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Sexual Exploitation and Abuse by UN Peacekeepers
Dissertation

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I hereby declare that I wrote this dissertation by myself, that all used resources and literature were properly cited, and that this dissertation has not been used in order to be granted another or the same academic degree/title.

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At this point I would like to express my gratitude to my thesis supervisor prof. JUDr. Pavel Šturma DrSc. for his professional guidance, time, expert advices and comments that helped me while conducting my research and writing of this thesis. I would also like to thank to my family for generous support and patience.

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ABSTRACT

The thesis provides legal analysis of sexual exploitation and abuse by UN peacekeepers with particular focus on military members of national peacekeeping contingents. It provides brief survey of peacekeeping operations thereby underlying their importance in the contemporary activities of the UN and describing factors that have caused or might led to sexual exploitation and abuse by UN peacekeepers.

Furthermore, UN action towards those acts is described and it is also evaluated whether such steps are successful, sufficient and whether more could have been done or what more can be done in the future.

A part is also dedicated to international humanitarian law perspective and international human rights law. In this context, the author tries to answer the question if and when the sexual exploitation and abuse by members of national peacekeeping contingents while deployed to a UN peacekeeping mission may constitute war crimes or crimes against humanity and whether there is a role to play by International Criminal Court. In the same vein, issues of extraterritorial application of human rights treaties are discussed.

The question of international responsibility is the central topic of this thesis. Apart from individual responsibility of members of national peacekeeping contingents for acts of sexual exploitation and abuse, responsibility of international organizations and responsibility of respective States is assessed. Legal consequences of wrongful acts are elucidated and role of possible avenues which may come into question as invocation of responsibility is analysed.

Key words: extraterritorial application of human rights treaties, military members of national peacekeeping contingents, responsibility, sexual exploitation and abuse, UN peacekeeping operations.

ANOTACE

Disertační práce poskytuje právní analýzu sexuálního vykořisťování a zneužívání, kterého se dopouští příslušníci mírových operací OSN. Obzvláštní důraz je kladen na vojenské příslušníky národních kontingentů zapojených do misí OSN. Práce poskytuje stručnou analýzu mírových operací a tudíž zdůrazňuje jejich význam v současných činnostech OSN. V tomto směru jsou popsány faktory, které způsobily nebo mohli ovlivnit sexuální vykořisťování a zneužívání, kterého se dopustili příslušníci mírových misí OSN.

Dále se práce zabývá kroky OSN vůči uvedeným činům a vyhodnocuje jestli tyto kroky jsou úspěšné, dostatečné a zda se v tomto ohledu mohlo učinit více co je ještě možné udělat více v budoucnosti.

Část práce se zabývá problematikou mezinárodního humanitárního práva a mezinárodních norem v oblasti lidských práv. Autor práce se pokouší odpovědět na otázku, zda a kdy sexuální vykořisťování a zneužívání, páchané vojenskými příslušníky národních kontingentů zapojených do misí OSN během jejich zapojení do mírových operací OSN může představovat válečné zločiny nebo zločiny proti lidskosti a zda Mezinárodní trestní soud může v tomto ohledu hrát určitou roli. Ve stejném duchu je diskutována otázka extraterritoriální aplikace lidsko-právních smluv.

Otázka mezinárodní odpovědnosti je ústředním tématem této disertační práce. Kromě individuální odpovědnosti vojenských příslušníků národních kontingentů zapojených do misí OSN pro činy sexuálního vykořisťování a zneužívání, odpovědnost mezinárodních organizací a odpovědnost jednotlivých států je posouzena. Právní následky protiprávního jednání jsou blíže objasněny a další možnosti, které přicházejí v úvahu při uplatňování odpovědnosti, jsou analyzovány.

Klíčová slova: extraterritoriální aplikace lidsko-právních smluv, mírové operace OSN, odpovědnost, sexuální vykořisťování a zneužívání, vojenští příslušníci národních kontingentů působících v mírových misích, země poskytující vojenské jednotky.

LIST OF ABBREVIATIONS

ACHHPR	African Charter on Human and Peoples' Rights
ARSIWA	Draft articles on. Responsibility of States for Internationally Wrongful Acts
AU	African Union
CAR	Central African Republic
DARIO	Draft Articles on the Responsibility of International Organizations
DPKO	Department of Peacekeeping Operations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	internally displaced person
IHL	international humanitarian law
ILC	International Law Commission
ISAF	International Security Assistance Force
KFOR	Kosovo force
MMsNCs	military members of national peacekeeping contingents
MONUC	United Nations Organisation Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
OIOS	Office of Internal Oversight Services

OSCE	Organization for Security and Co-operation in Europe
SEA	Sexual exploitation and abuse
SG	Secretary General
SOFA	Status of Forces Agreement
TCC	troop contributing country
UN	United Nations
UN GA	United Nations General Assembly
UN SC	United Nations Security Council
UNAMSIL	United Nations Mission in Sierra Leone
UNEF	United Nations Emergency Force
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTSO	United Nations Truce Supervision Organization
WPA	women's protection adviser

INTRODUCTION

During the past few years a series of heinous acts of sexual exploitation and abuse (SEA) have been committed in states and territories wherein the United Nations (UN) has deployed peacekeeping operations. These acts were perpetrated *inter alia* by military members of national peacekeeping contingents (MMsNCs) whilst assigned to a UN peacekeeping unit.¹

A major political scandal of the same nature made the headlines when Anders Kompass, the Director of Field Operations for the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, leaked confidential documents detailing the abuse of children by French troops in Central African Republic (CAR) to French authorities as a response to the UN's inaction.²

It should be pointed out that this is not the sole incident when these acts have been perpetrated either by MMsNCs or other personnel assigned to a peacekeeping unit. As we will further explore in our thesis, the fact that peacekeepers have frequently taken advantage of victims' vulnerable positions in zones torn by conflict in various States all around the globe, by offering basic necessities such as drinkable water, food, clothes in trade for certain "services," was revealed at the turn of the 20th and 21st century. List of territories where SEA was committed by peacekeepers indicates that it is indeed a persistent problem.³ As shall be pointed out, from the beginning of the 1990s the positive work done by the UN peacekeepers has been marred by numerous allegations of SEA.

¹ See UN GA, Report of the Secretary-General, Special measures for protection from sexual exploitation and sexual abuse, 2013, UN Doc A/67/766.

² LAVILLE, S. UN whistleblower who exposed sexual abuse by peacekeepers is exonerated. In: *The Guardian* [online]. 2016-1-18 [Accessed 2016-2-2]. Available at: <<http://www.theguardian.com/world/2016/jan/18/un-whistleblower-who-exposed-sexual-abuse-by-peacekeepers-is-exonerated>>.

³ See KRÁLIK, J. Will the UN take action against sexual exploitation and abuse in peacekeeping missions? In: *Denník N* [online]. 2016-2-1 [Accessed 2016-2-1]. Available at: <<https://dennikn.sk/blog/zakroci-osn-proti-sexualnemu-zneuzivaniu-mierovych-misiach>> .

SEA should not only be morally reprehensible, it also destroys confidence between peacekeepers and local population. Furthermore, it undermines the values that the UN strives for.⁴

In this context, we shall take a look into the framework governing establishment, mandate of the peacekeeping missions and their whole functioning. Existing modelling instruments that govern conduct of persons involved in peacekeeping operations in a host State will be fleshed out to prepare us to understand some of the particularities defined in concrete legal instruments. By the concreteness of an instrument we mean an agreement signed between a specific entity - that being an organization or a State - and a State to which a mission is deployed.

Our thesis examines the framework of SEA between UN personnel deployed to peace operations and local population living in States and territories where respective missions serve. The centre of attraction in this thesis are MMsNCs, The reason why main focus will be put on MMsNCs is not only that they form the largest part of a peacekeeping operation but they remain under exclusive criminal jurisdiction of troop contributing countries (TCCs) which creates space for interesting legal discourse.

The mandate in which these actors operate varies and is often governed by an intrinsic system of legal instruments with norms of differing normative force. Some tasks and activities may be governed by the mandate given by one organization, while other activities may fall under the mandate of another organization or under mandate of a respective State. Common practice also indicates that the mandate is at some point transferred from one entity to another. As it is witnessed frequently in particular cases, identifying the exact circumstances and determining the point when the conduct ceases to be attributable to just one actor and the point at which responsibility of another actor may be established, is a tedious task also for the judiciary.

⁴ HEATHCOTE, G. and OTTO, D., *Rethinking Peacekeeping, Gender Equality and Collective Security. Thinking Gender in Transnational Times*, Palgrave MacMillan, Basingstoke, 2014, p. 70.

Since the peacekeepers operate in different territories of their States and to some extent may engage in hostilities, applicability or norms of international humanitarian law comes into question. Other interesting questions shall be the extraterritorial application of human rights instruments, since it may be argued that by ratifying human rights treaties, States are under an obligation to respect human rights extraterritorially. Last but not least the question of responsibility arises as well. In this context, we will pay attention to attribution of conduct which should lead as to further elaborations. Discussing the question of responsibility from the traditional point of view and as pointed out by Šturma *“an international organization (e.g. the United Nations) is responsible only for missions or operations under its control, not for authorized operations under national command.”*⁵

Therefore, we shall examine to which entity might the conduct be attributed and whether the responsibility arises by breach of an international obligation. We will also discuss whether the acts of SEA fall beyond the official capacity of MMsNCs and if so, what are the consequences

While respective offences perpetrated by peacekeepers form only one part of the problem, second part is being impunity of the perpetrators. The main role in the second part is played or better said not played by TCC which should take further steps leading to punishment of perpetrators of SEA since the MMsNCs fall within exclusive criminal jurisdiction of TCC and consequently the perpetrators of SEA continue to evade justice. As we can witness regularly, many offenders are either not prosecuted by TCCs or prosecuted for lesser offences. Thus, a role of possible alternative approaches shall be discussed. We shall explore whether international judicial bodies could be instrumental in this respect.

Following the recent judgements of the European Court of Human Rights (ECtHR), the TCC may, under certain circumstances, be responsible for the conduct of its troops deployed in UN peacekeeping operations. Correspondingly, the argument of this paper shall be based on the premise that an individual or state may submit a complaint concerning the violations of the international human rights

⁵ ŠTURMA, P., *Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law*, *Czech Yearbook of Public & Private International Law*, Prague: CSIL, Vol. 2, No. 1, 2011, pp. 3-19, p. 12.

treaty (such as European Convention on Human Rights) before a international or regional human rights monitoring body (such as ECtHR) when the TCC bears responsibility for the unlawful conduct of its troops in the host State and fails to prosecute and adequately punish the perpetrator.⁶

Unfortunately, an effective mechanism that would compel respective States to bring perpetrators of such serious crimes to justice is not established and States have full discretion in taking further action against perpetrators of SEA. This results in impunity of perpetrators.

In this thesis we would like to point out the to problems arising from the fact that the TCC have exclusive criminal jurisdiction over the MMsNCs, we will discuss what steps the UN has taken and whether there are some possibilities from within the organization how to deal with this issue.

Since our focus is on the UN, we will assess this framework from the perspective of UN peacekeeping operations. Furthermore, bearing in mind that the UN could not be summoned before the national courts of countries that were parties to human rights instruments, as well as the doctrine of attribution and concept of effective control proposed by the International Law Commission (ILC), it will be asserted that respective States may under certain circumstances be responsible for the conduct of their troops while assigned to the peacekeeping operation.

Finally, given the recent approach of international case law, our intention is to ascertain the possible role of international judicial bodies in the cases of SEA perpetrated by the MMsNCs while deployed in UN peacekeeping operations.

⁶ See e.g. KRÁLIK, J. The Role of the ECtHR Regarding Crimes Committed by UN Peacekeepers, In: *Cork Online Law Review*, [online]. 2016-2-11 [accessed 2017-2-1]. Available at: <<https://www.corkonlinelawreview.com/single-post/2016/02/11/The-Role-of-the-ECtHR-Regarding-Crimes-Committed-by-UN-Peacekeepers>>.

METHODOLOGY

Reasons for Elaboration of the Issue

At first sight, it may be assumed that an author having in mind to address the issue of SEA in UN peacekeeping operations, might do this research first and foremost for his purpose to blame UN, deliver another blow to it and do this research for the sheer joy of criticism of the organization.

We would like to note that it is not in our intention to prepare a work which will offer petty self-purported criticism of the organization and we would like to portray the UN as a heavy footed rigid system not being able or more regretfully not willing to deal with the matter of such a serious gravity. We do not want to contribute to those actions whose intention is to do harm to organization and its functioning.

On the contrary, we consider the UN not only as one of the most marvellous achievements of 20 century, but one of the greatest successes in the history of mankind. Attainment of its goals should be in the best intention of whole community.

Of course, in fields where its efficiency gradually peters out, , States united in international organizations, or even individual persons (e.g. scholars, journalists, experts of international organizations and NGOs) should point out to its failures and deficiencies which may consequently lead to international law violations resulting in impunity. As we believe in the spirit of the Charter and it is our reason not only to point out to these deficiencies but also based on findings of our research to try to propose solutions and suggestions how to as to how we can improve this situation. Where possible, these proposals shall be focused on international law perspective.

Established aims are interrelated to reasons why we are interested in making research in this topic, as from the legal point of view they raise attractive and comprehensive legal questions. Furthermore, it should be noted that SEA cases

perpetrated by UN peacekeepers are sadly still very present and hence it is a serious topic. But it is not only its up-to-dateness which is crucial.

It must be stressed that it is a topic of a complex nature. Consequences of UN powerlessness and States inaction in bringing perpetrators of SEA crimes committed in peacekeeping operations enables not only impunity of potential criminals but leaves a permanent footprint in fragile souls who have been harmed as victims. Their psychological traumas must be exacerbated by the fact that no justice has been done in relation to the SEA that they had to suffer.

We think that more in depth analysis of this issue in Czech or Slovak literature would be beneficial and in this respect our research might be helpful. It also cannot be said that these issues are addressed abundantly in foreign publications. Especially a research that would bring national law perspective by comparing domestic criminal law systems would seem to be beneficial. Therefore, we hope that this thesis could find its readers abroad as well.

Aims

For the purposes of this thesis we have defined several aims which are decisive to address the issues identified in the introduction:

- ❖ Examine the legal framework governing establishment and functioning of peacekeeping operations thereby trying to identify main reasons that prevent investigation and criminal proceedings.
- ❖ Analyze national approaches (legislation, vetting procedures as for example screening of peacekeepers) of some of the greatest peacekeeping TCC and draw the consequences thereof.
- ❖ Address the question of applicability of international humanitarian law and international human rights law to the conduct of peacekeepers
- ❖ Examine the question of State and international organization responsibility in relation to sexual exploitation and abuse by various

categories of peacekeepers with greater focus on MMsNCs. In this respect we shall analyze alternative frameworks.

- ❖ Based on the findings, try to propose a solution that could help to resolve the problem and end impunity.

Key Questions Laid Down

Research conducted stems from two principal questions that may be directly associated to the aims identified above and that will be dealt with consistently through our thesis:

- ❖ **Principal question no. 1: What are the main hindrances that prevent effective punishment of the perpetrators of SEA?**
- ❖ Sub-question no. 1: Are there gaps in the international or domestic legal frameworks?
- ❖ **Principal question no. 2: Where the UN and respective State fail to bring perpetrators to justice, is there a role to play by international judicial bodies in terms of responsibility of international organization, State or individual responsibility?**

Research Methods

In this thesis, we have used following legal methods: grammatical, logical, , historical and comparative. For better understanding of some of the concepts and to outline some of the particularities of specific cases, we have used also descriptive method.

The logical analysis as a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions, is incorporated to structure the content of this thesis. Respective chapters are logically and systematically ordered and focus

is put on in-depth analysis of norms of international law, international conventions, case studies and analysis of various academic literature and reports. Logical reasoning based on deduction and induction shall assess the interconnections between general international law, particular norms and their application on specific conduct in question in their wider context.

We also examine mutually dependent relationships between norms of general international law and provisions of specific agreements concluded between international organization and a specific State. Our analysis sees the norms from the perspective of its relationship between them in a system. For example, when assessing particular agreements in this system, we will use Vienna Convention on the Law of Treaties as a main instrument in the international legal system regulating law on treaties.

Historical method may be seen in those parts which discuss the main ideas and reasons for creating peacekeeping operations. We make use of it also to provide some information about deployment of national contingents abroad before the UN was established.

Comparative method is used on those occasions when we felt that its use will contribute to a better understanding of changes that have either been made in the course of time comparing various model agreements within the same or different legal frameworks. Firstly, it is used when discussing agreements adopted within the UN, with their amended recent versions. Secondly, we will compare various frameworks and approaches of Member States of the UN. Focus will be put on the greatest troop contributors to UN peacekeeping operations. In this way we refer to advantages or disadvantages of various frameworks.

The dissertation operates with variety of primary and secondary sources.

While we benefit from use of some of the most ratified international conventions such as Vienna Convention on Diplomatic Relations or Geneva Conventions and human rights treaties of universal (such as International Covenant on Civil and Political Rights) or regional character (such as European Convention on Human Rights) whose goal is to protect human rights and fundamental freedoms

that may be invoked in cases of SEA, great extent is also put to analysis of international, regional and national decision of judicial bodies.

Of course, judicial decisions have to a greater extent an illustrative value as they need to be perceived in the context of law, time and other objective and subjective circumstances that formed them. However, their value to construct our argument in this thesis is not marginal.

Other group of sources comprises of UN agreements, resolutions, decisions, guidelines, policy manuals, meeting records, etc. They should illustrate how the UN is dealing with this topic in the course of time and how it is addressing not inconsiderable allegations. We cannot forget to mention work of ILC Commission which has brought to our attention Draft articles on Responsibility of States for Internationally Wrongful Acts of 2001 and Draft articles on the responsibility of international organizations of 2011 respectively.

In our research we also look into national frameworks and approaches of the largest peacekeeping contributors that are related to recruiting peacekeepers or related to targeting SEA. We consider this as very important since the MMsNCs fall within exclusive criminal jurisdiction of TCCs.

We analyse also secondary sources being it books, academic articles from various journals, NGO reports that are highly relevant in the light of UN peacekeeping operations and SEA. Some of these reports provide testimonies of victims and statistics which from the legal point of view are maybe insignificant. However, we feel that in the context of thesis as a whole they certainly deserve to be mentioned and since lack of funds does not enable us to make direct collection of data (testimonies of victims, witnesses) relevant for our research, we shall rely on findings of NGO reports. We also use some newspaper articles. However, they shall be used solely for illustrative purposes and shall not constitute primary basis for our legal argument.

In this context, it should be noted that primary sources, as international conventions, resolutions of UN bodies, other UN documents and preparatory works, play the most important role and they are used to construct the basis of our argument. These are followed by decision of various judicial bodies. Secondary

sources, such as books and articles by highly qualified experts are used more for illustrative purposes or to provide different opinions on the researched topic.

We would also like to state that if the degree of our research fails to demonstrate a quality needed for a standard international publication, we hope that primary sources and secondary sources which may be found in the footnotes⁷ or at the end of the thesis shall assist reader to familiarize himself in this topic. In the other words if the reader does not find answers in this work, additionally the sources from which benefits this thesis may be consulted.

Chapter Outline

The thesis is systematically divided into 4 substantive Chapters. At the end of every chapter is a summarizing conclusion. While the purpose of initial chapters is to acquaint and prepare the reader to key concepts which will be used in this work, subsequent chapters will use these concepts with assumption that the reader has read the introductory chapters and understands them.

We will firstly introduce reader to the concept of peacekeeping operations within United Nations and discuss how this concept has evolved since its invention. It is not among mentioned aims of this thesis to deliver an integrated detailed view into all historical conceptualities delimitating this issue and because of this fact we address some historical aspects only marginally. Our purpose is to demonstrate that SEA by peacekeepers is a part of a greater issue and consequence of some other factors and findings of the first Chapter should be instrumental which aspects deserve greater attention.

In second chapter we will provide definitions related will be addressed throughout our study. In relation to this we shall further describe what action has

⁷ Style of our footnotes is based on the publication compiled by Eva Bratková. See BRATKOVÁ, Eva. (zprac.). *Metody citování literatury a strukturování bibliografických záznamů podle mezinárodních norem ISO 690 a ISO 690-2 : metodický materiál pro autory vysokoškolských kvalifikačních prací* [online]. Verze 2.0, aktualiz. a rozšíř. Praha : Odborná komise pro otázky elektronického zpřístupňování vysokoškolských kvalifikačních prací, Asociace knihoven vysokých škol ČR, 2008-12-22 [accessed 2017-5-30]. 60 p. Available at: <<http://www.evskp.cz/SD/4c.pdf>>.

been taken by the UN following revelations of SEA in respective missions. We will also describe special UN instruments such as Status of Forces Agreements that are concluded with host states and Memorandum of Understanding that are concluded with a TCC. Both instruments are governing establishment and functioning of peacekeeping operations and they provide for exclusive criminal jurisdiction of TCCs over the troops. Therefore, in this Chapter we will also demonstrate why it is our opinion that such a great prerogative needs to be broken. We shall demonstrate this by examining national frameworks and approaches of the greatest TCCs in the context of SEA and in relation to recruitment of peacekeepers into UN peacekeeping operations..

In the third Chapter we will address the issue from the perspective of international humanitarian law (IHL) and international human rights law. In this context, we shall address whether the norms of IHL might be applicable to the conduct of peacekeepers, and if so, under what circumstances. The main question of applicability of the international human rights law shall be to determine whether States are obliged to respect their human rights obligations extraterritorially. In this Chapter, we will look into approach of several judicial or quasi-judicial bodies and also assess what could be the role of the International Criminal Court.

In the fourth Chapter we will discuss the question of responsibility. We will look how the responsibility should be determined. We will also address the question of shared responsibility in international law. Case law of various international and national judicial bodies shall help us to come up with findings. Following the recent judgements of some international judicial bodies, we will contend that there is a role to play for those tribunals where respective States do not take any action towards perpetrators of such serious crimes. In relation to this we will address what possibilities there exist for a victim in relation

Elaboration of the Issue in Available Literature

Generally speaking, SEA by UN Peacekeepers has been discussed at the international level by several authors. Particular attention to make these issues widely known to the general public was also presented by nongovernmental organizations. It must be however pointed out that there is a scarcity of literature addressing particularities flowing from the problem or focusing on some of the aspects of this intricate issue and proposing alternative mechanisms. There is also a great lacuna in literature describing national frameworks and approaches of greatest TCCs in the context of SEA and in relation to recruitment of peacekeepers into UN peacekeeping operations.

From the perspective of doctrinal legal study, the most comprehensive research has been conducted by Róisín Burke who has addressed the complex issue of SEA in peacekeeping operations in her book entitled *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law*.

Gabrielle Simm work's entitled *Sex in Peace Operations* puts focus on other staff categories engaged in peacekeeping missions, namely private military contractors and humanitarian NGO workers. Zsuzsanna Deen-Racsmány has contributed to elaboration of exclusive criminal jurisdiction over UN Peacekeepers as well as description of several legal instruments adopted within the UN.

There is also quite a number of publications that have discussed the problem from the perspective of gender studies. Olivera Simic and Gina Heathcote have works are probably the most interesting.

Grenfell and Greenwood discuss the questions of IHL application in the context of UN peacekeeping missions. Issues of extraterritorial application of human rights treaties have been discussed also by several authors Publications of Marko Milanović could be mentioned in this respect.

This topic was also covered by Marco Odello whose focus was put on the accountability of peacekeepers and Muna Ndulo by analysing how the UN has been facing this pertinent problem.

From the perspective of Czech or Slovak scholarly work, the issues of responsibility were elaborated for instance by Pavel Šturma in *Drawing a Line between the Responsibility of an International Organization and Its Member States under International Law*.

The author of this thesis has written articles analyzing the extent of the immunity granted to MMsNCs and the role of ECtHR in taking action against impunity.

Benefit of the Thesis

Analysis of the topic from the legal perspective shall identify how the UN is targeting the issue of SEA perpetrated by peacekeepers. After examination of possible steps by the UN we shall determine whether from the legal perspective those actions are sufficient, effective and what can be done more. In this context, we shall identify possible gaps, flaws and propose some solutions how to minimize the negatives.

Based on agreement between a host State and the UN, the TCCs have exclusive criminal jurisdiction over MMsNCs. Therefore, for an example, we shall look into the national framework and approaches of one of the largest troop contributors and find a conclusion whether we may assume that the prerogative of exclusive criminal jurisdiction could lead to criminal prosecution from the side of such contributor. We shall contend that this prerogative given to TCCs is one of the largest obstacles contributing to impunity. Our finding shall trigger a discussion concerning possible reforms of peacekeeping.

One of the most important parts of our thesis is devoted to the attribution of responsibility for the conduct of peacekeepers. We shall address this issue, specify under which circumstances might be the organization and/or respective States for the conduct of peacekeepers. With regard to our findings we shall provide the possibilities which avenues might be approached by a victim of SEA.

Last but not least, although *Kompass'* revelations made the headlines of several newspapers and related news appeared in public broadcasting, in the light

of our experience it should be noted that members of the general public are in general not aware of this issue. Therefore, one of the main benefits of this thesis shall be to raise the awareness of academics, students and public. If this work attracts interest of military personnel it could be even more useful.

1 BRIEF HISTORY OF THE UNITED NATIONS PEACEKEEPING OPERATIONS

1.1 Preliminary Observations and Rationale

To present SEA by peacekeepers as a complex issue which needs to be understood in the greater context of peacekeeping operations as such this Chapter will be devoted to present development of peacekeeping operations. We would like to demonstrate that several factors could have affected SEA by peacekeepers.

It should be noted that peacekeeping is not mentioned explicitly in the constituent document of the UN, the UN Charter. Provisions of both Chapter VI and Chapter VII are referred by scholars as a legal basis for its creation. While Chapter VI entitled peaceful settlement of disputes contains provisions how to resolve issues through non-military means, Chapter VII provides for collective military and non-military action of States, which the UN can take against threat to the peace, breach of the peace, or act of aggression. The UN however frequently refers to a peacekeeping operation as a one “involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict.”⁸

In the difficult period of Cold War, when the Security Council was paralysed due to the lack of agreement between its permanent members, peacekeeping operations became an alternative tool to unworkable system of collective security. With regard to the establishment of peacekeeping missions, Hatto also mentions decolonization as a UN’s reason for their creation.

It was only in 1992 when the UN delineated peacekeeping more precisely in an official document, a report prepared by then Secretary General Boutros Boutros-Ghali, entitled An Agenda for Peace. The main objective of this document was to

⁸ *The Blue Helmets: A Review of United Nations Peace-keeping*, 3rd ed., New York : United Nations, Dept. of Public Information York, 1996, p. 4.

further strengthen and shape peacekeeping and peace-making in the post-cold War world.⁹ We shall return to this document in further parts of this work.

It is however not our intention to focus in this chapter on a thorough examination of relevant provisions of the UN Charter allowing for the establishment and functioning of a peacekeeping mission. Even the ICJ has not taken the opportunity offered and has not clarified in its 1962 Certain Expenses Advisory Opinion which articles of UN Charter should be regarded as the legal basis of peacekeeping.¹⁰ We will also return to the financial matters of peacekeeping later on in this work.

In this part we would rather like to provide a brief description of the history of peacekeeping operations which have been deployed 71 times in total since the first use of this instrument in late 1940s.¹¹ It needs to be mentioned that the UN has invented this tool, but regional organizations¹² often follow suit and sometimes an individual state deploys a mission that satisfies the attributes of peacekeeping mission to the host state.¹³

Furthermore, we will mention which organs have authorized these operations, what were the main tasks of deployed units, which countries have contributed most to the peacekeeping operations, current trends and other particularities of the respective missions.

⁹ The document also provided legal basis for the establishment of Department of Peacekeeping Operations created by then SG Boutros Boutros-Ghali which started carrying out its duties in the beginning of 1992. This body is charged with the planning, preparation, management and direction of UN peacekeeping operations. See United Nations General Assembly, An Agenda for Peace, 17 June 1992, A/47/277.

¹⁰ See International Court of Justice, Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 20th July 1962. See also discussion in ORAKHELASHVILI, A.. Legal basis of un peacekeeping or Certain Expenses of the United Nations, *Virginia Journal of International Law Association*, Vol. 43, No. 1, pp. 486-524.

¹¹ See Peacekeeping Fact Sheet, [online] 2017-2-28 [Accessed 2017-3-2]. Available at: <<http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>>.

¹² European Union and African Union have also deployed several peacekeeping operations. For operations conducted under the aegis of EU see e.g. SARI, A., Status of Forces and Status of Mission Agreements under the ESPD: The EU's Evolving Practice, *The European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 67-100. For African Union operations see WILSON, R., J. and SINGER HURVITZ, E., Human Rights Violations by Peacekeeping Forces in Somalia, *Human Rights Brief*, Vol. 21, No. 2, 2014, pp. 1-7.

¹³ E.g. France has been active in this field engaging especially in its former colonies. See France peace operations, In: *Rule of Law in Armed Conflicts Project (RULAC)*, Geneva Academy of International Humanitarian Law and Human Rights, [online]. 2016-5-1 [Accessed 2016-2-2]. Available at: <http://www.geneva-academy.ch/RULAC/peace_operations.php?id_state=67>.

We will also describe some of the documents adopted within the United Nations framework that intended to give directions and delineate the UN peacekeeping in general. This should provide the reader with a brief introduction towards a complex topic of SEA perpetrated in peacekeeping operations.

A special Chapter will later be devoted to the elaboration of specific agreements concluded between the organization and the host country, i.e. the country to whose territory a mission is deployed, as well as to special agreements between the UN and TCCs.

Given more comprehensive mandates and tasks that respective missions have carried out with time, it is undisputed to state that the classical notion of peacekeeping was exceeded. We would however like to clarify that when in this thesis the term “peacekeeping operations” will be used to mean all multinational peace operations.

1.2 First Years – Birth of Peacekeeping as an Alternative Tool to the Security Council Paralysis

The roles of various peacekeeping operations have evolved through time. The first mission was created by the UN Security Council (UN SC) in 1948 under the name United Nations Truce Supervision Organization (UNTSO). UNTSO was deployed to the Middle East region to observe and maintain fragile ceasefire and assist parties to the armistice agreements in application and adherence to those agreements.¹⁴ Count Folke Bernadotte, UN Mediator for Palestine whose task was to negotiate truce between conflicting parties also deserves credit for establishment of the first operation. Initially, 36 peacekeepers of 63 envisaged were sent to the area. The arrangements called for members drawn from Belgium, France and USA to supply vessels and military observers. Each country was asked to send 21 men.¹⁵ After the assassination of Bernadotte by Jewish extremists, the mission

¹⁴ UN SC Res 50, The Palestine Question, 29 May 1948, S/801 (1948).

¹⁵ Fifty-five years of UNTSO, [online] 2003-9-5 [accessed 2017-2-1] Available at: <<http://www.un.org/en/events/peacekeepersday/2003/docs/untso.htm>>.

personnel rose to 572. It is interesting to note that since its establishment, the mission has been still active until today. It continues to monitor ceasefires, performs other related activities and its personnel is often times called to form a part of other peacekeeping operations in Middle East region (if we consider Egypt as being also situated in this area). Since then, the UN peacekeeping forces have been deployed to several areas around the globe, totaling of 63 missions. 17 missions have been active until today.¹⁶

The first armed peacekeeping mission was United Nations Emergency Force (UNEF) which was established by General Assembly (GA) Resolution. It must be said that its establishment under the provisions of GA Resolution Uniting for Peace was deemed controversial. During the rivalry between the Communist block and Western allies, when the Council failed to respond adequately to the situation in Korea in 1950, General Assembly adopted the resolution called Uniting for Peace. The text stipulated: *“that failure of the Security Council to discharge its responsibilities ... does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security.”*¹⁷

This resolution basically meant that when the SC, because of the lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, the GA shall consider the matter immediately and then it should make appropriate recommendations to Members for collective measures.¹⁸ It was however questionable if the GA had such authority to recommend the establishment of armed forces as foreseen in the resolution.¹⁹

¹⁶ Current Peacekeeping Operations, [online]. [Accessed 2017-2-1]. Available at: <<http://www.un.org/en/peacekeeping/operations/current.shtml>>.

¹⁷ UN GA Res. 377, Uniting for peace, 3 November 1950, A/RES/377.

¹⁸ *Ibid.*, p. 11.

¹⁹ See generally KRASNO, J., E., DAS, M., The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council, *The UN Security Council and the politics of International Authority*, London, etc.: Routledge, 2008, pp. 173-195, for other remarks see LEBOVIC, J., H., Uniting for Peace? : Democracies and United Nations Peace Operations after the Cold War, *The journal of conflict resolution : a quarterly for research related to war and peace* (48), 2004, pp. 910-936.

Establishment of UNEF was an important innovation within the UN Peacekeeping. As we have said above, its personnel was for the first time armed. However, its forces were allowed to use their weapons only in self-defence. It should be noted that a fundamental principle governing the positioning and whole functioning of the force was the consent of the host Egyptian government. The second party of the conflict Israel has not given its consent and as a consequence, the mission had the mandate to operate only on the Egyptian side of the border. The requirement of consent was necessary due to the fact that such operation was not an enforcement operation based on Chapter VII provisions and requirement of consent of the host country authorities remains obligatory since then. With neutrality and minimal or non-use of force (except in self-defence) and party consent, it forms the three main tenets of classical peacekeeping.²⁰

Troops were provided voluntarily by UN Member States, while Egypt maintained that troops from permanent members and some other countries that may had special interest in the conflict were banned. In comparison to UNTSO, UNEF was a more substantial operation in terms of total number of personnel deployed. The work force of 6000 personnel was created and contingents from 10 countries were accepted. This was also the mission that for the first time used so-called blue helmets and blue berets which provide for a nickname of peacekeeping troops, while the officers of each contingent continued to wear their national uniforms. UNEF continued its task for more than 10 years.²¹

An ever greater operation in terms of a total number of troops was Operation in the Congo (ONUC), established by SC Res S/4378 in 1960. It deployed civilian and military personnel to Congo and the total number of force was around 20,000. Primary contributors of troops were the African States such as Ghana, Guinea, Mali, Morocco and Tunisia.²² What makes this operation unique and different from other peacekeeping operations was the fact that SC RES 4741

²⁰ WEDGWOOD, R.. Evolution of UN Peacekeeping, *Cornell International Law Journal*, Vol. 28, No. 3, 1995, pp. 631-643, p. 632-633.

