues of attribution regarding States, while there are only 3 concering international organizations. This is due to the fact that IOs operate under different circumstances and do not possess the same possibilities as States. For example, it is an easy-to-understand impossibility for an insurrection to succeed and become an international organization, whereas this scenario has happened quite often in the past (Namibia, South Sudan, etc.). However, the three option of attribution are shared between States and IOs, namely the conduct of organs and/or agents, the conduct of organs placed at the disposal of a State or IO and last but not least the acknowledgement and adoption of the conduct. In subsequent parts of the chapter, these scenarios will be analysed.

5.6.1. Articles 6 and 7 of ARIO

Article 6. Conduct of organs or agents of an international organization

"1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents."

Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

"The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

According to the long-standing practice of the UN, peace operations established by the SC and the GA are considered subsidiary organs of the UN. As a result, national contingents "will hold a dual institutional status" belonging to the TCC that seconds them, as the seconding itself is conditional and limited in time.[486] This "dual organ status" of military contingents in peace operations exists as operational control needs to be transferred to the UN, while the TCC retains disciplinary and criminal jurisdiction.[487] As SARI points out, no military contingent is ever fully seconded to the UN, as the TCCs retain disciplinary and criminal jurisdiction over their forces, rendering Article 6 inapplicable in the context of current peace operations.[488]

SARI brings forth an interesting proposal that to some extent is constructed on ARIO, but takes into consideration the specific nature of peace operations. The notion would establish a rebuttable presumption regarding the responsibility of the UN, following the line of thought that the transfer of authority by the TCCs to the UN over their troops enables the UN to exercise that same authority, which would mean that a presumption could be established that the troops act under the control of the UN. Naturally, the proposed presumption can be proven false or rebutted if there is evidence that the troops acted under the control of the TCC.[489] The notion is enticing on the one hand because it would alter the "effective control" threshold of attribution

[486] SARI, Aurel: *UN Peacekeeping Operations and Article 7 ARIO: The Missing Link*, International Organizations Law Review, Vol. 9, 2012, p. 80.
[487] PERISIC, *ibid*. p. 12.
[488] SARI, *ibid*. p. 79.
[489] SARI, *ibid*. pp. 82-83.

and on the other hand would shift the burden of proof to the UN in proving it did not have control. From a practical standpoint however, even SARI acknowledges that it is not a victim-friendly approach because of jurisdictional issues and in no way does it replace an effective and large-scale claim settlement system.[490] In my opinion it might serve as a dogmatic background for future settlement of claims arising from SEA. Nonetheless, it only provides a palpable solution if supplementary questions, such as the problem of the forum are addressed at the same time.

5.6.1.1. Agents of the Organization

As early of 1949, the *Bernadotte* case has shed some light on what the ICJ understands as "agents" of the organization, establishing the theoretical framework of the issue.

One of the most prominent manifestations of the link between an individual and a State is diplomatic immunity. Even in 1949 it was not unheard of that a state used the tool of diplomatic protection to safeguard the interests of individuals of particular importance to that State.[491] This protection is given based on the nationality link (among other criteria), however since international organizations are very different to States in this regard a new sort of link between individual and the organization had to be established. In its advisory opinion the Court decided to base the *quasi* diplomatic protection on the agency thread. This means that the organization can protect its agents in case they suffer harm as a result of the actions of a state. The Court used the implied powers tenet, that the right to protect its agents is implied in the UN Charter and that '*these powers which are essential to the performance of the functions of the Organization, must be regarded as necessary implication arising from the Charter'*.[492] If it can be derived from the Court's decision that violating the rights of the agents of an IO is unlawful, then we can use the *argumentum a contrario* reasoning to prove that obligations ca also rise from the actions of its agents. Therefore, it can be argued that international organizations, especially the UN can theoretically be responsible for the actions of its agents.

This however raised a further question: if States can provide diplomatic protection to their nationals and change the nature of the dispute to become an international dispute between subject of international law based on the nationality link between the person and the State, then what is the link between the injured person and the international organization that enables the

[490] SARI, *ibid*. p. 84.
[491] SCHIFFNER, Imola: *A diplomáciai védelem a nemzetközi jogban,* Doktori értekezés, Szegedi Tudományegyetem, 2010, pp. 21-27.
[492] *Bernadotte case*, pp. 13-14, 16.

international organization to do the same? The answer to this question lies in the agent status of the person in question. As noted by the Court:

"The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions — in short, any person through whom it acts."[493]

In the present case it was evident that Count Bernadotte was an agent of the UN, as he was given the task of mediation by the UN Security Council.[494] The attempt on his life occurred while he was discharging the functions bestowed upon him by the SC. It was also apparent that he was targeted because of his position and especially because of his proposals regarding the two-state solution of Israel and Palestine. This very case served as the bases for formulating Article 6 of ARIO, which makes it possible for an organization to be held responsible for the actions of one of its agents.[495]

Building upon the findings of the Bernadotte case, the ICJ further accentuated its point on "agents" in the 1989 Dumitru Mazilu advisory opinion by stating:

"In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials."[496]

With regard to privileges and immunities, the Court also said in the same opinion:

"The essence of the matter lies not in their administrative position but in the nature of their mission."[497]

More recently, in its Cumaraswamy advisory opinion of 1999, the Court pointed out that:

[493] *Bernadotte case*, p. 177.
[494] A/RES/186 (S-2) 14 May 1948.
[495] ARIO Art.6.
[496] Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion of 15 December 1989, International Court of Justice, I.C.J. Reports 1989, p. 177 at p. 194, para. 48. (Dumitru Mazilu advisory opinion).
[497] Ibid., p. 194, para. 47.

"The question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity."

In the same opinion the Court briefly addressed also the question of attribution of conduct, noting that in case of:

"[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[498]

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.[499]

The latest definition of agent can be seen in Art. 2, d.) of ARIO:

"Agent of an international organization" means 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.

According to TZANAKOPOULOS, based on Art. 2 of ARIO, there would be no hardship in looking at peacekeeping personnel as charged by the Security Council to carry out the tasks defined in the mandate or even as entities "through which" the United Nations acts and as a result, making them agents of the Organization.[500] If we only take a look at this section of ARIO, all conduct by peacekeeping personnel appears to be attributable directly to the UN through this institutional link. However, this is where Article 7 will bear special significance as it puts forth the idea of a control link in place of the institutional link to serve as basis for

[498] Cumaraswamy advisory opinion, pp. 88-89, para. 66.
[499] There existed a differentiation regarding „higher" and „lower" officials when establishing the responsibility of States in the 1929 Harvard Draft Convention on the Responsibility of States. However, this reflected the contemporary American standpoint and not the practice of the international community and gradually faded. See also: NAGY, Károly: *Az állam felelőssége a nemzetközi jog megsértése miatt*, Akadémiai Kiadó, Budapest, 1991, p. 70.
[500] TZANAKOPOULOS, Antonios: *Attribution of Conduct to International Organizations in Peacekeeping Operations*, at EJIL: Talk!, available at: https://www.ejiltalk.org/attribution-of-conduct-to-international-organizations-in-peacekeeping-operations/ (accessed: 17 August 2020) p. 2.

deciding attribution. A case-by-case analysis through the control link will serve as the tool to avoid the blanket attribution of conduct to the UN. [501]

5.6.1.2. Rules of the Organization

Besides „agents of the organization" , „rules of the organization" must also be examined since per Art. 6 para 2 these will determine the functions of the agents.

According to Art. 2, b) of ARIO:
„Rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

There was a debate regarding terminology in the ILC where previous versions of ARIO would have contained „internal law" instead of „rules of the organization". The debate was concluded by 2004, when Special Rapporteur GAJA signalled in the report of the work of the ILC that *"[t]here would [be] problems in referring to the 'internal law' of an organization, for while it has an internal aspect, this law has in other respects an international aspect."*[502]

In general terms, acts of the organization comprises resolutions, decisions, recommendations, declarations, guidelines, regulations, directives and standards, composed by organs of the organizations towards member states, other organs or individuals. There is an ongoing debate regarding the nature of these documents, especially whether they are sources of international law or not. Without diving deep into the actual debate, one side (ANZILOTTI, JESSUP among others) proposes that these documents form an integral part of international law due to their contractual origins and the fact that they regulate relations between states. Another side (CAHIER, KOLASA, SKUBISZEWSKI) reasons that it is separate from international law, but nonetheless forms an important part of the law of nations, while the third side (AMERASINGHE, BENZING, BLOKKER, FOCSANEANU, MEIHSLER, MONACO, ÖBERG, SCHERMERS) argues that these documents form the internal legal order of the organizations which still possesses external effects and ramifications, especially concerning responsibility.[503]

[501] TZANAKOPOULOS, *Attribution of Conduct*…, p. 3.
[502] GAJA, *Second Report*, p.10.
[503] AHLBORN, Christiane: *The Rules of International Organizations and the Law of International Responsibility*, Shares Research Paper Series, 2011, pp. 14-15, available at: http://www.sharesproject.nl/wp-content/uploads/2012/04/02-Ahlborn-The-Rules-of-International-Organizations-and-the-Law-of-International-Responsibility-.pdf (accessed: 19 August 2020).

The "practice of the organization" mentioned at the end of Art. 2 b.) also needs to be highlighted. Decades of practice is capable of altering the wording of even the constituent document of the Organization. This change can at times be regarded as necessary for the Organization to fulfil its purpose if the constituent document cannot be expected to be changed, while at the same time can also be considered contrary to the "internal law" or "rules of the organization".[504] The fact that that the practice of the organization forms an essential part of the "rules of the organization" has been reinforced by the ICJ in its 1971 Namibia Advisory Opinion.[505] However, as AHLBORN notes, it is a much more feasible scenario that political organs are responsible for directing the practice of an organization rather than judicial organs.[506] It might further complicate matters, that in some cases, it is not the complete membership in its entirety that establishes the practice of the organization divergent from the constituent document, but only a fraction of it.[507] A clear example for this is the practice of the Security Council, a body comprised of 15 from the 50-193 members of the organizations and how it has changed its voting procedure and subsequently the meaning of Art. 27 para 3 of the UN Charter. In the case of the Security Council, the practice of a political organ, reinforced by the decision of its judicial organ was of sufficient magnitude to create a desuetude, changing the meaning of the preeminent treaty in international law.

The International Law Commission has also published the feedback it received from international organizations on ARIO in 2011, and the UN's understanding of Art. 2, b):

4. To fully appreciate the impact of the proposed definition on the scope of application of the draft articles to the United Nations, the Secretariat wishes to provide the Commission with a brief description of the United Nations instruments that would typically fall within the current definition of the "rules of the organization", and the nature of which, depending on the rule in question, may be either international or internal:

(a) The constituent instrument of the United Nations is the Charter of the United Nations. While most of its provisions are international in character, certain provisions, such as Article 101, also constitute internal law of the Organization;

[504] AHLBORN, *ibid*, p. 19-20.
[505] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion on 21 June 1971, ICJ Reports 1971, p. 16.
[506] The statement is especially true since most of the IOs do not even have a judicial body. See also: AHLBORN, *ibid*, p. 20.
[507] AHLBORN, *ibid*. p. 21.

(b) "Decisions" and "resolutions" are normally understood as decisions and resolutions of the principal organs of the United Nations, such as the General Assembly, the Security Council and the Economic and Social Council. Some decisions or resolutions of Principal Organs, such as international conventions adopted by the General Assembly, are international law in character, while others, such as resolutions adopting the Staff Regulations and Rules of the United Nations or the Financial Regulations and Rules, constitute internal law of the Organization;

(c) "Acts of the organization" consist of a variety of very different instruments, that is, decisions and resolutions of all organs, including the Secretariat (Secretary-General's bulletins and other administrative issuances), exchange of letters between and among heads of United Nations organs, judicial decisions and rulings of United Nations-based international tribunals and internal United Nations tribunals, international agreements concluded between the Secretary-General and States or other international organizations, as well as contractual arrangements of all kinds.[508]

In the UN's case, a very large set of documents given the sophisticated structure as well as the detailed practice of the Organization. Regarding the constituent instrument is the UN Charter, an international treaty of special status within the normative framework of international law. Notable sections having possible ramifications regarding international responsibility are Chapters V through VIII dealing with the competencies of the Security Council, Chapter XV containing provisions on the Secretariat as the two main organs of the UN in charge of initiating and maintaining peace operations through the mandate on one hand, providing institutional framework on the other, including the annual reports of the Secretary-General on the current status of peacekeeping. Article 105 deserves special mention as the part from where the immunities and privileges of the organization derive from (as expanded on in the 1946 Convention and the SoFAs among others). Even though immunity from jurisdiction needs to be handled separately from issues of responsibility, it still plays a substantial role if one aspires to adopt a victim-centred approach focusing on the compensation of victims.

Concerning "decisions" and "regulations" the UN clarifies its point by naming the most prolific of its three organs, the Security Council, the General Assembly and the Economic and Social Council, although the list is not exhaustive. It also mentions explicitly Staff Regulations

[508] *Responsibility of International Organizations, Comments and Observations Received from International Organizations*, A/CN.4/637 and Add 1, 14 and 17 February 2011 (available at: https://legal.un.org/ilc/documentation/english/a_cn4_637.pdf), (accessed: 18 August 2020).

and Rules, a binding source of law for civilian component of peace operations, in which sexual misconduct is duly regulated, creating a direct obligation for individuals to abide by as well as the Organization to prevent and enforce.[509] It is perplexing to see that the Staff Regulation and Rules are explicitly mentioned in subparagraph b.) even though formally it is a bulletin by the Secretary-General and these bulletins are highlighted in section c.) of the UN's standpoint.

By "decisions of all organs" one can assume by applying simple logic that the decisions of organs not explicitly mentioned in section b.) will be the ones falling under the category, such as the Secretariat, which is mentioned separately. Within that category, some notable bulletins can be categorized containing obligations for the organizations, such as compliance with IHL as detailed in previous Chapters, or the program norm of preventing sexual and gender based violence.[510] "Administrative issuances" could be understood as mission-specific guidelines by the Secretary-General, although in practice the appointment and relieving from office of SRSG's who fail to enforce general rules, such as bulletins are more prevalent.[511] The UNDT and UNAT can be considered as preeminent examples of "internal UN tribunals", the decisions of which also constitute "rules of the organization". It needs to be noted however, that these are not institutions possessing criminal jurisdiction, but rather for settling labour and disciplinary debates with the UN as employer. SoFAs and MoUs fall under the category of "international agreements concluded between the Secretary-General and States or other international organizations", in which the clear obligation of prohibiting SEA is enshrined, while "contractual agreements" are best illustrated by private contracts with private contractors fulfilling various roles in aiding the mission or PMSCs. It deserves to be mentioned that regarding the latter category, it is not the individual private contract itself which is considered to be the "rule of the organization", but the recurring elements in those contracts which constitute the solidified practice of the UN.

5.6.2. Acknowledgement and adoption of conduct

Besides the aforementioned avenues of attribution, the possibility for an IO to acknowledge and adopt a given conduct thereby establishing the link of attribution must also be examined.

[509] ST/SGB/2018/1, Rule 1.2, effective from: 1 January 2018, available at: https://hr.un.org/handbook/staff-rules#Rule%2010.1 (accessed: 18 August 2020).
[510] UN SC Res. S/1325/2000, On women and peace and security, (31 October 2000).
[511] See also the resignation of Mr. Babacar Gaye in 2015 from MINUSCA, available at: https://www.bbc.com/news/world-africa-33890664 (accessed: 18 August 2020).

Article 9. Conduct acknowledged and adopted by an international organization as its own

"Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own."

Contrary to other forms of attribution, "acknowledgement and adoption" of the conduct happens during or – more likely – after the unlawful conduct has taken place, whereas for example seconding armed forces under Art. 7 of ARIO must occur prior to any unlawful conduct for the link of attribution to be established. Acknowledgement of the conduct enables IOs to have an opportunity to voluntarily accept responsibility for acts that would be otherwise be impossible or at least very hard to attribute. It might also serve as a tool to shorten legal proceedings if any other case of attribution would apply, as it functions independently from all other forms of attribution and can be applied preventively by the organization, before attribution could be established.

Acknowledgement of the conduct was analysed by the ICTY in the *Nikolić* case, in which the ICTY analysed the nature and contents of RSIWA. Even though RSIWA was formulated to deal solely with the responsibility of States, since Art. 11 of RSIWA precisely matches that of Art. 9 of ARIO, through analogy, the ICTY's reasoning can still apply.[512] The ICTY relied on the work of the ILC as "general legal guidance" evaluating the events concerning SFOR as follows:

„For the purposes of deciding upon the motions pending in the present case, the Chamber does not deem it necessary to determine the exact legal status of SFOR under international law. Purely as general legal guidance, it will use the principles laid down in the Draft Articles insofar as they may be helpful for determining the issue at hand."[513]

After the statement, the ICTY has formulated its opinion as:

"The Trial Chamber observes that both Parties use the same and similar criteria of "acknowledgement', "adoption", "recognition", "approval" and "ratification", as used by

[512] RSIWA Art. 11. Conduct acknowledged and adopted by a State as its own: Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own. See also ARIO Art. 9. above.

[513] *Prosecutor v. Dragan Nikolić, Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, (hereinafter: Nikolić case), ICTY,* 9 October 2002, Case No. IT-94-2-PT, para 61.

the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have "acknowledged and adopted" the conduct undertaken by the individuals "as its own".[514]

As the ICTY correctly notes, wording is of paramount importance regarding acknowledgement of the conduct.[515] Terms used to express explicit acknowledgement and adoption of the conduct may take the form of "approval" or "ratification", but merely "endorsing" and "supporting" an act is considered to be insufficient.[516] Indeed, there are some positive examples where the UN has acknowledged its responsibility, such as in the cases of ONUC and UNEF, where the Organization has also established Claims Review Boards tasked with compensating victims of unlawful killings.[517]

On a sidenote, from a sociological perspective the conduct and actions of IOs has to be scrutinized as legitimacy and reputation is the bread and butter of these organizations. The general perception that an IOs is legitimate derives in a substantial amount from the reputation of the organization which in turn can be traced back to the organization is complying with its international obligations.[518] States tie their financial support and cooperation to the organization only if that organization is respected by its citizens and the State believes that the work of the Organization benefits itself as well as the international community. As DAUGIRDAS notes, it is an ongoing project to defend an IO's reputation and a maintaining a good reputation requires constant work as well compliance with international law.[519]

This notion explains why IOs and especially the UN is sometimes keen on accepting responsibility in the form of acknowledging and adopting a conduct, even when it is not legally necessary or prudent, such as the loss of human life caused accidentally by peacekeepers. While on the other hand, the UN appears reluctant to accept responsibility in scenarios where

[514] *Nikolić case* para 64.
[515] From a policy standpoint it makes perfect sense that when SGs make public statements, they appear to be deliberately avoiding the expressions mentioned in the decision of ICTY as they are not keen on voluntarily attributing a conduct to the UN, thereby possibly establishing the responsibility of the organization. See also SG Kofi Annan's speech regarding Srebrenica from 2005, available at: https://www.un.org/press/en/2005/sgsm9993.doc.htm (accessed: 29 August 2020), or SG Ban Ki-moon's 2016 speech concerning the Haiti cholera outbreak, available at: https://news.un.org/en/story/2016/12/546732-uns-ban-apologizes-people-haiti-outlines-new-plan-fight-cholera-epidemic-and (accessed: 29 August 2020).
[516] GERLICH, *ibid*. p. 34.
[517] TONDINI, *ibid*. pp. 180-181.
[518] DAUGIRDAS, Kristina: *Reputation and the Responsibility of International Organizations*, European Journal of International Law, Vol. 25, No. 4, 2015, p. 1007.
[519] DAUGIRDAS, *ibid*, p. 1009.

associating the event with the Organization can seriously damage the reputation of the Organization, as seen after the massacre of Srebrenica or the spreading cholera in Haiti.

