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Responsibility under International law for Human Rights Violations Committed by the Personnel of United Nations Peace Support Operations: Sexual Exploitation and Abuses of Children and Women.

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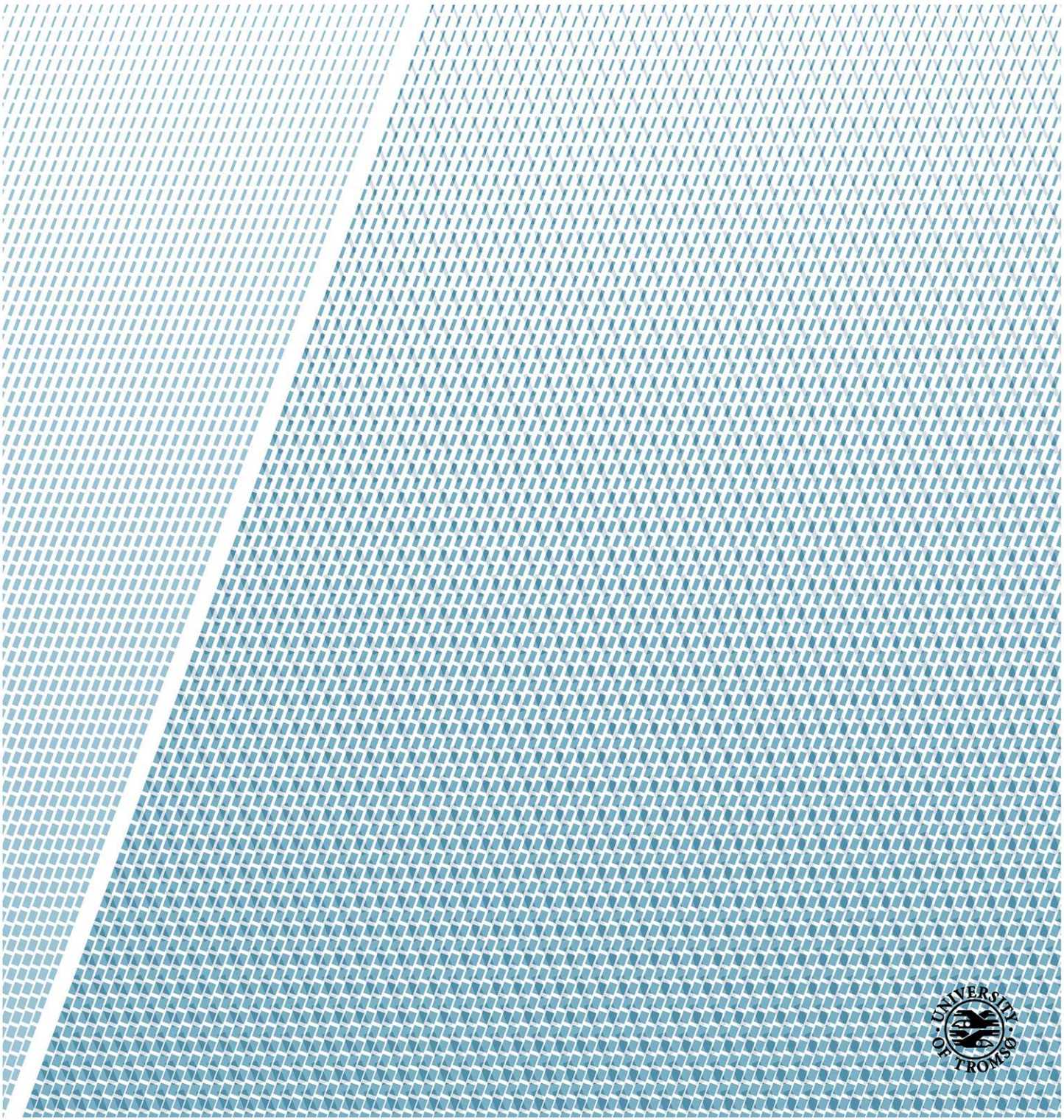

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List of Abbreviations

BAI	Bureau des Advocats Internationaux
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CPIUN	Commission on the Privileges and Immunities of the United Nations
CRC	Convention on the Rights of the Child
DARIO	Draft Articles on the Responsibility of International Organizations
DARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts
DRC	Democratic Republic of Congo
ECC	Effective Control and Command
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HR	International Human Rights Law
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGO	Inter-Governmental Organization
IHL	International Humanitarian Law
IJDH	Institute for Justice & Democracy in Haiti
ILC	International Law Commission
MINUSTAH	United Nations Stabilization Mission in Haiti
MSC	Military Staff Committee
NGO	Non-Governmental Organization
ONUC	Operation des Nations Unies au Congo
PSO	Peace Support Operation
R2P	Responsibility to Protect

SEA	Sexual Exploitation and Abuse
SOFA	Status of Forces Agreement
TCS	Troop Contributing State
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTSO	United Nations Truce Supervision Organization
VCLT	Vienna Convention on the Law of Treaties
VCLT-IO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

Abstract

A considerable amount of cases of sexual exploitation and abuse of children and women committed by the personnel of United Nations peace support operations have been brought to the attention of the public, especially in recent years. As multiple actors are involved in United Nations peace support operations, *i.a.* the United Nations itself and Troop Contributing States, the question of attribution of responsibility is highly important – either as multiple responsibility or as the sole responsibility of one entity.

This thesis will investigate the issue of international responsibility and examine who carries the onus for such misconduct. The issue of international responsibility in the context of United Nations peace support operations is not merely theoretically interesting, but it also holds practical consequences for victims wishing to file a legal case against the United Nations as with the current so-called Cholera Complaint.

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

Chapter 1: General concepts

1 Introduction

Contemporary Peace Support Operations (PSOs)[1] may include different actors playing different roles and holding different functions. Two important primary actors on the international level are the United Nations (UN) and the Troop Contributing States (TCSs)[2] and they are both considered in this thesis. In principle, they are bound by International Human Rights Law (HR)[3] obligations flowing from different legal sources.[4] Such obligations, prohibitions on sexual exploitation and abuses (SEAs)[5] of women and children[6] in particular, have been violated by the personnel of PSO forces on a number of occasions. It was first documented in Bosnia-Herzegovina, and Kosovo in the early 1990s and then later in Mozambique, Cambodia, East Timor and Liberia.[7] For example, according to an Amnesty International report, in Bosnia-Herzegovina and Kosovo in the 1990s, "UN peacekeepers helped support sex trafficking as customers of brothels relying on forced prostitution".[8]

[1] One of the examples of UN PSOs in the past is the United Nations Observer Mission in El Salvador (ONUSAL). It was established "in July 1991 to verify implementation of all agreements between the Government of El Salvador and the Frente Farabundo Marti para la Liberacion Nacional, including a ceasefire and related measures, reform and reduction of the armed forces, creation of a new police force, reform of the judicial and electoral systems, human rights, land tenure and other economic and social issues." The mission was terminated in 1995. https://www.un.org/en/peacekeeping/missions/past/onusal.htm . Access 28 Apr. 2014 at 14:00 hrs; United Nations Peacekeeping Force in Cyprus (UNFICYP) is an example of current PSOs. "UNFICYP is one of the longest-running UN Peacekeeping missions. It was set up in 1964 to prevent further fighting between the Greek Cypriot and Turkish Cypriot communities on the island and bring about a return to normal conditions. The Mission's work is based on four components that work together closely: the military, UN Police (UNPOL), the Civil Affairs Branch and Administration, which supports all activities. The Mission counts almost 1100 personnel. Since 1964, almost 180 UN personnel have lost their lives while serving in UNFICYP." http://www.unficyp.org/nqcontent.cfm?a_id=778&tt=graphic&lang=l1. Access 28 Apr. 2014 at 14:00 hrs

[2] Larsen, Kjetil M. "The Human Rights Treaty Obligations of Peacekeepers" Cambridge, 2012, p.11.

[3] "Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law." http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx. Access 28 Apr. 2014 at 15:00 hrs.; see also http://www.un.org/en/documents/udhr/hr_law.shtml . Access 28 Apr. 2014 at 15:30 hrs.

[4] Ibid.

[5] It includes all forms of coercive and unlawful sexual activities, prostitution, pornography and trafficking. For more information about the definition of SEA see Muntarbhorn, Vitit "Article 34: Sexual Exploitation and Sexual Abuse of Children" in: A, Alen, J. Vande Lanotte, E. Verhellen, F. Ange, E. Berghmans and M. Verheyde (Eds.) A commentary on the United Nations Convention on the Rights of the Child , Martinus Nijhoff Publishers, Leiden, 2007.1-41, pp. 1-4; see also Stockholm Declaration " First World Congress Against Commercial Sexual Exploitation of Children: Declaration and Agenda for Action" 27-31 August 1996, Stockholm, Sweden, para.5. Available at: http://www.ecpat.net/sites/default/files/stockholm_declaration_1996.pdf.

[6] According to the Article 1 of the Convention on the Rights of the Child (CRC), "child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

[7] Defeis, Elizabeth F. "UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity" Washington University Global Studies Law University, 2008, Vol. 7. No. 2, 185-214, p. 187.

[8] Novic, Natalie "When Those Meant to Keep the Peace Commit Sexualized Violence" Women under Siege, 25 May 2012: http://www.womenundersiegeproject.org/blog/entry/when-those-meant-to-keep-the-peace-commit-sexualized-violence. Access: 23 January 2013 at 16:23 hrs.

However, it "was brought to the spot light of public attention in 2002 pursuing allegations of widespread abuse of refugee and internally displaced women and children by humanitarian workers and peacekeepers in West Africa".[9] This was followed up by, for example, the revelation of sexual abuses in 2004 by a number of peacekeeping personnel in the Democratic Republic of the Congo (DRC),[10] sexual abuse of a 15-year old girl in Liberia and some multiple assaults cases in Haiti.[11] According to the Zeid Report dated 25 March 2005, in the DRC, SEAs involved "the exchange of sex for money (on average $1-$3 per encounter), for food (for immediate consumption or to barter later) or for jobs (especially affecting daily workers)".[12] Much more distressing were acts of rape disguised as prostitution in which victims were given food or money as a gift by personnel of PSOs after being assaulted in order to give the rape the appearance of consensual transaction and prostitution rather than rape.[13] During 2004-2006, the UN investigated 319 members of PSOs who were suspected of having committed SEAs, and consequently the UN disciplined 179 people for SEA including soldiers, civilians and police officers.[14] Notably, in 2005 alone 296 complaints were lodged against peacekeeping personnel.[15]

However, SEAs continued. In 2006, the UN reported 357 allegations of SEAs by the UN PSOs personnel.[16] In 2008, according to a report by the United Kingdom based non-profit organisation Save the Children, UN peacekeepers in Haiti abused a young Haitian girl sexually.[17] Although the numbers are down to 74 reported allegations in 2011,[18] it still existed. As a case in point, five Uruguayan UN PSOs personnel, who raped a Haitian teenager, were accused in January 2012.[19] Additionally, "[i]n March [2012], two UN

[9] Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse "Sexual Exploitation and Abuse by UN, NGO and INGO Personnel: a self–assessment" Humanitarian Exchange Magazine, Issue 52, October 2011:http://www.odihpn.org/humanitarian-exchange-magazine/issue-52/sexual-exploitation-and-abuse-by-un-ngo-and-ingo-personnel-a-self-assessment.

[10] UN General Assembly "Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly" Fifty-ninth session, Agenda item 77, Comprehensive review of the whole question, of peacekeeping operations in all their aspects including "A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations" prepared by Prince Zeid Ra' ad Zeid Al-Hussein (hereinafter Zeid Report), UN. Doc. A/59/710, 25 March 2005, 1-41, p. 1, Available at:
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/247/90/PDF/N0524790.pdf?OpenElement

[11] Sweetser, C. "Providing Effective Remedies to Victims of Abuse by Peacekeeping" University Law Review, Vol. 83, New York University School of Law (2008) 1643- 1677, p. 1645.

[12] Zeid Report, op. cit. p. 8.

[13] Ibid.

[14] European Parliament "Implication UN forces in Sexual Abuses in Liberia and in Haiti" European Parliament Resolution on the Involvement of UN Forces in Sexual Abuse in Liberia and Haiti, Official Journal of European Union (European Parliament Resolution hereinafter), 23.12.2006, C 317 E , 899-901, p.900

[15] Sweetser, C., op. cit. p. 1645.

[16] It appears that the amount of allegations supersede that of individuals who have been investigated during 2004-2006. It therefore seems that multiple charges typically must have related to the same person, or that the perpetrator was unknown.

[17] Novic, Natalie , op. cit.

[18] Ibid.

[19] Ibid.

peacekeepers from Pakistan were found guilty of raping a 14-year-old boy in Haiti. They were sentenced to just a year of prison in their home country".[20]

All in all, as the number of PSOs and their personnel grown, widespread accounts of inappropriate behaviour and SEAs carried out by PSO personnel have been reported around the world, notably in Haiti, Guinea, Liberia, Sierra Leone, Bosnia, Cambodia, East Timor, and the Democratic Republic of the Congo.[21] As Muna Ndulo, a Cornell constitutional law scholar, points out, UN peacekeepers have fathered an estimated 24,500 babies in Cambodia and 6,600 in Liberia – as a result of SEAs. Subsequently, they have abandoned their children at the end of their employment.[22]

These reports have motivated me to work on my chosen topic - *Responsibility*[23] *under International Law for Human Rights Violations Committed by the Personnel of United Nations Peace Support Operations: Sexual Exploitation and Abuses of Children and Women.*

It would seem that this issue is of great importance to both HR and public international law in general, and that it might need further attention. Hence, the responsibility of the UN under international law and the issue of how to redress victims will be considered in this thesis

The relevance of this topic to peace studies is well shown by the fact that peacekeeping personnel are supposed to protect the people who are stuck in a conflict situation and help them obtain peace. Simply put, peacekeepers help the parties to a conflict to resolve their conflicts peacefully.[24] In the words of the European Parliament: The "whole purpose of peacekeeping missions is to help countries ravaged by civil or international conflict restore stability, guarantee public security and install the rule of law".[25] However, when they act to the contrary and violate HR themselves, an important issue is the redressing of victims. In

[20] Ibid., For more examples regarding conviction/ accusing personnel of PSOs forces see: http://usatoday30.usatoday.com/news/world/story/2012-03-13/Haiti-UN-peacekeepers/53515134/1 ; http://www.bbc.com/news/world-latin-america-18030350 .
[21] Novic, Natalie, op. cit.
[22] Ndulo, Muna "The United Nations Reponses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions" Vol. 27, No. 1, Berkeley Journal of International Law (2009) 127-161, pp. 129,157.
[23] One may argue that the term 'responsibility' should be replaced by the term 'accountability' since the latter is a more open and broader model. However, I use these two terms as synonym. Thus, wherever the term 'accountable'/accountability is used it means 'responsible/responsibility' and vice versa. For more information in this respect, see Dekker, Ige F. "Accountability of International Organizations: An Evolving Legal Concept" in Wouters, Jan, Brems, Eva, Smis, Stefaan, and Schmitt Pierre, (eds.), Oxford: intersentia, 2010, 21-36.
[24] United Nations, Peacekeeping, From the Millennium Report (Millennium Report hereinafter), p. 2, Available at: http://www.un.org/cyberUNSChoolbus/briefing/peacekeeping/peacekeeping.pdf
[25] European Parliament resolution, op. cit. part E.

order to give the victim proper compensation, as opposed to *ex gratia payments*[26], responsibility must be established for actors involved in these PSOs.

The legal foundation for PSOs lies somewhere between Chapter VI and VII of the United Nations Charter (UNC)[27]; as the Millennium Report stated: "Chapter VI outlines specific means which countries may use to settle disputes: negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional institutions or arrangements or other peaceful means. Chapter VII provides for enforcement action by UN Member States, including the use of armed force or other collective measures for dealing with 'threats to peace' ".[28] Therefore, the UNC allows the United Nations Security Council (UNSC) and the United Nations General Assembly (UNGA) to deploy troops and other personnel of its PSOs, in general, around the world. This thesis only considers the violation of the rights of those people who are supposed to be protected by the personnel of UN PSOs – i.e. blue berets or blue helmets, and not the UNSC authorized coalitions of the willing. It will moreover not address the issue of SEA between personnel belonging to a UN PSO. In other words, only the HR of the civilian population in the area of deployment of PSOs forces is considered in this thesis.

Observance of both women's and children's rights is one of the important concerns of the UN and the UNSC in particular.[29] For example, UNSC resolution No. 1820 (2008) condemns sexual violence against women and children in situations of armed conflict and post-conflict and calls upon all parties to armed conflicts for the cessation of such acts.[30] Furthermore, it "[u]rges appropriate regional and sub-regional bodies in particular to consider developing and implementing policies, activities, and advocacy for the benefit of women and girls affected by sexual violence in armed conflict".[31] Thus, as the report of the UN Secretary-General on the protection of civilians in armed conflicts states: "[R]esolution 1820 (2008) signalled the council's strengthened commitment to address sexual violence in conflict",[32] and the UNSC has also taken measures to enhance protection of women and children as the most vulnerable

[26] When something has been done ex gratia, it has been done voluntarily, out of kindness or grace. In law, an ex gratia payment is a payment made without the giver recognising any liability or legal obligation. In other word, "it done from a sense of moral obligation rather than because of any legal requirement."
http://www.oxforddictionaries.com/definition/english/ex-gratia . Access 20 Apr. 2014 at 13:00 hrs.
[27] Charter of the United Nations (UNC), San Francisco, adopted 26 June1945. 1 UNTS XVI (entered into force 24 October 1946).
[28] Millennium Report, op. cit.; Also see UNC, Chapter VI & VII.
[29] United Nations Security Council, Report of the Secretary General on the Protection of Civilians in Armed Conflict, UN Doc. S/2009/277-29 May 2009, pp. 2-3. Available at: http://www.poa-iss.org/CASAUpload/ELibrary/S-2009-277en.pdf .
[30] Security Council Resolution 1820, Adopted at its 5916th meeting on Women, Peace and Security, UN Doc. S/RES/1820 (2008) 19 June 2008.1-5, p. 2. Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf .
[31] Ibid. p. 4.
[32] UNSC Resolution, S/2009/277, op. cit. p.3.

parts of society affected by conflict.[33] Therefore, violations of these rights by the personnel of PSOs do achieve the attention of the UN itself, the public and also non-governmental organizations (NGOs) such as Human Rights Watch (HRW) and Saving the Children. Hence, the matter of application and responsibility for these HR violations has become the occupation of many scholars.

This thesis assesses to whom the responsibility for the violation of HR is to be attributed under international law, and it argues that different actors involved in PSOs may have a degree of responsibility under international law. This may open up avenues for victims to access some form of compensation, and owing to the fact that responsibility without the establishment of a right for victims to reparation is relatively meaningless, how to redress victims is the other issue which will be covered by this thesis. It also considers the responsibility for TCSs in regard to HR violation committed by the personnel of UN PSOs.

Actually, there are difficulties in establishing responsibility for the UN since there are limitations on bringing a case against it before a third party dispute settlement system. For instance, according to the statute of the International Court of Justice (ICJ), only states can be parties in cases before the court.[34] However, theoretically, the UN and a State may agree upon referring a dispute to an ad hoc international tribunal to have it settled through arbitration. They would nevertheless seem likely to settle disputes through another system. An agreement between the UN and a State which provides that in case of disputes, the UNGA or other related organ will ask the ICJ for an advisory opinion on the point at issue. If it is agreed in advance that this opinion will be accepted as decisive by both parties, the court's opinion will be binding on both the UN and the State.[35]

Furthermore, none of the HR committees or courts seems to allow for cases to be brought against Inter-governmental Organizations (IGOs) such as the UN. However, this does not answer the question of whether national courts are allowed to try cases against the UN or UN personnel. Another difficulty regarding the responsibility of the UN is that it may be argued that as PSOs troops are composed of militaries of Member States and that they therefore do not belong to the UN. Hence, the responsibility of the UN is called into question, at least as a sole responsibility. Should they nevertheless be seen as for these purposes only representing

[33] Ibid.
[34] Statute of the International Court of Justice (ICJ Status hereinafter), Annex to UN Charter, United Nations, 1945, 1 UNTS XVI Article 34, Part 1.
[35] Thirlway, Hugh "The International Court of Justice" in Evans, M. (ed.) "International Law" 3rd ed., Oxford: Oxford university Press, 2010, 586-614, p.608.

the UN, their function as UN employees grants them functional immunity. This immunity typically follows from Status of Forces Agreements (SOFAs). Thus, they cannot be tried by national courts of the host State. One may nevertheless argue that according to the traditional theory of employer responsibility, the UN is responsible for its personnel's wrongdoings. The question is thus which forum may try the person - TCS courts, host States courts, or third States courts. Indeed, the potential responsibility of the host State is also one of many related issues which should perhaps have been looked into. However, due to the limited scope of this thesis, civil and criminal responsibility of perpetrators, and the responsibility of the host State will regretfully not be considered.[36]

2 Research Questions

In this regard, the main question is who is responsible for the violation of HR during PSOs?

Similarly, the following sub-questions and their answers constitute the different chapters of the thesis:

1- How is HR binding on the UN?

2- Under which sources of international law and to what extent is the UN responsible for HR violations by its PSOs personnel?

3- Under which sources of international law and to what extent are TCSs responsible for HR violations by the personnel of UN PSOs?

4- Is it possible to have a claim against the UN adjudicated or otherwise handled in an authoritative manner?

5- How can victims be redressed and are there any examples of victims having been properly redressed?

6- Is finally the onus of misconduct undertaken by PSOs personnel and the redressing of victims on the UN or on the TCSs? What are the suggestions for proper redressing mechanism?

[36] For more information in this regard see O'Brien, Melanie "Protectors on Trial? Prosecuting Peacekeepers for War Crimes and Crimes against Humanity in the International Criminal Court" Vol. 40, International Journal of Law, Crime and Justice, 2012, 223-241.

3 Methodology

In the words of the Oxford English Dictionary, method means "a special form of procedure adopted in any branch of mental activity, whether for the purpose of teaching and exposition or for that of investigation and inquiry".[37] Conducting research in international law might be a rather difficult exercise even for professional practitioners, owing to the fact that the sources of international law are enormously vast and since there is no single code of legal rules, or single court whose decisions can be relied upon as all-encompassing and imperative. As Rosenne points out, this is due to the substance of the material being diffused,[38] to a large extent; the broad variety of primary source-materials to be examined; the many languages in which these materials are written; the ever increasing amount of legal literature; and also the essential characteristics of public international law itself which is the law of coordination but not subordination.[39] Therefore, international law requires its own proper methodological techniques which are widely different from other disciplines such as social science or economy.