²¹ Middle East, UNEF I. Background, [online] [accessed 2-3-2017]. Available at: <<http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html#two>>

²² See Republic of the Congo – ONUC. Background [online] [accessed 2-3-2017]. Available at: <<http://www.un.org/Depts/DPKO/Missions/onucB.htm>>.

expanded the mandate and authorized the use of military force by ONUC. Another noteworthy fact is that then Secretary General (SG), under whose control the force operated, found death in a plane crash.

Although the importance of ONUC due to its multidimensional peacekeeping and the concept of use of force cannot be disputed, also maybe because of many deaths of peacekeepers who oftentimes were asked to carry their duties beyond their mandate and the tragic death of then SG whose intention was to negotiate the ceasefire between the warring parties in Congo, the peacekeeping missions in the second half of 1960s and 1988 shifted to the primary principles on which peacekeeping was built before establishment of ONUC or UNEF.

During the 1960s and 1970s, the UN deployed short-term missions in the Dominican Republic - Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP)²³, West New Guinea (West Irian) - UN Security Force in West New Guinea (UNSF)²⁴, and Yemen - UN Yemen Observation Mission (UNYOM). The organization also started a longer term deployment in Cyprus - UN Peacekeeping Force in Cyprus (UNFICYP)²⁵ and the Middle East - UN Emergency Force II (UNEF II),²⁶ UN Disengagement Observer Force (UNDOF) and UN Interim Force in Lebanon (UNIFIL).²⁷ Those missions were fully established within the three

²³ UN SC Res 203, The situation in Dominican Republic, 14 May 1965, S/RES/203. Secretary General has appointed Jose Antonio Mayobre as his representative in the Dominican Republic. The representative and his small team had to observe and report on the developments in Dominican Republic. See also Dominican Republic - Domrep. Background. [online] [accessed 3-3-2017]. Available at: <<http://www.un.org/en/peacekeeping/missions/past/domrepbackgr.html>>.

²⁴ This was the first mission when the UN assumed direct administrative responsibility for a territory. UNSF comprised 1,500 Pakistan troops supported by Canadian and US aircraft and troops. The Administrator has under his authority Papuan Volunteer Corps, the civil police, Dutch and Indonesian troops.

²⁵ Established by the SC under SC Res 186 in 1964. The peacekeeping force consisted of Austria, Britain, Canada, Denmark, Finland, Ireland, and Sweden. STEGENGA, J. A. *The United Nations Force in Cyprus*, Ohio State University Press, 1968, p. 73. The mission is still operating and currently has mandate until 31 January 2017. Today it comprises of 1080 total number of personnel of contingents from Argentina, Australia, Austria, Bosnia-Herzegovina, Canada, Croatia, El Salvador, Hungary, India, Ireland, Italy, Montenegro, the Netherlands, Peru, Serbia, Slovakia, Ukraine and the United Kingdom. See also HENN, F. *A Business of Some Heat: The United Nations Force in Cyprus 1972-74*. Leo Cooper Ltd, 2004, 512 p.

²⁶ Mission was established to supervise the ceasefire between Egyptian and Israeli forces. Initially, it included contingents from 12 countries: Austria, Canada, Finland, Ghana, Indonesia, Ireland, Nepal, Panama, Peru, Poland, Senegal, Sweden.

²⁷ United Nations Peacekeeping. The Early Years. [online] [accessed 2017-2-3]. Available at <<http://www.un.org/en/peacekeeping/operations/early.shtml>>. With regard to UNIFIL Hatto

fundamental pillars mentioned above - party consent, impartiality and use of force only in self-defence. The Period before the end of the Cold War culminated in 1988 when increased role of UN peacekeepers in restoring maintaining peace was awarded by Nobel Peace Prize.

The greatest troop contributors during this period were mostly medium-sized developed States - Australia, Austria, Canada, Denmark, Finland, Ireland, New Zealand, Norway and Sweden and developing States Fiji, Ghana, India, Nepal, Pakistan and Senegal.²⁸

1.3 Post-Cold War Era and the Great Expansion of Peacekeeping in the 1990s

After the end of the Cold War and a profound thaw in the atmosphere of international relations there was a big hope that the UN would play a greater role in maintaining and restoring global peace mainly due to the fact that permanent members of the SC started cooperating more extensively and as a result many peacekeeping operations were established since 1988. As a result, two new observation missions were established in 1988. The United Nations Good Offices Mission started operating in Afghanistan and Pakistan and the United Nations Iran–Iraq Military Observer Group (UNIIMOG) was deployed to observe the cessation of hostilities and the withdrawal of all forces to the internationally recognized boundaries without delay. Between 1988 and 2012, the UN has established and authorized 54 operations to restore or maintain peace.²⁹ Furthermore, until 1988, only 26 States provided troops to peacekeeping operations. By November 1994 this

observes that it is rather a „*separate case among the traditional operations between 1965 and 1988.*“ This was mainly due to the fact that it operated in difficult circumstances, Lebanese government had little influence and some of the armed groups were against the presence of peacekeepers. HATTO, R. From peacekeeping to peace-building: the evolution of the role of the United Nations in peace operations. *International Review of the Red Cross. Multinational Operations and the Law*, Vol. 95, No. 891-892, December 2013, pp. 495-515.p. 496.

²⁸ FINDLAY, T. *Challenges for the New Peacekeepers*, Stockholm International Peace Research Institute, Oxford University Press Inc., New York, 1996, p. 2.

²⁹ HATTO, R. From peacekeeping to peace-building: the evolution of the role of the United Nations in peace operations, p. 496.

number was extended to 76 and while in 1988 the UN had only 9950 troops, in 1995 it had 80 000.³⁰

It should be also pointed out that the tasks that certain missions were authorized to perform have varied and in fact have expanded or become more complex as time went by. Whereas above mentioned missions deployed to Afghanistan, Pakistan and Iran and Iraq respectively, could be to some extent compared to the first UN missions created in the late 1940s, whose tasks were primarily supervision, monitoring and assistance, the United Nations Protection Force (UNPROFOR) in the former Yugoslavia³¹ and the United Nations Operations in Somalia (UNOSOM I and II)³² could be compared to ONUC, mainly because of their further extension in the use of force and are regarded as enforcement operations.³³ Other group of multifunctional operations is characterized by uniqueness and tasks such as reintegration processes and security sector, the tasks that were never introduced before, a perfect example of this mission is United Nations Transitional Authority in Cambodia (UNTAC) which was a multinational mission comprising

³⁰ The motivations towards increased interest concerning participation in peacekeeping missions vary. For some it might be altruism, boost of national prestige and independence, increase of influence in the course of international relations, active involvement because in the future same assistance may be needed, symbolic repayment of a debt or gratitude for successful deployment of a peacekeeping operation to repaying State, rehabilitating military, gaining experience and professionalism or desire to profit from reimbursements for the cost of troop contributions and positive image building. Some underdeveloped countries can also profit from received equipment, training, knowledge sharing and contacts with other forces employed. See FINDLAY, T. *Challenges for the New Peacekeepers*, p. 2-10.

³¹ See UN SC Res 770 for situation in former Yugoslavia. UN SC Res 770, Bosnia and Herzegovina, 13 August 1992, S/RES/770. With regard to the structure of UNPROFOR, it should be pointed out that such structure included military, civil affairs with civilian police component, public information and administrative components. As of November 1994, the total number of peacekeepers was 38 810 including 680 UN military observers. It had also 727 civilian police, 1870 civilian staff (including 1353 contractual personnel) and 2188 local staff. This makes it the largest peacekeeping operation in the history of the UN. Among the largest troop contributors were Bangladesh, Canada, France, Jordan, Malaysia, Netherlands, Pakistan and the United Kingdom. See Former Yugoslavia – UNPROFOR. United Nations Protection Force. Background. [online] [accessed 2017-3-2] Available at: <http://www.un.org/en/peacekeeping/missions/past/unprof_b.htm>.

³² See UN SC Res 794 for Somalia. UN SC Res 794, Somalia, 3 December 1992, S/RES/794. First UN mission deployed to Somalia was UNOSOM I. It was established in April 1992 and was operating until December the same year. The second mission was established in March 1993 and was active until March 1995. Among the greatest contributors to these missions were Bangladesh, Egypt and Pakistan. See Somalia – UNOSOM II. Background. [online] [accessed 2017-4-3] Available at: <<http://www.un.org/en/peacekeeping/missions/past/unosom2backgr2.html>>.

³³ Comparable operation authorized by the SC under Chapter VII to carry out peacekeeping was a non-UN multinational mission Operation Turquoise by France in Rwanda. See UN SC Res 929, UN Assistance Mission for Rwanda, 22 June 1994, S/RES/929.

contingents from 46 countries making it the most international mission up to date (largest by France, India and Indonesia).³⁴

Hatto in this respect remarks that there is a tendency to speak more broadly about peace operations rather than peacekeeping operations since peacekeeping has just become one of facets of multidimensional peace operations.³⁵ These multidimensional operations were created to warrant the implementation of broad peace agreements and being instrumental in laying the bedrocks for sustainable peace. Peacekeepers were assigned to engage in complex tasks designated to build and support sound and strong institutions of governance, monitor the observance of human rights, security sector reform out of respect for the rule of law, demobilization, disarmament or reintegration of former combatants, military and police training, boundary demarcation, civil administration or assistance in refugee repatriation. In this respect, it needs to be pointed out that greater role in these operations has been played by civilian components.

Another noteworthy mission was United Nations Transition Assistance Group (UNTAG). Not for its tasks, since it had to monitor the peace process and elections,³⁶ rather more for its background, since in the MoU annexed to the SOFA it was stated that if a participating State failed within reasonable time to take steps to exercise the jurisdiction in any case including arrest and detention when appropriate and should the accused remain in the host State territory, he shall become subject to local criminal jurisdiction.³⁷ This was a novelty which was not accepted by TCCs. We will dig more into this topic in a specifically devoted Chapter to SOFAs and MoUs.

³⁴ The UN was for example responsible for organizing elections and has taken over some administrative tasks of an independent state. See FINDLAY, T., *Cambodia: The Legacy and Lessons of UNTAC. SIPRI Research Report no. 9*, Stockholm International Peace Research Institute, Oxford University Press Inc., New York, 1995, p. 27-31. ISBN 0-19-829186-8.

³⁵ HATTO, R. From peacekeeping to peace-building: the evolution of the role of the United Nations in peace operations, p. 496.

³⁶ See UN SC Res 632, Namibia, 16 February 1989, S/RES/632.

³⁷ UNTAG SOFA, Art. 54(b) as quoted by BOOM, R. Impunity of Military Peacekeepers: Will the UN Start Naming and Shaming Troop Contributing Countries? In: *American Society of International Law Insights*. [online] 2015-11-24 [accessed 2017-3-4] Available at: <<https://www.asil.org/insights/volume/19/issue/25/impunity-military-peacekeepers-will-un-start-naming-and-shaming-troop>>.

Secondly, the type of clashes also changed throughout the years. While at the beginning, the peacekeeping operations were intended to engage in inter-State conflicts, in the post-Cold War period the peacekeeping operations have been sent to alleviate intra-State conflicts and civil wars.³⁸

It should also be noted that in the above mentioned Agenda for Peace which provided an analysis of peacekeeping in the post-cold War world, the traditional concept of parties' consent was broken and from the wording it seemed that it would be possible to deploy a mission even without the consent of the host State.³⁹ This would have meant that the UN could establish a mission with its tasks, designate its composition and send it to the State or territory concerned without an agreement of the host State concerning mandate or TCC.

Furthermore, paragraph 43 of the Agenda for Peace was an innovation in relation to the classic notion of use of force by peacekeepers. A clear intention was presented to use of force when all peaceful means are unsuccessful, and in the words of then SG Boutros-Ghali *"as the option of taking it is essential to the credibility of the United Nations as a guarantor of international security."*⁴⁰ In this paragraph a reference was made to special agreements concluded on the basis of Art. 43 of the UN Charter which provided for making available of armed forces by respective States to the UN SC.⁴¹ This article has been inoperative since establishment of the UN. The purpose of the Agenda of Peace was to revive Art. 43 of UN Charter and make it effective. In this context, paragraph 44 of Agenda of Peace proposed to establish peace enforcement units to restore and maintain the cease-fire with stating that such tasks may on the occasion exceed the mission of peacekeeping and referencing again to the Article 43 of UN Charter.⁴²

However, in 1995 a Supplement to the Agenda of Peace was adopted. In this document the SG Boutros Boutros-Ghali stepped back and emphasized the "three

³⁸ See e. g. United Nations Peacekeeping. Post-cold War surge. [online] [accessed 2017-3-17]. Available at: <<http://www.un.org/en/peacekeeping/operations/surge.shtml>>.

³⁹ *"Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned."* UN GA, An Agenda for Peace, 17 June 1992, A/47/277, para 20.

⁴⁰ DEBRIX, F. *Language, Agency, and Politics in a Constructed World*. Taylor & Francis, 2003, p. 186.

⁴¹ Charter of the United Nations, 24 October 1945, Art. 43 [online] [accessed 2017-2-2]. Available at <<http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>> .

⁴² UN GA, An Agenda for Peace, 17 June 1992, A/47/277, para. 44.

particularly important principles” which are party consent, impartiality and use of force only in self-defence.

Additionally, it was stated that three facets have led the peacekeeping operations to give up the consent, impartiality and use of force only in self-defence. These have been the cases of protection of humanitarian operations during existing warfare, protection of civilian population in designated safe areas and demanding the conflicting parties to accomplish national reconciliation. As an example, it was referred to the engagement of peacekeepers in Bosnia and Herzegovina and Somalia where the missions were given additional mandates concerning the use of force. The SG observes that the conflicts which the UN is asked to resolve have usually deep roots and therefore they require patient steps over a period of time with the necessity to resist the temptation to quicken them.⁴³

As Hatto notes, the UN’s withdrawal from conflict management in second half of the 1990s or in the other words a step back to basic principles of peacekeeping operations was to a great extent due to the negative experiences faced in Bosnia,⁴⁴ Rwanda and Somalia.⁴⁵ As a result, the UN bestowed the regional organizations with mandate to carry out enforcement operations in the second half of the 1990s. Van der Lijn provides as an example the NATO Implementation Force (IFOR) and Stabilisation Force (SFOR) in Bosnia and Herzegovina.⁴⁶

However, in 1999, the UN deployed several missions with complex and extensive mandates and started a trend that further continued in the new millennium.⁴⁷ As several authors point out this was also due to the fact that

⁴³ UN GA and UN SC, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of Fifteenth Anniversary of the United Nations, 3 January 1995, A/50/60-S/1995/1, paras 33-36.

⁴⁴ The UNPROFOR’s tasks in Bosnia were to keep the Sarajevo airport open and protect humanitarian convoys. The infamous case of Srebrenica massacre will further be elaborated in another Chapter of this dissertation.

⁴⁵ HATTO, R. From peacekeeping to peace-building: the evolution of the role of the United Nations in peace operations. p. 508-509.

⁴⁶ See VAN DER LIJN, J. et al., *Walking the Tightrope: Do UN peacekeeping operations actually contribute to durable peace?* Amsterdam: Dutch University Press, 2006.

⁴⁷ E. g. The United Nations Interim Administration Mission in Kosovo (UNMIK) which is being still active today, United Nations Mission in Sierra Leone (UNAMSIL) which in a positive way contributed rebuilding the country, assisted in holding national elections and was instrumental in bringing government services to local communities and the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC).

although regional interventions, unilateral interventions by respective States might be stronger in terms of force and pushing through enforcement action preferred requirements, it was often times done without impartiality and interest of only some parties to the conflict were preferred. It was mostly the party that was sponsored by the State undertaking intervention. Hence, in the late 90s, the legitimacy of UN was again immensely desired and the UN peacekeeping started to be an important institution in assisting countries torn by conflict to create conditions for peace.⁴⁸

1.4 UN Peacekeeping in the 2000s until Today

The newly established direction in peacekeeping in the late 1999s prompted then SG Kofi Annan to establish a high-level group mandated to undertake an in-depth study of UN peace operations and provide recommendations for change. The group which was headed by Lakhdar Brahimi published its report on 21 August 2000.

The group re-approved that Party consent, impartiality and use of force only in self-defence should remain the three fundamental principles of peacekeeping. Its objective was a better coordination of the multidimensional mission considering the fact that many missions have been deployed to intra-State conflicts where clarity of clear determination of warring parties is worsened and the relations are variable. Furthermore, such coordination might be fruitful because of various actors' engagement in the missions. These may come from UN and its specialized agencies, TCCs, NGOs or regional organizations.

To this extent, the report proposed a pre-mandate financing mechanism to ensure adequate resources for newly started missions, a greater role for Special Representatives and personnel engaged directly in the field contributing to rapid and effective deployment or greater flexibility, enhanced role of non-military

⁴⁸ HATTO, R. From peacekeeping to peace-building: the evolution of the role of the United Nations in peace operations, p. 509.

personnel, use of force to prevent atrocities and to protect civilian population at risk.⁴⁹

In this regard, UN Mission in Sierra Leone (UNAMSIL) is referred as the first peacekeeping mission granted with mandate under Chapter VII measures for “protection of civilians under imminent threat of physical violence.”⁵⁰ The more flexible concept of use of force in peacekeeping missions was further employed in 2013 with regard to interventions in Mali and the Central African Republic, missions authorized by the SC.⁵¹

As for the integration of multifunctional missions, Hatto rightly contends that due to bureaucratic complexities and resulting reluctance of UN Agencies involved within peacekeeping operations, their integration under the control of the Special Representative of the Secretary-General is to the great extent unworkable. The same statement may be proclaimed about the stance presented by some NGOs

⁴⁹ See UN GA and UN SC, Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council. Report of the Panel on United Nations Peace Operations, 21 August 2000, A/55/305–S/2000/809. Although the report did not explicitly refer to grave violations committed by peacekeepers, a few weeks later after its publication, the SC adopted Resolution 1325 on women, peace and security making a special demand to Member States, to the SG and to “all parties to an armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians.” Furthermore, the resolution called upon “all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls.” Very interestingly, the resolution also underscored “responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls.” With great emphasis on “the need to exclude these crimes, where feasible from amnesty provisions.” See UN SC Res 1325, Women and Peace and Security, 31 October 2000, S/RES/1325. These policies stem also from extensive involvement of peacekeepers in sexual assault, trafficking, prostitution including children prostitution and transmission of sexually transmitted infections in Cambodia. According to Whithworth as quoted by Simm, UN responses to such large-scale peacekeepers involvement was “denial and minimisation.” SIMM, G. *Sex in peace operations*, University of New South Wales, Sydney, 2013, p.9.

⁵⁰ UN SC Res 1289, The situation in Sierra Leone, 7 February 2000, S/RES/1289. With regard to its implementation DPKO has developed a comprehensive action plan. In 2006 it was observed, that although some progress has been made, there are still gaps present in the implementation. One of its main initiatives was to employ a greater number of women candidates to senior positions within the missions and greater number of women peacekeepers in order to engage more efficiently with local population, since DPKO after experiencing difficulties in Sierra Leone and Timor-Leste, identified the need for a smooth transitioning of a gender-related programmes to the UN country team. In other words, participation of women in all levels of peacekeeping operations, including civilian, police and military was necessary. JACKSON, P. *The Yearbook of United Nations, 2006*, Department of Public Information, United Nations, New York, Volume 60, p. 84-85.

⁵¹ VAN DER LIJN, J. et al., *Peacekeeping operations in changed world*, CLINGENDAEL, Netherlands Institute of International Relations, 2015, p. 26

which have feared that such integration could dramatically affect their independence.

Although supported by then SG Kofi Annan, some recommendations from the report were in reality received with unwillingness from respective States. This was mainly due to the fear of respective States that their troops might consequently be exposed to a greater danger.⁵² In addition, some, mostly developing States wherein the mission has been or might have been deployed, were afraid of interferences into their sovereignty, given the expanded and more flexible mandates under which peacekeepers perform their tasks.

Another noteworthy fact, demonstrating the current trend in contribution to peacekeeping operations is that Western developed States have been more reluctant to directly participate in most of the peacekeeping operations. The decrease in direct involvement of some of the Western States seemed logical after the failure and great pressure put on the backs of their contingents during peacekeeping operations in the first half of the 1990s operating under obscure mandates, having improper resources and facing confrontations with heavily armed groups of greater numerical superiority in comparison to smaller and insufficiently equipped peacekeeping troops. Such threats were no longer desirable by developed States and some of them have chosen to support respective operations only financially.

As a consequence, many peacekeeping operations have consisted predominantly of troops that were contributed by developing countries with their outdated equipment and weapons, lacking specialized training and without greater logistical support. This shortcoming might to some extent have also contributed to SEA in peacekeeping operations.⁵³

On one hand, the modern peacekeepers perform more complex and sometimes improvised tasks than those intended by traditional peacekeeping. On

⁵² These concerns were justified, as was later shown in a terrorist attack on UN headquarters in Baghdad. See FILKINS, D. and OPPEL, R.A. Top Aid Officials are Among 17 Killed. In: *New York Times*. [online] 2003-8-19 [accessed 2017-5-3]. Available at: <<http://www.nytimes.com/2003/08/19/international/worldspecial/top-aid-officials-are-among-17-killed.html>>.

⁵³ HATTO, R. From peacekeeping to peacebuilding: the evolution of the role of the United Nations in peace operations, p. 511.

the other hand, we do not see a great demand for peacekeeping operations from the UN Member States. As a result, the greatest troop contributors to peacekeeping operations are developing States and it seems that this trend will continue unchangeable in the near future.

With regard to UN Personnel, as of 31 August 2016, 100 019 has been a total number of uniformed personnel of which 85 442 pertained to troops, 12 885 to police and 1692 to military observers. Civilian personnel consists of 5256 international and 11 215 local work force. Total number of UN Volunteers has been 1559.⁵⁴

At present, the largest contributing States to peacekeeping missions are Bangladesh, Egypt, Ethiopia, Ghana, India, Jordan, Nepal, Nigeria, Pakistan, Rwanda and Senegal. As may be seen the UN relies primarily on African and South Asian forces which provide nearly 75% of the troops and police under UN command while European States' participation has decreased to 8% of all deployments in 2011.⁵⁵

Despite some evident difficulties, in the beginning of 21st century the peacekeeping has been regarded as a far cheaper alternative to war. In 2003 the UN peacekeeping cost around \$ 2.6 billion while States have spent more than \$794 billion on arms.⁵⁶

The approved budget for peacekeeping operations in 2017 is \$7.87 billion which is substantially more than in 2003 but less than for the period 2015-2016 and clearly less than States' expenditures on arms.⁵⁷ However, although the total number of peacekeeping missions and peacekeepers remains the same for the past few years, we have seen a downward tendency and decrease in budget. As financial aspect is largely determinative to success of intended policies or certain steps that need to be taken, it seems that SEA or crimes in general perpetrated by

⁵⁴ Peacekeeping Fact Sheet, [online]. 2017-2-28 [Accessed 2017-3-2]. Available at: <<http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>>.

⁵⁵ GOWAN, R., GLEASON, M. *UN Peacekeeping: The Next Five Years*. A Report by the New York University Center on International Cooperation Commissioned by the Permanent Mission of Denmark to the United Nations, 2012, p. 2-3.

⁵⁶ 2004 PARLIAMENTARY HEARING AT THE UNITED NATIONS "FROM DISARMAMENT TO LASTING PEACE: DEFINING THE PARLIAMENTARY ROLE" The Challenges of Peacekeeping in the 21st Century, New York, 19-20 October 2004, p. 2.

⁵⁷ See UN GA, Approved resources for peacekeeping operations for the period from 1 July 2016 to 30 June 2017, 22 June 2016, A/C.5/70/24.

peacekeepers is a part of a larger, more complex problem that the UN has to deal with.

Another issue which must be faced by contemporary UN peacekeeping is shared responsibility with regional organisations such as EU, African Union (AU) or OSCE, or with military alliances as NATO.⁵⁸ Such concerted convoluted actions have also contributed to difficulties regarding applicability of legal rules. It should be pointed out that it may be unclear for an observer to untangle this complicated web of legal framework and determine under whose authority a certain assignment is performed. With regard to SEA perpetrated by personnel deployed to peacekeeping operations, this web is tangled even more.

1.5 Concluding Remarks

Under the given circumstances at the dawn of the Cold War, the UN had to improvise and by introducing the instrument of peacekeeping, it made a virtue of necessity. With time, the traditional concept of peacekeeping was broken and peacekeepers started to be entrusted with more complex functions. It should be said that peacekeeping, although not envisaged in the UN Charter, has to some extent become relatively successful alternative to largely non-functional system of collective security. Of course, as many other instruments of this type, it has not been flawless and some of operations were if not total collapse, then definitely some kind of failure.

Undertaking structural analysis of peacekeeping in the above Chapter, we have identified several intricate problems that the UN has to face and that need to be addressed in the future. It is our position that these aspects form a large composite problem, while these aspects are closely interrelated and SEA

⁵⁸ For example NATO-led UN-mandated International Security Assistance Force (ISAF) which undertook security operations from 2001 to 2014 and had a force of 130 000. For clarifying the legal nature of the ISAF see MORTOPOULOS, C. D. . Could ISAF Be A PSO? Theoretical Extensions, Practical Problematic and the Notion of Neutrality, *Journal of Conflict & Security Law*, Oxford University Press, 2010, pp. 573-587. However, it must be said that greater contribution by Western States to this operation has to some extent contributed to their nonparticipation in peacekeeping missions established by the UN during the first decade of 21st century.

perpetrated by peacekeepers forms just one aspect of this larger issue. Among other sub-issues may be identified greater participation of troops from developing countries, insufficient training of troops, lack of financial resources resulting in continuous decrease in budget, Western States' unwillingness to contribute troops and ambivalent or flexible mandates entrusting peacekeepers with difficult tasks that may endanger their security. Indeed, it would be very presumptuous to say that there is a direct causation between above mentioned obstacles and SEA perpetrated by peacekeepers.

However, we argue that there is certainly some correlation and if identified problems are perceived as being a part of one large problem and tackled effectively, this could have to a large extent contribute to decline in SEA or other criminal offences perpetrated by peacekeepers while deployed in peacekeeping missions.

Currently, 16 UN Peacekeeping operations are deployed to the various parts of the world. Nine of them operate in Africa, three in the Middle East, two in Europe and one in India and Haiti respectively. Considering the enduring conflicts in Africa, the trend might be that primacy of African continent, in terms of total number of peacekeeping missions deployed, will continue in the future.⁵⁹ The more so because of the fact that interests of permanent members of the SC are not that much endangered in Africa in general.

This means that a permanent member would probably not be deeply hostile to the establishment of a peacekeeping mission to that region by exercising the veto right. On the other hand, a disinterest of some of western States to participate directly in those peacekeeping operations, although not stopping financial contributions, puts the UN into certainly not enviable position.

⁵⁹ VAN DER LIJN, J. et al., *Peacekeeping Operations in a Changing World*, p. 20

2 SEXUAL EXPLOITATION AND ABUSE: DELIMITATION, OCCURRENCE AND THE UN APPROACH

2.1 Preliminary Observations

This Chapter should serve firstly as a theoretical basis providing for delimitations relating to status of staff categories employed within peacekeeping missions for the purposes of better specification of perpetrators committing SEA. Furthermore, delimitations with regard to victim as an object of SEA by peacekeepers shall be made. We shall also define “sexual exploitation” and “abuse” in the context of the UN peacekeeping missions. Further parts of this Chapter are devoted to the UN responses, i.e. actions the UN is taking against SEA in peacekeeping missions. In this context, attention will also be drawn to two main instruments, Status of Forces Agreements and Memorandum of Understandings which among other things, provide also for exclusive criminal jurisdiction of the TCCs over their troops. Therefore, we will also address frameworks and approaches of various TCCs to demonstrate that breaking the exclusive criminal jurisdiction (although perhaps the most difficult politically achievable solution) is the most effective answer in bringing perpetrators to justice and in reducing SEA in peacekeeping missions.

At the outset it should be noted internationally accepted definitions for violent sexual crimes and rape as well as generally approved age by which a person is able to consent to a sexual act have not been established yet.⁶⁰ However, some ramifications are provided for by official documents approved by the UN.

As stipulated by the Guidelines on prevention and responses to sexual violence against refugees elaborated in 1995, there are various forms of sexual violence. These acts may cover *“all forms of sexual threat, assault, interference and*

⁶⁰UN GA, Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, 16 August 2006, A/60/980, p. 9.

*exploitation, including statutory rape⁶¹ and molestation without physical harm or penetration.*⁶² Of diverse forms of sexual violence, rape is referred to as probably the most frequent one.⁶³ Rape was defined by the International Criminal Tribunal for Rwanda as *“a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”*⁶⁴ and sexual violence more widely as *“any act of a sexual nature which is committed on a person under circumstances which are coercive.”*⁶⁵ There is no need for coercion to attribute to physical force, but rather to *“threats, intimidation (...) and forms of duress which prey on fear or desperation may constitute coercion.”*⁶⁶

Furthermore, with respect to definitions of SEA, above mentioned Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises of 2002 defines sexual exploitation as: *“any abuse of a position of vulnerability, differential power, or trust for sexual purposes; this includes profiting monetarily, socially or politically from the sexual exploitation of another.”*⁶⁷

It further provides the following definition of sexual abuse which is understood as: *“an actual or threatened physical intrusion of a sexual nature,*

⁶¹ With respect to the generic term of statutory rape it should be pointed out that the criminal offence of the criminal offense of statutory rape is deemed to be committed when an adult sexually penetrates a person who, under the law, is incapable of consenting to sex. See GOODWIN, M. Law's Limits: Regulating Statutory Rape Law. *Wisconsin Law Review*, Vol. 2013 No.2, 2013, pp. 482-540.

⁶² UNHCR, Guidelines on prevention and responses to sexual violence against refugees, 1995, p. 4.

⁶³ According to statistics provided by Stop Rape Now – UN Action Against Sexual Violence in Conflict 20,000 – 50,000 women were raped during war in Bosnia and Herzegovina in early 1990s, 250,000 – 500,000 women were raped during Rwandan genocide, 50,000 – 64,000 internally displaced women in Sierra Leone were violently attacked by respective combatants, in an average day 40 women are raped in Kivu, DRC. It should of course be noted that with regard to high figures, only few of those cases include peacekeeping personnel. Stop Rape Now – UN Action Against Sexual Violence in Conflict In: Stop Rape Now. [online] [accessed 11-12-2016]. Available at: < http://unipd-centrodirittiumani.it/public/docs/StopRapeNow_Brochure.pdf

⁶⁴ International Criminal Tribunal for Rwanda (ICTR), The Prosecutor v. Jean-Paul Akayesu, Trial Judgement, ICTR-96-4-T, 2 September 1998, para. 598.

⁶⁵ *Ibid.*, para. 598.

⁶⁶ *Ibid.*, para. 688.

⁶⁷ Investigation into sexual exploitation of refugees by aid workers in West Africa, UN GA, Annex I. Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, 11 October 2002, A/57/465, p. 22. The report also provided set of recommendations specifically prohibiting SEA, improving investigation, enhancing coordination and calling for sanctions.

including inappropriate touching, by force or under unequal or coercive conditions.”

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With regard to those preliminary definitions it may be observed that due to their general nature they allow for a great leeway. Therefore, in this Chapter we will look into how those definitions and whole issue of SEA by peacekeepers was dealt with after newer and newer allegations of SEA were revealed.

2.2 Status of Personnel Operating in the UN Peacekeeping Missions

Before we immerse ourselves into description of SEA in the context of peacekeeping operations we shall at first define the group into which the perpetrators of these acts belong, i. e. we need to provide a brief description of employment categories that are involved in peacekeeping operations.

Furthermore, brief outline of legal framework will be fleshed out, as it will be seen that given various tasks, specific involvement into the mission and organizational genesis, the personnel in respective missions is not governed by the same norms.

Disentangling and outlining particular norms in the next part should lead to their specification and relevance in following Chapters of this thesis.

Firstly, as we have mentioned in the previous Chapter, the peacekeeping operations were neither envisaged in the UN Charter,⁶⁹ nor were they intended to

⁶⁸ *Ibid.*, p. 22.

⁶⁹ Drafters of the UN Charter planned to establish a controlled system over (all) UN operations. Article 43 provides that national contingents be made available for the UN under special agreements with states. This force had to operate under direction of the UN. The Military Staff Committee, a special organ was to be established with a mandate of assisting and advising to the UN. However, despite introducing relevant provisions into the UN Charter, in reality the Committee was never used. See discussion in BURKE, R., *Attribution of Responsibility: Sexual Abuse and Exploitation, and Effective Control of Blue Helmets*, *Journal of International Peacekeeping*, 2012, Vol. 16, No.1, pp. 1-46, p. 4-5.

be covered by the Convention on Privileges and Immunities of the United Nations (the Convention).⁷⁰

Therefore, when looking for the legal basis providing for respective conduct of personnel engaging in peacekeeping operations we need to differentiate between various staff categories.

As a whole, the legal framework comprises of an intricate system of norms. It should be noted that although military remains to be the primary base of specific categories operating in peacekeeping, as time went by many new categories have been invented and have engaged respective missions, being it in particular administrators, economists, police officers, legal experts, electoral observers, communication and public information experts, de-miners, human rights monitors, humanitarian workers, civil affairs and governance specialists.

Much civilian staff of the UN or some of its specialised agencies may be recruited from local population and with staff of the NGOs, they form an active part of peacekeeping.⁷¹

Apart from NGOs' personnel, UN staff and related personnel comprises of UN Volunteers, personnel or employees of non-United Nations entities or individuals who have entered into a cooperative arrangement with the United Nations (including interns, international and local consultants as well as individual and corporate contractors), experts on mission including UN police officers, members of national formed police units, corrections officers and military observers, as well as military members of national contingents serving in United Nations peacekeeping missions) while NGOs staff comprises of personnel as set down by international organizations and their membership bodies; and personnel of non-governmental organizations.⁷²

With regard to crimes committed by UN staff and related personnel employed in peacekeeping operations, the UN adopted a dual approach

⁷⁰ The Convention was passed by the General Assembly on 13 February 1946, few years before the first deployment of UN peacekeeping operation. UN GA, Convention on the Privileges and Immunities of the United Nations, 13 February 1946.