5.7. Ultra vires acts

Article 8. Excess of authority or contravention of instructions

"The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."[520]

Two instances of *ultra vires* acts are possible regarding IOs. In the first case, the ultra vires conduct is within the scope of the organization, but the organ or agent did not possess the authority to do it, thus exceeding the competence, or in the second case, the act itself exceeds the competence of the organization.[521] One of the specific characteristics of IOs is that they do not enjoy general competence, like states, so the second scenario is entirely feasible. Regarding SEA in peace operations, it is generally accepted that if the peacekeeper is considered an agent, the conduct falls under the category of "private domain" and cannot be considered attributable to the organization.[522] Examples from the practice of the UN can be seen during the operations of UNEF and ONUC, where the organization paid compensation to the victims and their families in the instance where civilians were killed by peacekeeping personnel even thought they were not given an order to fire. A contrary example can be observed during the operation UNFIL, where personnel were involved with transporting explosives to the territory of Israel. In the latter situation, the UN did not accept any form of responsibility. ZWANENBURG notes that "*The structure of armed forces provides better opportunity to prevent violations of international law than the structure of other state organs. In peace support operations these opportunities are not reproduced, because the UN commander is in command but does not have disciplinary powers in the same sense as national commanders."* ZWANENBURG also differentiates between on-duty and off-duty peacekeepers regarding ultra vires conduct, as according to his interpretation, only on-duty conduct can be considered ultra vires.[523]

[520] ARIO Art. 8.
[521] GERLICH, *ibid*. p.27.
[522] GERLICH *ibid*. p. 28.
[523] ZWANENBURG, Marten: *Accountability of Peace Support Operations*, Martinus Nijhoff, Leiden, 2005, *ibid*, p. 106.

While attribution for off-duty conduct evidently does not fall under the category of *ultra vires*, it nonetheless might evoke other links between the individual and the organization, thus establishing responsibility. For SEA in a peace operation, the main question is not whether the individual in question commits the act in uniform (on-duty) or wearing a civilian attire (off-duty), but the nature of the authority the UN and the TCC wield over the individual in that specific instance.

Acts carried out outside of official capacity would be rendered automatically attributable to the TCC.[524] In the context of SEA, this reasoning overly simplify the legal argument. Since it is quite firmly established that SEA cannot be committed in the official capacity of peacekeepers,[525] it would render all acts automatically imputable to TCCs, without any consideration or without applying any test for attribution. It is the leading trend in scholarly literature that *ultra vires* acts are generally attributable to the state, as the state has the opportunity to directly control the conduct of its troops via the command and control chain and therefore having the ability to prevent the violation of the mandate.[526] This relates to factual observations during the missions, as it can be noted that even though officially there is a unified command structure under the force commander, every decision made at the UN level can be overruled on national level as dictated by the interests of the state.[527] However, I find this reasoning to be problematic. Following this logic, it becomes an indisputable presumption that only the state can be responsible for *ultra vires* acts, excluding the responsibility of the UN or the possibility of a shared responsibility model. In my understanding this would lead to a straight-up state responsibility 'solution', with all its negative effects, such as the withdrawal of states from participating in peace operations. Furthermore, it also eliminates the possibility of an enhanced future cooperation, where the UN is capable of exercising command and control over the operation and cements the status quo of a state-interest-determined operation.

Acts carried out outside of official capacity would be rendered automatically attributable to the TCC.[528] In the context of SEA, this reasoning overly simplify the legal argument. Since

[524] PERISIC, *ibid*. p. 23.
[525] ILC: ARIO with Commentaries, Art. 8, para 10.
[526] MILEVA, ibid. 129. p. See for example: DANNENBAUM, *Translating the Standard of Effective Control*, p. 11; SARI, Aurel: *Jurisdiction and International Responsibility in Peace Support Operations: the Behrami and Saramati case*, Human Rights Law Review, Vol. 8, 2008, pp. 151-170.
[527] Perhaps the most prevalent example to this phenomenon is the Nuhanovic&Mustafic v. the Netherlands and the Mothers of Srebrenica v. the Netherlands cases, where the courts decreed that it was the express decision of the Dutch government that contravened the mandate of the mission and resulted in the death of more than 8000 Muslim Bosnians. The case itself will be analysed in the following chapter.
[528] PERISIC, *ibid*. p. 23.

it is quite firmly established that SEA cannot be committed in the official capacity of peacekeepers,[529] it would render all acts automatically imputable to TCCs, without any consideration or without applying any test for attribution.

5.8. Aid or assistance

Besides the general rules on attribution and the question of ultra vires acts, the issue of "aid or assistance" also needs to be addressed. Article 14 of ARIO details the situation where the IO aids or assists the commission of an internationally wrongful act:

"An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:
(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that organization."[530]

The example cited by the ILC in its commentaries concerns a peace operation, MONUC, which has provided help to the armed forces of the DRC and therefore considered to be aiding the commission of violations by the armed forces according to the legal counsel of the Organization:

"If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the [Democratic Republic of the Congo], MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely … MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law … This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law."[531]

[529] ILC: ARIO with Commentaries, Art. 8, para 10.
[530] ARIO Art. 14.
[531] ILC ARIO Commentaries, Art. 14, para 6.

In the case of MONUC, the legal counsel of the UN was of the opinion that providing logisitic support is to be considered aiding the armed forces of the State, which are sufficient to cause the UN to be responsible for aiding their unlawful conduct.

Article 14 is supplemented by Article 58, in which another possibility is enshrined, namely that the State aids or assists the commission of an internationally wrongful act by an international organization.

Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization
"1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State.
2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article."[532]

The same rules apply as in Article 14, but the provision is supplemented by the rule that if the conduct was carried out in accordance with the rules of the organization, it does not engage the responsibility of the State in question. The second paragraph has been added to provide an opportunity to States who act in conformity with the rules of the organization to not be held responsible for the conduct. However, the commentaries advise caution, as these provisions are not a blanket clause for states to evade responsibility under international law, as each situation needs to be assessed on a case-by-case basis. Also, it is entirely possible that a State may not be responsible for the conduct under ARIO, but it would be responsible under RSIWA for its own actions.[533]

One of the major issues with "aiding or assisting" a wrongful conduct is that ARIO does not provide a definition for either "aiding" or "assisting".[534] In order to get a glimpse of what the ILC thinks on the issue, or define the specific characteristics, one must observe a previous

[532] ARIO Art. 58.
[533] ILC ARIO Commentaries, Art. 58, paras 4,5.
[534] FRY, James D.: *Attribution of Responsibility*, Shares Research Paper 37, 2014, pp. 17-18, available at: http://www.sharesproject.nl/wp-content/uploads/2014/03/SHARES-RP-37-final.pdf, (accessed: 24 August 2020).

version of RSIWA from 1978, in which the "aiding" or "assisting" was underlined by the following statement:

„Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation."[535]

If the conduct that is considered aid or assistance creates the responsibility of the party in question irrespective of the attribution of the conduct, it can have significant ramifications in the context of peace operations. For instance, if we ascertain that the State is responsible for conduct as it was carried out by its military contingents as agents or organs of the State, then the UN, if it had knowledge of SEA taking place in the operation, decides not relieve the SRSG or the force commander in question or does not initiate the repatriation of the individuals accused of SEA could be responsible for aiding or assisting the commission of the conduct if further acts of SEA take place. This line of thought would create a form of responsibility where the UN would be responsible for certain conduct regardless of deciding on attribution pedning the reaction of its organs and agents, such as the SG, the Secretariat, the OIOS or the DPO. From another point of view, in these scenarios dual attribution would be rendered impossible as the TCC(s) would be responsible for a separate conduct and the UN's responsibility could only be established for aiding or assisting the commission of the conduct.

5.9. Criticism of ARIO

It is safe to say that ARIO has prompted a greater wave of criticism from various subjects of international law than RSIWA. The mixed feedback from States and other IOs can be traced back to a great extent to the lack of practice by IOs regarding the norms of responsibility.[536] Indeed, there is only a fraction of practice that can be relevant when compared to the practice of States. However, if we accept the fact that both States and IOs are primary subjects of international law, then it is not only the practice of IOs between themselves, but those of IOs and States that can be taken into consideration. Admittedly, this does not solve the jurisdictional gap, but to some extent expands the scope of observable practice.

[535] ILC Yearbook 1978/II (2), p. 99, also in: FRY, *ibid*, p. 18.
[536] BOON, *ibid*, p. 8.

Another wave of criticism is derived from the notion that ARIO does not take into consideration the vast differences between the hundreds of IOs that currently exist and that it is impossible and not prudent to try to create a legal solution regarding responsibility that would fit all IOs.[537] This argument can be countered with the notion of juridical equality. More precisely the fact that a relatively small organization can possess rights and be bound by obligations, just as a large one like the UN, even though the scope of rights and obligations will undoubtedly be determined by the competences of the organization in question. Using the analogy of States: there are vast differences between States regarding their size, power, political influence, economic capacity, monetary tools, internal mechanisms, etc. but the nominal-juridical equality of States is still not questioned (although notable exceptions exist), as it is the basis for the current model of international law and international relations since the Treaties of Westphalia - also highlighted by the UN Charter itself.[538]

A third array of criticism comes from the fact that ARIO is considered to be a rather progressive work by the ILC, even though it copies extensively from RSIWA. The Commission was therefore criticised that it did not take into consideration the speciality of IOs and merely "cut and pasted" a great portion of RSIWA.[539] Such an argument can be negated by the fact that IOs were invited to participate during the compilation of the then-draft articles and could voice their opinions and concerns. Indeed, several major IOs have provided written commentaries to ARIO even regarding its final version of 2011.[540] It is nonetheless true that a vast majority of IOs were not invited and could not voice their opinions, thereby somewhat distorting the perceived "general opinion" of IOs to reflect the largest and most influential organizations, such as the UN and its specialized agencies, the Council of Europe, the European Commission, NATO, OSCE, OECD and UNIDROIT to name the most prevalent ones. At this point it needs to be noted, that although the opinion of IOs were taken into consideration during the drafting procedure, ultimately ARIO was brought before the General Assembly and voted on by States. Therefore, it can be stated that although IOs are "on the rise" when it comes to their opinions and practice being taken into consideration, the process of norm-creation still largely rests in the hands of States.

[537] BOON, *ibid*. p.8.
[538] UN Charter Art. 2, para 1.
[539] BOON, *ibid*, pp. 8-9.
[540] *Responsibility of International Organizations, Comments and Observations Received from International Organizations*, A/CN.4/637 and Add 1, 14 and 17 February 2011, available at: https://legal.un.org/ilc/documentation/english/a_cn4_637.pdf, (accessed: 18 August 2020).

Overall, ARIO can be considered an important document in the codification and development of responsibility of IOs in international law and it could serve as invaluable tool in bringing about legal certainty to the otherwise "murky waters" of responsibility and also in the grander scheme of things a way to elevate IOs from their current status of "secondary general subjects" of international law.

5.10. Responsibility in joint operations

The case of joint operations deserves special mention. In a joint operation, there is a substantial military force operating semi-independently, but in a coordinated manner to the peace operation. Clear-cut examples would be UNPROFOR in the former Yugoslavia, aided by the Rapid Reaction Force established by the Netherlands, France and the UK, as well as UNOSOM II in Somalia, supported by the US Rangers. According to the Secretary-General's report of 1996, in these cases:

"In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[541]

The Secretary-General's report iterates the practice of the UN, where the organization is willing to take responsibility, but only if it possesses operational command and control and that control has to be decided on a case-by-case basis.

A similar situation arises when the UN initially assumes command and control, but the State "overwrites" the commands coming from UN headquarters or the force commander and directs the actions of its troops. State responsibility can be established if there is a direct link between the command originating from the State and the conduct in question.[542]

5.11. Multiple attribution of conduct and the concept of shared responsibility

[541] *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, Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations*, Report of the Secretary-General, A/51/389, adopted: 20 September 1992.
[542] TONDINI, *ibid*. p. 184.

Sharing or dividing responsibility to a certain degree is not alien to domestic legal systems, as it has equivalents in both civil law and corporate law as well as in the field of international refugee law.[543] Even in the realm of multinational military operations can we observe possible applications of shared responsibility.[544] For peacekeeping, shared responsibility analyses the prospect of establishing responsibility of certain actors, most notably states and IOs together and at the same time for acts happening or for crimes committed during the operation. The goal this special form of responsibility serves is always first and foremost protecting the interest of the victims and the satisfaction of their claims – an aim aligned with the current policy perspectives of UN leadership.[545] A secondary purpose is to decipher to what extent is the act in question attributable to the States and IOs involved.[546] The *raison d'être* of the regulation – as argued by some authors - that just as international organizations and the material regulating their legal status developed and diversified, so too must the rules on responsibility.[547]

Following the general model of establishing responsibility in interational law, a breach of international obligation through an act or omission and attribution linking the conduct with the state or IO is required as well as the negative criteria of missing circumstances precluding wrongfulness. [548] In this basic scenario, damage is not a necessary element.[549] In contrast, shared responsibility necessitates the existance of damage as it views the breach of obligations from the side of the injured party. It is also necessary to point out that in contrast to general norms on responsibility, which operate with one actor whose responsibility is in question and more actors are the specific case, regarding shared responsibility the point is only valid where there are multiple actors potentially responsible for a conduct. [550] A probable scenario of shared responsibility arises when multiple actors are breaching multiple international obligations

[543] See also: HURWITZ, Agnes: *The Collective Responsibility of States to Protect Refugees*, Oxford University Press, Oxford, 2009.
[544] KREPS, Sarah E.: *The United Nations – African Union Mission in Darfur: Implications and prospects for success,* African Security Review Vol. 16, No. 4, 2007, pp. 66-80.
[545] UN SG Antónió Guterres' speech to the UN GA in 2007; https://www.un.org/sg/en/content/sg/speeches/2017-09-19/sgs-ga-address (accessed: 17.12.2019.)
[546] NOLLKAEMPER, André – JACOBS, Dov: *Shared Responsibility in International Law: A Conceptual Framework.* Michigan Journal of International Law 2013. Vol. 34, Issue 2, 424-427. http://www.mjilonline.org/wordpress/wp-content/uploads/2013/04/Nollkaemper-Jacobs-FTP-3_C.pdf (letöltés ideje: 2015.02.21.)
[547] SOREL, ibid. p. 129.
[548] *RSIWA* Art. 2., ARIO Art. 4.
[549] Although not an absolute requirement and sometimes hard to discern - as can be seen with the categories of political, moral damage or in the case where no damage arises from the breach – it still plays a pivotal role while calculating compensation. See also: *Case Concerning the Factory at Chorzów*. PCIJ No. 13. Judgment, 13 September 1928.
[550] LECK, ibid, p. 360.

resulting in a singular case of damage on the side of a single victim. As attribution needs to be observed from the side of at least two actors, causal connections are going to be much more closely observed than in the case of regular responsibility regime.

To bring a general example of how this abstract tenet can be implemented in peace operations: the UN asks a state to participate in a peace operation, which the state in question accepts and sends peacekeepers to the area. Both the force commander appointed by the UN and contingent commander delegated by the state are aware of the fact that the area which they control is full of barbed wires, landmines, booby traps and small arms, but decide to prioritize other tasks and neglect their duties to disarm the territory. As a result, a local civilian treads on a landmine and is killed.[551]

In the aforementioned fictional case it was the responsibility of both commanders to protect the life of local civilian population which creates a breach of obligations through omission. The general regime of responsibility at that point would take a look at tests of attribution to decide whether the state or the UN should have given the order. However, in this case both parties might be responsible, since the force commander acted as an agent of the UN, with the authorization of the UN for attaining the goals of the Organization, while the contingent commander – although this varies greatly in each situation and up to a judicial process to prove – acted as the representative of his/her own state, with the protection of his own personnel in the forefront of his/her thoughts The causal relationship is also evident as the loss of human life has directly arisen from the decision (or lack thereof) of these two commanders and as such the theoretical outcome can either result in the responsibility of the UN as well as the TCC.

Attribution and causal relation might show remarkable similarities at first glance and it is worth delving into the differences between the two in order to better understand how and why shared responsibility could work. Attribution answers the question of which party is responsible for a given conduct: the TCC or the UN. As such it applies a simple binary code: either the conduct is attributable or not, but there is no middle ground.[552] Establishing attribution stands at the forefront of scholarly literature and tasks international tribunals with the most amount of problems which try to solve the riddle through various attribution test sas explained above. Causal relation on the other hand assumes there is another step that needs to be taken,

[551] Completely fictional, but possible scenario. The same line of thought can be used with the obligation to prevent SEA in peace operations.
[552] Both ARIO and RSIWA operate with distinct sets of attribuation. A conduct must fit into one of these categories, otherwise attribution and responsibility cannot be established.

which is finding the relation between the previously attributed conduct of the state or the IO and the damage occuring on the side of the injured party. [553] The answers to the question of causality are not as apparent as in the case of attribution as the whole context and interdependence of obligations needs to be observed, revealing the logical chain linking the breach of obligations, attribution, potential or missing circumstances precluding wrongfulness and damage while enveloping them in a compact and holistic understanding. In this context there is no more binary coding of causality or non-existant causality, but the extent of responsibility resulting in the damage from the breach of obligations needs to be established. A multitude of variations is possible and the observer might even draw the conclusion that the act is not linked to the damage incurred and that the damage would have arisen irrespectively of the conduct or that only multiple breaches of obligation were sufficient to cause the damage (akin to a composite breach of obligations). Therefore, when analysing the prospect of shared responsibility, multiple conducts and multiple attributions need to be observed before linking them together through causality and defining how the damage is related to the attributable breaches of obligation. This is the type of responsibility that could answer the dilemma of consistently invoking multiple iterations of responsibility in peace operations. In practice however, this might not be such an easy task especially because of the peculiarities of peace operations. Even though most of the treaties and resolutions of IOs are made available to the general public, for academic purposes the case materials of domestic courts are scarcely available or not at all as states are not keen on showing a potentially shameful conduct to the wider international community. Further complicating matters is the division of labour and tasks in a peace operation as it is often highly unclear where the exact orders came from or whether a state applied informal pressure on the UN and/or the force commander changing orders fundamentally or simply sabotaging the Organizations goals for furthering state interests. [554]

5.11.1. Normative background

Chart No. 15.: Normative background of multiple attribution of conduct in RSIWA and ARIO
Source: MESSINEO, Francesco: *Multiple Attribution of Conduct*, Shares Research Paper No. 2012-11, p.12, available at: http://www.sharesproject.nl/wp-content/uploads/2012/10/Messineo-Multiple-Attribution-of-Conduct-2012-111.pdf (accessed: 30 August 2020).