International law is a normative science that, the issues raised in the former paragraph aside, has its own unique and rigorous approach to analysing and solving questions. There are at least seven methods for legal research representing the major methods of contemporary international legal scholarship, excluding methods which may have been utilized by scholars in the past, but additionally there are also other useful ways of addressing international legal scholarship, such as humanistic or philosophical approaches. However, due to space constraints this thesis does not cover more than one of them, but in general they are: Legal positivism, the New Haven school, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics.[40] Of these the majority applies a modified version of legal positivism with the focus on the established sources and the traditional ways of deriving rules and arguments from them.[41]

It is worth noting, however, that the classic view of positivism means that there are no other rules than these which States have agreed to through treaties, customary law, and other

[37] Oxford English Dictionary 690(second edition, 1989).
[38] When international law meets other sciences it turns into an interdisciplinary field of study such as commercial/business international law, philosophy of law, or law and sociology.
[39] Rosenne, Shabtai, "Practice and Methods of International Law" Oceana Publications, Inc., New York, 1984, pp.1-2.
[40] Ratner, S., Slaughter, A. M. "Symposium On Method In International Law" Appraising the Methods of International Law: a Prospectus for Readers, Vol. 93 Am. J. Int'l L. (1999), 291- 423, pp.291, 293.
[41] Ibid. p.293.

forms of consent in international law. This view associates law with the expression of State will. That is, international norms are established by the consent of the States (their collective will) on that norm. However, the modified version of positivism is not necessarily fully associated with State voluntarism. It does not authorize a State to change its mind and withdraw its consent unilaterally after the collective will of States reaches consent on the content of an international rule.[42] As Slaughter and Ratner states, "for the modern representatives of analytical positivism, the unity of the legal system, embodied by the Grundnorm (basic norm) or the "unity of primary and secondary sources", is more important than the emanation of law from concrete acts of will".[43] Customary international law is then a rigorous separation of legal norms from nonlegal factors such as moral principles, political ideologies, natural reasons and so forth.[44]

Materials for such an analysis are found in *i.a.* the International Law Commission (ILC) documents, treaties such as the UN Charter, Resolutions of UNGA or the UNSC, etc. Take, for example, the ICJ statute. According to the UNC Article 92, the ICJ is the main judicial organ of the UN and it is established by UNC.[45] According to Article 38 of the ICJ statute, and for the purpose of that context, international law has three main sources, namely, international treaties and conventions, customary law, and the general principals of law. Additionally, there are two subsidiary sources, namely, judicial decisions and teaching/doctrine.[46]Actually, this list is held to reflect the main sources of relevance to international law in general and should be regarded as "pointing towards materials where the answer in terms of public international law can be found".[47]However, there are other valid sources of international law which are not mentioned by Article 38 of the ICJ statute. This category includes in particular binding resolutions of international organizations such as the resolutions of the UNSC[48], and unilateral obligations[49]. It also includes soft laws (nonbinding documents) such as resolutions and reports of the UNGA, and the reports of the UN ILC. They might reflect customary international law and take part in the process of establishing international law; however they are not binding in themselves.

[42] Ibid. pp. 293,303-304.
[43] Ibid. p. 304.
[44] Ibid. p. 303.
[45] ICJ Status, op. cit. Art. 1.
[46] Ibid. Art. 38.
[47] Rosenne, Shabtai, op. cit. p. 18.
[48] Zwanenburg, Marten, op, cit. p.3.
[49] See ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf.

The methodology of international law is therefore the ways to identify and apply primary (treaties, customary law and the general principals of law) and secondary (judicial decisions and teaching/doctrine) sources to the question at hand. The link between a legal theory and a legal method is thus one between the abstract and the applied. [50]

From the perspective of the thesis title, customary law is the main sources to be used due to the fact that intergovernmental organization like the UN cannot be party of the relevant human rights treaties[51] and there is no general treaty about the responsibility of the UN under international law as an intergovernmental organization for wrongful acts. Also, the work of the ILC – of relevance both for the responsibility of the UN and States - such as Draft Articles on Responsibility of States for Internationally wrongful Acts 2001 (DARS)[52] and Draft Articles on the Responsibility of International Organizations 2011 (DARIO)[53], ICJ advisory opinions, and the resolutions and reports of the UNGA, may be rich sources for the project. Of relevance to the responsibility of sending States, in addition to the customary law, are naturally treaties they might be parties to, like the International Covenant on Civil and Political Rights (ICCPR)[54], and the European Convention on Human Rights (ECHR)[55]. It is worthwhile here to point out that wherever treaty or convention provisions are used in this thesis, they will be interpreted on the basis of the legal regime found in the 1969 Vienna Convention on the Law of Treaties (1969 VCLT)[56]. Article 31 (1) here provides that "[a]

[50] Ratner, S., Slaughter A. M., op. cit. p.292.
[51] Article 59 of ECHR amended by protocol No. 14 Article 17. The latter reads that:" The European Union may accede to this Convention." Protocol No. 14 to ECHR, Strasbourg, 13.v. 2004, Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/194.htm; The European Union is in the process of negotiating the framework for its accession to the ECHR.
[52] ILC "Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001" (DARS) adopted at its 53rd session, in 2001 and submitted to the General Assembly as a part of ILC's report covering the work of that session. The report which also contains commentaries on DARS appears in Yearbook of the International Law Commission, 2001, Vol. II Part Two. Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol.I)/ Corr.4. Available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.
[53] ILC "Draft Articles on the Responsibility of International Organizations, 2011" (DARIO) adopted at its 63rd session and submitted to the General Assembly as a part of the ILC's report covering the work of that session (A/66/10 para. 87). The report will be appeared in Year book of the ILC, 2011, Vol. II, Part Two. Available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf.
[54] "International Covenant on Civil and Political Rights" (ICCPR) Adopted by the General Assembly of the United Nations on 19 December 1966. Its optional protocol also adopted by the General Assembly of the United Nations on 19 December 1996, Treaty Series, Vol. 999, I-14668, 172-346. Available at: http://www.refworld.org/pdfid/3ae6b3aa0.pdf.
[55] "European Convention for the Protection of Human Rights and Fundamental Freedoms" known as "European Convention of Human Rights" (ECHR) Adopted by Council of Europe, as *amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html
[56] Vienna Convention on the Law of Treaties (1969 VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, I-18232, 331-512, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". [57]

[57] Ibid, p.340, Article 31 (1); these parts of the 1969 VCLT are international customary law.

Chapter 2: International Governmental Organization, Responsibility, and Peace Support Operations

In order to define PSOs and give an overview of the issue of responsibility for the conduct[58] of the personnel of PSOs, the concept of international organization to which this personnel and these operations belong should be explained.

1 International Organization

International organizations are categorized into two groups, IGOs and NGOs. For the purpose of this thesis, however, international organization only covers international governmental organization and not international association such as international NGOs and international public corporations. These two categories should not be conflated.[59]

There are three criteria by which an international organization is to be distinguished. First of all, the entity shall be prevalently composed of other international organization, or/and entities, or/and States. The other important criterion is that the entity must be established under international law and the instrument of the establishment should be either a treaty, resolution of an international organization, resolution of a conference of States, or by the joint unilateral acts of States. Last but not least, the entity must possess independent internal organs having a separate and autonomous will from that of its members. In other words, the entity must have a separate legal personality and be capable of majority based action. [60]

1-1 Responsibility

Under international law, responsibility is a consequence of the breaching or not-observance of international norms and obligations attributable to a legal person.[61] Therefore, it seems to me that an entity should be considered as a legal person when legal personality is ascribable to that entity.[62] In other words, by attributing international responsibility to an international organization, legal personality must be ascribed to that international organization due to the fact that international legal personality is the ability of bearing rights and obligations/duties

[58] There is a discussion regarding on-duty and off-duty conduct which is not cantered to this thesis. It will therefore not be covered here. For further readings see Leck, Christopher "International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangement and the Attribution of Conduct" Vol. 10, Melbourne Journal of International Law (2009) 1-19, pp.5-6.
[59] Akande, Dapo "International Organizations" in Evans, M. (ed.) "International Law" 3rd ed., Oxford: Oxford university Press, 2010, 252-283, p. 254.
[60] Ibid.
[61] Zwanenburg, Marten "Accountability of Peace Support Operations", Martinus Nijhoff Publishers, Leiden, Boston, International Humanitarian Law Series, Vol. 9, 2005, p.51.
[62] Such entities are also likely to have rights and to some extent are able to enforce these on the plane of international law.

under international law.[63] So, it appears that the breaching of international obligations held by the entity invites legal consequences which lead to the accountability of the delinquent legal person.

Article 3 of DARIO states that "[e]very internationally wrongful act of an international organization entails the international responsibility of that organization",[64] And under Article 4 of DARIO, an international organization is internationally responsible for conduct consisting of an action or omission, if that conduct or omission "is attributable to that organization under international law; and constitutes a breach of an international obligation of that organization".[65]

Hence, legal personality, the elements of attribution and the breach of international law will be discussed in this thesis.

1-1-1 Legal Personality and its Sources

Therefore, the above criteria, the first one in particular, have been of crucial importance in order to recognize an IGO as such. Additionally, as Naert points out, there is no generally accepted definition of the term international organization, but several non-identical terms are used to describe its legal status, such as subject of international law, international legal capacity, legal person, and international legal personality.[66]

Lacking any treaty definition, the attention should be drawn to the ICJ Reparations for Injuries Advisory Opinion.[67] According to this opinion, international personality means the capacity of bearing rights and duties and the right to present an international claim,[68] in other words it means "the capacity to operate upon an international plane".[69] So, the Court acknowledged that the very international organization studied here - the UN - is an organization which possesses international personality and is capable of availing itself of obligations incumbent upon its members.[70] International legal personality will be discussed more in later paragraphs.

[63] Zwanenburg, Marten, op. cit. p. 65.
[64] DARIO, op. cit. Article 3.
[65] Ibid. Article 4.
[66] Naert, Frederik, "International Law Aspects of the EU's security and Defence Policy" with a Particular Focus on the Law of Armed Conflict and Human Rights, Intersentia, 2010, p. 262.
[67] Reparation for Injuries Suffered in the Services of the United Nations (Reparation for Injuries hereinafter), Advisory Opinion: I.C.J. Reports, 1949, 174-186. Available at: http://www.icj-cij.org/docket/files/4/1835.pdf.
[68] Ibid. pp.177-179.
[69] Ibid. p. 179.
[28] Ibid. pp. 177-180.

As mentioned in preceding paragraphs, before establishing international legal responsibility for an intergovernmental organization, referred to as an international organization hereinafter, legal personality must be recognized for the international organization in question. The legal personality of the international organization studied here - the UN - must be recognized in the domestic law of the Member states under Article 104 of the UNC. [71] But the UNC is silent on the international legal personality of this organization – its bearing of rights and duties which emanate from international law. There is moreover no treaty basis expressing that this international organization possesses international legal personality. Yet, customary international law has generated principles which concern issues such as international legal personality and responsibility.[72] Once customary international law, which is binding on all States, ascribes some traits such as personality to an organization, a subject of international law is created with rights and obligations.[73] It is perhaps needless to say that one of the subsidiary sources of international law are advisory opinions of the ICJ. The way these advisory opinions reflect the law, indicates well how the ICJ will handle a similar case between States in the future. [74]

Before going through the ICJ advisory opinions regarding international legal personality, the different schools of thoughts in this regard should be mentioned. There are two schools of thought as regards how international legal personality of an international organization is to be established, the inductive[75] and the objective approach. According to the former, the legal personality of an international organization follows from the capacities, powers, rights, and duties conferred on that organization in its constituent instrument and developed in practice. Hence, it will only have personality if its members intended it to have such personality or if it can be asserted that such personality is necessary for the fulfilment of the functions ascribed to it by its members.[76] According to the latter approach, the organization has international legal personality as long as certain objective criteria set out by law are fulfilled. These criteria, as have been mentioned in preceding paragraphs, are as follows: composing predominately of States or/and other international organizations or/and other entities, being established under international law, and possessing autonomous organs which have a

[71] Article 104 Charter of United Nations: The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
[72] Akande, Dapo, op. cit. pp. 257-258.
[73] Ibid. p.259.
[74] Ibid. pp. 255-256.
[75] Some Scholars call it as subjective school of thought for example Zwanenburg states that there are two theories explaining international legal personality of international organization, namely, objective and subjective theories (Zwanenburg, Marten, pp. 65-66) instead of objective and inductive theories.
[76] Akande, Dapo. op. cit. pp. 256-257.

separated will from that of the members. Thus, personality is under this approach not derived from the will of the members as such, but from the presence of the criteria stated in the definition of an international organization. [77]

Returning to the ICJ Advisory Opinion regarding Reparation for Injuries Suffered in the Service of the United Nations, it *inter alia* answered the question whether the UN had the "capacity to bring international claim" against a State that was allegedly responsible for damages which the UN had suffered. To answer this question, the ICJ considered, initiatively, the characteristics of the UN and investigated whether they included the right to present international claims. Then, the ICJ determined if the UN possessed international legal personality. It stated that holding international legal personality meant that an entity must be capable of availing itself of obligations incumbent upon its members. Then, the court concluded that the UN was an international legal person and consequently a subject of international law and capable of bearing international rights and duties. Thus, it should possess international legal personality to carry out the intentions of its founders – the Member States. Additionally, the sum of its international rights comprised the right of bringing international claims to preserve its rights.[78]

All in all, what can be inferred from the above mentioned ICJ Advisory Opinion, as Akande points out, is that it is the members of the international organization who ascribe characteristics which are necessary to satisfy the criteria set out by international law to qualify as an international organization. Once the members ascribe those characteristics making it capable of fulfilling the above mentioned objective criteria predetermined by international law, the rules of international law confer international personality on the organization with all its consequences.[79] Therefore, the ICJ has taken the middle position between the two above-mentioned extremes.

However, Zwanenburg believes that the ICJ does not support the objective theory but rather the inductive or subjective theory. He states that members can expressly or implicitly give legal personality to an international organization by provisions of constitution which reflect members' will. Also, he mentions that the ICJ referred to the intention of the founders

[77] Ibid. pp. 254, 257.
[78] Reparation for Injuries, op. cit. pp. 177-180.
[79] Akande, Dapo, op. cit. p. 257.

in several passages of its opinion[80] and quotes the following statements of the ICJ opinion to support his idea:

> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. I t must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person.[81]

Zwanenburg notes that there are no radical differences, practically, between the effects of these two theories[82] if, as Akande states, one accepts that "the characteristics which confer international legal personality on international organizations must necessarily be conferred on it by its members."[83] Once the members of the organization confer those characteristics through constituent instrument or subsequent practice, international law endows international organization with international personality along with its all consequences.[84] Arguably, in the above-mentioned Advisory Opinion, the ICJ searched to see whether the characteristics which are necessary for international personality had been conferred on the UN by its members.[85]

1-1-2 The Consequences of Possessing International Legal Personality

Having international legal personality, an international organization has separate rights and duties from those of its members. It therefore has an independent personality which can on its own bring a claim before international tribunals, if such tribunals have jurisdiction to deal with the case, for the purpose of preserving its rights through the mechanisms by which international disputes are settled. It also bears responsibility for the non-fulfilment of its obligations. [86] It should also be mentioned that, as Akande points out, there is an assumption according to which if an international organization itself is responsible for violation or non-

[80] Zwanenburg, Marten, op. cit. pp. 65-66.
[81] Reparation for Injuries, op. cit. p. 179.
[82] Zwanenburg, Marten, op. Cit. p. 66.
[83] Akande, Dapo. Op. cit. p. 257.
[84] Ibid.
[85] Ibid.
[86] Ibid. pp. 257-258.

observance of its obligations, its members are not liable in regard to the organization's obligations. However, this is merely a presumption and can be displaced.[87]

Moreover, the creation of new international obligations and rights is the other consequence of possessing international legal personality. Naert holds that "an entity with international legal personality may, within its powers, to some extent create new international obligations and rights (though not necessarily new laws)".[88] The internal manifestation thereof is decision-making, and treaty-making is considered as its external manifestation.[89]

The aforementioned consequences are those which are inherent in any international legal personality. But, there are some consequences which do not apply to all of them and which derive from the nature of the personality of an international organization like the UN. One of these consequences is the immunity and privileges - conferred by customary international law - from which the international organization can benefit to function independently and efficiently within a host State.[90] The other one is the competence of an international organization to enter into certain types of treaties such as agreements with host States or settling claims by or against the organization.[91] It is important to mention that an international organization possesses objective personality and is therefore opposable also to non- members. In other words, non-members are obliged to accept that the international organization is a separate legal person. [92]

In sum, an international organization such as the UN has a separate legal personality from that of its Member States, and consequently, rights and obligations which bring it responsibility and accountability for all acts or omissions attributable to it.

1-1-3 Breach of International Law Obligations and the Attribution of the Conduct of Peace Support Operations

As has been mentioned in the preceding paragraphs, a legal person may be held responsible for a breach of obligations under international law which is attributable to him. But what are these obligations and how they are attributable to the UN or/and States?

[87] Ibid., p. 258
[88] Naert, Frederik, op.cit. p. 266.
[89] Ibid.
[90] Akande, Dapo. op. cit. p. 258.
[91] Ibid.
[92] Ibid. p. 259.

Admittedly, there are some obligations under international law which are incumbent upon both international organizations and States. But, the aspects of these obligations might be different for States compared to those of international organizations. The question is then whether international organizations are subject to the rules applicable to States and if so, with what changes, if any. Clearly, international organizations are subjects of international law but they are different from States - the traditional subject of international law.[93]

The other important issue is attribution of conduct of PSO personnel to the UN, and/or TCSs. Indeed, by referring to these rules and instruments, the obligations whose breach invites responsibility will be recognised and also the issue of how, to what extent and to whom the conduct of PSOs is attributable will be inferred. In other words, these international instruments define a linkage between the conduct of PSO personnel and the responsibility of the UN/TCSs. As Shaw states, attributability (also termed imputability) has been described as a legal fiction which associates the actions or omissions of officials, organs, or individuals - with a certain connection to the State or the UN - to the State or the UN itself. This attributability represents the responsibility of a State or the UN for damages to the property or person of an alien.[94]

Thus, different international obligations are binding on international organizations and States and will be discussed in other chapters of this thesis. These typically derive from customary international law and treaties. Of relevance to customary law are instruments like UNGA and UNSC reports and resolutions, the work of the ILC, jurisprudence and advisory opinions of the ICJ and so forth. Emphatically, the breach of these obligations during PSOs invites legal consequences - international responsibility - for the actors involved in PSOs.

To sum up, there are two difficulties regarding the attribution of conduct to PSOs. On the one hand, the multiplicity of actors involved in these operations and their tangled relationship make this issue complicated. On the other hand, this issue is intertwined with the question of State responsibility as well as the responsibility of the UN as an international organization.[95]

[93] Naert, Frederik, op. cit. p. 257.
[94] Shaw, Malcolm N. "International law" 6th Edition, Cambridge: Cambridge University Press, 2008, p. 786.
[95] Zwanenburg, Marten, op. cit. p. 51.

2 Peace Support Operations and the Personnel of such Forces

Since one of the main aspects of this thesis is the responsibility for personnel of peacekeeping forces and the peacekeeping operation itself, rendering a definition and description of PSOs would seem necessary. Owing to the fact that there is no unique definition of this term, defining it is a little bit difficult.

In 2000, the panel on United Nations Peace Operations, whose report is called the Brahimi report[96] in reference to the chairman of that panel, pointed out that "United Nations peace operations entails three principal activities: conflict prevention and peacemaking; and peace building".[97] Additionally, there are different definitions given by officials of the UN, doctrines from different national publications regarding armed conflict, and scholars. The UN General Assembly made the first attempt to clarify the equivalent term to PSOs in use then by forming a special committee on peace operations in 1965. The outcome of the committee, in 1974, was the 'Draft Articles or Guidelines for United Nations Peacekeeping Operations under the authority of the UNSC in accordance with the Charter of the United Nations'. Although the most recent draft of these Articles was published in 1977, they have unfortunately not been finalized yet.[98] On the other hand, the term PSOs, as a newer term, is naturally not defined in the UNC. Zwanenburg states in this context that "the concept [of peace support operations, peace operations, or peacekeeping] was invented as an improvised and practical response to the failure of the United Nations Charter system of collective security"[99] under Article 43 and, in general, to the lack of enforcement actions because of the major powers deadlock during the Cold War.[100] Actually, it was a reply to the lack of consensus of the permanent members of the UNSC due to divisions between the Eastern and the Western blocks.[101]

Before going further, it should also be pointed out that PSOs have been developed over three generations. These generations will show how the concept of PSOs have been transformed as time goes by.

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[96] Report of the Panel on United Nations Peace Operations of 21 August 2000 (Report of the Panel hereinafter). UN Doc.A/55/305, S/2000/809.
[97] Ibid. para.IO.
[98] Zwanenburg, Marten, op.cit. p. 11.
[99] Ibid.
[100] Frostad, Magne, "Good Guys Wearing Cuffs- The Detention of Peacekeepers" in German Yearbook of International Law, vol. 45, Duncker & Humblot, Berlin, 2002, 291-330, p.292.
[101] Gray, Christine, "The Use of Force and The International Legal Order" in Malcolm D.Evans (ed.) "International Law" 3rd Edition, Oxford University Press, 2010, 615-650, p.638.

In 1947, pursuant to the adoption of a partition plan for Palestine by the UNGA and the claim of Jewish leaders to establish the state of Israel, fighting between the parties in question escalated. The UNSC called for a cease-fire accepted by the parties. Because of the Cold War, the United States and the Soviet Union were reluctant to let any further parties intervene. Therefore, in 1948, the UNSC established a neutral third party, composed of unarmed military observers and called United Nations Truce Supervision Organisation (UNTSO), to supervise the observance of the cease-fire.[102] This is the example of observer mission which consists of unarmed military and civilian personnel who monitor the implementation of cease-fire agreements. Otherwise, PSOs forces are typically light armed and include fully equipped infantry contingents.[103]

However, in 1960, a rather untypical peace operation from the earlier ones of the UN took place within the Congo, Opération des Nations Unies au Congo (ONUC) - in English the 'United Nations Operations in the Congo'. It was established by the UNSC and its mandate expanded to the use of armed force beyond self-defence. The mandate authorized the Secretary-General to cooperate with the government and provide the government with necessary military forces in order to remove all the Belgian forces from the Republic of the Congo and to prevent the occurrence of civil war.[104] The very important point which differentiates this generation from the second one is that the UNSC never made any express reference to Chapter VII in authorising armed force to prevent civil war and to secure the removal of all Belgian forces from Congo, although it used the language of that Chapter.[105] It thus at least foreshadowed the later second generation mission.

The second generation was developed after the end of the Cold War. The UNSC expanded its peace support operations to over forty forces, mostly dealing with intrastate conflicts. In 1992, the UN Secretary General, in his report 'Agenda for Peace', took an optimistic and expansionist view regarding preventive diplomacy, peacekeeping and peacemaking. This is obvious for example in para 29 of his report:

> In conditions of crisis within a country, when the Government requests or all parties consent, preventive deployment could help in a number of ways to alleviate suffering and to limit or control violence. Humanitarian assistance, impartially provided, could be of critical importance; assistance in maintaining security, whether through military, police or civilian personnel, could save lives and develop conditions of safety in which

[102] Zwanenburg, Marten, op. cit. p. 12.; Also see UNSC Resolution 50 of 29 May 1948, UN Doc. S/RES/50(1948).
[103] Millennium Report, op. cit. p. 2.
[104] http://www.un.org/depts/DPKO/Missions/onucM.htm. Access: 24 September 2013 at 13:35 hrs.
[105] Gray, Christine, op. cit. p.639.