⁷¹ United Nations Peacekeeping. Post-cold War surge. [online] [accessed 2017-3-4]. Available at: <<http://www.un.org/en/peacekeeping/operations/surge.shtml>>.

⁷² Facilitation Guide. For facilitated presentation of the film "To Serve with Pride" On prevention of sexual exploitation and abuse by United Nations and related personnel, p. 3.

distinguishing between its regular staff (being it either experts on mission, officials, UN volunteers, individual contractors, consultants, civilian police, or military observers) and MMsNCs who remain in national service during their assignment. Whilst the former has the status of categories under the Convention the latter is governed by the status of forces agreements (SOFAs) and the Memorandum of Understandings (MOUs),⁷³ i.e. this category does not benefit from protection of the Convention whatsoever.

The main difference between the Convention on one side and SOFAs and MOUs on the other is the extent of which jurisdictional immunity is granted and the possibility to waive the immunity.⁷⁴

The Convention provides that its categories are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. The Secretary-General has the right and duty to waive the immunity of any official/expert of mission after particular circumstances are met.⁷⁵

Unlike the immunities of the UN officials involved in the peacekeeping operation, the exclusive jurisdiction over the MMsNCs of the respective participating state is not subject to the waiver of the Secretary-General or any other respective UN body. It should be noted that such exclusive prerogative does not have its legal basis in the UN Charter.⁷⁶

Burke, who compares the jurisdictional immunities granted to the MMsNCs to the law of visiting forces; diplomatic immunity; and the doctrine of functional necessity, concludes that the granting of such expansive immunity appears

⁷³ These instruments will be elaborated to a greater extent in next parts of this dissertation. At the outset it is valuable to point out that SOFA is an agreement concluded with the government of a State/territory to which the mission is to be sent while MOU is an agreement with a State whose troops are contributed into a mission.

⁷⁴ See UN GA, Comprehensive review of the whole question of peacekeeping operations in all their aspects, 24. March, 2005, A/59/710, , paras 15 – 22.

⁷⁵ Convention on the Privileges and Immunities of the United Nations, Art. 5, Section 20 and Art. 6, Section 23 respectively.

⁷⁶ The UN Charter itself mentions other categories. 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. Charter of the United Nations, 24 October 1945, Art. 105 (2) [online]. [accessed 2016-2-2]. Available at: <<http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>>.

somewhat out of line with the UN Charter and general international law, both of which favour the granting of immunity to the extent that is functionally necessary.⁷⁷

It appears that such special immunity regime has solely conventional character (unlike the diplomatic immunities). Hence, the focus of the following Chapter shall be put into the legal instruments governing the conduct of troops while deployed in a UN peacekeeping operation. Where cases of SEA where UN officials were involved will be discussed further in this thesis, this will be done solely for illustrative purposes and the centre of attraction of this work shall be MMsNCs.

2.3 Targets/Victims of SEA

In this part, we would like to provide some words regarding victims or in other words targeted objects of SEA perpetrated by peacekeepers. It needs to be pointed out that in this thesis we will not address sex and related crimes between peacekeepers, we will also not deal with sex crimes committed by diplomats and diplomatic personnel deployed by respective States into conflict territories as diplomats are subject to prosecution or waiver of immunity by sending States.⁷⁸

Our research focuses on crimes perpetrated by MMsNCs on local population who may be found on the territory where the respective missions are deployed. This group comprises of residents, i.e. persons maintaining residency or domicile in a given place; internally displaced persons (IDPs), refugees and stateless persons.

While status of refugees, as persons who have been forced to flee their country of origin, is governed by the 1951 Convention, status of IDPs is not specifically covered by this Convention, but The Office of the United Nations High Commissioner for Refugees (UNHCR) is granting them protection as well, since they may flee from their place of residence for the same reasons as refugees, although unlike refugees, IDPs stay within their own country of origin.⁷⁹

⁷⁷ BURKE, R *Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity*, *Journal of Conflict & Security Law*, Oxford University Press, Vol. 16, No. 1, 2011, pp. 63-104, p. 91.

⁷⁸ See Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, Art. 31.

⁷⁹ The 1951 Refugee Convention defines a refugee as : “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or

Therefore, although different categories of persons may be included in the term local population,⁸⁰ the main focus in our research is to be put on persons' vulnerability and difficult situation, psychical infirmity considering grave conditions that affect their everyday life. It is their dependence on respective UN peacekeepers whose tasks are related to distribute various basic necessities such as food, clothes, blankets etc.⁸¹

With respect to age and gender of victims, it should be noted that both females and males are targeted. Moreover, highly regrettable is the fact that criminal offences of SEA were perpetrated on children as young as 9 years.⁸²

2.4 First Allegations and First Responses from within the UN

The issue of SEA in peacekeeping operations is not a new one and was raised for the first time several years ago. First allegations came in the beginning and throughout the 1990s and concerned regions including Bosnia and Herzegovina, Kosovo, Cambodia and Timor-Leste.⁸³ In early 1990s the UN had no official policy

political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." IDPs are not covered by this Convention. See UN GA, Convention Relating to the Status of Refugees, 28 July 1951 and UNGA, Protocol Relating to the Status of Refugees, 31 January 1967. For IDPs see e. g. COHEN, Roberta, International Protection to Internally Displaced Persons. Refugee Policy Group, June, 1991; and Refugee Policy Group, 'Human Rights Protection for Internally Displaced Persons: An International Conference,' 24-25 June 1991.

⁸⁰ See part of this dissertation elaborating SG Bulletin and discussing beneficiaries of assistance.

⁸¹ As per UNHCR and Save the Children-UK report various humanitarian workers were involved in trading "humanitarian commodities and services, including oil, bulgur wheat, tarpaulin or plastic sheeting, medicines, transport, ration cards, loans, education courses, skills training and other basic services" for sex with local girls aged under 18. UNHCR and Save the Children-UK, Sexual Violence and Exploitation The Experience of Refugee Children in Guinea, Liberia and Sierra Leone, February 2002, p. 4-5.

⁸² Human Rights Watch, Central African Republic: Rape by Peacekeepers UN, Troop-Contributing Countries Should Hold Abusers Accountable, February 4, 2016. For statistics see e.g. UN GA, Activities of the Office of Internal Oversight Services on peace operations for the period from 1 January to 31 December 2014, 23 February 2015, A/69/308, p. 7

⁸³ See UN GA, Comprehensive review of the whole question of peacekeeping operations in all their aspects, p. 7. See United Nations Conduct and Discipline Unit, Sexual Exploitation and Abuse Policy, In: *Conduct in UN Field Missions* [online] [accessed 2016-11-12] Available at:<<https://cdu.unlb.org/Policy/SexualExploitationandAbusePolicy.aspx>>.

how to target SEA by peacekeepers.⁸⁴ However, UN SG's Special Representative Yasushi Akashi replied to NGO worries about sexual violations by UN peacekeepers by saying boys will be boys.⁸⁵

Furthermore, in 1999, Human Rights Watch criticized several forms of child prostitution involving humanitarian organizations' workers in Guinea.⁸⁶ Subsequent reports have revealed cases of SEA by UN personnel in Liberia, Sierra Leone and the Democratic Republic of Congo.⁸⁷

After these reports, the Office of Internal Oversight Services (OIOS) conducted an investigation. Apart from the domestic law of respective countries adherence to Convention of the Rights of the Child and the African Charter of on the Rights and Welfare of the Child respectively, was emphasized.⁸⁸

Results of those investigations were reflected in a report that was issued in October 2002. It was prepared by then SG which recognized that there had indeed been violations of fundamental human rights which included sexual abuses in refugee camps. The investigation team received 43 allegations of possible SEA. According to information provided by the report, only 10 cases were substantiated by evidence which involved civilian and military members employed by various international agencies. However it should be pointed out that these numbers are most likely do not reflect reality and the actual number of SEA crimes is much higher owing to the fact that complaint procedures, victim support, subjective

⁸⁴ Gender mainstreaming policy within specialized agencies of the UN could be regarded as a predecessor that influenced later practice of peace operations. See UN GA, Report of the Economic and Social Council for the Year 1997, 18 September 1997, UN Doc A/52/3/Rev.1, p. 27-35.

⁸⁵ SIMM, G.. Sex in Peace Operations, p. 9.

⁸⁶ See Human Rights Watch, Forgotten Children of War, July 1999, Vol. 11, No. 5 (A), pp. 53.

⁸⁷ ODELLO, M. *Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers*, *J. Conflict & Security*, Oxford University Press, Vol. 15, No. 2, 2010, pp. 347-391, p. 350. As provided in a note prepared by UNHCR and Save the Children-UK an assessment team conducting its activities in Liberia, Sierra Leone and DRC, 67 allegations of abuse and exploitation against individuals based in a range of agencies responsible for the care and protection of refugee and IDP communities. These agencies implicated included UN peacekeepers and several international and local NGOs. UNHCR and Save the Children-UK, Sexual Violence and Exploitation The Experience of Refugee Children in Guinea, Liberia and Sierra Leone, February 2002.

⁸⁸ Art. 1 of the Convention of the Rights of the Child defines a child as every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. GA Res 44/25, Convention of the Rights of the Child, 20 November 1989, Art. 1. Same definition is provided by Art. 2 of the African Charter of on the Rights and Welfare of the Child. Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, Art. 2.

factors such as fear, anxiety or other mental health problems might have to the greater extent contributed to underreporting of respective misconducts.⁸⁹

More specifically, a case of a UN volunteer was referred to the appropriate agency. Another involved a peacekeeper who was repatriated (it was not however provided whether the peacekeeper was a military member of a respective national contingent). Further, the report only vaguely states that other cases involved NGO personnel and were referred to the relevant organizations for further steps to be taken.⁹⁰

Nevertheless, it should be noted that the report recognized that the problem of SEA was of a global character and reemphasized the establishment of the Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises which was created in March 2002 and its tasks were to bring more strength to the protection of vulnerable persons, especially children and women.⁹¹ Six principles identified by Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises served later as UN policy by the SG in his Bulletin, adopted in 2003.

2.5 Secretary General's Bulletin on Special Measures for Protection from Sexual Exploitation and Abuse of 2003

After revelation of grave sexual mistreatments of refugees by UN aid workers in West Africa identified by above mentioned documents, the UN GA expressed its concern and asked Secretary General to undertake remedial and preventive measures which could then helped to minimize sexual exploitation and related offences. Further to these recommendations, in October 2003, the SG promulgated a Bulletin covering special measures for protection from SEA.

⁸⁹ See e. g. UN GA, Comprehensive review of the whole question of peacekeeping operations in all their aspects, 24 March, 2005, p. 8, para 7.

⁹⁰ UN GA, Investigation into sexual exploitation of refugees by aid workers in West Africa, 11 October 2002, A/57/465, p. 3-4.

⁹¹ See UN GA, Investigation into sexual exploitation of refugees by aid workers in West Africa. Annex I Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, p. 20.

First of all, it has provided definitions of SEA. Pursuant to its Section 1 sexual exploitation is to be understood as:

any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.⁹²

Furthermore, sexual abuse is defined as “the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”⁹³

It is noteworthy to mention, that the Bulletin stipulated in its Section 2 that the provisions of the Bulletin shall apply to “all staff of the United Nations, including staff of separately administered organs and programmes of the United Nations.”⁹⁴

In the next Section the Bulletin explicitly outlawed SEA as a conduct prohibited for UN Staff. In order to grant greater protection to women and children the Bulletin promulgated further rules which included prohibition of sexual activities with children under 18, notwithstanding the consent of the child or age of majority at the local level. In the same nature, exchange money, services or goods for various sexual activities were prohibited and so was included any exchange of assistance for beneficiaries of assistance.⁹⁵

Very interestingly Section 5 addresses the possibility to refer the cases to national authorities after their investigation and upon consultation with the Office of Legal Affairs.

Several observations shall be made with respect to definitions provided above which make these provisions very difficult to enforce. From wording of the definitions of SEA it may be observed that the natures of these definitions is very encompassing and it is possible to include in them lots of various activities. This has indeed some pros but also some cons. Simm rightly points out that such all-embracing definition of SEA may assist in helping to transfer the legal burden of defining sex related crimes from victims to alleged perpetrators.

⁹² United Nations Secretariat, Secretary-General’s Bulletin, Special measures for protection from sexual exploitation and sexual abuse, 9 October 2003, ST/SGB/2003/13, Section 1.

⁹³ Secretary-General’s Bulletin, Special measures for protection from sexual exploitation and sexual abuse, Section 1.

⁹⁴ *Ibid.*, Section 2.1.

⁹⁵ *Ibid.*, Section 3

With regard to this a very problematic appears to be sexual activity such as prostitution which may certainly be included in the above definitions. The problem is created by the fact that given various parts of the world where the peacekeeping operations engage and various cultural nuances, the prostitution is not illegal in every country in the world.

Consequently, the Bulletin fails to provide definitions of beneficiaries of assistance. This creates a lot of vagueness and questioning since it may include various categories of persons. It is also questionable to which extent this term encompasses local population living in the territory where the respective peacekeeping mission is deployed while if persons do not depend on humanitarian assistance provided by organization and its incorporated programmes. In this context, although the Bulletin categorically prohibits any sexual activities with children under 18, this creates another problem due to the fact that the age of consent and age of maturity differs in respective countries.⁹⁶

Likewise, although the Bulletin stipulates a possibility to refer the cases to national authorities, it is still only a possibility and owing to above identified issues related to various national laws concerning age of consent, maturity, while taking into consideration problems of prostitution, only small number of cases could be brought before national authorities for criminal prosecution, not to mentioning that in some States and territories where the missions are carrying out their activities, the State apparatus is insufficient or unworkable.⁹⁷

In the words of Burke, another failure of the Bulletin's norms is the fact that military contingents were up until recently not included, i.e. these norms did not have direct application to them. The UN has recognized this imperfection and in 2006 a group of legal experts was created (GLE I) to examine how to make provisions of the Bulletin binding on military contingents. Subsequently, the GLE

⁹⁶ With regard to examples concerning the attainment of majority see KRÁLIK, J. Child Labour in Israeli Settlements: International Conventions and Applicable Law, *Slovak Yearbook of International Law*, Vol. 5, No. 1, 2015, p. 5.

⁹⁷ "The lack of a well-functioning legal and judicial system, which creates an environment of *de facto* impunity." UN GA, Comprehensive review of the whole question of peacekeeping operations in all their aspects, para 11.

reviewed the Bulletin's enforceability by TCCs, which are accordingly best arranged to ensure that the Bulletin is indeed made binding on respective contingents.⁹⁸

Finally, in 2007 the Bulletin was largely incorporated into Model Memorandum of Understanding which will be addressed in another Chapter of this thesis. Second equally important issue addressed by GLE was the fact that peacekeeping operations may include different categories of personnel (civilian, police and military) which may be governed by various norms and statutes.⁹⁹ The GLE also proposed a Draft Convention on Criminal Responsibility of Experts on Mission for the UN which would address criminal activities of UN officials and experts of missions.¹⁰⁰

2.6 UN Standards of Conduct

In that period, the DPKO elaborated the specific codes of conduct entitled "Ten Rules: Code of Personal Conduct for Blue Helmets" and "We Are United Nations Peacekeepers." While the former, apart from rules addressing impartiality, integrity and prohibition of misuse of authority, explicitly outlawed indulgence in "immoral acts of sexual, physical or psychological abuse or exploitation of the local population,"¹⁰¹ the latter emphasized the fact that the troops must not commit any act that could result in physical, sexual or psychological harm or other torment to members of the local population, underscoring especially women and children.¹⁰²

⁹⁸ BURKE, R. *Sexual Exploitation and Abuse by UN Military Contingents. Moving Beyond the Current Status Quo and Responsibility under International Law*. Martinus Nijhoff, 2014, p. 32. For establishment of the group See UN GA, Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, 16 August 2006, A/60/980. For subsequent report addressing the role of the national laws which also reiterate the role of contingent commanders see UN GA, Making the standards contained in the Secretary-General's bulletin binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel, 18 December 2006, A/61/645.

⁹⁹ Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations. Note by the Secretary-General, n. 40.

¹⁰⁰ *Ibid.*, Annex III.

¹⁰¹ Department of Peacekeeping Operations. 10 Rules. Code of Personal Conduct for Blue Helmets. [online] [accessed 2016-11-12]. Available at: <http://www.un.org/en/peacekeeping/documents/ten_in.pdf>.

¹⁰² Department of Peacekeeping Operations, We Are United Nations Peacekeepers, [online] [accessed 2016-11-12]. Available at: <http://www.un.org/en/peacekeeping/documents/un_in.pdf>.

With regard to legal force of those documents it must be said that providing no direct reference to laws, norms or provisions of a higher quality, these instruments served merely as guiding principles or manuals for respective troops how to behave when deployed into action.¹⁰³

We agree with the fact that such rules of conduct should be first and foremost very clear and brief, since they are addressed to military personnel. Nevertheless, at first not providing reference to more concrete norms of a higher value and secondly not providing information regarding possible sanctions when the rules had been violated make these instruments lacking teeth.

As Burke notes the norms included in those standards of conduct are of a weak nature. Moreover, until just recently when they were included in revised model Memorandum of Understanding, they were not binding on respective military contingents who paid greater respect to their national codes of conduct.¹⁰⁴

2.7 Leading to Prince Zeid's Report

By the beginning of 2005 a new set of allegations appeared. The revelations concerned UN Mission in the DRC - MONUC. It should be pointed out that the number of allegations received increased significantly. Between May and September 2004, the OIOS investigated 72 allegations which consequently resulted in 20 case reports. According to the report, perpetrators in these cases were positively identified in 6, no perpetrators were identified in 11 and "accusations were not fully corroborated in 2."¹⁰⁵ More specifically, after the allegations

¹⁰³ See e.g. Comprehensive review of the whole question of peacekeeping operations in all their aspects, para 20 for criticism of guidelines, since these types of instruments provide only a general framework. The instrument is of a non-binding force, rules might or might not be followed, while codes of conduct must have status of binding norms. See also Defeis who observes that such documents conducting rules of conduct for MMsNCs are regarded as an area of concern. Although TCCs have accepted the rules of conduct in the Ten Rules and We Are United Nations Peacekeepers documents, they could be only labelled as guidelines, which might give rise to the inference that they are non-binding." DEFEIS, E. F. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity, Washington University Global Studies Law Review, Vol. 7, No. 2, pp. 185-214, p. 196.

¹⁰⁴ BURKE, R. *Sexual Exploitation and Abuse by UN Military Contingents. Moving Beyond the Current Status Quo and Responsibility under International Law*, p. 33.

¹⁰⁵ Peacekeepers' sexual abuse of local girls continuing in DR of Congo, UN finds, In: *UN News Centre*. [online] 2005-1-7 [Accessed 2017-1-17] Available at: <

emerged, a series of investigations were carried out by military components of MONUC as well as civilian police units. Immediately, representatives from Department of Peacekeeping Operations (DPKO) and OIOS followed suit.¹⁰⁶

Of the 72 allegations, 68 concerned military contingent personnel, however 44 of those cases were closed after preliminary examination, mostly because witnesses/victims could not be identified or traced. Some other cases could not be investigated for various reasons (e. g. some of the perpetrators were rotated out of the area). Of the remainder of allegations, OIOS developed 19 cases involving military personnel.¹⁰⁷

The infringement included various acts of sexual violence. However, as Odello castigates, *“the consequences were very limited for the staff involved.”*¹⁰⁸ More specifically, a UN French civil servant was repatriated. The acts of military personnel were condemned and the national authorities were asked to repatriate the perpetrators. The report of the OIOS does not however mention the countries in question, most likely to avoid their angst. ¹⁰⁹

In the same year Prince Zeid Ra'ad Zeid Al-Husseini was appointed as personal adviser to then SG to address the problems of SEA perpetrated by UN personnel. He prepared and submitted a report entitled A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations. The report was focused on four main areas of interest:

- The current rules on standards of conduct;
- the investigative process;

http://www.un.org/apps/news/story.asp?NewsID=12990#.WLE4x_krLIU>. It is also interesting to note that according to the report, payment for such “services” ranged from 2 eggs to 5 \$ per one confrontation. See also Comprehensive review of the whole question of peacekeeping operations in all their aspects, para 6 p. 8. Pointing out that SEA mostly involves exchange of sex for money for foodstuff (either for immediate consumption or to barter later) or for jobs (especially affecting daily workers).

¹⁰⁶ Peacekeepers’ sexual abuse of local girls continuing in DR of Congo, UN finds

¹⁰⁷ See UN GA, Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, 5 January 2005, A/59/661.

¹⁰⁸ ODELLO, M. Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers. 2010, p. 350.

¹⁰⁹ *Ibid.* p. 350.

- organizational, managerial and command responsibility;
- individual disciplinary, financial and criminal accountability.¹¹⁰

Zeid report was up to its publication the document that owing to the complexity of the whole issue has targeted to the greatest extent the nature of SEA and made interesting recommendations on measures how to reform the UN peacekeeping missions.¹¹¹ As the title of the report suggests, it provided a comprehensive strategy to tackle the issue.

As Deen-Racsmány observes the report was a part of a UN three-pronged strategy, addressing roots of the issue (preventive measures and training), ensure enforcement of standards of conduct and bringing the perpetrators to justice (criminal accountability).¹¹²

2.8 United Nations Security Council Resolutions addressing SEA

The UN SC has adopted several important resolutions concerning sexual violence and the whole issue of SEA perpetrated in armed conflict and/or by peacekeepers.

Although some remarks might be said with regard to Resolution 1325 adopted by the SC, in this part we shall discuss mainly those resolutions that referenced to SEA by peacekeepers and were adopted after first greater revelations and identifications of the issue from within the UN in 2002. In the first Chapter which dealt with history and nuances of peacekeeping operations we have referenced also briefly to Resolution 1325 which generally called on all parties to take special measures to protect women and girls from gender based violence, in

¹¹⁰ UN GA, Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly, 24 March 2005, A/59/710, p. 2.

¹¹¹ While a whole-embracing document, addressing various problems and suggesting solutions, we are several times referencing to it in various Chapters of this dissertation.

¹¹² DEEN-RACSMÁNY, Z. "Exclusive" Criminal Jurisdiction over UN Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy? *The Military Law and the Law of War Review*, Vol. 53, No. 2, 2015, p. 248.

particular rape and other forms of sexual abuse, in situations of armed conflict. As Burke notes, it succeeded mostly in increase recruitment of women peacekeepers into respective units which may help “counter societal and force attitudes that foster gender inequality and promote better conduct among male peacekeepers.”¹¹³ Heathcote in this context points out that women’s diverse roles need to be recognized, normative assumptions need to be challenged which clearly presents not only a wish that roles of women must be enhanced but also that challenging problem from their perspective could be very instrumental.¹¹⁴ However, in the words of Defeis, the number of women in peacekeeping missions remains regrettably still very low.¹¹⁵

UN SC Resolution 1820 adopted in 2008, condemned the use of sexual violence as a means of war and further declared that “rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide.”¹¹⁶ The resolution reaffirmed the former Resolution 1325 and requested to continue and strengthen the efforts to implement the policy of zero tolerance of SEA in peacekeeping operations. It also highlighted that sexual violence perpetrated in armed conflict constitutes a war crime and demanded all parties to armed conflict to take appropriate measures to protect civilian population from sexual violence.¹¹⁷ It also encouraged parties to undertake troop awareness trainings and enforce disciplinary measures.¹¹⁸

Subsequently in 2009, the SC adopted Resolution 1888 which specifically mandated peacekeeping missions to protect women and children from sexual violence during armed conflict. It requested the SG to appoint a special

¹¹³ BURKE, R. *Sexual Exploitation and Abuse by UN Military Contingents. Moving Beyond the Current Status Quo and Responsibility under International Law*, p. 35.

¹¹⁴ HEATHCOTE, G. and OTTO, D., *Rethinking Peacekeeping, Gender Equality and Collective Security. Thinking Gender in Transnational Times*, p. 49.

¹¹⁵ DEFEIS, E. F.. *Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity.*, p. 199.

¹¹⁶ UN SC Res 1820, Women Peace and Security, 19 June 2008, S/RES/1820. See also Women, Peace and Security. Study submitted by the Secretary-General pursuant to Security Council resolution 1325 2002, which stipulates that Cases of SEA may also constitute violations of international humanitarian law, international human rights law or both. *Women, Peace and Security: Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000)*, chapter IV (United Nations publication, Sales No. E.03.IV.1), 2000.

¹¹⁷ UN SC Res 1820, para 4.

¹¹⁸ See *Ibid.*, para 6-8.

representative to coordinate various mechanisms to fight the crime. Furthermore, the Resolution inter alia called SG to appoint a team of experts that were of a particular concern in terms of sexual violence and that would work in close cooperation to UN experts in the field as well as respective governments.¹¹⁹

The SC agreed also on other measures to enhance the protection of women and children from sexual violence and rape, namely the identification of women's protection advisers (WPAs) among gender advisers and human rights protection units.¹²⁰

Other provisions included strengthening monitoring possibilities related to sexual violence, more adequate training of peacekeepers to carry out better their tasks¹²¹ as well as strengthening efforts of zero tolerance policy concerning SEA, preventive measures such as pre-deployment and in-theatre awareness training and assuring accountability of persons perpetrating crimes.¹²²

In 2015 the SG announced that he will start naming and shaming countries whose peacekeepers face credible accusations of SEA.¹²³ Based on this, in March 2016 before the adoption of SC RES 2272 and for the first time first countries were named.

In 2016, one year after Kompass leaked the report which revealed other cases of SEA in peacekeeping missions and great criticism from various sides, the UN SC adopted resolution which condemned perpetration of SEA and introduced some other measures. The resolution was preceded by publication of a report in which for the first time the names of TCCs of the perpetrators were listed and noted with regret that the numbers of allegations have risen dramatically during the past years. In this report, it was also mentioned that the UN is in the final process of its

¹¹⁹ UN SC Res 1888, Women and peace and security, 30 September 2009, S/RES/1888, para 8.

¹²⁰ *Ibid.*, para. 12.

¹²¹ *Ibid.*, para. 19.

¹²² *Ibid.*, para. 21.

¹²³ See e. g. Secretary-General's Remarks at Meeting with Permanent Representatives of Troop and Police Contributing Countries on Sexual Exploitation and Abuse, In: *United Nations Secretary-General*, 2015-9-17, [online] [accessed 2017-2-15]. Available at: <<https://www.un.org/sg/en/content/sg/statement/2015-09-17/secretary-generals-remarks-meeting-permanent-representatives-troop>>.

efforts to establish a trust fund that will provide the victims medical aid, legal and other services.¹²⁴

By the already mentioned SC Res 2272 of 11 March 2016, the SC asked the SG to replace all *“to replace all military units and/or formed police units of the troop- or police-contributing country in the United Nations peacekeeping operation where the allegation or allegations arose with uniformed personnel from a different troop- or police-contributing country.”*¹²⁵

Clearly, this can be characterized as a great move forward, on the other hand as Boom observes, it is not very likely that the SC would be able to adopt stronger measures which would ensure individual criminal accountability of troops. In this context, some permanent and non-permanent members of the SC even expressed concerns that the SC is not the appropriate place to solve this issue.¹²⁶ But this might be the first step towards the immunity reform, since it is the immunity which to some extent causes problems. As we have mentioned previously and as shall be reiterated in this thesis, the consequence of exclusive criminal jurisdiction of TCCs over their MMsNCs is impunity of perpetrators. Its main demonstration is the fact that perpetrators are not brought into justice and secondly it can have negative impact also on potential future acts, since if troops are aware of the fact they will not be sanctioned for their conduct, this will not prevent them from engaging in criminal activities.

However as Boom further notes, the result of these consultations shall be subject to consideration by the GA’s Special Committee on Peacekeeping

¹²⁴ See UN GA, Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General, 16 February 2016, A/70/729. First on the list was the Democratic Republic of Congo, whose peacekeepers faced seven allegations, followed by Morocco and South Africa, each hit with four accusations. Most of the allegations involved troops from African countries: Cameroon, Congo, Tanzania, Benin, Burkina Faso, Burundi, Gabon, Niger, Nigeria and Togo. Police from Rwanda, Ghana, Madagascar and Senegal also faced claims. Peacekeeping police from Canada and Germany as well as soldiers from Moldova and Slovakia were also accused of SEA while serving as UN peacekeepers. See also LANDRY, C. UN report: Peacekeepers from 21 nations accused of sexual abuse, In: Agence France-Presse, 2016-3-4 [online] [accessed 2017-2-15]. Available at: <<http://www.rappler.com/world/regions/africa/126669-drcongo-bemba-guilty-war-crimes-central-african-republic-icc>>.

¹²⁵ UN SC Res 2272, United Nations peacekeeping operations, 11 March 2016, S/RES/2272, p. 2.

¹²⁶ BOOM, R. Introductory Note to United Nations Security Council Resolution 2272 & Secretary-General Report on Special Measures for Protection from Sexual Exploitation and Abuse, *International Legal Materials*, Vol. 55, No. 4, 2016, p. 756.

Operations which consists of more than 150 past and present troop and police contributing states. The Special Committee on Peacekeeping Operations addresses on its achievements to GA through the Fourth Committee (Special Political and Decolonization). Commonly, the recommendations of the Special Committee on Peacekeeping Operations are adopted without further consideration. Whether the Special Committee on Peacekeeping Operations will be able to achieve the accountability impasse remains to be seen in the future.¹²⁷

It follows from the above, that the UN clearly has addressed the issues of SEA in peacekeeping missions. The steps were mostly related to greater institutionalization, establishment of specialized positions within respective units and suggestions to States to undertake preventive action and carry out trainings that would cover the issue more in to deep.

2.9 Status of Forces Agreement (SOFA)

As we have briefly outlined, status of forces deployed into the respective host state under a UN mission is governed by the so-called Status of Forces Agreements (SOFAs). A SOFA is an agreement between the UN and the host State regulating legal status and deployment of UN peacekeeping forces in the territory of the host state. The greatest implication of the SOFA is exclusive criminal jurisdiction of TCCs over their troops.

However, this was not always the case. It is interesting to note that for example Memorandum of Understanding annexed to the UNTAG SOFA provided: *“should a Participating State fail within reasonable time to take steps to exercise the required jurisdiction in any particular case including arrest and detention when appropriate and should the accused remain in the Territory he shall become subject to local criminal jurisdiction”*¹²⁸ Obviously, some States were reluctant to provide

¹²⁷ BOOM, R. Introductory Note to United Nations Security Council Resolution 2272 & Secretary-General Report on Special Measures for Protection from Sexual Exploitation and Abuse, p. 756.

¹²⁸ UNTAG sofa, Art. 54(b) as quoted by BOOM, R. Impunity of Military Peacekeepers: Will the UN Start Naming and Shaming Troop Contributing Countries? In: *American Society of International Law Insights*. [online] 2015-11-24 [accessed 2017-3-2] Available at: <

their troops until greater safeguards are introduced and requested for a Model status of forces agreement which would not allow complementary territorial jurisdiction of a host State.¹²⁹

In 1990, as requested by the UN GA, the Model SOFA was elaborated. The Model SOFA reflects previous practice with regard to the stationing of UN peacekeeping forces in respective states.¹³⁰ Article 46 of Model SOFA provides for functional immunity (*rationae materiae*) and stipulates that all members of the UN peacekeeping operation, including locally recruited personnel, shall be immune from legal process in respect of words spoken and written and all acts performed by them in their official capacity.¹³¹

Article 47 of SOFA governs the jurisdiction of criminal activity with regard to crimes committed in a private capacity. While pursuant to Article 47 (a), if the accused is a member of the civilian component or a civilian member of the military component, the Special Representative or Commander may agree with the host state government on whether or not to institute such criminal proceedings by the host state. On the other hand Article 47 (b) stipulates that MMsNCs shall be subject to the exclusive jurisdiction of the TCC in respect of any criminal offences which may be committed by them in the host state. This means that the respective participating states have jurisdiction over acts of MMsNCs committed in both public and private capacity.¹³²

Certainly, Article 47 (b) has been the main pillar on which the UN has based its protection of the MMsNCs in its peacekeeping operations. Initially, it has been the main objective of the organization to persuade as many states as possible to join its operations. Had this safeguard not existed, it is hardly conceivable that

<https://www.asil.org/insights/volume/19/issue/25/impunity-military-peacekeepers-will-un-start-naming-and-shaming-troop>>.

¹²⁹ BOOM, R. Criminal Accountability of Military Peacekeepers Some Comments on the Secretary-General's Proposal for a Naming and Shaming Policy, *Journal of International Peacekeeping*, Vol. 19, No. 3-4, 2015, pp. 287-296, p. 292.

¹³⁰ See UN GA Res 44/49, Comprehensive review of the whole question of peace-keeping operations in all their aspects, 8 December 1989, A/RES/44/49.

¹³¹ UN GA, Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Model status-of-forces agreement for peace-keeping operations, 9 October 1990, A/45/594, Art. 46.

¹³² *Ibid.*, Art. 47.

states would be keen to provide troops and send them far beyond their borders into unknown territories with fragile regimes and weak governments with very limited legal systems, not to mention well-nigh non-existent judiciary and poor detention conditions. If we take it from this perspective, one may completely understand the approach and intention chosen by the UN. However, in reality we are witnessing repercussions caused by the aforementioned rules.