[553] AHLBORN, Christiane: *To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States.* Amsterdam Center for International Law, Amsterdam, 2013. pp. 16-18.
[554] AHLBORN: *ibid, p.* 20.

*Conduct of one actor to whom two rules of attribution apply at the same time**	**STATE ORGAN (DE JURE OR DE FACTO)** ***Article 4 ASR***	**IO ORGAN** ***Article 6 ARIO***	**ENTITY EXERCISING GOVERNMENTAL AUTHORITY** ***Article 5 ASR***	**AGENT OR ENTITY EXERCISING IO FUNCTIONS** ***Article 6 ARIO***	**ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY A STATE** ***Article 8 ASR***	**ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY AN IO**
STATE ORGAN (DE JURE OR DE FACTO) ***Article 4 ASR***	Joint organ established by two or more states; *or* organ of two or more states at once	Joint organ established by two or more states/IOs; *or* organ of two or more states/IOs at once	A state organ is entrusted with exercising the governmental authority of another state	A state organ is entrusted with IO functions	A state organ is directed, instructed or controlled by another state	A state organ is directed, instructed or controlled by an IO
IO ORGAN ***Article 6 ARIO***		Joint organ established by two or more IOs; *or* organ of two or more states/IOs at once	An IO organ is entrusted by a state to exercise governmental authority	An IO organ is called to exercise functions of another IO	An IO organ is directed, instructed or controlled by a state	An IO organ is directed, instructed, or controlled by another IO
ENTITY EXERCISING GOVERNMENTAL AUTHORITY ***Article 5 ASR***			Entity (not an organ) is exercising the governmental authority of more than one state at the same time	Entity (not an organ) is exercising the governmental authority of a state and the functions of an IO at the same time	Entity (not an organ) is exercising the governmental authority of a state and acting under the direction, instruction or control of another state	Entity (not an organ) is exercising the governmental authority of a state and acting under the direction, instruction or control of an IO
AGENT OR ENTITY EXERCISING IO FUNCTIONS ***Article 6 ARIO***				An agent or entity is exercising the functions of two or more IOs at the same time	Agent or entity exercising the functions of an IO and acting under the direction, instruction or control of a state	Agent or entity exercising the functions of an IO and being instructed, directed or controlled by another IO
ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY A STATE ***Article 8 ASR***					Person or entity acting under the instructions, direction or control of more than one state at the same time	Person or entity acting under the instructions, direction or control of (one or more) state and (one or more) IO.
ACTOR DIRECTED, INSTRUCTED OR CONTROLLED BY AN IO						Person or entity acting under the instructions, direction or control of two or more IOs

*** Note that, if Article 6 ASR or Article 7 ARIO apply, multiple attribution does not arise (see below, part 4).**

Regarding the normative background, both RSIWA and ARIO textually allows for two or more actors to be responsible for the same conduct.

RSIWA Art. 47, para 1:

„Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."[555]

ARIO Art. 48, para 1:

„Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act."[556]

Through a combined reading of the aforementioned texts it becomes clear that peace operations - even though officially maintained and conducted by the UN – are always operated by a multitude of states, supported by other international organizations (AU, EU, NATO, OAS, League of Arab States, etc.), specialized agencies, NGOs and various other actors invoking different manners of responsibility which nonetheless culminate in a single damage suffered by the injured party. [557]

The concept of independent responsibility with a plurality of actors is therefore apparently supported by both works of the ILC. In other words, all of the actors involved are separately responsible for the same wrongful act as co-authors. At this point, it is worth mentioning a trend in international law, as it is moving from a traditional individual-bilateral understanding (BROWNLIE) to more of a "general law of wrongs" approach (CRAWFORD). This approach means that a collective action concerning a breach of obligations is seen in the light of joint violation of rules rather than separate breaches of norms by the individual actors. This is a crucial point where responsibility and the invocation of responsibility differs, as the "underdevelopment" of evocation of responsibility does not affect the theoretical normative framework of responsibility insofar as multiple attribution is concerned.[558]

[555] RSIWA Art. 47, para 1.
[556] ARIO Art. 48, para 1.
[557] Or in the case of SEA, committed by peacekeeping personnel and suffered by the victim.
[558] ibid. pp. 23-24.

As GAJA points out in his second report to the ILC in 2004, dual attribution can lead to joint or joint and several responsibility, however, joint as well as joint and several responsibility does not depend on dual attribution.[559] Special rapporteur GAJA highlights the examples of joint military actions, such as the bombing of Belgrade by NATO forces and the so-called mixed agreement of European Union, where both the Union and its member states are parties. In the latter scenario, it can be regarded as irrelevant if the breach of obligations is attributable to the member state or the EU, since in either case, responsibility can be established.[560]

According to the theoretical framework set up by NOLLKAEMPER, three instances can result in shared responsibility, Firstly, where there is co-authorship for the same internationally wrongful act. Secondly, where separate acts determine a single injury. And thirdly, in cases where "indirect responsibility" applies, such as "aiding" or "assisting" "directing" and "controlling" or coercing the other party in the commission of the internationally wrongful act.[561]

Based on the aforementioned, it is not an impossible task to create a theoretical legal basis for shared responsibility along with its invocation in practice. If we view shared responsibility from the victim's side, arriving at some form of compensation should be of primary importance. From a fiscal standpoint, the victim might not care where compensation comes from as long as there is compensation. All claims of the responsible parties might be handled among themselves at a later date.[562]

The advantages of such a system are apparent at first glance. The injured party would no longer have to fear that if filing a claim against a state is to no avail, the injured party might arrive at a dead end without any possibility of getting compensation or redress. It would furthermore underline the governing principle of responsibility that someone must always be responsible – as articulated by Special Rapporteur Gaja.[563] A noteworthy side-effect would be strengthening the status of IOs as principal subjects of international law.[564]

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[559] HALLING, Matt – BOOKEY, Blaine: *Peacekeeping in Name Alone: Accountability for the United Nations in Haiti*, Hastings International & Comparative Law Review, Vol. 31, Issue 1, 2008, p. 475, Saura, ibid, p. 479, 523.
[560] GAJA, *Second Report* of 2004, para 8.
[561] MESSINEO, Francesco: *Multiple Attribution of Conduct*, Shares Research Paper No. 2012-11, pp. 5-6, available at: http://www.sharesproject.nl/wp-content/uploads/2012/10/Messineo-Multiple-Attribution-of-Conduct-2012-111.pdf (accessed: 25 August 2020).
[562] NOLLKAEMPER – JACOBS: *ibid, p.* 105.
[563] GAJA, Giorgio: *First report on the responsibility of international organizations*. 2003, ibid.
[564] AHLBORN: *ibid, p.* 26.

Possible disadvantages and the hardships in application shouldn't be neglected either. In order for the concept of shared responsibility to work effectively a unified justice mechanism would be highly desirable which would establish responsibility standards – something severely missing in public international law. One of the greatest flaws of the notion is not accounting for the jurisdictional gap regarding IOs that permeates the system of international law. Concerning peace operations shared responsibility can only be implemented between various state parties as the UN is protected by a virtually absolute immunity which would mean that should a court decide in favour of the UN's responsibility, the UN would simply invoke its immunity per the Charter, making it a moot point to rule in favour of establishing the Organization's responsibility.[565] It might lead to furter injustice of only one of the parties are held to account without that party having some manner of redress against the other party responsible for the conduct. Further redress though is currently very limited. Because of jurisdictional hardship, the most suitable solution would be a presumption of the UN's responsibility and the establishment of a standing commission which would then decide the ratio of responsibility between the UN and the state(s) in question.

The greatest risk for the UN is the loss of credibility in the purpose of the Organization and losing the support of the international community as well as the host state. For TCCs it can be a deterrent that their voluntary participation in peace operations results in a myriad of compensation cases for which they have to pay at least some of the bill. Vaning support from the member states can lead to a dwindling number of peace operations and the relativization of peacekeeping in the international community. Naturally, this cannot be the goal of introducing shared responsibility, however, it nonetheless constitutes a valid argument in the discussion.[566]

Chart No. 16.: Advantages and disadvantages of applying shared responsibility for acts committed in UN peace operations

Advantages	Disadvantages

[565] UN Charter, Art. 105. (2); See also: *Convention on the Privileges and Immunities of the United Nations*, 1946. Art. 18. para (a).

[566] The role of the media deserves special mention here. On the one hand, it is capable of putting pressure on the UN for claims not satisfied or situations not investigated, on the other hand excessive use of the media's unquenchable thirst for scandal and negative news in general can lead to a defunct portrayal of the UN, which could result in the lack of trust by the host state and lack of support by TCCs and the wider international community.

promotes the interests of the victim/injured party	lack of unified justice mechanism to establish global standards
highlights the general principle of lawful conduct	disregards the problem of the jurisdictional gap - cannot permeate the UN's immunity shield
reinforces the legal status as subjects of international law	implies a continuity of malfeasance where the UN must provide compensation on a regular basis
presents the UN as a law-abiding organization ready to provide redress – possible benefit to reputation	

Source: author's own chart

5.12. Individual criminal responsibility

Besides the responsibility of international organizations and States, individual criminal responsibility also needs to be addressed. At first glance, one of the most appealing solutions would be prosecution by the ICC, especially since TCCs are prone not to either be biased when it comes to their own citizens committing crimes abroad or not to take their obligations set out in the MoU seriously. However, prosecution by the ICC might not be an ideal solution because of legal and political reasons detailed below.

5.12.1. The International Criminal Court

According to the ICC's Statute, prosecuting SEA can be envisioned either as war crimes or crimes against humanity.[567] As formulated by the Statute of the ICC regarding crimes against humanity:

Art. 7, para 1:

[567] Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544; Crimes against humanity Art. 7. para (1), section g.) War crimes Art. 8. para (2) section b.) subsection xxii.).

„For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack …"

Section G:

„Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;"

In the case of crimes against humanity however, there is a requirement that these acts must be part of a larger and organized plan to target or harm a specific population as a whole[568] and these are not fulfilled when crimes of the aforementioned nature are being committed in a peace operation.[569] Since SEA is best described as a "crime of opportunity", meaning that it is being committed because the perpetrator can do it, and not as a premeditated act targeting the civilian population, crimes against humanity are not applicable *per se*. On a side note, the armed forces of Burundi are currently being investigated by the Office of the Prosecutor of the ICC *proprio motu* for alleged crimes against humanity.[570] Even though the acts in question were cimmitted on the territory of Burundi from 2015 to 2017, several NGOs are pushing for an extended investigation regarding the conduct of Burundi armed forces participating in MINUSCA, as it is the operation with one of the highest occurence of SEA and several substantiated allegations have emerged concerning the same troops serving as peacekeepers from Burundi.[571]

On the other hand, regarding war crimes, Art. 8 the ICC's Statute states:

1. „The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. „For the purpose of this Statute, "war crimes" means:

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[568] HARRINGTON, Alexandra R.: *Victims of Peace: Current Abuse Allegations U.N. Peacekeepers and the Role of Law in Preventing them in the Future,* ILSA Journal of International & Comparative Law, Vol. 12, Issue 1, Fall 2005, p. 141.
[569] LEWIS, p. 611.
[570] Information about the ongoing investigation available at: https://www.icc-cpi.int/burundi (accessed: 29 August 2020).
[571] The UN's Deal with a Dictator, Report from Aids-Free World's Code Blue, February 2020, available at: https://static1.squarespace.com/static/514a0127e4b04d7440e8045d/t/5e501ffc3a2ab25c3d4a6fda/1582309390358/UN%27s_Deal_With_a_Dictator.pdf (accessed: 29 August 2020).

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: […]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […]

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;"

Within the category of war crimes, the only possible avenue for sexual abuse to be considered a war crime under the Rome Statute would be if a homogenous national military contingent under a contingent commander would commit SEA on a large scale. In that case, the contingent commander could be held accountable under the Statute. This is supported by the declaration of the Office of the Prosecutor of the ICC, who stated that the *"Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility"*, such as the leaders of the State or organization allegedly responsible for the crimes falling under the material jurisdiction of the Court. In theory, it is possible for the ICC to establish individual responsibility for war crimes, as SEA is evidently covered by section xxii of Art. 8, para 2, section b) of the Statute, albeit only in the case of leaders and commanders.[572]

Even if *rationae materiae* the Court would be able to prosecute individuals, there are other jurisdictional issues that need to be resolved. The ICC would only have jurisdiction regarding individuals who are nationals to a state party to the Rome Statute, with major TCCs not being parties to the Statute, e.g.: India and Pakistan.[573] It is worth mentioning however, that since the ICC operates with complementary jurisdiction, the Statute's application is secondary to that of States.[574] A viable method to invoke the ICC's jurisdiction arises with the possibility

[572] Note in LEWIS, ibid. n. 149.
[573] 122 state parties as of 15.12.2019. At: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed: 15.12.2019.)
[574] Seeming exceptions to this rule, albeit with lesser relevance are offenses committed against the administration of justice, as enshrined inArticle 70 of the Statute. Some authors, such as Karsai argue that in this case the Court has primer jurisdiction and not just a complementary one. See also: KARSAI, Krisztina: *The Hidden Primer Jurisdiction of the ICC – About the Article 70 of the Statute*, XVth International Congress on Social Defense, Toledo, 2007, p. 5.

for the UN SC to refer a case, a group of cases or a situation to the ICC.[575] This may lead to a situation where the ICC can have jurisdiction in cases where the crimes took place in the territory of a state not party to the Convention.[576] A prime example for this is SC Resolution 1593 of 2005,[577] which referred the situation in Darfur to the ICC, establishing jurisdiction for crimes committed in the region where none of the involved states were party to the ICC Statute at that time.[578]

The individual criminal responsibility of the commanders also needs to be further analysed. Art. 28 of the ICC Statute can be used to establish criminal responsibility of commanders and superiors in general.

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[579]

The main difference between superior responsibility and command responsibility is that in the former case the person in charge is of non-military character, for example a civilian politician, whereas in the latter case, the person in charge also belongs to the military and situated in the command structure.[580] Establishing the responsibility of commanders and superiors is not unknown in domestic military practice as made apparent by the 1946 decision

[575] ICC Statute Art. 13. Section (b)
[576] ÁDÁNY, Tamás: *A Nemzetközi Büntetőbíróság joghatósága, előzmények, tendenciák, előfeltételek*, Pázmány Press, Budapest, 2014, p. 185.
[577] UN SC Res. 1593/2005 (31 March 2005).
[578] ÁDANY, p. 186.
[579] ICC Statute Art. 28.
[580] O'BRIEN, Melanie: *The Ascension of Blue Beret Accountability: International Criminal Court Command and Superior Responsibility in Peace Operations,* Journal of Conflict and Security Law, 2010, Vol. 15. No. 3. p. 550.

of the US Supreme Court in the Yamashita case, where the commander was tried for war crimes as in not stopping subordinates in committing war crimes.[581] Even in international criminal law the responsibility of commanders is becoming well-established, starting from the Nuremberg and Tokyo tribunals and especially due to the work of the two *ad hoc* tribunals established in the 1990s, the ICTY and the ICTR.[582] The ICTY has established the commander's responsibility in the Blaskic[583] and Celebici[584] cases, while the ICTR has reached a similar conclusion in Musema.[585] The responsibility of the commander is also reflected in the Model MoU as it puts the *'obligation to maintain the discipline and good order of the contingent.'* on the leader of the mission. [586] This authority can be interpreted in three distinctly dimensions of authority, command and control distribution as strategic, operational and tactical.[587] Ultimate authority and strategy lies with the Security Council, which issues the mandate and its alterations, whereas operational authority rests with the Head of Mission. It is the SG who appoints the Head of Mission, who serves as Special Representative of the Secretary General (SRSG) and exercises operational authority. On the other hand, the Force Commander serves as the head for military affairs who issues commands to the contingent commanders and also appoints the military component heads. Regarding the tactical sphere, the individual component heads (military, police, civilian, etc.) play a pivotal role in the command structure of the operation. It is not without consequence that the TCCs appoint their own contingent commanders responsible for the command and conduct of all national forces in the mission as through them, the TCC can exercise substantial control over its troops, albeit in theory they continue to serve under the UN's aegis, led by an SG-appointed force commander. As the disastrous events of Srebrenica have shed some light on the possible effects of direct state interference in UN peacekeeping operations, the UN has been combatting the phenomenon for decades although with varying success.[588]

[581] Yamashita 3217 U.S. 1 (1946), Decision on 4 February 1946.
[582] O'BRIEN, p. 534, 536-539.
[583] *Prosecutor v. Tihomir Blaskic*, ICTY, 29 July 2004, IT-95-14-A.
[584] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, ICTY, 16 November 1998 IT-96-21-T.
[585] *The Prosecutor v. Alfred Musema*, ICTR, 16. November 2001, ICTR-96-13-A.
[586] Revised Model MoU, Art. 7. Section 4.
[587] O'BRIEN p. 540-541.
[588] During the crisis at Srebrenica in 1995, the Dutch UN component blatantly disregarded orders from HQ as well as its mandate while obeying direct orders from the Dutch Ministry of Defense. When reports of direct and disastrous interference by the government were released in 2001, it led to the fall of the government, paving the way for future litigation against The Netherlands. On a side note, public opinion after the reports were released considered the UN as week and ineffective as it didn't have enough influece in its own mission to counterbalance the orders of a participating state.

As O'BRIEN notes, it is not the rank of the commander that matters,[589] but whether that person exercises effective control over subordinates at the time the crime is committed, as also highlighted in the practice of the ICC.[590] O'BRIEN also observes the difference between "effective command and control" and "effective authority and control", providing an analysis on how these two concepts differ. Essentially, command can be described as providing or issueing concrete orders, while authority is the capacity to act in a given situation.[591] The nature of command responsibility is typically considered to be a crime by omission, a failure to act, when the commander has been provided adequate information, signalling the existence of a serious problem, disciplinary issues by the forces or outright human rights abuses and SEA occurring in a mission.[592]

Further complicating the matter, the *de iure* and *de facto* responsibility may differ greatly. *De iure* speaking, an individual exercising commanderial duties may not be responsible if the crimes committed by the troops were outside of his or her influence to prevent or report.[593] In the case of *de facto* command and authority that person will be responsible even if he was not officially a superior, but became so in reality, by issuing orders and controlling the behaviour while having the capacity to report and prevent the crimes committed, effectively creating a superior-subordinate relationship.[594] Therefore, a case by case analysis is necessary to determine the factual relation between the persons in question. As a result, when attempting to establish the responsibility of the force commander, the first thing to establish is whether the force commander had knowledge of the acts and raise the question whether he or she was able to stop them. Besides the events of Srebrenica, it is not unheard of that the force commander is denegated to a formal role with little practical competence. For example, in the early 1990s during the UNOSOM I and II missions in Somalia, the contingent commanders were operating based on orders received from their state command, completely disregarding the force commander's will.[595]

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[589] O'BRIEN, p.544.
[590]Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para 414. Even though the final decision of the ICC was favourable towards Mr. Bemba, his case marks a significant stepping stone in the evolution of the ICC's practice on the matter.
[591] O'BRIEN, pp. 544-545.
[592] These may manifest in adequate IHL training, establishing and monitoring an effective reporting system and taking corrective action when the superior becomes aware of such an action occuring, see also: O'BRIEN p. 545.
[593] O'BRIEN 544.
[594] ibid.
[595] ZWANENBURG, Marten: *Accountabiltiy of Peace Support Operations*, Martinus Nijhoff, Leiden, 2005, pp. 40-41.