> negotiations can be held; the United Nations could also help in conciliation efforts if this should be the wish of the parties. In certain circumstances, the United Nations may well need to draw upon the specialized skills and resources of various parts of the United Nations system; such operations may also on occasion require the participation of non-governmental organizations.[106]

It seems that second generation PSOs consist of operations which are ambitious and where the use of force may go beyond self-defense. Here, military and humanitarian operations seek to settle Cold War conflicts and achieve national reconciliation and the re-establishment of effectual governments. The typical examples of these operations are mostly Namibia, Angola, Mozambique, Afghanistan, Cambodia, and Central America; and the operations envisaged serious problems of non-cooperation in Angola and Cambodia.[107]

The third generation has evolved from 1999 up to the present, when the distinction between peacekeeping operations and enforcement operations under Chapter VII has become even more blurred. In 1999, the United Nations Interim Administration Mission in Kosovo (UNMIK)[108] and the United Nations Transitional Administration in East Timor (UNTAET)[109] were established. These operations were different from any other missions undertaken by the UN before. In each place, the UN established a transitional administration to build peace within a territory. In other words, the UN sought to accomplish all the functions of a State.[110] It appears that by conducting these missions the UN entered into the State without the need for consent of the former government and effectively ruled the territory. And when that territory was ready to govern itself, the UN in different ways transited the power to the new government. It would seem as if that the institution of Responsibility to Protect (R2P), Disarmament, Demobilisation, and Reintegration, and Transitional Justice may be encompassed by these missions. These issues, however, are far beyond the Scope of this thesis, so they will not be covered here. Nevertheless, the issue of R2P will be considered to the extent required for addressing how HR is binding on the UN through R2P.

Coming back to the definition of PSOs, the term has been defined in different ways by different scholars. Before rendering a comprehensive definition of the UN PSOs, it should be noted that PSOs may also be grouped into two categories: 'peacekeeping operations' and

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[106] Report of Secretary General, An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping, UN Doc. A/47/277 - S/24111, 17 June 1992, p.8, para 29. Available at: http://www.unrol.org/files/A_47_277.pdf .
[107] Gray, Christine, op. cite. p.639.
[108] It was established by UNSC Resolution No. 1244 at its 4011th meeting, on 10 June 1999, UN Doc. S/RES/1244 (1999), Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244%281999%29.
[109] It was established by UNSC Resolution No. 1272 at its 4057th meeting, on 25 October 1999, UN Doc. S/RES/1272 (1999), Available at: http://www.worldlii.org/int/other/UNSCRsn/1999/52.pdf.
[110] Gray, Christine, op. cite. p. 640.

'peace enforcement operations'. Hence, UN PSOs includes these two extremes which are secerned by the military doctrine of many armed forces such as the United States or the Netherland. The former is an impartial military operation accompanied with the consent of the host State where force will not be used except in self-defence; such as traditional PSOs conducted by the UN. The latter means the use of military force or the threat of its use in terms of an international mandate or authorization to retain or regenerate international peace and order, e.g. the use of force to compel a delinquent State to comply with a resolution or sanction.[111]

As far as the UN and the ICJ are concerned, peacekeeping operations are distinguished from enforcement actions. In 1962, the UNGA asked the ICJ to give an advisory opinion regarding the interpretation of the UNC Article 17, para. 2. The issue concerned the expenses allocated to the peace operation in Congo. The ICJ held that

> [i]t can be said that the operations of ONUC did not include a use of armed force against a state which the UNSC, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilised in the Congo were not authorised to take military action against any state. The operation did not involve preventive or enforcement measures against any state under Chapter VII and therefore did not constitute action as that term is used in Article II.[112]

Whereas the ICJ here defines 'enforcement action' as 'military action' against a state under Chapter VII of the Charter,[113] the question is then how military action against non-State entities can be categorised?

The UN itself appears to define 'peacekeeping operations' as operations conducted by the UN without reference to the Chapter VII, whereas those which refer to that Chapter are called 'enforcement'. The aforementioned distinction is reflected in reports made by the UN. For example, according to the Brahimi report "where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the UNSC, acting under Chapter VII of the Charter".[114] Other reports show that peacekeeping operations are referred to as the operations which are not enforcement under Chapter VII, and which are based on the consent of the host state. For example, the report on the work of the UN for 2003 submitted by the UN Secretary-General to the UNGA, categorized the UN

[111] Zwanenburg, Marten, op. cit. pp. 31-32.
[112] Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 20 July 1962: I.C.J. Reports 1962, 51-181,p. 151. Available at: http://www.icj-cij.org/docket/files/49/5259.pdf.
[113] Zwanenburg, Marten, op. cit. pp. 31.
[114] Report of the Panel, op. cit. para.IO.

missions in Ethiopia and Eritrea, in the Democrat Republic of Congo, and in Sierra Leone under the heading 'peacekeeping and peacebuilding'.[115]

It is also worth to point out that PSOs are different from international armed conflict in the sense that they are not inherently international armed conflict, but enforcement operations could admittedly easily become international armed conflict. Both PSOs and internationally acting States may establish an international armed conflict, and thereby activate International Humanitarian Law (IHL)[116], but the PSOs will typically have at least more legitimacy.

Thus, it appears that PSOs include both operations established by the UN without reference to Chapter VII of the Charter and those with enforcement powers under that Chapter.

Concerning the personnel of PSOs forces, they are UN officials (both staff and official volunteers) and "experts performing missions," a technical term that includes military observers, military advisers, military liaison officers, consultants, lightly equipped soldiers, and civilian elements.[117]

[115] Report of the Secretary-General on the Work of the Organization of 28 August 2003, UN Doc. A/58/I. pp. 8-10, para. 40, 42 and 45. Available at: http://legal.un.org/ola/media/info_from_lc/A_58_1E.pdf.

[116] "International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict. International humanitarian law is part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States – treaties or conventions –, in customary rules, which consist of State practice considered by them as legally binding, and in general principles. International humanitarian law applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter." ICRC, Advisory Service on International Humanitarian Law "What is International Law?" 2004, Available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf ; See also Bouvie, Antoine A. "International Humanitarian Law and the Law of Armed Conflict" Harvey J. Langholtz, Ph.D. (series editor), Peace operation Training Institute, Second Edition, 2012, pp. 12-13.

[117] Sweetser, C. op. cit. p. 1645; Frostad, Magne (2002), op. cit. p.293; See also Larsen, Kjetil M. op. cit. p.13.

Chapter 3: Responsibility of the United Nations for its Sub-organs and What It Authorizes

International responsibility is influenced by the attribution of an internationally illegal conduct.[118] Therefore, it is important to establish which legal instruments regulate SEA by the personnel of UN PSOs and to which subjects of international law they can be attributed, *i.e*. the UN or TCS. Here, it is worthwhile to note that attribution of conduct to the TCS or the UN is not the only way of ensuring observance of IHL or HR.[119] When an HR or IHL obligation is infringed, even if the act is not attributable to a State or the UN, individual responsibility may also exist under international criminal law. However, individual criminal responsibility will not be covered by this thesis.[120]

1 Identifying Human Rights binding on the United Nations

It appears that the relevant field of international law for SEA committed by its PSOs personnel is HR. Since an international organization cannot be a party to HR treaties, only by identifying sources of HR obligations in general international law can such obligations be imposed upon the UN.[121] As Larsen states there are three different ways in which the UN can be bound by HR obligations. First, the UN as a subject of international law is bound by international HR standards to the extent that these standards have reached international customary law status (external conception). Second, the UN is bound by the HR obligations under the UNC in order to promote HR standards (internal conception). Third, the UN is bound by HR standards inasmuch as its Member States are bound (hybrid conception)[122].[123]

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[118] See DARIO, op. cit. Articles 3-4.
[119] Larsen, Kjetil M. op. cit. p.105.
[120] For more information in regard to criminal responsibility of PSOs personnel, see Ferstman, Carla "Criminalizing Sexual Exploitation and Abuse by Peacekeepers" Special Report, United States Institute of Peace, September 2013, Available on http://www.usip.org/sites/default/files/SR335Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peackeepers.pdf '; O'Brien, Melanie op. cit.; Kent, Vanessa L, "Peacekeepers as Perpetrators of Abuse: Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations" Vol. 14(2), African Security Review (2005), pp. 85-92.
[121] 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, and Schmitt Pierre, (eds.), Oxford: intersentia, 2010, 51-128, p. 56.
[122] The hybrid conception means that whenever a HR obligation is binding on Member States, it is binding on the UN as well. However, because the UN cannot become a party to the conventions or treaties such as ECHR and ICCPR - when such obligation emanate from a treaty - it cannot be held responsible under the treaty's mechanisms for establishing responsibility. But, it does not mean the UN's responsibility is totally excluded. It means the obligations of Member States may influence the obligations of the UN and vice versa [on the basis of *travaux preparatoires*]. Larsen, Kjetil M. op. cit. p.12; for more readings see Naert, Frederik "Binding international Organizations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organizations" in Wouters, Jan, Brems, Eva, Smis, Stefaan, and Schmitt Pierre, (eds.), Oxford: intersentia, 2010, 129-168.
[123] Larsen, Kjetil M. op. cit. p.12. It seems that the latter encompasses the first two ways since the Member States are also bound by UDHR which constitutes international customary law status and the UNC imposes some HR standards to them as well.

In the following paragraphs, the Universal Declaration of Human Rights (UDHR)[124] and the UNC will be looked at with the views of establishing whether they oblige the UN to comply with HR obligations. These instruments, as held by Naert, admittedly do not explicitly impose HR obligations on the UN itself, but on the basis of the *travaux preparatoires*[125] it seems that the intention of founding fathers was to bind the UN and this is also the prevailing view in the literature.[126]

Admittedly, UDHR reflects, to a large extent, international HR standards. In legal doctrine, there is a growing consensus that most of the rights emanate from UDHR, have obtained the status of legally binding norms[127] that some have achieved *jus cogens*[128] Character. It is an established fact that contemporary PSOs play a prominent role in the protection of HR, and that international HR norms – which derive from UDHR - provide a normative framework for the conduct of involved actors, *inter alia* the UN.[129] A wide range of statements and documents from the UN have acknowledged that HR norms constitute the normative framework for such conduct.[130] The Capstone Doctrine[131] is a good example of the above-mentioned idea:

> International human rights law is an integral part of the normative framework for United Nations peacekeeping operations. The Universal Declaration of Human Rights, which sets the cornerstone of international human rights standards, emphasizes that human rights and fundamental freedoms are universal and guaranteed to everybody. United Nations peacekeeping operations should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates […] United Nations peacekeeping personnel – whether military, police or civilian should act in accordance with international human rights law and understand how the implementation of their tasks intersects with human rights. Peacekeeping personnel should strive to ensure that they do not become perpetrators of human rights abuses. They

[124] Universal Declaration of Human Rights (UDHR), adopted by United Nations General Assembly Resolution 217 A (III), Paris, 10 December 1948. Available at: http://watchlist.org/wordpress/wp-content/uploads/Universal-declaration-of-human-rights.pdf .

[125] The literary meaning of this French term is preparatory works. It constitutes the materials used in preparing the ultimate form of an agreement or statute, especially an international treaty. The materials constitute the legislative history. This is a secondary form of interpretation and is used to clarify the intent of the makers of the statute or treaty. http://definitions.uslegal.com/t/travaux-preparatoires/; For more readings see Ris, Martin "Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties" Vol. 14, Issue 1, Boston College International and Comparative Law Review (1991) 111- 136, Available at: http://lawdigitalcommons.bc.edu/iclr/vol14/iss1/6.

[126] Naert, Frederik, op.cit. pp. 389-390.

[127] De Schutter, Olivier, op. cit. p. 56.

[128] Article 53 1969 VCLT defines *jus cogens* as a peremptory norm of general international law and reads that "[…] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; genocide, crimes against humanity, racial discrimination, rules prohibiting in slavery have *jus cogens* status. Crawford, James "Brownlie's Principles of Public International Law" 8th edition, Oxford University Press, 2012, p. 595.

[129] Larsen, Kjetil M. op. cit. p.4.

[130] Ibid.

[131] Ibid.

> must be able to recognize human rights violations or abuse, and be prepared to respond appropriately within the limits of their mandate and their competence. United Nations peacekeeping personnel should respect human rights in their dealings with colleagues and with local people, both in their public and in their private lives. Where they commit abuses, they should be held accountable.[132]

It appears that, according to the above-mentioned doctrine, the UN has acknowledged that the personnel are responsible, individually, for HR violations within the limits of their mandate and their competence. It seems that the individual personnel are accountable for HR violations criminally; and the UN, somehow, has recognized its civil responsibility[133] as well by limiting the responsibility of its personnel to their competence and mandates. It does not mean that individuals incur responsibility directly from HR. Although, they may violate a right considered by HR, they naturally have onus due to violate a code of criminal law of the state in which the crime occurs. They therefore have indirect criminal responsibility in connection with HR.

Moreover, as discussed in chapter 2, PSOs include both peacekeeping operations and enforcement Operations, but the scope of the above-mentioned document - Capstone Doctrine - is obviously confined to peacekeeping operations. But as Larsen states, this explicit limitation does not affect the general introductory remark on the normative framework for PSOs.[134]

Evidently, fundamental HR should be universally respected. The UN and all Member States are pledged to cooperate in order to promote and observe the HR standards.[135] According to the Article 5 of the UDHR, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[136] Thus, SEA carried out by personnel of UN PSOs forces constitute treatment covered by the mentioned Article and do therefore establish responsibility for the actors involved in PSOs - the UN in particular. Notably, SEA of women and children can be seen as a form of modern slavery;[137] and Article 4 of the UDHR indicates that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms".[138] It noteworthy that the prohibition of slavery and the slave trade is amongst those international HR which have been recognized as having

[132] UN Peacekeeping operations: Principles and Guidelines (Capstone Doctrine), published by the UN Department of Peacekeeping Operations (DPKO) 18.1.2008, section 1.2, pp. 14-15. Available at: http://pbpu.unlb.org/pbps/library/capstone_doctrine_eng.pdf.
[133] The focus here is on non-penal consequences.
[134] Larsen, Kjetil M. op. cit. p.5, footnote no. 4.
[135] UDHR, op. cit. Preamble.
[136] UDHR, op. cit. Article 5.
[137] Muntarbhorn, Vitit, op. cit. p. 5.
[138] UDHR, op. cit. Article 4.

the character of *jus cogens*.[139] Therefore, it seems that this Article prohibits SEA of all people, including women and children, and obliges the UN and Member States to comply with it.

Moreover, promoting and encouraging respect for HR is referred to in different chapters of the UNC and the UN is naturally bound by its very own constituent instrument. The term 'human rights' is repeated 6 times in the Charter in Articles 1, 13, 55, 62, 68, and 76.[140] For example, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[141], referred to in Article 1 of the Charter, is one of the purposes for establishing the UN. Likewise, one of the purposes of international economic and social cooperation under chapter IX of the UNC is to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"[142]. Under Article 56, the pre-mentioned obligations are clearly imposed on both the UN itself and its Member States in order to fulfill this objective.[143] Consequently, it would even follow from Article 103 of the UNC that any international obligations conflicting with the obligation to respect and promote HR should be disregarded.[144]

Thus, it appears that the UN has acknowledged that HR obligations are binding on it as "Charter law" when it carried put the operations which it authorizes itself under UNC chapter VI, VII or somewhere between. Therefore, it is responsible for any SEA of women and children of the local population committed during PSOs by its personnel.

Concerning customary international law, the basis for its apparently binding nature is rarely examined in detail in regard to international organizations and scholars who have widely studied this issue have come to discrepant conclusions.[145] That customary international law may be binding on the UN, nevertheless, seems to be confirmed by Article 38 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT-IO)[146] which provides

[139] Crawford, James (2012), op. cit. p. 595.
[140] In Articles 1(3), 12(b), 55(c), 62(2), 68, and 76(c), respectively, promoting and encouraging respect for human rights, assisting in the realization of human rights, universal respect for and observance of human rights, promoting respect for and observance of human rights, promotion of human rights, encourage respect for human rights have been considered.
[141] UNC, op. cit. Article 1(3).
[142] UNC, op. cit. Article 55(c).
[143] UDHR, op. cit. Article 56.
[144] UNC, op. cit. Article 103; for more readings see De Schutter, Olivier, op. cit. pp. 94-102.
[145] Naert, Frederik, op. cit. p. 393.
[146] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force), 1-39, Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf; the very fact that customary international law may be binding on the UN might have been seen as rendering the claim that Article 38 of 1986 VCLT-IO reflects customary international law.

that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such".[147]

However, there is little relevant practice to establish in customary law international responsibility of international organizations for HR violations. Thus, it is naturally difficult to identify relevant international customary rules.[148] However, it is noticeable that conduct by UN PSOs personnel has been useful in the development of principles of responsibility for the UN.[149] And UN practice in this field has been comprehensive and coherent enough and done with the essential degree of *opinion juris*[150] to be considered as customary international law.[151] Malcolm Shaw points out that "international organizations in fact may be instrumental in the creation of customary law".[152] The ILC also stated that records of accumulative practice of international organizations may be considered as evidence of customary international law.[153]

2 Self-made Bindings

The UN affirms explicitly in Ten Rules: Code of Personal Conduct for Blue Helmets (UN Code of Conduct hereinafter)[154], that its personnel has a commitment to respect local laws, customs and practices, to treat host country inhabitants with respect, courtesy and consideration, and to act with impartiality, integrity and tact.[155] The UN binds itself to observe HR and not to commit SEA, especially during PSOs. An explicit statement of UN Secretary General, Ban Ki-moon, confirms this claim. He expresses that "the United Nations and I personally, are profoundly committed to a zero- tolerance policy against sexual exploitation or abuse by our own personnel. This means zero complacency. When we receive credible allegations, we ensure that they are looked into fully. It means zero impunity."[156]

Furthermore, the UNGA and the UNSC have issued several resolutions indicating the commitment of the UN to observe HR - women's and children's rights in particular. For

[147] Ibid. p.19, Article 38.
[148] Larsen, Kjetil M. op., cit. p. 101.
[149] Ibid.
[150] Opinio juris is described as "the psychological component of CIL because it refers to an attitude that nations supposedly have toward a behavioral regularity." Goldsmith, Jack L. & Posner, Eric A. "A Theory of Customary International Law" John M. Olin Law & Economic Working Paper No. 63, 2D Series, Available at www.law.uchicago.edu/files/63.Goldsmith-Posner.pdf.
[151] Larsen, Kjetil M. op. cit. p. 101.
[152] Shaw, Malcolm N., op. cit. p. 83.
[153] Yearbook of the ILC, 1950, Vol. II, pp. 368-372. Available at: http://legal.un.org/ilc/publications/yearbooks/1950.htm.
[154] UN, Ten Rules: Code of Personal Conduct for Blue Helmets (UN Code of Conduct hereinafter) – lack of UN Doc.- available at: http://www.un.org/en/peacekeeping/documents/ten_in.pdf
[155] Ibid. Codes 1-3; see also https://www.un.org/en/peacekeeping/issues/cdu.shtml
[156] https://www.un.org/en/peacekeeping/issues/cdu.shtml Access: March 7, 2014, at 21:15 hrs.

example, UNSC resolution 1612 (2005) welcomes the efforts of UN PSOs in implementing the Secretary-General's zero-tolerance policy on sexual exploitations and abuses in order to make sure that personnel are in full compliance with the UN Code of Conduct[157]. The UNSC also asked the Secretary-General to take all required measures to prevent misconducts, to keep the UNSC informed about it, and to urge TCSs to apply preventive action including pre-employment awareness training. TCSs should also take disciplinary action to ensure the accountability of the personnel in cases of SEA committed by them.[158]

The other document in this regard which may serve as a good example is the Statement of Commitment on Eliminating Sexual Exploitation and Abuse by UN and Non-UN Personnel adopted at the High-level Conference on Eliminating Sexual Exploitation and Abuse by UN and NGO Personnel on 4 December 2006 in New York. According to this Statement, the UN binds itself to prevent future sexual exploitations and abuses by its personnel. It also reaffirms the importance of the observance of regulations binding on the UN in regard to SEAs and the providing of assistance to victims.[159] It recalls that six core principles relating to sexual exploitation and abuse[160] - adopted by the Inter-Agency Standing Committee Working Group in July 2002 - are binding on UN staff and all personnel thereof.[161] By adoption of UNGA resolution 62/214, the UN has profoundly condemned all acts of SEA by its personnel and ensured the appropriate and timely assistance to the victims of SEA involving its personnel.[162]

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[157] For further information regarding UN standards of conduct see: http://cdu.unlb.org/UNStandardsofConduct/CodeofConduct.aspx.

[158] UNSC Resolution No. 1612, Adopted at its 5235th meeting in 26 July 2005, S/RES/1612(2005), para 11, p. 4. Available at: http://watchlist.org/wordpress/wp-content/uploads/SC-Resolution-16121.pdf.

[159] Statement of Commitment on Eliminating Sexual Exploitation and Abuse by UN and Non-UN Personnel (Statement of Commitment hereinafter)adopted at the High-level Conference on Eliminating Sexual Exploitation and Abuse by UN and NGO Personnel on 4 December 2006 in New York, USA, pp.1-5, Available at: http://cdu.unlb.org/Portals/0/PdfFiles/PolicyDocK.pdf.

[160] The 2002 Report and Plan of Action of the IAUNSC Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises established six core principles relating to sexual exploitation and abuse, to be incorporated into the codes of conduct and staff rules and regulations of member organizations.These principles are as follows: 1. "Sexual exploitation and abuse by humanitarian workers constitute acts of gross misconduct and are therefore grounds for termination of employment. 2. 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 regarding the age of a child is not a defense. 3. 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 exchange of assistance that is due to beneficiaries. 4. Sexual relationships between humanitarian workers and beneficiaries are strongly discouraged since they are based on inherently unequal power dynamics. Such relationships undermine the credibility and integrity of humanitarian aid work. 5. Where a humanitarian worker develops concerns or suspicions regarding sexual abuse or exploitation by a fellow worker, whether in the same agency or not, he or she must report such concerns via established agency reporting mechanisms. 6. Humanitarian workers are obliged to create and maintain an environment which prevents sexual exploitation and abuse and promotes the implementation of their code of conduct. Managers at all levels have particular responsibilities to support and develop systems which maintain this environment." See Statement of Commitment, op. cit. p. 5; Report of the Inter-Agency Standing Committee Task Force on protection from Sexual Exploitation and Abuse in Humanitarian Crises of 13 June 2002, Plan of Action, Section I.A. Available at: http://www.unicef.org/emerg/files/IASCTFReport.pdf.

[161] Statement of Commitment, op. cit. p.1.