First of all, it is dependent on the will of the respective states as to whether MMsNCs are prosecuted for crimes committed during their assignment to an operation. According to the Center for Economic and Policy Research, as quoted by Ferstman, even if the respective TCC decides to prosecute the MMsNC, the perpetrator in subsequent criminal proceedings is usually charged with a crime of a lesser offence and thus receives a lesser sentence which may include a financial penalty but no deprivation of liberty.¹³³

Another drawback of the UN SOFA is its ambiguous position within the framework of public international law. Let us provide few examples to illustrate this situation. If the host state gives its consent to the presence of the foreign troops in its territory and enters into the SOFA with the UN, thereby agreeing that the MMsNCs fall under exclusive criminal jurisdiction of respective TCCs, there is nothing moot about it. However, the UN sometimes fails to conclude such agreement. This can be due either to time pressures or simply by the fact that the host state no longer has sovereign or stable government with which the UN could start its negotiations.¹³⁴

The position of the UN in cases where no SOFA is signed is that provisions under the UN Model SOFA are applicable. This would have meant that the UN Model SOFA is composed exclusively of provisions of the customary international law. This assertion is mostly doubtful with regard to Article 47 (b) which governs the exclusive criminal jurisdiction of TCCs over the MMsNCs. To accept the statement that exclusive criminal jurisdiction of TCCs over the MMsNCs is part of customary

¹³³ FERSTMAN, C., *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*, United States Institute of Peace, 2013, pp. 1-16, p. 4.

¹³⁴ For instance no SOFA was concluded with Somalia when the UN deployed its mission there in 1992. See UN SC Res 751, Somalia, 24 April 1992.S/RES/751.

international law, these acts must have already occurred as a sense of obligation (opinio juris) and these acts must have already been discerned by a repetition of similar international acts over time by states (state practice). As stipulated by the ICJ in the North Sea Continental Shelf cases, in order to constitute opinio juris the States must behave in a way that their conduct is "*evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief. i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.*"¹³⁵ It must be said that since there is no opinio juris of a State, it is very doubtful whether the opinion of the UN may constitute an opinio juris.

Nevertheless, and to support our argument, in our case we clearly face an absence of another element of customary international law which is state practice. It could have been established if the State to which the peacekeeping mission was deployed, while not having concluded a SOFA and not having consented to the presence of the UN troops in its territory, had treated the troops under the terms of the UN Model SOFA or as otherwise immune, as if the state was under a binding obligation to do so.¹³⁶ Problem of a similar nature arises in cases where the crime is committed in a third state, i.e. in a state with which the UN has not concluded the respective SOFA.¹³⁷ The UN would probably maintain its position and claim applicability of the UN Model SOFA.¹³⁸ However, state practice is inconsistent since several third states have prosecuted MMsNCs when they committed crimes in those third states.¹³⁹

¹³⁵ International Court of Justice, North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 20 February 1969, para. 77

¹³⁶ WORSTER, W. T., Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement, *Military Law and the Law of War Review*, Vol. 47, No. 3-4, 2008, pp.278-376, p. 357.

¹³⁷ Pursuant to Art. 34 of Vienna Convention on the Law of Treaties which governs customary general rule concerning third states "a treaty does not create either obligations or rights for a third state without its consent." United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Art. 34, [online]. [accessed 2016-2-2]. Available at:

<https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf>.

¹³⁸ "Additionally, and in accordance with customary law applicable to United Nations peacekeeping operations, SOFAs provide for privileges and immunities to be granted to military personnel contributed by Member States." Memorandum to the Assistant Secretary-General for Peacekeeping Operations, United Nations Juridical Yearbook, 1995, p. 408, para. 5.

¹³⁹ Israel (as a third state) has prosecuted a member of a national contingent forming part of a peacekeeping operation. SOFA was concluded between the UN and Lebanon and Israel was not a

2.10 UN Memorandum of Understanding (MOU)

MOU is an agreement concluded between the UN and states that are contributing personnel and equipment to UN peacekeeping operations. It also contains provisions which govern the question of jurisdiction over the MMsNCs. The same approach as with the SOFAs was followed and the UN Model MOU was introduced subsequently after the UN Model SOFA. However, contrary to the UN Model SOFA, the UN Model MOU has been the subject of several amendments.¹⁴⁰ This was due to the inaction of TCCs in infamous cases of human rights violations during peacekeeping operations which led to impunity of the MMsNCs.

By all means, the UN is fully aware of the unwillingness of states to prosecute the perpetrators of the most serious crimes and tries to ensure that the states take action against the perpetrators.. This intention may be seen in the amended Model MOU, which stipulates that MMsNCs and any civilian members subject to national military law of the national contingent provided by the TCC are subject to its exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the peacekeeping mission. Furthermore, the TCC assures the UN that it shall exercise such jurisdiction with respect to such crimes or offences.¹⁴¹

Yet, in view of the recent incidents, amendments of relevant UN documents do not compel respective states to take the necessary steps to adequately punish MMsNCs of serious crimes committed whilst deployed to the UN mission. The reluctance of states to agree on a more imperative and categorical wording of

party to this agreement. See discussion in DEEN-RACSMÁNY, Z., "Exclusive" Criminal Jurisdiction over UN Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy? p. 276-277.

¹⁴⁰ See Annex entitled Agreement between the UN and Participating State which forms part of the document adopted by the UN GA. UN GA, Administrative and Budgetary Aspects of the Financing of the United Nations Peace-keeping Operations: Financing of the United Nations Peace-keeping operations. Reform of the Procedures for Determining Reimbursement to Member States for Contingent-owned Equipment, 9 July 1996. A/50/995.

¹⁴¹ UN GA, Report of the Special Committee on Peacekeeping Operations and its Working Group, 2008, UN Doc A/61/19/Rev.1, 5.

Model MOU's provisions indirectly supports this position.¹⁴² The assurance clause was meant to be a compromise between the UN and its member states. However, it seems that changing the wording of MOU's provision has not helped to solve this problem. States have demonstrated clearly that they do not want to renounce their right of exclusive criminal jurisdiction in respect of their troops and the UN appears to be rather helpless to push forward more substantial changes.

Therefore, the organization tries to find alternative solutions how to overcome the current status quo. One such example is the UN Security Council resolution that calls for the repatriation of peacekeeping units whose soldiers face allegations of sexual abuse.¹⁴³ Nevertheless, until the UN finds states' support to make needed legal changes that would in a substantial way enable victims to seek the justice, we must look for alternative solutions. One of them will be described in subsequent parts of this thesis.

2.11 National Frameworks and Approaches

In previous parts of this Chapter we have provided an overview how the UN is targeting the issues of SEA perpetrated by peacekeepers during their deployment into a peacekeeping mission. As is stipulated in SOFAs and MOUs, TCCs are endowed with an exclusive prerogative which is exclusive criminal jurisdiction over their troops. Although, it cannot be said that the UN is silent and does not try to fight with SEA in peacekeeping missions, in this part we shall try to demonstrate why only breaking the exclusive criminal jurisdiction could provide effective solution.

Of course, this could lot of effort needs to be paid by the UN itself because the situation would need smart political manoeuvring and providing explanation why the radical step would be beneficial for the TCCs.

¹⁴² UN GA, Comprehensive review of the whole question of peacekeeping operations in all their aspects. Revised draft model memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation], 3 October 2006, A/61/494, p. 11.

¹⁴³ UN SC Res 2272 United Nations peacekeeping operations, 11 March 2016, S/RES/2272.

Why the UN has not done so up to now and we could have witnessed rather thorough bureaucratisation of the issue was obvious. The organization was mostly afraid that it may lose potential troop contributors if it bars exclusive criminal jurisdiction by TCCs over their troops. Yet, as was demonstrated in first Chapter of this thesis , the organization has lost Western willingness, at least with regard to providing troops from Western States to the peacekeeping missions. Western States still remain the greatest financial contributors to those missions. However, this might not be indefinitely maintained. At least USA, the greatest donor has threatened UN that it will cut its funding of the peacekeeping operations.¹⁴⁴

Exclusive criminal jurisdiction of TCCs over their troops basically means that not only it is upon the discretion of the respective States whether to investigate and prosecute criminal offences of their troops but if a State decides to prosecute the perpetrator it is solely under the norms of national law of this State. In this context, a perpetrator might in fact be prosecuted for criminal offences of a lesser degree, as for instance of a crime of private violence.¹⁴⁵

In the following lines we would therefore provide some information regarding national framework and approaches by some of the greatest troop contributors to the UN peacekeeping missions India, Bangladesh, Ethiopia and Nigeria. Since a thorough analysis of respective national frameworks could be the exclusive topic for a thesis, our objective is only to identify main flaws which would support our assertion that the exclusive criminal jurisdiction of TCCs over their troops in current circumstances of UN peacekeeping, described mainly in Chapter one of this thesis is no longer tenable.

With respect to India, it should be pointed out that it was only in 2012, after a fatal gang rape of a young paramedical student in New Delhi in December 2012 that the legislators took action. The Criminal Law amendment bill introduced new

¹⁴⁴ See e.g. SENGUPTA, S. U.N. Peacekeeping Faces Overhaul as U.S. Threatens to Cut Funding, In: *The New York Times*, 2017-3-24, [online] [accessed 3-2-2017]. Available at: <https://www.nytimes.com/2017/03/24/world/united-nations-peacekeeping-trump-administration.html?_r=0>.

¹⁴⁵ KRÁLIK, J. Imunita členov mierových síl OSN s dôrazom na príslušníkov vojenských jednotiek, In: ŠTURMA, P. a TRÁVNIČKOVÁ, Z. *Imunity v mezinárodnom právu*, Česká spoločnosť pro mezinárodní právo, Praha, 2016, pp. 170-182, p. 174.

definitions of sexual offences, such as sexual harassment and rape.¹⁴⁶ However, the flaw is that it does criminalise only offences perpetrated on women.¹⁴⁷ Moreover, with respect to armed forces, it applies only to areas controlled “*by the Central or a State Government.*”¹⁴⁸ It therefore excludes its applicability on acts perpetrated in other territories. Indian Armed Forces are subjected to the rules and regulations of the Army Act. This law specifies what constitutes an offence and sets out the punishment.¹⁴⁹ Section 70 of the Act stipulates that some civilian offences shall be not triable by court martial. Among other things it lists rape as one of such offences. However, this is not the case when the person commits his act outside India.¹⁵⁰ Then the person falls under the discretion of the court martial. Basically, this means that since the Army Act does not provide detailed definitions of criminal offences, it is up to this court to decide on punishment. It should be noted that there is also practical evidence that India fails to prosecute perpetrators of SEA. After allegations of SEA in the DRC showed that children had “distinctive Indian features” and India repeatedly assured the UN that the allegations if proven, would lead to strict and exemplary action. Thus far, no one was convicted.¹⁵¹

Furthermore, selection of peacekeepers for the UN operations is strongly desired. Security personnel who participate in UN operations earn approximately four times more than is their average monthly pay while deployed inside India, upwards of \$2,200 a month for an officer and \$1,100 for a Jawan (low ranked soldier in India), in addition to other allowances.¹⁵² This clearly makes it an exclusive privilege and being a member of a peacekeeping mission is considered as a great advantage for individual.

¹⁴⁶ Pursuant to this law, rape is understood as penetration of the labia majora, urethra, mouth, or anus with any object or body part, including the mouth, or any parts of the victim’s body. Access to Justice for Women India’s response to sexual violence in conflict and social upheaval, University of California, October 2015, p. 11.

¹⁴⁷ See KRÁLIK, J. Imunita členov mierových síl OSN s dôrazom na príslušníkov vojenských jednotiek, p. 180.

¹⁴⁸ India: Act No. 13 of 2013, The Criminal Law (Amendment) Act, 2013 [India], 2 April 2013, para. 376 (2), c).

¹⁴⁹ India: Tainting the UN’s Blue Helmets, Asian Centre for Human Rights, June 2014, p. 11-12.

¹⁵⁰ India: Act No. 46 of 1950, The Army Act, 1950, 20 May 1950, Section 70.

¹⁵¹ See India: Tainting the UN’s Blue Helmets, Asian Centre for Human Rights, June 2014, p. 19-21.

¹⁵² India: Tainting the UN’s Blue Helmets, Asian Centre for Human Rights, p. 12.

With regard to other States approaches, it is noticeable and regrettable that Bangladesh has not developed vetting policies and no transparency in the selection of Bangladeshi peacekeeping forces exists.¹⁵³ In February 2009 a mutiny was of a paramilitary group Bangladesh Rifles was staged. The death toll was more than 70 persons. One of the reasons of this rebellion was denial of equal opportunities to serve within peacekeeping missions.¹⁵⁴

In the same vein as in India, serving in a peacekeeping contingent is a great financial privilege. US \$2,200 a month for an officer and US \$1,100 for a soldier which is ten times more that soldiers and officers earn in Bangladesh.¹⁵⁵ It should also be noted that financial incentive provided to Bangladesh for its participation in the UN mission very attractive, especially for a developing country. In particular, from 2001 to 2010, the UN compensation reached the amount of approximately \$1.28 billion, 67 per cent of which is accounted for by troop costs with the rest as equipment cost reimbursement.¹⁵⁶

With respect to Nigeria, according to report prepared by Civil Society Legislative Advocacy Centre, there is no publicly known policy on SEA and harassment in the army, moreover the army does not have civilian oversight mechanism. There is also a great corruption in relation to peacekeeping recruitment policy.¹⁵⁷

The vetting system in Nepal is also highly criticised mainly due to the evidence that although several individuals' trials with torture or murder allegations were pending, they were sent to another missions. The Nepal has introduced new

¹⁵³ Bangladesh: Sending Death Squads to Keep the UN's Peace, Asian Centre for Human Rights, June 2014, p. 1.

¹⁵⁴ See e. g. RAMESH, R. and MONSUR, M. Bangladeshi army officers' bodies found as death toll from rebellion rises, In: The Guardian, 2009-2-28 [online] [accessed on 2-7-2017]. Available at: <<https://www.theguardian.com/world/2009/feb/28/bangladesh-soldiers-rebellion-mutiny>>.

¹⁵⁵ Bangladesh: Sending Death Squads to Keep the UN's Peace, Asian Centre for Human Rights, June 2014, p. 1-2.

¹⁵⁶UZ ZAMAN, R. and BISWAS N.R. Bangladesh's Participation in UN Peacekeeping Missions and Challenges for Civil-Military Relations: A Case for Concordance Theory, *International Peacekeeping*, Vol.21, No.3, 2014, pp.324-344, p. 328.

¹⁵⁷ See Nigeria: Navigating Secrecy in the Vetting and Selection of Peacekeepers, Civil Society Legislative Advocacy Centre, 2014, p. 27- 32 and 40.

recruitment policy in 2014. However, it might be said that this is still not very transparent.¹⁵⁸

After these observations, it is our view that TCCs, especially those from developing countries, benefit to a large extent from participation in the UN peacekeeping missions and therefore the UN should be more stringent towards these States with regard to those States' inactivity related to investigation and prosecution of their troops for SEA.

2.12 Concluding remarks

As we have specified in this Chapter, the UN framework has during past 25 years indeed offered some shifts. More specifically, it introduced and then updated modelled instruments governing conduct of MMsNCs. It also developed some policies and guidelines in order to better address the issue of SEA in peacekeeping operations. From no policy in 1990s, with its boys will be boys justification, it has moved to approach which may be described as zero tolerance policy.

On the other hand a question may be posed, whether to some extent greater bureaucratisation of the problem by putting focus on developing detailed intrinsic instruments, establishing SEA focal points or providing peacekeeping missions with specialized units is the best solution for minimising the SEA by peacekeepers in the long term.

With respect to statistics provided by the UN Conduct and Discipline Unit that should reflect whether actions taken from within the UN were sufficient and successful show that in 2007 and 2008, in the time when significant measures were adopted within the organization,¹⁵⁹ there were 56 and 49 allegations against military personnel (including contingent personnel and military observers). In the

¹⁵⁸ Vetting in Nepal. Challenges and Issues. Advocacy Forum – Nepal, July 2014, p. 11-12.

¹⁵⁹ As Simic observes, these numbers should of course be treated with caution since they are influenced by various factors such as inconsistency in rates of reporting, shifts in awareness, the willingness of the DPKO to follow-up on allegations, and the extent that the media pays attention to leaked information about these cases. See SIMIC, O.. Protection from Protectors: Sexual Abuse in UN Peacekeeping Missions, In: e-international relations, [online]. 2015-10-9 [Accessed 2016-11-30]. Available at: <<http://www.e-ir.info/2015/10/09/protection-from-protectors-sexual-abuse-in-un-peacekeeping-missions/>>.

following years when the measures were in process of their implementation, the figures have slightly dropped from 55 in 2009 to 38 allegations in 2010, 40 allegations in 2011, 19 allegations in 2012, 37 allegations in 2013, 25 allegations in 2014 and 38 in 2015.¹⁶⁰ However, after the report on the sexual abuse of children by French peacekeeping troops in the Central African Republic had been leaked to French authorities by Anders Kompass, a then UN aid worker, and consequently made public,¹⁶¹ the allegations surged to 73 in 2016.¹⁶²

This illustrates that the system is not functioning as it should and SEA was neither eradicated nor reduced. We have demonstrated that the main persistent issue is still exclusive criminal jurisdiction or respective TCCs over their troops. Unwillingness, reluctance, inadequate legislative framework is in our opinion the main obstacle. Overcoming this impediment, greater engagement and more active role of the UN may in our opinion provide the most effective tool in respect of prevention and decrease of SEA by peacekeepers.

¹⁶⁰ See UN Conduct and Discipline Unit, Statistics. Allegations by Category of Personnel Per Year (Sexual Exploitation and Abuse) [online]. [Accessed 2016-11-30]. Available at: <<https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsbyCategoryofPersonnelPerYearSexualExploitationandAbuse.aspx>>.

¹⁶¹ See e.g. UN aid worker suspended for leaking report on child abuse by French troops, In: In: *The Guardian* [online]. 2015-4-29 [Accessed 2016-11-23]. Available at: <<https://www.theguardian.com/world/2015/apr/29/un-aid-worker-suspended-leaking-report-child-abuse-french-troops-car>>. For a synopsis of the case concerning abuses by peacekeepers in CAR see

¹⁶² UN Conduct and Discipline Unit, Statistics. Allegations by Category of Personnel Per Year (Sexual Exploitation and Abuse).

3 APPLICATION OF THE INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW TO SEXUAL EXPLOITATION AND ABUSE PERPETRATED BY THE MMSNCs

3.1 International Humanitarian Law – Applicable Rules

International humanitarian law (IHL) may be characterized as a set of rules which seek for humanitarian reasons to mitigate the effects of an armed conflict. Its goal is to protect individuals who are not or are no longer engaging in the hostilities and regulates the means and methods of warfare. IHL is also known as the law of war (*jus in bello*) or the law of armed conflict.¹⁶³

The fundamental IHL instruments include the 1899 and 1907 Hague Conventions and the Regulations,¹⁶⁴ four Geneva Conventions of 1949¹⁶⁵, and their Additional Protocols of 1977.¹⁶⁶ As pronounced by Fruchterman both regimes have their differences. While the Hague Conventions govern the rules for conducting war, the Geneva Conventions are drawn up primarily to protect the victims of war.¹⁶⁷

¹⁶³ What is IHL? In: International Committee for the Red Cross, [online] 2015-9-18 [accessed 2016-11-13]. Available at: < <https://www.icrc.org/en/document/what-ihl>>.

¹⁶⁴ International Conferences (The Hague), Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

¹⁶⁵ International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

¹⁶⁶ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

¹⁶⁷ FRUCHTERMAN, R. L. Jr., Enforcement: The Difference between the Laws of War and the Geneva Conventions [comments], Georgia Journal of International and Comparative Law, Vol. 13, Supplement Issue, 1983, pp. 303-304, p. 304.

Solis refers to a report of the UN SG which provides that the part of conventional IHL which has beyond doubt become part of international customary law includes the four Geneva Conventions of 1949.¹⁶⁸

As what concerns the applicable rules, one of the most important elements that need to be determined is the status of an armed conflict, since different rules are applicable in international armed conflict and in non-international armed conflict. Non-international armed conflict is governed merely by Common Art. 3 of Geneva Conventions which is also considered as customary international law and should constitute a “*minimum yardstick*.”¹⁶⁹

If the States concerned have ratified Additional Protocol II, it is applicable as well.¹⁷⁰ The rules of the international armed conflict are governed by remaining provisions of all of 4 Geneva Conventions and Additional Protocol I, if respective States have ratified this protocol.¹⁷¹

In our case, we need to determine whether and under what circumstances the IHL might be applicable to the UN peacekeeping operations. It should be pointed out that the question of applicability of IHL to the UN has been debated for a long time. In particular, when peacekeepers engage in hostilities of such an extent as to bring about the application of IHL, either via acts in self-defence, or while carrying out a mandate as authorised by the SC under Chapter VII of the UN Charter, questions have arisen as to whether they should be equally subject to the rules of IHL.¹⁷²

Let us however return to Geneva Conventions briefly. Art. 1 stipulates that “*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.*”¹⁷³ If we understand this very extensively

¹⁶⁸ SOLIS, G. D. *The Law of Armed Conflict. International Humanitarian Law in War*, Cambridge University Press, 2010, p. 82.

¹⁶⁹ International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, p. 114, para. 218

¹⁷⁰ As of 31 March 2017 it has 168 State Parties.

¹⁷¹ As of 31 March 2017 it has 174 State Parties.

¹⁷² GRENFELL, K. Perspective on the applicability and application of international humanitarian law: the UN context, *International Review of the Red Cross*, Vol. 95, No. 891-892, 2013, pp.645–652, p. 645.

¹⁷³ Geneva Conventions, Common Article 1.

we could argue that State Parties to Geneva Conventions are under an obligation to ensure respect even by the UN and in all circumstances. However, Greenwood probably rightly opines that there is scarcity of empirical evidence that would demonstrate the obligation of States to intervene to prevent violations of IHL perpetrated by others.¹⁷⁴

It should be noted that the UN itself is not a Party to Geneva Conventions or any other treaty that encompasses norms of IHL. However, UN force deployed into peacekeeping missions consists of national contingents which are provided by States. Those States are Parties to the Conventions and most of them are Parties also to the Protocols. Greenwood in relation to this further observes that those States are required by Art.1 of the Conventions and Art. 1 of Additional Protocol I to ensure that their troops should respect the provisions of the Conventions and the Protocol in all circumstances.

This might be applicable in cases when State uses its national armed forces under national command and control but with the authorization of the Security Council. Greenwood further contends that if armed forces under the command of the UN or acting under UN authorization become involved in an armed conflict, they are under an obligation to adhere to the customary IHL and the conventions to which these States are parties. As for the UN, it should be bound at least by the customary international law.¹⁷⁵

The UN itself recognized that it is bound at least by customary international law when it affirmed in its 1999's SG Bulletin that *"the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants."*¹⁷⁶

However as Burke points out, the document is just of an administrative nature not legally binding on the UN Member States, it cannot create legally binding

¹⁷⁴ GREENWOOD, Ch. International Humanitarian Law and United Nations Military Operations, *Yearbook of International Humanitarian Law*, Vol. 1, No. 1, 1998, pp. 3-34, p. 9-10.

¹⁷⁵ *Ibid.*, p. 17-18.

¹⁷⁶ United Nations Secretariat, Secretary-General's Bulletin. Observance by United Nations forces of international humanitarian law, 6 August 1999, ST/SGB/1999/13, Section 1.

obligations and the UN cannot by itself act on its breaches.¹⁷⁷ What is of a particular relevance is the fact that humanitarian law should apply when peacekeepers are actively engaging in situations of armed conflict.

Firstly, another question that pops up is the determination of the conflict. Which rules should be applicable to UN peacekeepers? Should it be those of international armed conflict or those applicable to non-international armed conflict? A preliminary issue that needs to be resolved at first is of course whether the situation amounts to armed conflict. The term armed conflict is not defined by any of the mentioned instruments.

In the Tadić case the ICTY came up with what has become a general definition of an international armed conflict. The Tribunal stated that "*an armed conflict exists whenever there is a resort to armed force between States.*"¹⁷⁸

As for the doctrine, according to Schindler "*the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. (...) Any kind of use of arms between two States brings the Conventions into effect.*"¹⁷⁹

With respect to non-international armed conflict the ICTY in Tadić case defined non-international armed conflict as "*whenever there is (...) protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.*"¹⁸⁰

Gasser writes that non-international armed conflicts are understood as armed battles taking place in the territory of a State between the government on the one hand and armed insurgent groups on the other hand. Another example is the collapsing of all governmental authorities in the State, no official government

¹⁷⁷ BURKE, R. Sexual Exploitation and Abuse by UN Military Contingents, p. 107.

¹⁷⁸ International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadic, case IT-94-1-A, 15 July 1999, para. 70.

¹⁷⁹ SCHINDLER, D. The different Types of Armed Conflicts According to the Geneva Conventions and Protocols, *Collected Courses of the Hague Academy of International Law*, Vol. 163, No. 2, 1979, pp. 117-164, p. 131.

¹⁸⁰ ICTY, Prosecutor v. Dusko Tadic, para. 70.

maintains power and as a consequence various groups fight each other in the struggle for power.¹⁸¹

However, in Tadić case the Tribunal further concluded that it is very difficult to draw a line between international and non-international armed conflict, since these can oftentimes include aspects of both.¹⁸²

Furthermore, it needs then to be ascertained whether rules of international armed conflict or rules of non-international armed conflict should be applicable to peacekeepers. The question perhaps would not be whether deployment and engagement of peacekeepers would alter the nature of international armed conflict. Above mentioned Bulletin provides in its Section 8 that detained members of armed forces shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949 by a UN force.¹⁸³

This may imply that the conduct in which the UN forces engage in a conflict should be always governed by the rules of international armed conflict. This is contended by David who additionally observes that this does not automatically mean that the deployment of a multinational peacekeeping force in a situation of disturbances transforms that situation into an armed conflict (in cases where the force was deployed on the basis of non-coercive mandate) or even an international armed conflict.¹⁸⁴

The existence of an armed conflict within a non-international armed conflict was recognized also by the ICJ in its Nicaragua case. In particular, actions by USA were governed by the rules of international armed conflict while actions of Nicaraguan forces and those of contras were governed by the rules of non-international armed conflict.¹⁸⁵ Therefore, it might be observed that if

¹⁸¹ GASSER, H. P. International Humanitarian Law: an Introduction, In: *Humanity for All: the International Red Cross and Red Crescent Movement*, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993, p. 555.

¹⁸² ICTY, Prosecutor v. Dusko Tadic, para. 73-75.

¹⁸³ United Nations Secretariat, Secretary-General's Bulletin. Observance by United Nations forces of international humanitarian law, 6 August 1999, ST/SGB/1999/13, Section 8.

¹⁸⁴ DAVID, E. and ENGDAHL, O. How does the involvement of a multinational peacekeeping force affect the classification of a situation? *International Review of the Red Cross*, Vol. 95 No. 891/892, 2013, pp. 659–679.p. 662.

¹⁸⁵ ICJ, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, 27 June 1986, para. 219.

peacekeeping forces are deployed to non-international armed conflict, their deployment would not internationalise the whole conflict, just their engagement would be governed by the rules of international armed conflict.

Other problem which appears is the fact that it is not always clear cut what is the actual engagement in hostilities by peacekeepers or what should be regarded as their involvement in hostilities? Art. 2 (2) of United Nations Convention of 9 December 1994 on the Safety of United Nations and Associated Personnel stipulates that the Convention shall not apply to a UN operation authorized by the SC as an enforcement action under Chapter VII of the Charter of the UN in which *“any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”*¹⁸⁶

From this it might be observed that when peacekeepers engage as combatants, rules of international armed conflict apply. Second point is on the other hand, whether rules of international armed conflict should be applicable only to enforcement actions under Chapter VII? In other words may all actions of peacekeepers be considered as those to which rules of IHL apply or only those enforcement actions authorized under Chapter VII?

While David thinks that the second option is right,¹⁸⁷ Engdahl does not agree and points out that decisive factor that constitutes an armed conflict would be based on the actual conduct of the forces in the field and not simply on whether a force is mandated to engage in armed conflict.

We agree with Engdahl. However, it needs to be pointed out that the conduct of peacekeepers might not always reach the intensity that is needed for the application of rules of IHL. Especially conduct under those operations not authorised under Chapter VII might not reach the intensity needed for actual engagement in armed conflict. Nevertheless, after peacekeepers' conduct reaches

¹⁸⁶ UN GA, Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Art. 2(2).

¹⁸⁷ He assumes that this is not the case of operations conducted solely for the purpose of 'maintaining or restoring international peace and security, see DAVID, E. and ENGDAHL, O. How does the involvement of a multinational peacekeeping force affect the classification of a situation? p. 662-663.

the threshold of hostilities, notwithstanding the fact that the operation is not a Chapter VII, norms of IHL would be applicable.

3.2 Safeguards under Geneva Conventions – Relevant Provisions as an Answer to SEA

With respect to find some avenues how to target the SEA by peacekeepers, Art. 29 of the 4th Geneva Convention stipulates that The Party in whose hands is protected person, is responsible for the treatment by its agents regardless of individual responsibility which may be also incurred.¹⁸⁸ As we have found out that the Geneva Conventions comprise of norms of customary international law and that the UN should be bound by those rules as well, violation of Art. 29 can constitute responsibility of TCC or the UN irrespective of the individual responsibility of the soldier. Further to this Art. 146 of 4th Geneva Convention provides that States “*to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.*”¹⁸⁹ Following Article further specifies grave breaches. SEA committed in the armed conflict might reach grave breaches if it falls into category of torture or inhuman treatment or wilfully causing great suffering or serious injury to body or health.¹⁹⁰

From other safeguards which provide protection to individuals it must be mentioned Art. 27 of 4th Geneva Convention which stipulates that protected persons shall be treated humanely and women shall be protected against rape or any mean of indecent assault.¹⁹¹

This may undoubtedly be applied to SEA by peacekeepers. Particularly noteworthy are also measures under Art. 86 (1) of Additional Protocol I which call for repression of grave breaches. Moreover, Art. 86 (2) emphasises that a

¹⁸⁸ Fourth Geneva Convention, Art. 29.

¹⁸⁹ *Ibid.*, Art. 146.

¹⁹⁰ *Ibid.*, Art. 147.

¹⁹¹ *Ibid.*, Art. 29

subordinate does not absolve his superiors from penal or disciplinary responsibility if they knew that he has committed a crime.¹⁹²

In relation to this Art. 87 of the Additional Protocol I governs duty of commanders to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.¹⁹³ Furthermore, Article 91 governs responsibility and provides that the Party shall, if the case demands, *“be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”* The question of responsibility will be further elaborated in another Chapter of this thesis . It should be pointed out that the abovementioned provisions speak about State Parties to the Conventions or Parties to the conflict. If we accept that the UN is a Party to the conflict, these provisions would apply to it as well. As we have stated it is not clear cut whether mentioned provisions of Additional Protocol I could be considered as norms of customary international law. This Protocol indeed is composed of some norms of such a nature, however there is not sufficient evidence that all of above norms might be applicable to the UN. Nevertheless, what needs to be emphasised is the fact that TCCs have duty, even when their contingents are deployed to peacekeeping operations, to secure that their troops act in accordance with IHL.

3.3 International Human Rights Law – Applicable Rules

In this part we will address applicability of international human rights law and assess whether the TCCs failures to prevent or stop acts from occurring as well as taking further steps may constitute violation of TCCs international human rights obligations. At first, we shall refer to some international human rights instruments and find out if they prohibit forms of SEA. We shall however not provide an exhaustive enumeration of such instruments, we will mention some most important just for the illustrative purposes and then we will refer to universal or regional treaties which protect human rights generally.

¹⁹² Additional Protocol I, Art. 86.

¹⁹³ *Ibid.*, Art. 87 (1).

For example, The Convention on the Rights of the Child prohibits sexual exploitation and abuse.¹⁹⁴ In addition, its Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography stipulates in Art. 3 that each State Party shall ensure that it will cover in its criminal law offence of sexual exploitation of the child, whether the offences are committed domestically or transnationally.¹⁹⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime also lays down some obligations of States towards legislation.¹⁹⁶ In the same vein, the Convention on the Elimination of Discrimination against Women in Art. 6 provides that Parties shall take appropriate measures, including legislative ones, to suppress exploitation of women.¹⁹⁷

Sexual related crimes may constitute torture or inhuman or degrading treatment. Such treatment is prohibited by e.g. International Covenant on Civil and Political Rights¹⁹⁸ or European Convention on Human Rights.¹⁹⁹ The ECtHR, which decides on applications alleging that a State party to ECHR has breached one or more of the human rights obligations concerning rights set out in the ECHR, held that rape constitutes violation of Art. 3 of ECHR (more specifically, prohibition of degrading treatment). What is noteworthy, the Court in this case also stressed that

¹⁹⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, Art. 34. The age as when a child attains majority differs from State to State. See discussion in KRÁLIK, J. Child Labour in Israeli Settlements: International Conventions and Applicable Law.

¹⁹⁵ UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001, A/RES/54/263, Art. 3. Other relevant Instruments include e.g. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, A/RES/317, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014,

¹⁹⁶ E.g. Art. 9 (5) stipulates that States Parties shall adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons

¹⁹⁷ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, Art. 6.

¹⁹⁸ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993

¹⁹⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 3. See e.g. European Court of Human Rights, M.C. v. Bulgaria, App. No. 39272/98, 4 December 2003, see also ECtHR, Factsheet – violence against women, May 2017, p. 5.

State Parties are under an obligation to prosecute any non-consensual sexual act, even in cases where the victim had not opposed physically.

With respect to investigation of such acts the Court in another case observed that State's have positive obligation to investigate and punish all forms of rape and sexual abuse in violation of Art. 3 of ECHR.²⁰⁰

By all means, sex crimes may after certain circumstances are met fall within Art. 3 of ECHR, however with respect to SEA by peacekeepers other factors must be assessed as well. One of them, question whether States have obligation to respect human rights extraterritorially shall be elaborated further in next part of this Chapter.

Under ECHR's regime all State parties are under the obligation "to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."²⁰¹ It needs to be determined what this means in practice.