Somalia is an emblematic example because of other problematic practice as well, such as the so-called "Article 98 agreements": bilateral agreements by the United States to ensure that its citizens are not prosecuted by the ICC.[596] So far over 100 of these agreements have entered into force and these treaties might serve as templates for states trying to solidify the absolute immunity of their personnel on foreign soil, besides the regular protection a SoFA or an MoU would bring.[597] Although its legal nature is problematic, as Article 98 does not explicitly allow states to sign bianco agreements with other states granting immunity to its citizens, the United States continues to use this practice.[598] According to the American interpretation, these treaties are only phrased as a commitment from the US's side to investigate allegations of crimes against humanity, war crimes and genocide. While obliging other state parties not to cooperate with other states or the ICC - in case of extradition of US citizens - these agreements are applicable to broad categories of personnel including military and civilians, with the express intent of eliminating any possibility of the ICC to act in the case of US citizens.[599] Seeing how reluctant US officials are to cooperate with the ICC, as shown by the fact the Prosecutor's visa has been revoked by US authorities, there is no wonder that scholarly literature interprets these agreements in a different light than the US and why it is considered a troubling movement for the future of international criminal justice.[600]

After legal arguments, some political considerations are also need to be highlighted. Prosecution before the ICC poses several inherent dangers as it might alienate TCCs who are not prepared to face trials at the ICC, nor are their troops expected to do so. Furthermore, TCCs are embarrassed about reports of human rights violations during missions and if TCCs had to

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[596] ICC Statute Art. 98.: *„Cooperation with respect to waiver of immunity and consent to surrender*
1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

[597] NOTAR, ibid. p. 426.

[598] TALLMAN, David A.*: Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict,* Georgetown Law Journal, Vol. 92., Issue 5, June 2004, p. 1034.

[599] BOGDAN, Attila: *The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98*, International Criminal Law Review, Vol. 8, Issues 1 and 2, 2008, p.41.

[600] U.S. Secretary of State Mike Pompeo announced the revocation of the visa of Fatou Bensouda, the ICC Prosecutor; Guardian, 05 April 2019, available at: https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor; New York Times: https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html (both accessed 17.12.2019.).

face the ICC as well would act as a serious deterrent from participating in a peace operation.[601] It would also be contradictory to the SoFA, which declares *expressis verbis* the exclusive jurisdiction of the TCC.[602] There are also several states, most notably the US, which is reluctant to enable procedure by a seemingly uncontrollable and hostile organization, exercising universal jurisdiction, which it would apply extraterritorially.[603]

5.12.2. Tri-hybrid tribunals and special courts

In her 2014 landmark book, BURKE advocates the possibility of a tri-hybrid court structure with the aim of involving multiple actors in the process.[604] In essence these courts would serve as "internationalized" domestic court with a shared or divided jurisdiction between the TCC, the Host State and the UN.[605] The concept is not entirely alien to the current system where the right of force commanders and SRSGs to arrange for the detention of the alleged perpetrator has long been established in the practice of peace operations.[606] However, there is large step between having powers to order a few days of detention and from establishing criminal responsibility. The proposed courts would operate through complementary jurisdiction, akin to the ICC, where proceedings would only be conducted if the TCC is not willing or able to arrange a genuine prosecution.[607] The introduction of on-site courts martial would require international component on a permanent standby in the headquarters.[608] The new system would also call for SoFAs and MoUs to be amended to call for a waiver of immunities in order for the proposed court to begin its process.

The benefits of such a system are almost self-explanatory and alike special courts and tribunals.[609] Operating with a higher rate of transparency and impartiality, possessing international legitimacy, their processes may result in dismantling the feeling of impunity of peacekeepers. However, the proposed system is prone to criticism and skepticism due to several factors.

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[601] ALLAIS, Carol: *Sexual Exploitation and Abuse by Peacekeepers: the Psychological Context of Behavior Change,* 39 Scientia Militaria South African Journal of Military Studies 1, p. 8.
[602] Model SoFA, Art. 46, 47. b.), 48.
[603] GROENLEER, Martijn: *The United States, the European Union and the International Criminal Court: Similar Values, different interests?;* International Journal of Constitutional Law 2015/4. p. 936-937.
[604] BURKE, *ibid*. 246-248. p.
[605] ibid. 246.
[606] Model Status of Forces Agreement, Art. 40-43.
[607] ICC Statute Art. 1., BURKE: 246-247. p.
[608] BURKE, p. 248.
[609] HOFFMANN, Tamás: *Nemzetközi büntetőjog,* In: KARDOS, Gábor-LATTMANN Tamás (eds.): Nemzetközi Jog, ELTE Eötvös Kiadó, Budapest, 2010. p. 384.

The future introduction of a tri-hybrid court would face significant hurdles along the road of its establishment. There is a substantial reluctance from TCCs to relinquish criminal jurisdiction over their own personnel as it can be seen by the MoUs and SoFAs. Furthermore, setting up a justice mechanism as proposed by BURKE would naturally require the consent of the host State, which would rule out its application in peace enforcement operations or they could be considered undesirable where the government does not exercise full control over its territory. Peace operations are called to life in the first place because of the perilous situation of the host state, often meaning that local courts and judiciary may not able to able to exercise their functions, let alone cooperate in such an advanced fashion of an accountability mechanism. Furthermore, setting up an advanced court mechanism would require substantial financial assets as well, something the UN currently lacks due to a reduction of voluntary contributions by member states from 2017. It does not facilitate the creation of the tri-hybrid courts that it would require an international treaty with TCCs prior to deployment. In the case of a framework agreement this would literally mean a treaty between all states contributing personnel, which would be a Herculian task to undertake. Domestic law also hurls a boulder before the establishment of such courts as criminal codes of many TCCs do not allow on-site court martials or similar proceedings. Modifying the criminal codes of a great portion of member states can be understood as a long-term solution to enable on-site court martials, but it is definitely not a realistic goal for the near future.

5.12.3. Conclusion

Based on the abovementioned arguments, it can be established that the ICC could have jurisdiction regarding SEA if not in the case of crimes against humanity, then regarding war crimes. However, taking into consideration the limited scope of application and the possible political repercussions such procedures would entail, it might not be the ideal way to ensure individual criminal responsibility. The concept of tri-hybrid tribunals could in theory eliminate a lot of problems plaguing the current system (such as effectiveness and timeliness, lack of host-state participation, providing feedback to victims among others), but it lacks realism insofar as it is built on the premise that TCCs would be willing to share criminal jurisdiction regarding their own nationals, the financial ramifications for the UN, the state of the host country and unlikely scenario of bringing together TCCs to be party to a new international treaty on the subject.

Chapter 6.: Questions of jurisdiction and attribution in judicial practice

"Peacekeeping works in some situations,
but it very often needs other ingredients.
Peacekeeping is not the aspirin
of international security."
- Jean-Marie Guéhenno

6.1. Introduction

Chapter 6 aims at analysing relevant legal practice of various international courts, such as the ICJ, ICTY and ECtHR along with the recent practice of Dutch courts regarding the tests of attribution necessary for ascertaining responsibility as well as some of the procedural issues, namely jurisdiction that occur. The latter will only be discussed concerning the practice of the ECtHR as in my opinion whether an international court decides it possesses jurisdiction in cases relating to international organizations is of paramount importance in order for theoretical responsibility to be put to practice. As a disclaimer it must be stated that the practice of the Dutch courts as domestic courts cannot be equated to those of international courts, however, since these are the forums which adopted landmark decision on attribution and the ICJ's statute regarding the sources of international law does not differentiate between domestic and international courts, it is safe to say that by analysing these judgments, one can glance at "subsidiary means for the determination of rules of law".[610] Furthermore, the cases cited in this chapter do not necessarily deal with peace operation, but rather multinational military operations. This is relevant because of two things.

Firstly, as detailed in chapters 3 and 4, it is imperative for TCCs to maintain criminal jurisdiction over their military forces. As a result, instances of SEA will be decided in the State of nationality of the alleged perpetrator and not before international forums. Since domestic legal forums are reluctant to share their proceedings with the wider audience of the international

[610] ICJ Statute, Art. 38, para 1, section d.

community, it is often not possible to say how the court in question has decided, if the case reached that phase of the criminal process at all.[611]

Secondly, since the cases in question do not always involve the UN and peacekeepers, but rather a multinational military operation with an international organization usually linked, one must carefully apply analogy in the matter.

6.2. Practice of the ICJ in the Nicaragua and Genocide cases

In its 1986 landmark judgment, the ICJ has evaluated the conduct of the contras, an anti-government insurgency group supported by the United States of America in Nicaragua.[612] The Court applied the "effective control" test in the Nicaragua case, through which it can be established that there must be a direct link between the entity and the state in question. Since the contras could not be considered as organs of the US, in order for responsibility to be established a control link must have existed. The main question of attribution was regarding the nature of this link. The Court has decided that merely financing, supporting, training or providing information did not constitute a sufficiently strong link for the contra's conduct to be rendered attributable to the US.[613] The ICJ proposed the idea of "effective control" as the test most adequate to reflect the norms international customary law:

„The Court has taken the view (paragraph 110 above) 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 United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. In the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this

[611] Notable example is the conduct of French forces in CAR in 2014. No charges were brought before the alleged perpetrators by the relevant French court and the case was only made public through a leak of information. See also: https://www.nytimes.com/2017/01/06/world/africa/french-peacekeepers-un-sexual-abuse-case-central-african-republic.html (accessed: 30 August 2020).
[612] Case Concerning the Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America)*, Judgment, Merits, 27 June 1986, I.C.J. Reports 1986, p. 14.
[613] Nicaragua case, paras 109-112.

conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[614]

According to the Court's understanding, the direct link through which a State influences the actions of the entity must be an invaluable one, without which the conduct could not take place at all.[615] Evidently, the effective control test of the ICJ sets a high bar for attribution to be established, making it hard to ascertain the "invaluable direct link" required.

The ICJ has faced the question of attribution again in the 2007 Genocide case, where once the conduct of paramilitary forces operating in Bosnia and their relation to the central government of Serbia and Montenegro was scrutinized.[616] The decision bears special significance because of two reasons. On the one hand, it establishes that the nature treaty-based obligation concerning genocide are two-fold: prevention and punishment, while on the other hand it maintains the previously enshrined test of effective control set out in the Nicaragua case.[617] Regarding attribution, two instances had to be decided. Firstly, whether the paramilitary forces could be considered organs of the State, and secondly, whether there was a direct control over their conduct by the State of Serbia.

About whether or not the paramilitary groups can be considered State organs, the Court has iterated the following opinion:

„ […] according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious."[618]

[614] ibid. para 115.
[615] ibid. para 277.
[616] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment on 26 February 2007, I.C.J. Reports 2007, p. 43.
[617] ibid. paras 425-450.
[618] ibid. para 391.

The requirement of "complete dependence" is quite high and the ICJ has been criticized for raising the attribution threshold too high. The same line of reasoning can be observed regarding effective control:

„The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[619]

The ICJ's judgment has been criticized for treating attribution as an "either/or proposition". State control either reaches the threshold of conduct and therefore the "direction" can be established over the conduct or it is insufficient and responsibility cannot be established at all. In this respect the Court does not take into consideration the modalities of State influence or the degrees of State involvement.[620]

Another wave of criticism derived from the perception that the ICJ merged the rules of individual criminal responsibility and State responsibility and tried to synchronized fundamentally different subsets of international law.[621] CASSESE remarked on the ICJ trying to find common denominator for complicity and attribution to be both erroneous and unsubstantiated.[622]

6.3. Practice of the ICTY in the Tadić case

It is no surprise that Cassese has criticized the decision of the ICJ, as judge of another forum - the ICTY – he was instrumental in developing another test of attribution, which in the

[619] ibid. para 400.
[620] GIBNEY, Mark: *Genocide and State Responsibility*, Human Rights Law Review, Vol. 7, Issue 4, 2007, p. 13.
[621] CLEARWATER, Sam: *Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ's 2007 Decision in Bosnia v. Serbia*, Auckland University Law Review, Vol. 15, Issue 1, 2009, p. 14.
[622] CASSESE, Antonio: *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, Journal of International Criminal Justice, Vol. 5, 2007, p. 880.

opinion of the ICTY better reflected the norms of international customary law. The "overall control test" was highlighted by the ICTY during the Tadić case. Per the facts of the case, the ICTY has formulated an opinion on whether the link between the Federal Republic of Yugoslavia and the Bosnian Serbs was sufficiently strong enough to amount for attribution, thereby establishing State responsibility.

In his analysis of the Court's judgment KAJTÁR argued that the ICTY has erred in three different aspects.[623] Firstly the Court applied the wrong test for determining whether the conflict can be deemed international or not. Secondly, he argued that the ICTY disregarded contemporary international law by inventing a new test of control. Last but not least he claimed that the Court overstepped its competence by reviewing the decisions of the ICJ.

For the purposes of the current thesis the second argument deserves special notice. According to KAJTÁR, the ICJ's judgment in the *Nicaragua* case in 1986 set up a binding form of customary international law by creating the effective control test. Regarding the effective control test it could be stated that there were judgments applying the same control test,[624] but other courts, such as the ECtHR tried applying other tests. These "other" tests like the overall control, the effective overall control, the full control or the ultimate authority and control test, cannot be regarded as exceptions to the rule of the effective control tests, but rather the attempts of various courts in finding the appropriate test used to decipher existing norms of international customary law, being convinced that the effective control test by the ICJ is not the most suitable one. It can be said that the majority of scholarly literature favours a similar approach to the question of attribution as the ICJ's effective control test. However, the assessment and wishes of the scholars do not constitute a binding source for international law, although it could help shaping it in the future.

Summarizing this subchapter, it can be argued that the overall control test, set up by the ICTY in the Tadić case may not be the best tool when deciding on which test reflects the norms of attribution, nonetheless it makes a compelling argument by lowering the threshold at which responsibility can be established. However, it cannot be stated that the ICJ's effective control test as devised during the Nicaragua case would be a binding norm, but rather a leading control test, supported by certain other decisions and the majority of scholars along with the

[623] KAJTÁR, Gábor: *An overall critique of the overall control test* In: Zsuzsanna Csapó (Ed.): Emlékkötet Herczegh Géza születésének 85. évfordulójára: A ius in bello fejlődése és mai problémái. Pécs, 2013, p. 82.
[624] As explained later on, Dutch courts referred to the ICJ's practice established in the Nicaragua case in their judgments while also applying the effective control test.

codification by the ILC, which would hopefully become binding in the future to the benefit of the international community.

6.4. The ECtHR and a rocky road to rationality

The judicial practice of the ECtHR handled the question of attribution and attempted to find the correct attribution test several times over the last decades. What can be observed in the practice of the European Court of Human Rights, is either utter chaos or a gradual understanding and appreciation of the work of other tribunals. Over the course of two decades the Court turned its opinion upside down several times as it shifted from the 2001 *Bankovic* decision through *Behrami, Al-Jedda, Al-Skeini* and lately the 2014 *Jaloud* and *Hassan* cases. This subchapter will focus on the reasoning behind each individual judgment and attempt to establish a preferential way forward, based on the tendencies and shifts in the ECtHR's practice while differentiating between the issue of a forum (jurisdiction) to material law (attribution).[625]

In multinational military operations, where information and supplies might be limited and the local population can turn out to be hostile, the behaviour of military personnel tends to be more lax regarding discipline and even States tend to turn a blind eye when international obligations are not enforced in a strict manner.[626] Nonetheless, this is not sufficient to excuse the unlawful conduct of personnel. The unlawful conduct can manifest in the breach of International Humanitarian Law or International Human Rights Law and especially the European Convention on Human Rights (ECHR). Notable examples include wrongfully arresting and detaining alleged criminals, denying the right to fair trial, sexual exploitation and abuse or targeting protected persons during armed conflict.[627] In the following subchapters jurisdiction and attribution will be analysed separately, with the jurisdiction-line tackling the *Loizidou, Bankovic, Issa, Öcalan, Pad, Al-Saadoon, Al-Skeini* and *Hassan* cases and the attribution line untangling the *Behrami, Al-Jedda* and *Jaloud* cases. The aim of the subchapter

[625] SZYDŁO Marek: *Extra-territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda*, International Criminal Law Review 12, Martinus Nijhoff Publishers, 2012, p. 277. Even though Szydło mentions jurisdiction of acts or omissions over the person, the practice of the Court, as it will be later explained in some detail, focuses primarily on territorial jurisdiction and in later judgments on the situation of the victim.
[626] BREITEGGER, Alexander: *Sacrificing the Effectiveness of the European Convention on Human Rights on the Alter of the Effective Functioning of Peace Support Operations: A Critique of Behrami &Saramati and Al-Jedda*, International Community Law Review 11, Martinus Nijhoff Publishers, 2009, p. 183.
[627] RYNGAERT, Cedric: *Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the 'Effective Control' Standard after Behrami*, Israel Law Review, Vol. 45. Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2012, p. 152.

is to provide an overview over the ever-changing currents in the practice of the ECtHR regarding jurisdiction and attribution.

6.4.1. Jurisdictional Matters before the ECtHR

6.4.1.1. From Loizidou to Al-Skeini (1996-2011)

The 1996 *Loizidou* case created the first standard the Court used to establish jurisdiction, which can be summarized that Court will have jurisdiction if a state that is party to the ECHR has 'effective overall control over an area'.[628]

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action-whether lawful or unlawful-it exercises effective control of an area outside its national territory. The obligation to secure the rights and freedoms set out in the Convention in such an area derives from the fact that such control can either be exercised directly, through armed forces, or through a subordinate local administration.[629]

Although some authors argue that *Loizidou* set a low threshold for establishing attribution, this can be considered an oversimplification.[630] Having 'effective overall control' over a territory would render all acts committed in that area attributable to the State having some vaguely described control over the territory. What the Court meant by 'effective overall control' was evident in the case of Cyprus, where the southern part of the island is controlled by Cyprus and the northern part by a Turkey-supported government. However, trying to apply it in a truly multinational environment, where several States together or separately control certain parts of the area, may prove to be a Gordian Knot, just as it later turned out to be.