[162] UNGA Resolution No. 214 on 'United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel' adopted at its 62end session in March 7, 2008, UN

Furthermore, the prohibition of SEA by PSOs personnel was considered in the 2005 World Summit Outcome resolution[163] through which the UNGA expressed its worries about "the increasing number of children involved in and affected by armed conflict, as well as all other forms of violence, including domestic violence, sexual abuse and exploitation and trafficking".[164] It also emphasized on the necessity of cooperation between all States to adopt policies whereby national capacities will be strengthened in order to improve the situation of those children and to assist in their rehabilitation and reintegration into society.[165]

Additionally, the UNGA has adopted some resolutions on the prohibition of SEA regarding specific regions, in which its PSOs personnel are serving, pursuant to the reports of the Office of Internal Oversight Services on SEA crisis in those regions. For example, under the resolution on Investigation into Sexual Exploitation of Refugees by aid Workers in West Africa,[166] the UNGA condemned any SEA of refugees and internally displaced persons particularly women and children,[167] and emphasized that the highest standards of conduct and accountability are required of all personnel serving in PSOs.[168] It also recognized the shared responsibility of the UN and TCSs, within their respective competence, to ensure that all PSOs personnel who commit SEA are held accountable,[169] and reiterated the necessity of specific responsibilities of humanitarian aid workers being incorporated into codes of conduct in order to prevent SEA and to adopt appropriate disciplinary procedures for dealing with such violations when they occur.[170]

Among all the relevant UN resolutions and documents, the Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse[171] (S.G. Bulletin hereinafter), where the zero-tolerance policy of the UN has been embodied, is the most prominent one. The Secretary-General reiterates the prohibition of SEA as misconduct of UN staff and personnel and promulgates specific standards in order to protect women and

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Doc. A/RES/62/214, pp.1-2. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/214&Lang=E; See Zeid Report, op. cit.; Resolutions 59/281 of 29 March 2005, 59/300 of 22 June 2005, 60/263 of 6 June 2006 and 61/291 of 24 July 2007, U.N.

[163] UNGA, Resolution 2005 World Summit Outcome adapted by at its 60th session, UN Doc. A/RES/60/1, 24 October 2005, 1-38.Available at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf.

[164] Ibid. p.31, para 141.

[165] Ibid.

[166] UNGA, Resolution on Investigation into Sexual Exploitation of Refugees by aid Workers in West Africa, 22 May 203, UN Doc. A/RES/57/306, Available at: http://www.refworld.org/docid/3f45e4f40.html.

[167] Ibid. para. 2,3.

[168] Ibid.

[169] Ibid. para 9.

[170] Ibid. para 8.

[171] Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, October 9, 2003, UN Doc. ST/SGB/2003/13. Available at: http://www.unhcr.org/405ac6614.html; For further readings in regard to UN resolutions on prohibition of SEA see Secretary-General's Bulletin, UN Doc. ST/SGB/1999/13 (1999); UN. Doc. S/2012/376 (2012); UN Doc. S/009/277 (2009); UN. Doc. A/59/782 (2005); UN. Doc. A/60/861 (2006); UN. Doc. A/61/957 (2007); UN. Doc. A/62/890 (2008); UN. Doc. A/63/720 (2009); UN. Doc. A/64/669 (2010); UN. Doc. A/65/742 (2011).

children as the most vulnerable part of the population. These standards iterate existing obligations –but are not an exhaustive list of obligations- under the UN staff regulations and rules.[172] To reiterate the importance of observance of HR by UN personnel, this last citation from the UN staff rules would be worthwhile: "Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them".[173]

As shown above, the self-binding mechanism has by definition not been imposed on the UN from any other entity. The self-binding obligations are voluntary and remain internal to the UN.[174] According to De Schutter, self-regulation is the ideal mechanism through which the responsibility of international organizations such as the UN can be improved, owing to the fact that this voluntary adoption of certain standards by the UN allows it to choose sufficiently detailed standards and to adopt obligations tailored to the specific context in with the UN operates.[175]

3 Responsibility for the United Nations under DARIO

The work of the ILC on responsibility of international organizations, DARIO, has not resulted in a binding convention, but the soft law document develops diverging rules regarding responsibility of international organizations for internationally wrongful acts. It is constructed around the fundamental principles regarding attribution of conduct to an international organization.[176] The principles of this document are supported, to a large degree, by practice, and it seems that it reflects, to some extent, customary international law and helps it develop.[177]

The most essential principle of international responsibility regarding the UN is found in DARIO Article 3.[178] It states that every internationally wrongful act invites international

[172] SG. Bulletin, op. cit. p. 2, Section 3; for more information about the UN staff regulations and rules see Staff Rules, Staff Regulations of the United Nations and Provisional Staff Rules, October 21, 2009, ST/SGB/2009/7. Available at: http://www.un.org/esa/cdo/hr/RULES%20AND%20REGULATIONS/Staff%20Rules%20JY9.pdf.
[173] Ibid. p. 2, Regulation 1.2.
[174] De Schutter, Olivier, op. cit. p. 108.
[175] Ibid. p. 109.
[176] Larsen, Kjetil M. op., cit., p. 111.
[177] Ibid. p.102.
[178] Ibid. p.102.

responsibility.[179] Article 4 defines an internationally wrongful act and determines the characteristics of such an act of an international organization. It holds that an action or omission, which is attributable to that organization under international law and constitutes a breach of an international obligation of that organization, is an internationally wrongful act of that organization.[180]

The very core element around which DARIO has been constituted is - as mentioned in preceding paragraphs - the attribution of conduct to an international organization - the UN for the purpose of this thesis. According to DARIO, there are two criteria of attribution of a conduct to the UN. First, the conduct of an organ or agent of the UN is attributable to the UN if it performs its official functions, whatever position they hold[181] even if the officials of that organ or agent exceed the authority of the organ or agent or contravene instruction. As long as they act in an official capacity and within the overall function of the UN, their conducts are attributable to the UN[182]. Second and the most important criterion for the purpose of this thesis would be where the UN holds effective control and command (ECC)[183] over the conduct of other entities.[184] According to the former the act of all subsidiary organs of the UN is attributable to it. And as regards the latter, if the UN has ECC over PSOs forces, it will incur responsibility for such personnel.

Here, a matter of crucial importance is which paradigm PSOs do fall into. That is, whether the conduct of UN PSOs personnel's is attributable to the UN under Article 6 or under Article 7.

Before moving to the next section, it is worth noting that, regarding attribution of conduct, one may argue whether the general principle of attribution of conduct in international law are applicable to the assessment of international responsibility under HR. In other words, if there is a *lex specialis*[185] rule in HR which contains principles incompatible with general

[179] DARIO, op. cit. Article 3.
[180] Ibid. Article 4.
[181] Ibid. Article 6. This Article provides:"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".
[182] Ibid. Article 8.
[183] The terms' command' and 'control' are taken as synonym in this thesis. These terminologies often are used interchangeable despite their having different meaning. Command needs more authority and power over the troops. This uncertainty also features in jurisprudence and literature on attribution of conduct to international organizations. Burke, Roisin, "Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets" Vol. 16, Journal of International Peacekeeping (2012) 1-46, p. 9; Effective command and control is a military term which shows the possession of control or authority: Zwanenburg, Marten, op. cit. pp. 34-35. It is not also necessarily the same as operational control. But they usually coincide. Larsen, Kjetil M. op. cit. p.116.
[184] DARIO, op. cit. Article 7. This Article reads" 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".
[185]Article 64 of DARIO and Article 55 of DARS give a *lex specialis* rule which applies to article as a whole- in the field of international responsibility. These Articles present the same rule and provide that Draft Articles "do not apply where and to

international law regarding international responsibility, it may be assumed to constitute a self-contained regime and prevail over general international law including DARIO and DARS.[186] However, this issue is far beyond the scope of this thesis and is not further covered here.[187]

3-1 Subsidiary Organ

As has already been discussed a bit in this thesis, the conduct of a subsidiary organ of the UN is attributable to it in accordance with Article 6 of DARIO. The question arises here whether UN PSOs function as a subsidiary organ of the UN? Since there is no permanent legal framework in this regard, it must be investigated case by case.[188] However, as a main rule developed over time, PSOs are integrated into the UN as subsidiary organ of the UN.[189] This is stated in several international instruments and documents. For example, according to the UNC the UNSC may establish subsidiary organs in order for it to perform its functions.[190] PSO could be one of these subsidiary organs tasked by the UNSC with maintenance of international peace and security.

It is also explicitly provided in the Model SOFA that "[t]he United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations".[191] Likewise, the UN legal counsel, in 2004, expressed that the conduct of PSOs, as a subsidiary organ of the UN, is imputable to the UN and thus the UN is responsible for compensation.[192] But it was the very assumption that the UN had exclusive control over the deployment of the national contingents of a peacekeeping force

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the extent that the conditions for the existence of an internationally wrongful act or the content or implementation the international responsibility of a state/ of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law". Crawford, James "The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, (Cambridge University Press), 2002, pp. 306, 308; *Lex specialis* is a Latin phrase which means "law governing a specific subject matter". It comes from the legal maxim "lex specialis derogat legi generali". This doctrine relates to the interpretation of laws. It can apply in both domestic and international law contexts. The doctrine states that a law governing a specific subject matter overrides a law that only governs general matters .Generally, this situation arises with regard to the construction of earlier enacted specific legislation when more general legislation is passed after such enactment .This principle also applies to the construction of a body of law or single piece of legislation that contains both specific and general provisions. http://definitions.uslegal.com/l/lex-specialis/ Access: 20 February 2014 at 19:11 hrs.

[186] See Crawford, James, op. cit. pp. 306-308; Larsen, Kjetil M. op. cit., p.103.

[187] For more information see B. Simma, " Human Rights and State Responsibility" in Reinisch and Kriebaum (eds.)The Law of International Relations, pp. 361-362; B. Simma and Pulkowski,"Of Planets and the Universe: Self-contained Regimes in International Law", European Journal of International Law, 17 (2006), pp.490-493; ILC Report, 56th session (2004), UN doc. A/59/10, pp. 288-289, para. 315.

[188] Larsen, Kjetil M. op. cit. p. 112.

[189] Ibid.

[190] Article 29 of UNC reads: "The UNSC may establish such subsidiary organs as it deems necessary for the performance of its functions".

[191] UNGA, Model Status of Forces Agreement for Peace-keeping Operations (Model SOFA hereinafter), Report of the Secretary General, A/45/594, 1-15, p. 5, para.15.Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N90/254/55/IMG/N9025455.pdf?OpenElement

[192] Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, quoted in the ILC Report, 56th session (2004), UN doc. A/59/10, Chapter V, pp. 111-112, para.5. Available at: http://legal.un.org/ilc/reports/2004/2004report.htm

which led the UN legal counsel to state so.[193] Therefore, as iterated in preceding paragraphs, it appears that the status of a subsidiary organ for PSOs should be considered in combination with the other main attribution establishing way: ECC. In other words, it would seem that the status of PSOs as subsidiary organs of the UN is not enough for attributing their conduct to the UN unless the UN exercises ECC over PSOs.[194]

As is pointed out in the statements of the UN Secretariat, PSOs under ECC of the UN are given the status of subsidiary organs.[195] Therefore, the attribution of conduct to the UN is premised on the assumption that PSOs are given the status of subsidiary organs in conjunction with ECC by the UN. It appears that, however, ECC is the decisive factor which should be studied further.

3-2 Effective Control and Command

The command and control structure and its legal framework in the context of UN PSOs developed on an *ad hoc* basis in the sense that there is difference between what is provided in law (*de jure*) and what is going on in fact (*de facto*). As Burke argues there are substantial differences between the legal framework initially contemplated by the UNC and the structure ultimately developed.[196]

Concerning the *de jure* aspect, Article 43 of the UNC provides that "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the UNSC, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security".[197] Furthermore, according to Articles 46 and 47 (1) a Military Staff Committee (MSC) shall be established and tasked with advising and assisting the UNSC on all issues related to military aspects of the maintenance of international peace and security, the employment and command of

[193] The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state: "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation." ILC Report, 56th session (2004) UN doc. A/59/10, Chapter V, para. 5,pp. 111-112.

[194] Larsen, Kjetil M. op. cit. p. 113.

[195] UNGA, Responsibility of International Organizations: Comments and Observations Received from International Organizations (2004) UN doc. A/ CN.4/545 p. 18. It provides: "The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In authorized chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where *effective* command and control is vested and practically exercised".

[196] Burke, Roisin, op. cit. pp. 4-5.

[197] UNC, op., cit., Article 43 (1).

forces.[198] Article 47(3) shows that the MSC is responsible for providing the UNSC with strategic direction of PSOs.[199]

Houck holds that strategic direction - in Article 47 (3) - is a process of command in which the MSC functions as a linkage in the chain of commands between the UNSC and operational commanders.[200] The MSC, after considering the views of operational commanders, provide the UNSC with military advises. And, consequently, when the UNSC makes decisions, the MSC would translate UNSC political objectives into a military plan, which would be transmitted to operational commanders in the field.[201] Article 47 (3) also provides that future questions relating to command issues shall be resolved subsequently.[202] Houck believes that the Article provided so, "not because the drafters were unable to agree on the meaning of "command", but because they were unable to agree on a mechanism for selecting commanders"[203] . Burke however notes that the drafters were unable to do that simply because there was no agreement among them upon the meaning of 'command'.[204]

The above-mentioned Articles and an overview of Chapter VII of the Charter show that the UN drafters contemplated a centralized control system over UN PSOs. However, due to Cold War tensions the system desired by the drafters of the Charter was never been established.[205] Therefore, concerning the *de facto* aspect, PSOs and its command and control structure developed over time on an *ad hoc* basis and has been different from operation to operation - as was discussed in the first chapter of this thesis regarding different generations of PSOs, especially the difference between peacekeeping and peace enforcement.

In principle, there is a clear connection between exercising ECC and the attribution of conduct. Many international documents and relevant sources suggest that the conduct of PSOs is attributable to the entity who exercises ECC over PSOs. For example, the Secretary-General in his report to the 51st session of UNGA states that "[t]he international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command

[198] Ibid. Articles 46, 47(1).
[199] Ibid. Article 47 (3); concerning the first generation of PSOs, it should be noted that they are largely acting outside chapter VII of the UNC.
[200] Houck, James W. "The Command and Control of United Nations Forces in the Era of Enforcement" Vol. 4, Duke Journal of Comparative and International Law (1993), 1-69, p. 9.
[201] Ibid. pp. 9-10.
[202] UNC, op. cit. Article 47 (3).
[203] Houck, James W., op. cit. p. 10.
[204] Burke, Roisin, op. cit. p. 5; For more information see Houck, James W., op. cit.; Scheffer, David J. "United Nations Peace Operations and Prospects for a Standby Force" vol. 28, Cornell Journal of International Law (1995) p. 649; Burke, Roisin, op. cit. pp.4-8.
[205] Ibid. p. 5.

and control of the United Nations".[206] He continues that if there is an agreement between the UN and the TCS regarding the modalities of cooperation in joint operations, international responsibility lies where ECC is vested. Otherwise, responsibility would be determined in each and every case in accordance with the degree of ECC by either party in the conduct of the operation.[207] According to Larsen, legal literature provides strong support for using ECC as the most important criterion for determining international responsibility. Many scholars such as Seyersted, Amrallah, Peck, Shrege, Krieger and others support the pre-mentioned idea and believe, unanimously, that when PSO forces are under the ECC of the UN, the responsibility is vested in the UN. [208]

However, the degrees and levels of ECC are still complex because UN PSOs operate on several levels, political and military, national and international.[209] The difficulty is that TCSs simply do not abstain fully or partially from commanding their troops;[210] although PSOs are subsidiary organs of the UN, troops still remain organs or employees of their respective States.[211] As stated in the Model SOFA, military contingents, while deployed UN PSOs are subject to the disciplinary and criminal jurisdiction of their respective TCSs.[212]

As a preliminary conclusion, Article 7 DARIO suggests that which entity in the particular circumstances will have the conduct attributed, is more important than whether the conduct is attributable solely to the TCS or the UN.[213] Therefore, it is of importance to investigate if there was real effective control over the PSOs during operations. Burke observes that "what is really at issue in determining effective control is who had the ability to act to prevent misconduct or to punish the perpetrator".[214] Evidently, it should be considered in a case by case manner and there is no resolute formula to apply to all circumstances.

Article 7 in conjunction with Article 48(1) DARIO – which suggests the possibility that international organization and one or more States can be simultaneously responsible for the

[206] UNGA, Report of the UN Secretary General, 20 September 1996, UN Doc. A/51/389, p. 6, para 17.
[207] UNG, Report of the UN Secretary General, 20 September 1996, UN Doc. A/51/389, p. 6, para 18.
[208] Larsen, Kjetil M. op., cit., pp. 116-117.
[209] Burke, Roisin, op., cit., p.8. There are also three tests of control, namely, effective control, overall control or ultimate authority and control, and effective overall control. This issue is not going to explain more here since it is outside the UN scope of this thesis and itself needs further investigation; For more information Ibid. pp. 1-32.
[210] Ibid. p.8.
[211] Ibid. p.15; See also Ibid. pp.31-32.
[212] Model SOFA, op. cit. P. 12, para. 47 (b).
[213] Burke, Roisin, op. cit. p.34.
[214] Ibid. p.34; It is always the prerogative of a State to criminally punish perpetrators (if not international tribunal) and the TCS is extremely unlikely to cede jurisdiction over alleged offenders within its contingent to the UN. Defeis, Elizabeth F., op. cit., p. 214; thus in relation to the issue of punishment if it is a question of criminal punishment, this will typically left with TCSs.

same internationally wrongful acts -[215] allows dual attribution of conduct [216] - to both TCSs and the UN - which would give victims of SEAs a more effective route for redress.[217] Concerning dual attribution, ILC leaves in its commentaries on DARIO open the possibility of conduct being attributable to both the international organization and the State, and provides that

> "[a]lthough it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ".[218]

Notably, dual attribution of conduct and consequently dual/joint/shared responsibility has been confirmed by the Supreme Court of Netherlands in Nuhanovic case[219]. The Supreme Court affirmed the strong approach to dual attribution of conduct taken by the Court of Appeal and consequently dissolved the appeal. It found that there is a possibility that both the Netherlands and the UN had effective control over the same internationally wrongful conduct committed by Dutchbat troops, and thus that the UN did not have exclusive responsibility. [220]

[215] DARIO, op. cit. Article 48 (1). It provides: "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".
[216] See Supreme Court of Netherland, Judgment, The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) Appellant in the Appeal in Cassation v. Hasan Nuhanovic Respondent in the Appeal in Cassation (Nuhanovic Case hereinafter), 6 September 2013, First Chamber, 12/03324, LZ/TT, pp. 19-20, para. 3.9.4. Available at: http://www.asser.nl/upload/documents/20130909T125927-Supreme%20Court%20Nuhanovic%20ENG.pdf; see also Leck, Christopher op. cit, p. 19.
[217] It also appears that there is a possibility of joint responsibility under Articles 14, 15, 16, 17, and 20 of DARIO. For Further readings regarding joint or shared responsibility see Heijer, Maarten den "Shared Responsibility before the European Court of Human Rights" vol., 60, Netherlands International Law Review (2013), 411-440.
[218] ILC, Commentaries on DARIO, 2011, p. 16, Commentary on Chapter II, para. 4. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf; See also the same source, p.20, Commentary on Article 7, para, 4.
[219] Nuhanovic Case, op. cit.
[220] Nuhanovic Case, op. cit. pp. 22-23, para. 3.11.2. It provides "[…] there was a possibility that both the United Nations and the State had effective control over Dutchbat's disputed conduct, […] international law, in particular article 7 DARIO in conjunction with article 48 (1) DARIO does not exclude the possibility of dual attribution of given conduct. […]".

Chapter 4: Responsibility to Protect as an Obligation on both the Member States and the United Nations

The opening words of the UNC contain a collective will to gain equal rights, justice, and development.[221] As mentioned explicitly, the catastrophic experiences of World War II motivated the international community to save succeeding generations from the scourge of war.

The UNSC has a large and systematic impact on global security. One of the tools to which the UNSC resorts in order to fulfil its main duty – maintaining international peace and security[222] - is a legal concept called R2P. Also, R2P plays an important role in global governance as applied by the UNSC.

According to Hobbes' way of thinking, as Nagel points out, the government has the exclusive right to use force and violence. This right legitimizes violent acts of States to uphold order and security. The very concept of the sovereign State has been the main obstacle for HR developments for a long time. Owing to the fact that HR and equal rights standards should be applied both domestically and globally, and HR issues and justice are not merely domestic issues, the whole of global society is to some extent responsible for HR violations. To achieve such global justice, global governance must be applied by international organs. Thus, keeping world peace and security is a collective responsibility.[223] As Thomas Nagel further points out, "the idea of global justice without a world government is a chimera".[224] Although the UNSC is not a world government, it is one of the organs which help achieve global governance through the use of its powers, including R2P.

This new concept in international law, world politics and international relations can work as a double-edged sword. That is, R2P can be an opportunity for basing the world on the foundation of human dreams concerning peace and freedom. In contrast, it can also provide a context for illegal interference, including international use of force. It follows that misuse of this concept may lead to a new form of colonialism. Without clear instructions for which measures may be used against HR violations, the rules can be interpreted based on the interests of the great powers. However, global governance as applied by the UNSC through R2P and its challenges are far beyond the scope of this thesis. The issue we are concerned

[221] UNC, op. cit. Preamble.
[222] Ibid., Article 24 (1).
[223] Nagel, Thomas "The Problem of Global Justice" Philosophy and Public Affairs 33, No. 2, (2005) pp. 114-115 & 125-127.
[224] Ibid.p 115.

with here is merely the concept and principles of R2P which reveal HR obligations binding on the UN as well as its Member States. Furthermore, the procedure of the UNSC regarding R2P shows how the UNSC applies it through PSOs and these operations are granted enhanced legitimacy through R2P.

1 Responsibility to Protect: History, Concept, and Principles

1-1 History and Concept

R2P has roots in the endeavour of the international community to avoid repeating the painful memories of the World Wars. The Charter of the United Nations established the first proper[225] collective decision making body for the protection of world peace and security. According to the Charter, all nations are supposed to abstain from violence in their relations and maintain international peace and security as a collective goal.[226]

In recent years most of the armed conflicts have taken place within States, not between them. These conflicts include those initiated by liberation movements, armed struggle against the central government in general, and rival armed parties fighting for power. This may lead to ethnic cleansing, genocide, and other forms of violence. Regardless of the name and the purpose of these lethal conflicts, their results are the same: HR violations, displacement, and widespread violence against civilians especially children and women, poverty, famine, and sympathy for terrorist groups.[227] In extreme cases even failed States.

During the last decades of the twentieth century the world was faced with a dramatic upsurge in domestic armed conflicts and HR violations within States. The genocides in Cambodia, Rwanda, and Bosnia-Herzegovina sounded the alarm for the international community to revise their methods in fighting the manifold HR violations.