With respect to applicability of abovementioned instruments directly to the UN needs to be pointed out that although the ICJ pronounced in the Reparations for Injuries case, that the UN possess legal rights as well as duties under international law which means that it may be legally responsible for wrongful acts, the issue is that the UN itself is not a Party to human rights instruments. Some of these instruments are concluded within the UN and by its Member States, nevertheless this does not constitute that the UN itself is bound by these instruments due to the fact that it is not Party to them. As a consequence, human rights judicial bodies do not maintain jurisdiction over the UN. However this perhaps could be not the case in norms of jus cogens and there are other examples where at least it was objected (although implicitly) that the UN has been granted such privilege.²⁰² As in the European Court of Human Rights Waite and Kennedy decision of 1999, which concerned an application by independent contractors at the European Space Agency for access to a remedy in pursuance of a dispute of an employment nature,

²⁰⁰ ECtHR, *I.G. v. the Republic of Moldova*, App. No. 53519/07, 15 May 2012, para. 45.

²⁰¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1

²⁰² Boon aptly compares the UN to a good Samaritan who bona fide assist to injured parties and hence is granted some immunity from liability. BOON, K. E. The United Nations as Good Samaritan: Immunity and Responsibility, *Chicago Journal of International Law*, Vol. 16, No. 2, 2016, pp. 341-385, p. 344.

provides some correction to this statement. In the decision the Court found that the availability of alternative means to protect effectively claimants' rights under Article 6 of the ECHR were required.²⁰³ In this context, the Court pointed out that the States should not hide behind the organization for the purposes to escape from their obligations. Issue of responsibility shall be in a great detail elaborated in the next Chapter of this thesis.

3.4 Extraterritorial Application of Human Rights Treaties

This part is devoted to another important aspect which is extraterritorial application of human rights treaties. More specifically, it needs to be ascertained whether the obligations flowing from international human rights instruments oblige parties to in relation to the extraterritorial acts of those States. It needs to be addressed whether perpetration of some acts in a different territory plays also a role. In the context of ICCPR, Art. 2 (1) provides that *"each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."*²⁰⁴ This has indeed raised some questions however as we have noted in a different paper with respect to the application of multilateral treaties the ICJ stipulated that the protection offered by the ICCPR extends wherever the State exercises its jurisdiction, even if that is in a foreign territory. The ICJ in its Wall Opinion reiterated that although the jurisdiction of States is primarily territorial, it may sometimes be exercised outside their national territory.²⁰⁵ More specifically,

²⁰³ See ECtHR, *Waite and Kennedy v Germany*, Merits, App. No. 26083/94 , 18 February 1999,, para. 67.

²⁰⁴ International Covenant on Civil and Political Rights, 16 December 1966, Art. 2(1).

²⁰⁵ ICJ, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 109. *"(...) the provisions of the ICCPR apply to the benefit of the population of the Occupied Territories, for all conduct by its authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law."* For a different view see an interpretation of Art. 2(1) of the ICCPR by the USA which is as follows: "Article 2 of the Covenant expressly stated that each State Party undertook to respect and ensure the rights recognized *"to all individuals within its territory and subject to its jurisdiction."* That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and

the Court pointed out that State Parties' obligations under the ICCPR apply to all territories and populations under its effective control.²⁰⁶ Therefore, at least since the 2004 there should not be dispute about it.

With regard to SEA as international human rights violations Burke points out that Belgian peacekeepers deployed to peacekeeping mission as part of UNOSOM II in Somalia were accused of several violations, in particular of sexual abuse. The Human Right Committee has criticized the conduct emphasising that the State Party to ICCPR should respect the safeguards of this covenant even when it exercises jurisdiction abroad, as is the case of peacekeeping missions.²⁰⁷ As the regime under ECHR provides most cases that have addressed the question of extraterritorial application of human rights instruments, in the following parts we will put focus on elaboration of cases that were brought before the ECtHR.

3.5 Spatial model of jurisdiction under Article 1 of the ECHR

Assuming that TCC have exclusive jurisdiction over their troops, a failure to adequately investigate potential crimes and bring the perpetrators to justice would mean that these states fail to comply with their obligations arising from international human rights instruments and ECHR in concrete. Obviously, certain criteria must be met. If we accept the premise that pursuant to Article 1 of the ECHR the element of jurisdiction is not restricted to the states' territories²⁰⁸ we need to prove that states have obligations to make inquiries in alleged cases where the acts were committed outside of their territory. This would mean that states, by ratifying the ECHR, accept that the obligations flowing thereof apply extraterritorially.

within United States territory. HRC, Consideration of Reports submitted by States Parties under Art. 40 of the Covenant, USA, 28 November 2005, Annex I.

²⁰⁶ ICJ, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 112.

²⁰⁷ BURKE, R. Sexual Exploitation and Abuse by UN Military Contingents. p. 143.

²⁰⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Art. 1.

As we will demonstrate, this has not always been clear-cut. One of the leading and, at the same time, controversial cases addressing the question of jurisdiction is *Banković v. Belgium and other states*. The case concerned the NATO bombings of the Serbian Television Network building. The building was destroyed, 16 people were killed and many were injured. In this context it is worth distinguishing this case from the alleged cases of SEA perpetrated by MMsNCs, mainly because of the fact that NATO carried out its bombings from air while its forces did not have effective control over area on the ground.

The applicants complained of violations of the ECHR. The ECtHR declared the application inadmissible as the act fell outside the jurisdiction of the responded State. The court defined the element of jurisdiction taking a rather more restrictive view. It has put its focus on regional context, i. e. pronouncing the ECHR to be applicable in the legal space (*espace juridique*) of contracting States.²⁰⁹ This meant two things. According to the court, the ECHR may be applicable in the territory of contracting States or in the territory being under effective control of the contracting States.²¹⁰ Neither requirement applied to the NATO members over former Yugoslavia, since, as we have mentioned earlier, NATO was conducting its operation from air, thereby not having effective control over the territory. Therefore, the ECtHR held the application inadmissible and has not resolved the question whether the respective act was the act of a State or of an organization. The Court concluded that the extraterritorial act would fall beyond the jurisdiction of defendant States in the sense of Article 1 of the ECHR.²¹¹

More specifically, it would mean that - due to the applicability of the ECHR solely within the legal space of its contracting States - a State could not be held accountable and brought before the ECtHR for its acts or acts attributable to this State while committed outside its territory and outside of the territory of

²⁰⁹ ECtHR, *Banković v. Belgium and 16 other contracting states*, App. No. 52207/99 12 December 2001, para. 80.

²¹⁰ *Ibid.*, "The responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory." See e.g. ECtHR, *Loizidou v. Turkey*, Merits, App. No. 15318/89, 18 December 1996, para. 52.

²¹¹ ŠTURMA, P. Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law, p. 13.

Contracting States if it did not have effective control over the territory. The Court has thus followed its approach pronounced in *Loizidou* in which it declared the ECHR applicable to the inhabitants of northern Cyprus, a territory controlled/occupied by Turkey, a ECHR contracting State.²¹² After *Banković* the Court however has chosen a different approach which shall be elaborated in the following lines.

3.6 Shift Towards Personal Model of Jurisdiction?

The current approach of the ECtHR is at first sight somehow opposite to the regional context and *espace juridique* model pronounced in the *Banković* case. In *Al-Skeini*, the ECtHR shifted its view and stated that “*whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation (...) to secure to that individual the rights and freedoms under the ECHR that are relevant to the individual’s situation.*”²¹³

Milanović points out that the Court acknowledged that the State’s jurisdiction, as stipulated in Article 1 ECHR, shall be clearly extended to other States or territories. As opposed to the Court’s reasoning in *Banković* (regional context and effective control test), what is imperative in *Al-Skeini* is the control and authority over an individual.²¹⁴

It follows from this that the Court departed from its position adopted in *Banković* by replacing its spatial or territorial model of jurisdiction. Milanović calls this personal model of jurisdiction. On one hand, the ECtHR pronounced that the ECHR rights can be “divided and tailored”,²¹⁵ but on the other the court recognized “*the existence of extra-territorial jurisdiction by a Contracting State when, through*

²¹² See ECtHR, *Loizidou v. Turkey*, 18 December 1996.

²¹³ European Court of Human Rights, *Al-Skeini v. UK*, App. No. 55721/07, 7 July 2011, para. 137

²¹⁴ Milanović refers to this question as the most essential, it needs to be determined whether the meaning of jurisdiction as stipulated by the ECHR refers to State’s control over a territory or also its control and authority over an individual. See MILANOVIĆ, M. *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (Oxford Monographs in International Law)*, Oxford University Press, 2013, p. 263.

²¹⁵ *Ibid.* For a more recent case which followed path of *Al-Skeini* and *Al-Jedda*, see ECtHR, *Hassan v. United Kingdom*, App. No. 29750/09, 16 September 2014, paras 74-75.

the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government."²¹⁶ What is somehow remarkable here is that the Court is not referring to effective control, but rather to exercise of public powers. But has the Court really fully negate Banković? Ryngaert, on the other hand speaks about emphasis on intensity and control which ECHR State Parties exercise over individuals and refers to 1989 case Stocké v Germany.²¹⁷ More interestingly the Court admitted in para. 142 that *"where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory."*²¹⁸ It follows from this that whenever the territory of one contracting state is occupied by another, the latter should be held accountable. This is of course not the case of Al-Skeini (Iraq) or cases of SEA perpetrated by peacekeepers in UN peacekeeping operations in African states or Middle Eastern states, i.e. beyond the territory of the non-contracting parties.

The Court furthermore acknowledged that a state may exercise jurisdiction even outside of the territory of member states and referred to its previous judgements, all of which included an element – that the victims were detained abroad.²¹⁹ In concluding paragraphs discussing jurisdiction the ECtHR observed that the UK exercised some of the public powers normally to be exercised by government. In particular, the UK through its soldiers engaged in security operations and exercised authority and control over individuals killed in the course of such operations.

What is noteworthy here is that the UK was held liable for death of all six individuals on behalf of whom the complaint was submitted despite the fact that not all of the victims were necessarily held and killed in detention. The Court has decided so because of the exceptional circumstances and because, according to the

²¹⁶ The Court cited para. 71 of *Banković*, European Court of Human Rights, *Al-Skeini v. UK*, App. No. 55721/07, 7 July 2011. para. 135.

²¹⁷ RYNGAERT, C. Clarifying the Extraterritorial Application of the European Convention on Human Rights, *Utrecht Journal of International and European Law*, Vol. 28, No. 74, pp. 57-60, p. 58. See also European Court of Human Rights, *Stocké v Germany* App. No. 11755/85, 12 October 1989.

²¹⁸ European Court of Human Rights, *Al-Skeini v. UK*, App. No. 55721/07, 7 July 2011, para. 142.

²¹⁹ *Ibid.*, para. 142.

Court, the rights under the ECHR can be divided and tailored, however, this should be possible only in situations where the contracting State exercises public powers.²²⁰ By dividing and tailoring rights, as departing to some extent from Banković, Murray contends, the Court means that in situations where extraterritorial jurisdiction might exist, States do not have obligation to give effect to the whole scale of human rights protections but only to those relevant to the situation and to extent appropriate in these circumstances. This might be narrowed to rights such as right to life or the prohibition of torture. Murray further posits that this should not be the case during occupation where the full spectrum of human rights law is applicable to activities of States.²²¹

Ryngaert furthermore opines the Court in Al-Skeini did not abandon explicitly spatial model pronounced in Banković. He maintains that the Court confirmed validity of the State agent authority model after certain circumstances are met, however he does not think that the Court introduced personal model of jurisdiction. In other words, according to this author, the Court has not determined that any individual over whom an ECHR Contracting State exercises control triggers jurisdiction of ECHR's Contracting State.²²²

3.7 Prosecuting the Perpetrators of SEA before the International Criminal Court?

The Rome Statute, the constituent treaty²²³ of the ICC, which was adopted in 1998 and entered into force in 2002, establishes among other things the ICC's jurisdiction. With regard to jurisdiction, it should be noted that the Court's jurisdiction does not arise automatically. As is stated in the preamble, it is the duty

²²⁰ *Ibid.*, para. 149.

²²¹ MURRAY, D. *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, 2016, p. 62-63.

²²² RYNGAERT, C. *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, p. 59.

²²³ It should be noted that this treaty is not binding on third States. See e.g. Vienna Convention on the Law of Treaties. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Art. 34 and Art. 35.

of every State to exercise its criminal jurisdiction over those who are responsible for international crimes.²²⁴ This concept may be described as complementary jurisdiction and it finds its reference also in Art. 1, 17, 18 and 19 of the Rome Statute.

As Solera observes ICC's jurisdiction is complementary to national courts and emerges only when national criminal jurisdiction was not available or unable to perform its tasks.²²⁵ The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and crimes against aggression.²²⁶

With respect to SEA, the possibility to prosecute peacekeepers for acts of SEA as acts of genocide or crimes against aggression may be excluded.²²⁷ The Rome Statute does not list SEA in any of its provisions. However, if certain conditions are met, these acts could theoretically fall within crimes against humanity pursuant to Art. 7 (1) letter g) which recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as crimes against humanity²²⁸. These crimes could also fall within war crimes as stipulated by Art. 8 (2) letter b) (xxii) (in armed conflict of an international character) and Art. 8(2)(e)(vi) (as regards armed conflict of a non-international character).²²⁹ Nonetheless, at first we have to look whether general requirements which must be met suffices for the SEA to fall under crimes against humanity or war crimes, as defined by the Rome Statute.

²²⁴ UN GA, Rome Statute of the International Criminal Court, 17 July 1998, Preamble.

²²⁵ SOLERA, O. Complementarity Jurisdiction and International Criminal Justice, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, pp. 145-171, p. 147.

²²⁶ The Rome Statute, Art. 5.

²²⁷ As pointed out by O'Brien it is not very likely that a member of peacekeeping mission would perpetrate genocide. This is based on two assumptions. The first is that the peacekeepers find rarely themselves located in the region of genocide, while the second premise that genocide requires a mental element of specific intent to destroy a group in whole or in part. O'BRIEN, M. Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the International Criminal Court, *International Journal of Law, Crime and Justice*, Vol. 40, No. 3, 2012, pp. 223-241, p. 246.

²²⁸ The Rome Statute Art. 7 (1), g)

²²⁹ "Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." Ibid. Art. 8 (2) letter b)(xxii) and Art. 8(2)(e)(vi). See also International Criminal Court, The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, pp. 1-43.

Crimes Against Humanity

General requirements which must be met can be inferred from Art. 7 (1) which specifies that the act must fall within definitions enlisted (as regards SEA we have specified that these might fall within e.g. rape, sexual slavery, torture or other inhuman acts), must be part of a widespread or systematic attack, directed against any civilian population and the perpetrator must have knowledge of that attack.²³⁰

Rather ambiguous terms widespread or systematic were defined in the ICTR's Akayesu case. The court pointed out that the concept of 'widespread' may be characterised as „*massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.*“ The concept of 'systematic' may be defined as „*thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.*“ The Court also specified that there is no need for a requirement that this policy must be adopted formally as the policy of a state. There must however be some preconceived plan or policy.²³¹ In the context of crimes perpetrated by peacekeepers,, it requirement of widespread applying to cases of SEA would be difficult to reach since those are acts of an isolated nature, although as Burke points out these acts may sometimes be linked to the broader situation in which they occur, for instance as acts of other perpetrators in the host State. Then the requirement may be reached.²³²

Secondly applying acts to the policy of UN or a TCC would be very difficult or illogical. Clearly, as peacekeepers are organs of the UN (or TCC) saying that it is a UN or sending policy to commit SEA would be absurd.

Further, Art. 7 (2) defines attack directed against any civilian population which means a “*course of conduct involving the multiple commission of acts referred*

²³⁰ The Rome Statute, Art. 7 (1).

²³¹ International Criminal Tribunal for Rwanda (ICTR The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)), ICTR-96-4-T, 2 September 1998, para 580.

²³² BURKE, R. BURKE, R. *Sexual Exploitation and Abuse by UN Military Contingents*, p. 188.

*to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”*²³³

With respect to this, Robinson points out, citing ICTY in Tadić case, that there is a no need to prove that the accused personally committed multiple offences. An accused will be criminally liable for a single inhumane act (e.g., murder), provided that the act will committed as part of the broader attack.²³⁴

Other case would be if widespread or systematic attack is directed against civilian population and an individual act of a peacekeeper would be part of that attack, the threshold for this requirement may be reached. It should however be noted that it is not very likely that a peacekeeper would intend his crime to be part of the attack, but it would certainly be committed as part of the attack if that attack persists.²³⁵

This would be the sole possibility, although indeed very difficult to prove especially because the last requirement, the knowledge of the whole attack, would be also more difficult to prove. It is required that the peacekeeper had knowledge of the whole attack that would be occurring. In other words, the perpetrator had knowledge that his behaviour was part of or intended his behaviour to be part of a widespread or systematic attack against a civilian population.²³⁶ To find a nexus between SEA by peacekeeper and a greater attack would be difficult to prove.

All in all, applying these requirements to acts SEA, it would be extremely difficult for SEA by peacekeepers to reach the threshold or prove that these acts could fall under crimes against humanity as stipulated the Rome Statute. This possibility cannot be excluded, nevertheless it is rather very implausible.

²³³ The Rome Statute, Art. 7 (2).

²³⁴ ROBINSON, D. Defining "Crimes Against Humanity" at the Rome Conference, *The American Journal of International Law*, Vol. 93, No. 1, 1999, pp. 43-57, p. 48.

²³⁵ O'BRIEN, M. Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the International Criminal Court, p. 231.

²³⁶ International Criminal Court (ICC), Elements of Crimes, 2011, p. 5.

War Crimes

War crimes refer to those violations of IHL that give rise to individual criminal responsibility of the perpetrator under international criminal law, whether these crimes are customary or conventional.²³⁷

With regard to the definition of such crimes under the Rome Statute, As stipulated in Art. 8 (1) , the jurisdiction of the Court will arise when the acts are *“in particular committed as part of a plan or policy or as part of a large-scale commission of such crimes.”*²³⁸

As noted by O’Brien, this is not a mandatory element of the crime, and the words ‘in particular’ suggest that this is indeed not an obligatory requirement.²³⁹ This can indeed trigger the jurisdiction of the court even for other war crimes that would not be committed as part of a plan or large scale commission of such crimes which broadens the extent of acts which would fall within the definition as stipulated in the Rome Statute. With inserting specification into first word of Art. 8 (1), the drafters perhaps wanted to point out that the Court should have priority in cases that reach threshold of being part of a policy or large-scale commission of such crimes. When assessing whether the acts of SEA might reach this threshold, it must be said that the policy requirement would be difficult to establish. Large-scale commission of such crimes might be perhaps established if a greater number of acts would occur during a mission. Nevertheless, since this is not a mandatory requirement, whether a perpetrator would be prosecuted by the Court would be assessed on a case by case basis.

Art. 8 (2) further specifies which acts fall within the definition of war crimes. As we have noted earlier, acts of SEA by peacekeepers may be included into grave breaches as defined by Geneva Conventions as torture, inhuman treatment, wilful causing of great suffering. This would then not be problematic.

²³⁷ O’KEEFE, R. *International Criminal Law*, 1st Ed., Oxford University Press, 2015, p. 123-124.

²³⁸ Art. 8 (1).

²³⁹ O’BRIEN, M. *Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the International Criminal Court*, p. 234.

Other main requirement that must be established, is association of an act with an armed conflict. In the words of van der Wilt such contextual element helps to differentiate war crimes from either ordinary crimes and other international crimes such as crimes against humanity and genocide.²⁴⁰

With respect to armed conflict, we have provided what can be regarded as armed conflict in part describing IHL. What is however interesting for our case is also specification of armed conflict. In other words, is it decisive whether acts of peacekeepers would be perpetrated in international armed conflict or non-international armed conflict? Art. 8 of the Rome Statute also lists which offences are regarded as war crimes when perpetrated in international armed conflict and non-international armed conflict.

It should be noted that not all offences that fall within the definition of war crimes when perpetrated in international armed conflict are enumerated for non-international armed conflict. In particular, grave breaches of Geneva Conventions are clearly applicable only in international armed conflict. As it was argued in part discussing IHL it might be accepted that whenever peacekeepers engage in hostilities, this may internationalise armed conflict. This is in particular valuable when determining the nature of armed conflict. So far, all discussed requirements could be met also in relation to SEA by peacekeepers.

However, in the Elements of crimes, which is an explanatory note to the Rome Statute it is stated that the conduct must have taken place *"in the context of and was associated with an international armed conflict."*²⁴¹

Therefore, it needs to be determined what is actually meant by such proposition. As clarified by Dormann, those are the terms that are meant to provide distinction between war crimes and ordinary criminal behaviour.²⁴² Terms "in the

²⁴⁰ VAN DER WILT, H. War Crimes and the Requirement of a Nexus with an Armed Conflict, *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, pp. 1113-1128, p. 1113.

²⁴¹ See ICTY, *Prosecutor v. Zejnir Delalic Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga"*, (Appeals Judgment), IT-96-21-A, 20 February 2001, para 160. See also e.g. elements of crimes for Art. 8 (2), a I and Art. 8 (2) a II, International Criminal Court (ICC), *Elements of Crimes*, p. 13-14.

²⁴² DORMANN, K., War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes, *Max Planck Yearbook of United Nations Law*, Vol. 7, No. 1, 2003, pp. 341-407, p. 358.

context of “ were further defined by the ICTY Tribunal which in Tadić case stipulated that: *“international humanitarian law applies from the initiation of (...) armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached and that at least some of the provisions of the Geneva Conventions apply to the entire territory of the Parties to the conflict, not just the vicinity of actual hostilities. (...) particularly relating to the protection of prisoners of war and civilians are not so limited.”*²⁴³ From this it might be observed that the terms in the context involve territorial requirement.

As for the ICC approach, it has clearly drawn its inspiration from the ICTY jurisprudence and in Lubanga case it specified that the armed conflict need not be considered the ultimate reason for the conduct. The conduct need not have taken place in the midst of the combat. Still, the armed conflict must play considerable role in the perpetrator’s decision, in his or her ability to commit the crime or in the manner in which the conduct was finally committed.²⁴⁴

The terms *“was associated with”* meant to follow also case law of the ICTY which stated that an acceptable nexus must be established between the perpetrated acts and armed conflict. For instance, murder for purely personal reasons with no relation to armed conflict would be excluded.²⁴⁵

As stipulated by Elements of Crimes must be aware of factual circumstances that established the existence of an armed conflict.²⁴⁶ The knowledge required is therefore basically that of an existence of armed conflict and the perpetrator does not need to have any knowledge regarding the category of the conflict (whether international or non-international).²⁴⁷

If we apply all these requirements to SEA by peacekeepers, their acts may constitute war crimes under Rome Statute if peacekeepers are involved in an armed

²⁴³ ICTY, *Prosecutor v. Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT- 94-1-AR72, 2 October 1995, para. 70.

²⁴⁴ International Criminal Court. *Prosecutor v. Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06, 29 January 2007, para. 287.

²⁴⁵ DORMANN, K., *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, p. 359.

²⁴⁶ See ICC, *Elements of Crimes*, p. 14.

²⁴⁷ O’BRIEN, M. *Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the International Criminal Court*, p. 245.

conflict²⁴⁸, taking advantage of the circumstances created by the conflict, which clearly is also applicable to the SEA by peacekeepers, since the victim's vulnerability would be to some extent influenced by the persisting armed conflict.

3.8 Hindrances preventing prosecuting SEA by peacekeepers before the ICC

Although we have found that under some circumstance acts of peacekeepers may reach the general requirements of crimes against humanity or more likely war crimes as stipulated by the Rome Statute, there are several obstacles that prevent prosecuting peacekeepers before the ICC even if their respective States fail to bring them into the justice.

At first, it should be noted that the perpetrator must either be a national of a State Party or the act must be committed on the territory of a State Party to the Rome Statute (the non-State Party may also lodge a declaration that it accepts jurisdiction of the Court).²⁴⁹

Of the greatest TCC, for example China, India, Indonesia are not yet State Parties to the Rome Statute. Of States where a peacekeeping mission is still active e. g. Haiti, Lebanon, South Sudan are not State Parties to the Statute.

The requirement of a State Party might be broken by the SC. Pursuant to Art. 13 (b) the SC may acting under Chapter VII of the UN Charter refer a situation to the Prosecutor in which a crime under jurisdiction of the ICC was committed.²⁵⁰ Because of veto power of Permanent Members and political overtone of such a referral in relation to SEA by peacekeepers, such referral is highly unlikely.

Acts of peacekeepers may be barred from jurisdiction of the Court pursuant to Art. 16 of the Rome Statute which governs deferral of investigation or

²⁴⁸ Although ICTY in Kunarać stated that the acts might also be "*committed in the aftermath of the fighting (...) and are committed in furtherance or take advantage of the situation created by the fighting.*" ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 568.

²⁴⁹ See the Rome Statute, Art. 12.

²⁵⁰ The Rome Statute, Art. 13 (b)..

prosecution. Under this Article, the SC may request the Court to not to commence or proceed any investigation or prosecution for a period of 12 months.²⁵¹

With regards to this Cassese observes that at the initiative of the USA the SC passed two resolutions in 2002 and 2003 respectively thereby requesting the ICC not to commence or proceed with investigations or prosecutions in respect of personnel of UN peacekeeping missions if such personnel are not nationals to a State Party to the Rome Statute. Since then, no such resolution requesting for deferral has been passed.²⁵²

Other barriers enshrined in the Rome Statute may be found in Art. 98. First of all, we need to mention Art. 27 (1) which provides that regardless of an individual's official capacity, criminal responsibility will emerge in respect of crimes over which the ICC has jurisdiction. The second paragraph specifies that all immunities, including personal immunities, which would in another way be enjoyed under international or national law, are ineffective to thwart the ICC from exercising its jurisdiction.²⁵³

However, Art. 98 (2) provides that the ICC *"may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."*²⁵⁴

This provision was inserted into the Rome Statute upon demands from the US side. USA claimed that obligation arising from SOFAs between USA and great number of other countries would not be endangered, bearing in mind that the USA was not a State Party to the Rome Statute. As a result, the ICC would then, due to constraint provided by Art. 98 (2), have to refrain from requesting the surrender of

²⁵¹ The Rome Statute, Art. 16.

²⁵² CASSESE, A. and others, *The Oxford Companion to International Criminal Justice*, 1st ed., Oxford University Press, 2009, p. 348. However, para. 6 of SC Res. 1593 with which the SC referred situation in Darfur to the ICC Prosecutor provided that all nationals of a TCC which is non-party to the Rome Statute should be subject to the exclusive jurisdiction of their respective TCC. UN SC Res 1593, Sudan, 31 March 2005, S/RES/1593, para. 6

²⁵³ The Rome Statute, Art. 27.

²⁵⁴ The Rome Statute, Art. 98 (2)

US nationals unless it would obtain consent from the US side. Although the USA is the main actor using such tool, other States follow suit, therefore also in relation to SEA, if a perpetrator would be from a non State Party, this might also prevent his surrender to the ICC.²⁵⁵ Military personnel may also be covered by first paragraph of the same Art. Pursuant to Art. 98 (1) the ICC may not issue a request if the execution of such request by a State Party would force the requested State to breach its obligations “with respect to the State or diplomatic immunity of a person or property of a third State.”²⁵⁶ It should be noted that most cases would fall within Art. 98 (2) because of SOFAs, however where SOFA would not be concluded, first paragraph may become applicable.²⁵⁷

Additionally, it should be pointed out that in the Preamble, Art. 1 and Art. 5 might be found a reference to jurisdiction “most serious crimes of international concern,”²⁵⁸ therefore, it is questionable, although in some cases SEA by peacekeepers may satisfy general requirements of war crimes or crimes against humanity under the Rome Statute, whether these particular perpetrations should be considered as most serious crimes of international concern. The Office of the Prosecutor of the ICC specifies that it determines which cases should be selected or prioritised for investigation or prosecution. It further provides that it shall select those cases based on the gravity of crimes, the degree of responsibility of the alleged perpetrators and the potential charges.

With regards to gravity, the Office’s focus shall be put on the most serious crimes that are of the concern of international community as a whole. The criterion of gravity is assessed both on quantitative and qualitative considerations.²⁵⁹

²⁵⁵ KING, H. Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute, *New Zealand Journal of Public and International Law*, Vol. 4, No. 2, 2006, pp. 269-310, p. 297-302.

²⁵⁶ The Rome Statute, Art. 98 (1).

²⁵⁷ See e.g. BENZING, M. U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties, *Max Planck Yearbook of United Nations Law*, Vol. 8, No. 1, 2004, pp. 181-236, p. 205.

²⁵⁸ The Rome Statute, Preamble, Art. 1 and Art. 5.

²⁵⁹ See the ICC, Draft Policy Paper on Case Selection and Prioritisation, The Office of the Prosecutor, 29 February 2016, p. 12.

Regulations of the Office of the Prosecutor further indicate factors which the Office should consider include nature, scale manner of commission and impact.²⁶⁰

The scale should concern, in particular, number of victims, damage, geographical spread, etc. Nature refers to factual elements of an offence such as rape or other sexual based crimes. The manner concerns means employed to execute the crime, intent of perpetrators, whether the crimes resulted from organized policy, what were the motives. The impact shall be assessed in the light of suffering of the victim or terror subsequently instilled.²⁶¹

With respect to above criteria, the ICC has pronounced in Lubanga case that the additional gravity threshold is that the Court must focus and initiate cases only against “*most senior leaders*.”²⁶² In relation to SEA by peacekeepers, it is clear that these crimes were perpetrated by ordinary troops.

However, in some cases responsibility of their superiors may be established and then possibly they could reach the threshold established by the ICC. On the other hand, requirement of senior leadership may be regarded to some extent as debatable. Explicit reference to this requirement cannot be found anywhere in the Rome Statute. Moreover, Al-Mahdi who was found guilty of the war crime of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments in the context of the armed conflict in Mali recently convicted to 9 years disprove this alleged requirement of seniority, since Al-Mahdi²⁶³ was an ordinary member of a paramilitary group and not a high ranked official.

This should not of course demonstrate that the ICC would indeed start investigations against the peacekeepers for perpetrating SEA. Although we have demonstrated that to some extent their acts may reach threshold of crimes against humanity or war crimes under the Rome Statute and theoretically may be brought before the ICC, in reality it is highly unlikely that the ICC would start investigation or

²⁶⁰ ICC, Regulations of the Office of the Prosecutor, 23 April 2009, Art. 29 (2).

²⁶¹ ICC, Draft Policy Paper on Case Selection and Prioritisation, p. 13.

²⁶² ICC, Situation in the Democratic Republic of the Congo, No. ICC-01-04, 13 July 2006, para. 56.

²⁶³ See e. g. The ICC convicts Al Mahdi for the destruction of cultural heritage in Mali, In: Global Policy Forum., 2016-10-19 [online] [accessed 2016-11-23]. Available at: < <https://www.globalpolicy.org/home/52882-the-icc-convicts-al-mahdi-for-the-destruction-of-cultural-heritage-in-mali-.html> >.

prosecution in the case in which the UN is involved. This option of course cannot be completely disregarded and after great pressure from the public something could happen. This may be in particular a prosecution of a top high ranked official. Regular prosecutions of regular troops before the ICC are given some interconnectedness between the ICC and the UN nearly impossible.

Therefore, as a better avenue seems to be establishment of a body of parallel or complementary powers at the international or hybrid level (TCCs and the international judicial body). Zeid in this context proposes creation of onsite court-martials. As an advantage, he lists immediate access to evidence and witnesses. Other added value may be demonstration to local community that perpetrators would be brought into justice.²⁶⁴

Since this might constitute financial burden to some States, the UN should engage itself into this matter. Another although perhaps utopian idea would be to establish integrated joint investigative body within all peacekeeping missions that would comprise members of TCCs whose national has perpetrated crime, the UN representatives and if needed or desired representatives of host States. The judicial body or an international court that would try to cases could be based elsewhere. However, such body would need to have its statute which would need to be approved by the SC. Secondly, all potential TCCs would need to accede to such an instrument. The UN could perhaps use the premises of the ICTY which will finalize its work soon or the expertise of its officials.²⁶⁵

3.9 Concluding Remarks

With respect to application of the IHL we have found out that when MMsNCs which form a part of the UN peacekeeping mission engage in hostilities in armed conflict, the norms of IHL should apply. This concerns at least norms of

²⁶⁴ See UN GA, Comprehensive review of the whole question of peacekeeping operations in all their aspects, 24 March, 2005, A/59/710, para .36.

²⁶⁵ The experts possess great knowledge and experience with regard to prosecuting sexual violence. See e.g. BRAMMERTZ, B. S. and JARVIS, M. *Prosecuting Conflict-Related Sexual Violence at the ICTY*, 1st ed., Oxford University Press, 2016.

customary international law *jus cogens* norms and most likely all other norms recognized by the UN in the SG Bulletin of 1999. Other point of view might be that all rules of IHL apply to the MMsNCs, since even during their deployment to a peacekeeping mission they form a part of their national contingents.

In the context of nature of armed conflict there is an assertion which has also its basis in jurisprudence of international judicial bodies that the engagement of peacekeepers internationalises the conflict, at least with regard to their conduct. Of course, some of the UN operations' mandates do not authorize peacekeepers to engage in hostilities. In this case, their individual engagement must be assessed. When such conduct reaches the needed threshold, rules of IHL may be applied. Our finding is also that SEA may in some circumstances constitute IHL violations and trigger individual, organizational or State responsibility.

In another part of this Chapter we have identified that SEA may under some circumstances (in particular, control over persons, territory/area) violate international human rights law. In particular, extraterritorial application of human rights treaties in connection to exclusive criminal jurisdiction of respective States requires that the victim should have right to a remedy. Possible avenues which might be contacted by a victim of SEA will be discussed in the next Chapter.

In the last part of this Chapter we have discussed the question of prosecuting MMsNCs before the ICC. We have come to the conclusion that although their acts may in some circumstances reach the threshold of crimes against humanity or more likely of war crimes, this option indeed does not seem to be very likely.