In the 2001 *Bankovic* case concerning the NATO bombings in Yugoslavia which had lethal results, the ECHR based its analysis of jurisdiction on a legal link between the individual and the State, which must exist if jurisdiction is to be established.[631] As the Court elaborated, this link should essentially be territorial. The State has jurisdiction over the conduct, if it happened

[628] *Case of Loizidou v Turkey* (dec.), No. 15318/89, 18 December 1996. Also in: MILANOVIC, Marko: *Al-Skeini and Al-Jedda in Strasbourg*, The European Journal of International Law, Vol. 23. No. 1, 2012, 2.
[629] *Case of Loizidou v Turkey*, para. 52.
[630] CERONE, John: *Jurisdiction and Power: The Intersection of Human Rights Law & The Law of Non-International Armed Conflict in an Extraterritorial Context*, 40, Israel Law Review, 2007, 428.
[631] *Bankovic and Others v Belgium and Others* (Dec.) No. 52207/99, 12 December 2001.

on its territory, and only has jurisdiction if the conduct took place outside of its territory under exceptional circumstances.[632]

In the *Issa* case in 2004, where the conduct of Turkish forces in Northern Iraq was scrutinized, the Court found that *'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.*'[633] As KANNIS notes, 'effective control over the territory' is required if a State wants to enforce the regulations of the ECHR.[634] While seemingly a step forward, it can by no means be interpreted as a blanket protection aiming at eliminating immunity, as the Court in *Issa* fell short of clarifying jurisdiction and its findings were contradicted by later judgments.

Merely a year later, in the 2005 *Ocalan* case the Court took a steep turn on the road. According to the facts of the case, the applicant was arrested by Turkish forces at the Nairobi Airport in Kenya and he argued that Turkey exercised jurisdiction during his detention.[635] Surprisingly, the Court accepted the applicant's argument and declared that at the moment of arrest, Turkey exercised jurisdiction over him. With this landmark judgment the Court moved to a 'jurisdiction over individuals' approach, which fundamentally contradicts the logic of previous judgments, as well as neglecting to illuminate whether this new principle is to be applied instead or parallel to the previous 'spatial territory approach'.[636]

Once again, in its 2007 *Pad* decision the ECtHR contradicted its previous findings when it asserted that shooting from a helicopter and the resulting loss of life are sufficient to form a nexus of "cause and effect" and as a result, the State's jurisdiction can be established. The mention of causality is a new aspect in the Courts reasoning, which didn't receive much support from later decisions. Still, *Pad* can be considered to be the first instance where the Court directly contradicted the *Bankovic* ruling. Both cases had similar facts: bombing from an airplane/helicopter and the resulting loss of life, yet the Court had drawn drastically different conclusions.[637]

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[632] KANNIS, Eleni: *Pulling (Apart) the Triggers of Extraterritorial Jurisdiction*, The University of Western Australia Law Review, Vol. 40, 2016, p. 225.
[633] *Issa and Others v Turkey* (Dec.), No. 31821/96, 16 November 2004, para. 71.
[634] KANNIS, p. 228.
[635] *Ocalan v Turkey* (dec.) No. 46221/99, 12 May 2005 para. 90.
[636] D'AMBROSIO, Dario Rossi: *The Human Rights of the Other – Law, Philosophy and Complications in the Extra-territorial Application of the ECHR*, SOAS Law Journal, Vol. 2, Issue 1, 2015, p. 12.
[637] *Pad and Others v Turkey*, (Dec.) No. 60167/00, 28 June 2007, also in: D'AMBROSIO, p. 13.

The 2009 *Al-Saadoon* case deserves a quick mention, as the Court has turned back to the territorial approach and also broadened its meaning when it stated that 'the territorial jurisdiction approach' can also be applied to a smaller amount of territory, such as 'the premises' instead of a wider area.[638] The underlying reason is that the balance of power between the individual and the State is fundamentally different when States detain foreign nationals. In forcing States to abide by the ECHR even under such circumstances is an understandable policy goal for the Court. Nonetheless, it remains unknown whether the ECtHR would have reached the same conclusion if cases of abuse in the Abu Ghraib prison complex and similar other facilities had not surfaced.

Picking up the reasoning of *Ocalan* in the 2011 *Al-Skeini* decision, the Court distanced itself slightly from the idea of territorial jurisdiction to a personal one when it noted that physical control over a person is the main factor in establishing jurisdiction.[639] The ECtHR also pondered upon the relevance of the *Bankovic* ruling, however, without expressly setting it aside or promoting it.[640] As SARI succinctly notes, the *Al-Skeini* holding is *'... a bizarre combination of the "control over territory" and the "State agent" models of jurisdiction.'*[641] To add even more confusion, the Court also added that the reason why the State has jurisdiction is because it exercised 'public powers'.[642] By 2011, jurisprudence was unsure if the ECtHR would establish the jurisdiction of a State based on a territorial or personal connection, State agent model or perhaps causality.

6.4.1.2. The Hassan Case (2014)

In the *Hassan* case, the detention of an Iraqi national was brought to the Court, who has been captured by UK forces in April 2003 and held at a detention centre until his release in May 2003. When deciding the case, the Court tackled two main issues. Firstly, whether the UK had jurisdiction over Mr. Hassan and secondly, whether international humanitarian law or international human rights law can and should be applied. In answering the first question the UK argued that the detention camp was operated by US forces, therefore the UK had no control and therefore no jurisdiction. The ECtHR also found however, that it were UK forces who took

[638] *Al-Saadoon and Mufdhi v United Kingdom* (Dec.) No. 61498/08, 30 June 2009, also in: D'AMBROSIO, p. 10.
[639] HENDIN, Stuart: *Extraterritorial Application of Human Rights: The Differing Decisions of Canadian and UK Courts,* Windsor Review of Legal and Social Issues, Vol. 28, 2010, p. 78.
[640] MILANOVIC, ibid., p. 9.
[641] SARI, Aurel: *Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?* Military Law and the Law of War Review 53/2, 2014, p. 299. (hereinafter: SARI, 2014)
[642] *Al-Skeini and Others v United Kingdom* (Dec.) No. 55721/07, 7 July 2011.

Mr. Hassan into custody, and they retained control over him while he was in the detention facility and UK forces decided about his release in May 2003.[643] In response to the second question, the UK argued that the Convention does not apply, because the arrest was carried out in an international armed conflict and in this context international humanitarian law should apply. Article 5 of the ECHR prohibits unlawful detention and even though Article 15 allows derogation regarding Article 5 in case of an emergency, the UK didn't notify the Secretary-General of the Council of Europe as it is required requested to do in such a scenario.[644] As a result, it can be argued that the UK did not intend to use any derogation and as a result, Article 5 can be applied to the fullest extent. The Court did not expressly state whether in case of an armed conflict the ECHR or the Geneva Convention takes precedence, but stressed, that *'... the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.'*[645] Following this line of thought, the Court also decided that the Geneva Conventions can be applied and constitute a valid reason for derogation of the right to liberty in times of an armed conflict. Since in the case of Mr. Hassan, a former high-ranking Ba'ath Party member in whose house a significant stash of weapons was found, there was sufficient evidence that the accused is a threat to security. Several judges found that the Convention should take precedence over the IHL, as in any other case, the potential excuses and reasons to apply derogation can lead to 'the disapplication of the safeguards' set by the Convention.[646]

The *Hassan* case can be seen as a semi-positive development, as on the one hand, the Court appears to favour a 'jurisdiction over persons' approach, solidified by its tendency to establish the jurisdiction of the State over detained and arrested individuals. On the other hand, new difficulties arise when the ECtHR faced the simultaneous application of IHL and IHRL. Naturally, as a body aiming at safeguarding human rights, the Court cannot reach the conclusion that humanitarian law takes precedence. It merely tried to harmonize the two sub-systems of

[643] WEBBER, Diane: *Hassan v. the United Kingdom: A new approach to Security Detention in Armed Conflict*, American Society of International Law, Vol. 19, Issue 7, 2015, https://www.asil.org/insights/volume/19/issue/7/hassan-v-united-kingdom-new-approach-security-detention-armed-conflict (accessed: 22 Aug. 2017).
[644] International Justice Resource Centre, *In Hassan v United Kingdom the European Court of Human Rights Finds Extra-territorial Jurisdiction over Iraqi Detainee and Examines Interplay Between Geneva Conventions and European Human Rights Obligations* http://www.ijrcenter.org/2014/09/17/in-hassan-v-united-kingdom-the-european-court-of-human-rights-finds-extra-territorial-jurisdiction-over-iraqi-detainee-and-examines-interplay-between-geneva-conventions-and-european-human-rights-obl/ (accessed: 22 Aug. 2017)
[645] *Hassan v United Kingdom* (Dec.) No. 29750/09, 16 September 2014, para. 35-37.
[646] *Hassan v United Kingdom* , ibid. 26, Separate opinion of Judges Spano, Nicolaou, Bianku, Kalaydjieva, paras. 5,10.

international law, while also obfuscating the *lex specialis* principle.[647] In the view of the author, balancing IHL and IHRL may prove to be a recurring hardship for the Court, should similar cases arise.

6.4.2. Attribution

6.4.2.1. Behrami & Saramati (2007)

The first major cornerstones of the ECtHR's practice regarding attribution were the 2007 *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* decisions. Supported by a UN Security Council decision, NATO sought to pacify and secure the region of Kosovo in 2000 and established KFOR as the means to reach its goal. Although KFOR troops were stationed in the area, de-mining has been remiss, resulting in the loss of life and grievous bodily harm and other serious injuries (*Behrami*). Certain individuals belonging to the local population were detained for prolonged periods of time without formally charging them or granting them the right to turn to a court (*Saramati*). The orders upon which the detention was based were issued by French and Norwegian officers. The Court found that as in both cases the operation was carried out in the interest of and under the auspices of the UN and NATO. As the ECtHR lacks jurisdiction over international organizations both cases were dismissed.[648]

The dilemma of the case was whether there was a sufficiently strong link between the conduct and the States, KFOR and/or UNMIK, or rather which link is the strongest.[649] The Court used the so-called 'ultimate authority and control' test to determine this link. According to this test, the conduct will be attributable to the entity in whose name it is carried out and who can control the conduct.[650] In order to understand what the court meant by 'ultimate authority and control', the meaning of 'authority' and 'control', the relation between the UN and NATO, as well as the transfer of authority in multinational military operations need to be analysed.

DUTTWILER describes authority as the ability to prescribe a conduct, the capacity to establish a legal connection between the State and the individual, and control as the ability to enforce the

[647] DE KOKER, Cedric: *Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts*, Utrecht Journal of International and European Law 90, 2015, pp. 93-94.
[648] *Behrami case*, paras 144-152.
[649] BREITEGGER, ibid, *p.* 165.
[650] SARI, Aurel: *Autonomy, Attribution and Accountability: Reflections on the Behrami Case*, 257-277, in: Richard Collins – Nigel D. White (eds.), International Organizations and the idea of Autonomy. Routledge, London, 2011, pp. 9-11.

prescribed regulations.[651] Therefore, a structured relationship is not necessary, if there is a tangible factual connection at the time of the conduct.[652] If we accept this interpretation, the UN should be the one prescribing and enforcing regulations. According to the Charter of the UN, member States are only required to 'accept and carry out the decisions' of the SC,[653] while the Council is bestowed with such powers as to *'carry out its duties [regarding] the maintenance of international peace and security'*.[654] The Security Council doesn't assume control over the military forces of States, it leaves this power with the States, or if the situation requires so, the military organizations established by the States. In case of a KFOR operation, the Security Council enables the mission with its resolution and calls on NATO to carry out the mandate. As a second step, NATO establishes KFOR, as a venue for its member States to cooperate and coordinate in Kosovo. It is unclear if KFOR had a separate legal personality or not. However, decision making should be understood either on the national level or on the level of KFOR. Based on evidence collected in the *Behrami* case, nothing points to the Security Council or NATO making day-to-day decisions. However, the Court did not even touch the chain of control and command, because it was of the opinion that it had no jurisdiction over the actions of international organizations and therefore would not want to take a position concerning attribution either. The ECtHR argued that the UN Security Council authorized NATO to establish the KFOR, delegating the power, placed upon it by the UN Charter to NATO, while retaining 'ultimate authority and control'. The Court failed to understand that should violations of international law occur as a result of KFOR's actions the Security Council would be in no position to stop it. Therefore effective control, the ability to prevent breaches of law or to punish or discipline the perpetrators, could not possibly rest with the UN.[655]

Transfer of authority is only partial in multinational peace operations. The international organization usually gets to decide over organization, deployment, conduct and strategic direction, while criminal jurisdiction and disciplinary authority remain in the hands of the State which seconded them. Therefore, it is a feasible option that the soldiers present in an operation act in the capacity of representatives of their own States and not as representatives of the mission or the organization.[656] As the Court argued, the French and Norwegian commander,

[651] DUTTWILER, Michael: *Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights*, Netherlands Quarterly Human Rights, Vol. 30/2, 2002, p. 157.
[652] DUTTWILER *ibid*. p. 159.
[653] UN Charter, Art. 25.
[654] UN Charter, Art. 24. Para. 1.
[655] RYNGAERT, ibid, *p.* 170.
[656] SARI, 2008, ibid. p. 160.

when issuing orders, acted in their international capacities, as ranking officers in a multinational military operation, and not as representatives of their respective States.[657]

The outcry of jurists as a result of the *Behrami* decision was nearly unprecedented, its reasoning bleeding from many wounds and its implications far-reaching. Firstly, the application of the 'ultimate authority and control' test would mean that in multinational military operations, since they are usually enabled by UN and carried out together by the UN and regional organizations, the Court would not have jurisdiction, allowing States to violate the ECHR without fear of judicial control over their actions. The other side of the same coin is that based on the *Behrami* ruling, it can be implied for States that they have a *carte blanche*, if the operation is mandated by the Security Council. States could set aside local human rights protection regimes, like the ECHR and obtain veritable impunity. From the victim's standpoint, this would mean that they have no way to seek redress, as at present no court has jurisdiction over international organizations.[658] Secondly, *Behrami* completely ignores the International Court of Justice's (ICJ) *Nicaragua* decision, which previously established the 'effective control' test in determining attribution, and which was widely used by international and national tribunals ever since and can be considered the leading case on the matter without adequately elaborating on why it chose to differ. [659] Thirdly, one of the great flaws of *Behrami* is its obtuse view regarding the indivisibility of responsibility, namely, that an act is either attributable to the State or to the international organization, but not both, thereby ruling out multiple attribution or shared responsibility.[660]

6.4.2.2. Al-Jedda (2011)

The ECtHR had to face the issue of attribution in 2011, when during the *Al-Jedda* case it was forced to either apply the 'ultimate authority and control' test of *Behrami* or discard the disputed holding. As the facts of the case have been established, the applicant, who had Iraqi-British dual citizenship has been kept in detention for three years in a British-run military prison

[657] *Behrami case*, para. 35.
[658] VAN DER TOORN, Damien: *Attribution of Conduct by State Armed Forces Participating in UN-authorized Operations: The Impact of Behrami and Al-Jedda*, Australian International Law Journal, 9, 2008, p. 25.
[659] Case Concerning the Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America)*, Judgment, Merits, 27 June 1986, I.C.J. Reports 1986, p. 14.
[660] MILANOVIC, ibid, *pp.* 14-15. It is somewhat ironic that the Court failed to observe the possibility of dual or multiple attribution, because in his Second Report, Special Rapporteur Giorgio Gaja named the 1999 NATO bombing of Yugoslavia as one of the main examples where dual attribution could have been applied. See also: GAJA, Giorgio: *International Law Commission: Second Report on Responsibility of International Organizations* Chapter I Art. 7, http://legal.un.org/ilc/documentation/english/a_cn4_541.pdf (accessed: 22 Aug. 2017) in: BELL, Caitlin A*: Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision*, International Law and Politics, Vol. 42, 2010, p. 516.

in Basra without formally being charged.[661] The UK cited UN Security Council resolution 1546 as legal basis for their action and Article 103 of the UN Charter, claiming that the Charter has higher legal authority than the Convention, therefore Article 5 of the Convention has not been violated.

The Court first observed the role of the UN Security Council and reached the conclusion that the Security Council had neither 'ultimate authority and control', nor did its mandate require British forces to hold a suspect in detention for three years, as the UN only issued the mandate, but had no 'effective control' over the conduct of national contingents.[662] This is a major step forward, as the Court has acknowledged the applicability of other tests to decide on attribution. [663] However, it only shifts responsibility from international organizations to a grey zone, as it rules out their responsibility, while also not clarifying the role of States, as it merely underlined that States should consider detainment to fall under their jurisdiction - parallel to its decision in *Al-Skeini*.[664] One of the more obvious consequences of Al-Jedda is that from that point onwards, if States wanted to avoid being dragged to the ECtHR, they would either need explicit Security Council mandate or they are required to make a formal derogation under Article 15 of the ECHR.[665] The Court doesn't mention the 'effective control' standard when it examines attribution to the UK, but the results are the same. [666] Reluctance from the Court's part can be observed in trying to cope with its own standards set out in *Behrami* and also the pressure from the international community to apply the 'effective control' test.[667] The ECtHR has left open the question of dual or multiple attribution, although it implicitly acknowledged it.[668]

The decision is also interesting, because the UN took a more direct role, than in events leading to *Behrami*. The mission in Iraq cannot be considered as a usual peace support operation, as the Security Council Resolutions calling for the establishment of the United Nations Assistance Mission for Iraq (UNAMI) treated the operation as an aid to setting up

[661] *Al-Jedda v. United Kingdom* (dec.) No. 27021/08, 7 July 2011, paras 10, 71.
[662] MILANOVIC, ibid, paras. 17-18.
[663] Al-Jedda, *ibid*, para 84.
[664] *ibid*, paras 85-86.
[665] NAERT, Frederik: *The European Court of Human Rights' Al-Jedda and Al-Skeini Judgments: an Introduction and Some Reflections*, Military Law and Law of War Review, 50/3-4, 2011, p. 318.
[666] LARSEN, Kjetil Mujeznovic: *Neither Effective Control nor Ultimate Authority and Control: Attribution of Conduct in Al-Jedda*, Military Law and the Law of War Review, 50/3-4, 2011, p. 356.
[667] RYNGAERT, ibid, p. 175.
[668] MESSINEO, Francesco: *Things Could Only Get Better: Al-Jedda beyond Behrami*, Military Law and the Law of War Review, 50/3-4, 2011, p. 338.

transitional government, thereby playing a major role in the affairs of the territory.[669] The ECtHR took a closer look at the UN Charter and the Security Council as a result. From a summary interpretation of the Charter, the Court deducted that upon forming a resolution, the Security Council cannot possibly expect it to be carried out at the cost of infringing human rights, one of the cardinal goals of the Organization.[670] A serious overlook from the ECtHR's part is that it effectively neglected the complex division of authority, which is a key aspect of all multinational military operations and this factor varies greatly from mission to mission. As RYNGAERT notes, it is not for the national force commander to retain the powers to discipline the troops and issue daily commands, if the strategic decisions are made on the level of the organization.[671] In that case, both the international organization and the State should bear the burden of responsibility or if one of them has control over both strategic and day-to-day decision-making, then that side needs to be held accountable solely.