Since the end of the Second World War, the international community and the UN, as the expression of the collective will of nation-States on global issues, have attempted to protect civilians in armed conflict. The unforgettable experience of the Holocaust caused States to

[225] The League of Nation was the first attempt of international community to protect world peace and security. The League of Nations (1919-1946) born with the will of the victors of the First World War to avoid a repeat of a devastating war, the League of Nations objective was to maintain universal peace within the framework of the fundamental principles of the Pact accepted by its Members: « to develop cooperation among nations and to guarantee them peace and security ». However, it faced with an unfortunate end resulting from the World War II. Therefore, it was not successful in protecting world peace and security.
http://www.unog.ch/80256EDD006AC19C/%28httpPages%29/17C8E6BCE10E3F4F80256EF30037D733?OpenDocument. Access: 25 Apr. 2014 at 15:30 hrs.
[226] UNC, op. cit. Preamble & Articles 1 & 2(4).
[227] Rummel, R. J. "Power Kill: Genocide and Mass Murder" Journal of Peace Research (1994) pp. 1-31.

establish a legal framework against this kind of disaster. These efforts lead in 1948 to the Convention on the Prevention and Punishment of the Crime of Genocide.[228] Moreover, "near the end of the 1990s there was a recognized need to shift the debate about crisis prevention and response: The security of community and the individual, not only the State, must be priorities for national and international policies".[229]

To respond to the civil wars, internal armed conflicts, and HR violations within States, Kofi Annan, the UN Secretary-General at that time, drew the State member's attention to the concept of sovereignty and the issue of humanitarian intervention.[230] Annan's main question was "when [must] the international community… intervene for humanitarian purposes?"[231]

Based on this proposal, the Canadian Foreign Minister L1oyd Axworthy established the International Commission on Intervention and State Sovereignty. The term R2P was first presented in the report of this commission in December 2001. Building on Francis Deng's idea of sovereignty as responsibility, the commission addressed Annan's question.[232] This report and its later versions have shaped the principles of R2P.

1-2 Principles

The concept of a sovereign State, rooted in Hobbes' thoughts, is a genuine obstacle to real improvement in HR although the respect for HR has improved in many States. Hence, a reassessment of the definition of sovereignty seems to be necessary.

The norm of non-intervention in internal affairs, which is codified in the UNC Art. 2 (7) as regards the UN itself, is one side of the principle of sovereignty. But we now see a re-characterization "from sovereignty as control to sovereignty as responsibility in both internal functions and external duties".[233]

This new understanding of sovereignty combined with a redefinition of human security as "the security of the people - their physical safety, their economic and social well-being,

[228] http://responsibilitytoprotect.org/index.php/about-rtop Access 04 Dec. 2013 01:00 hrs.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] World Federalist Movement – Institute for Global Policy, "Summary of the Responsibility to Protect: The Report of the International Commission on International and State Sovereignty" (2001) Responsibility to Protect – Engaging Civil Society, A Project of the World Federalist Movement's, Program on Preventing Conflicts -Protecting Civilians, p. 3. Available at: http://responsibilitytoprotect.org/index.php/about-rtop#ICISS.

respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms",[234] are the theoretical basis of the R2P.

Therefore, the pillars of R2P are transformations of accepted traditional concepts. R2P is thus founded upon three non-sequential pillars:

> "1. The State carries the primary responsibility for the protection of populations from genocide, war crimes, crimes against humanity and ethnic cleansing.
>
> 2. The international community has a responsibility to assist States in fulfilling this responsibility.
>
> 3. The international community should use appropriate diplomatic, humanitarian and other peaceful means to protect populations from these crimes. If a State fails to protect its populations or is in fact the perpetrator of crimes, the international community must be prepared to take stronger measures, including the collective use of force through the UN UNSC".[235]

These pillars appear to show that R2P is not a pretext for intervention in other sovereign States or a unilateral right to authorize military attacks. It is rather to be understood as international solidarity in order to prevent, react and rebuild. These three elements, the responsibility to prevent, react, and rebuild, were approved in 2005 by the UN, and are the very foundation of R2P. The process of implementing these elements consists of political, economic, legal, and military measures.[236]

2 The Inner Workings and Procedure of the Security Council regarding Responsibility to Protect

To be familiar with the central issues regarding R2P,[237] it is important to point out a few details about the UNSC itself. According to Article 7 of the UNC, the UNSC is one of six principal organs of the UN.[238] Its main function is the maintenance of international peace and security around the world.[239] In order for the UNSC to be capable of accomplishing its responsibility, all members of the UN confer authority on the UNSC to act on behalf of them,[240] and according to Charter Article 25, "[t]he Members of the United Nations agrees to

[234] Ibid.
[235] http://responsibilitytoprotect.org/index.php/about-rtop, op. cit.
[236] World Federalist Movement – Institute for Global Policy, op. cit. pp. 3-4.
[237] In order to assess how HR is binding on the UN through R2P, it is necessary to study how R2P works through inner procedure of the UN.
[238] UNC, op. cit. Article. 7.
[239] Ibid. Articles 23 (1) & 24 (1).
[240] Ibid. Article 24 (1).

accept and carry out the decisions of the UNSC in accordance with the present Charter".[241] The decisions made by the UNSC under Chapter VII are binding on all members; but the UNSC may also choose to only give recommendations. The UNSC has 15 members - 5 permanent and 10 non-permanent - and decisions are made by a majority of 9 out of 15 but each of the permanent members has veto powers.[242] Drawing on the defined role of the UNSC in keeping and maintaining international peace and security, it could be said that the UNSC is the main international actor with the power to authoritatively protect HR.

According to Chapter VI and VII of the UNC, the UNSC has two main tools to maintain international peace and security. In consideration of Chapter VI of the Charter, the UNSC has the power to request pacific settlement of disputes through discussion, inquiry, mediation, and conciliation.[243] As Article 33 and 34 of the Charter spell out, the UNSC can investigate any dispute which is likely to jeopardize international peace and security, and invite the parties to such disputes to settle it through the aforementioned peaceful means. It can also recommend parties such terms of settlement in accordance with Chapter VI of the Charter.[244]

Peaceful operations are divided into three categories, namely conflict prevention and peacemaking, peacekeeping, and peace-building.[245] Peacemaking activities try to stop the conflict in progress by diplomacy or mediation. Peacekeeping - as a subclass of PSOs as explained in the first chapter of this thesis - addresses typically civil wars and attempts to build peace in the hazardous aftermath of civil wars. Peace-building is a series of measures conducted on the far side of conflict to rebuild the foundations of peace. Peace-building measures encompasses, but are not limited to, demobilisation, the reintegration of former combatants into civilian society, enhancing respect towards HR, training police forces, reforming the judicial system and so forth. As mentioned in preceding paragraphs, these peaceful operations are often based on the regulation of Chapter VI on pacific settlement disputes.[246]

By virtue of Chapter VII of the Charter, the UNSC has also the power to apply economic and political sanctions,[247] or to conduct military enforcement[248] - as the other subclass of

[241] Ibid. Article 25.
[242] Ibid. Articles 23(1) & 27; See also Luck, Edward C. " United Nations Security Council: Practice and Promise" Routledge, UK, 2006, pp. 16-17, 20.
[243] UNC, op. cit. Article 33; See also Luck, Edward, p. 31.
[244] UNC, op. cit. Articles 33 & 34.
[245] Luck, Edward C., op. cit. p.33.
[246] Ibid. p.33.
[247] UNC, op. cit. Article 41.
[248] Ibid. Article 42.

PSOs - to preserve collective security. Accordingly, if there is a threat to the peace, breach of the peace or an act of aggression, the UNSC may authorize the use of force against the delinquent State.[249] The enforcement operations are the most important feature of the contemporary international system that distinguishes the robust UN from the feeble League of Nations.[250]

As long as humanitarian protection purposes are of concern to the UN and listed amongst the purposes for the UN in Article 1 of the Charter, the UNSC functions on behalf of Member States and may develop the humanitarian imperative through R2P. Hence, the public acceptance of a shared R2P has become commonplace.[251] Thus, there is reasonable agreement on the fact that people who end up in dangerous conflict situations should be protected from serious crimes.[252] States are therefore responsible to protect their people from serious crimes, namely genocide, ethnic cleansing, crime against humanity, and war crimes. International society has a duty to help the states in accomplishing their responsibility to protect their people from HR violation and such crimes. If a State should nevertheless fail to fulfil its responsibility, international society, which confers authority on the UNSC to act on its behalf, should take decisive and reasonable action through the provisions set out in the Chapter VII of the UNC. It is worthwhile to point out that R2P has been reaffirmed in several UNSC resolutions including resolution 1674 (2006),[253] 1894 (2009),[254] 1970 (2011)[255] and 1973 (2011).[256] R2P now is one of the primary functions of the UNSC which may act through PSOs, and it is very central to the legitimacy of these operations.[257]

The pillar structure of R2P - is more easily understandable than its legal status. R2P, as Zifcak believes, has been principally a political doctrine rather than legal one.[258] Although R2P is considered an obligation, the question is what kind of obligation? Is it a hard and fast

[249] Ibid. Articles 39 & 42; Dinstein, Yoram "War Aggression and Self-Defence" 5th edition, Cambridge University Press, 2011, pp. 333- 335.
[250] Luck, Edward C., op. cit. p.48.
[251] Ibid. pp. 81, 92.
[252] Bellamy, Alex J. and Williams, Paul D. "The New Politics of Protection? Cote d' lvoire, Libya and the Responsibility to Protect" 87 (4), International Affairs, (2011), p. 826.
[253] UNSC, Resolution 1674, Adopted at its 5430th meeting, on 28 Apr. 2006, S/res/1674(2006), regarding Protection of Civilians in Armed Conflict.
[254] UNSC, Resolution 1894, Adopted at its 6216th meeting, on 11 Nov. 2009, S/res/1894(2009), regarding Protection of Civilians in Armed Conflict.
[255] UNSC, Resolution 1970, Adopted at its 6491st meeting on 26 Feb, 2011, S/RES/1970 (2011), regarding peace and security in Africa.
[256] UNSC, Resolution 1973, Adopted at its 6498th meeting on 17 March, 2011, S/RES/1973 (2011), regarding the situation in Libya.
[257] Bellamy, Alex J. and Williams, Paul D, op. cit. pp. 827-828.
[258] Zifcak, Spencer "The Responsibility to Protect" in Evans Malcolm D. "International Law", 3rd Edition (Oxford), 2010, 504- 527, p.523.

legal obligation whose infringement invites legal responsibility for UNSC or it is soft law which is not binding on the UN? Or does it provide the UNSC with a new authority it did not have before? In other words, what is the legal status of R2P? To answer this question, a look at the 2005 World Summit Outcome would seem necessary.

According to the 2005 World Summit Outcome, States strictly committed themselves to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity. It states that "[w]e accept that responsibility and will act in accordance with it".[259] It appears that the responsibility of States is expressed in a rather strong language and might therefore be considered a rigid obligation. In contrast, responsibility of the UN or in the words of the abovementioned document: Responsibility of the "international community, through the United Nations",[260] to help protect populations from the above-mentioned crimes, is less strict. Regarding coercive measures under Chapters VII, the outcome document indicates that "we are prepared to take collective action, in a timely and decisive manner, through the UNSC".[261] It appears that States are reluctant to recognise that the UNSC and its Member States bear legal obligations for the protection of population against grave HR violations.[262] As Peters points out, this weak phrase was inserted during the drafting history to replace stronger obligations.[263]

Nevertheless, it would seem that, despite a weak language, it is still an obligation. In this regard, Peters believes that the responsibility of the UN under Chapter VII to take coercive measures to protect population from grave HR violation, pull "pre-existing norms [and principles] together and places them in a novel framework",[264] and strengthens the normative power of those principles.[265] It might also be seen as a powerful political call for all States to comply with obligations which have already been set forth in the charter, in HR conventions, and IHL.[266]

However, the 2005 World Summit Outcome is not itself a legally binding instrument since it is merely a UNGA resolution. But as some scholars believe, since the UNGA is extremely representative of the world's nations, the political debates towards this document and the text

[259] 2005 World Summit Outcome, op. cit. para 138, p. 30.
[260] Ibid. p. 30, para 13; it should be noted that these obligations are pre-existing.
[261] Ibid. p. 30, para 139.
[262] Glanville, Luke "The Responsibility to Protect Beyond Borders" Human Rights Law Review (2012), 1-32, p. 21.
[263] Peters, Anne "The UNSC's Responsibility to Protect" International Organizations Law Review 8 (2011), 1-40, p. 9.
[264] Ibid. p.9.
[265] Ibid. p.10.
[266] Zifcak, Spencer, op. cit. p. 523.

itself manifest an *opinio juris* which together with relevant practice may consequently lead to the formation of customary international law.[267] Additionally, as held by Peters, the other important factor which constructs *opinio juris* in regard to R2P, is the practice of the UNSC in its binding resolutions regarding R2P, resolutions 1973 (2011) and 1975 (2011)[268] in particular, since these resolutions as such are binding and express an *opinio juris.*[269] Finally, UN practice in relation to PSOs for the protection of civilians in armed conflicts might also be relevant international practice contributing to the creation of an international customary obligation to protect civilians from grave HR violation. Thus, it might be that R2P is an emerging legal norm in regard to the UN and refers to the primary level of international obligations.[270]

All in all, R2P is on its way to become a customary norm.[271] But what is its content? Under UNC Article 39, the UNSC "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"[272]. It seems that the UNSC is the foremost entity authorized to decide if there is a threat to international peace and security, and it does not need to give reasons for its decisions. When it comes to the veto right of the permanent members of the UNSC, R2P nevertheless does not oblige the UNSC to use its Chapter VII powers since stronger State practice would be necessary to revoke this significant part of the UN system. Perhaps it may lower the threshold for UNC Art. 39, but this is currently mere speculation. At the very least, R2P has not established a unilateral right to use force on foreign territory.

So, it may be assumed that R2P even as a fledgling rule of customary international law cannot bind HR to the UN itself. Therefore, it may be true that R2P is more of a moral obligation than a legal one. And the dangers which emanate from an abuse of this imperative moral behaviour, may make the UNSC act through R2P in order to restore or maintain international peace and security.[273]

[267] Jellinek, Eva Maria, "The Impact of the Responsibility to Protect on States Behaviour: An Analysis" A thesis submitted in conformity with the requirements for the degree of Master of Laws, Graduated program of the Faculty of Law, University of Toronto, 2012, 1-57, p. 31; Peters, Anne, op. cit. p.12; Glanville, Luke, op. cit. pp. 31-32.
[268] UNSC, Resolution 1975, Adopted at its 6508th meeting on 30 March, 2011, S/RES/1975 (2011), regarding the situation in Côte d'Ivoire.
[269] Peters, Anne, op. cit. p.12.
[270] Ibid.
[271] Zifcak, Spencer, op. cit. p. 524.
[272] UNC, op. cit. Article 39.
[273] Zifcak, Spencer, op. cit. pp. 521-523.

As regards the UNSC, there is not sufficient UNSC or State practice to say that there is an obligation to respond to these crises etc. But, perhaps there might be a case for R2P highlighting and adding somewhat to HR obligations as regards how the UNSC uses its authority, especially its power to derogate from other international law obligations under UNC Art. 103. It is not obligation to go in but if there is HR violation, it is a moral obligation not to allow them to be violated.

As regards TCSs, it might be hard to say that R2P identifies additional HR obligations for these States than they had before under treaties or customary international law. Perhaps R2P merely gives some added moral dimensions to these rights.

Whatever the nature of R2P, it at least highlights established HR obligation binding on Member States, and might be in the process of establishing some added obligations for the UNSC itself. Finally, R2P and PSOs interact as the UNSC applied R2P through PSOs and PSOs seem to be legitimized through R2P.

Due to the fact that "[t]he obligations of international organizations may influence the obligations of states and vice versa",[274] the responsibility of TCSs will be considered in the following chapter.

[274] Larsen, Kjetil M. op. cit. p.12.

Chapter 5: Responsibility of Troop Contributing States for Sexual Exploitation and Abuses

It may seem that States are merely responsible for internationally wrongful acts or omissions which impose damages on another State; in the sense that one State is plaintiff against the other State and must be compensated by the trespasser State. But States can be held responsible for redressing individuals as well. In the case of SEA committed by UN PSOs personnel, TCSs may be held responsible for the misconduct of their troops in order to redress the victims of such wrongdoings. It is worthwhile pointing out that no difficulty arises in regard to the international legal personality of TCSs – which is a requirement of establishing international responsibility - on the basis that States "by definition have an international legal personality, possession of this being a necessary evidence of statehood".[275]

Admittedly, a State as an abstract legal entity cannot, in reality, act by itself; but it can do so through its servants – authorized representatives and officials. And if the conducts of its authorized servants and organs are attributable/imputable to it, that State may be held accountable for the said conduct.[276] As discussed in chapter 2, attributability is an important concept in the context of international responsibility.[277] It therefore becomes necessary to examine whether the conduct of PSO personnel regarding SEA may be attributable to a TCS.

Two theories exist here regarding State responsibility, namely the objective/risk theory and the subjective/fault theory.[278] According to the former, liability of a State is strict; in the sense that once an unlawful act – attributable to a State – is committed by an agent of that State and especially when it causes damages on the territory of another State, the first-mentioned State is internationally responsible irrespective of good or bad faith. The latter approach holds intentional or negligent conduct on the part of the agent concerned as a necessary element in order to establish international responsibility of a State.[279] However, these theories will not be considered further due to the space and scope limitations of this thesis.[280] Instead, the issue of HR binding on TCSs and the responsibility under DARS will be discussed in the following parts.

[275] Ibid. p. 87.
[276] Shaw, Malcolm N., op. cit. p. 786.
[277] In regard to the definition of the concept of attribution see pp. 15-16 of this thesis.
[278] Shaw, Malcolm N., op. cit. p. 783.
[279] Ibid.
[280] For more information about theories regarding state responsibility see Shaw, Malcolm N., op. cit. pp. 781-785; Flemme, Maria "Due Diligence in International Law", Master Thesis, Faculty of Law, University of Lund, Spring 2004. 1-49, pp. 5-12;

1 Identifying Human Rights binding on Troop Contributing States

States are the primary holders of obligations under HR, as the legal regime as such was primarily established and developed for the protection of individuals against abuses undertaken by States.[281] TCSs are bound by HR obligations regarding SEA, as is also the UN. However, the international sources of law under which they are bound differ from those of the UN since TCSs can be parties to HR treaties while the UN cannot. Actually, the UDHR and the UNC are the only common instruments which impose HR obligations on both the UN and TCSs.

As was discussed in chapter 3, Articles 5 and 4 of the UDHR contain provisions regarding the prohibition of torture, inhuman treatment, and modern slavery. Admittedly, SEAs are obvious examples of these forbidden behaviors.

Moreover, a TCS may also be party to HR conventions. Some of these conventions may even explicitly prohibit SEA against women and children. Thus, non-observance of such conventions may incur international responsibility for any TCS which is a contracting State. It should be noted that Article 29 1969 VCLT provides that treaties are binding upon each State Party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established.[282] However, the real question is perhaps whether these obligations also applied abroad and if the responsibility of the States can be replaced by the responsibility of international organization like the UN.

The Convention on the rights of the Child (CRC)[283] prohibits SEAs in all forms. Article 19 of the CRC ensures a child the right to protection from all forms of violence and reads as follows: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".[284] Notably, according to the Committee on the Rights of the Child's General Comment on the Article 19[285] , communities and camps or settlements for refugees and

[281] Larsen, Kjetil M. op. cit. p. 87.
[282] 1969 VCLT, op. cit. p. 339, Article 29.
[283] Convention on the Rights of the Child (CRC) Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, UN Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html
[284] Ibid. Article 19.
[285] UN, Committee on the Rights of the Child, General Comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence, UN. Doc. CRC/C/GC/13, 1-28. Available at: http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

people displaced by conflict and/or natural disasters are a type of setting in which the child's protection and well-being must be secured.[286] On the other hand, Article 19 is not limited to violence perpetrated solely by caregivers in a personal context, but encompasses situations in which State actors misuse their power over children.[287]Furthermore, State actors are included in the group in whose care children are.[288]

Thus, TCS troops on UN PSO duty are responsible for protecting and caring for the whole population including children, and if misconduct is attributable to a TCS, international responsibility may arise for the relevant TCS. According to Article 34 of the CRC – which is the most important Article in the CRC in regard to SEAs - all State parties are obliged to protect children from all forms of SEAs including unlawful, coercive and inducible sexual activities and practices, pornographic performances, and prostitution.[289] Furthermore, Article 35 whose scope is broader than Article 34, guarantees the prevention of abduction, sale and trafficking of the child.[290] When it forbids any forms of trafficking, sale, and abduction, it can be construed that it also includes the prevention of trafficking, sale, and abduction for the purpose of SEA.

Under Articles 37 (a) and 38 (1 and 4) of the CRC, State parties are obliged to ensure proper treatment and avoid torture and cruel treatment, and undertake to protect the whole population affected by armed conflicts, especially children, and comply with IHL.[291] It may be true that the pre-mentioned Articles implicitly preclude State parties from SEAs as such would be in contrast to proper treatment and protection of children in armed conflicts. The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OP1 hereinafter)[292] prohibits the sale of children, child prostitution, and child

[286] Ibid. p. 13, para. 34.
[287] Ibid. p. 13-14, para, 36
[288] Ibid. p. 6, para, 11 (a).
[289] CRC, op. cit. Article 34. It provides: "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials".
[290] Ibid. Article 35. It reads: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form".
[291] Ibid. Articles 37 (a) and 38 (1, 4); Article 37 (a) provides: " States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or Punishment…." Article 38 (1,4) reads: "1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.... 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict".
[292] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child pornography (OP1) adopted by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002, Treaty Series, Volume 2171, A-27531, 247-254. Available at: http://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf

pornography,[293] and obliges each State Party to ensure that SEA against children in all forms are fully covered by its criminal or penal law, whether it is committed domestically or transnationally or on an individual or organized basis.[294]

The CRC also includes provisions regarding rehabilitation of child victims and provides that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child".[295] A similar provision regarding rehabilitation and social reintegration of child victims is also included in Optional Protocol to the CRC on the involvement of Children in Armed Conflicts (OP2 hereinafter)[296].[297]

Overall, as observed by Muntarbhorn, interdisciplinary measures including law and politics should be taken against SEA directed at children, and such measures should be taken through education, socialization, and mobilization. By doing so, Article 34 of CRC must be implemented on different levels; national, bilateral, and multilateral. The latter would seemingly include both regional and international cooperation.[298]

Under Article 2 of the CRC, the general implementation obligation is set out. It provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind […]".[299] States need to be able to show that they have implemented the provisions set forth in the CRC to the maximum extent of their available resources and, where necessary, having sought international cooperation.[300] The question which may arise is whether the CRC applies

[293] Ibid. p. 248, Article 1. Article 2 provides the definitions of sale of children, child prostitution and child pornography as it states:" For the purpose of the present Protocol: a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration; c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes".
[294] Ibid. pp.248-249, Article 3.
[295] CRC, op. cit. Article 39.
[296] Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflicts (OP2) adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002, Treaty Series, Vol. 2173, A-27531, 236-241. Available at: http://www.ohchr.org/Documents/ProfessionalInterest/crc-conflict.pdf
[297] Ibid. p. 239, Article 7. According to this Article: "States Parties shall cooperate in the implementation of the present Protocol, including in prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance […]"; see also OP1, op. cit. pp. 251-252, Articles 8 and 9 (3,4).
[298] However, one may argues that this Article is not comprehensive, from the perspective of levels of corporation, because of not referring to the regional/sub regional action which has become increasingly important in order to protect children's right. Muntarbhorn, Vitit, op. cit. p.4.
[299] CRC, op. cit. Article 2.
[300] Ibid. Article 4.

extraterritorially. According to Gondek, there are two main bases for extraterritorial application of HR treaty obligations, namely, the existence of control and the concept of international assistance and cooperation.[301] The provisions of CRC may therefore also apply outside the territory of a State Party through its troops, and since a TCS exercises a level of effective control over its troops during PSOs, its jurisdiction is not replaced by that of the UN.