4 ESTABLISHING RESPONSIBILITY OF STATES AND INTERNATIONAL ORGANIZATIONS FOR CRIMES OF SEXUAL EXPLOITATION AND ABUSE PERPETRATED BY MILITARY MEMBERS OF NATIONAL PEACEKEEPING CONTINGENTS

4.1 Responsibility in International Law

When international law is breached (we may also talk about international wrongful acts) then the question of responsibility emerges. This Chapter is devoted to secondary norms of international law, i.e. the norms that will apply in cases when a subject of international law breaches (by an act or omission) its international obligation which flow from primary norms of international law, either generally applicable or from its treaty obligations.²⁶⁶

Bearing in mind the traditional point of view, the public international law was solely a law between States. However, with respect to the question of responsibility we cannot currently speak about States as the only entities which may be responsible under international law rules and in some cases the responsibility of international organisation may arise. As per the ICJ's reasoning presented in the Reparations for Injuries Suffered in the Service of the United Nations Advisory Opinion, the UN possess international personality owing to the fact that *"fifty States, representing the vast majority of the members of the international community had the power, in conformity with international law, to bring into being an entity possessing objective international personality."*²⁶⁷

²⁶⁶ See ČEPELKA, Č. a ŠTURMA, P. *Mezinárodní právo veřejné*, 1st ed., Praha: C. H. Beck, 2008, p. 572.

²⁶⁷ ICJ, Reparations for Injuries Suffered in the Service of the United Nations Advisory Opinion of 11 April 1949, In: *Elementary International Law*, T.M.C. Asser Press, 2011, p. 322.

However, as Pellet emphasises, the system that is being used to determine the responsibility of States cannot be used interchangeably and unmodified to the international organizations. It should be agreed that international law of responsibility that applies to international organisations includes general rules which apply also in the field of responsibility of States, together with some special rules that apply for international organizations solely.²⁶⁸

Individuals are other groups which moved from the realm of being an object of international law to the sphere of subjects. Individuals may both invoke the responsibility of other subjects of international law (e. g. in the sphere of human rights violations and investment) as well as they can be held accountable for their own internationally wrongful acts.²⁶⁹

When the MMsNCs commit act of SEA some types of responsibility may be involved. More specifically, apart from individual criminal responsibility, the responsibility of UN and respective TCC may be established as well. In the context of our research, we would like to demonstrate that apart from individual criminal responsibility of direct perpetrators who are subject to exclusive criminal jurisdiction of their respective TCC, the UN itself as well as a TCC may be responsible for the conduct of peacekeepers which could then open up other possibilities for victims.

As will be demonstrated the essential determining factor to establish the responsibility of a certain entity is attribution of conduct. We will discuss two main tests of attribution of conduct to a certain entity have evolved with time. In particular, we will discuss effective control²⁷⁰ and overall or ultimate authority and control.

²⁶⁸ CRAWFORD, J., PELLET, A. and OLLESON, S. , *The Law of International Responsibility (Oxford Commentaries on International Law)*, 1st Edition, Oxford University Press, 2010, p. 7.

²⁶⁹ *Ibid.*, p. 7-8.

²⁷⁰ Milanović points out with regard to effective control that it is a homonym, it is used for attribution of conduct purposes; in humanitarian law it is sometimes referred to as to establish the threshold of the beginning of belligerent occupation of a territory; furthermore it a test developed by the ECtHR for the purposes of determining a State's jurisdiction over a territory; in criminal law it is used to describe relationship between a superior and a subordinate so his command responsibility may be engaged. See MILANOVIĆ, M. *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (Oxford Monographs in International Law)*, Oxford University Press, 2013, p. 52-53.

Several cases of various judicial bodies will be discussed in this context. Relevant case law should provide our guidance and our findings should be based thereof. Test of effective control was also proposed by the ILC in its draft articles concerning State responsibility and responsibility of international organizations. These works of the ILC, termed as codification and progressive development should also provide our further directions.

We will discuss in various parts of this Chapter that the responsibility can be attributed to more than one entity and it can be concurrent, i.e. responsibility of both international organization and respective State may be established simultaneously. This assertion should be based on effective control test. Based on this finding we shall explore further avenues which may address the question of responsibility of States or UN itself and play a crucial role in providing redress to victims of SEA perpetrated by peacekeepers.

More specifically, such finding could encompass an option to lodge an application before the European Court of Human Rights (ECtHR)²⁷¹ with regard to acts committed by the MMsNCs who are nationals of State Parties to the European Convention on Human Rights (ECHR) whilst they are assigned to the UN mission, exists. Other regional human rights instruments with their implementation mechanisms will be discussed as well in this part. Specifying a particular standard for determining the degree of state involvement must be established at first. As we shall demonstrate, in the practice of several important judicial bodies this was not always unequivocal.

²⁷¹ The reference to ECtHR at this point is not accidental since based on recent judgements relating to extraterritorial jurisdiction and attribution of conduct to a State provide an indirect evidence that there might be some remedies at ECtHR level to victims of SEA. This argument shall be made stronger in this Chapter. It is to be assumed that, as stipulated in Article 35 ECHR, all domestic remedies are exhausted before sending an appeal to Strasbourg. Therefore, we will focus on other requirements that must be met regarding the particularities of the crime in question and the special nature of the relationship between the UN and the MMsNCs.

4.2 The ICJ – Nicaragua case (effective control)

The effective control test was firstly proposed in 1986 ICJ's Nicaragua judgment. In this case, the Court differentiated between two categories of individuals not having the status of de jure organs of a State but nevertheless acting on behalf of that State:

- a) individuals who were dependent on the USA – refunded, supplied and otherwise supported by, and operating according to the planning and direction of organs of USA (persons of unidentified Latin American countries who were paid by, and acting on the direct guidance of, US military personnel)
- b) persons who, although paid, financed and equipped by a foreign State, nonetheless retained a degree of independence of that State (these were the Nicaraguan rebels, or contras)

As specified by Cassese, the ICJ firstly determined that acts of first group of persons could be attributed to the USA while with regard to the acts of the latter category it took a different approach.²⁷²

The court pointed out that the Nicaragua's contras have been at least at some point dependent on the USA that it could not carry out its military activities without the support of the USA.²⁷³ In its reasoning the ICJ maintained that the acts of contras were attributable to USA in those situations where the USA had effective control of the contras.²⁷⁴

The test applied in this case has offered an adequately powerful agreement of rules designed to attribution of the actions of an armed group to a respective State, basically demanding that the armed groups are operating on the instruction,

²⁷² CASSESE, A. The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, *The European Journal of International Law*, Vol. 18 no. 4, 2007, pp. 649-668, p. 652.

²⁷³ ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, para. 112.

²⁷⁴ *Ibid.*, para. 115.

or at the direction of, the foreign state. In these circumstances, the actions of the armed group can be attributed to the foreign State.²⁷⁵

Before we immerse ourselves to applying the notion of effective control to SEA by peacekeepers, to complicate things further we must address another standard that was proposed by a different judicial authority.

4.3 The ICTY – Prosecutor v Tadić (overall control)

Some ten years later, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a somehow more flexible test. This was done in now a very well known and many times referred case of Dusko Tadić who himself was paradoxically not a very high level official who participated in crimes that occurred in Bosnia.²⁷⁶

It firstly needs to be pointed out that the ICTY Court was not specifically concerned with a question of State responsibility. It had to determine whether the conflict was international or internal.

The Court however also declared that cases of individuals acting on behalf of a State without specific instructions, from those individuals making up an organised and hierarchically structured group, such as a military unit or, in cases of war or civil disturbances, armed groups of irregulars or rebels should be distinguished. The Court further pronounced that given the fact that an individual must adapt to some requirements under which the group is acting and is subject to the authority of the leader of the group, if the group is under overall control of a State, these acts can consequently be attributed to this State.²⁷⁷

Furthermore, according to the Court, the fact that the State can be held responsible for actions performed by a group notwithstanding the instructions of

²⁷⁵ OHLIN, J.D. Control Matters: Ukraine & Russia and the Downing of Flight 17, In: *Opinio Juris*, [online] 2014-7-23. [Accessed 2016-3-2]. Available at: <<http://opiniojuris.org/2014/07/23/control-matters-ukraine-russia-downing-flight-17/>>.

²⁷⁶ Another uniqueness or interesting fact is that Dusko Tadić has been a first person tried by an international tribunal since the Nuremberg Tribunal's trials.

²⁷⁷ ICTY, *Prosecutor v. Dusko Tadic*, case IT-94– 1-A, 15 July 1999, para. 120.

this State, associates the group with the State organs. The Court in its reasoning further referred to (then) Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission which governed States' responsibility for ultra vires acts or transactions of its organs.²⁷⁸

This means that the State should be responsible for acts of its organs if they interfered with the commands and acted otherwise as instructed. In the next paragraph the Court contends that same rationale applies to the situation of an organised group. The Court reiterated once again that if the group "*is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State.*"²⁷⁹

Few things may be said to the Court's reasoning. It clearly must be looked through the lens of conflict in the Former Yugoslavia and by the Court's intention to as many perpetrators (whether direct or indirect) into justice as possible. The main goal was perhaps to link the senior military and political leaders into those acts and establish their responsibility. Nevertheless, the Court mentioned a doctrine of joint criminal enterprise²⁸⁰ (although in Tadić the Court just mentioned this doctrine, Tadić was not prosecuted and convicted under it) under which it subsequently convicted several perpetrators.

However, according to Burke, overall control standard cannot be employed to acts of military contingent personnel, since Tadić involved irregular organized armed forces and there would be a difficulty to apply this rationale to realities of UN peacekeeping operations. Secondly the court was solely asked to determine whether or not an armed conflict is international, although also presenting it as equally applicable under the law of State responsibility. The other issue is that peacekeepers conduct their activities in the territory of another State, not the State of their origin, in Tadić case the controlling State was the same State where the

²⁷⁸ ICTY, *Prosecutor v. Dusko Tadic*, para. 121.

²⁷⁹ ICTY, *Prosecutor v. Dusko Tadic*, para. 122.

²⁸⁰ Under this doctrine a commander may be criminally responsible for acts that he had not ordered and which he was unaware. See the critique in e.g. LAUGHLAND, J. *Travesty: The Trial of Slobodan Milosevic and the Corruption of International Justice*. 1st Ed., Pluto Press, 2007, p. 76, for further critique see MILANOVIC, M. State Responsibility for Genocide, *The European Journal of International Law*, Vol. 17, No. 3, 2006, pp. 553-604, p. 585 – 587.

armed forces carried out their actions and the State which was in control of those forces.²⁸¹

4.4 The ICJ – Genocide Case (switch back to effective control)

As we have mentioned above, the International Criminal Tribunal for the Former Yugoslavia applied a looser test and decided that the main standard shall be overall control, i.e. the involvement in planning and coordination of action.²⁸²

However, the ICJ in its 2007 Genocide judgement rendered the overall control unsuitable and switched back to the effective control test. More specifically, the ICJ contended that the ICTY had jurisdiction only over individuals and was not in a position to deal with questions on State responsibility.²⁸³ Furthermore, it also observed that the doctrine laid down in the Tadić judgment was unpersuasive due to the fact that it was merely used to determine whether an armed conflict was international and observation that logic does require to apply such test to determine the responsibility of a State for the acts of the paramilitary units, armed organs which are not its official organs is not the same. The Court was of a position that the involvement of one State in another State's territory for the purposes to characterize the conflict as international differ from nature and extent of State's involvement which is required to constitute this State's responsibility.²⁸⁴

Additionally, the Court pronounced that with overall control test there is the danger of broadening the scope of State responsibility right above the fundamental principle governing the law of international responsibility. The Court has not however stipulated that the State's responsibility cannot be established for acts of persons or groups of persons who are not State organs, it specified that if such acts are in question those acts to be internationally wrongful, they are attributable to the State in question under the rule of customary international law reflected in

²⁸¹ BURKE, R. Sexual Exploitation and Abuse by UN Military Contingents, p. 267

²⁸² ICTY, *Prosecutor v. Dusko Tadic* (Appeal Judgement) , paras 120-122.

²⁸³ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgement, General List No. 118, 11 July 1996, para 403.

²⁸⁴ *Ibid.*, paras 404-405.

Article 8 of Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) pronounced by International Law Commission.²⁸⁵

This is in cases when a State either gave instructions or provided the directions under which a perpetrator acted or where it exercised effective control over the respective action when the wrongdoing was perpetrated.²⁸⁶ As stipulated by the commentary to ARS the three phrases “instructions”, “direction” and “control” are disjunctive. Therefore, it is sufficient to establish any one of them.²⁸⁷

With regard to the delimitation of those three requirements, when applying them to acts of SEA by peacekeepers we may observe the following. It is very unlikely that the acts of SEA would be committed on someone’s instruction, whether organization or State itself, and the same may be pronounced in relation to instruction. The sole realistic possibility would be to perpetrate the acts under a control. Therefore, we must put our focus on the notion of effective control and try to find its meaning either in some legal norms, concepts, or reasoning of a respective judicial authority.

4.5 Effective Control Test as Stipulated by the International Law Commission

While discussing the ICJ’s Genocide case we have mentioned a paragraph in the judgment where a reference was made to ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). We should therefore devote some time to addressing respective articles as introduced by the ILC. As Šturma and Čepelka point out the subject of State responsibility was included into codification programme of ILC in 1949 and in 2001 the commission prepared ARSIWA which is

²⁸⁵ In the next part of this Chapter we will elaborate more on the work of ILC whose object is pursuant to Art. 1 para. 1 of its Statute “*the promotion of the progressive development of international law and its codification.*” GA, resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Statute of the International Law Commission, 1947.

²⁸⁶ ICJ, *Genocide Case*, 11 July 1996. para 406.

²⁸⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10,, p. 48.

up to now a non-binding document covering responsibility of States, State organs or rebel movements. Articles do not cover international organizations which are usually not regarded as general international law subjects.²⁸⁸

Responsibility of international organizations is specifically governed by Draft Articles on the Responsibility of International Organizations (DARIO). This subject was on the ILC's agenda since 2002 and in June 2011 the Commission adopted the text. This document was to a large extent based on Draft Articles on responsibility of States, however as Šturma points out "*the simple transposition of rules on State responsibility for the responsibility of international organizations should have certain limits.*"²⁸⁹ It should also be noted that DARIO have also non binding effect. There is also some criticism why those rules might be regarded as problematic. Klabbers points out that international organizations are parties and therefore bound only by few treaties. Consequently it might be difficult to accuse an organization of committing internationally wrongful act. Although the ICJ determined in 1980 that organizations are bound by rules of general international law, those might not all be rules of customary international law and hence there are not many rules international organization can violate.²⁹⁰ With respect to conduct of some peacekeepers, as we have observed several times, given the intrinsic system of norms and various mandates of a mission, it is not always clear cut to which entity a conduct might be attributed. If however acts would be attributable to the UN this might not end before a court.

Nevertheless, both ARSIWA and DARIO are of a high relevance when assessing the conduct of MMsNCs and attributing the responsibility either to State or international organization. Some authors are of a position that DARIO can help to clarify the primary international law norms that bind international organizations. They also allege that there are good reasons to think that the DARIO will incite international organizations and their members to prevent violations and to address

²⁸⁸ ČEPELKA, Č. and ŠTURMA, P. *Mezinárodní právo veřejné*, p. 572-573.

²⁸⁹ ŠTURMA, P. *Drawing a line between the Responsibility of an International Organization and its Member States under International Law*, p. 4.

²⁹⁰ KLABBERS. J. *International Law*, 2nd Ed., Cambridge University Press, 2013, p. 134.

violations instantly when they occur.²⁹¹ We will see what the future brings and whether the measures they constitute will be enforced on a regular basis.

While determining which entity is responsible for the conduct of MMsNCs we must take into consideration the specificity of the relationship between the UN and MMsNCs. Several factors need to be ascertained here. We shall base on our argument on three possible premises. More specifically, the conduct of MMsNCs may be attributed to a TCC, organization itself, or both.

Art. 4 of ARSIWA stipulates that act of an organ whatever position it holds in a State apparatus shall be considered as an act of the State.²⁹² It was also pronounced by the ICJ in Genocide case that this is a rule of customary international law.²⁹³ In connection to this, pursuant to Article 8 of Articles on the ARSIWAa specific conduct will be attributable to the State if a person or group of persons is acting “*on the instructions of, or under the direction or control of,*” the State.²⁹⁴ As we have mentioned in previous part of the three disjunctive terms only the last one comes into question with regard to SEA of MMsNCs.

In this thesis , we have demonstrated on several occasions that in the case of peacekeeping operations and SEA perpetrated by peacekeepers, it might be ambiguous to whom the conduct might be attributed.

If we contend that for a specific act an organisation’s responsibility would be constituted a basis for its attribution would be found in DARIO. First of all and in the words of Šturma, Art. 4 of DARIO provides two conditions for an internationally wrongful act of an international organization that leads to the international responsibility of that organization. First of all, if the act is attributable to the international organization under international law, and secondly if the act constitutes a breach of an international obligation of that organization.²⁹⁵

²⁹¹ DAUGIRDAS, K. Reputation and the Responsibility of International Organizations, *The European Journal of International Law*, Vol. 25, No. 4, pp. 991-1018, p. 993.

²⁹² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10, art. 4

²⁹³ ICJ, Genocide Case, para. 385.

²⁹⁴ The Draft Articles are a combination of codification and progressive development. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8.

²⁹⁵ ŠTURMA, P. Drawing a line between the Responsibility of an International Organization and its Member States under International Law, p. 6.

In relation to this, Art. 6 governs conduct of organs or agents of an international organization. First paragraph of respective article provides that irrespective of the position of an organ or an agent their conduct shall be considered an act of that organization under international law. Para 2 indicates that it is up to organization to specifically determine who shall be considered its organ or an agent.²⁹⁶

In commentary to this article, it is further specifies that with respect to UN a term agent should cover both UN officials as well as other persons acting on the basis of functions that were conferred upon them by the UN. This conduct shall cover acts of agents acting in their official capacity or in other words, in the exercise of their competences.²⁹⁷ Burke points out that since the troops are during their deployment subjected to exclusive criminal jurisdiction of TCC, they cannot be to full extent seconded to the UN, and therefore Art. 6 should not be applicable to them.

As military contingents can be regarded as organs of a State that are provided to the organization, this may lead to another conclusion. Art. 7 of DARIO reads as follows: *“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.”*²⁹⁸

Few things may be observed with regard to this. First of all, Article 7 takes into consideration organ of a State but apart from an organ, it also mentions an agent of international organization. With regard to this, it is specified in the commentary that the organ of a State can be comprehended in a broader context, since it encompasses entities and persons whose conduct is attributable to State.

Additionally, the commentary provides an example, specifically referring to military contingents placed at the disposal of UN. The commentary further determines that the criterion for conduct attribution to respective State or

²⁹⁶ International Law Commission, Draft Articles on the Responsibility of International Organizations, December 2011, A/66/10,, art. 6.

²⁹⁷ See Draft Articles on the Responsibility of International Organizations, commentary, p. 18.

²⁹⁸ Draft Articles on the Responsibility of International Organizations, Art. 7.

organization is based on factual criterion over specific conduct and that “full factual circumstances and particular context” need to be taken into consideration.²⁹⁹

Furthermore, it is specified that the UN assumes that in principle it retains exclusive control over the national contingents in a peacekeeping force. However, the commentary itself admits that this is not always the case because the TCC have exclusive prerogatives and it is oftentimes the case that the organization instead of exclusive command and control, possesses merely operational command and control which is vested to respective States simultaneously.³⁰⁰

It should also to be noted that multiple attribution of conduct is possible as well. A general commentary to Chapter II of DARIO provides that “*Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded.*”³⁰¹ We will refer to this several times in our thesis, at least in next part that will be discussing some ECtHR cases.

As was have observed above, effective control has frequently been applied and cited as the decisive standard by several judicial bodies and has found in place also in ARSIWA and DARIO. Therefore, it seems that no dispute exists with regard to the question of proper standard for determination of the degree of state involvement in SEA cases committed by the MMsNCs, while they are deployed to a UN peacekeeping operation. As neither ARSIWA or DARIO provide definitions what exactly should constitute effective control in the following parts we shall further look into various judicial bodies’ decisions elaborating this approach in more detail to find out whether there could shed be some light into this issue.

4.6 ECtHR - Behrami and Saramati joined cases

Joined cases of Behrami and Behrami v France and Saramati v France, Germany and Norway concerned the events relating to the international territorial administration of Kosovo. More specifically, Behrami and Saramati was the first

²⁹⁹ Draft Articles on the Responsibility of International Organizations, commentary, p. 20.

³⁰⁰ *Ibid.*, p. 23.

³⁰¹ *Ibid.*, p. 16.

case by ECtHR regarding the conduct of Kosovo force (KFOR) deployed by NATO. The United Nations Interim Administration Mission in Kosovo (UNMIK) was the official mandated mission to under which the KFOR provided international security presence.³⁰² The Court was asked to determine whether it was competent to examine participation of ECHR Member States in the mission and to ascertain whether they breached their obligations under ECHR.

Agim and Bekim Behrami argued that France was responsible under ECHR for the failure to mark and defuse undetonated bombs and that their right to life pursuant to Art. 2 of ECHR was violated. The applicants argued that they were brought under the jurisdiction of France pursuant to Article 1 of ECHR. Saramati also contended that he was brought to jurisdiction of involved States which were France and Norway. He claimed breaches of right to liberty and security pursuant to Art. 5, right to an effective remedy pursuant to Art. 13 and right to a fair trial pursuant to Art. 6.³⁰³

The Court determined that the issue needs to be resolved by determination whether the applicants came to extraterritorial jurisdiction of those respective States. Having said that, the Court maintained that Kosovo was under the effective control of civil (exercised by UNMIK) and security presence (exercised by KFOR) of international character jointly performing public powers. The Court hence switched this question to some extent and reformulated it to the extent that it is not a question of extraterritorial jurisdiction, but a question whether the Court is competent to examine if relevant State Parties to ECHR (France and Norway) have contributed to civil and security presence in Kosovo which was maintained by international community.³⁰⁴ Therefore, the disputed question was to whom the conduct may be attributed, i.e. whether it should be attributed to States or to international organizations respectively.

³⁰² See UN SC Res 1244, Kosovo, 10 June 1999, S/RES/1244.

³⁰³ ECtHR, *Behrami and Behrami v. France Application No. 71412/01 and Saramati v. France, Germany And Norway*, App. No. 78166/01, Grand Chamber Decision As to Admissibility, 2 May 2007, para. 62.

³⁰⁴ SARI, A. Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases, *Human Rights Law Review*, Vol. 8, No. 1 2008, pp. 151-170, p. 154.

Sari points out to this that KFOR was not a UN peacekeeping mission itself, nor was it established as an organ of the UN (unlike UNMIK) and the SC did not maintain any command over it. Although KFOR seemingly operated under NATO's unified command and control, various TCCs exercised multiple powers over their contingents and in reality there was not any chain of command that could justify attribution of KFOR's conduct to NATO.³⁰⁵

To disentangle this, the Court also made the reference to ILC to a then-version of ILC DARIO (their final version adopted later in 2011), and paradoxically has placed them on the same niveau as UN Charter or DARS. To determine the attribution of KFOR's conduct, the Court referred to effective control test. It examined then Art. 6 (later adopted as Art. 7). As we have mentioned previously, this article governs attribution of conduct of a State or international organization placed at disposal of another organization with the decisive factor being effective control. While using this article, the Court omitted, that the respective article allowed for multiple attribution of conduct which the Court failed to assess due to the fact that it found out that the conduct was attributable to the UN and stopped there looking whether other options are possible.³⁰⁶

The ECtHR stated in particular that the decisive factor was "ultimate authority and control so that operational command was only delegated."³⁰⁷ Furthermore, the ECtHR posited that Chapter VII grants SC a right to delegate MS and international organizations, the delegation in this respective case was explicit and interestingly, since leadership of the military presence was under obligation to report to the SC this allowed the SC to pursue overall authority and control.³⁰⁸ Correspondingly, following alleged chain of command which was according to the Court established by SC Res 1244 (which is highly disputable since there is no reference to other specific entities apart from the UN, the resolution is formulated in a too general manner), the SC retained ultimate authority and control over the

³⁰⁵ SARI, A. Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases, p. 154.

³⁰⁶ See BELL, C. A. Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision. *New York University Journal of International Law and Politics*, Vol. 42, No. 2, 2010, pp. 501-548, p. 513-514.

³⁰⁷ ECtHR, App. No. 71412/01, *Behrami and Saramati*, para. 133.

³⁰⁸ *Ibid.*, para 135.

security mission as well and it only delegated it to NATO. The NATO consequently possessed power, vested to it by the SC, to establish operational command of the KFOR. Accordingly, following court reasoning, “the effective command of the relevant operational matters was retained by NATO.”³⁰⁹ The Court by this logic concluded that KFOR was exercising lawfully delegated powers of the SC therefore action was attributable to the UN.³¹⁰ The Court therefore dismissed the application as it concluded it was incompetent to review it *rationae personae*.

What is interesting to note regarding these court findings, is the fact that although referring to effective control when assessing attribution of the conduct, the court has not explained what it understands by effective control. This is however not the most crucial omission. The thing is rather that it departed from the interpretation as used in Nicaragua and Genocide cases and interpreted it by the words of Šturma “*in a highly unusual way.*”³¹¹

Another point is that the court by a rather strange assessment came to the conclusion that the conduct is attributable to the UN. The Court has come to this conclusion by referring to ultimate authority and control which is clearly not what the ILC had in mind, at least if we refer to DARIO and its commentary, which explicitly mentions factual control over specific acts rather than a broad control over whole mission. Furthermore, the Court stopped when it determined that the conduct should be attributed to the UN and since it would not have jurisdiction over UN.

Consequently, the court was criticized for the fact that it concluded that the actions of KFOR had not been attributable to respective TCCs, but to the UN. For example, Bell also points out that attribution of conduct to a sole entity does not exclude a possibility of attribution of responsibility (not conduct) to both international organization and the State by referring to Art. 47 of DARIO (now adopted as Art. 48) which governs responsibility and provides clarification by distinguishing attribution of a conduct from responsibility. In other words, in cases

³⁰⁹ *Ibid.*, para 140.

³¹⁰ *Ibid.*, para. 141.

³¹¹ ŠTURMA, P. Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law, p. 13.

when the conduct might be attributed to one entity it does not mean that merely this entity should bore responsibility for such act.³¹² From this it flows that attribution of conduct to one entity cannot automatically create presumption that this entity bears also responsibility. Therefore, the judicial bodies deciding such cases should, apart from resolving the question of attribution of conduct, also determine which entity bears responsibility for the conduct involved.

The Court in *Behrami and Saramati* clearly could have done more since from the perspective of possible human rights violations as unlawful detentions or cases of SEA by peacekeepers, such pronouncements, given the fact that the organization itself cannot be brought before international or domestic courts, would also undermine whole rationale and noble pillars on which the UN and ECHR is standing.

4.7 ECtHR - Al-Jedda and aftermath

However, on the contrary to the 2007 ECtHR rulings on *Behrami and Saramati* which by not discussing the possibility of dual or multiple attribution of conduct and determining the attribution of the conduct exclusively to the UN and therefore inadmissible, in 2011 in its *Al-Jedda v. UK case* the Court contradicted to some extent with its former judgements or at least provided some other reasoning.

The case concerned a dual Iraqi/British national who was put into detention by British forces to a detention facility located in Iraq. He was held in the detention for more than three years. Al Jedda complained breach of right of liberty and security pursuant to Art. 5 of ECHR. It should be noted that the forces deployed did not involve a specific peacekeeping mission but rather a multinational force under unified command.³¹³ Šturma observes with regard to this that unlike the civil and security presence in Kosovo the multinational force in Iraq was not established on

³¹² BELL, C. A. Reassessing Multiple Attribution: The International Law Commission and the *Behrami and Saramati* Decision, p. 516-517.

³¹³ UN SC Res 1511 , Iraq, 16 October 2003, S/RES/1511 p. 3

instruction by the UN, it was not mandated to operate under UN aegis and it was not a subsidiary UN organ.³¹⁴

With respect to the attribution of conduct the court held that the acts of UK troops in Iraq were attributable to the UK rather than to the UN. More specifically, the ECtHR indicated that the UN had neither effective control nor ultimate authority over the acts and omissions of UK troops. The ECtHR also referred to Article 7 of the DARIO.³¹⁵

The court did not provide a general definition of effective control. However, following DARIO approach it provided a thorough examination of factual circumstances and the specific context of the case in question.³¹⁶ It also implicitly acknowledged that the conduct may be attributed either to the UN, the respective TCC, or both entities.³¹⁷ As Professor Šturma observed the court “seems to have taken a 180-degree turn from the previous approach followed by the Court in *Behrami and Saramati*.”³¹⁸

If we compare the *Behrami and Saramati* judgements before the ECtHR with *Al-Jedda*, the main implication of the former was that the conduct was attributed exclusively to the UN for acts of its peacekeeping forces. Accordingly, an individual could not bring the UN before national or international court because of the absolute immunity of the UN. Moreover, since the UN was attributed with sole responsibility, an individual could not call for responsibility of respective TCC before national or international courts.

Al-Jedda however considered also double and even multiple attributions of conduct and by referring to effective control test it reversed the reasoning pronounced by the ECtHR in *Behrami and Saramati* and concluded that the conduct

³¹⁴ ŠTURMA, P. Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law p. 14.

³¹⁵ ECtHR, *Al-Jedda v. UK*, App. No. 27021/08, 7 July 2011, para. 84.

³¹⁶ *Ibid.*, para. 85.

³¹⁷ The Court does not consider that, (...) the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. *Ibid.*, para. 80, See MILANOVIĆ, M. *Al-Skeini and Al-Jedda in Strasbourg*, *The European Journal of International Law*, Vol. 23, No. 1, 2012, pp. 121-139, p. 136.

³¹⁸ ŠTURMA, P. Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law, p. 14.

may be attributed to respective TCC. Hence an individual was enabled to claim responsibility of respective TCC before national or international judicial bodies.

More interestingly, the Court also discussed also the relationship between Art. 103 of the UN Charter and the ECHR. Pursuant to Art. 103 of the UN Charter in an event of a conflict, all Member States' obligations flowing from the UN Charter shall prevail over any other international agreement.³¹⁹

The Court clarified, with regard to the priority of the obligations under the UN Charter (Art. 103) over Article 5 of the ECHR, very convincingly, that it did not believe that the language used in Resolution 1546 demonstrates precisely that the SC intended to place MS into the multinational force under an obligation to use steps of indefinite internment without charge and without judicial guarantees, in breach of their obligations under international human rights instruments including the ECHR. In the absence of clear provision to the contrary, the assumption shall be that the SC had expected States within the multinational task force to contribute to the maintenance of security in Iraq while complying with their undertakings under international human rights law.³²⁰

In its ruling, the Court also dismissed some assertions that the Fourth Geneva Convention, as a legal basis could operate to disapply obligations vested in Art. 5 of ECHR. More specifically, the ECtHR posited this result explaining that it is not established that IHL places an obligation on an Occupying Power to use indefinite internment without trial'. It further said that in the view of the Court, that it appears from the provisions of the Fourth Geneva Convention that internment under IHL should be viewed not as an obligation but rather as a last resort.³²¹

Thus, following what has been described, the conduct of peacekeepers may, under certain circumstances, apart from the UN, be attributed to respective states. However, this does not necessarily mean, that the states must always have effective control over their troops whilst they are committing SEA during their assignment

³¹⁹ Charter of the United Nations, 24 October 1945, [online] [accessed 2017-4-2]. Available at <<http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf> > , Art. 103.

³²⁰ ŠTURMA, P. Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law, p. 13-14.

³²¹ PEJIĆ, J. The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law, *International Review of the Red Cross*, Vol. 93, No. 883, September 2011, pp. 837-851, p. 843.

but that the effective control criterion is most significant when it comes to identification of the responsible entity. The conduct may be attributed to states after thorough examination of all circumstances, being it mandate of mission and factual circumstances as evidenced in abovementioned examined cases and bearing in mind that the TCCs have exclusive criminal as well as disciplinary jurisdiction over their troops.

To avoid future confusion, it would be more appropriate if a judicial body dealing with cases involving crimes of MMsNCs would address clearly and explicitly when exactly and under which circumstances a TCC has effective control over its troops while deployed in UN peacekeeping operation. Nevertheless, due to the specific nature of these operations, there would perhaps always be a need to base this attribution on 'a factual criterion' and taking into consideration all factors that may be relevant, as stipulated in the commentary to the DARIO.³²²

4.8 Nuhanović and Mothers of Srebrenica

As observed by Professor Šturma, there is a lack of case-law discussing responsibility of international organizations in relation to states' responsibility. Furthermore, these cases are of a heterogeneous nature.³²³ As far as this issue is concerned, and for better understanding of the complexity of the issue, in the following lines we will provide some examples of national case-law that concerned potentially similar problems that arose with regard to attribution of conduct for acts of MMsNCs while deployed in a peacekeeping operation.

The two cases discuss attribution of conduct during the infamous incidents which occurred in Srebrenica and concerned Dutch peacekeepers. First is the Nuhanović case and second is the Mothers of Srebrenica case, both of which appeared before the Dutch courts and also made their way to Strasbourg before European Court of Human Rights.

³²²International Law Commission, Draft Articles on the Responsibility of International Organizations, December 2011, A/66/10, Commentary to Art. 7, p. 23.

³²³ŠTURMA, P. Drawing a Line Between the Responsibility of an International Organization and its Member States Under International Law, p. 12.

In both cases, the Dutch courts held that the acts of Dutch peacekeepers were attributed to the Netherlands since, according to courts, the peacekeepers exercised effective control over 300 Bosnian Muslims who were trying to escape from Serbs and sheltering with Dutchbat. They were later surrendered to the Serbs and most of them were subsequently killed.³²⁴

Nuhanović claimed that the refusal of Dutch peacekeepers to protect his family members constituted a wrongful act which should be attributed to the Netherlands. Boutin clarifies this that the notion of wrongful act should be not be understood in its international law meaning and rather as a tort, since the applicant brought the case primarily on domestic torts. The intention was to determine whether the Netherlands is under an obligation of reparation. On the other hand the arguments by the Netherlands were fully based on international law. The respective court assessed this issue and decided that the claims had to be entertained under private law while attribution of conduct had to pass the test as per international law rules.³²⁵

In its decision, the Dutch Supreme Court in Nuhanović based its reasoning on Article 7 of the Draft Articles on the Responsibility of International Organizations (DARIO) in conjunction with Article 48 (1) DARIO which does not exclude the possibility that the conduct may be attributed both to the UN and the respective state.³²⁶ Since Nuhanović did not claim responsibility of the UN, the Court just addressed only responsibility from the perspective of the Netherlands.