6.4.2.3. Jaloud (2014)

Another leading case illustrating the ECtHR's practice is the 2014 *Jaloud* case, where Dutch troops patrolling a UK-controlled zone shot a suspect moving through a checkpoint, violating his right to life as set out in Article 2 of the Convention as well as the right to fair trial (Article 6 of the ECHR), because the case hadn't been properly investigated by the authorities of the UK.[672] The ECtHR argued that criminal jurisdiction remained in the hands of the Netherlands because of the fact that its troops had control over the checkpoint.[673] As a result, the Netherlands exercised 'full control and authority' over the checkpoint, over the area where the checkpoint was set up, as well as the persons passing through it.[674] With this ruling, the Court set up a new standard for attribution on its ever-widening scale, but created a situation of uncertainty.[675] The Court disregarded the fact that the Dutch contingent was only in support of UK and US forces and received daily orders from a British officer.[676] This new 'persons passing over a checkpoint'

[669] United Nations Security Council Resolution 1511, adopted 16 October 2003, (S/RES/1511), United Nations Security Council Resolution 1546, adopted 8 June 2004, (S/RES/1546).
[670] *Al-Jedda v. United Kingdom*, *ibid*. 42, para 102.
[671] RYNGAERT, *ibid, p.* 176.
[672] Convention for the Protection of Human Rights and Fundamental Freedoms, (adopted 4 November 1950, Rome, effective 3 September 1953), UNTS 213, Art. 2, 6.
[673]*Case of Jaloud v. the Netherlands* (dec.) No. 47708/08, 20 November 2014.
[674] XENOFONTOS, Stefanos: *Case Development: Recent Developments in the Extraterritorial Scope of Application of the ECHR in the Aftermath of the Jaloud v* The Netherlands [2014] Legal Issues Journal, 2016, pp. 119, 122.
[675] PEJIC, Jelena: *The European Court of Human Rights' Al-Jedda Judgment: the oversight of international humanitarian law*, International Review of the Red Cross, Vol. 93, 2011, pp. 839-842.
[676] SARI, 2014, ibid, *pp*. 299-300.

standard is a mix of the personal and spatial jurisdiction models established earlier into a new, hybrid model. [677]

Although the Court tried to separate jurisdiction from attribution, but by articulating it in such a manner, it created even more confusion.

" […] the Court cannot find that the Netherlands troops were placed „at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were „under the exclusive direction or control" of any State (compare, mutatis mutandis, Article 6 of the International Law Commission's Articles on State responsibility […] [678]

The ECtHR used the 'full command' standard to establish the jurisdiction of the Netherlands, however this standard is inefficient and misleading when trying to allocate responsibility. As previously mentioned, attribution regarding States has seven main cases. Out of the relevant scenarios of attribution, one is where the organ or agent is exercising governmental authority, because based on its position, holds a certain rank or spot in the hierarchy of the State's administration.[679] In another instance, there is no necessary direct link, but certain parts of the government exercise control or some sort of direction over the conduct.[680] In the case of seconded forces, as in the case of multinational peace operations, the organization does not have armed forces of its own, but relies on States to lend those forces to it. If we apply the 'full command' principle to this scenario, then there is no distribution of operational responsibility. Therefore, no matter what the organization orders, if it has control over strategic decisions, the State will ultimately have to take the blame and be held responsible. This could prove, if this were to become standard, to be a major deterrent to State contributions to multinational military operations. It is exactly because of this reason, that the International Law Commission, when formulating the ARIO, stated that responsibility needs to be decided based on who exercised effective control over a given decision.[681]

6.4.3. Summary of the ECtHR's practice

In theory, ARIO and RSIWA can serve as support for international courts, compiling and developing international customary law. The ECtHR is one of several international courts

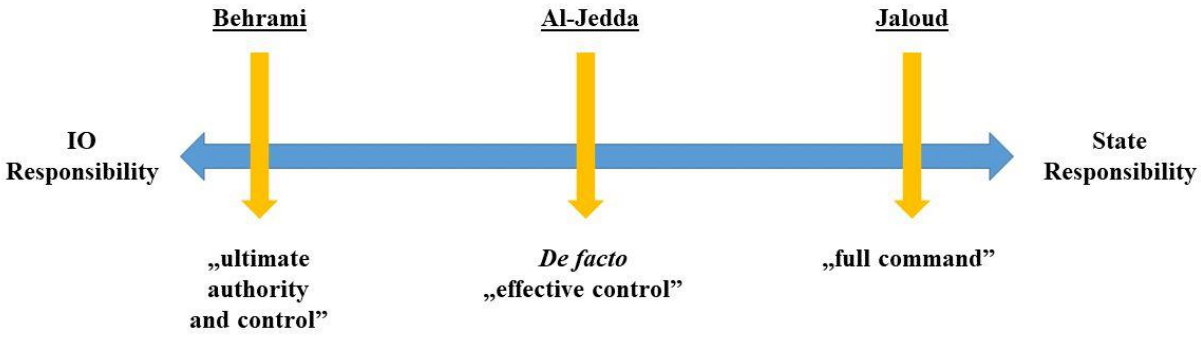
[677] *Case of Jaloud v. the Netherlands*, ibid. at 53, para. 152.
[678] *Case of Jaloud v. the Netherlands*, ibid. at 53, para. 154.
[679] Responsibility of States for Internationally Wrongful Acts, Art. 5.
[680] Responsibility of States for Internationally Wrongful Acts, Art. 6.
[681] Articles on the Responsibility of International Organizations with Commentaries, Art. 7, Commentaries (1)-(4) also in: SARI, 2014, ibid, *p.* 303.

relying on the material of the ILC, but does not necessarily concur with the whole material of ARIO and RSIWA, specifically including the 'effective control test'. As D'AMBROSIO points out, it remains unclear, why extraterritorial detentions and arrests trigger State jurisdiction, while extraterritorial killings may or may not.[682] Control over a territory may be relevant or not in the practice of the Court, but control over the person always matters, as ultimately it serves as the connection between the State and the individual that will determine the result of the conduct.[683] Therefore, it would be a more feasible option, if the ECtHR discarded the strict territorial approach and focused more on the conduct of the State regarding the individual.

Concerning attribution, it is the opinion of the author, that the Court hasn't found a veritable solution yet. Effects of *Behrami* on international organizations like the UN could be catastrophic if it were to become the leading test of attribution. Peace operations could be in danger for fear that the organization would be held solely responsible for conduct over which it had little control as well as the ramifications of paying financial liability obligations.[684] While the *Al-Jedda* ruling doesn't solve anything, the 'full command' standard applied in *Jaloud* is just as detrimental and fundamentally wrong as *Behrami*, as it disregards the link between the actions of the perpetrators and the results it triggers in relation to the victim, which is 'cause and effect'. Furthermore, it narrows down the viewpoint of the Court to a binary standard: deciding on whether attribution can be established regarding one of the parties involved or whether the conduct in question is not attributable at all. A possible solution is not out of reach. In *Al-Jedda*, the Court has already acknowledged that there are other standards in international law used to determine attribution, and even used the 'effective control' test to some extent. Every act and every conduct needs to be analysed individually, taking into consideration which State or international organization had issued which command – the precise reason why the 'effective control' standard was set up in the first place. It would be a great step forward if the same standards, notably the 'effective control' principle could be applied universally: a set of standards established by the ICJ, supported by the ILC, carried out by local courts (Belgium-*Mukeshimana* case, the Netherlands-*Nuhanovic* case) and should be promoted by international tribunals, like the ECtHR.

Chart No. 17.: Attribution in the practice of the ECtHR

[682] D'AMBROSIO, ibid, *p.* 16.
[683] DUTTWILER, ibid. p. 162.
[684] BELL, *ibid, p.* 544.



Source: author's own creation, based on: NOLLKAEMPER, André: *Dual Attribution: Liability of the Netherlands for the Conduct of Dutchbat in Srebrenica*. Amsterdam Center of International Law, Amsterdam 2011. http://www.sharesproject.nl/wp-content/uploads/2011/10/SHARES-RP-04-final.pdf (accessed: 2020.03.19.)

6.5. Practice of the Dutch courts

Out of the practice of domestic courts, two processes before Dutch courts deserve special mention. In the first case of *Nuhanović* v. The Netherlands the applicant has been working as a translator in the Dutchbat camp near Srebrenica, while the applicant's brother and father were sheltered in the camp of Potočari by Dutch peacekeepers. However, after the advance of Bosnian Serb troops led by General Mladić and subsequent agreement between Dutchbat leader Karremans and General Mladić, the peacekeepers left the camp as well as the protected population to the mercy of Bosnian Serb forces, who have taken the men behind the nearby woods and executed them. In the *Nuhanović* case, the applicant asked the court to declare the Dutch peacekeepers responsible for the death of his brother and father as they should have known in advance what the result of withdrawing their protection would mean for those in the camp. The case reached the level of the Supreme Court which ruled in favour of the applicant, declared the responsibility of The Netherlands and ruled that the state owes compensation to the victims' surviving relative. In its decision, the Supreme Court stated that there was a direct interference of Dutch government officials in the decision of the commander and as a result the effective control test of attribution is satisfied. Furthermore, the Dutch government, while issuing the order, had to have prior knowledge of the possible effects of its

decision as news were reaching the peacekeepers' camp of serious violations by Bosnian Serb troops in the region border-lining ethnic cleansing and even possible acts of genocide.[685]

The decision is a novelty for several reasons. Firstly, it is a landmark case where a State has been declared responsible for its conduct during a peace operation by a judicial forum. Secondly, the Court did not rule out the possible responsibility of the UN. This second statement might sound like a mediocre achievement, but in reality, it constitutes a major step forward as all previous cases concerning the responsibility of an international organization and especially the UN have been dismissed by stating the obvious, that no legal forum has jurisdiction over IOs. Besides a traditional compromise, a compromise clause or voluntary acceptance of jurisdiction complemented by an explicit waiver of immunity, there is basically little to no chance for a court to have jurisdiction over an IO. This jurisdictional gap functions as a black hole on the web of international law, relativizing the concept of responsibility. The *Nuhanović* case is especially relevant exactly because of the fact that it does not rule out the possibility of establishing the responsibility of an IO. Technically, as a domestic court, the jurisdictional gap and the immunity of the UN established in Art. 105 of the Charter does not enable any positive statement or decision regarding the responsibility of the UN or any other IO, but at least the theoretical possibility now exists. Last but not least, the decision directly referenced ARIO, which clearly shows that the Court believed the applicable sections of ARIO to reflect international customary law.[686]

The pitfall to avoid here is overestimating the importance of the ruling. Even the Dutch Supreme Court itself has highlighted that the case cannot lead to a generalized responsibility of States for peace operations. The *Nuhanović* case should be considered a very specific case, where very well documented events aided the Court in establishing responsibility and therefore, the establishment of state responsibility.

The other noteworthy case is the *Mothers of Srebrenica* v. The Netherlands litigation which has been brought before various courts between 2012-2019. Before the ECtHR the cases were rejected as the UN's immunity was upheld.[687] In 2014 the Hague District Court ruled that the Netherlands is responsible for the death of 300 men and children who were killed by

[685] Supreme Court of the Netherlands: *Case of Nuhanović v. the Netherlands*. 12/03324 Judgment, 6 September 2013.
[686] Notwithstanding the fact that Dutch courts are traditionally international law friendly, progressive and possess and activist approach in their decision making and interpretation of international norms.
[687] Stitching Mothers of Srebrenica and Others against the Netherlands, ECtHR Application No. 65542/12.

Bosnian Serb forces after leaving the peacekeeper's camp. The Court declared it possible for the future to also establish the responsibility of the UN for such conduct as well as the responsibility of states and IOs at the same time for the same conduct.[688]

The 2019 decision of the Dutch Supreme Court drastically changed the final outcome in several aspects.[689] On the one hand, it applied a percentage-based method of establishing the responsibility of The Netherlands, but changed the previous ratio to state that The Netherlands is only responsible in 10% for what has happened with the 300 Bosnians whose lives have been lost. Although the outcome is detrimental to surviving relatives, the Dutch Supreme Court embraced a percentage based responsibility and adopted a legally binding decision on its application regarding a peace operation. On the other hand, the Court has analysed attribution in a new light. Relying on internal UN documents, it was established that peacekeepers functioned as *de facto* organs of the IO per Art. 6 of ARIO and not as agents or organs placed at the disposal of the Organization as per Art. 7 of ARIO.[690] The legal relevance cannot be overstated. In this iteration the Court has basically stipulated the responsibility of the UN while barring further procedure because the Organization's immunity has been evoked, while automatically limiting possible state responsibility.

Overall, it can be regarded as development that several Courts – at least on the domestic level – are contemplating the concept of shared responsibility, especially when it comes to peace operations. However, these decisions do not set up a rule of a consistent line of though on when and how to evoke shared responsibility, nor do they attempt to come up with unified standards of application. Small steps are taken where some courts are pointing out the possible establishment of IOs' responsibility, although no concrete steps are taken to bridge the jurisdictional gap barring accountability on a systematic scale for IOs.

6.6. Conclusion

Overall, the diverging practice of international and domestic courts can be observed with each forum applying a different test of attribution: the ICJ consequently relying on 'effective control', the ICTY lowering the bar of attribution to 'overall control'. Meanwhile the

[688] Hague District Court: *Case of Mothers of Srebrenica v. the Netherlands*. C/09/295247 / HA ZA 07-2973 Judgment, 16 July 2014.
[689] Supreme Court of the Netherlands, Case No. 17/04567, Decision on 19. July 2019.
[690] DANNENBAUM, Tom: *A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands*, 23. July 2019, https://www.ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands/ (accessed: 18.12.2019.)

ECtHR's practice has not yet solidified, ranging from an almost certain state responsibility arising from the application of the 'full command' test to leaning towards the responsibility if IOs with 'ultimate authority and control'. The ECtHR also managed to find the middle ground in the *Jaloud* case, as if effectively utilized the 'effective control' test, but later diverted from that reasoning.

It can also be seen that unified legal practice is hard to achieve even on a domestic level as seen by the example of the Netherlands, where in the same situation (the massacre of Srebrenica), slightly differing facts resulted in vastly different judgments by the Supreme Court of the Netherlands in the *Nuhanović* and *Mothers of Srebrenica* cases.

Chapter 7.: De lege ferenda proposals and conclusion

„We all share a responsibility to do whatever we can
to help prevent and protect one another from such violence."
– Desmond Tutu

7.1. A new take: the multi-tiered approach

If we have to draw the conclusion from the recent conflicts, such as Mali, DRC, Syria or the plight of the Rohingya, it becomes likely that the world is drifting towards an era of mutual distrust and discord, where cooperation between states and groups of states will continue deteriorate. This might result in an increased role for the UN and for peacekeeping as an impartial and truly multinational institution, even though peacekeeping is not always the solution to problems, as shown by the second generation of peace operations. To live up increased and fundamentally different demands, the UN has to reform peacekeeping and ensure that its image is not discredited by the phenomenon of sexual exploitation and abuse, which has been a "black stain on the blue helmet" for a long time.

Finding a solution to the problem of SEA has been on the agenda of the UN for decades and indeed substantial measures have been taken, especially in recent years. These measures have been adopted with a genuine intent of improving the situation, however, the fact that there had to be a major scandal before the UN took decisive action casts a shadow of doubt on the priorities of the Organization. Further aggravating the problem, the UN often fears losing TCC support, especially that of the large contributors and as a result, the Organization is often reluctant to publicly condemn member states who refuse to step up in their efforts in combatting rampant SEA in their contingents.[691] As a result, for the outside, the UN often seems tool less and weak, emphasizing zero-tolerance in speeches while refusing to seek out against States with "a record of shame".

SEA has a substantial literature in academia and scholars are not shy of coming up with solutions to the phenomenon. Even though a great many of the proposals are merited, two

[691] The NGO Code Blue reporting on the „record of shame" of the UN by not speaking up against Burundi, whose whistle-blowers have been found to commit acts of SEA with reckless impunity: http://www.codebluecampaign.com/press-releases/2019/7/15 (accessed: 21 December 2019).

factors should not be disregarded. First and foremost, that the goal of any reform attempt should be to improve peacekeeping and restore confidence in its purpose, not to discourage troop-contributing countries by rushing them into actions they are unwilling to take. Secondly, all of the proposals must be realistic or at least acknowledge the fact that although the solution in question might seem profound, due to political, legal or economic reasons, it will most likely not be realized.

The proposals detailed in this chapter do not constitute perfect solutions, but rather serve the purpose of hopefully facilitating discussion both on the academic and practical level so that a purely theoretical argumentation can be disregarded in favour of finding applicable and realistic solutions. As a result, a special "multi-tiered" system of proposals was drawn with the intent of providing ammunition for further discussion as well as to help legal practitioners with their reasoning and also decision-makers when adopting reforms. The first tier of solutions is practical and technical in nature, aimed at being easy to carry out and implement at the same time, requiring little to no political will or compromise. The first tier merely strengthens existing mechanisms by shoring up weaker segments of the institution of peacekeeping, paving the way for a broader set of reforms. The second tier is where some degree of political will is required from both the UN's side and the part of the TCCs. These are the mid-term solutions that necessitate closer cooperation with stakeholders as well as substantial reforms within the UN. Last but not least, the third tier of reform proposals are addressed. The ideas contained in this group require long-term planning and firm political will to an extent that is currently not met by either of the parties involved. These proposals might bring meaningful change and constitute large strides toward eliminating SEA from the system of peacekeeping if and when implemented correctly. It deserves a special mention how this third tier of proposals is different from the work of others. Some NGOs - namely Code Blue - argue that specialized courts for personnel needs to be set up,[692] while one of the most renowned expert on the subject, BURKE, advocates a tri-hybrid court model.[693] Although both have merit and putting them into practice would arguably alleviate much of the problem, their implementation is doubtful to occur, even on the long run.

Chart No. 18.: Multi-tiered de lege ferenda proposals

[692] Code Blue proposal on the establishment of a separate, independent court structure: https://static1.squarespace.com/static/514a0127e4b04d7440e8045d/t/588289db2994ca3d59b93c38/1484949980156/FINAL+Special+Courts+Mechanism+-+Updated+January+2017.pdf (accessed: 21.12.2019.)
[693] BURKE, ibid. pp. 245-248.