A convention regarding women's rights known as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[302] It explicitly prohibits making women the subject of SEAs. Here, Article 3 ensures the exercise and enjoyment of fundamental HR and freedoms for women.[303] Moreover, Article 6 concerns SEA and provides that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".[304] In 1989, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee hereinafter) adopted its General Recommendation on Violence against Women calling on all parties to protect women and girls, as a vulnerable part of society, from violence including sexual violence and sexual harassment.[305]

Regarding the issue of jurisdiction implied in Article 2 of CEDAW, it seems that States primarily exercise territorial jurisdiction through legislation to abolish all forms of discrimination against women in accordance with the convention.[306] However, according to

[301] Gondek, Michal "The Reach of Human Rights in a Globalising World: Extraterrial Application of Human Rights Treaties" (Oxford), 2009, pp. 315-316.

[302] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, United Nations, Adopted by General Assembly resolution 34/180 of 18 December 1979, Treaty Series, vol. 1249, p. 13, available at: http://www.unrol.org/files/CONVENTION%20ON%20THE%20ELIMINATION%20OF%20ALL%20FORMS%20OF%20DISCRIMINATION%20AGAINST.pdf

[303] Ibid. Article 3.

[304] Ibid. Article 6.

[305] UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee hereinafter), General Recommendation No. 12 on Violence against Women, adopted in its 8th session, 1989, UN. Doc. A/44/38. Available at: http://www1.umn.edu/humanrts/gencomm/onwomen.htm
It reads" The Committee on the Elimination of Discrimination against Women, Considering that articles 2, 5, 11, 12 and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life, Taking into account Economic and Social Council resolution 1988/27, Recommends to the States parties that they should include in their periodic reports to the Committee information about: 1. The legislation in force to protect women against the incidence of all kinds of violence in everyday life (including sexual violence, abuses in the family, sexual harassment at the work place etc.); 2. Other measures adopted to eradicate this violence; 3.The existence of support services for women who are the victims of aggression or abuses; 4.Statistical data on the incidence of violence of all kinds against women and on women who are the victims of violence".

[306] Article 2 of CEDAW provides:"States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate

the General recommendation No. 28[307] provided by the CEDAW Committee, States parties shall apply the obligations which derive from the convention without any discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or under their effective control, regardless of whether the affected persons are in their territory.[308] Additionally, the CEDAW Committee reiterates in General Recommendation No. 30[309] the necessity of extraterritorial application of the Convention to persons within their effective control and expresses that in conflict or post-conflict situations, State parties are bound by CEDAW obligations wherever they exercise jurisdiction over a foreign territory, for example, through their national contingents and forces that form part of UN PSOs.[310] Thus, as TCSs exercise their jurisdiction over a foreign territory through their effective control over their PSO troops, they are extraterritorially bound by CEDAW obligations and are responsible for SEAs committed by their troops in such situations.

The ICCPR is another convention which establishes HR obligations for TCSs regarding SEAs and which reinforces the necessity of protecting the rights of children and women. Article 8 of ICCPR repeats the call to protect all people including children and women against slavery.[311] As discussed in preceding paragraphs and also in chapter 3 of this thesis, SEAs of women and children can be seen as a form of modern slavery. Thus, SEA is prohibited under this Article. Moreover, Article 24 (1) of ICCPR recognizes the right of the child and reaffirms the protection of children. It indicates that "[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national, or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state". [312] In this regard, the Human Rights Committee (HRC) issued General Comment No.17[313] which indicates that the rights provided

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discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women".

[307] UN, CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women, 10 December 2010, UN. Doc. CEDAW/C/GC/28. Available at: http://www1.umn.edu/humanrts/gencomm/CEDAW%20Gen%20rec%2028.pdf

[308] Ibid. General rec 28, p. 3, para. 12.

[309] UN, CEDAW Committee, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situation, 18 October 2013, UN. Doc. CEDAW/C/GC/30. Available at: http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf

[310] Ibid. p. 3, para. 8-9.

[311] ICCPR, op. cit. p. 175, Article 8. It reads: "No one shall be held in slavery; slavery and slave- trade in all their forms shall be prohibited…"

[312] Ibid. p. 179, Article 24 (1).

[313] Human Rights Committee (HRC), ICCPR General Comment No. 17: Article 24 (Rights of the child) Adopted at its Thirty-fifth session on 7 April 1989, in International Human Rights Instruments, Compilation of General Comments and General recommendation adopted Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7 12 May 2004, 144-146 Available at: http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf

for in article 24 are not the only ones recognized for children, as every child also enjoys all civil rights proclaimed in ICCPR.[314] It also emphasizes on taking all required social and economic measures to prevent children "from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution".[315]

ICCPR regulates the application of its obligations in Article 2 (1), where States parties undertake to respect and ensure the rights recognized in ICCPR to 'all individuals within their territory and subject to its jurisdiction'.[316] There has been a discussion as to whether the term 'and' is to be understood in a connecting or conjunctive way. Some scholars find that the *travaux preparatoires* indicate an unaccomplished effort to delete the term 'within its territory' or to substitute 'or' for 'and'; this since it was worried that such changes might require the States parties to protect individuals, who are subject to their jurisdiction but living abroad, against the illegal conducts of the foreign territorial sovereign. This was deemed impossible for a State to do so.[317]

The ICJ addressed this issue in its advisory opinion in the Wall Case[318], where Israeli obligations under *inter alia* the ICCPR were considered as applicable to that territory.[319] The court here stressed that 'the exercise of jurisdiction is primarily territorial',[320] but it indicated that jurisdiction "may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions".[321] It is nevertheless submitted by some commentators that the highly unusual length of the Israeli occupation may have influence on ICJ opinion.[322] Overall, the majority view gives the ICCPR extraterritorial application. As regards the applicability of the ICCPR to PSOs, the HRC has found that it also applies there.[323]

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[314] Ibid., p, 144, para. 2; See also Ibid. p.145, para. 4.
[315] HRC, op. .cit. para. 3, p, 144.
[316] ICCPR, op. cit. Article 2, p. 173.
[317] Frostad, Magne "The Responsibility of Sending States for Human Rights Violations during Peace Support Operations and the Issue of Detention" Vol. 50/1-2, Military Law and the Law of War Review, 2011, 127- 188, pp. 134-135.
[318] ICJ Reports of Judgments, Advisory Opinions and Orders, case concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Wall Case hereinafter), 2004, 136- 203. Available at: http://www.icj-cij.org/docket/files/131/1671.pdf
[319]Ibid., p. 191-192, para. 134.
[320] Ibid., p. 179, para, 109.
[321] Ibid.
[322] Frostad, Magne (2011) op. cit., p. 135.
[323] HRC, General Comments No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on its 2187th meeting, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, 1- 8, p. 4, para 10. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement; According to para 10 general Comments: "State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".

Apart from universal attempts to protect children and women' rights relating to the prohibition of SEA, there are also regional HR protection systems. The most developed system of its kind is the European ECHR. The European Court of Human Rights (ECtHR) is its regional enforcement mechanism.[324] In fact, it is the operational arm of the ECHR and is vested with the power to sanction against delinquent States.[325]

The ECHR contains some provisions of relevance to SEAs. First of all, according to the Article 3 torture, inhuman and degrading treatment is forbidden.[326] SEA of women and children can be seen as acts covered by that article. Secondly, Article 4(1) provides that "[n]o one shall be held in slavery or servitude".[327] Interestingly, derogations from the provision of Article 3 and 4 (1) is not allowed even in emergency situation.[328] Finally, Article 13 recognizes the right to an effective remedy and states that "[e]veryone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".[329] Thus, according to the latter, if UN PSO personnel commit SEA and such acts are attributable to a TCS, victims can seek redress before a national authority of the TCS since the person may have an arguable claim of his/hers rights under Articles 3 and 4 (1) of ECHR having been violated.[330]

ECHR regulates the application of its obligations in Article 1 which provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention".[331] According to the *travaux preparatoires* the term 'residing within the territories' was replaced by the Expert Intergovernmental Committee with the term 'everyone within their jurisdiction' in order to extend the benefits of the ECHR to all persons within the jurisdiction of the States parties, even those who could not be considered as residing there in the legal sense of the words.[332]

Extraterritorial application of the ECHR has been considered by many cases, especially the Bankovic Case[333] and the Al-Skeini Case[334], where it is furthermore emphasized that the

[324] There had been the other regional mechanism as such called European Commission which is defunct and does not exist anymore. Muntarbhorn, Vitit, op. cit. p.12; For information about the extraterritorial reach of ECHR in PSOs see Larsen, Kjetil M. op. cit. pp. 433-438; Frostad, Magne, 2011, op. cit. pp. 132-141; see also Article 56 of ECHR concerning territorial application.
[325] Muntarbhorn, Vitit, op. cit. p.13.
[326] ECHR, op. cit. Article 3.
[327] Ibid. Article 4 (1).
[328] Ibid. Article 15(2).
[329] Ibid. Article 13.
[330] The right to seek redress is, to a large extent, expressed in other Human Rights Treaties as well.
[331] ECHR, op. cit. Article 1.
[332] Frostad, Magne, 2011, op. cit. p. 138.
[333] Council of Europe, ECtHR, Bankovic and Others v. Belgium and Others (Bankovic Case), Application No. 52207/99, 12 December 2001, Decision as to the admissibility (Grand Chamber), 1-25.

jurisdictional competence of State parties under Article 1 of ECHR is primarily territorial.[335] The two established exceptions are here where one State Party holds authority and controls over a person (agent), and where a State Party has effective control over a foreign territory.[336]

All in all, in connection with SEA committed by PSO personnel lent to the UN by States, TCSs may incur international responsibility.

2 Responsibility of Troop Contributing States under DARS

The ILC decided in 1975 to work extensively on draft articles relating to the responsibility of States. The draft articles were separated into three parts. The first part was meant to deal with the origins of international responsibility, whereas the second part was meant to deal with the content, forms and degrees of international responsibility, and the third part was intended to deal with the settlement of disputes and the implementation of international responsibility. Part I was provisionally adopted by the ILC in 1980 and DARS was finally adopted on 9 August 2001.[337]

Although there is a wide range of State practice in relation to international responsibility of States,[338] DARS has not been adopted as a formally binding convention, and chances are good that it will not be adopted as such either. The aim of drafting these Articles was to have the UNGA pays close attention to this issue and also to drawn the attention of States to it.[339] However, although DARS as such is not legally binding, it to a large extent reflects customary international law.[340]As held by Larsen: "[A]ll draft Articles have been submitted for comments by governments and others, and this procedure has provided fairly reliable conclusions about state practice and *opinio juris* of the states. Nevertheless, each article must in principle be viewed in light of the general requirements for the establishment of customary international law, and the Articles can only be seen as *prima facie* evidence of the existence of customary law".[341]

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[334] Council of Europe, ECtHR, Al-Skeini and Others v. the United Kingdom (Al-Skeini Case), Application No. 55721/07, 7 July 2011, Judgment (Grand Chamber), 1-86.
[335] Bankovic Case, op. cit. p. 16, para. 61; Al-Skeini Case, op. cit. p. 57, para. 131.
[336] Ibid. pp. 57- 60, para 132- 140.
[337] Shaw, Malcolm N., op. cit. p. 780; See also Crawford, James, op. cit. pp. 1-60 provide an extensive account of the ILC's work on history, evolution of the articles and other relevant issues concerning the state responsibility topic.
[338] Shaw, Malcolm N., op. cit. p. 780.
[339] Larsen, Kjetil M. op. cit. p.101.
[340] Ibid.
[341] Ibid.

In the ICJ judgment concerning the Application of the Genocide Convention[342] (Bosnia and Herzegovina V. Serbia and Montenegro),[343] the ICJ explicitly stated that customary law on international responsibility is found in Articles 4 and 8 of DARS.[344] The Court here nevertheless indicates that it "does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case".[345]

Thus, the ICJ's opinion in the above-mentioned judgment supports Larsen's statement. Individual articles must therefore be considered separately to see whether it reflects customary international law.

The most essential principle of international responsibility of States is manifested in Article 1 which indicates that "[e]very internationally wrongful act of a State entails the international responsibility of that State".[346] This principle is widely supported by practice and hence it reflects customary international law.[347] The elements of an internationally wrongful act of a State are provided under Article 2. It defines the internationally wrongful conduct as an act or omission which is attributable to the State under international law and which constitutes a breach of an international obligation of the State.[348] Hence, a conduct in breach of an international obligation will not entail the international responsibility of a State unless it is also attributable to that State. Chapter II of DARS follows up on this and defines the circumstances under which conduct is attributable to a State.

Under Article 4, conduct of any State organ – including any person or entity having that status in accordance with the internal law of the State – shall be considered as an act of the State concerned under international law, irrespective of whether the organ exercises legislative, executive, judicial or any other function, whatever position it holds within the State, and whatever its character as an organ of the central Government or of a territorial unit of the State is.[349] According to Shaw, this approach reflects customary international law,[350] and the ICJ supports Shaw's statement in its judgment on Immunity from Legal Process

[342] The Convention on the Prevention and Punishment of the Crime of Genocide adopted by United Nations General Assembly, 9 December 1948 as General Assembly Resolution 260, No.1021, United Nations- Treaty Series 1951, 278-322 Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf
[343] ICJ, Reports of Judgments, Advisory Opinions and Orders, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (ICJ Genocide Case hereinafter) 2007, 47-240. Available at: http://www.icj-cij.org/docket/files/91/13685.pdf
[344] Ibid. pp. 202, 207, para. 385, 398; See also DARS, op. cit., Articles 4 & 8.
[345] Ibid, p. 215, para. 414.
[346] DARS, op. cit. Article 1.
[347] Crawford, James, op. cit. pp. 77-80 with references to practice.
[348] DARS, op. cit. Article 2.
[349] Ibid. Article 4.
[350] Shaw, Malcolm N., op. cit. p. 786.

indicating that "[a]ccording to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state".[351] It moreover pointed out that this rule is of customary character.[352] ICJ also reiterated the same view 8 years later in its judgment on the Application of the Genocide Convention.[353]

Notably, it is a well-known fact that Article 43 of the UNC[354], which calls on all Member States to make armed forces available to the UNSC, has never been put into effect. So, the UN has no standing forces at its disposal.[355] Thus, armed forces sent to PSOs by TCS are clearly their organs[356] and so *prima facie* fall within the scope of Article 4 of DARS which is the elemental principle on attribution of conduct to the States. However, the military forces of TCSs do not act merely on behalf of the State during PSOs. They are, to varying degrees, placed at the disposal of and under the control and direction of another entity such as the UN. Thus, the issue of attribution of the conduct of PSOs personnel to another entity than the State will arise.[357]

Under Article 5, the conduct of a person or of an entity - not an organ of a State under Article 4 - empowered by the internal law of that State to exercise elements of governmental authority shall be considered as an act of that State under international law, provided the person or entity is acting in that capacity in the particular instance.[358] It appears that this provision covers, *inter alia*, the situation of privatized corporations which hold specific public or regulatory functions.[359] For example, in some countries, the conduct of private security firms authorized to act as prison guards is included in the aforementioned provision as in that capacity they may exercise public powers of detention and discipline subsequent to a judicial sentence or prison regulation.[360]

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[351] ICJ, Reports of Judgments, Advisory Opinions and Orders, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999, 62-91, p.87, para.62.Available at: http://www.icj-cij.org/docket/files/100/7619.pdf
[352] Ibid.
[353] ICJ, Genocide Case, op. cit. pp. 202, 207.
[354] Article 43 of the UNC reads: "1- All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2- Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3- The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes".
[355] Larsen, Kjetil M. op. cit. p.108.
[356] Ibid.110.
[357] Ibid.109.
[358] DARS, op. cit. Article 5.
[359] Shaw, Malcolm N., op. cit. p. 787.
[360] Crawford, James, op. cit. p. 100.

Article 5 issues may arise, as Shaw observes, in situations where an organ or an agent of a State, such as its military contingent, is placed at the disposal of another international legal entity, such as the UN, in a situation, such as PSOs, where both the State and the entity exercise elements of control and a certain jurisdiction over the organ or agent in question.[361] Therefore, it is not enough to be an organ of a State in order to impose responsibility on the State – that State must have exercised some extent of control over the organ.

Article 6, however, provides that in a situation where an organ of a State is placed at the disposal of another State – not any other legal entity such as international organization like in particular the UN - and exercises elements of the governmental authority of the latter State; the conduct of the organ is therefore considered as the conduct of the State at whose disposal it is placed.[362] The commentary to this provision limits the application of Article 6 to a specific situation. It follows that

> "[t]he words 'placed at the disposal of' in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ 'placed at the disposal of' the receiving State is a specialized one, implying that the organ is acting with consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed. [But] [i]n performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State".[363]

This provision is of little relevance to the situation of contemporary PSOs due to the fact that TCSs normally place their forces at the disposal of the UN and not that of another State. Moreover, it is improbable that a TCS will place its forces under the 'exclusive direction and control' of another State even if the peace operation is authorized by the UN to act under unified command of the latter State.[364] In such operations the personnel of TCSs are not integrated into the forces of the commanding State in the sense required by Article 6.[365]

An unlawful act of an organ of a State or of a person or entity empowered by the State to exercise elements of its governmental authority is attributable to that State under international law, as provided for by Article 7, even if the organ, person or entity exceeds its authority or contravenes instructions providing that it acts in that capacity;[366] in the sense that the

[361] Shaw, Malcolm N., op. cit. p. 787.
[362] DARS, op. cit. Article 6. It provides: "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed".
[363] Crawford, James, op. cit. p. 103.
[364] Larsen, Kjetil M. op. cit. p.109.
[365] Ibid. pp.109-110.
[366] DARS, op. cit. Article 7.

officials act "at least to all appearances as competent officials or organs or they must have used powers or methods appropriated to their official capacity".[367] Thus, during PSOs, if the personnel of PSOs forces commit misconduct which is otherwise attributable to a TCS, by exceeding their authority or infringing instructions, that TCS incurs international responsibility providing that the personnel acted in their official capacity. It seems that this Article falls into the objective theory regarding State responsibility, discussed above, and lays down an absolute and strict rule of liability.[368]

As a general principle, the conduct of private persons or entities such as companies, or enterprises State-owned and controlled – but which are nevertheless not the organ of a State - is not attributable to that State unless there is a special factual relationship between them and the State.[369] There are two situations under Article 8, which reflects customary international law[370], where the conduct of private persons and entities is attributable to it; when these act on the instructions of the State or under the State's direction and control.[371] It is therefore clear that Article 8 of DARS is of merely indirect relevance in the context of PSOs in so far as it only concerns the attribution of the conduct of a private person or entity which is not an organ or agent of a State, while forces acting in PSOs are organs of that State and so are not directly included in this Article.[372]

However, the relevance of this Article rests on its influence on relevant provisions in DARIO.[373] As was discussed in chapter 3 of this thesis, there is a clear connection between effective control and the attribution of conduct in the context of PSOs, and consequently international responsibility lies where effective control is vested. According to the commentary on Article 8 of DARS, the terms 'instructions', 'direction', and 'control' express alternative relationships and it is sufficient to establish any of them in order to attribute the conduct of a private person or entity to the State. Furthermore, they must be related to the conduct which contributes to the internationally wrongful act.[374] Before moving forward, it is worthwhile to mention that there are several articles in DARIO which seem to establish concurrent responsibility for both the international organization – the UN to the purpose of

[367] Shaw, Malcolm N., op. cit. p. 788.
[368] Ibid. p. 789.
[369] Crawford, James, op. cit. p. 110, 112.
[370] See ICJ, Genocide Case, op. cit. pp.207, 210, para. 398, 406.
[371] DARS, op. cit. Article 8. It provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of that State in carrying out the conduct".
[372] Larsen, Kjetil M. op. cit. p.110.
[373] Ibid.
[374] Crawford, James, op. cit. p. 113.

this thesis- and Member States in specific situations, such as Articles 14, 15, 16, 17, 20 and 48.[375]

According to Larsen, "the requirement of 'direction and control' refers, in particular, to the 'effective control' test [...which] provides a high threshold for the attribution of conduct of non-state entities to the state".[376] It appears, as the commentary to this provision indicates, that the effective control test implies that this principle does not extend to conducts which are incidentally or in a circumferential manner associated with an operation.[377] Thus, to attribute a conduct to a TCS in PSOs, the conduct should be an integral part of the operation and carried out under effective direction or control of a State.

The attribution of authorized conduct and the degree of control are widely considered in international jurisprudence.[378] For example, the ICJ in the Nicaragua case[379] stated that although the US provided the *contras* with heavy subsidies and other support, there was no clear evidence of the US having exercised such a degree of control in all fields to justify that the *contras* had acted on the behalf of the US.[380] It emphasized that having the effective control of military or paramilitary operations in which HR or IHR are violated is essential to establish the international responsibility of a State.[381] It explains the degree of effective control as follows:

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

[375] See supra note No. 217.
[376] Larsen, Kjetil M. op. cit. p.110.
[377] Crawford, James, op. cit. p. 110.
[378] "In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves 'governmental activity'. Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as 'volunteers' to neighbouring countries, or who are instructed to carry out particular missions abroad". Crawford, James, op. cit. pp. 110-112.
[379] ICJ, Reports of Judgments, Advisory Opinions and Orders, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA) (ICJ Nicaragua Case hereinafter), 1986, 14-150. Available at: http://www.icj-cij.org/docket/files/70/6503.pdf.
[380] Ibid. p. 62. para. 109.
[381] Ibid. p. 65. para. 115.