The court referred to Articles 4 and 8 of the ARSIWA and observed that Dutchbat's conduct can be attributed to the state if Dutchbat should be considered as an organ of the state or if it acted under on the instructions or under the

³²⁴ See e.g. BILEFSKY, D. and SIMONS, M., Netherlands held liable for 300 deaths in Srebrenica Massacre. In: *The New York Times* [online]. 2014-7-16 [Accessed 2016-3-2]. Available at < http://www.nytimes.com/2014/07/17/world/europe/court-finds-netherlands-responsible-for-srebrenica-deaths.html?_r=0 >.

³²⁵ BOUTIN, B. L. Responsibility of the Netherlands for the acts of Dutchbat in Nuhanovic and Mustafi: the continuous quest for a tangible meaning for 'effective control' in the context of peacekeeping, *Leiden Journal of International Law*, Vol. 25, No. 2, 2012, pp. 521-535, p. 523-524.

³²⁶ Art. 48 (1) stipulates: "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." Supreme Court of The Netherlands, Case No. 12/03324, *The State of the Netherlands v Hasan Nuhanović*, 6 September 2013, paras 3.9.2, 3.11.2.

direction or control of the state. It decided that the in the case of Dutch peacekeepers the latter Article is applicable.³²⁷

The reason as to why the Court referred to the ARSIWA as well as to the DARIO is perhaps rational, since Article 7 of the DARIO does not say anything about the responsibility of the state, it simply says that when an international organization does not have effective control over conduct then it is not responsible. It should follow from this that the responsibility of a state is not established automatically.

Furthermore, with respect to the effective control criterion, the Court observed that it is not necessary whether the state has countermanded the command structure of the UN by giving instructions to its troops or exercising operational command and control. More specifically, the Court referred to the DARIO commentary with its line of reasoning that the attribution of conduct to the seconding state or the international organization is based *“on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account.”*³²⁸

After the Dutch Supreme Court held that the conduct of Dutch peacekeepers may be attributed to the Netherlands, as the Netherlands exercised the effective control over the troops.³²⁹ The Netherlands was also responsible for the non-pecuniary damage.³³⁰

Nuhanović further filled a complaint before the Military Chamber of the Court in Arnhem against Public Prosecutor’s decision not to investigate Dutch commanders in charge before the Dutch military court. The court ruled in April 2015 that based on all arguments as a whole, there was no basis to open a criminal investigation, because of the fact that although State’s liability in tort was constructed, on the basis of the commanders’ lack of awareness the Military court held that the commanders’ individual liability was not engaged. Consequently, the lawyers representing Nuhanović appealed to the ECtHR claiming that the Dutch authorities have not opened a criminal investigation in this case. The complaint was

³²⁷ Supreme Court of The Netherlands, Case No. 12/03324, *The State of the Netherlands v Hasan Nuhanović*, 6 September 2013, para. 3.8.1-3.8.2.

³²⁸ *Ibid.*, para. 3.11.3.

³²⁹ *Ibid.*, para. 3.13.

³³⁰ *Ibid.*, para 3.15.5.

submitted under Art. 2 of the ECHR wherein it was claimed that the respective Dutch Appeal Court had failed to order the criminal prosecution of the three Netherlands servicemen, or at least a criminal investigation into their involvement in the deaths of their relatives the decision was rendered.

The ECtHR in its decision *Mustafić and others (Nuhanović was involved there as well) v the Netherlands* found the application inadmissible. More specifically, with regard to the applicants' claim that the Appeal Court had applied the wrong legal standard, due to the fact that it had treated the three soldiers merely as potential accessories to crimes, which is distinct from the principal perpetrators, rather than holding them to account as State agents – the Court found that that had been entirely appropriate and the Dutch authorities had sufficiently investigated the incident, given that there was no evidence that the Dutch soldiers had had a direct hand in the killings. There was no lingering uncertainty as regards the nature and degree of involvement of the three servicemen and it was therefore impossible to conclude that the investigations had been ineffective or inadequate.³³¹

Unlike in *Nuhanović* where solely the responsibility of a State solely, the Mothers of Srebrenica claimed responsibility of the UN and filed a complaint regarding the UN's immunity from national jurisdiction in a civil case. The ECtHR in its decision unanimously declared the application inadmissible on the grounds that the UN enjoys immunity from the jurisdiction of national court.³³²

In the Mothers of Srebrenica case the Hague District court, apart from relying likewise on Article 7 of the DARIO when determining attribution of conduct,³³³ also provided definition for effective control. It defined the term as “the

³³¹ Dismissal of claim that Netherlands peacekeepers should have been prosecuted for their conduct at Srebrenica, ECtHR, Press release [online] [accessed 2017-3-8] Available at: <<http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5494500-6902015&filename=Decision%20Mustafic-Mujic%20and%20Others%20v.%20the%20Netherlands%20-%20claim%20that%20Netherlands%20peacekeepers%20at%20Srebrenica%20should%20have%20been%20prosecuted.pdf.>>

³³² See ECtHR, *Stitching Mothers of Srebrenica and Others v. the Netherlands*, App. No. 65542/12, 11 June 2013.

³³³ See The Hague District Court, Case No. C/09/295247 *Stitching Mothers of Srebrenica v The State of Netherlands*, 6 July 2014.

actual say or *factual control* of the state over Dutchbat's specific actions"³³⁴ and further specified it as "*actual say over specific actions whereby all of the actual circumstances and the particular context of the case must be examined.*"³³⁵ The ruling found the Netherlands responsible for the deaths of approximately 300 civilians who were under Dutch effective control. The court further specified that other refugees not located within the mini safe Dutch area were not under effective control of the Netherlands.³³⁶

The evacuation of 300 refugees was discussed between Dutch officer and a Bosnian Serb Military Leader Ratko Mladić. The last group that was to undergo the transport was that of the men aged between 16 and 60 years of age who at first needed to be screened for war crimes. It was agreed that after screening they would be returned back to the enclave. Dutchbat would have to supervise the evacuation and arrange the transportation of the refugees but in the end they let the other party to take care of the transport.³³⁷ Based on this evidence, the Court declared that Dutchbat should have been aware about the serious risk of genocide.³³⁸

Furthermore, the importance of both these cases lays in the fact that the courts established that the peacekeepers are under the duty to protect individuals who are in their control under condition that the peacekeepers are aware of the risk that crimes may be committed against those individuals. As court pointed out in Nuhanović case, the Dutchbat (as a State organ) had received reports that crimes had been committed or were being committed, yet it decided to send the men away from the compound which was under effective control of the Netherlands. However, Mothers of Srebrenica also revealed that States' endeavours may in analogous cases involving peacekeepers lead into their objective to prove that the organization itself should bear the sole responsibility. Consequently, the court

³³⁴ *Ibid.*, para. 4.34.

³³⁵ *Ibid.*, para. 4.46.

³³⁶ The Hague District Court, Case No. C/09/295247 *Stitching Mothers of Srebrenica v The State of Netherlands*, 6 July 2014, para. 4.87.

³³⁷ *Ibid.*, para. 4.212.

³³⁸ *Ibid.*, para. 4.257

would need to determine that due to UN absolute immunity it could not proceed and dismiss the case.

The Nuhanović judgement also affirmed legal obligation to protect individuals in related cases³³⁹ which is also highly relevant for our research since it might be applied to SEA perpetrated by peacekeepers. There is a relative abundance of evidence that the States have not taken sufficient action against the perpetrators of SEA. This has led to repetitive cases since after first revelations not much has happened from the side of TCCs to prevent further criminal acts. Consequently, if those States exercised effective control over their troops, their responsibility may be established.

It should be noted that this decision is very important because it is related to the scope of UN immunity before domestic courts as it was confirmed by the Dutch Supreme Court that the immunity of the UN is absolute.³⁴⁰

With respect to this question Boon points out that in the Mothers of Srebrenica case, relevant authorities have emphasised that the decision not to evacuate some of the refugees near the safe haven fell within the notion of operational necessity. Such regime is paramount to the SC's mandate under Chapter VII. Questions of operational necessity are considered as public matters (*acta iure imperii*), which do not fall within the Section 29 of Convention on the Privileges and Immunities of the United Nations obligation to provide alternative means of settlement. Boon further specifies that the idea behind the distinction of public or private is that immunities should indicate to protect the UN from vexatious litigation.³⁴¹

Verdirame explains that claims arising from gross negligence or wilful misconduct and where it was established personnel that was provided to a peacekeeping operation by a TCC acted wilfully, with criminal intent or because of

³³⁹ ČENGIĆ, A. Introductory Note to the Netherlands v Nuhanović and the Netherlands v Mustafić-Mujić et al. (Sup. Ct. neth), *International Legal Materials*, Vol. 53, No. 3, 2014, pp. 512-537, p. 513.

³⁴⁰ Supreme Court of The Netherlands, Case No. 12/03324, *The State of the Netherlands v Hasan Nuhanović*, 6 September 2013, para 4.3.6

³⁴¹ BOON, K. Mothers of Srebrenica Decision: Dutch Court holds The Netherlands Responsible for 300 Deaths in 1995 Massacre, In: *Opinio Juris* [online] 2014-7-17 [accessed 2016-12-11]. Available at: <<http://opiniojuris.org/2014/07/17/mothers-srebrenica-decision-dutch-high-court-holds-netherlands-responsible-300-deaths-1995-massacre/>>.

gross negligence the UN assumes liability while retaining a right of indemnity against a TCC.³⁴² This is not applicable when claims are resulting or attributable to the acts of peacekeepers arising from operational necessity.³⁴³ Such liability could have been excluded with regard to the Dutch involvement or failure to protect refugees during Srebrenica massacre due to the fact that this failures/omissions resulted from operational necessity. With respect to our research, it certainly cannot be pointed out that SEA by peacekeepers had resulted from the same factor.

To support our understanding, we shall further shed light to the concept of operational necessity and ascertain what it is understood under such a notion. Verdirame observes that although it is in some ways similar to military necessity, operational necessity applies where damage results from necessary actions taken by peacekeepers while carrying out their operations in pursuance of the mandate of an operation.³⁴⁴ The operational necessity clearly cannot emerge in situations of SEA perpetrated by peacekeepers since SEA is not a necessary action and it is also very unlikely that by undertaking such activities would be needed to efficiently carry out operations in pursuance of the mission's mandate.

It follows from this that another important question arises. In particular, it needs to be clarified whether the peacekeepers while perpetrating SEA, act in their official capacities or in other words, in the exercise of their competences. In this context, we need to determine whether acting beyond official's competence affects the question of organization or State responsibility.

4.9 Organ or Official is Acting Ultra Vires

Not every conduct by an organ or official might be attributed to the State. Generally, only acts that are perpetrated in official capacity or by exercising organ's or official competence can be attributed to the State, which as shall be

³⁴² VERDIRAME, G. *The UN and Human Rights Who Guards the Guardians?* Cambridge: Cambridge University Press, 2011, p. 227.

³⁴³ See UN GA Res 52/247, Third-party liability: temporal and financial limitations, 17 July 1998, A/RES/52/247, para. 6.

³⁴⁴ VERDIRAME, G. *The UN and Human Rights Who Guards the Guardians?* p 227.

demonstrated is important for our case. With respect to acts of SEA perpetrated by peacekeepers the preliminary observation might be that such acts are not committed in official capacity since it is rather unreal that requirements of such conduct would be provided for in respective mandate of the mission or other documents specifically governing conduct of respective troops. The same might be observed when establishing responsibility of international organizations.

Šturma and Čepelka in this context note that even with regard to sexually motivated criminal offences, those fall in a private capacity, it is purely private conduct. However, with regard to the norms of IHL (*jus in bello*) this is not the case. In the aspects of *jus cogens* IHL norms which must be adhered to in all circumstances and IHL in this extent also prohibits such violent behaviour of members of armed forces.³⁴⁵

This was legally laid down for example in Art. 91 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 which governs the situation when a State Party to the conflict, which violates the respective provisions of Geneva Convention or a provision from Protocol I, shall if the case so demands, be liable to pay compensation. The responsibility of such State for all acts committed by individuals forming component of its armed forces shall be involved.³⁴⁶

Čepelka and Šturma with regard to this point out that this includes implicitly all acts, not only those that would interfere with the instructions or orders, but also sexually motivated crimes.³⁴⁷ Following this reasoning such acts whether private or not including SEA could be imputed even to the UN in the cases where IHL is applicable but only in cases where the acts reach threshold of crimes against humanity (acts committed as part of the attack, knowledge of the perpetrator that his behaviour was part of or intended his behaviour to be part of a widespread or systematic attack against a civilian population) or war crimes, as was discussed in

³⁴⁵ ČEPELKA, Č. a ŠTURMA, P. *Mezinárodní právo veřejné*, p. 590.

³⁴⁶ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 91.

³⁴⁷ ČEPELKA, Č. a ŠTURMA, P. *Mezinárodní právo veřejné* p. 592.

previous Chapter (violation of IHL must be perpetrated by engagement into armed conflict).

Now this might not always be clear cut with regard to the peacekeeping missions since not all armed conflicts where the peacekeeping operations are deployed must necessarily reach the threshold of an armed conflict. Moreover, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 does not contain such provision which provides explicitly for the same assurances as Art. 91 of Protocol I. This would then fall within the *lex specialis* rule set out under Art. 55 of ARSIWA and Art. 64 of DARIO which provide that the articles are not applicable where special rules of international law governing State or international law organization responsibility exist.³⁴⁸

Attribution of responsibility would not be that much clear cut when IHL rules would not apply, as it is the case of several peacekeeping operations. The ILC in both ARSIWA and DARIO governs the possibility of acts *ultra vires* or excess of authority or contravention of instructions. More specifically, Article 7 of DARS provides that *“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”*³⁴⁹

Article 8 of DARIO reads as follows: *“The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.”*³⁵⁰

If we compare respective articles of ARSIWA and DARIO governing *ultra vires* acts we may observe the following. Both provisions refer explicitly to official capacity. Art. 8 of DARIO adds that the agent must act under overall functions of that organization. Based on wording of Art. 8 of DARIO such conduct can be

³⁴⁸ BURKE, R. *Sexual Exploitation and Abuse by UN Military Contingents*, p. 290-291.

³⁴⁹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 7.

³⁵⁰ Draft Articles on the Responsibility of International Organizations, Art. 8.

established if a peacekeeper was performing functions or engaging in conduct related acts under official authority and mandate of the UN. Accordingly, we could presume that such conduct must be attributed to the organization. Such presumption might be rebutted if it is demonstrated that a peacekeeper had acted under instructions of the TCC.

In a different view and interestingly, Palchetti provides that Dutch District Court in *Mothers of Srebrenica* determined that conduct must be attributed to the TCC, notwithstanding the fact whether this State had given any instruction or order relating to the ultra vires conduct. This would be the case because that 'state has a say over the mechanisms underlying said ultra vires actions.'³⁵¹ Clearly, this would not be the case with SEA perpetrated by the peacekeepers or at least not always. Firstly we would like to return back and mention what was stated already.

As we have observed, it would be difficult to establish that acts of SEA fall within official capacity. We agree with Šturma and Čepelka that with regard to jus cogens norms of IHL that must be respected in all circumstances, members of armed forces are under an obligation to not to commit crimes and act violently. This would not however be always the case during the peacekeeping missions.

The nature of conflict would not be the only complicating factor, as we provided above by quoting respective articles, the other is the fact that a peacekeeper perpetrating acts of SEA acts under overall functions of the organization or a State when such State is aware of the fact that its troops are going to contravene or have contravened the instructions and does nothing about it.

It cannot be said that every ultra vires act must invariably be attributed to the TCC due to the fact that such TCC retains disciplinary powers or the power to exercise criminal jurisdiction over its troops. The retention of such powers does not imply that the State exercised factual control over the specific ultra vires conduct of peacekeepers.

Palchetti further citing ILC Report on the work of its sixty-third session that for the purpose of ultra vires act's attribution, what is decisive is whether

³⁵¹ PALCHETTI, P. *International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution*, *Sequência (Florianópolis) no. 70 Florianópolis Jan./June 2015*, 2015, p. 43.

peacekeepers were purportedly or apparently carrying out their official functions and not whether the TCC (or the organization) was bestowed with powers which would have allowed it to prevent such conduct from occurring.³⁵²

In this context we may say that SEA perpetrated by peacekeepers is clearly not perpetrated in official functions and is clearly an off duty act. Such act must therefore be distinguished from acts *ultra vires*. Rather, as stipulated by the ILC Commission in its Commentary to Art. 7 of ARSIWA, *“cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.”*³⁵³ In the context of SEA perpetrated by peacekeepers, we are speaking about acts committed in private capacity and not acts *ultra vires*.

With respect to UN responsibility for acts in private capacity/off duty acts, we may base our findings on the ICJ decision in *Special Rapporteur of 29 April 1999*. The Court provided the *“immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.”*³⁵⁴

The Court further referred to Article VIII, Section 29, of the General Convention and emphasises that *“any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that the United Nations shall make provisions for pursuant to Section 29.”*³⁵⁵

Based on this evidence, the ICJ implicitly refused either legal or financial responsibility for acts perpetrated in private capacity. The first sentence of the respective paragraph of the judgement might to some extent cover also peacekeepers as it speaks about United Nations which may cover also

³⁵² PALCHETTI, P. *International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution*, p. 44.

³⁵³ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, p. 46.

³⁵⁴ ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 29 April 1999, para. 66.

³⁵⁵ *Ibid.*, para. 66.

peacekeepers. Nevertheless the second part refers to General Convention provisions which are not applicable to MMsNCs. With respect to this, to establish responsibility of the UN would be very difficult.

Concerning the responsibility of a State, Burke refers to ILC in its Commentary to Art. 7 of ARISWA which provides that if the conduct is systematic and repetitive and the State knew or should have known and should have taken steps to prevent might provide the logic to argue that with respect to repetitive nature of SEA and foremost the TCC's and UN's knowledge of it, the conduct (although acts perpetrated in private capacity) might be attributed to the TCC or to a lesser extent, according to Burke, also to the UN, which is however less clear-cut. This author further points out that it is more plausible to contend that the responsibility may be imputed to the TCC or UN for their omission to prevent such acts and consequently to punish the perpetrators.³⁵⁶

Yet, as we can agree to some extent with such observation, attribution to UN of such acts would be, based on above findings, at least very difficult if not problematic due to the fact that UN is not the body responsible to try perpetrators and it has to certain extent undertaken some steps how to prevent acts from occurring. Whether its steps are sufficient is a different question but certainly not a question how to resolve the issue of responsibility.

It needs to be pointed out that responsibility of a State, due to its failure to prevent acts from occurring and failure to punish perpetrators may arise not because of the gravity of the acts. Given the repetitiveness, fact that the acts were perpetrated in different territories, time passage between acts, knowledge of the State and failure to take adequate steps to punish perpetrators and prevent further similar acts, It should also to be noted that it is not act ultra vires that would be attributable to the State (because SEA are simply not considered as ultra vires acts but rather off duty acts). State responsibility would arise because of failing to prevent the acts from occurring and failing to bring perpetrators of SEA to justice.

Palchetti further points out that the international responsibility of a State may arise not by the fact that the State is itself responsible for the conduct which

³⁵⁶ BURKE, R. Sexual Exploitation and Abuse by UN Military Contingents. p. 288.

was perpetrated by a peacekeeper in a private capacity and off duty. Instead, bearing in mind that the peacekeeper has breached either IHL (case that was to some extent discussed few lines above) and international human rights law rules, consequently, TCC is under an international obligation to punish such perpetrator, since its responsibility arises as a reaction of the failing of its authorities to bring the perpetrator to justice, and not as a consequence of the wrongful conduct of peacekeepers.³⁵⁷ We agree that such responsibility may arise with regard to State since it is the State which has exclusive criminal jurisdiction with respect to any criminal acts perpetrated by them, then based on what was said previously such responsibility of a State might be incurred through omission.

What should be the role for the UN? Although not being Party to international human rights treaties and not having competence in punishing perpetrators it shall indeed provide either preventive mechanisms or incite the States to take further action against targeting SEA, being it preventive action (e. g. awareness raising or calling for more transparent vetting procedures) or in bringing perpetrators to justice. Furthermore, in the territories where the acts occur, the UN should provide greater protection to the victims of SEA, better support, assistance and it shall ensure that teams or special units performing assistance to victims would be equipped with experts with sufficient experience in this field.

4.10 Legal Consequences of Wrongful Acts

This part should briefly explore legal consequences of wrongful acts. In particular, we will look into what legal relationship come into existence as a consequence of unlawful conduct which is SEA.

As per Art. 33 of ARSIWA obligations of States may, depending on particular character of the obligation be owed to States, several States or international community as a whole. Second paragraph specifies that obligations may be owed to

³⁵⁷ PALCHETTI, P. International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution, p. 44.

any person or entity other than State.³⁵⁸ This may be for instance be the case as concluded by the ICJ in LaGrand case where the Court opined that Art. 36 of the Vienna Convention on Consular Relations creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in the ICJ by the national State of the detained person.³⁵⁹

In the same vein, Art. 33 of DARIO stipulates that obligations of international organisations may be owed to one or more States, one or more other organizations or to international community as a whole. Similarly, second paragraph provides that obligation of an international organization may be owed to any person or entity other than a State or an international organization.³⁶⁰

Art. 34 of ARSIWA and Art. 34 of DARIO both further govern the reparation for the injury caused by international wrongful act which shall have the form of restitution, compensation and satisfaction.³⁶¹

Articles 35 of ARSIWA and DARIO govern the first form of the reparation, restitution. It implicates the reestablishment as far as possible of the situation which existed prior to the perpetration of the internationally wrongful act, to the range that any alterations that have arisen in that situation may be tracked to that act.³⁶²

In the context of SEA by peacekeepers it is however problematic how the reestablishment of the prior situation might be achieved. Therefore, we need to look to other forms.

Art. 36 of ARSIWA and DARIO both deal with compensation for damage which was inflicted by an internationally wrongful act, to the nature that such damage is not corrected by restitution. The term of damage is further defined as any damage whether material or moral.³⁶³

³⁵⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 33.

³⁵⁹ See ICJ, *LaGrand Case, (Germany v. United States of America)*, Judgment of 27 June 2001, para 77.

³⁶⁰ Draft Articles on the Responsibility of International Organizations, Art. 33

³⁶¹ See Art. 33 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, and Draft Articles on the Responsibility of International Organizations, respectively.

³⁶² See commentary to Art. 35 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, and Draft Articles on the Responsibility of International Organizations, respectively

³⁶³ Draft Articles on Responsibility of States for Internationally Wrongful Acts Commentary to Art. 36, p. 98.

As is further specified in the commentary, non-material damage can be commonly perceived to include loss of close relatives, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.³⁶⁴ Compensation might be therefore a suitable form of reparation in relation to SEA by peacekeepers.

Art. 37 of ARSIWA and DARIO respectively govern third form of reparation which is satisfaction. As stipulated by para. 2 of the respective article, *“satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”*³⁶⁵ It should be noted that the forms presented in this article are merely examples and satisfaction may have other form. The commentary to DARS provide further examples as *“due inquiry into the causes of an accident resulting in harm or injury, (...), disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act or the award of symbolic damages for non-pecuniary injury.”*³⁶⁶

Disciplinary and penal action against perpetrators of egregious crimes is also of a high relevance in relation to SEA by peacekeepers and it might be considered as a form of reparation that can be used frequently. If the TCC fail to investigate thoroughly relevant facts and bring the perpetrators to justice, a form of satisfaction may come into question.

4. 11 Exploring Avenues for the Invocation of Responsibility

Since the UN is not Party to international human rights instruments it is also questionable whether a claim for reparation brought directly against the organization might be successful. And if so, which entity shall have jurisdiction to decide in such case. In the same vein, in this part we will look into the possibilities which bodies may be addressed if a State responsibility is claimed.

³⁶⁴ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Art. 36 p. 101.

³⁶⁵ *Ibid.*, Art. 37 (2).

³⁶⁶ See *Ibid.*, Commentary to Art. 37, p. 106.

Nevertheless, at the outset we must determine which entity, depending on all the circumstances, we want to hold to account. In other words, whether it should be the UN or a respective State. We shall demonstrate that with respect to the UN there are not that many possibilities as with States. Since the UN is not a Party to international human rights instruments it is also questionable whether a claim brought directly against the organization might be successful.

Firstly, an injured party may take up the claim for not respecting local laws from the side of peacekeepers directly to the UN. However, what should be the particular UN authority to which the claim should be addressed is ambiguous. It can perhaps be the Chief of the Mission but the State may also bring the claim to the SC which authorizes the mission or to the UN SG.

As Burke points out, although the UN is not under an obligation to ensure that the TCC exercise effectively jurisdiction over their personnel, there is an indirect relationship based on revised model MOU, which governs settlements of disputes and puts an obligation on the UN to establish a mechanism in a mission to discuss and resolve, amicably by negotiation in a spirit of cooperation, differences arising from its application. However, it is not clear what outcome of such system should be.³⁶⁷

Further to this, it may be opined to bring a claim against the UN before national courts. This was the cause for example in the Mothers of Srebrenica case before the Dutch courts. However, as was pointed out the UN possesses absolute immunities before domestic courts.

Nevertheless, some option is further raised by Art. 53 of Model SOFA which provides that any dispute between the UN peacekeeping operation and the host country, shall unless otherwise agreed by the parties submitted to a tribunal of three arbitrators. However, thus far such procedure has not come into existence with regard to any peacekeeping mission.

As we have mentioned in previous part, the UN accepted that claims arising from gross negligence or wilful misconduct and in those cases where it was established that the personnel MMsNCs which was provided to an operation by TCC

³⁶⁷ See BURKE, R. Sexual Exploitation and Abuse by UN Military Contingents. p. 300-301.

acted wilfully, with criminal intent or because of gross negligence, the UN assumes liability while retaining a right of indemnity against a TCC.³⁶⁸

Such position is also governed by Model MOU in its Art. 9 entitled claims by third parties which provides that the UN shall be responsible for dealing with any claims by third parties where inter alia personal injury, was caused by the personnel or equipment provided by the TCC in the performance of services or any other activity.

Consequently, as per Art. 10 the TCC shall reimburse the UN. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the TCC, the TCC will be liable for such claims.³⁶⁹

In the last case cited above where the UN would accept responsibility for dealing with claims of an injury, death, caused by gross negligence or wilful misconduct by MMsNCs, this would be rather narrowed or restricted to financial compensation primarily, while the question of impunity would stay untouched and will stay with the TCC.

Rashkow discussing the procedure for the third party claims, observes that as for the peacekeeping missions, the UN established internal administrative processes in place to deal with claims against it. Initially, these processes have included internal so-called claims review boards. Their decisions may be further challenged by requests for additional administrative review within the UN or arbitration. As for the future of its working, the newly established regime recognizes that such claims may continue to be addressed, as they have in the past, by local claims review boards. The new regime also preserves the long-standing but never invoked option for the establishment of a standing claims commission which have their legal basis in the SOFA although in reality they were never established.³⁷⁰

With regard to their establishment we may provide few words concerning the recent Haiti Cholera crisis case. In this case the victims claimed the UN

³⁶⁸ VERDIRAME, G. The UN and Human Rights Who Guards the Guardians? P. 227.

³⁶⁹ See Memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation], 3 October 2006, A/61/494 Art. 9 and Art. 10.

³⁷⁰ RASHKOW, B. Remedies for Harm Caused by UN Peacekeepers, In: *American Society of International Law*. [online] 2014-4-2 [accessed 2016-12-11] Available at: <<https://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers>>.

responsibility in spreading the disease inside Haiti. As a consequence several thousand³⁷¹ people have died in Haiti since then. UN was accused of failing to provide sufficient measures in scrutinizing the Nepalese peacekeeping contingent which entered the Haitian soil and the claimants urged the UN to establish a claims commission under the terms of the SOFA with Haiti to review the claims. Furthermore, the claimants have filed suit against the UN in the Federal District Court in New York.³⁷²

More specifically, it was on March 7, 2014 when the Government of USA submitted a Statement of Interest claiming that the UN has immunity from suit and service in this case. Subsequently, On May 15, 2014 the plaintiffs send a response with a brief that argued that the UN does not possess immunity when it has interfered with its treaty obligations to provide victims access to an out-of-court process for establishing their claims. Around 20 prominent international law and human rights experts, several with UN experience and connection, signed on to amicus curiae letters submitted on the same day and supporting of plaintiffs.

Consequently, on July 7, 2014 the Government of USA lodged its reply in which it insisted on UN immunity. Plaintiffs filed a letter concerning this emphasising that the UN's failure to create an alternative mechanism for deciding on victims' claims violates its legal obligations and denies victims the basic right to a remedy.

If we accept an assertion that it is UN's obligation to provide alternative mechanism to decide on victims' claims, we would maintain that the UN failed to comply with its obligations foreseen in SOFA concluded between the UN and Haiti. Nevertheless, this cannot imply that the UN absolute immunity from every form of legal process would be waived (unless it is waived by the organization itself, which is definitely not the case here).³⁷³ . On October 23, 2014 the court heard oral

³⁷¹ Some claim the total number of victims is greater than 30 000. See PILKINGTON, E., and QUINN, B. UN admits for first time that peacekeepers brought cholera to Haiti. In: *The Guardian* [online] 2016-12-1 [accessed 2016-12-12]. Available at: < <https://www.theguardian.com/global-development/2016/dec/01/haiti-cholera-outbreak-stain-on-reputation-un-says>>.

³⁷² RASHKOW, B. Remedies for Harm Caused by UN Peacekeepers.

³⁷³ „It remains indispensable, however, that the new process should also involve an apology entailing acceptance of responsibility and an acceptance that the victims' claims raise private law matters, thus requiring the United Nations to provide an appropriate remedy. Acceptance of these two elements

statements on the question of UN immunity. On January 9, 2015, the Court ruled in favour of the defendants and (perhaps rightly) dismissed the case for lack of subject matter jurisdiction.³⁷⁴

The Appeals court ruled in August 2016 that the UN cannot be sued before American courts. More specifically, as opined by the court, the UN did not lose its legal immunity even if it failed to give the plaintiffs a chance to seek a settlement, as required by an international instrument. Paradoxically, few hours before the decision was made public, the UN admitted finally that it played some role (although not saying explicitly that the organization has caused the outbreak) in the cholera spreading and presented a statement that more could have been done with regard to the initial outbreak of the disease. It also acknowledged that new actions must be introduced.³⁷⁵

On 1 December 2016 then SG Ban Ki-moon delivered a public apology before the GA. He did not however say that the UN has caused the outbreak but merely stated that more could have been done with regard to it. By his statement Ban Ki-moon rather proclaimed a moral responsibility.³⁷⁶ By this the UN has admitted some wrongdoing and promised to create a fund to provide compensation to victims. However, up until now, it has failed to collect the sufficient sum of money since of the plans that \$400 million is needed, only about \$2 million has been raised so far by respective Member States (South Korea, France, Chile, India and Liechtenstein).³⁷⁷

would in no way prejudice the UN's right to immunity from suit, and nor would it open the floodgates to other claims." See UN GA, Report of the Special Rapporteur on extreme poverty and human rights, 26 August 2016, A/71/40823., p. 2.

³⁷⁴ Building Stability and Prosperity in Haiti Through Justice, Institute for Justice and Democracy in Haiti, Cholera Litigation, Current Status, [online] [accessed 2016-12-12] Available at: <<http://www.ijdh.org/cholera/cholera-litigation/>>.

³⁷⁵ PIARROUX, R. The U.N.'s responsibility in Haiti's Cholera Crisis, In: New York Times, [online] 2016-9-7 [accessed 3-4-2017] Available at: <https://www.nytimes.com/2016/09/08/opinion/the-uns-responsibility-in-haitis-cholera-crisis.html?_r=0>.

³⁷⁶ SENGUPTA, S. U N. Apologizes for Role in Haiti's 2010 Cholera Outbreak, In: *New York Times*, [online] 2016-12-1 [accessed 2017-3-4] Available at: <https://www.nytimes.com/2016/12/01/world/americas/united-nations-apology-haiti-cholera.html?emc=eta1&_r=1>.

³⁷⁷ The Editorial Board, U. N. Accepts Blame but Dodges the Bill in Haiti, In: New York Times, 21 March 2017, [online] 2017-3-21 [accessed at 2017-4-1] Available at: <<https://www.nytimes.com/2017/03/21/opinion/un-accepts-blame-but-dodges-the-bill-in-haiti.html>>.

Although this is a rather different situation in comparison to SEA it may be observed that the fact that the UN clearly possesses absolute immunity prevents further measures even if the conduct could be attributed to the UN.

If we additionally contend that the UN has violated its obligations by not providing effective remedy to the victims just as envisaged by Art. 51 (establishment of claims commission to resolve any dispute or claim of a private law character)³⁷⁸ and Art. 53³⁷⁹ of Model SOFA respectively, the organization itself should, bearing in mind its noble purposes,³⁸⁰ provide compensation and take measures in stopping the violent acts from occurring and establish safeguards that would prevent the acts from occurring in the future.

Nevertheless, it would always be individual Member States who need to agree on steps that need to be taken within the relevant organs of the UN to stop violence and who would on behalf of the UN provide funds to indemnify victims in terms of financial compensation.

With respect to bringing claim against the UN before some of the international judicial tribunals or human rights monitoring bodies the possibilities are limited. Due to the fact that the UN is not a party to treaties and human rights conventions human rights monitoring bodies such as ECtHR do not have jurisdiction over the UN.

As regards the ICJ, Art. 34 of the ICJ Statute stipulates that the Court has jurisdiction in contentious cases over States only. However, as suggested by the International Law Association pursuant to Art. 96 of the UN Charter in connection to Art. 65 of the ICJ Statute, the UN may submit the request to ICJ. Such opinion is non-binding, other shortage is the fact that such opinion would not break through

³⁷⁸ Establishment of claims commission to resolve any dispute or claim of a private law character. See UN GA, Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, 9 October 1990, A/45/594, Model SOFA, Art 51.