Category / Tier	Tier 1: practical and technical solutions; relatively easy to implement in the short-term	Tier 2: mid-term goals requiring some political will	Tier 3: long-term solutions requiring systematic changes and substantial political will
Vetting	- blacklisting personnel with previous record of misconduct; - refusal of individuals' participation who are involved in allegations		- refusal of TCC support altogether in cases where the TCC would send systematically individuals involved in misconduct; - increased role of experts hired individually
Training	enhanced training regarding SEA and human rights	regular checking of TCC training facilities by UN Staff	examination of personnel upon deployment
Gender issues	supporting all-female squads	increased participation of female personnel on all levels especially investigation and leadership	dismantling the "aura of masculinity"
Information dissemination	dissemination of reliable data on a regular basis (no changes in applied terminology)	introduction of anonymised system for case-study research	compact system for providing information to victims regarding the status of their cases

Communication and cooperation with TCCs	heightened cooperation regarding responses through diplomatic channels	public declaration ("naming and shaming") of TCCs refusing to cooperate	refusal of TCC contribution of personnel (economic pressure on TCCs)
Whistle-blowers	direct reporting link to the OIOS	inner document by the SG ensuring protection on all levels for would-be whistle-blowers; guidelines on what constitutes false reporting	systematic protection e.g.: insurance clause in staff contracts
Responsibility		application of the effective control test supplemented by refutable presumption of the UN's responsibility	introduction of shared responsibility where the UN satisfies demands for compensation upfront - permanent mechanism for redress established between the UN and the TCC
Immunity of military personnel	strengthened diplomacy in realizing voluntary TCC obligations	amendment of domestic criminal codes for SEA during peace operations	international treaty on SEA
Immunity of civilian personnel	faster revocation of immunity by the SG - waiver	established process for waiver of immunities	international treaty with member states creating an

			obligation to bring civilian perpetrators to account
Enhanced remedies for victims	enhanced trust fund for victims supplemented by psychological, medical and legal aid	standing commission for claims regarding monetary compensation for SEA	easy-to-access information for victims (see also: information dissemination)

Source: author's own creation

The proposed *de lege ferenda* solutions can be divided into four main groups: pre-deployment action (training, vetting and gender issues), information sharing (dissemination of data, communication with TCCs, and whistle-blower protection), responsibility and immunity, enhancing the situation of victims. All of the proposed solutions in the three tiers will follow this line of division.

7.2. Pre-deployment

7.2.1. Vetting

Regarding the vetting process, a short-term solution could be blacklisting personnel with a previous record of misconduct. In case of a minor misconduct, such as instances of disciplinary procedures resulting in a written censure or a fine, the UN should be able to evaluate and accept the individual in question as future member of peacekeeping personnel, whereas for serious misconduct resulting in summary dismissal or criminal acts, there would be an automatic rejection from the UN's part. In the broad categories between the two extremes, the UN should have discretional competence to decide for itself. [694]

In the long-term, should troop-contributions ramp up, the refusal of TCC support altogether could become feasible in cases where the TCC would systematically send individuals involved who were previously involved in misconduct or whom are the subjects of ongoing

[694] BOSCO, Laura: *Prioritizing UN Peacekeeper Accountability*, IPI Global Observatory, 9 January 2017, Available at: https://theglobalobservatory.org/2017/01/united-nations-peacekeeping-sexual-abuse-guterres/ (accessed: 21.12.2019.).

investigations.[695] Another possibility regarding vetting of civilian personnel would be individual recruitment of experts to be applied on a larger scale.

7.2.2. Training

Among the easiest-to-implement solutions, NOTAR has compiled a list of proposals, including enhanced pre-deployment training on human rights as well as incorporating human rights and anti-SEA measures in the codes of conduct.[696] Due to public opinion on the responsibility of the UN for SEA, the Organization must ensure that personnel embarking on the road to be deployed on the field as peacekeepers are adequately trained for the task, including pre-deployment training on preventing SEA. Therefore, besides unified training curriculum and examination on human rights and SEA, the UN should also check it regularly that the facilities and curriculum of TCC training centres are at sufficiently high quality and that the UN's standards are met. Lastly, examination of personnel upon deployment is desired, as in previous instances the TCCs were found to issue certificates to the personnel for completion of the training criteria, while in reality no real human rights training took place.

7.2.3. Gender issues

As a first step, increased participation of women, especially in the investigation team and in the higher echelons of command. Female participation has been one of the cornerstone of UN peace operation with a purely positive record, bringing benefits to the civilian population, the UN and lasting effects on the TCCs as well.[697]

From a systematic point of view, female participation should be further increased either by consciously enforcing previously adopted regulation or commencing new programmes.[698] Previously successful programmes, such as the FFPUs in Liberia by India should continue as they have had a profoundly positive effect on the host state at its female population during their stay between 2007-2016. Their progressive effects can still be felt long after leaving as crime

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[695] Such as in the case of Burundi, detailed above at p. 171, footnote 570.
[696] NOTAR, ibid. pp. 428-429.
[697] KEITA, Bintou: *Women in Peacekeeping: An Operation Imperative*, 14 October 2018; https://medium.com/@UNPeacekeeping/women-in-peacekeeping-an-operational-imperative-24d4e9a86250? (accessed: 21.12.2019.).
[698] Such as UN SC Res 1325/2000 On Women, Peace and Security adopted on 31 October 2000.;
System-wide Strategy on Gender Parity, adopted on 6 October 2017, available at: https://www.un.org/gender/sites/www.un.org.gender/files/gender_parity_strategy_october_2017.pdf (accessed: 21.12.2019.).
Gender Responsive United Nations Peacekeeping Operations, adopted on 1 February 2018, available at: https://peacekeeping.un.org/sites/default/files/gender-responsive-un-peacekeeping-operations-policy-en.pdf (accessed: 21.12.2019.).

rates decreased through trust-building and better relations with peacekeeping personnel and the implementation of practical measures such as providing patrols and lighting on the streets. Through applying more empathy in everyday relations they have gained the acceptance of local women, teaching them self-defence and first aid techniques, maintaining orphanages and educating local girls and women on the risks of HIV/AIDS, as well as inspiring local women to join the security forces, providing further stability to the region. Following the example of India, Bangladesh and Nigeria have also set up FFPUs, while Rwanda and Ghana are currently deliberating a similar move.[699] Furthering development programmes could also prove to be a valuable tool for preventing the occurrence of SEA, such as alleviating the economic strain on women pushing them towards "survival sex" by creating jobs specifically for women and helping women establish enterprises on their own. Practical solution requiring TCC cooperation could take the shape of a choosing the location and rationally organizing the refugee camps so that women wouldn't have to take long distances to fetch firewood or buy food which opens up possibilities for a SEA-like attack against them.

According to some authors, such as VOJDIK and GUNNARSSON one of the main issues facilitating SEA is the aura of masculinity attached to peace operations and military in general.[700] Depicting men as strong cornerstones of society able to protect "weaker" women and children has been a long-established stereotype that continues to live to modern times. The image of the macho protector, able to not only protect, but to make decisions for the protected members of society completely disregards the notion of gender equality and the possibility of involving women in the decision-making process. The UN has attempted to combat the phenomenon by encouraging increased female participation, but ultimately it is up to the decision of member states if they send male or female personnel to a peace operation. What the UN can do is to promote the idea of gender equality, involving the tenet in the pre-deployment curriculum, and enforcing it on the field. It also helps to have female leaders at the highest echelons of command.[701] A female commander is unlikely to dismiss allegations with a sway of hand saying "boys will be boys" but is rather expected to follow-up on those allegations and initiate proceedings, while strictly enforcing the zero-tolerance measures of the UN. Through a

[699] On the role of FFPUs see also: (both accessed: 21.12.2019.)
http://www.ndtv.com/india-news/indian-women-peacekeepers-inspire-liberian-girls-1265343
http://blogs.lse.ac.uk/southasia/2015/05/27/women-in-united-nations-peacekeeping-holding-up-half-the-sky/
[700] GUNNARSSON, Hanna: *Accountability of the UN and Peacekeepers: A Focus Study on Sexual Exploitation and Abuse*, SOAS Law Journal, 2015. Vol. 2, Issue 1, pp. 222-223.
[701] Such as Major General Kristin Lund of Norway, who has led UNFICYP from 2014 and currently leads UNTSO from 2017. https://www.un.org/sg/en/content/sg/personnel-appointments/2017-10-06/major-general-kristin-lund-norway-head-mission-and (accessed: 21.12.2019.).

combined application of the aforementioned measures as well as implementation of previously adopted international norms and policy inside the UN, the Organization could be able to dismantle the tradition of masculinity permeating the military structure of the UN.

7.3. Information sharing

7.3.1. Dissemination of data

Another field where considerable improvement could be achieved is the dissemination of detailed, reliable data at regular, made available to the general public. The current iteration of the CDU's website is a good start, although it could be further improved by detailed information regarding the allegations and which states were reluctant to cooperate with the UN in tackling SEA. Transparency could be further enhanced through the consistent usage of terminology, as it is currently impossible to effectively compare statistics from 2007-2020.

Building up on the aforementioned information dissemination of data, a comprehensive system could be set up, made available for TCCs and host states while providing anonymised cased for researchers wanting to look deeper into the phenomenon and related tendencies. Naturally, such a system would have to operate through rigorous data protection rules as well as limited access by the general public. The establishment of such a system would enable the unabated flow of information so that stakeholders would not have to rely on the media for news, but they could get reliable information from an authentic source.

The previously highlighted information system should be widened on the long-term to allow access to victims seeking feedback on their cases or of the circumstances do not permit it, a system should be accessed by actors of the community reporting mechanism or even focal points in the mission as well as the Victim's Rights Advocate so that the information can be relayed to the victims.

7.3.2. Enhanced communication between the UN and State partners

Furthermore, TCCs should be required to share the outcome of investigations. Even though some scholars argue that the courts of the TCC could be biased to rule against their own citizens, currently TCC jurisdiction is an unquestionable cornerstone of the current system.[702] It is imperative that the UN gets hold of this information and that the Organization disseminates

[702] BROWER, Charles H.: *International Immunities of the United Nations: Some Dissident Views on the Role of Municipal Courts*, Virginia Journal of International Law, Vol. 41, Issue 1, Fall 2001, p. 35.

it to both State-partners and non-state partners as it would enhance transparency and trust in the work of the UN by a significant margin. Currently, the only method to achieve this is through diplomatic channels, as previous attempts (such as the 2008 GLE Initiative) at an international treaty have not resulted in success. For a mid-term solution, the UN must walk a fine line between putting pressure through its diplomatic machinery on non-compliant States by sharing with the wider international community which States are reluctant to cooperate and between alienating the support of TCCs. For the long-term, the UN should be able to refuse troop contributions from States who haven't investigated and prosecuted or provided adequate feedback concerning allegations of SEA against their won nationals. Besides diplomatic pressure by disclosing such an information (the so-called "naming and shaming"), this would mean a mounting economic pressure for developing countries who are also the largest contributors regarding manpower. Once again, it must be reiterated that the two latter solutions are only possible if the UN possesses sufficient manpower to maintain the secure function of peace operations.

7.3.3. Whistle-blower protection

The protection of whistle-blowers is another field where considerable improvements need to be made. As seen in earlier chapters, the case of Mr. Anders Kompass leaking information to a TCC caused him to be targeted by serious repercussions by senior management of the UN. Letting misconduct and possible crimes known to actors outside the organization was deemed to be the only avenue for him, but his example can be discouraging to other staff members if they have to ask themselves whether it is worth it that their whole career as well as their names might be dragged through the dirt. Naturally, the goal would be to keep information within the organization, provided that there is competent and accountable management who are committed to investigating SEA and not in supressing information.

For a start, a direct reporting link to the OIOS could be established, circumventing existing structures and directly channelling information to authorities inside the UN with investigative competence. Heightened protection of whistle-blowers on a system-wide scale could be the circulation of an internal document composed by the SG encouraging all would-be whistle-blowers to report misconduct and use available channels without fear of repercussion. This way, even if their own superiors would not act on the findings or threaten whistle-blowers with disciplinary measures, because whistle-blowers would enjoy protection from the highest ranking UN authority. In order to avoid a multitude of false reporting,

guidelines could also be established as to what constitutes false reporting and external experts should be hired from the private sector in order to bring necessary experience into the UN system by developing the required materials.

Regarding adequate and systematic protection for whistle-blowers, which could be achieved through an insurance clause in their contract providing substantial benefits if their status is terminated as a result of engaging in whistleblowing activities and a resulting unfair dismissal. In order not to encourage unfounded whistleblowing for monetary gain, the whistle-blower clause in the contract could only be activated if the unfair dismissal has been established by the UN's own court structure (UNDT-UNAT).

7.4. Responsibility and immunity

7.4.1. Responsibility

There are no clear-cut short-term solutions to resolving the question of responsibility in peace operations. Even though the theoretical background has been mapped out reasonably well in ARIO and expanded by academia, the most commonly accepted solution of the effective control test still raises the threshold of attribution too high to be of practical use. At this point, it is worth returning to the proposal of SARI, who has proposed the refutable presumption that the UN should be automatically responsible for a conduct, however it could prove that the Organization has no effective control over the conduct in question, thereby opening avenues for State responsibility.[703] The notion would be in line with both the "effective control" attribution test supported by ILC commentaries and the practice of the ICJ on the one hand, and also with the standpoint of the Secretariat, in which they expressed that UN would be willing to accept responsibility insofar as the Organization had effective control over the conduct.[704]

The proposed method can also be appealing to TCCs as when MILEVA compared the ramifications of a continuous declaration of state responsibility by courts notes three possible effects emerged:

- a negative effect on the willingness of states to contribute troops;
- micromanagement and exercising extreme caution when using force;

[703] SARI, Aurel: *UN Peacekeeping Operations and Article 7 ARIO: The Missing Link, pp. 82-83.*
[704] O'BRIEN, p. 544.

- a positive effect as states will be more inclined to invest in education of personnel to avert conduct for which the state could be deemed liable.[705]

It is striking that only the last possibility can be considered an improvement and the first two effects have adverse ramifications. In the first case, the reduction in contribution is a logical political response from the state's point of view, for which the UN must prepare by redefining the current framework of peacekeeping. It could prove to be equally disastrous if states to micromanage their troops further, as it would reduce efficiency and cohesion in the mission, hindering the overall goal and the completion of the mandate. Therefore, it could prove to be an applicable solution for the UN to take responsibility for satisfying all civilian claims arising from misconduct and criminal activities in peace operations, establish a forum for redress for victims and then have a permanently operated mechanism for deciding on the ratio of responsibility between the Organization and the TCC based on the norms of shared responsibility. This way, the victim's claim is satisfied first, there is no onus on domestic courts continuously ruling against TCCs, while maintaining the dialog between stakeholders and nudging them towards lawful conduct and ending impunity.

7.4.2. Immunity of military personnel

For military members of national contingents, voluntary obligations by the TCCs should be reinforced, especially on the level of the MoUs, albeit the "voluntary compact" style of commitments does not seem to bring tangible improvements as it lacks any form of sanction whatsoever.[706] In contrast, diplomatic efforts have led to an all-time high cooperation in the field of communication regarding SEA with member states in 2015-2016, while between 2017-2019 a gradual decline can be observed, while data from the first half of 2020 is currently inconclusive.[707]

[705] MILEVA, Nina: *State Responsibility in Peacekeeping – The effect of responsibility on future contributions*; Utrecht Law Review, Vol. 12. Issue 1., 2016. p. 133. See also: LENNEKE, Sprik: *Mothers of Srebrenica v. Netherlands: the law as Constraint for Peacekeeping*, E-International Relations, 2014. p.3. http://www.e-ir.info/2014/09/24/mothers-of-srebrenica-v-the-netherlands-the-law-as-constraint-for-peacekeeping/ (accessed: 12.12.2016.), SCHRIJVER, Nico: *Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations,* International Organizations Law Review, Vol. 10. Issue 2, 2013, p. 595.
[706] UN Voluntary Compact on Preventing Sexual Exploitation and Abuse: https://www.un.org/preventing-sexual-exploitation-and-abuse/content/voluntary-compact (accessed: 21.12.2019.).
[707] See also Chart No. 10.

Regarding military personnel, an amendment of the criminal codes could be an oprion as supported by the fact that several states have voluntarily done it already.[708] The reasons why such a move could be realistic as a mid-term solution is that its effect would encompass only a small fraction of the population. Even for the largest contributors of peacekeeping personnel, this would mean several thousands of people out of which only a small fraction would ever be charged with committing SEA. Nonetheless, surmounting such a substantial diplomatic pressure on TCCs to comply with the modification of their criminal codes would take years if not decades to implement. Concerning the immunity of military personnel, the earlier initiative of the UN's GLE needs to be promoted through diplomatic channels which would supplement non-binding recent documents, such as the Voluntary Compact.[709] It needs to be mentioned though, that at as of the summer of 2020, such a proposal appears to be far from reality. Nonetheless, due to the scandal-centric response cycle of the international community, it is highly advisable to prepare for such an eventuality.

7.4.3. Immunity of civilian personnel

For civilian personnel a faster revocation of immunity - through a waiver issued by the SG - could be an adequate short-term solution in cases where the host state possesses adequate means to initiate proceedings against the alleged perpetrator. In the mid-term, a uniformed process for waiving immunity needs to be set up in order to avoid delays and possible repatriation before judicial proceedings in the host state can commence. It is worth reiterating once again, that this method is only possible in host states with a functioning and reliable justice system. It is also dependant on the political will of the UN to relinquish the immunity its agents enjoy, a move that has been lately promoted by the SG as well as on the willingness and capacity of the host state to prosecute the individual in question.[710]

Although some authors have promoted the idea of capacity-building in the form of strengthening the criminal justice system in host states, DURCH and ENGLAND succinctly note that solution is akin to „trying to build a ship while you're on it."[711] Instead, as a long-term

[708] Special measures for protection from sexual exploitation and abuse: a new approach, Report of the Secretary-General, A/71/818, 28 February 2017, Annex II: Best practices of Member States on prevention of and response to sexual exploitation and abuse.
[709] Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations, UN GA A/60/980, 16 August, 2006.
[710] https://www.independent.co.uk/voices/un-child-rape-sex-exploitation-united-nations-antonio-guterres-prosecutions-immunity-trial-a7956816.html (accessed: 21.12.2019.).
[711] DURCH-ENGLAND, ibid. p. 8.

solution the UN should prepare an international treaty putting the onus of initiating proceedings against civilian personnel with the possible ramification what if a state refuses to cooperate, the UN will waive the immunity of its agent, allowing for host state criminal proceedings to commence. This solution would offer the chance for cooperation between the UN and the TCC while also ensuring that justice is met if the TCC does not wish to comply. Just as in the case of military personnel, such a treaty is currently quite far from reality.

7.5. Victims

On the side of the victims, the community reporting mechanism and anonymous online reporting are valuable steps by the UN by not requiring the victims to relive the trauma by walking to the peacekeepers camp where the crime happened and report the events to the comrades-in-arms of the perpetrators. For a short-term solution, improving on the existing trust fund to provide better cover to victims regarding medical, psychological and legal costs would be desirable.