> applicant State. Such acts could well be committed by members of the contras without the control of the United States".[382]

However, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) addressed the issue in the Tadic case[383] and took a different position from the ICJ. It used the 'overall control' test which is more lenient and flexible than the 'effective control' test. The former test was primarily used by ICTY to qualify an armed conflict as international. That is, if a foreign State exercises overall control over a group which is involved in a *prima facie* non-international armed conflict, this conflict is transformed into an international armed conflict.[384] But the Appeal Chamber also suggested that the test is relevant for the attribution of conduct of non-state entities to a State:

> "In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law".[385]

In the Genocide case[386], the ICJ took that same position as it has in the earlier Nicaragua case. The court states that "the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility",[387] and this test cannot be used to establish international responsibility for States.[388] It holds that the responsibility of a State arises where a person or entity on whatever basis acts on behalf of it. Therefore, the act of official organs of a State, or of persons or entities which are not formally recognized as official organs under internal law but may nevertheless be equated with State organs due to their complete dependence on the State, or of persons and entities

[382] Ibid. pp. 65-66. para. 115; See also Crawford, James, op. cit. pp. 110-111.
[383] Prosecutor v. Dusko Tadic (Appeal Judgment), International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. IT-94-1-A (ICTY Tadic Case hereinafter) , 15 July 1999, 1-173. Available at: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf .
[384] Larsen, Kjetil M. op. cit. p.110; see also Crawford, James, op. cit. pp. 111-112.
[385] ICTY, Tadic Case, op. cit. p. 62, para. 145. However, It should be noted that, as many scholars have pointed out, in Tadic case the issue questioned was of individual criminal responsibility not state responsibility and the situation might be different where the state assumed responsible exercised clear effective control over the territory in which the violation had been occurred. Shaw, Malcolm N., op. cit. p. 790; Crawford, James, op. cit. pp. 111-112.
[386] ICJ, Genocide case, op. cit. pp.207, 210, para. 398, 406.
[387] Ibid. p.210, para. 406.
[388] See Ibid. pp.210-211, para. 407 indicating that the court determines whether Respondent incurs responsibility under article 8 of DARS which examines effective control not overall control.

under Article 8 of DARS, is attributable to that State.[389] ICJ continues that the latter is so "where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility".[390]

This issue has also been considered by the ECtHR. In the Loizidou case[391], which shows that military occupation is the prominent instance of land control[392], the court states that

> "[i]t is not necessary to determine whether […] Turkey actually exercises detailed control over the policies and actions of the authorities of the [Turkish Republic of Northern Cyprus (TRNC)]. It is obvious from the large number of troops engaged in active duties in northern Cyprus[393] […] that her army exercises effective overall control[394] over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey [...]".[395]

In sum, it seems that the 'effective control' test applied by the ICJ in the Nicaragua and Genocide cases and most probably by the ECtHR in the Loizidou case is the proper test under Article 8 of DARS. As was mentioned in preceding paragraphs, although Article 8 is of indirect relevance in the context of PSOs since it refers to private persons or entities while PSOs forces are the organs of TCSs, its relevance is revealed in its influence on relevant rules in DARIO where the responsibility rests with ECC. Thus, although under Article 4 of DARS the conduct of PSOs forces is attributable to TCSs, in connection with Article 8, DARIO

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[389] Ibid. p.210, para. 406.
[390] Ibid.
[391] Council of Europe, ECtHR, Loizidou v. Turkey, Judgment (Grand Chamber) (Loizidou Case hereinafter), Application No. 15318/89, 18 December 1996, Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007#{%22itemid%22:[%22001-58007%22]}
[392] Frostad, Magne (2011) op. cit. p. 142.
[393] Regarding active duties in which the Turkish army is involved in Northern Cyprus, ECtHR, in Loizidou Case, p. 5, para 16 of the judgment (Grand Chamber), found that "Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication. The army's headquarters are in Kyrenia. The 28th Infantry Division is based in Asha (Assia) with its sector covering Famagusta to the Mia Milia suburb of Nicosia and with about 14,500 personnel. The 39th Infantry Division, with about 15,500 personnel, is based at Myrtou village, and its sector ranges from Yerolakkos village to Lefka. TOURDYK (Turkish Forces in Cyprus under the Treaty of Guarantee) is stationed at Orta Keuy village near Nicosia, with a sector running from Nicosia International Airport to the Pedhieos River. A Turkish naval command and outpost are based at Famagusta and Kyrenia respectively. Turkish airforce personnel are based at Lefkoniko, Krini and other airfields. The Turkish airforce is stationed on the Turkish mainland at Adana".
[394] Effective overall control lies somewhere between effective and overall. However, it seems perhaps much closer to effective control.
[395] ECtHR, Loizidou Case (Grand Chamber) 1996, op. cit. p.18, para. 56.

provisions and owing to the fact that the UN exercises some degree of ECC over PSOs forces, it is nevertheless true that TCSs must exercise some degree of ECC over their organs placed at the disposal of an organization in order for them to be held responsible for their troop's misconduct.

Thus, it may be true that, as discussed in chapter 3,[396] there is dual responsibility where both the UN and TCSs exercise an amount of ECC over PSOs forces. The amount of ECC might, however, vary according to the circumstances of each specific case. Thus, SEAs committed by the personnel of such forces may be attributable to both.

[396] See Chapter 3 of current thesis, pp. 34-35.

Chapter 6: The Possibility of filing a Claim against the United Nations and the Issue of Redressing Victims of Sexual Exploitation and Abuses

As was discussed in chapter three, the UN is bound by HR obligations under its own constitutive document and customary international law. But, this does not ensure a forum in which victims of SEAs can file claims against the UN. Actually, the question is whether it is possible to sue the UN at all. As held by Wouters and Others, there is no international tribunal that generally has jurisdiction over international organizations - *i.a* the UN- because of the immunity traditionally bestowed upon them.[397] Much case-law show that immunity of international organizations - the UN for the purpose of this thesis - is permissible in as much as there exists reasonable alternative means to protect victims' rights effectively.[398] Such cases try to reconcile individual rights with rights of the international organizations.[399] However, the question is whether national courts constitute an appropriate forum to assess the specificities of dispute settlement mechanisms which should have been set up by international organizations. Moreover, interference by a national judiciary may threaten the independence of the UN in accomplishing its functions and missions. Additionally, even if a victim could obtain a judgment which convicts the UN, the possibility of the enforcement of the national decision is questionable.[400] In subsequent sections, the possibility of suing the UN, the issue of redressing victims of SEAs, and the ongoing so-called Cholera Complaint[401] - as an example of what may be done in SEAs cases - will be discussed.

1 The Possibility of Filing a Suit against the United Nations

It is clear that international organizations, *i.a* the UN, cannot be sued before regional or international judicial tribunals, since these only cater for cases against States.[402] There are therefore clear limitations on the bringing of a case against the UN before a third party dispute settlement system. Moreover, according to the statutes of the ICJ only States can be

[397] Wouters, Jan, Brems, Eva, Smis, Stefaan, and Schmitt Pierre " Accountability for Human Rights Violations by International Organizations: Introductory Remarks" in Wouters, Jan, Brems, Eva, Smis, Stefaan, and Schmitt Pierre (eds.) "Accountability For Human Rights Violations by International Organizations, Oxford: intersentia, 2010, 1-18, p. 11.

[398] Council of Europe, ECtHR, Case of Beer and Regan v. Germany, Application No. 28934/95, Judgment, 1999, p. 3 available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58912#{%22itemid%22:[%22001-58912%22]} ; Council of Europe, ECtHR, Case of waite and Kennedy v. Germany, Application No. 26083/94, Judgment, 1999, p. 261. Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58912#{%22itemid%22:[%22001-58912%22]}.

[399] Wouters, Jan and Others, op. cit. pp.11-12.

[400] Ibid. p. 12.

[401] United States Distict Court, Southern Districtt of New York, Class Civil Action, Delama Georgesand Others v. the United Nations and Others regarding Cholera Outbreak in Haiti (Cholera Complaint), Civil Action No. 1:13-cv-07146-JPO, 9 October 2013. 1-67, Available at: http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf; for an overview regarding the events which led to this complaint see http://www.ijdh.org/2013/10/topics/health/cholera-complaint-against-the-un/#.U1d0APmSx8F.

[402] It should be noted that the European Union will become an exemption against which lawsuit can be filed before ECtHR, when the negotiations with the Council of Europe has been finished regarding accession under ECHR Art. 59(2).

parties in cases before the court.[403] The TCS as Member States can nevertheless be sued either before regional and international judicial bodies or/and their own domestic courts, and the bringing of Member States before relevant courts is an indirect way to secure the responsibility of international organizations such as the UN. One may argue that although it is a short-term option, it would practically evade immunities enjoyed by international organizations as such.[404] However, as the issue here is the possibility of filing a case against the UN itself, the possibility of suing Member States in order to target UN accountability[405] will not be covered further. And since the UN only offers a poor internal redress mechanism[406] - under article VIII section 29 of 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN)[407], the only possibility is to sue the UN before a domestic court.[408] Having said that, the main barrier, limiting claims against the UN before national courts, is the privileges and immunities which the UN enjoys.

1-1 Privileges and Immunities Enjoyed by the United Nations

It is generally accepted that international organizations may enjoy privileges and immunities. Although international organizations have in a few cases been endowed with the same immunities as States by analogy in the literature or jurisprudence, these are different, in the vast majority of cases, from the rules applicable for States.[409] For example, the immunity of international organizations is absolute unless waived by the organization itself, while that of States is not absolute and excludes commercial activities.[410]

An international organization such as the UN requires certain privileges and immunities to perform its functions effectively and to secure the international character of its personality.

[403] See this thesis Chapter 1, p. 5. The possibility of referring a dispute to an ad hoc international tribunal to have it settled through arbitration either ICJ advisory opinion, are the ways which suits settlement of disputes between the UN and States. But they are not work for victims of SEA to complain against the UN.
[404] 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, and Schmitt Pierre (eds.) "Accountability For Human Rights Violations by International Organizations, Oxford: intersentia, 2010, 169-212, p. 171.
[405] For more information in this regard see Ibid. pp. 180- 201.
[406] Ibid. p. 171; see also Ibid., pp. 174-176; Neumann, Peter "Immunity of International Organizations and Alternative Remedies against the United Nations" Seminar on State immunity, Summer Semester, 2006, Institute for International Law, Vienna university, 1-29, pp. 10-11. Available at: https://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf
[407] UNGA, Convention on the Privileges and immunities of the United Nations (CPIUN), 13 February 1946, United Nations Treaty Series, Vol.1, 15- 32, No. 4. Available at: http://www.un.org/en/ethics/pdf/convention.pdf
[408] The prerequisite for any claim against the international organisation, *i.a.* the UN, is its recognition as a subject of international law that possesses international legal personality. See this thesis chapter, pp.11-14; Tondini, Matteo, op. cit. pp.172 - 173.
[409] Naert, Frederik, op.cit. pp. 365- 366.
[410] Ibid. p. 366.

Furthermore, these immunities help it to uphold its interdependence from its Member States.[411]

1-1-1 Sources

There are three different sources, namely, treaties, customary international law, and national law, from which the privileges and immunities of international organizations may emanate.[412]

There are three types of treaties which deal with the privileges and immunities of the UN. First of all, the UNC provides basic provisions requiring Member States to endow the UN with immunities.[413] As the Secretary-General states, the entitlement of the UN and its officials to immunities is explicitly enshrined in Article 105, paragraph 2, of the UNC.[414] This Article provides that the UN, its officials, and the representatives of Member States are to enjoy such privileges and immunities which are necessary for the independent exercise of their functions in connection with the organization.[415] The other source is general multilateral agreements dealing with the privileges and immunities of the UN, namely, CPIUN and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies[416]. They are considered as a supplement to the more basic provisions of the UNC.[417] Last but not least, there are many bilateral agreements between the UN and individual States in which the UN is situated or performs a particular mission such as PSOs. These are typically referred to as SOFAs. Interestingly, such States need not be Member States of the UN. [418]

In the absence of treaty obligations, customary international law calls on States to grant international organizations privileges and immunities. This has been recognized by both the national courts of member and non-Member States and includes the provisions which are necessary for an organization to perform its functions.[419] In the case of the UN, nevertheless, there is no need for customary international law to recognize privileges and immunities as

[411] Akande, Dapo, op. cit. p. 271.
[412] Ibid. pp. 272-273.
[413] Ibid. p. 272.
[414] General Assembly, Report of the Secretary – General on the Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946 (1995 Secretary – General's Report hereinafter) , UN Doc. A/C.5/49/65 of 24 April 1995, 1-14, p. 10, para. 25. Available at : http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.5/49/65
[415] UNC, op. cit. Article 105. It provides: "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purpose. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization. 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose".
[416] UNGA, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, United Nations Treaty Series, Vo. 33, 261- 291. Available at: http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html
[417] Akande, Dapo, op. cit. p. 272.
[418] Ibid.
[419] Ibid.

there are treaty obligations in this regard and almost all States are parties to the UNC. Moreover, since an international organization such as the UN enjoys immunities and privileges within the territory and national legal order of a State, many States have enacted domestic laws governing such privileges and immunities.[420]

1-1-2 Scope

Privileges and immunities most commonly derive from treaties. As Akande states, there are significant similarities in the content of these treaties which allows customary international law to develop.[421] Although most treaties grant privileges and immunities to the UN itself, to its officials including experts on missions, and to representatives of Member States or exceptionally of other bodies of the UN,[422] only privileges and immunities of the UN itself[423] will be covered here.

Obviously, the immunity which precludes law suits against the UN - by e.g. victims of SEAs - in national courts is the immunity from judicial jurisdiction. The UN is granted an absolute immunity from the judicial jurisdiction of States under Article II of the CPIUN.[424] It provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution".[425] The UN itself can waive this immunity by consenting ad hoc to the proceeding or in a more regular manner through SOFAs.

Some have sought to restrict the absolute nature of the UN's immunity. It has been argued that it may amount to injustice where there is no alternative means for individual victims to be redressed; the granted immunity should therefore be conditional on the presence of alternative methods of resolving disputes and other means of obtaining redress.[426] Moreover, relying on an analogy with States' immunity, one may also argue that such immunity should be granted to an international organization such as the UN only in relation to sovereign exercises and not in relation to commercial or private ones. The latter limits the immunity of

[420] Ibid. p. 273.
[421] Ibid.
[422] Ibid.
[423] Privileges and immunities of the UN encompass immunity from the jurisdiction, immunity from execution, inviolability of premises, property, and archives, Currency and fiscal privileges, and freedom of communication. However, immunity from the jurisdiction is considered in this section since the issue of suing the UN is centered to this thesis. For further information see Ibid. pp. 271- 281.
[424] Neumann, Peter, op. cit. pp. 9-10.
[425] CPIUN, op. cit. Article II, Section 2.
[426] Akande, Dapo, op. cit. pp. 273- 274.

the UN from an absolute to a restricted one. [427] Both arguments are merely *de lege ferenda* since they are not in accordance with the treaty obligations providing immunities for the UN. Besides, the UN is not a sovereign entity and does not exercise sovereign authority although it is composed of sovereign States.[428] Indeed, this immunity is granted to the UN to protect its official functional activities rather than public or sovereign acts as such.[429]

Accordingly, the victims of SEA cannot take legal action against the UN before domestic courts although the UN may be at least co-responsible for SEAs committed by the personnel of PSOs. However, as previously mentioned, there is a possibility for the UN waiving its immunity by agreeing to the judicial proceeding or by withdrawing from its immunities when concluding SOFAs.

It is also worthwhile to note that even if there might be a possibility for suing the UN before national courts, according to the CPIUN, the UN still possesses immunity from enforcement jurisdiction or measures execution, which prevents the seizure or pre-attachment of its property or other assets.[430] These may nevertheless of course also be waived by the UN itself. The latter needs a separate and express consent of the UN.[431]

2 Redressing Victims of Sexual Exploitations and Abuse

There is general agreement on the urgent need for a strategy of assistance to victims of SEA committed by PSO personnel. However, to date, there has not been a clear system through which such victims could be redressed.[432] Unfortunately, the UN insists that it bears no legal liability itself for SEAs committed by its PSO personnel.[433] It seems that the UN merely undertakes a commitment of assisting and supporting victims and children born as a result of SEAs to get redress.[434] For example, according to the Zeid Report, victims of SEAs should be provided with effective mechanisms by the UN to lodge complaints against UN personnel – not against the UN itself - in confidential settings.[435]

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[427] Neumann, Peter, op. cit. p. 4 ; Akande, Dapo, op. cit. pp. 273- 274.
[428] Ibid. p. 274; Neumann, Peter, op. cit. pp. 2-3.
[429] Ibid. p. 9; Akande, Dapo, op. cit. p. 274.
[430] CPIUN, op. cit. Article II, Section 3. It provides that: "The premises of the United Nations shall be inviolable. The property and assets of the of the United Nations, wherever located and by whomsoever held, shall be immune from reach, requisition, confiscation, expropriation, and any other form of interference, whether by executive, administrative, judicial or legislative action".
[431] Akande, Dapo, op. cit. pp. 274- 275.
[432] Defeis, Elizabeth F., op. cit. p. 210.
[433] Ibid.
[434] The Secretary- General "Draft United Nations Policy Statement and Draft United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff or Related Personnel (Draft Victim Assistance Policy hereinafter) June 2006, UN Doc. A/60/877, 1-21, pp. 4, Part A, para 3. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/376/36/PDF/N0637636.pdf?OpenElement
[435] Zeid Report, op. cit. p. 18, para 40.

2-1 Providing Assistance and Support to the Victims

According to the Draft Victim Assistance Policy, financial and technical support range from emergency assistance and include "medical and psychosocial support, to more comprehensive assistance, such as educational opportunities or skills training and, in certain cases, financial support".[436] Furthermore, in cases where the alleged act of SEA constitutes a crime, the UN will also assist alleged victims to pursue the case with the national authorities.[437] The UN will also work with community-based organizations to raise awareness of the rights and needs of complainants, victims and children fathered by UN PSOs personnel.[438] Notably, as held by the Zeid Report, the UN should encourage the victims who have credible evidence to have the paternity established to seek a court order for support. But in the lack of a functioning legal system, where the PSOs is deployed the General Assembly could adopt a resolution which requests the Secretary-General to proclaim rules enabling him, where the victim has credible evidence, to offer to obtain a DNA test of the child in order to prove whether the allegation is well founded.[439]

Due to the problems with making UN responsibility a reality, the Draft Victim Assistance Policy recommends that in order to fund such assistance, the UN should establish a funding mechanism through a centralized 'Headquarters-based trust fund'.[440] These funds would be contributed to by 'departments, agencies fund and programs' within the UN and also by TCSs.[441] Additionally, the Zeid Report suggests that the daily allowance of soldiers found guilty of SEA to be seized in order to contribute towards the trust fund.[442] It continues that the TCS then can recoup those sums from the soldiers concerned, since it has *inter alia* disciplinary authority over personnel of its contingents.[443]

2-2 Non-Contractual Claims for Remedies through an Internal Mechanism

Under Article VIII, Section 29, of the CPIUN, the UN shall make provisions for appropriate modes of settlements and respond to the claims arising from contacts, other disputes of a private law character (non-contractual claims), and disputes involving its officials enjoying immunity if their immunity has not been waived by the Secretary-General.[444] The 1995

[436] Draft Victim Assistance Policy, op. cite. p. 5, Part A, para 8.
[437] Ibid.; see also ibid. p. 12, Part B. para 18, 20.
[438] Ibid. p. 16, Part B, para 34.
[439] Zeid Report, op. cit. p. 26, para 76; see also Draft Victim Assistance Policy, op. cit. p. 14, Part B, para 26.
[440] Ibid. p. 18, Part B, para 42.
[441] Ibid., pp. 18- 19, Part B, para 44.
[442] Zeid Report, op. cit. p. 25, para 75; see also Ibid. para 76.
[443] Ibid. pp. 25- 26, para 75.
[444] CPIUN, op. cit. Article VIII, Section 29 (a, b).

Secretary General's Report refers to, *inter alia*, claims of a private law character including claims related to the conduct of UN PSOs. Within the context of PSOs, the UN has envisaged claims or disputes of a private law character in relation to two categories.[445] The first category includes claims for compensation submitted by third parties for personal injury or death and/or property loss or damage, resulted from conduct of members of a UN PSOs within the "mission area" concerned. The second category consists of claims arising out of any kinds of commercial contracts into which the UN has entered, in order to meet the requirements of a PSO.[446] It seems that the redressing of victims of SEAs, committed by the personnel of PSOs, falls into the former category.

In this regard, under the Model SOFA, a standing claims commission will be established for the purpose of settling such claims.[447] However, such claims have to date been settled without resort to the establishment of a claims commission.[448]

Concerning past and present PSOs, it has been the practice to establish in the mission an internal local claims review board, on the basis of authority delegated by the Controller[449], to examine and recommend settlement of third-party claims.[450] When the settlement amount offered by the board exceeds the financial limits set out in the applicable delegation of authority, the related claim will be referred to UN Headquarters by the PSO concerned.[451] Then, the offers of the board are reviewed by the Field Operations Division, Department of Peacekeeping Operations, which, in turn, forwards them to the Director of the Peacekeeping Financing Division, Office of Program Planning, Budget and Accounts for review and approval.[452] After approval, the claimant is paid against the execution of a release form indicating that the claimant agrees to be compensated and holds harmless the UN, its officials and agents, any and all claims and causes of action by third parties arising from or relating to the injuries or loss at issue. [453]

It appears that the compensation is very dependent on the approval of a representative of the entity against which the claim has been made. Additionally, the claimant has to sign the forms described above in return for compensation. Generally, internal redressing mechanisms are neither impartial nor effective and thus does not fully satisfy the need to redress victims;

[445] 1995 Secretary-General's Report, op. cit. p. 6, para. 15.
[446] Ibid.
[447] Model SOFA, op. cit. p. 13, Aricle VII, para 51.
[448] 1995 Secretary-General's Report, op. cit. p. 6, para. 16.
[449] Controller is the delegation of financial authority for the establishment of a local claims review board. Ibid. p. 14.
[450] Ibid. p. 7, para. 17.
[451] Ibid. p. 7, para. 18.
[452] Ibid.
[453] Ibid. pp. 7-8, para. 19; It seems that this process takes a long time to proceed.

since the UN may considers its interests more than those of victims and victims may accept whatever the UN offers because of fear of its consequences or because of the lack of any other way to be compensated even partially.

In sum, to date, neither Zeid's recommendations nor the Draft Victim Assistance Policy have been implemented by the UN in order to provide the victims with assistance and support.[454] As Defeis states "[t]he concern that such assistance might constitute an admission of peacekeeper misconduct has contributed to the delay".[455] When also taking into account that the UN limits its assistance and support to the situations where the identity of the UN personnel allegedly having committed SEA is unknown,[456] the only way available for victims to become fairly redressed is by suing the UN before a national court. Although, as previously discussed, the latter holds some restrictions and obstacles, it works best where the UN does not acknowledge its responsibility itself – if it had waived its immunity by any means before.

3 The Cholera Complaint

In 2013, the UN was sued in a national court – the Southern District of New York federal court - in regard to the Cholera epidemic spread by the United Nations Stabilization Mission in Haiti (MINUSTAH) which caused the death of over 7000 Haitians in 18 month and has also infected hundreds of thousands – almost 1 in every 20 Haitians.[457] This groundbreaking case is one of the largest cases ever to seek justice for UN wrongdoing.[458] The Cholera Complaint has impact and implications beyond Haiti, since it challenges the UN to establish mechanisms in order to uphold its commitment to be a universal leader in accountability and promotion of human rights for all.[459] It is also an exemplary case which addresses legal aspects of relevance to cases concerning SEAs.