³⁷⁹ Any other dispute and any appeal shall be submitted to a tribunal of three arbitrators. See *Ibid.* Art. 53 Model SOFA.

³⁸⁰ Pursuant to Art. 1 para 3 of the UN Charter one of essential purposes of the UN is to “*achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.*” Charter of the United Nations, 24 October 1945, [online] [accessed 2-2-2017]. Available at <<http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf> > .

the UN immunity and it is also not very likely that the UN would endeavour for such opinion before the ICJ.³⁸¹

In the following lines we shall explore some possibilities which avenues may be addressed if we want a State hold to account. First of all we can mention the institute of diplomatic protection whereby a host State and a TCC are both parties to a multilateral instrument. This can be done before an objective body. However, the body does not assess violation caused to a State but injury/damage done to its national. The State is with regard to this affected only on its simple interest and not on its subjective right and the Court in full extent constitutes the decision on compensation. Pursuant to a treaty that was concluded beforehand the Court obliges guilty State primarily (liability) to pay a financial compensation not to injured individual but to the State of individual's nationality which submitted a claim on behalf of its national (translation by author of this thesis).³⁸²

With regard to SEA by peacekeepers this could be done for example through ICJ since this Court has power to adjudicate disputes between States. However, after assessing the cases that particular States have submitted before it, it is very unlikely that such claim would be brought before it by a State whose national is a victim of SEA. This assertion can be supported by the fact that many victims' States have fragile regime, they are facing difficult situations, civil strife or humanitarian catastrophes (which is ultimately why a peacekeeping mission was deployed to such State) therefore it is not very wise to expect that such State would submit a claim on behalf of its victims.

³⁸¹ BURKE, R. Sexual Exploitation and Abuse by UN Military Contingents, p. 305-306.

³⁸² This needs to be distinguished from the responsibility as a legal consequence which flows from general international law where the court just declares such legal consequence in its declaratory judgement. Such decision constitutes only the amount of compensation. ČEPELKA, Č. a ŠTURMA, P. *Mezinárodní právo veřejné*. p. 642. In the same vein, Kool understands responsibility as the substantive form of having to act with due diligence; non-compliance implying that the community is entitled to request the violator to accept the consequences of his irresponsible behaviour. In a legal context, this further leads to liability: attaching legal consequences to unlawful behaviour, thereby implying a legal obligation to provide for redress. Accountability, on the other hand, primarily refers to the procedural aspect, symbolizing the ritual of being tried in a court. The author further points out that there is a specific sequence within this three terms: accountability follows responsibility, whereas accountability aims at establishing liability. KOOL R.S.B. (Crime) Victims' Compensation: The Emergence of Convergence, *Utrecht Law Review*, Vol. 10, No. 3, 2014, pp. 14-26, p. 16.

Other possibility, as was discussed above is to initiate proceedings before the TCC's national courts. We have discussed this option above in Dutch cases even in relation to peacekeeping missions.³⁸³ These cases illustrate, that States sometimes try to evade itself from the responsibility by trying to transfer it to the UN, which would then have absolute immunity before the Courts. Solid achievements can be witnessed in these cases as the victims have reached at least financial compensations of some ten thousand of Euros.³⁸⁴

Nevertheless these cases were also brought before the ECtHR and it has taken quite a few time since at least something was accomplished. Applicants in Nuhanović claimed also responsibility of individuals which was dismissed.

Another already outlined option is to seek justice before international human rights monitoring bodies which in contrast to the abovementioned option of diplomatic protection, accept also complaints of individuals. An individual may claim violations of international human rights law trying to invoke the responsibility of a TCC for SEA or omission to omission to prevent such acts.

With regard to this an individual has several options which may be used simultaneously. Requirement is that the TCC must be a State Party to a treaty over which the body has jurisdiction. In the following lines we will address several possibilities.

If a TCC is a State Party to ECHR, a State may lodge a complaint concerning any alleged breach of the Convention.³⁸⁵ Same possibility may be used by individuals, NGOs or group of individuals.³⁸⁶ Of course, there are some admissibility criteria which must be met such as exhaustion of domestic remedies and the application must be submitted within a period of six months from the date on which the final decision was taken.³⁸⁷ If the Court finds out there has been a violation of

³⁸³ *Supreme Court of The Netherlands, Case No. 12/03324, The State of the Netherlands v Hasan Nuhanović, 6 September 2013.* and The Hague District Court, Case No. C/09/295247 *Stitching Mothers of Srebrenica v The State of Netherlands*, 6 July 2014.

³⁸⁴ PIETERS, J. Compensation Deal Reached With 2 Srebrenica Families, In: *NL Times*, 26 June 2016, [online] 2016-6-26 [accessed 2016-12-18] Available at: <<http://nltimes.nl/2015/06/26/compensation-deal-reached-2-srebrenica-families>>.

³⁸⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Art. 33.

³⁸⁶ *Ibid.*, Art. 34.

³⁸⁷ *Ibid.*, Art. 35.

ECHR it affords just satisfaction to the injured party to the case.³⁸⁸ Art. 46 of ECHR provides that States shall abide the Court's judgment. A final judgment is transmitted to the Committee of Ministers which supervises its execution and may take further steps if a Party refuses to abide by a final judgment.³⁸⁹

In the recent years have some authorities of the Parties to the ECHR contested that they are not automatically bound by the Court's decisions and that they do not need to implement them automatically.³⁹⁰ Although, such radical views are rather sporadic, they cannot be overlooked and underestimated.

Approach based on American Convention on Human Rights comes into consideration if a perpetrators are nationals of a State Party to this Convention.

The Inter-American System is composed of two entities: a Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both authorities can decide individual complaints concerning alleged human rights violations and may issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm.³⁹¹

If Commission receives a claim it may request further information from a State which is indicated as being responsible for the alleged violations, the Commission may further carry out an investigation and may try to provide assistance to parties to reaching a friendly settlement.³⁹² If these procedures are not completed and the settlement could not be reached, State Parties or Commission itself have a right to submit a case before the Inter-American Court of Human Rights.³⁹³

³⁸⁸ *Ibid.*, Art. 41.

³⁸⁹ *Ibid.*, Art. 46.

³⁹⁰ Russian Constitutional Court came to the conclusion that the decision of the ECtHR on compensation payment of more than €1.866 bln on Yukos case violates the Russian Constitution and cannot be enforced. The Russian Constitutional Court upheld its 2015 decision where it stated that Russia may not enforce decisions of ECtHR if they contravene Russian Constitution. PHILIPPOV, I. Russian Constitutional court denies enforcement of ECHR decision on Yukos, In: *CIS Arbitration Forum*, 25 January 2017 [online] 2017-1-25 [accessed 3-4-2017] Available at: <<http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/>>.

³⁹¹ See International Justice Resource Center. Inter-American Human Rights System, [online][accessed 2017-3-23]. Available at: <<http://www.ijrcenter.org/regional/inter-american-system/>>.

³⁹² See *Ibid.*, Art. 48.

³⁹³ See *Ibid.*, Art. 61.

The decisions of the Court are binding. The Court may rule that the injured party be ensured the enjoyment of its right or freedom that was violated. It shall also rule, that the consequences of the measure or situation that constituted the breach of such right or freedom are remedied and that compensation be paid to the injured party.³⁹⁴

As regards the implementations of decisions by the Court Huneus states that it is rather an “*elusive goal*.”³⁹⁵ More specifically, as for 2008, States had fully implemented only one tenth of the Court’s rulings. Of the 105 cases that accomplished a final judgment, 94 were still under the Court’s jurisdiction pending compliance.³⁹⁶

With respect to SEA perpetrated by peacekeepers from States of African continent, a victim may submit a complaint to the African Court on Human and People’s rights.³⁹⁷ However, the prerequisite is that the State has signed and ratified the Protocol to the African Charter on Human and Peoples’ Rights (ACHPR) and furthermore the Court may receive complaints by NGOs and individuals³⁹⁸ if a State Party concerned has made a declaration that it accepts competence of the Court.³⁹⁹

The Court decided its first case in 2009 and since then it has not adjudicated that many cases⁴⁰⁰ especially if we compare its work with above mentioned mechanisms. Its future work will demonstrate whether its decisions can make impact and be implemented. Nevertheless, the Court can order the payment of fair compensation or reparation⁴⁰¹ and its decisions are binding on State Parties.⁴⁰²

³⁹⁴ See *Ibid.*, Art. 63.

³⁹⁵ HUNEUS, A. Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights. *Cornell International Law Journal*, Vol. 44, 2011, pp. 493-533, p. 504.

³⁹⁶ *Ibid.*, p. 504.

³⁹⁷ As of March 2017, 30 States had accepted the Court’s jurisdiction.

³⁹⁸ African Union, Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003, Art. 5 (3).

³⁹⁹ *Ibid.*, Art. 34 (6). Up until today, only 8 States have accepted the Court’s jurisdiction to receive complaints referred by individuals and NGOs. These States are Benin, Burkina Faso, Cote d’Ivoire, Ghana, Malawi, Mali, Rwanda, and Tanzania.

⁴⁰⁰ Up to 2012, the court has received 22 applications. See African Union, Report of the African Court on Human and Peoples’ Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa. 8-9 November 2012.

⁴⁰¹ African Union, Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003, Art. 27 (1).

⁴⁰² *Ibid.*, Art. 30.

The other institution working under ACHHPR system is The African Commission on Human and Peoples' Rights. It is a quasi judicial body tasked to promote and protect human rights in the 54 Member States of the African Union, which have all ratified the ACHHPR.

The mandate of the Commission is pursuant to Art. 45 of the ACHHPR to *"collect documents, undertake studies and researches on African problems in the field of human and peoples, rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments."*⁴⁰³

The other option could be to submit a communication to Committee on the Rights and Welfare of the Child which is a body established within the Organization of African Unity and its primary mandate is to monitor implementation of the rights enshrined in The African Charter on the Rights and Welfare of the Child. It may receive communications also by individuals⁴⁰⁴ and also may resort to any appropriate methods of investigating.⁴⁰⁵

With regard to States that are Parties to International Covenant on Civil and Political Rights, a competent organ to receive communications from another State Parties is the Human Rights Committee.⁴⁰⁶ Furthermore, the individual complaint mechanism was established by its Optional Protocol.⁴⁰⁷ It should be noted that there are 169 State Parties to the ICCPR and 116 State Parties to its Optional Protocol making these instruments two of the most ratified Conventions within the system of international law.⁴⁰⁸ The Committee shall then forward its views to the

⁴⁰³ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, Art. 45.

⁴⁰⁴ See Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, Art. 44.

⁴⁰⁵ See *Ibid.*, Art. 45.

⁴⁰⁶ ICCPR, Art. 41.

⁴⁰⁷ UN GA, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, Art. 5 (1).

⁴⁰⁸ HARRINGTON, A. H. Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties, *Duke Journal of Comparative & International Law*, Vol. 22, No. 2, 2012, pp. 153-182, p. 159.

State Party concerned and the individual.⁴⁰⁹ It is however still contested whether the views expressed under Art. 5(4) of the Optional Protocol qualify as decisions of a quasi-judicial body or simply constitute authoritative interpretations.⁴¹⁰

Harrington with regard to this points out that The HRC is the most important interpreter of the ICCPR which is itself legally binding. The HRC's decisions are thus strong indicators of legal obligations. In this context, rejection of those decisions is good evidence of a State's bad faith attitude towards its ICCPR obligations.⁴¹¹

4.12 Concluding Remarks

In this part we have found that decisive factor for establishment of responsibility of an entity is attribution of conduct. Effective control test is considered as the most successful and most reasonable solution for the attribution. In addition, responsibility of the State may arise through failure to prevent SEA from happening and from failure to bring perpetrators of SEA to justice.

Furthermore, our finding is that after making attribution of conduct test, responsibility may be attributed to several entities, for example both State (or several States) and international organization (or theoretically several international organizations).

We have demonstrated that the acts of SEA by peacekeepers fall beyond their official capacity, these acts are not considered as acts *ultra vires* but merely as off duty private acts and therefore responsibility might arise through omission to punish the perpetrator or take other necessary steps which would stop the acts from occurring or prevent their occurrence in the future. This is mainly because States have obligations under international human rights treaties and international humanitarian law. Responsibility of the UN might arise as well, at least with regard to norms which must be adhered to in all circumstances such as *jus cogens* norms of

⁴⁰⁹ Optional Protocol to the International Covenant on Civil and Political Rights, Art. 5 (4).

⁴¹⁰ FAHIM, M. D. *Diplomacy, The Only Legitimate View of Conducting International Relations*, p. 151.

⁴¹¹ HARRINGTON, J. *The Human Rights Committee, Treaty Interpretation, and the Last Word*, EJIL: Talk! 5 August 2015 [online] 2015-8-5 [accessed 2017-3-4] Available at: <<https://www.ejiltalk.org/the-human-rights-committee-treaty-interpretation-and-the-last-word/>>.

IHL. However, this would be very difficult to prove with regard to the UN. We maintain this position mainly due to the fact that the UN has indeed taken some steps that should at least alleviate occurrence of SEA in peacekeeping missions. Although it should certainly be more careful while undertaking investigations, it is not an entity which has obligation to try perpetrators. With respect to IHL violations, it would be very unrealistic or very difficult to prove that the acts of SEA would reach the threshold of crimes against humanity or war crimes thereby attributable to the organization.

Moreover, it was pointed out that taking further action against the UN is very difficult. Bringing the organization before a judicial body and achieve success is arduous or rather unattainable task. This arises as a result of the absolute immunity from legal process which the UN possesses before the domestic courts, as well as the fact that the organization is not party to human rights instruments and therefore international judicial bodies do not have jurisdiction to rule on cases against it.

It follows from this that the international judicial bodies that should ensure that the international human rights instruments are adhered to, might be used as last instance where respective States have failed to take necessary steps to stop the acts from occurring and bringing perpetrators to justice. Through these bodies a victim may ask for some form of reparation.

CONCLUSION

With the thaw in the Cold War, the UN peacekeeping has become even more important alternative to rather unworkable or impossible UN collective security system. However, in the turn of the centuries, its reputation was damaged by the acts of sexual exploitation and abuse (SEA) in peacekeeping missions which have been perpetrated inter alia by military members of national contingents (MMsNCs). We have found out that this is not an issue that would have appeared only exceptionally or accidentally in a single place. After the increased use of peacekeeping operations in the late 1980s, it has emerged quite frequently in various parts of the world where the peacekeeping operations have been deployed.

In the first Chapter of our thesis we wanted to demonstrate that the institute of peacekeeping has indeed developed through years to become one of the most important and effective tools of the UN to help States in troubles to create conditions necessary for lasting peace. In relation to this we have proved that SEA in peacekeeping missions is not accidental. There is indeed some correlation with other sub-issues. We deem that the greatest issue is predominant participation of troops from the developing countries. Troops from many of these countries are entering the mission with lack of or insufficient training or non-existent or ineffective vetting procedures.

Although we cannot say that the UN is not tackling the issue of SEA, it is our position that it is doing it not in a right way and as was demonstrated in the second Chapter, it seems to be clear that measures adopted within the UN have not have desired effect yet. Moreover, since the total number of allegations has risen dramatically after the publication of leaked report concerning cases of SEA by French peacekeepers and strong public condemnation, a question may be posed whether the UN investigation authorities are precise enough and sufficiently equipped or even willing to investigate the cases of SEA.

Another thing is that no concrete actions with regard to prosecution of perpetrators have been taken in reported cases. This is a fact that directly contributes to impunity. The troops are very much aware of the fact that nothing

can happen to them (apart from their repatriation back home) if they engage in SEA while deployed to a peacekeeping mission, since their State of origin does not take further steps related to criminal proceedings of perpetrators.

It should be noted that due to exclusive criminal jurisdiction of the TCCs over their troops, after the act of the SEA is perpetrated, the ball is always on the side of the TCCs. The UN may perhaps tighten the rules. The UN can try to amend existing instruments such as Memorandum of Understanding by asking States to provide periodical information as regards allegation, ask them to conduct investigation in the field or undertake other measures. However, as the UN is an organization where diplomatic harmony and political courtesy plays its main role, the State could ignore such appeals since no sanction mechanism in this respect exists.

Therefore, a question has arisen whether there are boundaries for the UN within which it must operate and why the organization is taking such ineffective measures, since the most effective solution clearly would be to take action against respective TCCs. Therefore, its goal should be to establish an effective sanctions regime.

However, as was previously contended, this is a problem of a complex nature, perhaps more a political one, and needs to be examined from various angles.

We must point out that balancing the sovereignty of States and bringing most of perpetrators of SEA committed while deployed into the UN peacekeeping mission to justice cannot be achieved without overcoming the current *status quo* secured by the provisions of legal instruments governing conduct of the MMsNCs.

In the third Chapter we have discussed applicability of international humanitarian law (IHL) as SEA may give rise to its violations. We have contended that although it may not always be clear which rules of IHL should apply to combatants, we opined that at least *jus cogens* norms of IHL should apply to peacekeepers. It was also discussed that rules of IHL are triggered when the peacekeepers engage in combat. At least with regard to actual engagement of peacekeepers in armed conflict, it should be said, that their activities should be governed by IHL rules applicable to international armed conflict. TCCs have

obligation to adhere to rules of IHL even when their troops are deployed to the UN operations since they remain members of the national contingents of the TCCs.

We have demonstrated that prohibition of SEA has its legal basis in various international human rights instruments and that States are under obligation to investigate these cases as well as punish their perpetrators. Nevertheless, the judicial body would always need to determine whether specific requirements of for the acts to reach the threshold of certain crimes (e.g. the standards of torture, cruel, degrading, or inhumane treatment) have been reached which could be difficult.

We may also agree on the fact that states are, when certain conditions are met, under an obligation to respect human rights and fundamental freedoms extraterritorially. This appears to be a more complex issue. First of all, given the approach by the ECtHR, it should be said that States could be held liable for human rights violations in cases when they exercise some public powers normally exercised by a government. If this is satisfied, treaty obligation may be established even in cases where the SEA is perpetrated outside the respective contingent's military base. If the State is not exercising public powers over a territory, then it may be liable only for the acts occurring within its military base abroad.

Finally, it should be said that by referring to the division and tailoring of obligations under the ECHR, the recent jurisprudence makes a positive step towards ensuring that the human rights obligations will be respected. Hypothetically, if a SEA case committed by MMsNCs appears before the ECtHR in the future, the Court should take into consideration these important obligations. In this spirit, as pronounced by Judge Bonello in his concurring opinion in *Al-Skeini*, human rights obligations should not be made *"depending on geographical coordinates."*⁴¹²

We have also discussed whether the ICC could play a role in prosecuting peacekeepers for their acts of SEA. Although we have found out that their acts may after certain circumstances are met reach the threshold of war crimes or to some extent also crimes against humanity, as defined by the Rome Statute, we consider such prosecution before the ICC as very unlikely. The reasons are that it is

⁴¹² ECtHR, *Al-Skeini v. UK*, para. 18.

questionable whether acts of SEA are the most serious crimes of concern to the international community and that it is very unlikely that the ICC would take action against conduct which bears to some extent the stamp of UN. Nevertheless, the UN should use all its powers and continue with the dialogue, thereby leading to a solution establishing a complementary jurisdiction at international or hybrid levels in cases where the TCC is unable or unwilling to exercise its jurisdiction. In such cases the UN should play the leading role in investigating crimes of possible SEA with the respective investigations carried out jointly by the UN and the TCC if were interested in doing so, as the cooperation between those actors is essential.⁴¹³

Such trials should not only be about perpetrators of SEA but rather to clarify the facts which are oftentimes not clarified or concealed. As is stated by Koskenniemi *“recording the truth and declaring it to the world through the criminal process has been held important for reasons that have little to do with the punishment of the individual. Instead, it has been thought necessary so as to enable the commencement of the healing process of the victims: only when the injustice to which a person has been subjected has been publicly recognized, the conditions for recovering from trauma are present and the dignity of the victim may be restored.”*⁴¹⁴ In addition, it must be said that such trials would have undoubtedly a preventive effect and deter potential perpetrators from committing analogous criminal offences in the future.

As we have come to the conclusion that apart from individual responsibility, the SEA by peacekeepers may possibly trigger responsibility of States and/or international organizations, therefore in Chapter IV we have discussed the question of State and international organization responsibility. Bearing in mind the relative indefiniteness in the context of determining the responsible entity, various judicial bodies as well as International Law Commission have developed which seems to be the best test how to attribute conduct to individuals, in our case, peacekeepers, and determine the entity responsible for their conduct. This concept is called the effective control test.

⁴¹³ Comprehensive review of the whole question of peacekeeping operations in all their aspects, paras 34-36.

⁴¹⁴ KOSKENNIEMI, M. *The Politics of International Law*, Hart Publishing, 2011, p. 173.

Second part which needed to be determined was to assess how an international liability would be constituted. We have found out that SEA by peacekeepers possibly fall beyond the official capacity and are considered a private act of a perpetrator. This does not arise if international humanitarian law might be applicable. Responsibility of a State might arise through omission to punish the perpetrator or take other necessary steps which would stop the acts from occurring or prevent their occurrence in the future, since States have obligations under international human rights treaties and international humanitarian law. Responsibility of the UN might arise as well, at least with regard to norms which must be adhered to in all circumstances such as jus cogens norms of IHL, but to determine its responsibility is more challenging than those of a State. Especially due to the fact that the UN does not have obligation to try the perpetrators by itself, this is fully in the hands of TCCs. The UN should however make an effort in terms of prevention and creating pressure on respective States that they will take further actions against the perpetrators.

Breach of international obligation of a State or international obligation opens avenues to right of reparation. However, as it was contended taking further action against the UN is very difficult. This arises as a result of the absolute immunity from legal process which the UN possesses before the domestic courts, as well as the fact that the organization is not party to human rights instruments. A successful claim against the UN in whichever case before any judicial body is still a long way off.

Therefore, it seems that holding TCC responsible for breach of their obligations with regard to failing to bring perpetrators to justice would be more successful. As was demonstrated, there are several possibilities how this can be achieved depending on the fact of which international human rights treaty the TCC of a perpetrator is a Party. At least with regard to the jurisprudence of ECtHR we may observe that there might be a glimmer of hope for the victims of SEA. Unfortunately, most of the perpetrators come from developing countries which are not parties to the European Convention of Human Rights.

Finally, it must be emphasised once more, that a greater engagement or a clearer stance taken from the side of UN would not only be instrumental but with respect to currently weak international reputation of the UN as regards SEA in peacekeeping mission, such stance would be welcomed and it may be considered inevitable.

Certainly, lofty speeches will not solve this situation of which the whole global community is complicit. On the other hand, we deem that the UN must bring all stakeholders into the table and be stricter. It must realize that developing States contribute a lot from their participation in peacekeeping missions. They consider it as prestigious, benefit from training and knowledge sharing and least but not least peacekeeping operations provide finances for their budgets.

This would undoubtedly be an arduous task, however we are looking with hope into the future, since as Martin Luther King pointed out *“the arc of the moral universe is long, but it bends toward justice.”*⁴¹⁵

⁴¹⁵ LUTHER KING, M. "Remaining Awake Through a Great Revolution," Sermon delivered at the National Cathedral, in: The Martin Luther King, Jr. Research and Education Institute, 1968-3-31 [online] [accessed 2017-4-4]. Available at: < <https://kinginstitute.stanford.edu/king-papers/documents/remaining-awake-through-great-revolution-sermon-delivered-national-cathedral> >.

SUMMARY

The thesis addresses issue of sexual exploitation and abuse perpetrated by UN peacekeepers during their deployment to a peacekeeping mission. In our work, we have addressed this issue from the perspective of military members of national peacekeeping contingents. We have done so owing to the fact that based on a Status of forces agreement, the troop contributing countries have exclusive criminal jurisdiction over their troops.

We have demonstrated that peacekeeping has since its establishment become an important tool available to the UN to assist host countries in dealing with conflicts and their aftermath. Taking into consideration great importance of peacekeeping mission, and frequent occurrence of sexual exploitation and abuse in various missions during past few years, it is indeed a serious problem. As was found, imperfect vetting procedures, increased participation of peacekeepers from developing countries, their insufficient training and lack of awareness may to some extent contribute to sexual exploitation and abuse. In our view, however, the greatest aspect which clearly deteriorates the situation is failure of States to bring the perpetrators to justice. This results in their impunity.

Therefore, we have tried to find out how the UN itself is trying to tackle this problem. It was indicated that it introduced and then updated modelled instruments governing conduct of military members of national peacekeeping contingents, being it so called Status of Forces Agreements which the UN frequently concludes with the host country or Memoranda of Understanding which are concluded between the UN and a troop contributing country. The UN also developed some policies and guidelines in order to better address the issue of SEA in peacekeeping operations. One of the most comprehensive document of such a nature was so called Zeid report of 2005. It contained recommendations how to tackle and prevent sexual exploitation and abuse. Some of them were implemented. However, the reported figures of offences are not lower and the UN itself needs to be more proactive and by putting greater focus on prevention, efficient investigation and ensure sufficient aid to victims. Its role must be

strengthened especially due to the fact that as it was outlined troop contributing countries are not only unwilling and reluctant to prosecute perpetrators of such serious crimes but oftentimes they do not have adequate legal framework.

As was demonstrated, it is very difficult for victims to demand justice before the courts of a troop contributing country. In this respect, we tried to find alternative solutions and tried to answer the question whether acts of sexual exploitation and abuse constitute violations of international humanitarian law and whether there could be a role for ICC to play. We have found out that if these acts are perpetrated by peacekeepers while engaging in hostilities in armed conflict, the norms of international humanitarian law should apply. We have come to the conclusion that although the acts of peacekeepers may in some circumstances reach the threshold of crimes against humanity or more likely of war crimes, the option of prosecuting peacekeepers before the ICC is not very likely mainly due to prioritisation of most serious cases and prosecuting most senior leaders. The fact that peacekeeping operations are part of UN involvement also seems to reduce the possibility of trying the peacekeepers before the ICC.

We have also come to the conclusion that sexual exploitation and abuse may under some circumstances, in particular, control over persons, territory/area, violate international human rights law. More specifically, extraterritorial application of human rights treaties in connection to exclusive criminal jurisdiction of respective States requires that the victim should have right to a remedy.

With respect the question of responsibility, effective control test is considered as the most successful and most reasonable solution for the attribution of conduct. It was found that responsibility of the State may arise through failure to prevent SEA from happening and from failure to bring perpetrators of SEA to justice.

Responsibility of the UN might arise as well, at least with regard to norms which must be adhered to in all circumstances such as jus cogens norms of IHL. However, this would be very difficult to prove with regard to the UN. We maintain this position mainly due to the fact that the UN has indeed taken some steps that should at least alleviate occurrence of SEA in peacekeeping missions. Although it

should certainly be more effective while undertaking investigations, it is not an entity which has obligation to try perpetrators.

We have also demonstrated that sexual exploitation and abuse fall beyond official capacity of peacekeeper. These acts cannot be considered as acts ultra vires but only as off duty private acts. In this context, responsibility may arise through omission to punish the perpetrator or take other necessary steps which would stop the acts from occurring or prevent their occurrence in the future.

Furthermore, it was pointed out that taking action against the UN is very difficult. Bringing the organization before a judicial body and achieve success is unattainable task. This arises as a result of the absolute immunity from legal process which the UN possesses before the domestic courts, as well as the fact that the organization is not party to human rights instruments and therefore international judicial bodies do not have jurisdiction to rule on cases against it.

It was also demonstrated that the international judicial bodies that should ensure that the international human rights instruments are respected, might be used in cases where respective States have failed to take necessary steps to stop the acts from occurring and bringing perpetrators to justice. Taking analogous action before the international judicial bodies against the UN is based on above mentioned facts, at least today, impossible.

SHRNUTÍ

Práce se věnuje problematice sexuálního vykořisťování a zneužívání páchaného mírovými jednotkami OSN během jejich nasazení do mírových misí. V naší práci jsme řešili tuto otázku z pohledu vojenských členů národních mírových kontingentů. Na tuhle kategorii jsme se zaměřili kvůli skutečnosti, že na základě tzv. Dohody o postavení sil mají země poskytující vojenské jednotky výhradní trestní pravomoc nad jejich vojskem.

Poukázali jsme na fakt, že mírové operace OSN se od svého založení stávají důležitým nástrojem, který má OSN k dispozici, aby pomohl hostitelským zemím při řešení konfliktů a jejich následků. Vzhledem k velkému významu mírových misí a častému výskytu sexuálního vykořisťování a zneužívání v různých misích v posledních několika letech, jde o opravdu vážný problém. Jak bylo zjištěno, nedokonalé postupy při tzv. prověřování, převládající účast mírových jednotek z rozvojových zemí, jejich nedostatečná odborná příprava a nedostatek povědomí mohou do jisté míry přispět k sexuálnímu vykořisťování a zneužívání. Podle našeho názoru však největším aspektem, který zjevně zhoršuje situaci, je neschopnost členských států postavit pachatele před spravedlnost. To vede k jejich beztrestnosti.

Proto jsme se snažili zjistit, jak OSN tento problém řeší. Bylo uvedeno, že organizace zavedla a následně aktualizovala modelové nástroje upravující chování vojenských příslušníků národních kontingentů, a to tzv. Dohody o postavení sil, které OSN často uzavírá s hostitelskou zemí nebo memorandami o porozumění, které jsou uzavírány mezi OSN a zemí dodávající vojska. OSN také vypracovala některé politiky a pokyny s cílem lépe řešit otázku sexuálního vykořisťování a zneužívání v mírových operacích. Jedním z nejkomplexnějších dokumentů této povahy byla tzv. Zeidova zpráva z roku 2005. Obsahovala doporučení, jak řešit a zabránit sexuálnímu vykořisťování a zneužívání. Některé z nich byly implementovány. Vykazované počty trestných činů však nejsou nižší a samotná OSN by měla být proaktivnější a více se zaměřit na prevenci, účinné vyšetřování a zajištění dostatečné pomoci obětem. Její úloha musí být posílena zejména z důvodu, že země, které dodávají vojenské jednotky, jsou nejen neochotné stíhat pachatele

takových závažných zločinů, ale často ani nemají dostatečný právní rámec nezbytný na jejich stíhání.

Jak bylo prokázáno, pro oběti je obtížné požadovat spravedlnost před soudy země, která poskytuje vojenské jednotky. V tomto ohledu jsme se snažili nalézt alternativní řešení a snažili se odpovědět na otázku, zda činy sexuálního vykořisťování a zneužívání představují porušování mezinárodního humanitárního práva a zda by mohl hrát určitou roli Mezinárodní trestní soud. Zjistili jsme, že když jsou tyto činy spáchány mírovými útvary během jejich účasti na nepřátelských akcích v ozbrojených konfliktech, uplatňování norem mezinárodního humanitárního práva přichází v úvahu. Dospěli jsme k závěru, že ačkoli chování mírových jednotek může v některých případech dosáhnout prahu zločinů proti lidskosti nebo pravděpodobněji válečných zločinů, možnost stíhání mírových jednotek před Mezinárodním trestním soudem není velmi pravděpodobná, zejména kvůli upřednostňování nejzávažnějších případů a stíhání zejména vedoucích představitelů. Skutečnost, že mírové operace jsou součástí OSN, také zřejmě omezuje možnost stíhat mírové jednotky před Mezinárodním trestním tribunálem.

Dospěli jsme také k závěru, že sexuální vykořisťování a zneužívání může za určitých okolností, zejména v případech, když se osoby, území nebo oblast nachází pod kontrolou státu, představovat porušování mezinárodních lidsko-právních norem. Také je nutné poznamenat, že extraterritoriální uplatňování smluv o lidských právech v souvislosti s výlučnou trestní pravomocí příslušných států vyžaduje, aby oběť měla právo na nápravu.

Pokud jde o otázku odpovědnosti, považuje se efektivní kontrolní test za nejspěšnější a nejprůměrnější řešení pro přiřazování chování. Bylo zjištěno, že odpovědnost státu může vzniknout tím, že se nepodařilo zabránit sexuálnímu vykořisťování a zneužívání, a nedošlo k tomu, aby se pachatelé těchto činů postavili před soud.

Zodpovědnost OSN může vzniknout, přinejmenším pokud jde o normy, které musí být dodržovány za všech okolností, jako jsou normy *jus cogens* MHP. To by však bylo velmi obtížné dokázat s ohledem na OSN. Zachováváme tuto pozici především proto, že OSN skutečně podnikla kroky, které by měly alespoň zmírnit

výskyt sexuální vykořisťování a zneužívání v mírových misích. Přestože by při vyšetřování mohla být aktivnější, není subjektem, který má povinnost stíhat pachatele.

Také jsme prokázali, že sexuální vykořisťování a zneužívání jsou konáním mimo oficiální kapacitu příslušníka mírové misi. Tyto činy nemohou být považovány za úkony *ultra vires*, ale pouze za úkony soukromé povahy. V této souvislosti může dojít k odpovědnosti státu za opomenutí potrestat pachatele, nebo podniknutí dalších nezbytných kroků, které by zabránily páchání sexuálního vykořisťování a zneužívání, nebo mohly zabránit jejich vzniku v budoucnu.

Dále však bylo zdůrazněno, že je velmi obtížné podniknout kroky proti OSN. Úspěšně stíhat organizaci před soudním orgánem je nedosažitelným úkolem. Vyplývá to z absolutní imunity, kterou OSN má před vnitrostátními soudy, jakož i ze skutečnosti, že organizace není smluvní stranou nástrojů v oblasti lidských práv, a proto mezinárodní soudní orgány nemají pravomoc rozhodovat o případech proti ní.

Dále bylo v práci prokázáno, že mezinárodní soudní orgány, které zajišťují dodržování mezinárodních nástrojů v oblasti lidských práv, by mohly být použity ze strany oběti v případech, kdy příslušné státy neprovedly nezbytné kroky k zastavení činů sexuálního vykořisťování a zneužívání a k předvedení pachatelů před soud. Uskutečnění obdobných kroků před mezinárodními soudními orgány proti OSN založeno na výše uvedených skutečnostech je, přinejmenším dnes, nemožné.

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