Besides the theoretical dilemmas of the responsibility of international organizations and states, a tangible way to help the victims is to provide financial compensation. The victims however cannot file a claim against the organization because of the lack of jurisdiction both before the courts of the host state and on the international level as discussed in previous chapters. This seemingly unlawful situation was addressed by the UN when it regulated the establishment of standing claims commissions. The GA resolution can be regarded as the basis for legal ordering of these scenarios, although it was accepted using a different mindset, namely property damage, personal injury or death, *inter alia*.[712] The standing claims commissions are enabled by the Article 51 of the UN Model SOFA boards, which establishes a three-party commission, where one member is appointed the SG, another by the government of the host state, and the chairman is selected by a consensus of the parties (or by the ICJ, if a consensus cannot be reached).[713] The commission has jurisdiction over claims of civil nature arising from the conduct of members of peacekeeping operations in the performance of their official duties.[714] The resolution rules out the case where 'operational necessity' is relied upon in relation third-party claims to activities of members of peacekeeping operations or acts

[712] UN GA Res. 52/247, adopted: 17 July 1998.
[713] Model SOFA Art. 51.
[714] UN GA Res. 52/247 Art. 5.

attributable to them.[715] Article 7 of the resolution bears special significance to acts of SEA,[716] as it eliminates the financial limitations, which would otherwise be applicable.[717] According to the Secretary-General's report if the claims arise as a result of gross negligence or wilful misconduct, the Organization assumes liability to compensate the third party. In a sense of secondary responsibility the UN can afterwards seek full compensation from the TCC. [718] The deadlines set forth in the resolution are quite unforgiving. Claims submitted after 6 months from the time of the damage, injury or loss sustained or from the time it was discovered by the claimant or in any case one-year from the termination of the mission.[719] The SG's report acknowledges one exception from this rule: in case the damage or injury occurs during the wind-up phase, the SG can waive the time limit.[720] It deserves special mention that although the financial limitations are discarded in case of SEA, there is no such exception mentioned. Therefore, it can be considered that the 6 months' time limit or 1-year term of preclusion is also applicable for sexual abuse and exploitation. The contents of compensation are limited to economic loss, loss of earnings and certain other expenses,[721] but it cannot encompass non-economic loss, neither suffering or moral anguish, nor punitive or moral damages.[722] The financial limit to private claims is 50.000 dollars,[723] which can be waived if; upon the conclusion of the investigation the SG finds compelling reasons for it.[724]

The UN has been criticized by several authors for being too slow to respond to these claims and only takes effective steps when the stakes are too high i.e. it gets sufficient media attention or there is a plausible risk that there's going to be public outcry. SHRAGA notes that in many cases, although the SRSG has the authority for the establishment of the commissions they are not set up at all, even when allegations resurface. [725] LEWIS observes that although these commissions might potentially operate as a forum for civil redress, they are operating on an ad hoc basis and cannot provide the consistent support required. [726] DANNENBAUM and LEWIS both

[715] ibid. Art. 6.
[716] ibid. Art. 7.
[717] ibid. Art. 9. section (d).
[718] Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations – Report of the Secretary-General, UN GA A/51/903 (21. May 1997).
[719] UN GA Res. 52/247 Art. 8.
[720] UN GA A/51/903 Para. 20.
[721] UN GA Res. 52/247 Art. 9. (a)
[722] UN GA Res. 52/247 Art. 9. (b)
[723] UN GA Res. 52/247 Art. 9. (d)
[724] UN GA Res. 52/247 Art. 9. (e)
[725] SHRAGA, ibid, pp. 406, 409.
[726] LEWIS, ibid, p. 605.

argue that the current system places no factual duty on the UN to develop the commissions, however as recent events show (e.g.: CAR), the international media can force rapid response from the UN in these scenarios, although legally speaking it is far from ideal that there has to be an outside pressure in order to force an organization to adhere to its own rules. The practice also raises the question of what will happen if and when the media attention subsides. SWEETSER assesses the necessity for the creation of a legal framework capable of establishing a transparent legal regime with a permanent compensation mechanism aiming at aiding the victims.[727] ABRAHAM cites the example of the United Nations Mission in Kosovo (UNMIK), where 70 people were detained, some of them accused with a bus bombing and even though international judges and the OSCE deemed the conduct unlawful, only after severe international pressure did the SRSG appoint a review board. To add insult to injury, the board found that the detentions were lawful;[728] with information regarding the work of review boards not released to the public. As DANNENBAUM pointed out, there is no outside control over the fairness of the judgements nor remedy if the applicant deems the decision unjust or unlawful.[729]

7.6. Conclusion

Through a multi-tiered approach, the plague of SEA that has haunted the UN for decades could be efficiently combated. Adopting a holistic approach and taking small steps at a time while widening the scope of commitments along the way could be a feasible solution. However, every single step requires a consistent commitment from the UN, even when media attention is not focused on the Organization as a result of a major ongoing scandal. It is equally important to note that although this thesis is primarily focused on issues concerning international law, a truly holistic solution must go beyond and combine the fields of international humanitarian law, criminal law, institutional law, but not just legal sub-systems, but it must also tackle financial, political, diplomatic, sociological and psychological questions as well.

Tackling the phenomenon of SEA from multiple angles such as pre-deployment training and vetting of personnel, enhanced communication and sharing information, prioritizing victim's claims and protecting whistle-blowers, increasing participation of women on all levels and not allowing the immunity of military and civilian personnel to result in impunity are cornerstones of the multi-pronged approach that would lead to a systematic overhaul of peace

[727] SWEETSER, Catherine E.: *Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel*, New York University Law Review, Vol. 83. Issue 5, 2008, pp. 1647, 1661, 1676.
[728] ABRAHAM, ibid, pp. 1330-1331.
[729] DANNENBAUM: *Translating the Standard of Effective Control, ibid*. p. 128.

operations. Dialogue between troop-contributing countries and the UN staff should be considerably strengthened in order to maintain cooperation and to provide solid reinforcements in the field of personnel base for future operations.

Peacekeeping has been successful in numerous states during more than seven decades of its existence and provided tremendous help in areas where no other help would come. With these perspectives taken into consideration it is vital to get a sound legal framework within which accountability can take place, and to persuade the troop-contributing countries to take action against these crimes, even if they are committed by their own peacekeepers. It is my firm belief that peacekeeping is worth reforming and that we have most of the necessary reforms drafted for us. Therefore, it is necessary to encourage the governments of troop-contributing countries and the leadership of the UN to cooperate in this matter and to put a stop to sexual abuse and exploitation once and for all.

Manuscript closed: 30 August 2020.

List of Charts

Annexes

Annex No. 1.: Latest data on United Nations Peacekeeping

Source: UN Peacekeeping website at:

https://peacekeeping.un.org/sites/default/files/pk_factsheet_3_20_english.pdf

(Last accessed: 30.07.2020.)

United Nations Peacekeeping

Peacekeeping Operations Fact Sheet

31 March 2020

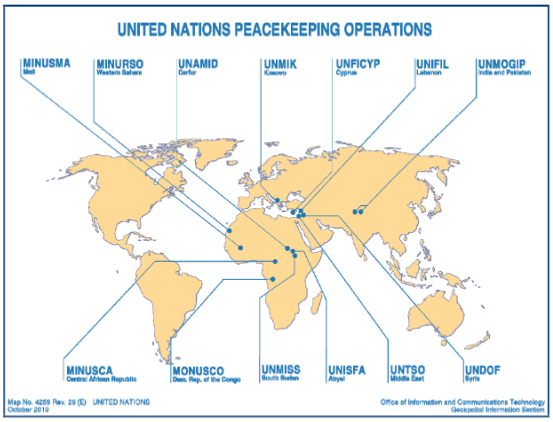
Peacekeeping operations since 1948	71
Current peacekeeping operations	13

PERSONNEL

Uniformed personnel	81,203
(troops 69,230, police 8,942, military observers 1,143 and 2,055 staff officers)	
Countries contributing uniformed personnel	121
International civilian personnel (as of 31 May 2018)	4,386
Local civilian personnel (as of 31 May 2018)	8,221
UN Volunteers	1,300
Total number of personnel serving in 13 peacekeeping operations	95,110
Total number of fatalities in all UN peace operations since 1948 *	3,928

FINANCIAL ASPECTS (US$)

Approved budgets for the period from 1 July 2019 to 30 June 2020	About 6.5 billion**



*Includes fatalities for all UN peacekeeping operations, as well as political and peacebuilding missions.

Mission	Established	Military Observers	Troops	Staff Officers	Police	International Civilians (as of May 2018)	Local Civilians (as of May 2018)	UN Volunteers	Total Personnel	Fatalities	Budget (US$)
UNTSO	May 1948	152	0	0	0	80	142	0	374	52	*67.16 million (2018-19) **
UNMOGIP	January 1949	43	0	0	0	24	48	0	115	11	*19.75 million (2018-19) **
UNFICYP	March 1964	0	718	53	63	36	115	0	985	183	53.53 million
UNDOF	June 1974	0	956	51	0	46	79	0	1,132	55	60.30 million
UNIFIL	March 1978	0	9,982	198	0	242	588	0	11,010	318	474.41 million
MINURSO	April 1991	0	20	7	0	72	158	15	272	16	52.87 million
UNMIK	June 1999	8	0	0	9	97	215	21	350	55	37.19 million
UNAMID	July 2007	43	4,185	120	2,163	672	1,948	66	9,197	278	385.68 million
MONUSCO	July 2010	180	13,590	294	1,185	769	2,201	334	18,553	186	1.11 billion
UNISFA	June 2011	145	3,486	129	35	141	76	32	4,044	37	263.86 million
UNMISS	July 2011	214	13,795	412	1,696	873	1,402	408	18,800	75	1.12 billion
MINUSMA	March 2013	38	11,757	476	1,748	691	730	170	15,610	209	1.07 billion
MINUSCA	April 2014	153	10,741	315	2,043	643	519	254	14,668	106	930.21 million
	Total:	**976**	**69,230**	**2,055**	**8,942**	**4,386**	**8,221**	**1,300**	**95,110**	**1,581**	**About $6.5 billion****

**Peacekeeping operations are financed annually (1 July through to 30 June) on the basis of legally binding assessments of all Member States. UNTSO and UNMOGIP are both exceptions to this and are funded from the UN regular biennial budget.*

UNTSO - UN Truce Supervision Organization
UNMOGIP - UN Military Observer Group in India and Pakistan
UNFICYP - UN Peacekeeping Force in Cyprus
UNDOF - UN Disengagement Observer Force
UNIFIL - UN Interim Force in Lebanon
MINURSO - UN Mission for the Referendum in Western Sahara
UNMIK - UN Interim Administration Mission in Kosovo
UNAMID - African Union-United Nations Hybrid Operation in Darfur
MONUSCO - United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
UNISFA - United Nations Interim Security Force for Abyei
UNMISS - United Nations Mission in the Republic of South Sudan
MINUSMA - United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSCA - United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic

**This amount finances 12 of the 13 United Nations peacekeeping missions, supports logistics for the African Union Mission in Somalia (AMISOM) through the United Nations Support Office in Somalia (UNSOS), and provides support, technology and logistics to all peace operations through global service centres in Brindisi (Italy) and Valencia (Spain) and a regional service centre in Entebbe (Uganda).

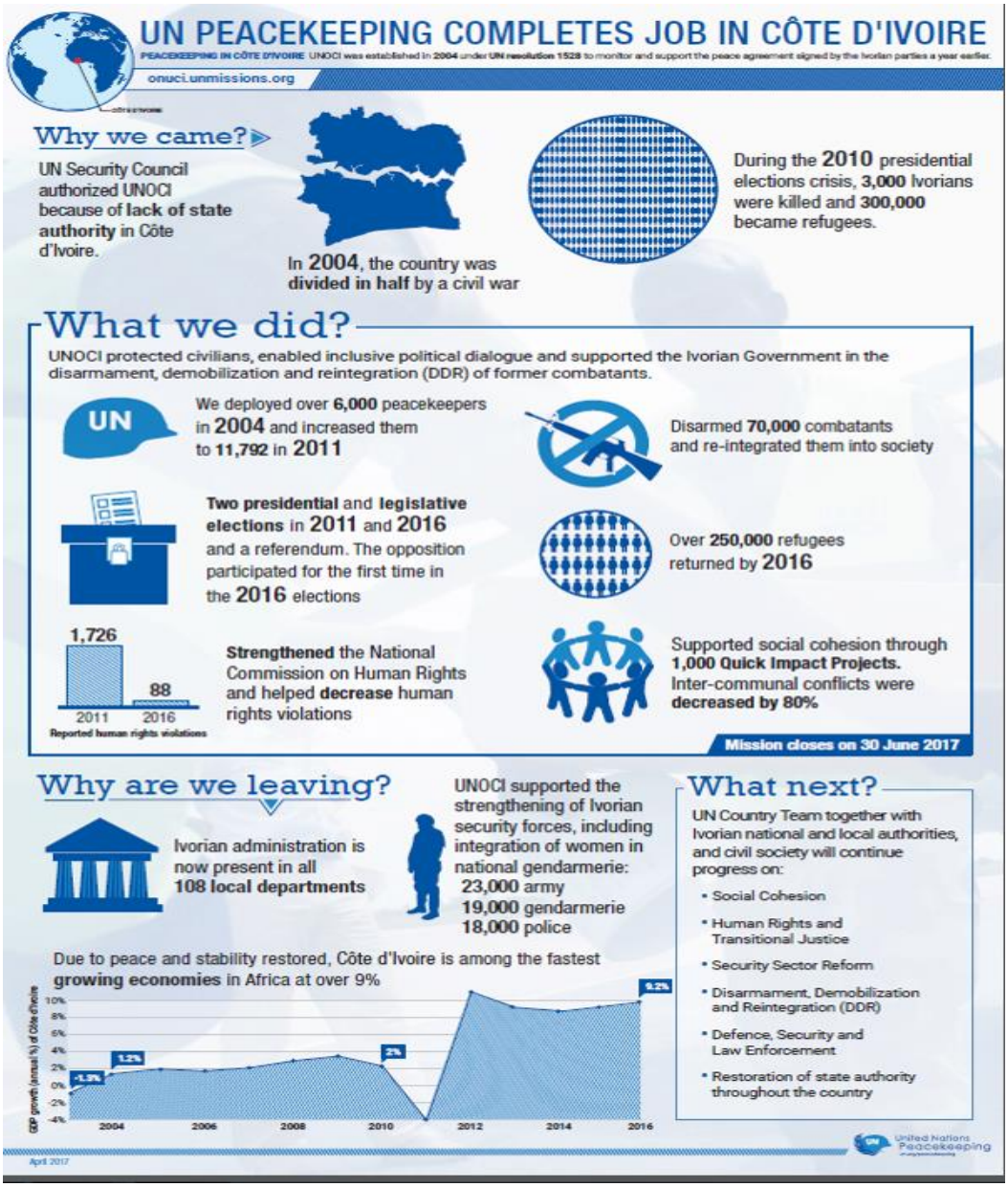
Prepared by the Peace and Security Section of the United Nations Department of Global Communications, in consultation with the Department of Peace Operations, Department of Operational Support — DPI/1634/Rev.225 March 2020

Annex No. 2.: Results of UNOCI – the UN operation in Côte d'Ivoire 2004-2016

Source: UN Peacekeeping website at:

https://peacekeeping.un.org/en/file/cote-d-ivoire-infographic-smjpg-0

(Last accessed: 30.07.2020.)



Annex No. 3.: Results of UNMIL – the UN peace operation in Liberia 2003-2018

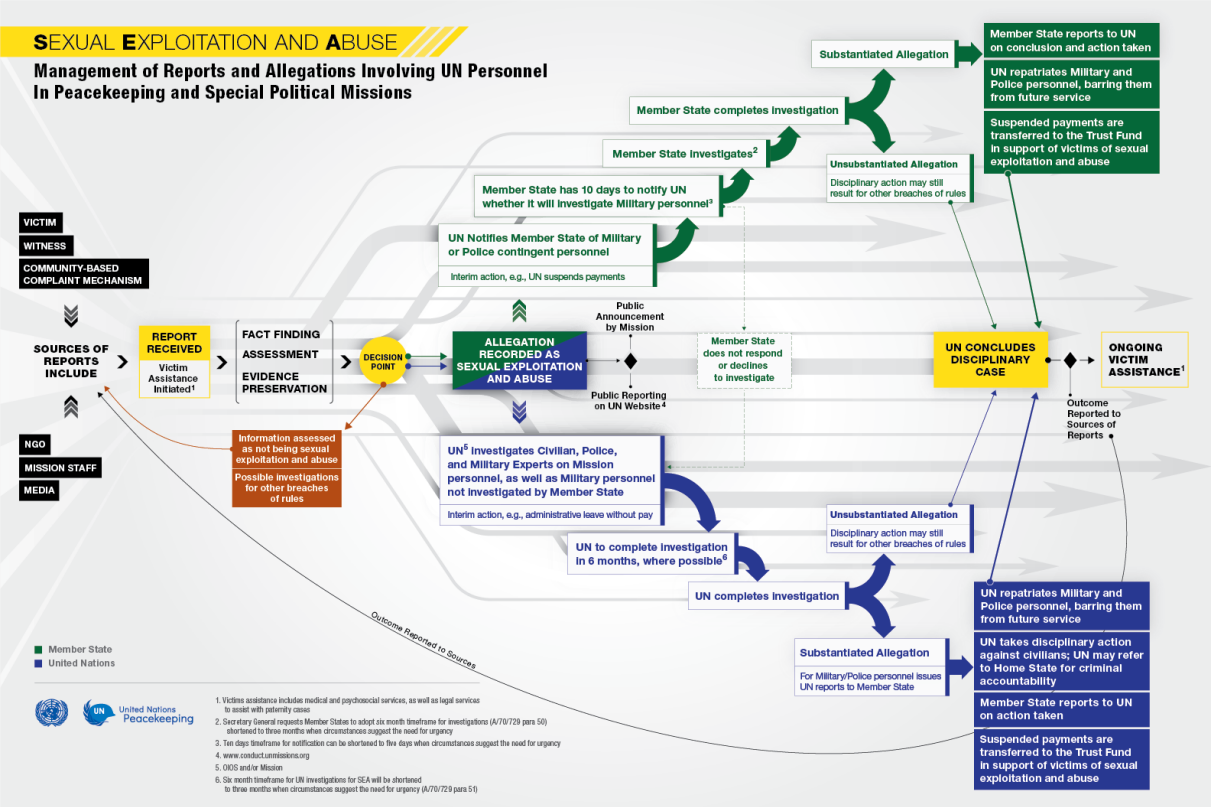
Source: UN Peacekeeping website at:

https://peacekeeping.un.org/en/file/unmil-infographic-smjpg-0

(Last accessed: 30.07.2020.)

Annex No. 4.: Response mechanism of the UN for SEA

Source: UN Peacekeeping - Conduct and Discipline Unit Website at https://dppa.un.org/en/addressing-sexual-exploitation-and-abuse (Last accessed: 28.08.2020.)



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