3-1 The UN Role in Cholera Outbreak

Numerous studies, including those of the UN itself, have shown that in 2010 *Vibrio cholera virus* was introduced to Haitian waters by MINUSTAH personnel.[460] MINUSTAH is a PSO and parts of its personnel were deployed to Haiti from Nepal, where cholera is endemic. As

[454] Defeis, Elizabeth F., op. cit. p. 211.
[455] Ibid. pp. 211- 212.
[456] Draft Victim Assistance Policy, op. cit. p. 19, Part B, para 44.
[457] Cholera Litigation, http://www.ijdh.org/cholera/cholera-litigation/#.U1d2VvmSx8G , Access: 14 May 2014 at 11:35 hrs.
[458] Ibid.
[459] Ibid.
[460] Petition for Relief, 2011, 1-37, p. 1, Available at: http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf.

reported by the Centers for Disease Control and Prevention, until the arrival of MINUSTAH peacekeepers, Haiti had not reported a single case of cholera for over 200 years.[461]

Although the UN knew that Nepal was experiencing a wave of cholera infection at that time, the Nepali peacekeepers were neither tested nor treated for cholera prior to deployment to Haiti.[462] The peacekeepers were stationed on a base in rural Mirebalais which maintained dangerous sanitation conditions, allowing human waste to pollute a stream that runs just meters from the base and into the Artibonite River - Haiti's primary water source.[463] Neighbors in the area reported disgusting smell arising from the camp, and later a UN investigation revealed that the drain water piping at the base was "haphazard" and "inadequate," and that all waste of the base were emptied into an open-air unfenced ditch.[464]

3-2 Claim for Compensation: Petition for Relief

The first step taken towards compensation of cholera outbreak victims was the filing of a claim, requesting relief and reparations against the UN. This claim, known as Petition for Relief, was filed against both MINUSTAH and the UN by the Bureau Des Advocats Internationaux (BAI) and Institute for Justice & Democracy in Haiti (IJDH) in November 2011. The Petition for Relief has been filed on behalf of over 5,000 victims of cholera in Haiti, who are the petitioners in this matter.[465] In fact, the Petition for Relief is not a claim before a judicial body and is in accordance with the procedures set out in the SOFA between the UN and the government of Haiti (SOFAH hereinafter).[466]

As is pointed out in the Petition for Relief, the catastrophic outbreak of cholera is directly attributable to the "negligence, gross negligence, recklessness and deliberate indifference for health and lives of Haiti's citizens"[467] by the UN and its subsidiary organ, MINUSTAH.[468] Admittedly, the facts and law dictate that UN's failures constitute negligence as such and it retains institutional liability for all conducts alleged that spread cholera virus in Haiti.[469]

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[461] Cholera Litigation, op. cit.
[462] Ibid.
[463] Ibid.
[464] Ibid.
[465] Ibid.
[466] Petition for Relief, op. cit. p. 16; Agreement between The United Nations and the Government of Haiti Concerning the Status Of the United Nations Operation in Haiti (SOFAH hereinafter),Volume 2271, 1-40460, 251-263. Available at: http://www.ijdh.org/wp-content/uploads/2014/03/MINUSTAH-SOFA-English.pdf . The Petition has been filed within the statute of limitations set forth in Article VII, papa 54 of SOFAH. However, it is not clear that the statute of limitations applies in this case since, to date, no standing claims commission (according to Article VIII, para. 55 of SOFAH) has been set up to hear the petition and also no procedures for filing petitions with the Claims Unit are available for public. Petition for Relief, op. cit. p. 17.
[467] Ibid. pp. 1, 18.
[468] Ibid. p.1.
[469] Ibid. p.18.

The following facts and obligations would seem to show UN's negligence. First of all, the UN had a duty to screen troops for cholera infection and test them prior to deployment from Nepal. But the UN failed to carry out such tests for individuals who did not exhibit active symptoms.[470] Secondly, the UN infringed its duty to maintain an adequate standard of its sanitation facilities and waste disposal at the Mirebalais camp which thus allowed cholera-infected fecal contamination to entered the Artibonite River.[471] Third, the UN failed to conduct proper water quality testing and allowed testing equipment to fall into disrepair. Finally, the UN failed to take immediate corrective action and wilfully delayed investigation and timely access to the cholera outbreak's source.[472]

The UN failed to comply with both the SOFAH and HR. Under Article VII para. 54 and Article VIII para. 55 of SOFAH, the UN has jurisdiction over this claim[473] and is required to establish a standing claims commission to settle all third party claims for personal injury, illness or death arising from or attributable directly to MINUSTAH's conduct.[474] Although MINUSTAH personnel enjoy civil and criminal immunity from Haitian courts, pre-mentioned provision ensures that this immunity shall not deprive the victims of a remedy for harms resulting from the conduct of MINUSTAH personnel. However, the UN breached its SOFAH's obligation and, to date, no standing claims commission has been set up by the UN in Haiti.[475]

In addition, the UN's reckless and negligent conduct breached MINUSTAH's obligations under Article IV, para 5 SOFAH, which provides that MINUSTAH shall respect all local rules and regulations.[476] As presented by the Petition for Relief, the local law of Haiti which has been violated is the Civil Code of Haiti, *inter alia*, with regard to the obligation to compensate injuries resulting from negligence, including negligent transmission of disease. Agreement against pre-mentioned law is contrary to public policy.[477] Furthermore, the Haitian penal code has been violated as well, criminalizing involuntary homicide and injury resulting from negligence or a failure to follow regulations.[478] The UN also infringed the

[470] Ibid.
[471] Ibid. p. 19.
[472] Ibid. p. 19. SOFAH and HR constitute the legal foundation for these obligations as will be discussed in following paragraphs.
[473] Ibid. p. 16.
[474] SOFAH, op. cit. p. 262, Article VIII, para. 55. It provides: "[…] any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose. […]."
[475] Petition for Relief, op. cit. p. 16.
[476] SOFAH, op. cit. p. 252, Article IV, para. 5.
[477] Petition for Relief, op. cit. pp. 21-22.
[478] Ibid. pp. 22-23.

obligation of control of communicable diseases in accordance with international conventions under Article V, para. 23 of SOFAH by not taking required measures to control cholera virus.[479]

As mentioned above, the UN and the MINUSTAH failed to comply with international conventions - which were required to be complied with under SOFAH - and HR, and thereby violated victims' fundamental rights including, *inter alia*, the right to life as provided for in Article 6 (1) of ICCPR[480], and Article 3 of UDHR[481] and the right to health as articulated in article 12 (1) International Covenant on Economic, Social and Cultural Rights[482], Article 25 of the UDHR[483], Article 24 of the CRC[484].

As discussed in preceding sections, under Article VIII Section 29 of CPINU, the UN is obliged to protect victims' right to an effective remedy under international law through providing a dispute settlement mechanism, and this way reflected in para. 55 SOFAH. However, the UN has failed to comply with this provision as well.

All in all, Petition for Relief demands that the UN install a national water and sanitation system that will control the cholera epidemic; redress individual victims of the cholera outbreak for their losses; and issue a public apology for its wrongful conducts.[485]

3-2-1 United Nations' Response to the Petition for Relief Claim

On 21 December 2011, the Office of Legal Affairs of the UN acknowledged that the UN had received the complaint and was in the process of reviewing it.[486] Regarding UN's privileges

[479] SOFAH, op. cit. p. 256, Article. V, para. 23. It provides: "MINUSTAH and the Government shall cooperate with respect to sanitary services and shall extend to each other the fullest cooperation in matters concerning health, particularly with respect to the control of communicable diseases, in accordance with international conventions"; see Petition for Relief, op. cit. pp. 23-24.

[480] ICCPR, op. cit. Article 6 (1). It reads: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

[481] UDHR, op. cit. Article 3 read that "[e]veryone has the right to life, liberty and security of person".

[482] International Covenant on Economic, Social and Cultural Rights, 19 December 1966, Adopted by the General Assembly of the United Nations, Article 12 (1). Available at: http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf, This Article provides: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

[483] UDHR, op. cit. Article 25. It reads: "Everyone has the right to a standard of living adequate for the health and well- being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

[484] CRC, op. cit. Article 24. It provides: "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: […]; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; […]".

[485] Cholera Litigation, op. cit.

[486] Acknowledgement from Office of Legal affairs, 21 December 2011. Available at: http://ijdh.org/wordpress/wp-content/uploads/2012/08/petition-for-releif-Claim-for-Compensation.jpg.

and immunities, the Office of Legal affairs stated that "[n]othing herein or relating to this matter shall be deemed a waiver, express or implied, of any of the privileges and immunities of the United Nations, including its subsidiary organs".[487]

However, unfortunately, on 21February 2013, Under Secretary-General for Legal Affairs, Patricia O' Brien, dismissed the claim and stated that this claim considered a review of political and policy matters. Thus, pursuant to the Section 29 CPIUN, these claims are not receivable.[488] On 7 May 2013, lawyers of the petitioners[489] challenged the UN's dismissal and stated that the UN's response does not explain how the claims entail a review of political and policy matters and also does not refer to any international or domestic law authority supporting the contention that such a review renders the claims 'not receivable'.[490] They added that in the absence of further information, UN's response to the claims under section 29 of the CPIUN is arbitrary, self-serving and contrary to international principles of due process.[491] The Legal Counsel of the UN, nevertheless, upheld its positions and replied to the letter of 7 May 2013 by a letter dated 5 July 2013, reiterating that the claims are not receivable. It held that there is no legal basis for the UN either to establish a standing claim commission, or to get involved in a mediation process in respect of the claims as such.[492]

Thus, the UN and its subsidiary organ, MINUSTAH, denied responsibility for causing the cholera epidemic in Haiti and they have taken no action to redress the victims or otherwise provide any form of legally-required remedies. Thereby, pursuing a legal action in a domestic court of law is the only option left for victims to seek enforcement of their rights.

[487] Ibid.
[488] UN dismissal of claim, 21 February 2013, Available at: http://www.ijdh.org/wp-content/uploads/2011/11/UN-Dismissal-2013-02-21.pdf.
[489] Attorneys of the petitioners are Mario Joesph, Av.from BAI, Brian Concannon, Jr., Esq. from IJDH, and Ira Kurzban, Esq. from law firm Kurzban Kurzban Weinger Tetzeli & Pratt P.A.
[490] Challenge to UN dismissal, 7 May 2013,Available at: http://www.ijdh.org/wp-content/uploads/2013/05/Cholera-Victims-Response-to-UN-Final.pdf.
[491] Ibid.
[492] Letter from United Nations Legal Counsel, dated 5 July 2013, to the cholera victims' lawyers, Available at: http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf; It is noticeable that UN Secretary-General Ban Ki-Moon in response to U.S Congress letter dated 30 May 2013 concerning the cholera situation in Haiti, reiterated that cholera victims' claims are not receivable and discussed funding for the UN's cholera eradication project. In fact, no acknowledgment of introducing cholera into Haiti by the UN has been made. Letter dated 5 July 2013 from the Secretary-General to congresswoman, Available at: http://www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf.

3-3 Lawsuit against the United Nations in a National Court and challenge of the United Nation's immunity

On 9 October 2013, plaintiff's lawyers took legal action against the UN, MINUSTAH, Ban Ki-Moon (Secretary-General of the UN)[493], and Edmond Mulet (former Under-Secretary-General for the MINUSTAH) in NY Federal Court.[494] It is worthwhile to note that Plaintiffs Delama Georges and Others, through and by their lawyers, filed a Class action complaint on behalf of themselves and all others similarly situated in the same condition ('the Class').[495] Notably, enforcement of victims ' (plaintiffs' and members of proposed class's) rights are protected under New York law, the U.S. constitution, international law and Haitian law.[496] All facts, demands and allegations are the same as stated in the Petition for relief, but more comprehensive and voluminous. The process of the complaint, the issue of jurisdiction and venue, and the alleged injuries are not covered here since they go beyond what the space limitation on this thesis allows for;[497] but the issue how the lawyers intend to get around the immunity of the UN is of crucial importance.

3-3-1 Challenging United Nation's Immunity

As discussed in preceding sections, the UN and its officials enjoy immunity[498] unless an express waiver has been made by them. However, the lawyers of the victims have alleged that the UN, including MINUSTAH, has waived its immunity since it has not establish a venue for plaintiffs to pursue legal remedies[499] – they have not taken any action to compensate the victims of the cholera epidemic or otherwise provide legally-required

[493] It is worthwhile to mention that Ban Ki-Moon, as the UN Secretary-General, "has and had overall responsibility for the management of the UN and its operations, including all operations in Haiti. Pursuant to Article 97 of the Charter of the UN, the Secretary-General is 'the chief administrative officer of the organization'." Cholera Complaint, p. 6, para. 21; also see Ibid, p. 59, para. 271. Notably, Ban Ki-Moon, in an interview with AL Jazeera on March 7 2013 stated that it was his personal decision to deny victims of cholera outbreak a remedy. Ibid, p. 41, para, 179.

[494] Cholera Complaint, op. cit., p. 1.

[495] Cholera Complaint, op. cit., p. 1; for more information regarding Class Action see ibid. pp. 8-12, para. 26-37.

[496] Cholera Complaint, op. cit. p. 42, para. 183.

[497] For further reading about facts, demands and allegations and for information concerning the process of the complaint, the issue of jurisdiction and venue, and the alleged injuries see Ibid., pp. 1-67; For information related to the plaintiffs ' Motion for affirmation that service has been made on defendant see Memorandum of Law in Support of Plaintiffs' Motion for Affirmation that Service Has Been Made, or in the Alternative, for Service of Process by Alternative Means and to Extend the Time to Effectuate Service (Memorandum of Law hereinafter), 4 February 2014, Available at: http://www.ijdh.org/wp-content/uploads/2011/11/Memorandum-for-Proper-Service-2-4-2013-Final.pdf; also see Brief of Amici Curiae Fanm Ayisyen Nan Miyami, Inc. and the Haitian Lawyers Association in Support of Plaintiffs' Motion for Affirmation that Sevice Has Been Made on Defendants, 21 February 2014, Available at: http://www.ijdh.org/wp-content/uploads/2011/11/DE-19-1-Proposed-Amicus-Brief.pdf.

[498] The UN including its subsidiary, MINUSTAH, enjoys immunity under UNC and CPIUN; Edmond Mulet, former Under-Secretary-General for the MINUSTAH, and Ban Ki-Moon, Secretary-General, are similarly immune from legal process and suit pursuant to the UNC, CPIUN, and the Vienna Convention on Diplomatic Relations, 18 April 1961, Available at: https://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf

[499] Cholera Complaint, op. cit. pp. 40-42, para. 172-183.

remedies;[500] failed to establish a standing claims commission, under SOFAH, to hear plaintiffs' claims;[501] and also failed to provide any mode of settlement for cholera-based claims under CPIUN.[502] Interestingly, by a letter dated 2 July 2013, the UN confirmed that the UN will not comply with its legal obligations to provide a remedy to members of the proposed Class and plaintiffs.[503] Thus, as mentioned before, since the UN's refusal of responsibility is not justified under relevant international law, comparative law, or the UN's own treaties and documents that establish its legal obligation,[504] pursuing a lawsuit in a court of law is the only option left for the plaintiffs to seek their right protected under New York law, the U.S Constitution, international law and Haitian law.[505] However, the U.S Attorney has argued on behalf of the UN in the Statement of Interest that the UN has repeatedly and expressly asserted its and it official's absolute immunity and the issue whether the UN has established a standing claims commission or a venue for plaintiffs to pursue legal remedies is irrelevant to the question of waiver.[506]

The lawyers have also argued that the UN implicitly waived its immunity from service of process[507] by appearing to accept service at UN headquarters as representatives from the UN Office of Legal Affairs informed the process server that the UN would accept service by mail or facsimile and then provided the process server a facsimile number to which the process could be faxed.[508] It therefore appears that the UN, which is immune from any process of lawsuit including service process, has waived it immunity by accepting service. The Statement of Interest, nevertheless, argues that "the UN disputes that any responsible or duly authorized officer of the United Nations accepted service of process or provided any advice on how process may be served against the United Nations or its officials. But even assuming, *arguendo*, that a UN employee did provide instructions to a process server, such instructions did not constitute an 'express […] waive[r]' of the UN's absolute immunity 'from every form of legal process'."[509]

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[500] Ibid. p. 40, para. 173.
[501] Ibid. p. 40, para. 174.
[502] Ibid. p. 40, para. 175.
[503] Ibid. p. 42, para. 182; see also Letter from United Nations Legal Counsel, dated 5 July 2013, op. cit.
[504] Cholera Complaint, op. cit. p. 41, para. 180.
[505] Ibid. p. 42, para. 183.
[506] Statement of Interest, U.S. Department of Justice, United States Attorney, Southern District of NY, Re: George v. United Nations, et al., 13 Civ. 7146 (JPO), 7 March 2014, pp. 5-6. All pleadings in the case are also available on Public Access to Court Electronic Records. Pacer, under case number 1:13-CV-07146.
[507] Service of process means "delivery of a writ, summons, or other legal papers to the person required to respond to them. Process is the general term for the legal document by which a lawsuit is started and the court asserts its jurisdiction over the parties and the controversy". http://legal-dictionary.thefreedictionary.com/Service+of+Process.
[508] Memorandum of Law, op.cit. p. 7.
[509] Statement of Interest, op. cit. Footnote, p. 9.

This case is still in process and therefore there is currently little case law supporting the arguments against the UN's immunity. However, it would seem that if it is proved that the UN has waived its immunity, that the complaint will be heard.

Chapter 7: Conclusions

Contemporary PSOs include different actors holding different roles and functions. Both the UN and TCSs are important primary actors on the international level. They are also bound by HR obligations following from different legal basis. SEAs committed by the personnel of PSOs, as an internationally wrongful conduct, might be attributable to both of them and thus they may both incur international responsibility.

ECC is the main factor which establishes attribution of internationally wrongful conduct committed by the personnel of UN PSOs, to either the UN or TCSs. In fact, in the context of a PSO, responsibility for the UN/TCSs arises where the UN/TCSs exercises their jurisdiction. PSOs are subsidiary organs of the UN over which the UN exercises some degree of ECC. Likewise, jurisdiction of TCSs arises, as Frostad observes, when they *inter alia* exercise effective command and control over a foreign territory, *inter alia* through their troops sent to a PSO, notwithstanding the temporary nature of such control.[510] Dual responsibility may therefore exist where both the UN and the TCS exercise an amount of ECC over PSO forces. The degree of ECC might, however, vary according to the factual circumstances of each specific case. Thus, SEAs committed by the personnel of such forces may be attributable to both, or merely one of them.

Where the UN incurs responsibility, redressing victims of SEAs, women and children in particular, should be given much more attention than it currently does. However, it seems that the UN only undertakes the burden of assisting and supporting the victims in order for them to seek compensation somewhere else, and does not accept itself international responsibility for the misconduct of its personnel and consequently does not try to redress the victims itself. And to date, the UN has not even implemented the assistance and support policy.

Moreover, according to Article VII Model SOFA and Article VIII CPIUN, the UN should arrange appropriate modes of settlement for non-contractual claims, such as those arising from SEAs committed by its personnel, through internal mechanism, namely, standing claims commission. But, the UN has mostly failed to comply with this obligation as was shown in the Cholera Complaint.

Therefore, it appears that filing a lawsuit against the UN is often the only way left open for the victims in order to seek redress. This way nevertheless comes with its own restrictions and obstacles, e.g. the UN's and its officials' absolute immunity from jurisdiction. Basically, it is

[510] Frostad, Magne (2011) op. cit. pp.141-142; Council of Europe, ECtHR, Loizidou v. Turkey (Loizidou Case hereinafter) (Preliminary Objections) Application No. 15318/89, 25 March 1995, 1-39,p.18, para. 62, Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920#{%22itemid%22:[%22001-57920%22]}; see also ECtHR, Loizidou Case (1996) (Grand Chamber), op. cit. p.17, para. 52.

not possible to take legal action against the UN and its officials unless such immunity had been expressly waived. The proof of the latter seems crucial as shown in the Cholera Complaint. Thus, due to the lack of a proper mechanism for compensations, eradication of SEAs committed during PSOs should be put towards the top of the UN's agenda.

To eradicate SEAs, the internal policy of the UN concerning the prohibition of SEAs, which is reflected in a zero-tolerance policy and the S.G. Bulletin[511], should be strictly enforced. However, not all troop contingents were fully supportive of these policies.[512] While the issue of SEAs has been addressed in numerous UNSC resolutions, UN reports and press accounts include allegations of SEAs and official inaction continue to increase.[513] Therefore, if the UN is truly to live up to its promise regarding the eradication of SEAs, the will of both TCSs and the UN itself is required.

Under UNSC resolution 1888[514], TCSs are required to properly investigate allegations of sexual violence.[515]The UN could also impose sanctions, withdraw contingents, and blacklist States which fail to take legally effective action against perpetrators.[516] Furthermore, TCSs are urged to take due precautions in vetting candidates for national armies to ensure that those guilty of SEAs are excluded.[517] TCSs are also required to take appropriate measures, which includes enforcing military discipline, to protect women and children from all forms of SEAs.[518] In addition, TCSs are responsible for ensuring adequate training of their troops[519] and they are recommended to deploy a great number of female personnel in PSOs including civil, military and police functions.[520]

All in all, it is crucial that abuse is eliminated, that perpetrators are punished, and that victims are compensated. It seems that in order to achieve the latter, it is important to find ways to penetrate the UN immunity "stone wall". As Tondini states, a successful option in the long term could be that of either "establishing real external and independent claims settlement mechanisms (which may secure access to justice for third parties – individuals and legal persons – while being also truly independent from the international organization concerned),

[511] Initially, only UN staff members were expressly bound by the prohibition in the S.G Bulletin. However, these standards have now been incorporated into the contracts, letters of engagement, and undertakings of all personnel. Moreover, UN staff regulation have been amended in order for it to clarify that SEAs are considered as a serious misconduct and may result in disciplinary action such as dismissal. Defeis, Elizabeth F., op. cit. pp. 195- 196.
[512] Ibid. p. 212.
[513] Ibid. p. 214.
[514] UNSC Resolution 1888, adopted in its 6195th meeting, 30 December 2009, UN Doc. S/RES/1888, 1- 7. Available at: http://www.un.org/womenwatch/daw/vaw/securitycouncil/S-RES-1888-%282009%29-English.pdf
[515] Ibid. p. 4, para. 7.
[516] Defeis, Elizabeth F., op. cit. p. 214; see also Burke, Roisin, op. cit. pp. 13-14.
[517] UNSC Resolution 1888, op. cit. p. 4, para. 3.
[518] Ibid.
[519] Ibid.
[520] Ibid. p. 6 para. 19; see also ibid. p. 2.

or putting international organizations' activity under the scrutiny of international courts/supervisory bodies of human rights".[521] Finally, to compensate victims and at some stage in the future hopefully eliminate SEAs, rhetoric must now be translated into action.

[521] Tondini, Matteo, op. cit. p. 171.

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